

Lee County School District  
No. 04-1892E  
Initiated by: Parent  
Hearing Officer: Carolyn S. Holifield  
Date of Final Order: September 10, 2004

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████, )  
)  
Petitioner, )  
)  
vs. ) Case No. 04-1892E  
)  
LEE COUNTY SCHOOL BOARD, )  
)  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a due process hearing was held in this case on June 29, 30 and July 1, 2004, in Fort Myers, Florida, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. Michael Hussey, Esquire  
Paul E. Liles, Esquire  
Hussey and Liles, P.A.  
Post Office Box 540  
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For Respondent: Edward Samuel Polk, Esquire  
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STATEMENT OF THE ISSUES

Whether Respondent, Lee County School Board, denied Petitioner, [REDACTED] a free appropriate public education (FAPE) by failing to develop and implement an appropriate individual educational plan (IEP).

PRELIMINARY STATEMENT

On May 27, 2004, Petitioner's mother filed a request for a due process hearing with Respondent, Lee County School Board (School Board). The request alleged that the School Board failed to develop and implement an appropriate IEP to meet Petitioner's unique needs; the School Board failed to provide Petitioner with a high quality education as required by Section 1, Article IX of the Florida Constitution; and the School Board has a custom and a policy of failing to design and implement appropriate IEPs and failing to provide a FAPE to children with disabilities. Later, Petitioner asserted that the School Board failed to timely produce Petitioner's educational records.

The School Board referred the matter to the Division of Administrative Hearings (Division) on May 27, 2004, for assignment of an Administrative Law Judge to conduct the due process hearing and prepare the final order. In a Notice issued June 3, 2004, the due process hearing was set for June 28 through 30, 2004.

During a telephone pre-hearing conference on June 24, 2004, Respondent made an ore tenus motion to continue the hearing. Over Petitioner's objection, the hearing was continued for one day and rescheduled for June 29 through July 1, 2004. Also,

during that pre-hearing conference, the undersigned ruled that an Administrative Law Judge lacks jurisdiction to resolve some of the issues asserted by Petitioner, specifically those related to the "high quality education" and the School Board's custom and policies regarding children with disabilities.

At the hearing, Petitioner presented the testimony of [REDACTED] Petitioner's [REDACTED]; [REDACTED] Petitioner's [REDACTED] [REDACTED]; and [REDACTED] an expert clinical psychologist. Petitioner's Exhibits 1 through 5, 6-1 through 6-5, 7-1, 7-2-1 through 7-3-1, 7-4-a through e, 8, 9-1, and 9-2 were admitted into evidence.

The School Board presented the testimony of [REDACTED] the local education agent for the School Board; [REDACTED], an exceptional student education teacher at [REDACTED] [REDACTED] [REDACTED] an exceptional education teacher at [REDACTED] [REDACTED] principal of [REDACTED] [REDACTED]; [REDACTED] assistant principal of [REDACTED] [REDACTED], the resource officer at [REDACTED] and Debra Sowa, an expert school psychologist. Respondent's Exhibits 2, 2-a, 4-a through f, 5, 7, 7-A, and 16 were admitted into evidence.

At the conclusion of the hearing, Petitioner waived the 45-day rule and agreed to extend the time for issuing the final order. The parties and the undersigned agreed to a schedule for filing proposed orders and final orders on July 26, 2004, and August 3, 2004, respectively. That schedule was based on the representation that the transcript of the proceeding would be filed on July 16, 2004, and the exhibits would be mailed to the

Division soon after the hearing. The three-volume hearing Transcript and the exhibits were separately filed with the Division on July 28, 2004, and July 29, 2004, respectively, and after the parties' proposed final orders were filed.

Petitioner filed [REDACTED] Proposed Final Order on July 26, 2004, and the School Board filed its Proposed Final Order on July 27, 2004. Petitioner filed a Motion to Strike Respondent's Proposed Final Order on July 28, 2004. The motion was denied by an Order issued August 4, 2004, and both Proposed Final Orders have been considered in preparation of this Final Order.

#### FINDINGS OF FACT

1. Petitioner, [REDACTED] was born in [REDACTED] and lives in Fort Myers, Florida, with [REDACTED], [REDACTED] mother.

Petitioner was born with, and continues to have, a variety of physical problems, which have required eight or nine major surgeries. [REDACTED] has only one lung, respiratory problems, hiatal hernia, and cervical atrophy.

