St. Johns County School District
No. 04-1961e
Initiated By: Parent
Hearing Officer: Suzanne F. Hood
Date Of Final Order: October 27, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1961E
	)	
ST. JOHNS COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

A final hearing was conducted in this case on August 17 and 18, 2004, in Jacksonville, Florida, and on August 19, 2004, in St. Augustine Beach, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bruce A. Goldstein, Esquire
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STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondent offered a placement and services that would provide Petitioner with a free and appropriate public education (FAPE) under the requirement of the Individuals with Disabilities Education Act (IDEA), as amended, 20 U.S. C. 1400 et seq.; and (b) whether Petitioner's unilateral placement at [redacted] ([redacted]) provides her with FAPE, thereby requiring Respondent to pay for such placement and to reimburse Petitioner for the related tuition and transportation costs incurred.

PRELIMINARY STATEMENT

On or about August 9, 2004, [redacted] (Petitioner) requested a due process hearing. Specifically, Petitioner alleged that Respondent St. Johns County School Board (Respondent) failed to provide her with an appropriate aural/oral language program with intensive services provided by individuals with the necessary background, training and experience to implement such a program. Respondent referred Petitioner's request to the Division of Administrative Hearings on June 3, 2004.

The undersigned conducted a telephone conference with the parties on June 7, 2004. During the conference, the parties agreed to extend the 45-day period set forth in Florida Administrative Code Rule 6A-6.03322(5)(k) in order to have sufficient time to prepare for hearing.

The undersigned issued a Notice of Hearing dated June 9, 2004. Pursuant to the agreement of the parties, the notice

scheduled the hearing for August 17-19, 2004.

An Order dated June 17, 2004, specifically extended the 45-day period referenced above. Pursuant to the agreement of the parties, the Final Order was due to be issued on or before October 11, 2004.

During the hearing, Petitioner presented the testimony of 12 witnesses. Petitioner also offered 22 exhibits that were accepted into the record as evidence.

Respondent presented the testimony of four witnesses. Respondent also offered 45 exhibits that were accepted into the record as evidence.

A transcript of the proceeding was filed on September 3, 2004.

On September 13, 2004, and September 28, 2004, Respondent filed unopposed Motions for Extension of Time to file proposed recommended orders due to power outages resulting from multiple hurricanes. The undersigned granted these motions in Orders dated September 14, 2004, and October 1, 2004, respectively. Pursuant to the agreement of the parties to further extend the 45-day period referenced above, the October 1, 2004, Order required the issuance of this Final Order on or before November 1, 2004.

The parties filed their Proposed Recommended Orders on October 4, 2004.

FINDINGS OF FACT

1. Petitioner was born on [redacted]. Doctors subsequently diagnosed Petitioner as profoundly deaf in both ears.

2. Petitioner received hearing aids in July 2002. The hearing aids proved to be unsuccessful.

3. After learning that Petitioner was a candidate for cochlear implants (CIs), Petitioner's parents decided to proceed with the required surgery so that Petitioner could learn through auditory verbal therapy (AVT) to listen and speak without the use of sign language. One aspect of AVT is to provide instruction in a setting where students cannot see the instructor's face, forcing them to listen in order to communicate. In order to facilitate that goal, the audiologists at the [redacted] ([redacted]) in Jacksonville, Florida, referred Petitioner to [redacted].

4. In August 2002, Petitioner and [redacted] family began receiving early intervention services at [redacted]. The early intervention services included AVT as well as other classroom services.

5. Petitioner underwent surgery for [redacted] first CI in November 2002.

6. The external component of the CI receives and processes incoming sound, converting it to electrical pulses. The external component conveys the electrical pulses through a coil that penetrates the patient's skin and connects to the internal component. The internal component consists in part of an electrode array.

7. The implantation and activation of a CI does not immediately result in meaningful hearing. With AVT, the patient learns to decipher the sounds that he or she hears by way of the CI to learn their meaning. Not every person with CIs is able to

learn how to use them to their maximum benefit.

8. After the surgery, Petitioner returned to [redacted] where [redacted] continued to receive services necessary for [redacted] to learn to listen and speak without the use of sign language. Petitioner also continued to receive services from an audiologist at [redacted] as part of the early intervention program. These services included on-going mapping and troubleshooting of the CI equipment. After implantation and activation, the CI equipment requires these technical adjustments in order for a recipient to maintain maximum utilization of the CI.

