

Lee County School District  
No. 04-0726E  
Initiated by: Parents  
Hearing Officer: Daniel Manry  
Date of Final Order: December 7, 2004

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████ and ██████., on behalf of )  
██████., ██████ a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 04-0726E  
 )  
LEE COUNTY SCHOOL BOARD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the due process hearing of this case on May 11 through 13; June 8 through 10, 14 through 16, 22, and 23; and July 12 through 15, 20, 23, and 26, 2004, in Fort Myers, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUES

The issues for determination in this proceeding are whether an Individual Education Plan (IEP) dated February 19, 2004, was designed to provide a disabled student with a free appropriate public education (FAPE), and whether Respondent violated any procedural safeguards.

PRELIMINARY STATEMENT

The ALJ changed the original style of the case to accurately reflect the parents as the Petitioners. This case has an extensive procedural history. The procedural history involves some facts that may, or may not, be relevant and material to remedies that Petitioners may seek to obtain in another forum against Respondent. Therefore, the procedural history is described in greater detail in the Findings of Fact.

At the due process hearing, Petitioners submitted 74 exhibits for admission into evidence that are identified in the record as: A-1 through A-11; B-1 through B-11; C-1 and C-2; D-1 through D-4; E-1 through E-8; F-1 through F-13; G-1 and G-2; H (Volumes 1 and 2); I, J, K, L, M, N, O, P, Q-1, Q-2, R, S, T, U, V, W, and X. Petitioners subsequently withdrew Petitioners' Exhibits B-16, J, and P. Respondent submitted 18 exhibits for admission into evidence that are identified in the records as Respondent's Exhibits 1 through 18. The ALJ identified and

admitted the cumulative file of the school attended by the disabled student as ALJ's Exhibit 1.

Petitioners presented the testimony of five witnesses, and Respondent presented the testimony of 15 witnesses. The identity of the witnesses and any rulings concerning the witnesses and exhibits are reported in the 19-volume Transcript of the due process hearing filed with DOAH on October 22, 2004. In accordance with agreed extensions of time to file proposed final orders (PFOs), the parties timely filed their respective PFOs on November 5, 2004. The parties waived the requirement for a final order within 45 days of the request for due process hearing.

#### FINDINGS OF FACT

1. Respondent is a body corporate and governmental agency duly empowered by the Constitution and Statutes of the State of Florida to administer, manage, and operate the Lee County Public Schools within the School District of Lee County, Florida (District). Respondent receives state and federal funding for education, including education for disabled students.

2. ██████., , (█████.), is a disabled ██████ student, born on ██████ ██████ 19█████. ██████. is, and has been at all times material to this proceeding, a student in the District. Respondent has identified ██████ as a child with disabilities under the Individuals with Disabilities Education Act, 20 U.S.C § 1400 et. seq. (IDEA).

3. ██████ has a specific learning disability and is speech and language impaired. ██████ also suffers from attention deficit hyperactivity disorder (ADHD) and microcephally, a condition in



8. Sometime in August 2002, █████ enrolled in kindergarten at █████ for the 2002-2003 school year. Between August 2002 and October 28, 2002, Respondent provided educational services to █████ pursuant to the last IEP for the preceding school year, presumably the IEP dated May 23, 2002. On October 28, 2002, Respondent and Petitioners jointly developed another IEP intended to operate for the remainder of the kindergarten school year.

9. At the conclusion of the kindergarten year, █████ had made substantial educational progress in letter identification, math, language, and pre-reading skills. Inconsistency in educational performance, however, caused █████ kindergarten teacher to consider retention in kindergarten. She recommended promotion with the idea that, if needed, retention in the first grade would provide █████ with a more structured environment.

10. In the first grade, █████ was the weakest student in █████ class. █████ was weaker in language arts and reading, but stronger in math and science. █████ understood ordinal numbers, money, and time. █████ could compare small groups of objects. █████ could complete patterns and could perform simple addition and subtraction. █████ had achieved 75 to 80 percent of █████ kindergarten goals by the time █████ began the first grade.