2. In addition to [REDACTED] physical problems, for many years, Petitioner has had significant psychiatric problems and behavioral problems. [REDACTED] has severe attention deficit hyperactivity disorder and has been diagnosed as bipolar.

3. Petitioner has been identified as an exceptional student eligible for services under the Individuals with Disabilities Education Act (IDEA) by virtue of [REDACTED] severe emotional disability, as well as other health impairments.

4. Petitioner is presently assigned to [REDACTED] where [REDACTED] has been continuously enrolled since [REDACTED] was in second grade. During the 2003-2004 school year, Petitioner was in the [REDACTED] grade at [REDACTED]

5. Petitioner began attending [REDACTED] during [REDACTED] second-grade year as a result of certain behavior problems. Before enrolling at [REDACTED] Petitioner attended a regular school and was served by an one-to-one assistant. At some point, that support was considered to be unsuccessful, and Petitioner was then transferred to [REDACTED] a more restrictive placement within the IDEA's framework.

6. [REDACTED] is an exceptional student education center that serves students from pre-K to age 22, many of whom have behavioral difficulties which cannot be adequately addressed within the setting of a regular school campus.

7. At [REDACTED] in order to provide more individual attention, the student-to-staff ratio is very low. About 95 percent of the staff is certified by the Florida Department of Education in exceptional student education, and all staff members are trained in Crisis Prevention Intervention and TEAM, an approach that utilizes verbal de-escalation techniques and other therapeutic restraints. In addition to the instructional staff and administrative staff, [REDACTED] has a full-time school resource officer who is an employee of the City of Fort Myers Police Department.

8. The physical facility at [REDACTED] is designed to maximize the safety and security of the students. For example, the exterior doors at the back of the campus have timers and alarms which alert the front office staff 15 seconds before the door will open to prevent students from running off campus. The classrooms are equipped with intercoms to the office, and essential administrative staff have two-way radios for instantaneous contact and availability.

9. [REDACTED] utilizes a specially-designed behavioral level system, which tracks students' behaviors by a daily point system and classifies them in seven different levels. A student first assigned to [REDACTED] is placed at Level 2, although Level 1 is the lowest. The student is then encouraged to make his/her way up to Level 7 by earning sufficient points to qualify for that level. When a student has maintained Level 7 for a period of time, a behavior contract is created by which the student can earn the opportunity to return to a regular school campus within a set period of time.

10. By all accounts, Petitioner's behaviors at the start of the 2003-2004 school year were much more problematic than had previously been the case. During the first part of the school year, Petitioner had a propensity for having rages and other emotional outbursts at home and at school. [REDACTED], Petitioner's teacher for the previous three school years, first observed an increase in Petitioner's behavioral problems at school the first three weeks of the 2003-2004 school year.

11. From August to February of the 2003-2004 school year, Petitioner was given approximately 60 disciplinary referrals or incident reports for [REDACTED] negative behavior. Specifically, [REDACTED] received disciplinary referrals for disrupting the class; failing to follow directives; making sexually inappropriate comments to other students; hitting, kicking and/or biting the teachers, teachers' assistants, students, and bus attendants; grabbing the breasts, buttocks or private parts of teachers and/or students; using profanity; refusing to follow directions; undressing [REDACTED] while in time-out; and taking [REDACTED] seat belt off while on the bus.

12. There were some days when Petitioner received several incident reports or disciplinary referrals. On one such occasion, Petitioner had five disciplinary referrals or incident reports on the same day. When these behavioral episodes occurred, it was not unusual for the assistant principal to call [REDACTED] to advise [REDACTED] of the situation. After one particular incident on the bus in which Petitioner was acting out, the bus driver drove [REDACTED] back to the school, and [REDACTED] was called to come and pick up [REDACTED] [REDACTED] from school. Following that incident, [REDACTED] requested that [REDACTED] be called if Petitioner were having an especially difficult day, and [REDACTED] would come to pick up Petitioner from school at the end of the day rather than having [REDACTED] ride the bus.

