

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████,)
)
Petitioner,)
)
vs.) Case No. 11-3132E
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a due process hearing was conducted in this case pursuant to Florida Administrative Code Rule 6A-6.03311 and section 1003.57, Florida Statutes,¹ before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on August 10, 11, and 25, 2011, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Susan Wallitsch, Qualified Representative
Mr. and Mrs. █████, Parents
(Address of record)

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

STATEMENT OF THE ISSUES

Whether the Broward County School Board (School Board) denied Petitioner [REDACTED] (**) a free appropriate public education at [REDACTED] Elementary School for the reasons set forth in the request for a due process hearing filed by [REDACTED]'s parents, and, if so, what relief should be granted?

Whether the placement proposed by the School Board is reasonably calculated to provide [REDACTED] a free appropriate public education in the least restrictive environment?

PRELIMINARY STATEMENT

On June 20, 2011, Mr. and Mrs. [REDACTED] (who will be referred to collectively herein as the "Parents") submitted to the Broward School Board a request for a due process hearing (Complaint), in which they alleged that "[REDACTED] Elementary and the Broward County School District have denied a Free and Appropriate Public Education to [REDACTED], and more specifically propose to deny [REDACTED] right to an individual education based on [REDACTED] unique learning needs and have violated [REDACTED] right to Placement in the Least Restrictive Environment." The Complaint was transmitted to DOAH that same day (June 20, 2011). The case was assigned to the undersigned, who, on June 22, 2011, scheduled the due process hearing that the Parents had requested for July 27 and 28, 2011.

On July 18, 2011, the Parents filed an unopposed motion requesting that the due process hearing be continued. By order

issued July 20, 2011, the undersigned granted the motion and rescheduled the hearing for August 10 and 11, 2011. Paragraph 8 of the Order provided as follows:

Pursuant to paragraph 7 of the Order of Pre-Hearing Instructions,^[2] the final order deadline is extended an additional 14 days (the length of the continuance granted by this Order).

The due process hearing was held on August 10 and 11, 2011, as scheduled, but was not completed. An additional day of hearing was scheduled for August 25, 2011, to allow the Parents the opportunity to present the testimony of Stacey Hoaglund, who was unable to testify on either August 10 or 11, 2011, due to illness. The hearing resumed on August 25, 2011, as scheduled, and was completed on that date over the course of the three days of hearing, the following witnesses testified: Robin Parker, SLP.D; Mrs. ■■■; Mr. ■■■; Lori Henricksen; John James; Felicia Starke; Lauren Forney; Amber Lentz; Jennifer Neiheisel; Rhonda Bachmann; Sherry Bees; and Ms. Hoaglund. In addition to the testimony of these witnesses, the following exhibits were offered and received into evidence: Petitioner's Exhibits A-23 through A-27, A-29 through A-36, B-1, B-3, B-5, C-2 through C-6, D-3, E-1 through E-6, and F-1; and Respondent's Exhibits 1 through 47.

At the due process hearing, the parties agreed to the following extended deadlines, which the undersigned thereupon

imposed: proposed final orders to be filed no later than three weeks (21 days) from the date of the filing with DOAH of the complete hearing transcript; and the final order to be issued no later than three weeks (21 days) after the filing of the last proposed final order.

The first four volumes of the Transcript of the due process hearing were filed with DOAH on August 29, 2011. The fifth and final volume of the Transcript was filed with DOAH on August 31, 2011. As a result, proposed final orders were originally due on September 21, 2011. The proposed final order deadline was thereafter twice extended, first at the request of the School Board (until September 26, 2011), and the second time at the request of the Parents (until September 30, 2011).

The Parents and the School Board both timely submitted their Proposed Final Orders on September 30, 2011. Thus, pursuant to the specific extension of time the undersigned granted at the due process hearing, the extended deadline for the issuance of this Final Order is October 21, 2011.

FINDINGS OF FACT

Based on the evidence adduced at the due process hearing and the record as a whole, including the parties' Joint Written Statement of Undisputed Facts,³ the following findings of fact are made:

1. ■ is the ■-year-old autistic child of Mr. and Mrs. ■

2. ■ is a sweet and loving child who, particularly when overwhelmed, frustrated, or not feeling well, can have (and did have this past school year) challenging behaviors (including kicking, hitting, and screaming loudly, as well as non-compliance, laying on the floor, and wandering off). Because of ■'s expressive language problems, ■ sometimes acts out as a means of communication. Coping with transition and change is generally difficult for ■

3. ■ is a visual learner with poor organizational ability who needs constant repetition to learn and retain information and skills.

4. ■ learns best when a simplified, systematic instructional approach is used in a one-on-one setting that is highly structured and organized and has minimal distractions. Presenting material to ■ in small manageable pieces free of unnecessary details and complexities is key to ■'s achieving academic success.

5. For approximately three years, starting when ■ was about two years of age, ■ had 40 hours of intensive, in-home, ABA/Lovaas therapy provided by Toni Haman, which proved to be successful.

6. Since shortly before ■'s third birthday, ■ has received speech, language, and communication services twice a week at Nova Southeastern University's (NSU's) Center for Autism and Related Disorders (CARD) under the general supervision of Dr. Robin Parker, who is CARD's consulting director, as well as a professor at NSU, where she teaches courses on communication and autism. (Dr. Parker has a clinical doctoral degree in Speech-Language Pathology.) Currently, ■'s direct clinician at CARD is Dr. Sotello. In the clinical setting at CARD, ■ has displayed echolalia (repeating another's words).

7. ■ resides in Broward County with ■'s Parents and ■'s twin sibling, K.

8. ■ is eligible to receive special education and related services from the School Board as a student with Autism Spectrum Disorder, a student with Language Impairments, and a student who requires Occupational Therapy.

9. ■ has attended public schools operated by the School Board since August 2006, when ■ entered pre-kindergarten.

10. ■'s "home school" is Tamarac Elementary School (Tamarac), but ■ has never attended Tamarac (which is 2.6 miles from ■'s home⁴). ■ attended Parkside Elementary School (Parkside), which has an autism cluster program,⁵ for pre-kindergarten (2006-2007 school year), kindergarten (2007-2008 school year), first grade (2008-2009 school year), and most of

the second grade, until April 2010 (2009-2010 school year). For the last few months of second grade (April 2010 to June 2010) and for third grade (2010-2011 school year), ■ attended ■ Elementary School (■), which does not have an autism cluster program.⁶ During the time ■ has been a Broward County public school student, with the exception of ■'s pre-kindergarten year when ■ was in an "Autism Specific Self-Contained classroom," ■ has been in general education classes (and receiving supports as an exceptional education student).

11. During the 2009-2010 school year, ■ was the subject of a Functional Behavioral Assessment (FBA) conducted at Parkside, the results of which were set forth in a report issued January 5, 2010 (2010 FBA Report). According to the 2010 FBA Report, the "[r]ationale" for conducting the FBA was the following:

- The student is engaging in behavior that places them [sic] or others at risk of harm.
- Behavioral concerns may result in exclusion from participation in activities or settings with peers.
- The student's behavioral difficulties persist despite consistently implemented behavior management strategies based on a less comprehensive or systematic assessment.

12. The following was a description of the "Target Behavior[s]" given in the 2010 FBA Report:

[■] will hit, kick, lay on the floor and/or scream.

This description was accompanied by the following "Baseline Estimate (how often, how long [these behaviors occurred])":

According to data taken from 10-9-09 through 12-10-09, on average these episodes of maladaptive behavior occur 3-4 times a day with an average of 17 instances of targeted behavior each day. The median number of targeted behavior is 10 times per day. The outburst will typically last for 30 seconds to 15 minutes per occurrence.