9. In September 2003, Petitioner's parents were aware that [redacted] early intervention services would soon be ending. In order to plan for the future, Petitioner's parents visited the Florida School for the Deaf and Blind (FSDB), located in St. Augustine, Florida. The family discovered that FSDB utilized only sign language to teach its deaf students.

10. The next week, Petitioner's parents contacted Respondent's staff. The family learned that Petitioner would likely attend a varying exceptionalities (VE) class at [redacted] Elementary School ([redacted]) because it was the school in her "zone." Petitioner's parents subsequently visited the [redacted] VE class.

11. At [redacted], the VE class consisted entirely of students who were developmentally delayed. There were no deaf children enrolled in the class. Neither the teacher nor the classroom aide had experience working with deaf children. Additionally, the class's speech/language pathologist (SLP) had no such experience.

12. Petitioner's parents then inquired whether Respondent offered other pre-school classes for students in the exceptional student education (ESE) program. Respondent's staff advised the family that the VE class at [redacted] Elementary School ([redacted]), which was closer to Petitioner's home, was not available to Petitioner.

13. Respondent's staff also advised Petitioner's parents that all of the ESE pre-school classes were VE classes and that Respondent did not have a pre-school ESE class specially designed to teach hearing-impaired children to listen and speak without using sign language. In short, there is no separate program for hearing-impaired students.

14. When hearing-impaired students enroll in a VE class, Respondent teaches them to use two modes of communication: sign language and speech reading, which includes lip reading. When combined, sign language and speech reading are called total communication.

15. Petitioner's mode of communication, and the one utilized by [redacted], is commonly referred to as auditory/oral. In contrast to total communication, auditory/oral communication emphasizes the importance of a child using listening skills to decode sounds of an audio-enriched environment. This emphasis opposes the tendency of a hearing-impaired child to favor the easiest communication mode, such as signing rather than speech reading, or speech reading rather than listening and speaking.

16. Respondent conducted and Petitioner's parents attended an IEP team meeting on February 10, 2004. Respondent's participants at the meeting included the following: (a) Lisa

Bell, pre-K coordinator; (b) Susan Cosby and Judy Hulley, both SLPs; (c) Margaret Guidi, ESE classroom teacher; and (d) Elizabeth Goedelman, itinerant teacher of the deaf. At the request of Petitioner's parents, the following individuals also attended the meeting: (a) Alisa Beard, certified auditory verbal therapist from [redacted]; and (b) Judi Barnes, coordinator of the CI team from [redacted].

17. Respondent's staff had prepared a draft IEP prior to the February 10, 2004, meeting. However, the IEP team spent the vast majority of the time reviewing and incorporating goals and objectives as recommended by the [redacted] staff. This cooperation was necessary because Respondent's staff had little or no experience working with CI students, and in particular, working with a pre-school CI child such as Petitioner whose goals were premised on an auditory/verbal mode of communication.

18. The February 10, 2004, IEP recommended that Petitioner be placed in a pre-kindergarten VE class at [redacted]. It also recommended 90 minutes of speech services per week, 120 minutes of hearing-impaired services per week, utilization of a FM amplification system in the classroom, and in-service training of teachers for strategies of working with hearing-impaired students. The IEP did not provide for an audiologist to provide any services or testing of the CI.

19. The IEP established language development as a priority. It proposed to increase auditory perception skills at the word, phrase, and sentence levels across all settings in the school environment.

20. It was apparent during the February 10, 2004, meeting that Respondent intended to implement the IEP in part by focusing on articulation skills, which typically require visual and physical cues. Placing an emphasis on articulation skills is appropriate for a hearing student with speech problems but inappropriate for a CI student who needs to focus on listening to access and process sound through the auditory channel. Articulation will not address Petitioner's unique needs as an oral deaf child to listen and speak without visual or physical cues.

21. At the conclusion of the meeting, Petitioner's parents accepted the IEP's goals and objectives as well as the supplemental aids/services as recommended by the IEP. The family rejected Petitioner's proposed placement/services in the [redacted] VE class and raised their concerns regarding implementation of the IEP, including the lack of background, training and experience of Respondent's staff.

22. In February 2004, the [redacted] VE class consisted of 14 children. Later in the year, Respondent split the class between two teachers and two aides with seven students per class.

23. All 14 students in the proposed VE class were developmentally delayed. One child was non-verbal with Downs Syndrome. Half of the class had language problems, including difficulties processing and understanding language. There were no hearing-impaired children, with or without CIs, in the class.