13. In accordance with [REDACTED] request, the assistant principal called [REDACTED] if Petitioner's behavior during the school day made it likely that [REDACTED] negative behavior would escalate. On other occasions, [REDACTED] called [REDACTED] to provide information relating to Petitioner's behaviors. Neither the assistant principal nor any other [REDACTED] staff person ever called [REDACTED] and instructed [REDACTED] to pick [REDACTED] [REDACTED] up from school because the school staff could not control Petitioner's behavior.

14. On January 20, 2004, while at school, Petitioner voiced suicidal ideation, complete with a specific plan to carry out the act. As a result of this incident, the school resource officer, [REDACTED] took Petitioner to the [REDACTED] [REDACTED], a mental health facility, pursuant to the Florida statutory format known as the Baker Act. Petitioner remained at the [REDACTED] for two days and was then released.

15. On January 26, 2004, less than a week after being released from the [REDACTED] Petitioner again made suicidal threats at school. As a result of these threats, Petitioner was Baker-Acted and admitted to the [REDACTED] [REDACTED] for the second time in a week.

16. Prior to January 2004, neither Petitioner's [REDACTED], nor [REDACTED] [REDACTED] teacher for the fourth, fifth, and sixth grades, had ever heard Petitioner make suicidal threats.



17. Following Petitioner's return to school after being released from the [REDACTED], after being Baker-Acted on January 26, 2004, [REDACTED] has not made any statements reflective of suicidal ideations.

18. After Petitioner was released from the [REDACTED] following [REDACTED] January 26, 2004, admission, the number of incident reports and/or disciplinary referrals [REDACTED] received, decreased significantly. The first week of February 2004, Petitioner received four disciplinary referrals; the second week of February 2004, Petitioner received two disciplinary referrals; the third week of February 2004, Petitioner had no disciplinary referrals; and the last week of February 2004, Petitioner had only one disciplinary referral. Most of these disciplinary referrals were for disruptive behavior in class and hitting and kicking a student and/or teachers.

19. After February 24, 2004, there continued to be improvement in Petitioner's behavior at school. [REDACTED] received no disciplinary referrals in March 2004, and only one each in April and May 2004, neither of which involved violent outbursts.

20. At the beginning of the 2003-2004 school year, there were several significant changes in Petitioner's life at school and at home that may have contributed to the increase in Petitioner's negative behaviors.

21. The 2003-2004 school year was the first time Petitioner was attending classes in a [REDACTED]-school format. For the previous three years, Petitioner's teacher had been Ms. [REDACTED] with whom [REDACTED] had a close relationship. The teacher's assistant had also been the same individual for those three years and with a few exceptions, so were [REDACTED] classmates. Those classmates were used to Petitioner's behaviors and had been taught by the teacher to ignore those behaviors. In addition to the changes of teacher and classmates, Petitioner was also confronted with the change of classes that occurs in [REDACTED] school and the fact that [REDACTED] had not one new teacher, but three.

22. Another significant factor that may have impacted Petitioner's behavior during the beginning of the 2003-2004 school year involved changes at home. In August 2003, the month the 2003-2004 school year began, Petitioner's natural [REDACTED] left the home, and [REDACTED] [REDACTED]'s new [REDACTED] friend moved into the home within a couple of weeks. According to [REDACTED] Petitioner's [REDACTED] had a severe alcohol problem and had been verbally abusive to both [REDACTED] and [REDACTED]. When Petitioner's natural [REDACTED] was living in the home, [REDACTED] always yelled at [REDACTED] for no reason and had always called [REDACTED] names, such as "stupid" and "f'ing stupid." In response, Petitioner would call [REDACTED] names. Petitioner's [REDACTED] spanked [REDACTED] a lot and at other times, [REDACTED] would totally ignore [REDACTED]. There has been no contact from the [REDACTED] since [REDACTED] left the home.

23. In addition to the changes at home and at school, Petitioner was almost [REDACTED] years old when the 2003-2004 school

year started and likely experiencing some of the adolescent problems attendant to that part of [REDACTED] development.

24. During the 2003-2004 school year, Petitioner's medications were changed and/or adjusted several times, the latest time being late February or early March 2004. Following the latest changes and/or adjustments to Petitioner's medications, [REDACTED] behavior improved significantly.

