

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 09-1740E
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a due process hearing was held in this case on April 19 and 20, September 27 through 29, and October 21, 2010, in Fort Lauderdale, Florida,¹ before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████ and ██████████ (Parents), pro se
(Address of Record)

For Respondent: Barbara J. Myrick, Esquire
Broward County School Board
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

The issues for determination are (1) whether the School Board's denial of eligibility of the Child for Exceptional Student Education, hereinafter ESE, services on the basis of an Other Health Impairment, hereinafter OHI, on April 12, 2007, was

appropriate; (2) whether the School Board's denial of eligibility of the Child for ESE services on the basis of an OHI and a Specific Learning Disability, hereinafter SLD, on March 13, 2009, was appropriate; (3) whether the School Board's denial of eligibility for ESE services on March 13, 2009, provided the Parents with adequate notice; and (4) whether the School Board failed to provide the Child a free appropriate public education, hereinafter FAPE, as a result of the denials of eligibility for ESE services. The parties agreed that the time-period covered by this due process hearing complaint is April 12, 2007, through September 30, 2009.

PRELIMINARY STATEMENT

On April 2, 2009, the School Board received a request for a due process hearing, hereinafter DPH Request, from the Parents of the Child. The Parents were represented by counsel. The DPH Request was referred to the Division of Administrative Hearings, hereinafter DOAH, by the School Board on April 3, 2009, and was assigned Case No. 09-1740E by DOAH.

Subsequently, the School Board filed a Motion to Strike, requesting, among other things, that all allegations regarding Section 504 of the Rehabilitative Act of 1973, hereinafter Section 504, including the appropriateness of the Child's Section 504 Plans and discrimination against the Child, be

stricken. The undersigned granted the School Board's Motion to Strike.

Also, the School Board filed a Motion for More Definite Statement requesting that the DPH Request be found insufficient. In essence, the School Board filed a notice of insufficiency. The undersigned determined, among other things, that the DPH Request was insufficient and granted the Parents leave to amend.

Sometime later, the Parents' counsel filed a Notice of Withdrawal. The undersigned granted the Parents' counsel leave to withdraw. The Parents proceeded in the matter pro se.

Subsequently, the Parents filed an Amended DPH Request. The School Board requested that the resolution meeting be waived. The undersigned denied that School Board's request.

The Parents requested leave to amend the Amended DPH Request. The undersigned granted the Parents' request. The Parents filed a Second Amended [sic] Request for Due Process Hearing, hereinafter Second Amended DPH Request.

The due process hearing was scheduled. No resolution of the Second Amended DPH Request was accomplished during the resolution period. The Parents requested and were granted leave to engage in discovery by videotaped depositions. A continuance of the due process hearing was requested and granted. The 45-day requirement was extended. Several motions, regarding

discovery, were filed, and several telephone conferences, regarding discovery, were held.

As part of the discovery process, the School Board requested medical documents from a third party and received the medical documents. Upon challenge by the Parents, the undersigned determined, among other things, that the School Board had not followed the proper discovery procedure for obtaining the documents; that the medical documents in the possession of the School Board would be immediately forwarded, under seal, to the undersigned; that all copies of the medical documents in the School Board's possession would be destroyed; and that the undersigned would determine in an in camera inspection whether the medical documents would be revealed in these proceedings.

The Parents appealed the undersigned's decision, regarding the medical documents, to Florida's appellate court. Florida's appellate court upheld the undersigned's ruling. This matter was stayed during the appellate proceedings.

Further, the Parents, at one point in time, requested the removal of the School Board's counsel from this case. The Parents' request was denied.

During these proceedings, several continuances were granted. Additionally, several extensions of the 45-day decision requirement were issued.

At hearing, the Parents presented the testimony of nine witnesses and entered 13 exhibits (Petitioner's Exhibits numbered 22, 30, 31, 31-D, 31-E, 31-F, and 31-P; and Respondent's Exhibits numbered 1 through 6)² into evidence. The School Board presented the testimony of eight witnesses and entered 45 exhibits (Respondent's Exhibits numbered 8 (pages numbered 19 and 20), 9 through 12, 14 (pages numbered 72-115), 16, 17, 19, 20, 22 through 28, 34 through 37, 38 (pages numbered 268 and 271), 40, 45 through 59, 65, 66, 71, 72, 76 through 78) into evidence.

A transcript of the due process hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was extended, thereby extending the 45-day requirement. Subsequent to the due process hearing but before the filing of the Transcript, the Parents requested the admission of Petitioner's Exhibit 31-A. The School Board sought additional time to respond to the request for admission, which was granted, and the School Board filed a response in opposition to the request. The Parents' request for admission of Petitioner's Exhibit 31-A was denied.

The Transcript, consisting of seven volumes, was filed in its entirety on November 5, 2010. The Parents moved to extend the length of the post-hearing submissions beyond 40 pages, which was granted.³ Subsequent to the filing of the Transcript,

there were several extensions of the 45-day decision requirement. The parties' post-hearing submissions were considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Child was born in [REDACTED].

2. In 2004, the Child began attending school in the School Board's educational system. The Child attended pre-kindergarten at a Montessori Magnet elementary school, hereinafter Montessori Magnet School, and continued in attendance through May 16, 2008, the first grade.

3. The Montessori Magnet School was not the Child's boundaried home school but was a school of choice. The Parents selected the Montessori Magnet School because it practiced the Montessori Method in educating students.

4. The Montessori Method's goal is intrinsic motivation, which is also a part of its philosophy. Under the Montessori philosophy, children are believed to be intrinsically motivated but are not expected to begin with intrinsic motivation. The Montessori Method believes in the individual child. Rewards and incentives are not encouraged in the Montessori Method. The classrooms are structured so that students will make appropriate choices about lessons that are being taught to them.

5. The Child had the same pre-school teacher, hereinafter Pre-School Teacher, for two years at the Montessori Magnet

School. The Child demonstrated intrinsic motivation and, among other things, was bright, sociable, and even tempered. However, at times, the Child had difficulty following rules and generalizing the rules to a variety of situations, but none of the Child's behaviors were atypical for students of the Child's age group. Additionally, in a large group, sometimes the Child needed reminders but, generally, had no difficulty attending to task.

6. During the 2004-2005 school year, nothing was noted to indicate that the Child exhibited behavior that was not typical of a child in the Child's age group. Also, the Child showed steady progress in all areas, including academics, social skills, and behavior. Further, the Montessori Magnet School had a checklist of areas of achievement, and, by the end of the school year, the Child had progressed satisfactorily on all but two items on the checklist.