24. Respondent's staff who would have implemented the February 10, 2004, IEP in the [redacted] VE class consisted of the

following: (a) Ms. Cosby, an SLP for over 30 years but who has no experience working with oral deaf children or children with CIs; (b) Ms. Hully, a part-time SLP who has no experience working with oral deaf children or children with CIs; (c) Ms. Guidi, an ESE teacher for 23 years but who has no experience working with oral deaf children and little knowledge regarding CIs; (d) Ms. Goedelman, an itinerant teacher of the deaf, who has some experience working utilizing sign language with CI students on the middle and high school levels but no experience with pre-school CI students whose IEPs rely exclusively on an oral approach; and (e) a full-time aide who has no experience working with deaf children.

25. At [redacted], Petitioner receives AVT and participates in a specialized auditory/oral educational program for children with CIs four times a week. Additionally, [redacted] attends a regular pre-school program, with [redacted] hearing peers, one day per week. The regular pre-school program provides Petitioner with an opportunity to socialize outside the school environment.

26. On or about February 25, 2004, Petitioner's parents advised Respondent in writing that Petitioner's recommended placement was inappropriate. The letter notified Respondent of the family's intention to unilaterally place Petitioner at [redacted].

27. Petitioner received [redacted] second CI in March 2004 after [redacted] third birthday. At that time, the first CI was turned off in order to facilitate [redacted] use of the second CI. At the time of the final hearing, Petitioner was using both CIs and working on higher-level auditory skills.

28. Through the use of the bilateral CIs, Petitioner hears differently than a typical child. [redacted] must be taught to hear and access sound.

29. Petitioner currently has no developmental delays unassociated with hearing loss. [redacted] requires intensive and on-going AVT in order to avoid educational regression. If [redacted] continues to participate in a program like the one at [redacted], [redacted] goal to be mainstreamed by kindergarten or first grade is realistic. Without such a program, Petitioner is at risk of falling behind and not achieving that goal.

30. On March 23, 2004, Respondent conducted a subsequent IEP meeting at the request of Petitioner's parents. The purpose of the meeting was to review an additional evaluation dated January 29, 2004, from [redacted].

31. The IEP developed during the March 23, 2004, meeting was essentially unchanged. Respondent continued to offer placement in [redacted]'s VE class, which included no other hearing-impaired or deaf children.

32. Respondent's staff acknowledged that Petitioner's speech and language was on a developmentally appropriate grade level. Respondent continued to maintain that its staff had received and would continue to receive the necessary training to ensure that Petitioner would meet the IEP's goals and objectives.

33. At the conclusion of the March 23, 2004, meeting, Petitioner's parents again accepted the IEP's goals and objectives as well as the proposed supplementary aids/services. However, they rejected the proposed placement/services.

34. The most persuasive evidence indicates that the proposed placement of Petitioner in the [redacted] VE class is inappropriate to meet [redacted] needs as an oral deaf child with bilateral CIs. The varying disabilities of developmentally delayed classmates would interfere with the ESE teacher's ability to meet Petitioner's special auditory needs. Because Petitioner is not developmentally delayed in any respect unassociated with [redacted] hearing loss, a VE class would not be an appropriate placement for Petitioner even if the teacher had the necessary background, experience, and training to teach young children with CIs.

35. The proposed VE placement at [redacted] would not provide Petitioner with teachers who have the necessary background, training, and experience to teach Petitioner auditory/oral language. The placement also would not provide Petitioner with auditory services or teachers with training and experience in mapping and troubleshooting CIs. In fact, the placement would put Petitioner at a substantial risk of regression during a critical time in her development. Because there is a narrow window of opportunity to maximize Petitioner's ability to access sound and develop spoken language, the proposed VE placement would undermine Petitioner's realistic goal of being mainstreamed by kindergarten or first grade.

36. The most persuasive evidence indicates that [redacted] is an appropriate placement for Petitioner. [redacted]'s staff has the required background, training, and experience to address all of Petitioner's educational needs. [redacted] focuses on a CI child's need

to access sound through the auditory channel rather than working on articulation skills. [redacted] offers the necessary parent participation and parent training to ensure that listening and speaking skills taught at school are practiced at home. [redacted]'s staff is skilled at troubleshooting the CI equipment and trained to provide the on-going mapping and audiological testing required by the CIs.