25. At the beginning of the 2003-2004 school year, [REDACTED] math teacher, [REDACTED] observed that Petitioner was ostracized by other students because of [REDACTED] behaviors. Over the course of the school year that situation progressed to where the other students ignored, rather than ostracized Petitioner. Near the end of the school year, Petitioner became accepted as [REDACTED] behaviors improved and made progress toward learning to ignore other people, where appropriate. Moreover, as [REDACTED] behavior improved near the end of the year, Petitioner was able to work with other students on projects or assignments, unlike the beginning of the school year.

26. Petitioner has historically had an obsession with bugs and would frequently pick them up and place them in [REDACTED] mouth or hide them in [REDACTED] clothing or in [REDACTED] desk. At times during school years prior to the 2003-2004 school year, [REDACTED] teacher, [REDACTED] would closely monitor Petitioner while walking on campus to prevent [REDACTED] from picking up bugs from the ground or windowsills. While [REDACTED] had inconsistent progress toward eliminating that behavior when Petitioner was [REDACTED] student, the

problem decreased significantly in frequency during the latter part of the 2003-2004 school year.

27. During the first five or six months of the 2003-2004 school year, Petitioner's academic progress was negatively impacted by [REDACTED] behavioral issues. Until Petitioner's behavioral issues were effectively dealt with, [REDACTED] did not make the academic progress [REDACTED] would have otherwise achieved.

28. Petitioner's academic progress during the first part of the 2003-2004 school year was also adversely impacted by [REDACTED] being tardy to or absent from school. During the first three grading periods of the 2003-2004 school year, consisting of 135 school days, Petitioner was absent from school a total of 16 days and was tardy on 55 other days. Thus, [REDACTED] missed all or a portion of 71 days out of 135. Many of these absences and tardies were due to Petitioner's numerous doctor appointments. Although the appointments were necessary, clearly when Petitioner was absent or late to class, [REDACTED] missed instruction that was necessary to facilitate [REDACTED] learning.

29. Despite Petitioner's being absent and/or late to school numerous times, [REDACTED] still made some academic progress. As reflected on [REDACTED] report card for the 2003-2004 school year, Petitioner not only made meaningful progress, but there was a noticeable improvement in academic success during the last quarter of the year.

30. Near the end of Petitioner's [REDACTED] grade year, on April 13, 2004, the IEP team met and developed an IEP for Petitioner. That IEP covered the periods of April 14, 2004 through May 27, 2004, and August 9, 2004 through April 13, 2005, and is the one that is at issue in this proceeding.

31. [REDACTED] attended and fully participated in the April 13, 2004, IEP meeting.

32. The April 13, 2004, IEP (2004 IEP), as in previous years, identified Petitioner's exceptionalities (or disabilities) as severely emotionally disturbed and other health impaired.

33. During the IEP meeting, [REDACTED] the local education representative, typed information on IEP forms. Each page of the IEP was projected on a large screen that was visible to all IEP participants, thereby, allowing all IEP team members to see the actual IEP document as it was being prepared. The IEP team members would read and agree with the entries on each page before moving to the next page. [REDACTED] knew that if [REDACTED] saw anything on the projection screen with which [REDACTED] did not agree, [REDACTED] could voice [REDACTED] disagreement. In fact, [REDACTED] made certain corrections to the document, such as [REDACTED] new address and telephone number. During the IEP meeting, [REDACTED] stated that [REDACTED] would like to see Petitioner continue to improve [REDACTED] behavior and actions and continue to show academic progress. This statement by [REDACTED] was typed onto the IEP form in the appropriate space.

34. The IEP team determined, as recorded on the 2004 IEP, that with regard to the results of the previous IEP goals, Petitioner made some progress behaviorally and academically.

35. Petitioner's behavior and academic improvement in the 2003-2004 school year coincided with changes and/or adjustments in [REDACTED] medications that were made in late February or early March 2004. After that change in medication, [REDACTED] observed that in math class Petitioner was more focused, showed much more enthusiasm for learning, and actually progressed to the point of seeking [REDACTED] out for assistance in completing [REDACTED] assignments, leading to noticeable academic improvement. [REDACTED] described Petitioner as "very studious," "very attentive to [REDACTED] work," and "willing to sit with me while we worked through things correctly."

36. At the end of the 2003-2004 school year, Petitioner was able to perform multiplication which [REDACTED] could not do at the beginning of the year. [REDACTED] also started to understand math concepts, as opposed to the mere rote of numbers. As an example, Petitioner understood what it meant for two times two to be four, rather than merely memorizing the fact. [REDACTED] also started to understand concepts of subtraction and borrowing and why it is done, as opposed to merely the mechanics of crossing-out one number and replacing it with another.