13. The 2010 FBA Report concluded with the following "Summary (Hypothesis) Statements":

Pattern: What patterns were identified in the data collected? (i.e. circumstances in which the behavior is most likely/least likely; possible functions of the behavior)

When this occurs (describe the circumstances): 10-9-09 When [] is asked to do a non-preferred activity
the student does (describe the behavior): [] will hit, kick, yell and/or lay on the floor
to get, or avoid (describe consequences): [] is attempting to avoid a non-preferred activity.

When this occurs (describe the circumstances): 10-23-09 When [] is asked to perform a non-preferred activity or does not want to do something [] is asked
the student does (describe the behavior): [] will hit, kick, throw things at adults and students, throw things in the room, scream, and/or lay on the floor.
to get, or avoid (describe consequences): to avoid completing the non-preferred task and/or avoid doing what was asked of []

14. On January 8, 2010, based on the results of the FBA, a new Positive Behavior Intervention Plan was developed for []

(2010 PBIP). It contained numerous "Proactive Strategies," "Replacement Skills," and Consequence Strategies." The stated goals of the 2010 PBIP were the following:

Academically: To increase work completion and academic performance.

Behaviorally: To communicate [REDACTED]'s] frustrations appropriately and to develop positive relationships with adults and peers.

15. The 2010 PBIP has remained in effect, unchanged, since its development on January 8, 2010, and the strategies contained therein (along with others, including those suggested by Dr. Parker and other CARD personnel⁷) have been regularly used, with mixed success, by school staff at [REDACTED] when [REDACTED] has engaged in the "Target Behaviors." Although no new, formal FBA has been undertaken since the issuance of the 2010 FBA Report, detailed daily data concerning the "Target Behaviors" was collected (primarily by school support personnel) during the 2010-2011 school year. By all appearances, the pattern of the "Target Behaviors" has stayed the same, and there is no reason to believe that the "Summary (Hypothesis) Statements" set forth in the 2010 FBA Report are no longer valid.

16. [REDACTED] had a very negative overall experience at Parkside.⁸ [REDACTED] so disliked going to school that it was a daily struggle for the Parents to get [REDACTED] out the door of their home on school days.

17. On March 11, 2010, Mrs. [REDACTED] on behalf of [REDACTED] filed a due process complaint against the School Board, alleging that "Parkside Elementary ha[d] denied a Free and Appropriate Public Education to [REDACTED]

18. On June 2, 2010, Mrs. [REDACTED] and the School Board, acting through Felicia Starke, one of its two due process coordinators, formally executed a written Resolution Agreement, which resolved the issues raised in the due process complaint. The Resolution Agreement read as follows:

IN RE:**D.**vs. THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA CASE NO. 10-1202E BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS

In resolution of the above named case the parties agree as follows:

The School Board of Broward County, Florida agrees to:

1. Provide a different school location for**[REDACTED] [REDACTED] to attend. ** [REDACTED] was reassigned through the McKay Scholarship Program to [REDACTED] Elementary School in April of 2010. School staff worked collaboratively with the family to transition [REDACTED] to [REDACTED] Elementary School.
2. Provide additional support to [REDACTED] at [REDACTED] Elementary School by providing a special education teacher with specialized training in Autism Spectrum Disorder.
3. Collaborate with the Center for Autism Related Disorders, specifically Dr. Robin Parker. The team at [REDACTED] Elementary School will participate in

ongoing communication with Dr. Parker to support consistency between settings.

4. Provide [REDACTED] with one-on-one tutoring four days per week beginning the week of July 26th through the week of August 13, 2010, for two hours per day, totaling 24 hours. The time of day for the tutoring will be mutually agreed upon between the tutor and the family. The tutoring will take place at [REDACTED] Elementary School.

5. Provide** [REDACTED] with 18 hours of tutoring during the first semester of the 2010-2011 [sic]. Location, dates, times and lengths of sessions will be mutually agreed upon between the tutor(s) and the parent(s).

6. Provide** [REDACTED] with a Behavior Technician for the 2010-2011 school year that will [sic] assigned to be with [REDACTED] throughout the school day.

7. Provide quarterly consultation by an Occupational Therapist with an expertise with Autism Spectrum Disorders. School staff will be notified by the District no later than August 30, 2010 who the consulting Occupational Therapist is and a schedule will be mutually agreed upon for the 2010-2011 school year.

8. Provide 8, 45 minute counseling sessions during the 2010 summer. Sessions will be arranged between the counselor and the parent at a mutually agreed upon location, time and date.

The Parent agrees to:

1. Paragraphs one through eight, as stated above.
2. Withdraw Request for a Due Process Hearing (DOAH Case No. 10-1202E), with

prejudice, that was filed on March 11, 2010, based on the amicable resolution set forth herein.

19. As paragraph 1. of the Resolution Agreement stated, ■ had been reassigned to Maplewood in April 2010.⁹ ■ came to ■ considerably behind in academics. Mathematics and reading comprehension were particular academic weaknesses of ■'s. Reading fluency was a relative strength.

20. The school (whose principal was then, and still is, Sherry Bees) welcomed ■ with "open arms," aware of the difficulties that ■ had had at Parkside and wanting to do whatever it could to help ■ achieve the success that had eluded ■ at ■'s former school. For the remainder of the school year (which was ■'s second grade year), ■ received instruction from Amber Lentz, who, at the time, taught a second grade general education class at ■. Ms. Lentz (who is now, and was then, dual certified in elementary education and exceptional student education) worked one-on-one with ■ on academics for an hour each school day.

21. On May 3, 2010, after ■ had arrived at ■, a new Individual Education Plan (IEP) was developed for ■ (May 2010 IEP). It enumerated the "Special Education Services," "Related Services," and "Supplementary Aids and Services" that ■ would be receiving from May 3, 2010, to June 9, 2010, and August 23, 2010, to May 2, 2011.

22. The "Special Education Services" provided for in the May 2010 IEP were: "Collaboration in Speech," three times a week, in the "ESE Class"; "Direct Language Therapy," three times a week for a total of 60 minutes, in the "ESE Class"; "Specialized Instruction in All-Academic Areas," five times a week for four hours a day, in the "General Education Class"; "Specialized Instruction in Behavior," four times a week for 20 minutes a day, in the "General Education Class"; "Specialized Instruction in Independent Functioning," two times a day for a total of 20 minutes a day, in the "General Education Class"; and "Specialized Instruction in Social Skills," four times a week for 15 minutes a day, in the "General Education Class."

23. The "Related Services" provided for in the May 2010 IEP were: "Family Counseling," one time a week for a total of 30 minutes, on the "General Education Campus"; and "Occupational Therapy, Consult/Collaboration," two times a month, on the "General Education Campus."

24. The "Supplementary Aids and Services" provided for in the May 2010 IEP were:

Other-Daily/Weekly reporting and collaboration with the parent;

Other-Peer assistance;

Adult assistance around school campus for safety and maintenance of special diet;

Adult supervision for lunch and snack;

Flexible Presentation-Provide copy of directions for tasks, when available;

Flexible Presentation-Reduce auditory distractions during testing;

Flexible Presentation-Repeat, clarify, summarize directions (teacher);

Flexible Presentation-Repeat/paraphrase directions (student);

Flexible Presentation-Student uses means to maintain/enhance visual attention;

Flexible Presentation-Use means to direct attention to test/task items;

Flexible Presentation-Verbal encouragement;

Flexible Scheduling/Timing-Add 1/2 time for tasks (Total time = time and a half of allotted time);

Flexible Scheduling/Timing-Extra time for processing information (written);

Flexible Scheduling/Timing-Extra time for processing/responding (oral);

Flexible Scheduling/Timing-Lessons broken down into smaller segments;

Flexible Scheduling/Timing-Reduce assignments;

Flexible Setting-One on one testing;

Flexible Setting-Allow movement as needed;

Flexible Setting-Close proximity when giving directions or lessons;

Flexible Setting-Preferential seating;

Seating near/with a positive role model
(female/male);

Written prompts;

Written/Visual task strip.