7. During the 2005-2006 school year, the Child showed growth in the areas of academics, social skills, and behavior. By the end of the school year, on the checklist of the areas of achievement, the Child had progressed satisfactorily in all areas, except four items on the checklist, but had grown in all areas.

8. However, the Child had experienced behavior problems during the 2005-2006 school year.

9. A teacher makes a referral for a child's behavior if the teacher considers the child's behavior to be serious.

10. On April 26, 2006, the Child received a referral for inappropriate touching from the Pre-School Teacher. The Child was removed from the class to meet with the Assistant Principal. Included in the consequences recommended by the Pre-School Teacher was the consideration of suspension.

11. Again, on May 3, 2006, the Child received a referral for inappropriate touching from the Pre-School Teacher. Included as a consequence for the Child's behavior was the possibility of the Child's removal from the magnet program.

12. Shortly after the beginning of the 2006-2007 school year, in December 2006, the Child was transferred to another teacher, hereinafter Second Elementary Teacher, at the Parents' request. The Second Elementary Teacher was the Child's teacher until May 2008.

13. During the 2006-2007 school year, the Child made progress in the Second Elementary Teacher's class. The Progress Report showed progress by the Child in all areas. The Second Elementary Teacher graded the Child's class work the same as other students in the class.

14. On February 24, 2007, the Parents notified the Second Elementary School Teacher that the Child had been diagnosed with Attention Deficit Hyperactivity Disorder, hereinafter ADHD.

15. Subsequently, the Parents provided a letter dated February 27, 2007, from C. Lynn Hernandez, M.D., stating that the Child was diagnosed with and was receiving treatment for ADHD.

16. Additionally, on March 5, 2007, the Parents notified the Principal of the Montessori Magnet School that a mental health facility had also diagnosed the Child with ADHD.

17. The evidence demonstrates that the School Board had been provided with two medical diagnoses of the Child suffering from ADHD.

18. ADHD manifests itself differently in different students. Many of the behaviors identified as ADHD are also considered developmental disorders for Pre-K students.

19. An ESE Eligibility Meeting was scheduled for April 12, 2007, which was the initial evaluation of the Child for ESE services. The ESE Eligibility Committee team members were the Parents, the Second Elementary Teacher, the School Psychologist, the ESE Teacher at the Montessori Magnet School, and the ESE Specialist at the Montessori Magnet School.

20. In preparation for the Eligibility Meeting, the School Psychologist conducted an evaluation of the Child and issued a written Psychological Report for consideration at the Eligibility Meeting. The School Psychologist determined that the Child's achievement scores fell within the high average to

very superior range, including the Child's writing skills, whereas, in a prior private evaluation, the scores fell within the low average range; that the Child operates within the average range in terms of behavior, whereas in the past there were some problems with behavior; and that there were no significant concerns emotionally, whereas in the past there were concerns. Also, the School Psychologist determined that the Child had a weakness in comprehension, which was in the low average range. Further, the School Psychologist reported that the Child's medication might have impacted the Child's behavior and that, apparently, the Child was receiving counseling, which might have also impacted the Child's behavior. In essence, the School Psychologist determined that the Child did not have an educational handicap.

21. Additionally, in preparation for the Eligibility Meeting, the Parents completed a Parent Information Form. Among other things, the Parents reported on the Parent Information Form that the Child was impulsive and had difficulty staying on task and remembering rules.

22. For the ESE Teacher, the standard procedure for an Eligibility Meeting was for a request to be made of the ESE Teacher to prepare Individual Educational Plan (IEP) goals for a student in advance of an Eligibility Meeting if a student was eligible for ESE services. The ESE Teacher was not requested to

prepare IEP goals for the Child in advance of the Eligibility Meeting. As a result, the ESE Teacher determined that the decision to deny eligibility had been made prior to the Eligibility Meeting. Consequently, the ESE Teacher went into the Eligibility Meeting with the mindset that eligibility would be denied.

23. The Eligibility Committee met on April 12, 2007. The Second Elementary Teacher indicated at the meeting that there were no concerns with the Child's ability to process information; that the Child's ADHD had no negative impact on the Child's classroom performance; and that ESE services were not needed for the Child to access the education program in the Second Elementary Teacher's class at the Montessori Magnet School. In addition to the Second Elementary Teacher's statements, the School Psychologist's evaluation and report and the Child's ADHD diagnosis were considered.

24. The evidence demonstrates that, prior to the Eligibility Meeting, the Eligibility Committee, except for the Parents, had determined that the Child was not eligible for ESE services based upon the information provided.

25. However, most importantly, the evidence also demonstrates that all the information presented at the Eligibility Meeting was meaningfully considered by the Eligibility Committee.

26. The Eligibility Committee determined that the Child failed to meet the criteria for ESE services and, therefore, the Child was not eligible for ESE services. Further, the Eligibility Committee considered eligibility under OHI but rejected it because the Child did not meet eligibility as defined by Special Programs and Procedures.

27. To demonstrate eligibility under OHI, an identifiable condition is required. However, an identifiable condition is not solely sufficient; a need for special programs and services is also required to be demonstrated. Special programs and services is a matter of degree; a student's performance would need to depart significantly from typically performing students, thus showing a need for special education.

28. ADHD is the identifiable condition.

29. But, the evidence does not demonstrate that, at that time, the Child's performance departed significantly from typically performing students and, therefore, fails to demonstrate a need for special education.

30. The Parents and the Second Elementary Teacher communicated in an effort to work together on the Child's academic and behavioral progress in the school setting. Also, the Second Elementary Teacher was of the opinion that the Child was displaying typical behavior for a child in the Child's age and grade range and related such to the Parents. Further, even

though the Parents were concerned that the Child had an issue with being honest, the Second Elementary Teacher was of the opinion that children in the Child's age and grade range have an issue with honesty and related such to the Parents.

31. On January 11, 2008, the Child scored in the above average range in reading on the STAR Reading Test. As a first grade student, the Child scored a grade equivalent of a third grade reader.

32. Regardless of the Child's academic performance, the Parents were concerned with the Child's ADHD negatively impacted the Child's performance in school. On January 23, 2008, the Parents consented to a Section 504/ADA initial evaluation.

33. On January 25, 2008, Dr. Hernandez completed a Request for Special Medical Consideration form. On the form, among other things, Dr. Hernandez recommended increased time for exams, preferential seating, increased contact with the family regarding assignments, and challenging academic work.

34. On February 4, 2008, the Parents' then counsel requested an IEP meeting from the School Board's Due Process Coordinator. The School Board's Due Process Coordinator advised the Parents' counsel, among other things, that a Section 504 meeting was scheduled; that, previously, the IEP committee had determined that the Child was not eligible for ESE services; and that the Child's ADHD was not interfering with the Child's

making progress, with reasonable accommodations, in the general education classroom.