37. At the end of the 2002-2003 school year, Petitioner's present level of performance by subject and grade level as

reported on May 2003 IEP was as follows: reading, 3.0 - 3.2, with comprehension slightly higher; math, 2.0; and written language, 1.5. By comparison, Petitioner's present level of performance, as recorded on the 2004 IEP, by subject and grade level was as follows: reading (decoding) 3.5, comprehension slightly higher; written language 1.5 to 2.0; and math 2.0 to 2.5.

38. Petitioner's "present performance levels," as reported on the IEP, are based on alternative assessments, including results of evaluations, state and district assessments, and work samples.

39. Petitioner's independent levels of performance were reported in the 2004 IEP by subject and grade level as follows: (1) reading, 3.5; (2) math 2.0 - 3.5; and (3) written language 1.5. These levels of performance were about the same as those reported on the May 9, 2003, IEP. At the end of the 2002-2003 school year, Petitioner's independent levels of performance by subject and grade level were: reading, 3.5; math 3.0; and written language 2.0.

40. The 2004 IEP noted that Petitioner was below grade level in academic areas and that [REDACTED] "[m]edication changes and resultant drowsiness militate against steady academic improvement."

41. Under the categories of "social" and "behavioral" plan, the 2004 IEP notes that:

[Petitioner] continues to work on [redacted] ignoring skills. Some progress has been made. A major issue for [redacted] continues to be poor timing as to speech, and negative and/or unsolicited comments to peers. [redacted] aggression has been blunted. Simultaneously, however, [redacted] ability/willingness to complete assignments has suffered. Notwithstanding this, [Petitioner] has improved sufficiently to achieve Level 7, the highest level in the point/level system at [redacted] (Emphasis supplied.)

42. After the 2004 IEP meeting, Petitioner's behavior remained good and did not deteriorate as evidenced by the fact that [redacted] had only two disciplinary referrals for the remainder of the school year, one in April and one in May, neither of which involved a violent outburst. Prior to the end of the school year, Petitioner had increased to a Level 7 on the behavioral rating system. That trend of Petitioner's earning Level 7s continued beyond the end of the 2003-2004 school year and was ongoing during the extended school year (ESY) period in the summer of 2004.

43. Petitioner had received occupational therapy (OT) services in the past. However, at the April 13, 2004, meeting, the OT services were discontinued on the basis that Petitioner had reached maximum potential from that service.

44. With regard to academic goals and benchmarks or short-term objectives, the 2004 IEP provides the following:



Academic Goal: [ ] will improve [ ] reading/language by .5 grade level.

Benchmarks or Short-Term Objectives

1. [ ] will identify the cause or effect in a selection 8 out of 10 times.
2. [ ] will predict events based on information in the selection 8 out of 10 trials.
3. [ ] will apply reasoning to analyze text 8 out of 10 trials.

Academic Goal: [Petitioner] will improve math skills by .5 grade level.

1. [ ] will find sum, difference, product, or quotient of two or more integer numbers in 8 out of 10 trials.
2. [ ] will select and apply the best operator to solve a word problem in 8 out of 10 trials.
3. [ ] will find the solution to a problem situation that requires the subtraction of integers 8 out of 10 trials.

45. On April 13, 2004, the IEP team determined that Petitioner's deficits in behavioral management require a small class size and that [ ] placement should be a separate day school, which effectively continued [ ] placement at [ ]. At [ ] Petitioner's class would typically have eight or nine students and one teacher and one teacher assistant.

46. With regard to transportation, the 2004 IEP provides that the School Board will provide transportation, that it will be "individual special transportation," and that an assistant or attendant is required for safety and behavior concerns. Unlike

Petitioner's IEP for the 2003-2004 school year, the 2004 IEP did not provide that Petitioner should wear a safety vest on the bus and have special seating on the bus (i.e. a seat behind the bus driver).

47. The 2004 IEP recommended that Petitioner receive ESY services. Pursuant to this recommendation, Petitioner attended ██████████ during the summer of 2004, and ██████████ was satisfied with the services Petitioner received.