37. [redacted]'s staff works with other children who have linguistic needs and abilities similar to Petitioner's. These classmates can serve as language models for Petitioner. Placing Petitioner in a class with children who have similar educational needs will ensure that Petitioner meets [redacted] goal of being mainstreamed by kindergarten or first grade.

38. Patricia Parekh teaches at [redacted]. She has a M.S. in communication disorders and is certified by the American Speech and Hearing Association (ASHA). Ms. Parekh completed a clinical fellowship in oral rehabilitation at Children's Hospital in Birmingham, Alabama, where she worked under the supervision of two auditory verbal therapists. Ms. Parekh also completed a clinical fellowship year at [redacted], where she has been employed as an SLP for four years.

39. While not required by statute or regulation, Ms. Parekh has the requisite professional training and experience to work with Petitioner. She has the expertise to train Petitioner's parents how to correct Petitioner's language at home.

40. Ms. Parekh could not have gained her expertise in working with CI students by attending a weekend conference. In

order to learn the necessary hierarchy of skills, Ms. Parekh worked under the supervision of Sue Allen, a master teacher, and Alisa Beard, a certified auditory verbal therapist. As long as Ms. Parekh is employed at [redacted], she will have the benefit of on-going training and supervision from her mentors.

41. Petitioner is enrolled in Ms. Parekh's pre-school classroom at [redacted]. At the time of the hearing, there were four children in the class. If Petitioner continues with [redacted] present services at [redacted], [redacted] should meet [redacted] goal to be mainstreamed by kindergarten or first grade.

42. Alisa Beard, who has her B.S. and M.S. in speech pathology, has worked at [redacted] since 1998. In 2000, Ms. Beard became a certified auditory verbal therapist after meeting the following prerequisites: (a) a M.S. degree in speech pathology, audiology, or deaf education; (b) three years of work experience in the field; (c) 2,500 hours of supervised on-site training; and (d) 250 hours of academic course work followed by a national examination.

43. Ms. Beard has worked with Petitioner since she was 16 months old. Ms. Beard also has worked with Petitioner's parents to train them to use AVT in the home environment.

44. Ms. Beard developed the proposed goals and objectives, which Respondent's staff incorporated into the initial IEP. Without Ms. Beard's help, the draft IEP developed by Respondent would not have been appropriate for Petitioner in any respect.

45. At the time of the hearing, Ms. Beard provided Petitioner with AVT four times per week for 30 minutes. During

these sessions, Ms. Beard focused on teaching Petitioner to listen and learn through the auditory channel.

46. Ms. Beard has the necessary expertise to teach Petitioner how to hear and speak using the CIs. With the help of an experienced teacher like Ms. Beard, Petitioner would not be at risk of regression. Instead, Petitioner would likely meet [redacted] goal of being mainstreamed by kindergarten or first grade.

47. Susan Allen is the founder of [redacted]. She has a M.S. in education of the deaf and a M.S. in special education speech and language pathology. She is certified in Florida as a regular elementary education teacher, a master teacher, and a SLP.

48. Ms. Allen has taught deaf children since 1965. In 1996, Ms. Allen began providing AVT to CI students. ASHA has certified her as an auditory verbal therapist. Ms. Allen knows how important it is for professionals working with an oral deaf child to have the necessary background, training and experience. Simple certification as an SLP is not sufficient to teach CI students.

49. [redacted] provides the educational staff and services so critical to Petitioner's success. Without an equivalent educational placement, Petitioner is not likely to make educational progress. Instead, [redacted] likely will regress and fail to meet [redacted] goals and objectives.

50. Mary Jo Schuh, supervisor of audiology at [redacted], has a B.S. and an M.S. in audiology. She is a certified audiologist by ASHA and licensed as such by Florida. Ms. Schuh was involved with the creation of the CI program at [redacted].

51. Ms. Schuh has known Petitioner since she was evaluated for deafness in 2002. According to Ms. Schuh, the first few years of life are the most important time for Petitioner to learn language. Even then, Petitioner will require audiology services for [redacted] lifetime, including mapping and troubleshooting the CIs.

52. Ms. Schuh is familiar with the staff at [redacted]. She is confident that [redacted]'s staff understands CIs and has the necessary background, training, and experience to be proficient in maintaining the CI equipment. According to Ms. Schuh, it took [redacted] two years to reach a satisfactory level of skill in troubleshooting the CI equipment.