35. No IEP meeting was scheduled by the School Board. The School Board determined that no new information had been presented to it. Also, the School Board had begun the process to assess whether the Child needed a Section 504 Plan.

36. On February 11, 2008, the Child was determined eligible for a Section 504 Plan due to ADHD based on medical documentation. A Section 504 Plan was developed and the Child received accommodations creating access to school, including classroom curriculum.

37. Following the Section 504 meeting held on February 11, 2008, another meeting was held with the Parents, the Parents' counsel, the Principal, the ESE Specialist, and the School Board's School-Parent Liaison. At the meeting, among other things, the Parents were assured that the Child was not being considered for dismissal from the Montessori Magnet School, and the Parents were directed to discuss any such concerns directly with the Principal. Additionally, decisions were made regarding, among other things, observation of the Child by the staff of the Montessori Magnet School; development of a daily sheet on the Child by the ESE Specialist, in cooperation with the Parents; and follow-up with the Child's classroom teacher.

38. The Parents were concerned about the effects of the Child's ADHD medication on the Child's performance and behavior at the Montessori Magnet School. As a result, the Parents were in constant contact with the staff at the Montessori Magnet School.

39. On March 17, 2008, the Parents, through their counsel, presented several issues that they wanted resolved at a Parent Conference. The Parents indicated, among other things, that the communication between the Parents and the administration and staff at the Montessori Magnet School was almost non-existent, but that it needed to improve for the betterment of the Child's education. Additionally, the Parents requested, among other things, an Independent Educational Evaluation, hereinafter IEE, at public expense.

40. The School Board's Coordinator of Student Services considered the School Psychologist's evaluation, completed on March 16, 2007, as being sufficiently comprehensive and, therefore, did not initially support granting the Parents' request for an IEE. However, in light of the School Board's not being able to locate the complete report of a prior evaluation referenced by the School Psychologist on which the Child performed on a lesser level, the Coordinator of Student Services agreed to the IEE at public expense.

41. During the 2007-2008 school year, the Child was not free of behavior problems. Four referrals were made by the Second Elementary Teacher for the Child's behavior.

42. The first referral was on February 8, 2008, for threatening to kill another student's hamster. Among other things, a student conference was held.

43. The second referral was on April 25, 2008, for inappropriate contact with another student in class. Among other things, the Child's Parents were contacted.

44. The third referral was on April 29, 2008, for disruptive behavior and for the Child not doing what the Second Elementary Teacher was telling the Child to do. Among other things, a student conference was held, and the Child's Parents were contacted.

45. The fourth referral was on May 1, 2008, for disruptive behavior--hitting another student.⁴ Among other things, a student conference was held. Additionally, the Second Elementary Teacher was extremely concerned that the Child was no longer doing what the Second Elementary Teacher was telling the Child to do; that the Child appeared to no longer respect the Second Elementary Teacher; and that the Parents were no longer supporting the Second Elementary Teacher in the school setting. The Second Elementary Teacher asked the Principal what option was available and the Principal indicated to the Second

Elementary Teacher that the state statute could be invoked to remove the Child from the class. The Second Elementary Teacher included on the referral form that the state statute was being invoked to remove the Child from the class.

46. When a teacher invokes the state statute to remove a child from class, a Discipline Placement Committee is convened. Once the request for removal is made by a teacher, a school has five days to convene the Discipline Placement Committee and determine whether to grant the request for a different class placement.

47. In addition to the Second Elementary Teacher requesting the Child's removal from class, on May 1, 2008, the Parents requested that the Child be removed from the Second Elementary Teacher's class and placed in the second-grade class to which the Child would be assigned for the 2008-2009 school year.

48. As a result of the Parents' request, a conference was held with the Parents, the Principal, the Assistant Principal, and the Magnet Coordinator for the Montessori Magnet School on May 1, 2008. The decision was made to remove the Child for the remainder of the school year from the Second Elementary Teacher's class and place the Child in another teacher's class, hereinafter Third Elementary Teacher, who taught kindergarten, first grade, and second grade. Although there was no guarantee

that the Child would be in the Third Elementary Teacher's class the following school year, the decision-makers for class assignment would make every effort to assign the Child to the Third Elementary Teacher's class the following school year.

49. The Discipline Placement Committee did not convene because the Parents agreed to the assignment to the Third Elementary Teacher's class.

50. During the time that the Child attended the Montessori Magnet School, no teacher or staff member reported to the Principal a concern or issue with the Child's educational progress.

51. The evidence demonstrates that, during the time that the Child attended the Montessori Magnet School, the Child made educational progress.

52. On May 16, 2008, the Parents enrolled the Child into the Child's boundaried home school, hereinafter Home School.

53. Subsequently, the School Board received a letter dated May 30, 2008, from Rohn Kessler, M.D. Among other things, Dr. Kessler stated that, on September 25, 2007, he had conducted an "IVA+Plus CPT (Integrated Visual & Auditory Continuous Performance Test)," hereinafter IVA, on the Child. The IVA is an attention test and measures responses to intermixed auditory and visual stimuli. Dr. Kessler further stated that the results of the IVA showed that the Child's global visual response

control was severely impaired, which indicated a pattern of responding that was very likely to negatively affect the Child's functioning in both home and school environments.

54. Further, Dr. Kessler recommended that the Child not attend the Home School because the Home School was undergoing renovations and the noise levels and construction disruptions would accentuate the Child's severe impairment in auditory attention; and that the Child be placed in a school environment that would provide the appropriate structure and intellectual challenge, with adequate accommodations to remediate the Child's deficiencies.

55. At the Home School, the Child's reading class was comprised of high achievers. At that time, the Child was reading above grade level. The Child had no academic problems in the reading class. The reading teacher, hereinafter Home School Reading Teacher, had no behavior problems with the Child; the Child complied with all directions and classroom rules.

56. At the Home School, the Child's first grade teacher, hereinafter Home School First Grade Teacher, used the Child's Section 504 Plan that was developed. The Home School First Grade Teacher provided the prompts from the Section 504 Plan, and the Child was successful in the class. No problems in behavior were experienced by the Home School First Grade Teacher.

57. However, the Child did experience difficulty with handwriting in the Home School First Grade Teacher's class in that the Child's handwriting was illegible. Written expression was not an issue. The Child's handwriting being illegible was typical for students in the first grade and was, therefore, not something that was a great concern for the Home School First Grade Teacher. All the first grade students were working on improving their handwriting to make it legible.