11. In both kindergarten and the first grade, █████ displayed behavioral problems. █████ displayed a short attention span and a need for redirection and encouragement. █████ walked around the classroom, talked aloud, crawled under a classroom table, and resisted lining up with █████ classmates to go to lunch by crawling under a table and crying. █████ was tardy

approximately 40 times in kindergarten and, when tardy, entered the classroom by greeting other students and then taking some time to settle ██████ in ██████ seat.

12. During the first grade, ██████ made noises in class, and called out across the classroom. ██████ resisted class work by stating ██████ was too hungry or tired, talked to other students, took away pencils or paper from other students, and reached into their crayon boxes.

13. The behavior problems in kindergarten and the first grade persisted between October 28, 2002, and February 19, 2004. Staff at ██████ and Petitioners jointly developed the existing IEP dated February 28, 2003. Respondent provided educational and related services to ██████ pursuant to the existing IEP from October 28, 2003, through April 28, 2004. On April 28, 2004, Respondent completed a modified stay-put IEP and thereafter provided educational and related services to ██████ pursuant to the modified stay-put IEP.

14. The proposed IEP that was completed on February 19, 2004, and is at issue in this proceeding, began at an IEP team meeting conducted on December 19, 2003. ██████ staff and Petitioners recessed the team meeting and concluded it on February 19, 2004. In relevant part, the proposed IEP sought to transfer ██████ to a varying exceptionalities (VE) classroom at a school other than ██████ and to place ██████ in a classroom setting that was neither a regular education classroom nor a small class size.

15. Respondent did not develop the proposed IEP jointly with Petitioners. Petitioners attended the IEP meetings on December 19, 2003, and February 19, 2004, but objected to the proposed IEP.

16. Respondent, through its employees, notified Petitioners that Respondent would transfer ██████ to a VE class in a different school. The only legal mechanism Petitioners had to prevent the transfer was to request a due process hearing and thereby invoke the so-called "stay-put" protections afforded by applicable law.

17. On March 3, 2004, Petitioners' filed the request for a due process hearing that is the basis for this proceeding. The so-called "stay-put" protections require ██████ to remain in the placement prescribed in the existing IEP during the pendency of this proceeding unless the parties otherwise agree. Between April 8 and 28, 2004, Petitioners and Respondent attempted to develop a mutually agreeable IEP for ██████. In the end, however, Petitioners did not agree to the modified stay-put IEP that Respondent completed and implemented on April 28, 2004. Therefore, the existing IEP is the stay-put IEP.

18. It is undisputed that the circumstances in existence when the due process hearing began rendered the proposed IEP, as well as the existing IEP, inappropriate for the unique educational needs of ██████ at the time of the due process hearing. The appropriateness of the modified stay-put IEP is not at issue in this proceeding because Petitioners did not request a due process hearing to challenge that IEP.

19. Petitioners assert that, based on then existing circumstances, the proposed IEP was not designed to provide FAPE to [REDACTED]. Conversely, Respondent maintains that the proposed IEP was, at the time, designed to provide FAPE to [REDACTED]. However, Respondent admits that intervening circumstances between February 19 and April 28, 2004, rendered the proposed IEP inappropriate at the time of the due process hearing. Respondent claims medication that [REDACTED] began taking a few days before February 19, 2004, is the intervening circumstance that now makes the proposed and existing IEPs inappropriate for the unique educational needs of [REDACTED].

20. Petitioners seek in this proceeding to exhaust their administrative remedies as a condition precedent to a subsequent action in another forum that Petitioners believe will redress the violations allegedly committed by Respondent. The ALJ has made findings of fact concerning the alleged procedural violations and inadequacies of the proposed IEPs as an incident of Petitioners' need to exhaust their administrative remedies as a prerequisite to the relief Petitioners seek in another forum.

21. The ALJ has also made findings concerning the existing IEP because such findings may be relevant and material to alleged procedural violations. In addition, [REDACTED] was in the first grade at [REDACTED] at the time of the due process hearing and may face similar issues in connection with future IEPs at the same school until [REDACTED] progresses to a middle school. The ALJ has made findings concerning the existing IEP in an effort to provide a factual backdrop for [REDACTED]'s future IEPs at [REDACTED].