25. The "Placement" section of the May 2010 IEP indicated that ■ would "participate with nondisabled students in the regular class" 96.67% of the time (for "all academic areas, electives/specials, grade level activities, hallway passages, lunch and recess") and be "Removed" 3.33% of the time ("to receive . . . Speech and Language services, and family counseling").

26. The "Special Considerations" section of the May 2010 IEP provided as follows:

Special Considerations identified below have been determined necessary for the student to benefit from [his/her] educational program and are funded through the Local Education Agency (LEA).

Health Care Needs

(x) Yes () No

- specialized administration of medication (e. ■ Epi-pen/insulin injections, nebulizer, suppositories)
- self care needs
- other

Details: Food sensitivities to Gluten, Casein diet; Parent will supply all foods for the Gluten-free and Casein-free diet. [■] needs reminders to wipe [■] after toileting and wash [■]'s hands after going to the bathroom. Frequent hand-washing

after using classroom materials such as:
glue, paste, play-do[h].

Specially Designed/Adaptive PE (description
of student needs)

() Yes (x) No

Assistive Technology Needs

(x) Yes () No

-portable word processor
-visual schedule^[10]

Details: written word/visual schedule.

Behavioral Needs

(x) Yes () No

Details: Positive Behavior Intervention
Plan is in place.

Transportation Needs

() Yes (x) No

Communication Needs

() Yes (x) No

Supports for School Personnel (special
training or materials required or needed by
staff)

Specialized training in Gluten-free/Casein-
free diet and food allergies provided by the
parent.

Staff to be provided with training
opportunities and support in Autism teaching
strategies. Staff to be provided with
training opportunities and support with
inclusion strategies.

The "Positive Behavior Intervention Plan" referred to under

"Behavioral Needs" in the "Special Considerations" section of the May 2010 IEP was the 2010 PBIP. As noted above, at no time during the period ■ has attended ■ has a new PBIP been developed for ■ The PBIP that the staff at ■ have used and implemented is the 2010 PBIP (that was developed during the time ■ was at Parkside).

27. The May 2010 IEP had nine "Annual Measurable Goals": three in the domain of Curriculum and Instruction; two in the domain of Social/Emotional Behavior; two in the domain of Independent Functioning; and two in the domain of Communication.

28. ■ received tutoring at ■ during the summer of 2010, as provided for in paragraph 4. of the Resolution Agreement. The tutoring was provided by Ms. Lentz and Lauren Forney, another ■ teacher dual certified in elementary education and exceptional student education. It was anticipated, at the time the tutoring assignments were made, that Ms. Forney would be ■'s third grade teacher for the upcoming 2010-2011 school year.

29. The School Board had difficulty locating a counselor to provide the "8, 45 minute counseling sessions during the 2010 summer" it had agreed to provide pursuant to paragraph 8. of the Resolution Agreement. As a result, these counseling sessions were not held. To compensate for its failure to have provided this counseling, the School Board provided ■, during the 2010-

2011 school year, with more than the "18 hours of tutoring" it had agreed to provide pursuant to paragraph 5. of the Resolution Agreement. Tutoring was provided the entire school year, not just during the first semester. It was done by Ms. Forney, once a week (on Mondays), after school.

30. From the beginning of the 2010-2011 school year until April 18, 2011, ■ was in Ms. Forney's third grade (general education) class. Including ■, there were 16 students in the class, seven of whom were exceptional education students. Ms. Forney had a paraprofessional, Marian Lombardi, assisting her in the classroom, primarily with the exceptional education students.

31. At the beginning of the school year, two paraprofessionals were assigned to work just with ■--Karen Hart, who focused on academics, and Kathy Foster, a behavior technician, who focused on behavior. A third one-on-one paraprofessional, behavior technician John James, was assigned to work with ■ on September 17, 2010. Ms. Foster trained Mr. James to do the work that she had been doing with ■. In November 2010, once Mr. James had been fully trained, Ms. Foster stopped working with ■, and Mr. James assumed all of Ms. Foster's responsibilities vis à vis ■. Ms. Hart stopped working with ■ after the Christmas break. Mr. James, who remained with ■ throughout the rest of the school year,¹¹

undertook a larger role in helping ■ with academics after Ms. Hart's departure.¹² He was unable, however, to assist ■ with ■'s bathroom routine, and Ms. Forney therefore had to fill the void, which took time away from her classroom instruction.

32. For the entire 2010-2011 school year, as required by paragraph 2. of the Resolution Agreement, the School Board "[p]rovide[d] additional support to [■] at ■ Elementary School by providing a special education teacher with specialized training in Autism Spectrum Disorder." That "special education teacher" was Ms. Lentz, who, for that school year (the 2010-2011 school year), was ■'s "autism teacher." As the school's "autism teacher," Ms. Lentz serviced ■ and the other nine students with Autism Spectrum Disorder at the school (most of whom were in third grade), making sure that their needs were being met in accordance with their IEPs. Ms. Lentz had her own classroom, which was separated by a door from Ms. Forney's classroom. Ms. Lentz provided one-on-one instruction to ■ in ■'s general education classroom, as well as in Ms. Lentz's own classroom (which had fewer distractions than the general education classroom¹³ and was a place where Ms. Lentz could take ■ to calm down¹⁴ when ■ was engaging in uncontrollable disruptive behavior¹⁵ that seriously impaired the learning environment in the general education classroom¹⁶). Ms. Lentz also had ■ in her classroom as a participant in a social skills

class (consisting of a small group of four or five students with Autism Spectrum Disorder) that Ms. Lentz taught along with ██████████'s speech pathologist, Jennifer Neiheisel.

33. There was an occupational therapist, Donna Revera, who worked directly with █ at ██████████. In addition, consistent with the provisions of paragraph 7. of the Resolution Agreement, approximately every nine weeks, Lori Henricksen, an occupational therapist employed by Kids First Occupational Therapy, with whom the School Board has a contractual agreement for consultative occupational therapy services, consulted with ██████████ staff concerning sensory integration strategies that could be used in the classroom by those servicing █

34. As the foregoing reflects, during the 2010-2011 school year, █ received instruction at ██████████ in one-on-one, small group, and large group settings (in either a general education classroom or Ms. Lentz's classroom).

35. Although the tutoring that █ had received during the summer had helped, █'s academic performance was still below grade level at the start of the 2010-2011 school year.

36. █ made academic progress while in Ms. Forney's third grade class,¹⁷ but that progress slowed considerably when the pace of instruction in the class picked up in the second half of the year in preparation for FCAT testing (in April).

37. ■ had behavioral issues in the classroom (including hitting, kicking,¹⁸ screaming loudly,¹⁹ and non-compliance) throughout the third grade,²⁰ however, these issues worsened and ■'s behavior became more disruptive as the academic demands in the classroom increased leading up to the FCAT.

38. In February 2011, after receiving e-mails concerning these behavioral issues, Ms. Henricksen went to ■ and observed ■ for approximately 90 minutes in different settings. It did not appear to Ms. Henricksen, from her observation, that ■'s behavioral issues were sensory-based, a finding that was supported by Ms. Henricksen's subsequent review of Sensory Processing Measure questionnaires that school staff and the Parents had completed, at Ms. Henricksen's request, following the observation. ■ did seem, during this February 2011 observation, to be more anxious than when Ms. Henricksen had observed ■ in the fall of that school year.