58. No teacher at the Home School reported to the Home School's principal any problem regarding the Child's behavior.

59. No teacher at the Home School reported to the Home School's principal any problem regarding the Child lessons.

60. On June 6, 2008, the Child completed the first grade at the Home School.

61. During the 2008-2009 school year, the Child's second grade, the Child was home-schooled until May 4, 2009.

62. On October 14, 15, 16, and November 14, 2008, the IEE at public expense was performed by Ketty Patiño González, Ph.D. Dr. González's report of the Child's evaluation was completed on November 19, 2008. The purpose of her evaluation was to examine the Child's cognitive, emotional, behavioral, and achievement functioning in view of the Child's history of behavioral problems.

63. In addition to administering tests, Dr. González obtained information from the Parents using parent questionnaires and from the Child using an emotional screener.

64. Dr. González determined that the Child's estimated overall cognitive ability was in the superior range, with subcategories: (a) very superior in fluid reasoning; (b) superior in visuospatial functioning when the Child slows down; (c) above average in comprehension/knowledge abilities; (d) above average to borderline in visual processing, moderated by executive functions, i.e., production controls; and (e) average in visuospatial integration, short-term memory, long-term storage and retrieval, and processing speed. Further, she determined that the Child's social perception and ability to deal with faces was below expectations, and the Child had problems with executive functions and with attention.

65. Regarding the Child's achievement, Dr. González determined that the Child was achieving according to expectations in word decoding, spelling, and mathematics but achieving below expectations in reading comprehension and conceptual writing. Further, she determined that, because the tests were one-on-one and largely untimed, the results might be reflecting the Child's optimal performance, not performance in regular classroom conditions.

66. Dr. González concluded that the Child was intellectually gifted but the Child's intellectual potential appeared to be masked by severe executive function deficits and problems with working memory related to ADHD, often described as twice exceptional; and that the Child would require both remediation in the area(s) of need and, concurrently, being given opportunities to enhance the intellectual strength. Further, she concluded that the Child would likely require an IEP to develop strategies to sufficiently challenge the Child's current academic level, while remediating the Child's dysgraphia (the inability of the Child to write legibly), lower than expected performance in reading comprehension, and other developmental and behavioral dysfunction resulting from the deficits in executive functioning.

67. Additionally, Dr. González concluded that the Child eventually needed to be reintegrated into the school environment. Also, she cautioned that, because of the Child's serious problems with impulsivity and executive functions, the Child's ADHD might be more difficult to treat and, therefore, might not respond as quickly.

68. Dr. González made several recommendations. Among other recommendations, one recommendation concerned the school environment. She recommended addressing the Child's academics and behavior in the school environment by the School Board

devising a program challenging the Child's strong academic areas while simultaneously considering the Child's average reading comprehension, conceptual writing skills, and behavior. Also, she suggested a program for twice exceptional students, should the School Board "have or choose to develop such a curriculum."

69. Further, regarding the school environment in addressing the Child's academics and behavior, Dr. González made a recommendation as "suggestions," regarding an "IEP" for the Child, including the following: (a) very explicit, extensive, and clear set of rules and expectations for the Child, which relates to the Child's ADHD; (b) "accommodations" for the Child's dysgraphia, which makes the Child's handwriting difficult for the Child; (c) pull-outs for the Child to attend accelerated math; (d) a program to address the Child's working memory--suggesting the program to be used; (e) written, specific scoring criteria for all applicable writing assignments; (f) consult with a behavioral specialist before re-integrating the Child into school; (g) a specific-designated person in school to help with solving any problem that might arise; (h) daily progress reports by the Child's teacher, including greater detail about the actions taken by the teacher to correct the Child's behavior in the classroom, and slips for the Parents, being sent immediately home, and for the Parents' signature in order to apprise the Parents of missing assignments or

assignments on which extra time is being given and sent home to complete; and (i) assistance provided to the Child with organization.

70. A meeting to review the IEE at public expense and determine if the Child was eligible for ESE services was scheduled for February 11, 2009, at the Home School. The meeting was a Multidisciplinary Team for SLD meeting.

71. Also, included in the information at the meeting on February 11, 2009, were the ADHD diagnosis and the information prepared by the Parents.

72. On the Parent Participation form, the Parents indicated, among other things, that they wanted the Second Elementary Teacher and the ESE Specialist to attend the meeting being held on February 11, 2009. These two persons were not required to be at the meeting but were requested by the Parents. As a result, the Second Elementary Teacher and the ESE Specialist could refuse to attend and, if they decided to attend, it was not the School Board's responsibility to ensure that they attended. Consequently, the School Board refused to require the presence of the Second Elementary Teacher and the ESE Specialist at the meeting.

73. The Second Elementary Teacher and the ESE Specialist did not attend the meeting on February 11, 2009. Among those in attendance at the Home School were the Parents, the Home

School's Principal and Reading Teacher, and the School Board's Program Specialist, Student Services Coordinator, and Due Process Coordinator, who was acting as the facilitator.

74. The meeting on February 11, 2009, was not completed and was re-scheduled for March 13, 2009.

75. The Parents submitted a due process complaint, requesting the attendance of the Second Elementary Teacher and the ESE Specialist at the re-scheduled meeting being held on March 13, 2009.

76. The due process complaint was resolved with the School Board agreeing that the Second Elementary Teacher and the ESE Specialist would participate by telephone at the meeting being held on March 13, 2009.

77. The eligibility meeting scheduled for March 13, 2009, was held at the Home School. Among those in attendance at the Home School were the Parents, the Home School's Principal and Reading Teacher, and the School Board's Program Specialist, Student Services Coordinator, and Due Process Coordinator, who was acting as the facilitator. The Second Elementary Teacher, the ESE Specialist, and another School Board Due Process Coordinator appeared by telephone.

78. Among the information considered at the meeting held on March 13, 2009, was Dr. González's report, the ADHD diagnosis, information prepared by the Parents, and the Child's

academic performance and behavior at both the Montessori Magnet School and the Home School. Additionally, the Parents participated in the discussions at the meeting on the information considered.

79. The Multidisciplinary Team for SLD determined that, at that time, the Child did not meet the eligibility criteria for SLD due to the Child failing to meet the criteria as defined by Special Programs and Procedures, hereinafter SP&P, in that the discrepancy between the Child's achievement and ability was correctable without special education and related services. Therefore, the determination was that the Child was not eligible for ESE services.