53. Judi Barnes, an expert in aural/oral deaf education and CI's, is the coordinator of the CI program at [redacted]. Dr. Larry Lundy, an expert in CI surgery, is Petitioner's surgeon. Laura Crooks is an expert in deaf education, special education, and early childhood education. All of these experts provide additional persuasive evidence of the following: (a) placement in a VE classroom is not appropriate for Petitioner if [redacted] is to make educational progress and meet [redacted] goal of being mainstreamed by five years of age; (b) Respondent's staff does not have the requisite background, training, and experience to teach Petitioner to listen and speak using the auditory channel or to maintain the CI equipment; and (c) [redacted] is an appropriate placement for Petitioner because of (i) the background, training, and experience of its staff, (ii) its parent participation program, and (iii) its classroom consisting of students with similar linguistic needs.

54. During the hearing, Respondent presented evidence that it is in the process of training school personnel to work with CI students. Petitioner would like the opportunity to incorporate Petitioner into the learning process.

55. Respondent now recommends implementing the IEP in the VE class at [redacted]. Respondent proposes this change because it has a new class there with a teacher who has a background in speech and language.

56. Respondent did not make plans to serve students with CIs until a CI child enrolled in the district in October 2003. Respondent's staff then began to identify weekend training seminars and began on-line research and reading related to educating CI students. Respondent also has attempted to arrange for a mentoring program for its teachers of CI students but has not worked out the details.

57. Respondent currently has a teacher of the deaf, Tracy Van Petten, who is pursuing certification in AVT. Ms. Van Petten has attended a two-week CI training course in North Carolina and two additional CI workshops. Ms. Van Petten has accumulated approximately ten of the 1200 hours (in working directly with CI students and parents) that she needs in order to fulfill one of ASHA's current requirements for certification in AVT.

58. Ms. Van Petten has been an itinerant teacher of the deaf for six years. She has some experience working with two CI students, ages six and seven. One of these students relied primarily on sign language and is currently attending school at [redacted]. Ms. Van Petten has never worked as a teacher of any pre-

school CI student. She does not have the necessary background, training, or experience to implement Petitioner's IEP appropriately.

59. Susan Andres is the SLP at [redacted]. Ms. Andres would provide Petitioner with articulation exercises in addition to oral therapy and auditory training. Ms. Andres would work with Petitioner using the same therapy that she uses with the hearing children except that it would be more auditory.

60. Ms. Andres attended a weekend training seminar to learn more about CIs. She has undergone some CI training at a public educational facility in New York. Ms. Andres has explored the possibility of being mentored. She currently does not and never has worked with any CI students. She lacks the background, training, and experience to implement the goals and objectives in Petitioner's IEP.

61. Jennifer Self, an SLP, is currently working at [redacted] where she teaches the pre-school VE class. There are seven developmentally disabled students in the class. There are no hearing impaired students in the class.

62. Ms. Self has had no training to prepare her to work with an oral deaf child who has CIs. In fact, she has never worked with a deaf child. Ms. Self does not have the background, training, and experience to implement Petitioner's IEP.

63. Elizabeth Goedelman, an itinerant teacher of the deaf, has worked with CI students who utilized sign language at the middle and high-school levels. Ms. Goedelman has had no experience as a teacher of pre-school CI students whose IEPs rely

exclusively on an oral approach. Ms. Goedelman does not have the background, training, and experience to implement Petitioner's IEP.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 1003.57(5), Florida Statutes (2004).

65. Petitioner has the burden of proving the following by a preponderance of the evidence: (a) Respondent violated the mandates of IDEA by failing to provide Petitioner with FAPE in a timely manner; and (b) Petitioner's unilateral placement at [redacted] was appropriate to provide the services that Respondent should have provided, thereby entitling Petitioner to compensatory education and/or reimbursement of out-of-pocket expenses at [redacted], including the cost of tuition and transportation. See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1997).

66. Respondent first argues that Petitioner is not entitled to a due process hearing because [redacted] was a private school student when Respondent developed the IEP. In the alternative, Respondent argues that Petitioner is entitled to a due process hearing only on the issue of whether the IEP would provide Petitioner with FAPE in the proposed public-school placement. In other words, Respondent asserts that Petitioner lacks standing to request a due process hearing, and to the extent that Petitioner

has standing, the Division of Administrative Hearings lacks jurisdiction to order Respondent to compensate/reimburse Petitioner for [redacted] private school expenses if the undersigned determines that Respondent's IEP fails to provide FAPE. These arguments are without merit for the following reasons.