48. After the April 13, 2004, IEP meeting, ██████████ was sent a notice regarding an IEP meeting scheduled on April 30, 2004, or May 1, 2004, to develop Petitioner's IEP for the 2004 ESY. The notice requested that ██████████ select the date convenient for her to attend the meeting and then advise school personnel. It is unknown whether ██████████ contacted school personnel to advise them of the date ██████████ wanted to schedule the meeting. However, the IEP for the 2004 ESY dated April 29, 2004, was developed in a meeting that ██████████ did not attend. At hearing, Petitioner asserted that ██████████ was deprived of the opportunity to participate in the meeting to develop the IEP for the 2004 ESY because ██████████ did not receive notice of the April 29, 2004, meeting.

Notwithstanding her assertions at hearing, this issue was not raised in the request for due process hearing or any time prior to the hearing. Therefore, that issue will not be addressed.

49. ██████████ expressed no concerns about the 2004 IEP at the April 13, 2004, IEP meeting, but contends that the 2004 IEP fails to provide a FAPE to Petitioner.

50. ██████ asserts that the 2004 IEP is not appropriate in that it calls for a rate of academic growth of only a half of a year despite the fact that the IEP is for a period of almost one academic year.

51. The goal of academic growth of a half of a year is reasonable, realistic, and appropriate for Petitioner at this time. Petitioner has limitations in cognition, which suggest that ██████ rate of academic progress is going to be below that of a child of average cognitive capabilities. Petitioner's IQ of approximately 75 to 80 indicates that ██████ would be making good progress if ██████ were to achieve academic growth of a half to three-fourths a grade annually. Even if Petitioner shows optimum educational progress, given ██████ unique capabilities, ██████ is not likely to perform at grade level with ██████ same age peers of average capabilities.

52. At the IEP meeting, ██████ did not raise any issues related to Petitioner's requiring special seating on the bus or needing a safety vest. At hearing, ██████ indicated that, in the past, both those items were included in Petitioner's prior IEP due to safety and behavioral issues involving Petitioner. However, ██████ failed to provide any presently existing safety and behavioral issues that required special equipment or seating on the bus. The mere fact that such equipment or seating was required by a previous IEP is an insufficient basis to determine that they must be included in the current IEP.

53. Based on [REDACTED] observations of Petitioner at home, [REDACTED] testified that Petitioner has issues related to the activities of daily living (i.e., personal hygiene and the proper use of eating utensils) that should be addressed on the 2004 IEP. However, [REDACTED] did not discuss these issues or concerns with the IEP team on April 13, 2004. Moreover, none of the behaviors or deficiencies in the areas described by [REDACTED] as occurring at home have been apparent in the school environment.

54. [REDACTED] objects to Petitioner's continued placement at [REDACTED] as provided for in the 2004 IEP. [REDACTED] contends that Petitioner should be placed in a residential facility because [REDACTED] is a danger to [REDACTED] and others. However, [REDACTED] never raised this issue during the April 13, 2004, IEP meeting.

55. [REDACTED] testified that while at home, Petitioner sometimes goes into a rage, the last one occurring between November 2003 and late February 2004. According to [REDACTED] at such times Petitioner can overpower individuals, even adults, and cannot be controlled. However, there is no evidence that Petitioner has ever overpowered anyone at [REDACTED] during [REDACTED] behavioral episodes. The staff and faculty at [REDACTED] who have had to intervene during such episodes have not been overpowered by Petitioner.

56. [REDACTED] also testified that on at least one occasion, while at home, Petitioner threatened to kill another student by cutting out the student's heart with a small pocket knife in

Petitioner's possession. This one incident, if true, standing alone is not enough to conclude that Petitioner is presently a danger to others. Here, [REDACTED] provided no time frame for this incident to determine whether it was recent or remote, or the circumstances surrounding the statement. Also, there is no way to determine whether Petitioner's conduct on that occasion was in response to any particular situation.

57. On February 26, [REDACTED] a licensed psychologist, conducted a clinical psychological evaluation of Petitioner at [REDACTED] request. In the report summarizing the results of the evaluation [REDACTED] noted that Petitioner presented a physical risk to [REDACTED] and others and recommended that a residential placement be considered for Petitioner.

58. [REDACTED] is not, and has never been, a school psychologist and did not approach the placement issue from the standpoint of an IDEA standard. Instead, [REDACTED] based [REDACTED] opinion on what is "in [Petitioner's] clinical best interest," rather than any educational framework. The recommendation for residential placement was for medical and mental health concerns and was not related to any determination that such placement would be needed for FAPE purposes.