80. In order to be eligible under SLD, a child must meet "all" the requirements of the SP&P, which provided in pertinent part:

1. Documented evidence which indicates that general education interventions have been attempted and found to be ineffective in meeting the student's educational needs.
2. Evidence of a disorder in one (1) or more of the basic psychological processes required for learning. . . Processing deficits may manifest themselves differently at different developmental levels.
 - a. Documentation of a process disorder must include one (1) standardized instrument in addition to the instrument used to determine the student's level of intellectual functioning.
 - b. In addition, the district may establish criteria for the use of more than one (1)

instrument to determine a process disorder and other criteria which will assist in determining a process disorder.

3. Evidence of academic achievement which is significantly below the student's level of intellectual functioning.

* * *

b. For students ages seven (7) through ten (10), evidence must be presented that the student exhibits a discrepancy of one (1) standard deviation or more between an intellectual standard score^[5] and achievement standard score in basic reading skills, reading comprehension, oral expression, listening comprehension, mathematics calculation, mathematics reasoning, or written expression.

* * *

d. A district may establish criteria for the use of more than one (1) instrument to determine a deficit area, and other criteria which will assist in determining an academic deficit.

4. Evidence that learning problems are not due primarily to other handicapping conditions. . . .

81. The Multidisciplinary Team for SLD determined that the Child: (a) failed to satisfy criterion numbered 1 because general interventions were attempted and were effective; (b) failed to satisfy criterion numbered 2 because the Child's cognitive assessment measured the Child processing in the average to above-average range, except for one inconsistency in a subarea (visuospatial); (c) failed to satisfy criterion

numbered 3b because, focusing on reading comprehension and written expression, the Child was in the average to above-average range even though the scores for each were mathematically below 105 and the Child's academic functioning demonstrated that, with prompts, the Child was successful academically; and (d) failed to satisfy criterion numbered 4 because all other handicapping conditions were ruled out.

82. As to criterion numbered 3b, the evidence demonstrates that there was one standard deviation or more between the Child's intellectual standard score and achievement score in reading comprehension and written expression. However, criterion numbered 3d allowed the School Board to take into consideration other criteria and that is what the Multidisciplinary Team for SLD did by considering the Child's performance in the classroom, with interventions.

83. Moreover, even if the Child satisfied criterion numbered 3b, the Child failed to satisfy the other criteria. The Child was required to satisfy "all" of the criteria in order to be eligible for SLD.

84. The evidence fails to demonstrate that the Child satisfied the criteria for SLD.

85. Additionally, the Multidisciplinary Team for SLD considered whether the Child was eligible for OHI. The Multidisciplinary Team for SLD determined that, at that time,

the Child did not meet the eligibility requirements for OHI due to the Child failing to meet the criteria as defined by SP&P in that, at that time, the Child failed to demonstrate a need for program or specialized services and instruction.

86. The eligibility criteria for OHI are that there is evidence of a health impairment that results in reduced efficiency in schoolwork and adversely affects the student's performance in the education environment and that the student needs special education as defined in Florida Administrative Code Rule 6A-6.03411(1)(c).

87. The Multidisciplinary Team for SLD agreed that the Child was suffering from ADHD (a health impairment) and that, therefore, the first part of the criteria was satisfied.

88. However, the Multidisciplinary Team for SLD determined that the ADHD did not reduce the efficiency in schoolwork and adversely affect the Child's performance in the education environment. The Child's teachers at the both the Montessori Magnet School and the Home School indicated that they had no concerns about the Child's performance or reduced efficiency in their classrooms. Additionally, Dr. González's report did not state that the ADHD had reduced efficiency in the Child's schoolwork and had adversely affected the Child's performance in the educational environment even though her report stated, among other things, that: (a) the Child's ADHD was not the typical

ADHD; (b) eventually, at some point, the ADHD might not respond as quickly to medication; and (c) the Child's behavior may, at that time, significantly negatively impact the Child in the school environment.

89. Also, regarding the Child's ADHD, although Dr. González's report suggested very explicit, extensive, and clear set of rules and expectations being included in an IEP for the Child, such rules and expectations could be provided within the general education classroom and, therefore, do not require ESE services.

90. Additionally, Dr. González's report made reference to suggested "accommodations" for the Child's dysgraphia, which makes handwriting difficult for the Child. Accommodations or interventions are considered after a child has been determined to have met the eligibility requirements. Further, the evidence demonstrates that the accommodations can be provided within the general education classroom and do not require the Child to be an ESE student to implement; and that the accommodation regarding a change in the grading scale is typically not an accommodation afforded through the Section 504 Plan but a child's needs would have to be examined by a team to make that determination.

91. Regarding behavior, if behavioral interventions being used in the classroom fail, a Functional Behavioral Assessment

(FBA) can be conducted and a Positive Behavior Intervention Plan (PBIP) can be developed for any student, whether a general education or ESE student, who demonstrates a need for the intervention. If the interventions developed from the FBA and PBIP are successful, there would be no need for consideration of ESE services.

92. The evidence fails to demonstrate that the Child's ADHD reduced the efficiency in the Child's schoolwork and had adversely affected the Child's performance in the educational setting environment. Consequently, the evidence fails to demonstrate that the Child satisfied the criteria for OHI.

93. The Multidisciplinary Team on SLD issued a written notice of its decision on March 13, 2009, hereinafter Notice of Decision. The Notice of Decision provides: (a) a description of the evaluation information used to make the decision; (b) the eligibility criteria used to make the decision and whether the criteria were not met; (c) the optional eligibility considered; (d) whether additional factors were considered; and (e) the final decision--failure of the Child to meet the eligibility requirements.

94. On May 4, 2009, the Child was re-enrolled in the Home School and completed the second grade on June 9, 2009.

95. During the 2009-2010 school year, the Child's third grade, the Child was enrolled in a middle school that had a

magnet gifted elementary program for the third grade, hereinafter Magnet Middle School. The Child remained enrolled at the Magnet Middle School until May 10, 2010, at which time the Child was re-enrolled at the Home School to complete the third grade.

96. The Child is currently being home-schooled by the Parents.

CONCLUSIONS OF LAW

97. The Division of Administrative Hearings has jurisdiction of these proceedings and the parties thereto pursuant to sections 1001.42(4)(1) and 1003.57(1), Florida Statutes (2010).⁶

98. The Parents have the burden of proof in these proceedings. Schaffer v. Weast, 546 U.S. 49 (2005). The standard of proof is a preponderance of the evidence. DeVine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).