39. On February 25, 2011, Ms. Forney, along with Ms. Lentz, had a conference with the Parents to discuss with them ■'s academic performance and behavior. At the conference, Ms. Forney presented to Mr. and Mrs. ■ a written report on these subjects, which provided the following information:

At this time [■] is on the 18th level on the Rigby Reading Assessment. This is below grade level. At school [■] is working in small groups and individualized groups on author[']s purpose, reference and research

and story development in addition to [redacted]'s regular reading every day. . . . In math [redacted] is getting a double do[se] in math every day with individualized instruction and intensive interventions. . . . These current grades [a "C" in reading, a "B" in language arts, and a "C" in mathematics] are with maximum teacher prompting, guidance and assistance. They also reflect a modified curriculum. [redacted] is really coming a long way academically, however, [redacted]'s recent lack of focus and negative behavior (i.e. kicking, screaming, laying on the floor and standing on furniture) has impacted [redacted]'s academic progress. [redacted] is such a smart [child] with so much potential.

40. Because of [redacted]'s deteriorating academic progress and behavior, [redacted] spent more and more time receiving one-on-one instruction from Ms. Lentz in Ms. Lentz's classroom.

41. At an IEP meeting held on April 5, 2011, the May 2010 IEP was closed out (with four "Annual Measurable Goals" having been "Mastered,"²¹ three "Annual Measurable Goals" having been "Continued with Revisions," and two "Annual Measurable Goals" having been "Discontinued"), and a new IEP was developed for [redacted] (April 2011 IEP). Participating in the meeting were the Parents, Rachel Tyman (who served as the LEA Representative), Ms. Forney, Ms. Lentz, Ms. Neiheisel, Ms. Revera, and Emilia Gonzalez-Abreu (a Family Counselor).

42. The April 2011 IEP described [redacted]'s present levels of performance in the domains of Curriculum and Instruction;

Social/Emotional Behavior; Independent Functioning; and Communication.

43. ■'s present level of performance in the domain of Curriculum and Instruction was described as follows in the April 2011 IEP:

Based on the Rigby Reading Assessment given in April 2011, [■] is on a level 16 which is [the] beginning of second grade. Based on the Diagnostic Reading Assessment (DAR) [■'s] scores were as follows: Oral reading and word recognition level 3, word meaning level 2 and spelling level 4. On both the September 2010 and November 2010 Benchmark Assessment Test of Reading (BATs) [■] was predicted to score proficient on the upcoming FCAT.

On the Go Math prerequisite Test, [■] scored a 63%. This tests the skills that were taught in second grade. The average was a 70%. On both the September 2010 and November 2010 Benchmark Assessment Tests in Math (BATs) [■] was predicted not proficient.

In the area of Reading, [■] is able to answer the literal questions within a story (i.e. answers within the story that are easy to identify) with maximum teacher prompting to remain focused. [■] requires direct teacher assistance as well as accommodated curriculum in order to answer "wh" questions within a passage. With teacher direction, [■] will utilize [■'s] reading strategies (i.e. underlining clues) to find the answer to multiple choice based questions. [■] struggles with answering author's purpose questions as well as compare and contrast. [■] also struggles with recalling facts and sequencing events in order. [■] is able to read an Accelerated Reader Book independently with teacher monitorin■

After completion of the story, [] is able to take the computerized test with guidance. []'s average is 84%, 39 out of 43 quizzes passed. [] is given reading passages that have one paragraph within the page in order to sustain attention and not overwhelm []. [] is also given one question per page on []'s reading practice/test. [] utilizes a colored reading helper ruler in order to help [].] follow along with the story.

In the area of Math, [] is able to add and subtract double digit numbers with and without groupin** [] requires teacher directed assistance for completion. Using visuals, [] is able to complete multiplication, addition, subtraction, and division sentences. [] is able to identify and continue patterns sequence. Using geometric shapes, [] is able to identify how many sides, type of angles, and what type of shape is being asked. Using visuals, [] is able to identify fractions according to how many are shaded to not shaded. [] can skip count numbers, whether on a number line or in a pattern. [] struggles with telling time. [] has a difficult time identifying time to the minute, increments of five, half hour, and quarter hour. When it comes to identifying greatest to least or the reverse, [] is unable to place the number in the correct order. In the area of measurement, [] needs teacher guidance to place the ruler in the correct place in order to measure the object. Once [] has the ruler in the correct place, [] is able to tell how long the object is. If the object falls in between two numbers and requires [] to pick out the fraction, [] is unable. In order for [] to complete and comprehend [**'s] work, [] requires one-on-one teacher directed instruction.

In the area of Writing, [] is able to formulate sentences when given a word bank (i.e. The ball is green). [] has a

difficult time formulating extensive sentences that deal with describing pictures. [] needs help starting the sentences and prompting to finish the sentence. [] also needs assistance making the sentence sound grammatically correct.

In []'s academics, [] requires accommodated curriculum as well as modified presentation for comprehension. [] also requires one-on-one teacher directed instruction. In the classroom setting, [] requires one-on-one assistance in order to learn and maintain skills. When an academic task is non-preferred or challenging for [], [] often requires frequency of reinforcers to be increased and may require the tasks to be broken down into smaller segments. [] struggles with tasks that have multiple steps and frequently requires breaks in order to get through the lesson. This lessens the amount of information that [] receives each day. [] has difficulty maintaining focus on academic tasks and requires that []'s assignments be broken down and the questions isolated to increase []'s focus and ability to learn the skill. [] benefits from []'s assignments being presented visually.

44. [] present level of performance in the domain of Social/Emotional Behavior was described as follows in the April 2011 IEP:

[] is a very loving student who genuinely cares about others and how they feel. [] is able to express what [] wants or needs either with words or with response cards as well as prompts. In the beginning of the year, [] often referred to [] in the third person, but now will speak using the word "I" on []'s own or by general prompt (i.e. hand touching []'s chest). When an unfamiliar or familiar person comes into the room, [] will greet the person with

teacher prompting [■] on occasion will partake in a conversation with a peer using multiple turn-taking exchanges. Most of the time, however, it involves teacher prompts, as well as visual and gestural prompts. [■] will take turns for three exchanges while maintaining eye contact for two seconds. However, [■] has difficulty continuing the conversation without multiple verbal, gestural, or visual prompts.

During social skills group, [■] needs prompting to initiate conversation as well as sustaining the conversation. When [■] is focused, [■] is able to ask questions to a peer in a small group setting. When asked a question by a peer, [■] needs multiple prompts to respond and will respond with short answer statements (i.e., balloons instead of talking in a sentence). Most of the time, [■] will lose focus and needs verbal and gestural redirection to join the group.

When [■] is requested to participate in a non-preferred task and becomes agitated, [■] is able to count to ten but needs verbal prompts to do so. [■] needs help communicating [■]'s wants/needs when frustrated. [■] tends to scream, wail, and moves away from the current area. A visual chart (i.e. About Me) and short break would be helpful to calm [■] down and regain [■]'s attention to the task. When [■]'s behavior continues to escalate even with all of the positive behavioral interventions in place, [■] may drop to the floor and hit or kick. When [■] is exhibiting this, [■] benefits from a timer being set and given 3 minutes of a break to regroup. When the timer goes off, [■] will often return to the task [■] was avoiding. These behavioral episodes vary in frequency and duration based on the tasks that are presented. The screaming behaviors are occurring on a daily basis with the aggression occurring with less frequency. Data has been collected on

the following behaviors: screaming, aggression (described as hitting and kicking), off task and out of area. When [] is with a small group of peers, [] tends to wander away from the group (i.e. walks in circles, finds something to do independently) without using verbal communication. [] would benefit from being given two choices (i.e. slide/monkey bars, sensory area/tent) that will allow [] to interact with []'s peers in a more natural setting []'s attention and ability to remain in []'s seat are inconsistent and impact []'s progress.