67. As Respondent acknowledges in its Proposed Recommended Order, the State of Florida receives federal funds to provide ESE services. Therefore, it is necessary to examine the IDEA and implementing regulations to determine the relief that an administrative law judge may grant.

68. 20 U.S.C. Section 1412(a)(10)(C)(ii) states as follows:

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

69. 34 C.F.R. Section 300.403 provides as follows:

> (a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. . . .
>
> (b) Disagreement about FAPE. Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question

> of financial responsibility, are subject to the due process procedures of [sections]300.500-300.517.
>
> (c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

70. The above-referenced federal statutes and regulations clearly authorize a hearing officer or administrative law judge to order reimbursement of private-school expenses in cases where the school district does not provide FAPE and where parents remove an ESE student from public school and unilaterally place the child in private school pending completion of administrative proceedings.

71. In this case, Petitioner fully intended to transfer from [redacted] to public school under an appropriate IEP when [redacted] early intervention services terminated on [redacted] third birthday. [redacted] did not participate in the IEP meetings seeking ESE services as a private school student at [redacted]. Petitioner was not required to withdraw from [redacted] and attend [redacted] under an IEP developed to place [redacted] in an ESE public-school program in order to challenge that IEP in a due process proceeding. See Justin G. v. Board of

Education of Montgomery County, 148 F. Supp. 2d 576, 587 (S.D. Md. 2001)(The IDEA does not bar children from receiving FAPE because their disabilities were detected before they reached school age; children not barred from seeking reimbursement after a unilateral private-school placement because they have not attended public school.)

72. In Cocores By and Through Hughes v. Portsmouth, N.H., 779 F. Supp. 203, 205 (D. N.H. 1991), the court stated as follows:

> Finally, the court finds erroneous the hearing officer's conclusion that the authority of the administrative process--as opposed to that of the court--does not extend to an award of compensatory education to the over-twenty-one plaintiff.

73. Other courts have found that the Division of Administrative Hearings has authority to determine whether a school district should provide a student with compensatory relief. See Whitehead By and Through Whitehead v. School Board for Hillsborough County, Florida, 918 F. Supp. 1515 (M.D. FL 1996)(Court denied school district's Motion for Partial Summary Judgment where administrative law judge determined that parents were entitled to compensation/reimbursement for providing services that school district should have provided); Cohen on Behalf of Cohen v. School Board of Dade County, 450 So. 2d 1238 (Fla. 3rd DCA 1984)(Hearing officer neither abused his discretion nor violated Education of the Handicapped Act in determining that parents of disabled child were not entitled to public funding for more than three round trips made by the child between Florida home and Georgia residential treatment facility.)

74. Tracking the language in the stay-put provisions of 20 U.S.C. Section 1415(j) and 34 Section C.F.R. 300.514, Florida Administrative Code Rule 6A-6.03311(11)(d) states as follows:

> (d) Status of student during proceedings. Except as provided in subsection (9) of Rule 6a-6.03312, F.A.C., during the time that an administrative or subsequent judicial proceeding regarding a due process hearing is pending, unless the parent of the student and the district agree otherwise, the student involved in the proceeding must remain in the present educational placement. If the proceeding involves an application for an initial admission to public school, the student, with the consent of the parent, must be placed in a public school program until the completion of all proceedings. If the administrative law judge agrees with the parent and finds that a change of placement is appropriate, that placement becomes the agreed-upon placement during the pendency of the appeal. (Emphasis Added)

75. Under the stay-put provisions, a school district cannot force a non-consenting parent to place a disabled child initially in a public ESE program pending completion of a due process proceeding to determine the appropriateness of that public school placement. It is also clear that an administrative law judge has authority, after a due process hearing, to agree with parents that a private school placement at public expense is appropriate.

76. Respondent correctly cites the general rule that an administrative law judge cannot rewrite the IEP. See Hendry County School Board v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986). The primary focus of the due process hearing is to determine whether the subject IEP provides FAPE. However, in those cases where a parent has objected in a timely fashion to an inappropriate IEP, an administrative law judge may determine the

parent's entitlement to reimbursement for expenses in providing services that should have been provided by the school district. See Whitehead, 918 F. Supp. at 1520.