99. This administrative tribunal may not substitute its own notions of sound educational policy for those of school authorities that are under review. Bd. of Educ. Hendrick Hudson Cent. Sch. Dist. v. Rowley, 102 S. Ct. 3034, 3052 (1982); Johnson v. Metro Davidson Cnty. Sch. Sys., 108 F. Supp. 2d 906, 914 (M.D. Tenn. 2000). Further, state and local educational agencies are deemed to possess expertise in educational policy

and practice and their educational determinations predicated upon their expertise should be given great weight. Metro Davidson Cnty. Sch. Sys. at id., citing Burilovich v. Bd. Of Educ. of the Lincoln Consol. Sch. Sys., 208 F.3d 560, 567 (6th Cir. 2000). The evidence does not demonstrate a reasonable reason not to give great weight to the expertise of the School Board in this matter.

100. Section 1001.42(4)(1) provides, among other things, that the School Board shall "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students"

101. Section 1003.01 provides in pertinent part:

As used in this chapter, the term:

* * *

(3)(a) "Exceptional student" means any student who has been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who have an intellectual disability; autism spectrum disorder; a speech impairment; a language impairment; an orthopedic impairment; an other health impairment; traumatic brain injury; a visual impairment; an emotional or behavioral disability; or a specific learning disability

(b) "Special education services" means specially designed instruction and such related services as are necessary for an exceptional student to benefit from education. . . .

102. Section 1003.57 provides in pertinent part:

(1)(a) Each district school board shall provide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable, including provisions that:

1. The district school board provide the necessary professional services for diagnosis and evaluation of exceptional students.

* * *

(b) A student may not be given special instruction or services as an exceptional student until after he or she has been properly evaluated, classified, and placed in the manner prescribed by rules of the State Board of Education. The parent of an exceptional student evaluated and placed or denied placement in a program of special education shall be notified of each such evaluation and placement or denial. Such notice shall contain a statement informing the parent that he or she is entitled to a due process hearing on the identification, evaluation, and placement, or lack thereof. . . .

103. Section 1003.571, Florida Statutes (2009), provides in pertinent part:

(1) The State Board of Education shall comply with the Individuals with Disabilities Education Act (IDEA), as amended, and its implementing regulations after evaluating and determining that the IDEA, as amended, and its implementing regulations are consistent with the following principles:

(a) Ensuring that all children who have disabilities are afforded a free and

appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(b) Ensuring that the rights of children who have disabilities and their parents are protected; and

(c) Assessing and ensuring the effectiveness of efforts to educate children who have disabilities.

(2) The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section.

104. States must comply with the IDEA in order to receive federal funding for the education of handicapped children. The IDEA requires states to establish policy which ensures that children with disabilities will receive a FAPE.

105. Definitions applicable to the IDEA are set forth at 20 U.S.C.S. section 1401, which provides in pertinent part:

(3) Child with a disability.

(A) In general. . . means a child--

(i) with . . . other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9. . . may, at the discretion of the State and the local educational agency, include a child--

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

* * *

(9) 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 school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program

* * *

(29) Special education. . . means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

106. The Code of Federal Regulations (C.F.R.) implements the federal statutes. The C.F.R. applicable to the pertinent sections of the IDEA is 34 C.F.R. section 300 (2006) and (2008).⁷

107. A child with a disability is addressed at 34 C.F.R. section 300.8, which provides in pertinent part:

(a) General.

(1) Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having . . . an other health impairment, a specific learning disability . . . and who, by reason thereof,

needs special education and related services.

(2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under §§ 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with § 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the Child would be determined to be a child with a disability under paragraph (a)(1) of this section.

* * *

(c) Definitions of disability terms. The terms used in this definition of a child with a disability are defined as follows:

* * *

(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that--

(i) is due to chronic or acute health problems such as . . . attention deficit disorder or attention deficit hyperactivity disorder . . . ; and

(ii) adversely affects a child's educational performance.

(10) Specific learning disability--

(i) General. . . means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to

listen, think, speak, read, write, spell, or to do mathematical calculations . . .

(ii) Disorders not included. . . learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(emphasis added)

108. The determination of eligibility is addressed at 34

C.F.R. section 300.306, which provides in pertinent part:

(a) General. Upon completion of the administration of assessments and other evaluation measures--

(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and

(2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

(b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part--

(1) If the determinant factor for that determination is--

(i) Lack of appropriate instruction in reading, including the essential components of reading instruction . . . ;

* * *

(2) If the child does not otherwise meet the eligibility criteria under § 300.8(a).

(c) Procedures for determining eligibility and educational need.

(1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, each public agency must--

(i) Draw upon information from a variety of sources, including aptitude and achievement test, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child

(emphasis added)

109. The specific documentation for the eligibility determination for a child suspected of having a SLD is addressed at 34 C.F.R. section 300.311, which provides in pertinent part:

(a) For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in § 300.306(a)(2), must contain a statement of--

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination, including assurance that the determination has been made in accordance with § 300.306(c)(1);

(3) The relevant behavior, if any, noted during the observation of the child and the

relationship of that behavior to the child's academic functioning;

(4) The educationally relevant medical findings, if any;

(5) Whether--

(i) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards consistent with § 300.309(a)(1); and

(ii) (A) The child does not make sufficient progress to meet age or State-approved grade-level standards consistent with § 300.309(a)(2)(i); or

(B) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development consistent with § 300.309(a)(2)(ii);

(6) The determination of the group concerning the effects of a visual, hearing, or motor disability; . . . emotional disturbance; . . . environmental or economic disadvantage; . . . on the child's achievement level; and

(7) If the child has participated in a process that assesses the child's response to scientific, research-based intervention--

(i) The instructional strategies used and the student-centered data collected; and

(ii) The documentation that the child's parents were notified about--

(A) The State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;

(B) Strategies for increasing the child's rate of learning; and

(C) The parents' right to request an evaluation.

(b) Each group member must certify in writing whether the report reflects the

member's conclusion. If it does not reflect the member's conclusion, the group member must submit a separate statement presenting the member's conclusions.
(emphasis added)

110. Florida Administrative Code Rule 6A-6.03028 provides in pertinent part:

(1) Entitlement to FAPE. All students with disabilities aged three (3) through twenty-one (21) residing in the state have the right to FAPE consistent with the requirements of the Individuals with Disabilities Education Act, 20 USC Section 1400, et. seq (IDEA), its implementing federal regulations at 34 CFR Subtitle B, part 300 et.seq. which is hereby incorporated by reference to become effective with the effective date of this rule, and under Rules 6A-6.03011 through 6A-6.0361, F.A.C. FAPE shall be made available to students with disabilities . . . and any individual student with a disability who needs special education and related services, even though the student has not failed or been retained in a course or grade, and is advancing from grade to grade. . . .