22. This proceeding has an extensive procedural history. On March 5, 2004, Respondent referred Petitioners' request for a due process hearing to DOAH. On March 12, 2004, counsel for Petitioners submitted a Revised Issues for a Due Process Hearing (Revised Issues). On March 19, 2004, counsel for Respondent filed a motion to strike or for a more definite statement with regard to the Revised Issues. On March 25, 2004, ALJ Susan B. Kirkland issued an Amended Notice of Hearing that included the Revised Issues.

23. On March 26, 2004, Respondent filed a motion to reschedule the due process hearing. On April 1, 2004, Judge Kirkland continued and rescheduled the due process hearing for April 14 through 16, 2004.

24. On April 6, 2004, the parties agreed to continue the hearing until May 11 through 13, 2004. On April 7, 2004, Judge Kirkland transferred the case to the undersigned. The undersigned granted a continuance and rescheduled the due process hearing for May 11 through 13, 2004.

25. The parties met on several days from April 8 through 28, 2004, in an attempt to prepare a mutually acceptable IEP, but were unable to reach agreement. Thereafter, Respondent delivered educational services to ██████ pursuant to the modified stay-put IEP.

26. On May 3, 2004, Petitioners filed with DOAH a Second Amended Notice of Issues that did not include objections Petitioners had to the modified stay-put IEP. In the afternoon of May 6, 2004, Respondent filed a Motion to Dismiss for

Mootness, to Strike Petitioners' Second Amended Notice of Issues or for Continuance of Final Hearing (the Motion).

27. On May 7, 2004, the ALJ conducted a telephone conference with counsel for the parties. During the conference, the parties disputed whether Petitioners had jointly developed the modified stay-put IEP.

28. In relevant part, the ALJ questioned whether DOAH had jurisdiction to determine the adequacy of the existing or proposed IEP in light of the modified stay-put IEP. The ALJ directed each party to submit a memorandum of law on May 11, 2004, by 9:00 a.m. The ALJ convened the due process hearing on May 11, 2004, but limited the first day of hearing to hear evidence on factual issues related to jurisdiction. The ALJ determined Petitioners had not agreed to the modified stay-put IEP and had not jointly developed the modified stay-put IEP.

29. At the request of the parties, the ALJ recessed the due process hearing on May 12, 2004, to afford the parties an opportunity to resolve their differences. On May 13, 2004, the parties entered into a partial settlement agreement that is not in evidence. For the remainder of the due process hearing, the parties submitted evidence and law on disputed issues concerning the existing IEP and proposed IEP.

30. Petitioners do not object to Respondent providing [REDACTED] with special educational services pursuant to an IEP. Rather, Petitioners object to placement of [REDACTED] in a VE class pursuant to the proposed IEP; the amount and frequency of services in the

existing and proposed IEP; the absence of a behavior intervention plan (BIP) that includes a special diet to prevent hyperactivity, or, alternatively, the failure to develop and implement such a BIP in a timely manner in either the existing or proposed IEP; and the omission from the existing and proposed IEP of essential services, including visual therapy, assistive technology, and a trained 1:1 aide.

31. █████ has an intelligence quotient (IQ) in excess of 100. █████ is capable of achieving appropriate educational goals, and is capable of progressing from grade to grade.

32. The existing IEP, as previously stated, was developed on February 28, 2003. An annual review of the existing IEP was not legally required for one year. Therefore, the adequacy of the existing IEP must be measured by whether it was designed and implemented to address █████'s unique educational needs for the remainder of the 2002-2003 kindergarten school year; and for that part of the 2003-2004 first grade school year that preceded implementation of the modified stay-put IEP on April 28, 2004.

33. The existing IEP was designed and implemented to adequately address the unique needs of █████ for the entire kindergarten year. Although █████ experienced behavioral problems, .... achieved █████ educational goals and progressed from kindergarten to the first grade.

34. The existing IEP was neither designed nor implemented to adequately address the unique needs of █████ during that part of the 2003-2004 first grade school year in which the IEP was in effect. During the first grade, █████ made meaningful progress toward the educational goals and benchmarks in the existing IEP. At the end of the 2003-2004 first grade school year, however, Respondent retained █████ in the first grade and did not promote █████ to the second grade. Thus, the existing IEP was not designed so that █████ could make meaningful progress toward .... educational goals and progress to the second grade.