59. [REDACTED] has not reviewed Petitioner's educational records and did not ask to see [REDACTED] IEP or any other school records. Furthermore, [REDACTED] did not speak with or obtain

information from any of [REDACTED] teachers. Other than [REDACTED] statement that [REDACTED] [REDACTED] was "struggling" in school, [REDACTED] had no information regarding [REDACTED] academic progress.

60. [REDACTED] also conducted a set of evaluations, including an IQ test, despite the fact that Petitioner was drowsy during much of [REDACTED] session with [REDACTED]. [REDACTED] scored [REDACTED] cognitive level at 52, a level at which [REDACTED] would not expect [REDACTED] to perform grade level academic work.

61. The only time [REDACTED] saw Petitioner was on the day of the evaluation. At that time [REDACTED] obtained information from which [REDACTED] formulated [REDACTED] opinions. Because [REDACTED] did not see Petitioner again, [REDACTED] had no idea whether [REDACTED] circumstances had changed since the February 26, 2004, evaluation. However, [REDACTED] conceded that if Petitioner is not exhibiting the same behaviors now that [REDACTED] was exhibiting when [REDACTED] saw [REDACTED] in February, [REDACTED] opinion would "obviously" change.

62. Although [REDACTED] received the clinical psychological evaluation report prepared by [REDACTED] prior to the April 13, 2004, IEP team meeting, [REDACTED] did not mention or provide the report to the IEP team.

63. During the April 13, 2004, IEP meeting, there was no discussion of a residential placement for Petitioner. It was

the IEP team's understanding that Petitioner was to be placed in the least restrictive setting possible to meet [REDACTED] educational needs. There was no need to consider the possibility of a residential placement because Petitioner was on Level 7, representing successful achievement toward [REDACTED] behavioral goals.

64. At the time the 2004 IEP was developed, [REDACTED] was the appropriate placement for Petitioner, because [REDACTED] was experiencing success there, both academically and behaviorally.

65. There are no services listed on the 2004 IEP, which cannot be delivered to Petitioner at [REDACTED]. There is nothing in [REDACTED] records which indicates a need for residential placement in order to achieve meaningful educational progress. On the contrary, there is a great potential for harm to Petitioner if [REDACTED] were placed in a residential facility because [REDACTED] has made significant growth and has developed control in the school environment.

66. Prior to this due process hearing, [REDACTED] requested that the School Board provide copies of Petitioner's educational records. In response, several hundred pages of documents were provided to [REDACTED]. However, several documents or types of documents mentioned by witnesses at the hearing were not among the records produced, specifically the anecdotal records of

██████████ the time-out logs, and the daily point sheets of Petitioner.

67. The anecdotal records were created by ██████████ when Petitioner was in ██████ class in order to determine what situations might have caused Petitioner to behave in a certain manner. It is unknown if these anecdotal records still exist.

68. The time-out log lists the names of students sent to time-out and the date and the reason they were sent there. Although, the time-out logs remained at school, ██████████ was usually notified when Petitioner's behavior was disruptive and ██████ had to be sent to time-out. Therefore, ██████████ often had first-hand knowledge of when Petitioner was sent to time-out.

69. The daily point sheets reflect the number of points each student earned for their behavior, staying on task, etc. The daily point sheets were sent home for parents to review and sign, after which they were to be returned to school. ██████████ always received the daily point sheets, signed them, and sent them back to school.

70. ██████████ claims that the School Board failed to provide ██████████ with all documents ██████ requested in 2001. However, there is no proper evidentiary basis to find any violation of ██████ rights with regard to that issue.

CONCLUSIONS OF LAW



71. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 1003.57(5), Fla. Stat. (2003), and Fla. Admin. Code R. 6A-6.03311(5)(e).

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

73. Petitioner has been identified as severely emotionally disturbed and other health impaired and is eligible for services as a child with a disability under both federal and state law.

74. The IDEA defines "free appropriate public education" at 20 U.S.C. 1401(8), as follows:

The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

75. The determination of whether a school district has provided or made available to children with disabilities a "FAPE," involves a two-prong 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.

76. If these requirements are met, the State has complied with the obligations imposed by Congress. Id. at 207.

77. 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).