45. [] present level of performance in the domain of Independent Functioning was described as follows in the April 2011 IEP:

[] appears to enjoy coming to school every day. In the morning, [] is greeted by an adult at []'s car and brought to []'s classroom.²² [] is able to sit outside the classroom door and read a book independently while waiting for the bell to ring. Throughout the school day [] requires one-on-one adult instruction and guidance. With maximum teacher prompting [] is able to follow a visual schedule. [] is able to complete one non-preferred activity to one preferred activity. [] is able to set up []'s schedule for the entire school day, and removes []'s icons upon completion. At this time, [] participates in heavy work activities, given by an Occupational Therapist, to assist with calming, organizing and attention to task. [] wears a pressure vest through the day to assist with sensory issues. [] also seeks approval and verbal praise from adults in order to complete []'s tasks. [] responds to verbal, gestural prompts, as well as sensory prompts (hugs or a massage to regain focus).

████ will become agitated with activities that become lengthy or difficult. Once frustrated, █████ needs wait time or a break in order to calm down. A timer is set to show █████ how much time █████ has for a break. Once the timer beeps, █████ will regain focus and get back to the assignment.

████ needs multiple verbal or gestural prompts to remain focused on the task at hand. █████ often lets █████'s] eyes wander around the room or █████ leaves █████'s] seat to avoid doing █████'s] work. █████ often uses multiple escape tactics to avoid completing █████'s] work. █████ has the ability to follow through in activities; however, █████ just needs maximum prompting to get there or even mental breaks (taking a sip of water, eating █████'s] snack in between, gentle hand massage). █████ responds to a visual hand countdown starting at 5-4-3-2-1 to gain focus.

46. █████ present level of performance in the domain of Communication was described as follows in the April 2011 IEP:

Based on speech-language pathologist interaction, █████ has shown an ability to self-monitor the/th/phoneme when reading and during conversation; however, █████ is inconsistent at times and will substitute this phoneme with an /f/ or /v/. █████ is intelligible at the conversational level and is able to use █████'s] speech skills to successfully communicate with peers and adults in █████'s] classroom and around campus (i.e. hallway, specials, cafeteria).

47. The April 2011 IEP enumerated the "Special Education Services," "Related Services," and "Supplementary Aids and Services" that █████ would be receiving from April 5, 2011, to June 9, 2011, and August 22, 2011, to April 4, 2012.

48. The "Special Education Services" provided for in the April 2011 IEP were: "Collaboration in Independent Functioning," five times a week, in the "ESE Class"; "Direct Language Therapy," four times a week for a total of 60 minutes a week, in the "ESE Class"; "Specialized Instruction in All-Academic Areas," one time a day for 2.15 hours a day, in the "ESE Class"; and "Specialized Instruction in Social Skills," four times a week for a total of 60 minutes a week, in the "ESE Class." The April 2011 IEP also provided that ■ would receive "Specialized Instruction in Behavior," once a day for 20 minutes a day, in the "General Education Class" (but only from April 5, 2011, to May 2, 2011).

49. The "Related Services" provided for in the April 2011 IEP were: "Counseling Services," once a week for a total of 30 minutes a week, on the "General Education Campus"; and "Occupational Therapy, Consult/Collaborate," two times a month, on the "General Education Campus."

50. The "Supplementary Aids and Services" provided for in the April 2011 IEP were:

Other-Daily/Weekly reporting and
collaboration with the parent;

Other-Peer assistance;

Adult assistance around school campus for
safety and maintenance of special diet;

Adult supervision for lunch and snack;

Fewer items placed on page; [23]

Flexible Presentation-Provide copy of directions for tasks, when available;

Flexible Presentation-Reduce auditory distractions during testing;

Flexible Presentation-Repeat, clarify, summarize directions (teacher);

Flexible Presentation-Repeat/paraphrase directions (student);

Flexible Presentation-Student uses means to maintain/enhance visual attention;

Flexible Presentation-Use means to direct attention to test/task items;

Flexible Presentation-Verbal encouragement;

Flexible Scheduling/Timing-Add 1/2 time for tasks (Total time = time and a half of allotted time);

Flexible Scheduling/Timing-Extra time for processing information (written);

Flexible Scheduling/Timing-Extra time for processing/responding (oral);

Flexible Scheduling/Timing-Lessons broken down into smaller segments;

Flexible Scheduling/Timing-Reduce assignments;

Flexible Setting-One on one testing;

Flexible Setting-Allow movement as needed;

Flexible Setting-Close proximity when giving directions or lessons;

Flexible Setting-Preferential seating;

Increased spacing between test items;
Seating near/with a positive role model
(female/male);
Written prompts;
Written/Visual task strip.

51. The "Placement" section of the April 2011 IEP indicated that ■ would be "with non-disabled students" 57.51% of the time (for "all academic areas, electives/specials, grade level activities, hallway passages, lunch and recess") and "Removed" 42.49% of the time ("to receive . . . Speech and Language services and counseling services," as well as "social skills [training] and academic reinforcement"²⁴). These percentages were intended to preserve the status quo. They reflected the actual amount of time that ■ was then currently spending during the school day with, and apart from, non-disabled peers, including the time spent in Ms. Lentz's classroom (from which ■ educationally benefitted) for "social skills [training] and academic reinforcement" (of which Mrs. ■ had been aware).²⁵

52. The "Special Considerations" section of the April 2011 IEP provided as follows:

Special Considerations identified below have been determined necessary for the student to benefit from [his/her] educational program and are funded through the Local Education Agency (LEA).

Health Care Needs

Yes () No

- specialized administration of medication (e.** Epi-pen/insulin injections, nebulizer, suppositories)
- self care needs
- other

Details: Food sensitivities to Gluten, Casein diet; Parent will supply all foods for the Gluten-free and Casein-free diet. [REDACTED] needs reminders to wipe [REDACTED] after toileting and wash [REDACTED]'s] hands after going to the bathroom. Frequent hand-washing after using classroom materials such as: glue, paste, play-do[h].

Specially Designed/Adaptive PE (description of student needs)

() Yes No

Assistive Technology Needs

Yes () No

- portable word processor
- visual schedule
- other

Details: swiss disc, theraband, reading helper ruler, pressure vest, ball stand, slant board.

Behavioral Needs

Yes () No

Details: Positive Behavior Intervention Plan is in place.

Transportation Needs

() Yes No

Communication Needs

(x) Yes () No

Communication is addressed through Goals and Objectives

(x) Yes () No

-other

Details: addressed thru goals

Supports for School Personnel (special training or materials required or needed by staff)

Specialized training in Gluten-free/Casein-free diet and food allergies provided by the parent.

Staff to be provided with training opportunities and support in Autism teaching strategies. Staff to be provided with training opportunities and support with inclusion strategies.

The "Positive Behavior Intervention Plan" referred to under "Behavioral Needs" in the "Special Considerations" section of the April 2011 IEP was the 2010 PBIP.

53. The April 2011 IEP had seven "Annual Measurable Goals": three in the domain of Curriculum and Instruction; two in the domain of Social/Emotional Behavior; one in the domain of Independent Functioning; and one in the domain of Communication.

54. The April 2011 IEP also contained a "Parent Input" section, which had the following statement by the Parents:

█████ has exhibited great improvement in many areas since █████ transferred to █████'s] present school. █████'s] handwriting skills improved dramatically within just a few weeks with █████'s] new teacher/autism coach. █████ has shown improvement in several academic areas-Reading, Math, Science, Art and Music among others. █████'s] social and language skills have improved. █████'s] parents believe that █████'s] improvement can be greatly attributed to the very positive school environment. The teachers, autism coach, SLP, behavior specialist, paraprofessionals and other staff members that work with █████ have made a tremendous impact on █████'s] life]. █████'s] fellow students show █████ acceptance because of their adult role models in school. █████ has become much happier and █████'s] behavior has improved.