77. An appropriate education does not mean a "potential-maximizing education." See Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 197 n.21 (1982). The issue in reviewing an IEP is whether the student has received "the basic floor of opportunity" necessary to receive "sufficient" educational benefit. See Rowley 458 U.S. at 202; J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1572-1573 (11th Cir. 1991); Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991). Consequently, FAPE "calls for more than a trivial educational benefit." See Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). An IEP must provide "significant learning" and "meaningful benefit" when considered in light of a student's potential and individual abilities. Ridgewood Board of Education, 172 F.3d at 247.

78. In Florence County School district Four v. Carter, 510 U.S. 7, 114 S. Ct. 361 (1993) and Burlington v. Department of Education of Massachusetts, 471 U.S. 359, 105 S. Ct. 1996 (1985), the Supreme Court held that parents are entitled to reimbursement for expenses incurred by a unilateral placement of their child when: (a) the district's proposed placement is determined to be inappropriate; (b) the parent's unilateral placement is determined to be appropriate; and (c) the equities would not otherwise warrant denial of the remedy of reimbursement.

79. Because the IEPs developed in February and March 2004 would have essentially failed in their mission to teach Petitioner to hear, comprehend, and communicate in her mode of communication, they did not provide [redacted] with FAPE. Respondent did not present any persuasive evidence during the hearing to show that placing Petitioner at [redacted] would have made a significant difference in providing FAPE.

80. The greater weight of the evidence indicates that the Respondent's proposed placement will not provide Petitioner with FAPE for the following reasons: (a) a VE classroom is inappropriate because Petitioner needs an educational program in a setting designed specifically for pre-school CI students in order to meaningfully access the educational process through an oral mode of communication; (b) the proposed placement is inappropriate because Respondent's professionals lack the necessary knowledge, training, and experience to implement the IEP; (c) the proposed placement is inappropriate because it does not provide for necessary parent training, on-going audiological services, and on-going mapping and troubleshooting services; (d) the proposed placement is inappropriate because it will not adequately develop Petitioner's auditory brain structure, and thus her ability to hear and speak, during the narrow window of opportunity before Petitioner is five or six years of age; and (e) the proposed placement is inappropriate because it fails to provide Petitioner with an opportunity to achieve [redacted] goal of being mainstreamed by kindergarten or first grade. Most importantly, placing Petitioner in the VE classroom will more

likely than not cause [redacted] to regress instead of making some educational progress.

81. On the other hand, [redacted] will provide Petitioner with an appropriate educational placement that will ensure [redacted] achieves all of [redacted] goals and objectives. There are no equities that would otherwise warrant denial of reimbursement for Petitioner's out-of-pocket expenses for tuition and transportation.

82. Respondent correctly argues that an administrative law judge cannot pass judgment upon the appropriateness of an IEP to determine the best methodology for educating a child. See O'Toole By and Through O'Toole v. Olathe District Schools Unified School District No. 233, 144 F.3d 692 (10th Cir. 1998). However, the methodology to be used in implementing Petitioner's IEP is not at issue here. To the contrary, the parties agree that AVT is the appropriate methodology to use in teaching Petitioner to listen and speak using the auditory channel. Use of "total communication" techniques to teach Petitioner will inhibit [redacted] ability to learn to listen and speak. Respondent was unable to show that its staff currently has the background, training, and experience to teach Petitioner using AVT.

83. Pursuant to 34 C.F.R. Section 300.346(a)(2)(iv), the school district is required to:

> (iv) [c]onsider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct

> instruction in the child's language and communication mode . . .

84. Petitioner's communication mode is auditory/oral, which requires that she receive AVT. The CIs make it possible for Petitioner to hear sound of some kind but only with an appropriate early education program using AVT will she learn to listen and speak using the auditory channel. Without intensive and on-going AVT, Petitioner will likely regress, failing to make educational progress or to reach [redacted] goal of communicating with [redacted] peers in a mainstream classroom by age five or six.

ORDER

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

ORDERED that:

Respondent shall provide Petitioner with compensatory education in the form of reimbursement for expenses related to [redacted] education at [redacted], including tuition and school transportation plus the statutory interest provided by Section 55.03, Florida Statutes, commencing at the time that she became eligible to receive services in Respondent's ESE program in March 2004 and continuing until such time that Respondent provides her with FAPE in an alternative placement.

DONE AND ORDERED this 27th day of October, 2004, in Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD

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Filed with the Clerk of the
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this 27th day of October, 2004.

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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 230.23(4)(m)5, Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.