111. Florida Administrative Code Rule 6A-6.030152 provides in pertinent part:

(1) Definition. Other health impairment [OHI] means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems. This includes, but is not limited to . . . attention deficit disorder or attention deficit hyperactivity disorder . . .
. . .

(2) Activities prior to referral. Prior to referral for evaluation, the requirements in subsections 6A-6.0331(1)-(3), F.A.C., must be met.

(3) Evaluation. In addition to the provisions in subsection 6A-6.0331(4), F.A.C., the evaluation for a student must also include the procedures in the district's Policies and Procedures for the Provision of Specially Designed Instruction and Related Services as required by Rule 6A-6.03411, F.A.C.

(4) Criteria for eligibility. A student with other health impairment is eligible for exceptional student education if the following criteria are met:

(a) Evidence of other health impairment that results in reduced efficiency in schoolwork and adversely affects the student's performance in the educational environment, and,

(b) The student needs special education as defined in paragraph 6A-6.03411(1)(c), F.A.C.

112. Florida Administrative Code Rule 6A-6.03411 provides in pertinent part:

(1) Definitions. As used in Rules 6A-6.03011 through 6A-6.0361, F.A.C., regarding the education of exceptional students, the following definitions apply:

(a) Accommodations. Accommodations are changes that are made in how the student accesses information and demonstrates performance.

* * *

(f) Child/student with a disability.

1. Student with a disability means a student, including aged three (3) through five (5), who has been evaluated in accordance with Rules 6A-6.03011 through 6A-6.0361, F.A.C., and determined to have a disability as defined under Rules 6A-6.03027, F.A.C., but does not include students who are gifted as defined under Rules 6A-6.03019 through 6A-6.030191, F.A.C., and

2. Who, by reason thereof, needs special education and related services. If it is determined, through an appropriate evaluation, that a student has a disability but only needs a related service and not special education, the student is not a student with a disability under Rules 6A-6.03011 through 6A-6.0361, F.A.C. If, however, the related services required by the student is considered special education rather than a related service under Rules 6A-6.03011 through 6A-6.0361, F.A.C., the student would be a student with a disability under this section.

* * *

(m) Exceptional student. Exceptional student means any student who has been determined eligible for a special program in accordance with these rules. The term includes students who are gifted and students with disabilities as defined in these rules.

(n) Exceptional student education (ESE). ESE means specifically designed instruction and related services that are provided to meet the unique needs of exceptional students who meet the eligibility criteria described in Rules 6A-6.03011 through 6A-6.0361, F.A.C.

* * *

(p) Free appropriate public education (FAPE). FAPE means special education or specifically designed instruction and related services for students ages three (3) through twenty-one (21) and for students who are gifted and in kindergarten through grade twelve that:

1. Are provided at public expense, under public supervision and direction, and without charge to the parent;
2. Meet the standards of the Florida Department of Education, including the requirements of Rules 6A-6.03011 through 6A-6.0361, F.A.C.;
3. Include an appropriate preschool, elementary school, or secondary school education in the State; and
4. Are provided in conformity with an individual education plan (IEP) that meets the requirements of Rule 6A-6.03028, F.A.C., an education plan (EP) for students who are gifted that meet the requirements of Rule 6A-6.030191, F.A.C., or an individual family support plan (IFSP) (if used as an IEP) for children ages three (3) through [five] (5) in accordance with Rule 6A-6.03029, F.A.C.

* * *

(r) General curriculum. The general curriculum is a curriculum or course of study based upon stated educational standards that address state and school district requirements for a standard diploma.

* * *

(dd) Related services.

1. General. Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a student with a disability to benefit from special education, and includes speech-language pathology and audiology services,

interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in students, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

* * *

(jj) Specially designed instruction. Specially designed instruction means adapting, as appropriate to the needs of an eligible exceptional student, the content, methodology, or delivery of instruction to address the unique needs of the student that result from the student's disability or giftedness and to insure access of the student to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the school district that apply to all students.

(kk) Special education for students with disabilities.

1. Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a student with a disability, including:
 - a. Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
 - b. Instruction in physical education.

2. Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a) of this subsection:
 - a. Speech-language pathology services, or any other related service, if the service is

- considered special education rather than a related service under State standards;
- b. Travel training; and
- c. Vocational education.

113. Florida Administrative Code Rule 6A-6.03018, regarding SLD, provides in pertinent part:

(1) Definition. Specific learning disabilities refers to a heterogeneous group of psychological processing disorders manifested by significant difficulties in the acquisition and use of language, reading, writing, or mathematics. These disorders are intrinsic to the individual and may occur across the life span. Although specific learning disabilities may occur concomitantly with other handicapping conditions or with extrinsic influences, the disabilities are not primarily the result of those conditions or influences.

(2) Criteria for eligibility. A student is eligible for special programs for specific learning disabilities if the student meets all of the following criteria as determined by the procedures prescribed in Rules 6A-6.0331 and 6A-6.03411, F.A.C.

(a) Documented evidence which indicates that general education interventions have been attempted and found to be ineffective in meeting the student's educational needs.

(b) Evidence of a disorder in one (1) or more of the basic psychological processes required for learning. . . Processing deficits may manifest themselves differently at different developmental levels.

1. Documentation of a process disorder must include one (1) standardized instrument in addition to the instrument used to determine the student's level of intellectual functioning.

2. In addition, a district may establish criteria for the use of more than one (1) instrument to determine a process disorder and other criteria which will assist in determining a process disorder.

(c) Evidence of academic achievement which is significantly below the student's level of intellectual functioning.

* * *

2. For students ages seven (7) through ten (10), evidence must be presented that the student exhibits a discrepancy of one (1) standard deviation or more between an intellectual standard score^[5] and achievement standard score in basic reading skills, reading comprehension, oral expression, listening comprehension, mathematics calculation, mathematics reasoning, or written expression.

* * *

4. A district may establish criteria for the use of more than one (1) instrument to determine a deficit area, and other criteria which will assist in determining an academic deficit.

(d) Evidence that learning problems are not due primarily to other handicapping conditions. . . .

* * *

5. For students with an emotional handicap, evidence that their inability to perform adequately on learning tasks is not primarily due to their emotional handicap.

* * *

(5) The multidisciplinary evaluation team

(a) For students suspected of having a

specific learning disability, the multidisciplinary evaluation team shall include the following personnel:

1. The student's regular teacher, or
 - a. If the student does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age

* * *

2. At least one (1) person qualified to conduct individual diagnostic examinations.

(b) The team must meet to consider the evaluation findings. If all members cannot be present, their findings may be presented by representatives of their disciplines.