35. The issues relating to the existing IEP involve alleged procedural violations that are inextricably intertwined with alleged substantive deficiencies. For example, the existing IEP did not require a BIP. The persistent behavior problems exhibited by █████ during kindergarten and the beginning of the first grade comprised a primary reason for developing the existing IEP. After developing and implementing the existing IEP, the behavior problems persisted and, in substantial part, interfered with █████'s successful completion of the first grade.

36. In addition to the previously discussed behavioral problems, █████ ran off of school property and engaged in similar behavior during transitions from home to class, between classes, and while in physical education classes.

37. Staff at ██████ began a functional behavior assessment (FBA) on September 11, 2003. It is undisputed that the FBA is a necessary prerequisite to a BIP.

38. Staff at ██████ did not complete the FBA until December 1, 2003. The final BIP is dated February 19, 2004.

39. The BIP was completed on February 19, 2004, and was untimely. No evidence adequately explicated the reasons that staff at ██████ required approximately five months after the FBA to complete a BIP for ██████

40. The BIP was not designed to adequately address the unique needs of ██████. The BIP failed to identify either immediate antecedent events at school or extended antecedent events in ██████'s home life that caused behavior problems in school and interfered with educational progress toward the second grade.

41. The parties dispute whether the proposed IEP includes the BIP. Respondent intended the BIP to be an integral part of the educational plan of care of ██████ irrespective of whether the proposed IEP required a BIP. However, inclusion of the BIP in the proposed IEP did not render the BIP timely. Moreover, the omission from the BIP of an adequate study of antecedent events, in relevant part, rendered the design of the proposed IEP inadequate for the unique educational needs of ██████ at the time that Respondent proposed the IEP.

42. The unique educational needs of ██████ at the time of the existing and proposed IEPs required a trained adult 1:1 aide. The existing IEP and the proposed IEP failed to provide a 1:1 aide for ██████.

43. █████ had difficulty in class attending to task and difficulty transitioning during the school day. █████ needed constant prompts, reminders, and redirection to task. A properly trained 1:1 aide would have provided assistance needed to address the unique educational needs of █████

44. Respondent refused to provide a 1:1 aide on the grounds that a 1:1 aide would result in █████ becoming dependent on the aide. Respondent argued that such dependence would result in more exclusion from the general population than would the VE classroom sought in the proposed IEP. Respondent also argued that dependence on a 1:1 aide would prevent █████ from making educational progress without the assistance of an aide.

45. The evidence Respondent submitted to support the argument that a trained 1:1 aide would be detrimental to █████ was neither credible nor persuasive. Although it is clear that dependence may begin immediately, the greater weight of evidence showed that a properly trained 1:1 aide would implement so-called "fading" techniques in a manner that progressively reduced the aide's assistance over time and prevented █████ from being permanently dependent on the aide.

46. The existing IEP and proposed IEP failed to provide █████ with a sensory diet free of gluten and casein that adequately addressed █████'s reaction to those ingredients in food and the difficulty █████ experienced in chewing certain foods due to █████ small mouth. Petitioners showed by a preponderance of the evidence that █████ had a medical necessity for such a diet and that an appropriate diet may reduce inappropriate behavior.

47. The existing and proposed IEPs failed to provide ESY services. ██████ experienced regression during periods in which ██████ received no services.

48. The regression was evidenced during summer breaks and when ██████ did not receive occupational therapy (OT). On the days that Petitioners provided private OT for ██████ before school, ██████'s performance at school improved. ██████ performance regressed on other days.

49. Neither the existing nor proposed IEP ensures that OT will be provided at weekly intervals. Rather, each IEP prescribes OT in monthly intervals.

50. Vision therapy greatly improves the educational performance of ██████ in the classroom and is necessary to adequately address the unique educational needs of ██████. Neither the existing IEP nor the proposed IEP provides ██████ with vision therapy. ██████ received private vision therapy when Respondent assessed the current level of performance in the modified stay-put IEP. At the time, the educational performance of ██████ had improved.