It is important that a staff member is in close proximity to monitor █████ during snack time in the classroom and lunch time in the cafeteria. Classmates should be advised that they should not share their food with █████ due to █████'s] food allergies and an adult should monitor to make sure no exchanges of food occur.

█████ is able to complete most toileting procedures on █████'s] own but it is essential that █████ is monitored during bathroom times to ensure that █████ follows the appropriate hygienic routine and so that █████ does not inadvertently enter or leave the restroom with █████'s] clothing in disarray or partially removed. It is also important that █████ washes █████'s] hand frequently with soap and water since many classroom materials contain food proteins (glutens and casein) which █████ is allergic to. Materials such as Play-Doh, markers, adhesives such as glue and paste, stickers, food, cooking supplies etc. typically contain these allergens.

These proteins can easily be transferred to [REDACTED]'s] mouth if [REDACTED]'s] hands are not immediately cleaned after usage.

Due to [REDACTED]'s] disorder [REDACTED] will sometimes be unable to make good decisions, show self-control or remain on task, especially under stress, frustrated, when [REDACTED]'s] medication is changed or when [REDACTED] is not feeling well. Because of this [REDACTED] requires visual supports and prompting from an adult to help her through the day.

[REDACTED] is primarily a visual learner. It is educationally necessary to provide [REDACTED] with visual aids and supports including schedules, written instructions and adult assistance.

At home [REDACTED] enjoys using the computer. [REDACTED] particularly enjoys searching for sites in foreign languages, including Spanish, French, Portuguese, Russian, Chinese and Japanese. [REDACTED] also enjoys practicing the piano. [REDACTED] is able to play many short songs and tunes by humming the song and then picking out the correct notes on the piano. [REDACTED] can play these songs in different keys. [REDACTED] also takes art lessons and loves to paint.

The long term goal is for [REDACTED] to pursue a standard high school diploma and to go to college.

55. In early April 2011, the decision was made to move [REDACTED] from Ms. Forney's class to another general education third grade class at [REDACTED]--a Reading Recovery class taught by a teacher (Ms. McAteer) dual certified in elementary education and exceptional student education, which had fewer students and

worked at a slower pace than Ms. Forney's class and, therefore, was reasonably believed to be a better fit for ■■■

56. A meeting attended by Mrs. ■■■, Dr. Parker, Ms. Forney, Ms. Lentz, Ms. Starke, Ms. Bees, and Ms. Tyman was held on Tuesday, April 12, 2011, to discuss this move.²⁶

57. Dr. Parker recommended at the meeting that an appropriate social story be written about the move for ■■■ and that it be read every day and night over a period of at least two weeks before the move was made.²⁷

58. To the dismay of the Parents, the School Board representatives at the meeting rejected Dr. Parker's recommendation that there be at least a two week pre-move waiting period and, instead, decided to move ■■■ to Ms. McAteer's Reading Recovery class the following Monday, April 18, 2011, a decision that was based on their good faith belief as to what was best for ■■■ given her academic and behavioral needs. They very much wanted ■■■ to succeed in a general education classroom setting at ■■■■■■■■■■, and they believed that the Reading Recovery class offered the best chance of achieving such success. The plan, as set forth in the written report of the meeting, was as follows:

Mrs. Lentz [will] stay with ■■■ in Ms. McAteer's classroom and . . . fade out over time. ■■■ will start ■■■'s] day off in the morning by coming in and sitting in front of Ms. Forney's class. Mr. James or

Mrs. Lentz will transition [REDACTED] to Ms. McAteer's classroom.

59. [REDACTED] moved from Ms. Forney's class to Ms. McAteer's class on April 18, 2011 (following the completion of FCAT testing), as scheduled, and remained there for the rest of the school year.²⁸

60. [REDACTED]'s transition from Ms. Forney's class to Mr. McAteer's class was a difficult one, marked by escalating behavioral issues. There was some improvement in [REDACTED]'s behavior, however, the last two weeks of the school year (when the academic demands in the classroom became less rigorous).

61. Notes, prepared usually by Mr. James or Ms. Lentz, describing [REDACTED]'s day in school had been sent home on a daily basis while [REDACTED] was in Mr. Forney's class. This practice stopped at around the time [REDACTED] was reassigned to Ms. McAteer's class pursuant to the request of Dr. Parker, who advised Ms. Lentz and Ms. Starke that it was becoming too upsetting for Mrs. [REDACTED] to read the contents of these home notes. Ms. Lentz, however, continued to communicate (mostly face-to-face) with Mrs. [REDACTED] almost every school day, as she had done for the entire school year up until that point in time,²⁹ telling Mrs. [REDACTED] about [REDACTED] day in school and, when [REDACTED] had had a rough day behaviorally, what had been done to deal with the situation.

62. While [REDACTED] has "shown improvement academically,³⁰ socially, and behaviorally since [REDACTED] started school at

Maplewood,"³¹ ■'s progress in these areas tapered off during the second half of the 2010-2011 school year. By the end of the school year, ■ classroom behavior, in particular, remained a significant problem, notwithstanding the School Board's use of a wide and exhaustive assortment of interventions intended to ameliorate the situation,³² including not only those in the 2010 PBIP and ■ IEPs, but also those suggested by occupational therapists working for the School Board, School Board district-level specialists, and Dr. Parker and her colleagues at CARD (whom Ms. Bees and her staff regularly reached out to for expert advice³³), as well as the Parents. Throughout the school year, ■ disruptive behavior negatively impacted not only ■ learning, but that of ■ classmates, particularly those who were distractible. While ■ classmates took an interest in, and seemed to have true affection for, ■ and benefitted from their social interaction with ■, because of ■ disruptive classroom behavior (which distracted not only them, but also their teacher, who had to take valuable time away from her instruction to deal with ■ behavior), ■ presence in their class significantly diminished their overall learning experience.

63. School Board personnel had ongoing discussions during the second half of the 2010-2011 school year as to whether [REDACTED] unique needs were best met in a general education classroom setting, or in some other setting on the continuum of alternative educational placements. Reasonable concerns were expressed during these discussion that, in the general education classroom setting, which was [REDACTED] then-current placement,**was too dependent on the prompting of adults and this was thwarting the development of [REDACTED] independent functioning Placement in a self-contained autism cluster classroom (with fewer students and more structure than a general education classroom) was deemed to be a viable alternative given [REDACTED] needs. Park Springs Elementary School (Park Springs), which has an autism cluster program, was identified as a school to which**might possibly be reassigned were**to be placed in an autism cluster classroom. Park Springs is inconveniently located 10.3 miles from [REDACTED] residence. There are 37 other elementary schools operated by the School Board that are located closer to [REDACTED] residence, including [REDACTED] (which is 3.2 miles from [REDACTED] residence). Not all of these schools, however, have an autism cluster program. Only twelve do.

64. The School Board sent the Parents a Parent Participation form, dated May 23, 2011, advising them that a meeting would be held on the last day of the school year,

June 9, 2011, to review the April 2011 IEP and discuss a "possible change in placement." Listed on the form as among the possible attendees at the meeting was a "Park Springs Representative." (It is the School Board's practice, whenever a proposed change in placement involving a potential school reassignment is going to be considered at an IEP meeting, to make arrangements to have present at the meeting a representative of a school to which the student might be reassigned were the change in placement to be made to present information about that school and what it has to offer the student.) After receiving this Parent Participation form, Mrs. ■ spoke with Ms. Starke and told her that she and Mr. ■ wanted ■ to remain at ■, adding that Park Springs was "much too far away" from their residence. Ms. Starke responded that the Park Springs representative would be able to provide information about the district's other autism cluster schools inasmuch as "the protocol was the same at all the autism cluster schools throughout the district."