78. Procedural violations must be analyzed in view of whether any actual harm results. 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).

79. Petitioner's mother asserts that the School Board violated her procedural rights by failing to provide her with adequate notice of the meeting at which Petitioner's IEP for the ESY for 2004 was developed. [REDACTED] further asserts that the School Board violated [REDACTED] procedural rights by failing to provide [REDACTED] with Petitioner's educational records requested as part of this proceeding. Finally, Petitioner asserts that the School Board violated [REDACTED] procedural rights by failing to provide all of Petitioner's educational records in 2001, pursuant to a request made at that time.

80. As noted in paragraph 48, the issue relative to the notice of the meeting to develop Petitioner's IEP for the ESY of 2004, was not raised in the request for a due process hearing or any time prior to this hearing. Therefore, that issue is not addressed in this Final Order. Likewise, the issue relative to alleged incomplete response to a 2002 request for Petitioner's educational records was not raised in the request for a due process hearing or prior to this hearing. Accordingly, that issue will not be addressed in this Final Order.

81. Here, the evidence established that the School Board did violate Petitioner's procedural rights by failing to provide Petitioner's educational records requested, specifically, the anecdotal records kept by one of [REDACTED] teachers, the time-out log, and the daily point sheets. If the records still existed, the School Board was obligated to provide them to Petitioner. Notwithstanding the procedural violation, there is no evidence of actual harm to [REDACTED] or Petitioner as a result thereof.

82. The second prong in the Rowley test to determine the appropriateness of an IEP is whether the IEP developed through the IDEA procedures is reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 207.

83. IDEA's requirement for a FAPE has been interpreted in Rowley, to be satisfied when the school system provides the student with a "basic floor of opportunity . . . consist[ing] of access to specialized instruction and related services which are individually designed to provide some educational benefit to the handicapped child [child with disabilities]." Rowley, 458 U.S. at 201. 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).

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

[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 ■ "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."

85. Petitioner contends that the 2004 IEP fails to provide Petitioner with related services to assist ■ to benefit from special education. Specifically, Petitioner alleges that OT services should be included in the 2004 IEP, as well as transportation-related equipment and accommodations (i.e., special seating and a safety vest), and services designed to assist Petitioner with activities of daily living (i.e., related to personal hygiene and proper use of eating utensils).

86. Under the IDEA, the services listed in paragraph 85 are related services. "Related services" are supportive services provided to a student with disabilities to assist that student to benefit from special education. 20 U.S.C. § 140. The term "related services" includes OT and transportation. 34 C.F.R. § 300.24(b)(5) and (15). Other supportive services not listed in 34 C.F.R. Section 300.24 may be required to assist the student with a disability to benefit from special education, and, if so, those services should be provided.

87. In order to provide a related service to Petitioner, there must be an identified need for the services. In this case, there has been no competent and substantial evidence to establish

that the related services Petitioner seeks are needed in order for Petitioner to benefit from special education.

88. Petitioner contends that the 2004 IEP is inappropriate in that it sets inappropriate goals of one-half year growth in academic areas for a one-year period. Contrary to the assertions of Petitioner, the evidence established that the annual goals, including the goal of one-half year growth in academic areas, and the benchmarks/objectives in the 2004 IEP are appropriate for Petitioner at this time.

89. As the party challenging the IEP, Petitioner has the burden to establish that the 2004 IEP does not offer █████ a FAPE. Devine v. Indian River County School Board, 249 F.3d at 1291-1292. Petitioner has failed to meet that burden.

90. Petitioner challenges the continued placement at █████ and seeks to have that placement changed to a residential facility.

91. To assess whether a residential placement is appropriate, a determination must be made as to whether full-time residential placement is necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process. A residential placement is "at no cost to parents of the child," only if it is necessary for educational purposes. See Tennessee Dept. of Mental Health v. Paul B., 88 F.3d 1466 (6th Cir. 1996). No such showing has been made in this case.

92. The evidence established that the 2004 IEP will provide Petitioner with a FAPE as required by the IDEA.

ORDER

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

ORDERED that

1. Petitioner, [REDACTED] claim is denied; and
2. Respondent, Lee County School Board, implement the IEP dated April 13, 2004.

DONE AND ORDERED this 10th day of September, 2004, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the  
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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(I)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.