51. Assistive technology, such as a keyboard and a computer, is necessary to adequately address the unique educational needs of ██████. ██████ does not space adequately between words when ██████ performs hand-written work, but spaces appropriately between words on the computer. Neither the existing IEP nor the proposed IEP provides assistive technology such as a keyboard and a computer.

52. Neither the existing nor the proposed IEP is designed to adequately address the student's unique educational needs. A comparison between the current levels of performance, goals, and benchmarks in the proposed and existing IEPs shows that both IEPs lack adequate objective standards for assessing the student's current level of performance, the benchmarks identified in the respective IEP.

53. One of the objective standards identified for measuring progress is the student's actual work and test scores. However, teachers at ██████ routinely destroyed much of that work before commencement of the due process hearing. In addition, the IEPs do not require teachers to identify techniques for redirection and prompts, and there is no objectively measurable continuity in the present level of performance and progress from one IEP to the next. The IEPs are also incomplete, including the boxes for quarterly assessments, and the remaining portions are completed inconsistently. The lack of objective standards and consistency renders unreliable any measure of whether ██████ could have achieved the annual goals in each IEP.

54. In addition to an untimely and inadequate BIP, Respondent committed several other procedural violations prior to the commencement of the due process hearing. During the IEP meetings conducted to develop the proposed IEP, an administrator

at [REDACTED] prevented the student's [REDACTED] from discussing circumstances at home that may, or may not, have constituted extended antecedent events that contributed to behavior problems in school. The administrator directed the student's [REDACTED] to stay focused on school-related matters.

55. Respondent destroyed or lost some of the educational records for [REDACTED]. Teachers at [REDACTED] maintain a student portfolio that includes actual work samples for [REDACTED] and [REDACTED] test results. Actual work samples and test results comprise one of the objective standards for measuring [REDACTED]'s educational progress toward [REDACTED] annual goals. In addition, the records produced by Respondent failed to include correspondence from Petitioners to the school evidencing the medical necessity for a sensory diet for [REDACTED].

56. Avoidance of deficiencies and procedural violations may have enabled [REDACTED] to progress to the second grade. For example, the timely implementation of an adequate BIP may have enabled [REDACTED] to avoid the behavior problems that interfered with [REDACTED] educational progress. However, [REDACTED] began taking medication for ADHD sometime around February 19, 2004. The educational progress [REDACTED] made after taking medication may prevent an answer to the question of whether the deficiencies and procedural violations prevented [REDACTED] from making educational progress unless [REDACTED] stays on medication and experiences similar problems under future IEPs that are flawed by deficiencies substantially similar to those found to exist in this proceeding.

57. The evidence is clear that █████ made meaningful educational progress after █████ began taking medication for █████ ADHD, but during the pendency of deficiencies in the existing and proposed IEP and during the identified procedural violations. The progress █████ made after going on medication also makes it is clear that placement in a VE class is, and was at the time of the proposed IEP, inappropriate for the unique educational needs of █████

58. Between February 19 and April 4, 2004, █████ improved significantly in classroom behavior and performance. █████ remained seated and focused in the classroom. █████'s classroom teacher was able to work with █████ in a productive manner and no longer recommended transfer to a VE class.

59. By April 28, 2004, █████ maintained very good interaction with peers. The student's ability to maintain self control had improved significantly. The only behavior problems that Petitioners reported occurred in transition between medication doses.

60. █████ followed classroom routines without difficulty. █████ displayed some organizational problems, but those were within the normal range of first graders. █████ worked independently, but continued to need periodic, rather than constant, assistance to compete academic work.

61. On April 28, 2004, toward the end of the first grade, █████ had improved █████ educational performance in curriculum and learning. █████'s strengths continued to be in math and science, and █████ letter recognition was near 85 percent.

62. █████ continued to have weaknesses in reading and writing. █████ scored 64 percent on a phonogram test. █████ recognized 24 percent of the words from the first of six books used for the first grade. █████ could decode 67 percent of the words. █████ read from a kindergarten level passage at a fluency rate of 18 to 20 words per minute.

63. █████ could write a short paragraph with three to four word sentences, using correct sentence structure. █████ understands the need for spacing between words, but does not do so when doing hand-written work. However, █████ does use spaces between words when using the computer. When doing hand-written work, █████ continued to use some floating letters, especially the letters g, y, and p, and █████ orientation to the line continued to need improvement.