65. The School Board has an ESE Cluster Placement Process, Review of Records Checklist form (Cluster Form) that School Board personnel are supposed to complete when an autism cluster classroom placement is being considered. According to the instructions given on the Cluster Form:

In order to ensure that all items are available for discussion at the IEP meeting, the ESE specialist and the ESE program specialist will review the records together, initialing and dating on the day the review was held. The availability of this information will assist the IEP committee in developing an IEP that documents the needs of the child, resulting in an appropriate placement. These items are not necessarily completed or collected in the order listed.

The checklist items on the Cluster Form are:

Documentation of a minimum of two (2) interventions, including results of accommodations/modifications and additional supports given to the student (recommended minimum of 6 weeks).

Documentation of a minimum of two (2) observations by district ESE staff.

Documentation of at least one teacher/parent conference.

Data (within 3 months) describing interventions, supports and services provided in the areas of social/emotional, behavior, and academics.

Current data in the areas of Communication, Daily Living Skills, Socialization, Motor Skills, and Curriculum (within 3 months) (e.g. test scores, checklists, performance measures).

Evidence of documented collaboration with DHH itinerant teacher and/or DHH program monitor for students with hearing impairment.

Development and implementation of PBIP based on a FBA (if behavior is a concern) with reviews by area behavior staff (for at least 6 weeks).

66. A Cluster Form was completed in the instant case, with all of the items on the checklist initialed and dated (between May 23, 2011, and June 9, 2011).

67. The IEP meeting noticed in the May 23, 2011, Parent Participation form was held on June 9, 2011, as scheduled. Present at this June 9, 2011, IEP meeting were the Parents, Ms. Tyman, Ms. McAteer, Ms. Lentz, Ms. Neiheisel, Ms. Henricksen, Ms. Parker, Ms. Starke, Ms. Gonzalez-Abreu, Renee Miscio (a School Board Area Program Specialist³⁴), Rhonda Bachmann (a Program Specialist with the Florida Diagnostic Learning Resource System,³⁵ who specializes in devising strategies and techniques to teach students with Autism Spectrum Disorder), and Stacey Hoagland (an employee of the Family Network on Disabilities of Broward County, who served as the Parents' advocate at the meeting). A representative from Park Springs participated in the meeting by telephone.

68. The School Board representatives at the meeting brought with them a draft of the changes and additions they proposed to make to the April 2011 IEP (School Board Draft), including proposed changes to the IEP's "Placement" section reflecting their belief that the least restrictive appropriate educational setting meeting [REDACTED] unique needs was a self-contained autism cluster classroom, which offered a highly structured, low student-teacher ratio learning environment and

in which a systematic, explicit approach to instruction was utilized. Although they had formed such an opinion, the record evidence does not establish that they came to the meeting with a closed mind on the matter.

69. The meeting started at around 9:00 a.m. and ended at around 2:30 or 3:00 p.m. There was one break that lasted approximately an hour.

70. The Parents and their advocate, Ms. Hoagland, were active participants in the meeting³⁶ They were given the opportunity to speak at length and express their views concerning the contents of the School Board Draft and the issues it raised. The School Board representatives at the meeting listened to them and considered what they said.

71. The most contentious issue discussed at the meeting related to placement. The Parents, individually and through their advocate, stated their opposition to the proposal to move**from a general education classroom setting at [REDACTED] to a self-contained autism cluster classroom at another school, explaining, in detail, why they believed that the status quo with respect to [REDACTED] placement should be preserved and that the proposed change in placement should not be made. Among the arguments they made was that leaving [REDACTED] (and its loving and caring environment, where [REDACTED] felt comfortable and at home) and returning to an autism cluster school (the type of school at

which [REDACTED] had had such a terrible experience before coming to [REDACTED]³⁷) would harm**emotionally and otherwise. They further contended that**benefitted from being with non-disabled peers.

72. Revisions to portions of the School Board Draft were made based upon the input provided by the Parents, but the School Board representatives at the meeting were unpersuaded by the Parents' arguments against changing [REDACTED] placement to a self-contained autism cluster classroom setting, which they (the School Board representatives) continued to believe was the least restrictive appropriate placement meeting [REDACTED] unique needs (a belief that was a sound one, particularly given the difficulties [REDACTED] had had in the general education classroom setting at [REDACTED] the second half of the school year and the apparent need**had for a more structured setting). Notwithstanding their continuing, well-supported belief that, even with the use of supplementary aids and services, [REDACTED] education could not be achieved satisfactorily in a general education class, they did recognize the value of [REDACTED] being able to interact with non-disabled peers during the school day (the importance of which the Parents had stressed during their presentation at the meeting), and they changed their position accordingly as to percentage of time [REDACTED] should be with these students (increasing it, from what it was in the School Board Draft, to 40.56 percent).

73. The June 9, 2011, meeting produced an Interim IEP (June 2011 Interim IEP) that made changes and additions to the April 2011 IEP consistent with the School Board Draft, as revised as a result of the input provided at the meeting

74. The June 2011 Interim IEP contained the following additional information concerning [REDACTED]'s present level of performance in the domain of Social/Emotional Behavior to update the information that had been provided in the April 2011 IEP:

6/9/11: [REDACTED]'s classroom setting was changed in April to a different general education setting that is designed to present the general curriculum with multiple opportunities to teach and re-teach skills until mastery, with a ratio of 14:3. [REDACTED] is demonstrating aggressive behaviors (ie. Hitting, kicking, screaming, dropping to the floor). These behaviors occur during small group, whole group, and individual times. These behaviors are not noted during specials times (ie. PE, art, media, and music.). [REDACTED] has begun expressing non-compliant behaviors (ie. saying no) during preferred and non-preferred activities. [REDACTED] has expressed that [REDACTED] is sad, tired, and is talking about sleeping more often (ie. Bed?, [REDACTED] tired). When provided with direct instruction in a small class or 1:1 setting, [REDACTED] can complete the tasks with decreased behaviors and decreased prompts. [REDACTED] participates in social skills instruction 4 days a week given a 1:2 ratio. Additionally [REDACTED] participates in the social skills group one time a week in a group of 10:2 in a natural environment. [REDACTED] needs several visual, verbal, and gestural prompts to participate and interact with her peers. [REDACTED]'s preferred activities and toys have been infused during this time to motivate [REDACTED] to participate. These behaviors are

inconsistent throughout the school year in all academic areas in the school setting

75. The June 2011 Interim IEP contained the following additional information concerning [REDACTED] present level of performance in the domain of Independent Functioning to update the information that had been provided in the April 2011 IEP:

6/9/11: [REDACTED] often has difficulty transitioning from one activity to the next, regardless if it['s] a preferred or non-preferred activity. When provided with prompting, [REDACTED] is often not engaged in the task which requires direct teacher assistance to regain focus. [REDACTED] is now setting [REDACTED]'s] schedule for each activity and choosing breaks instead of setting up the entire day. A variety of strategies are used in order to prompt [REDACTED] to complete a task. When consistent activities are implemented [REDACTED] is comfortable in following through [with] the task. When an activity is novel or the level of the curriculum is challenging [REDACTED]'s] behavior may intensify and require more intensive adult prompting and reinforcement.