(c) A written report shall be prepared which reflects the findings of the multidisciplinary evaluation team. The report shall include the following components:

1. Whether or not the student has a specific learning disability;
2. The basis for making the determination;
3. The relevant behavior noted during the observation of the student;
4. The relationship of that behavior to the student's academic functioning;
5. The educationally relevant medical findings, if any;
6. The determination of the team concerning evidence that the student's learning problems are not primarily due to other handicapping conditions;

7. The determination of the team concerning the effects of environment, cultural differences, or economic disadvantage;

8. Whether there is a severe discrepancy between achievement and ability which requires exceptional student education and related services; and

(d) Each team member shall certify in writing whether or not the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(6) This rule shall take effect July 1, 1994, for all school districts.
(emphasis added)

114. The evidence is insufficient to demonstrate that the Child met the eligibility criteria for ESE services under the IDEA at the time of the Eligibility Meeting on April 12, 2007. As a result, the evidence fails to demonstrate that the School Board's denial of eligibility for ESE services at the Eligibility Meeting on April 12, 2007, was not the appropriate decision.

115. The evidence is insufficient to demonstrate that the Child met the eligibility criteria under the IDEA for OHI at the time of the Eligibility Meeting on April 12, 2007, and, therefore, that the Child was eligible for ESE services. Consequently, the evidence fails to demonstrate that the School Board's denial of eligibility on the basis of an OHI and,

therefore, for ESE services at the Eligibility Meeting on April 12, 2007, was not the appropriate decision.

116. The evidence demonstrates that the Child did not meet the criteria for SLD or an OHI under the IDEA at the time of the eligibility meeting held on March 13, 2009. Consequently, the evidence demonstrates that the School Board's denial of eligibility for the Child as a student with SLD or with an OHI and, therefore, for ESE services on March 13, 2009, was appropriate.

117. Regarding the School Board's notice of denial of the Child's eligibility at the meeting on March 13, 2009, 20 U.S.C.S. section 1415 provides in pertinent part:

(b) Types of procedures. The procedures required by this section shall include the following:

* * *

(3) Written prior notice to the parents of the child in accordance with subsection (c)(1), whenever the local education agency-

* * *

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

* * *

(c) Notification requirements.

(1) Content of prior written notice. The notice required by subsection (b)(3) shall include--

(A) a description of the action . . . refused by the agency;

(B) an explanation of why the agency . . . refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the . . . refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part . . . and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of the part . . .;

(E) a description of other options considered by the IEP Team and the reasons why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

118. Regarding the School Board's notice of denial of eligibility on March 13, 2009, 34 C.F.R. section 300.503 provides in pertinent part:

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency--

* * *

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Content of notice. The notice required under paragraph (a) of this section must include--

(1) A description of the action . . . refused by the agency;

(2) An explanation of why the agency . . . refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the . . . refused action;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and,

(7) A description of other factors that are relevant to the agency's . . . refusal.

119. As to prior written notice, Florida Administrative Code Rule 6A-6.03311 provides in pertinent part:

(1) Prior written notice. The school district shall provide parents with written notice a reasonable time before . . . refusing to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education (FAPE) to the student. Prior notice may be

provided at any meeting where such . . .
refusal is made. . . .

(a) The prior notice to the parents shall be written in language understandable to the general public and shall be provided in the native language or other mode of communication used by the parents, unless it is clearly not feasible to do so.

* * *

(c) The notice to the parents shall include:

1. A description of the action . . . refused by the school district;
2. An explanation of why the school district . . . refuses to take the action;
3. A description of each evaluation procedure, assessment, record, or report the school district used as a basis for the proposed or refused action;
4. A statement that the parents of a student with a disability have protection under the procedural safeguards of these rules and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
5. Sources for parents to contact to obtain assistance in understanding the provisions of Rules 6A-6.03011 through 6A-6.0361, F.A.C.;
6. A description of other options that the individual education plan (IEP) team considered and the reasons why those options were rejected; and
7. A description of other factors that are relevant to the school district's proposal or refusal.

120. The evidence demonstrates that the School Board's notice on March 13, 2009, at the eligibility meeting of the denial of the Child's eligibility provided the Parents with adequate notice of the denial.

121. The definition of FAPE is found at 34 C.F.R. section 300.17, which provides in pertinent part:

Free appropriate public education or FAPE means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA [State educational agency], including the requirements of this part;

(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

Special education is found at 34 C.F.R. section 300.39 and is defined as follows:

(a) General.

(1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

- (i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;
- (ii) Travel training; and
- (iii) Vocational education.

* * *

(3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards with the jurisdiction of the public agency that apply to all children. . . .

122. In general, a FAPE must be available to all children residing in a state between the ages of 3 and 21, inclusive.

34 C.F.R. § 300.101(a).

123. The undersigned's decision, as to whether the Child received FAPE, must be based on "substantive grounds." 20 U.S.C.S. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(1). However, in matters regarding a procedural violation, the undersigned may find that the Child did not receive a FAPE "only if the procedural inadequacies impeded" the Child's "right to a FAPE" or "caused a deprivation of educational benefit." 20 U.S.C.S. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2)(i) and (iii).

124. The evidence demonstrates that the Child's FAPE was not denied by the School Board.

CONCLUSION

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

ORDERED that the due process complaint by the Parents against the School Board in this matter is dismissed.

DONE AND ORDERED this 10th day of March, 2011, in Tallahassee, Leon County, Florida.

S

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of March, 2011.

ENDNOTES

^{1/} The due process hearing was held by live presentation and video teleconference.

^{2/} Respondent's Exhibits numbered 1 through 6 were offered into

evidence by the Parents. Additionally, Petitioner's Exhibits numbered 31-A, 31-G, and 32 were rejected.

^{3/} Florida Administrative Code Rule 28-106.215 limits proposed orders (post-hearing submissions) to 40 pages unless authorized by the presiding officer.

^{4/} The issue presented by the Parents as to whether the written statement, purporting to be the Child's statement, involving the hitting was actually written by the Child is not decided by this Administrative Law Judge. The issue is not determinative of this matter.

^{5/} The Child's measured intellectual ability was a full scale ability of 120. One standard deviation is considered 15 points. As a result, one standard deviation below the Child's level of intellectual functioning is below 105.

^{6/} Unless indicated otherwise, all future references to the Florida Statutes are to the year 2010.

^{7/} Unless indicated otherwise, 34 C.F.R. section 300 refers to the 2006 Code of Federal Regulations and amended 2008 Code of Federal Regulations.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to Section 1003.57(1)(b), Florida Statutes (2009), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), and Florida Administrative Code Rule 6A-6.03311(9)(w).