64. The preponderance of evidence does not show that the problems █████ experienced in classroom behavior and performance prior to February 19, 2004, were caused either individually or severally by: deficiencies in the design and implementation of the existing IEP; deficiencies in the design of the proposed IEP; or procedural violations. The greater weight of evidence shows that, between February 19 and April 28, 2004, medication for ADHD resulted a significant improvement in █████'s classroom behavior and educational performance. █████ achieved a significant post-medication improvement despite deficiencies in the design and implementation of the existing IEP; deficiencies in the design of the proposed IEP; and procedural violations.

CONCLUSIONS OF LAW

65. DOAH has jurisdiction over the parties and the subject matter of this proceeding. § 1003.57(5), Fla. Stat. (2003); Fla. Admin. Code R. 6A-6.03311; 20 USC §§ 1400 et. seq. DOAH provided the parties with adequate notice of the administrative hearing.

66. Respondent asserts that DOAH has no subject matter jurisdiction over the existing and proposed IEP because the modified stay-put IEP renders those IEPs moot. In support of its assertion that DOAH lacks jurisdiction, Respondent cites Board of Education of Downers Grove Grade School District No. 58 v. Steven, 89 F.3d 464, 467 (7th Cir. 1996).

67. In Downers Grove the parents of a disabled student challenged an IEP designed and implemented while the student was in middle school. By the time the court heard the case, the student had progressed to high school in a different school district and was being educated pursuant to a different IEP developed by a different IEP team in the high school. The court reasoned that a decision involving the earlier IEP would have no discernable effect on the current IEP, current school, and current school district. Even if the previous IEP were deficient, the student would not experience the same problems with the same school district again.

68. The facts in Downers Grove are inapposite to this proceeding. [REDACTED] has not progressed out of elementary school into a middle school, and [REDACTED] is not in a different school district. Rather, Respondent retained [REDACTED] in the first grade in [REDACTED]. [REDACTED] is in the same school and school district and must jointly develop subsequent IEPs with the same, or similar, IEP staff that designed and implemented the existing and proposed IEPs in a manner that did not adequately address [REDACTED]'s unique educational needs.

69. The findings and conclusions in this Final Order do not constitute opinions upon "moot questions or abstract propositions." If, for example, [REDACTED] were to experience future problems in making progress toward [REDACTED] educational goals in the same school and same school district and all other circumstances were equivalent to those in this proceeding, Respondent arguably could no longer assert that those problems were caused by the absence of medication. Respondent would be required to address the design and implementation to the then-challenged IEP. Respondent arguably would be bound under the doctrine of administrative stare decisis by the findings and conclusions in this Final Order; unless Respondent successfully changed the terms of this Final Order on appeal or unless Respondent could distinguish the facts or law in the subsequent case from those in this proceeding. Gessler v. Department of Business and

Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993).

70. In Gessler, the court explained:

The concept of stare decisis, by treating like cases alike and following decisions rendered previously involving similar circumstance, is a core principle of our system of justice. . . . [I]t is nevertheless apparent the legislature intends there to be a principle of administrative stare decisis in Florida.

Id.

71. The statutory framework underlying the holding in Gessler admittedly may not apply to this proceeding because Chapter 120 does not apply to due process hearings conducted in accordance with the IDEA. However, the judicial principle of stare decisis would control any appellate decisions involving this and subsequent similar cases between the same parties.

72. The existing IEP is the stay-put IEP. After Petitioners filed their request for due process hearing, applicable law required [REDACTED] to remain in the then-current educational placement unless Respondent and Petitioners otherwise agreed. 20 USC § 1415(j); Fla. Admin. Code R. 6A-6.03311(5)(1). Petitioners did not affirmatively agree to the modified stay-put IEP. Rather, Petitioners objected to the modified stay-put IEP. Respondent cited no legal authority to support a conclusion that the failure of Petitioners to file a

due process request to challenge the modified stay-put IEP constitutes tacit agreement with that IEP.

73. The trier of fact has based findings concerning the existing and proposed IEPs based on the trier's assessment of the preponderance of evidence. Respondent bears the burden of proof to show by a preponderance of evidence that the proposed IEP was designed to provide FAPE to [REDACTED]. If Petitioners were to have filed a request for due process hearing to challenge the existing IEP, Petitioners would have had the burden of proof to show the existing IEP was neither designed nor implemented to provide FAPE to [REDACTED].

74. The party seeking to change an IEP bears the burden of proof. Devine v. Indian River County School Board, 249 F.3d 1289, 1292 (11th Cir. 2001); Christopher M. v. Corpus Christi Independent School District, 933 F.2d 1285, 1290-1291, (5th Cir. 1991); McKenzie v. Smith, 771 F.2d 1527, 1531-32 and 1534 (D.C. Cir. 1985). See also Carlisle Area School District v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995) and Oberti v. Board of Education, 995 F.2d 1204, 1219 (3d Cir. 1993) (both holding that the school district bears the burden of proof for changes to an existing IEP that the school district proposes, and the parents bear the burden of proof for changes to an existing IEP that the parents propose). Allocation of the burden of proof recognizes the principle that great deference must be given to an IEP that

is jointly developed by educators and a student's parents.  
Devine, 249 F.3d at 1292; JSK v. Hendry County School Board, 941 F.2d 1563, 1573 (11th Cir. 1991).

75. For reasons stated in the Findings of Fact, the existing IEP was not designed or implemented to provide FAPE to [REDACTED]. Respondent failed to satisfy its burden of showing that the proposed IEP was designed to adequately address the unique educational needs of [REDACTED] at the time that Respondent proposed the IEP.

76. The IDEA creates a presumption in favor of the placement in a regular classroom setting developed jointly by educators and the parents in the existing IEP. Respondent bears the burden of showing that a change in that placement to a VE classroom is appropriate. It is clear from the evidence that placement in a VE classroom was not, and is not, appropriate for the unique educational needs of [REDACTED].

77. Educational placement includes a student's entire educational program and is not limited to the physical location where the program is implemented. Hill by Hill v. School Board for Pinellas County, 954 F. Supp. 251, 253 (M.D. Fla. 1997) (citing Weil v. Board of Elementary & Secondary Education, 931 F.2d 1069 (5th Cir. 1991), cert. denied, 502 U.S. 910 (1991), and Concerned Parents and Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education, 629 F.2d

751 (2nd Cir. 1980); noting that no change to student's IEP or educational placement occurred).

78. Procedural inadequacies that result in the loss of educational opportunity or seriously infringe on the parents' opportunity to participate in the IEP formulation process, or cause a deprivation of educational benefits, undermine the very essence of the IDEA and result in the denial of FAPE.

Independent School District Number 283 v. S.D., 88 F.3d 556, 562 (8th Cir. 1996); W.G. v. Board of Trustees of Target Range School District No. 23, Missoula, Mont., 960 F.2d 1479, 1484 (9th Cir. 1992); Roland M. v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990); Doe v. Alabama State Department of Education, 915 F.2d 651, 662 (11th Cir. 1990); Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). However, the preponderance of evidence does not show that the procedural violations committed by Respondent resulted in a loss of educational opportunity for █████ seriously infringed the parents' opportunity to participate in the IEP formulation process, caused a deprivation of educational benefits for █████ undermined the very essence of the IDEA, or resulted in the denial of FAPE. The greater weight of evidence shows that █████ made meaningful educational progress after the procedural violations when █████ began medication for █████. ADHD.

#### ORDER

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

ORDERED that the existing IEP was neither designed nor implemented to adequately address the unique educational needs of █████ during the first grade. The proposed IEP was not designed to adequately address the unique educational needs of █████ during the first grade. Respondent committed procedural violations identified in this Final Order. The educational progress █████ made in the latter part of the first grade after █████ began medication, while the IEP deficiencies and procedural violations were operative, precludes a finding based on a preponderance of the evidence that the deficiencies and violations, either jointly or severally, prevented █████ from making educational progress during the portion of the first grade that preceded the start of medication.

DONE AND ORDERED this 7th day of December, 2004, in Tallahassee, Leon County, Florida.

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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.