76. The June 2011 Interim IEP contained the following additional information concerning [REDACTED] present level of performance in the domain of Communication to update the information that had been provided in the April 2011 IEP:

6/9/11: [REDACTED] displays increasing difficulty expressing her wants and needs in the large group setting, most often when [REDACTED] is frustrated, overwhelmed, or attempting to participate in a non-preferred activity. This also carries over into small group settings and during one-on-one instruction.

77. The June 2011 Interim IEP enumerated the "Special Education Services," "Related Services," and "Supplementary Aids and Services" that ■ would be receiving from the beginning of the next school year (August 22, 2011) to April 4, 2012.

78. The "Special Education Services" that the June 2011 Interim IEP indicated would be provided the next school year, up until April 4, 2012, were: "Direct Language Therapy," four times a week for a total of 60 minutes a week, in the "ESE Class"; and "Intensive Instruction in Academics, Behavior, Independent Functioning, [and] Communication," five times a week for a total of 920 minutes a week," in the "ESE class."

79. The "Related Services" and "Supplementary Aids and Services" provided for in the June 2011 Interim IEP were identical to those that had been provided for in the April 2011 IEP.

80. The June 2011 Interim IEP made no changes to the "Special Considerations" section of the April 2011 IEP.

81. The "Placement" section of June 2011 Interim IEP provided that ■ would be "with non-disabled students" 40.56 percent of the time (for "electives/specials, grade level activities, hallway passages, lunch, recess, science and social studies") and "Removed" 59.44 percent of the time. Under the section subheading, "Removal from Programs with Nondisabled Students," the following was stated:

The extent to which the student will NOT participate with nondisabled students in the regular class. The reason for the student's separation from instruction with nondisabled peers is stated below.

Intensive curriculum or instructional approach for most learning activities;
Small group training in social skills, self-regulatory behavior, self-advocacy, conflict resolution, dealing with authority, socialization; Assistance for the majority of learning activities; On-going continuous assistance for participation in learning activities; Supervision to ensure physical safety during most activities; Specialized instruction approaches.

82. Changes and additions were made by the June 2011 Interim IEP to the "Annual Measurable Goals" that had been set forth in the April 2011 IEP, which resulted in a total of ten "Annual Measurable Goals" (compared to the seven in the April 2011 IEP): three in the domain of Curriculum and Instruction; three in the domain of Social/Emotional Behavior; two in the domain of Independent Functioning; and two in the domain of Communication. (The additional "Annual Measurable Goal" in the domain of Communication was added at the suggestion of Ms. Hoagland.)

83. At the end of the June 9, 2011, meeting, after the June 2011 Interim IEP was "closed out," it was "reopened," at Ms. Hoaglund's request (on behalf of the Parents) so that the

following addendum could be added to what was contained in the "Parent Input" section of the April 2011 IEP:

6/9/11- In the one year [] has been here [] has made more progress academically, socially, behaviorally, and emotionally than [] had in the past 4 years at an autism cluster school. We believe this is the least restrictive setting for [] as [] has been in [a] general education setting since kindergarten. The parents feel [] would regress if [] is moved into an autism cluster classroom. They feel it would damage [] academically, socially, emotionally, and behaviorally. They also believe that such a move would negatively impact the family unit. They do not agree with the school district[']s proposed change in placement. The parents believe []'s needs can be met in this setting with appropriate resources and supports. They feel this proposed change is due to budget cuts and the county's unwillingness to provide the appropriate resources.[³⁸]

84. The Parents subsequently, on June 20, 2011, submitted the instant Complaint to the School Board challenging the change in [] placement that would take place were the June 2011 Interim IEP to be implemented.

CONCLUSIONS OF LAW

85. District school boards are required by the "Florida K-20 Education Code"³⁹ to "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) and 1003.57, Fla. Stat. "Exceptional students," as that term is used in the "Florida K-

20 Education Code," are students who have "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^[40]; a speech impairment; a language impairment^[41]; an orthopedic impairment; an other health impairment; traumatic brain injury; a visual impairment; an emotional or behavioral disability; or a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; students who are deaf or hard of hearing or dual sensory impaired; students who are hospitalized or homebound; children with developmental delays ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e)." § 1003.01(3)(a), Fla. Stat. Pursuant to section 1003.57(1)(d), "[i]n providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

86. The parties have stipulated, in paragraph 5 of their Joint Written Statement of Undisputed Facts, that**"is eligible for exceptional student education in the areas of Autism Spectrum Disorder [and] Language Impair[ment] and [■] receives Occupational Therapy."⁴²

87. The "Florida K-20 Education Code's" imposition of the requirement that "exceptional students" receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., as most recently amended (IDEA),⁴³ which mandates, among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school."⁴⁴ 20 U.S.C. § 1412(a)(1); see also Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484, 2488 (2009) ("The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq., requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State."); J. P. v. Cnty. Sch. Bd. of Hanover Cnty., 516 F.3d 254, 257 (4th Cir. 2008) ("Under the IDEA, all

states receiving federal funds for education must provide disabled schoolchildren with a 'free appropriate public education' ('FAPE')."); and Shore Reg'l High Sch. Bd. of Educ. v. P. S., 381 F.3d 194, 198 (3d Cir. 2004) ("All states receiving federal education funding under the IDEA must comply with federal requirements designed to provide a 'free appropriate public education' ('FAPE') for all disabled children."); cf. A** for Health Care Admin. v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998) ("[A] state that has elected to participate [in the Medicaid program], like Florida, must comply with the federal Medicaid statutes and regulations."); Pub. Health Trust of Dade Cnty., Fla. v. Dade Cnty. Sch. Bd., 693 So. 2d 562, 564 (Fla. 3d DCA 1996) ("The State of Florida elected to participate in the Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1994), which provides federal funds to states for the purpose of providing medical assistance to needy persons. However, once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with the federal Medicaid statutes and regulations"; held that where a Florida administrative rule is in direct conflict with federal Medicaid statutes and regulations, the federal Medicaid law governs); and State of Fla. v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976) ("Once a state chooses to

participate in a federally funded program, it must comply with federal standards.").

88. Under the IDEA, a "free appropriate public education" consists of "special education" and, when necessary, "related services." See 20 U.S.C. § 1401(9) ("The term 'free appropriate public education' means special education and related services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d)").

89. "Special education," as that term is used in the IDEA, is defined as:

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.

20 U.S.C. § 1401(29).

90. The term "related services," as used in the IDEA, is defined as:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A). It has been said that "related services are those 'that enable a disabled child to remain in school during the day [to] provide the student with the meaningful access to education that Congress envisioned.'" Ortega v. Bibb Cnty. Sch. Dist., 397 F.3d 1321, 1324 (11th Cir. 2005). "Related services" include "behavioral interventions and supports." Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg 46540, 46569 (Aug 14, 2006).

91. To meet its obligation under sections 1001.42(4)(1) and 1003.57 to provide an "appropriate" public education to each of its "exceptional students," a district school board must provide "personalized instruction with 'sufficient supportive

services to permit the child to benefit from the instruction.'" Hendry Cnty. Sch. Bd. v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986), quoting from, Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188 (1982); see also § 1003.01(3)(b), Fla. Stat. ("'Special education services' means specially designed instruction and such related services as are necessary for an exceptional student to benefit from education. Such services may include: transportation; diagnostic and evaluation services; social services; physical and occupational therapy; speech and language pathology services; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board.").

92. The instruction and services provided must be "'reasonably calculated to enable the child to receive educational benefits.'" Sch. Bd. of Martin Cnty. v. A. S., 727 So. 2d 1071, 1073 (Fla. 4th DCA 1999), quoting from, Rowley, 458 U.S. at 207. As the Fourth District Court of Appeal further stated in its opinion in A. S., 727 So. 2d at 1074:

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J. S. K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198, 102 S. Ct. 3034. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997) (citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. of Educ., 938 F.2d at 715, and Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208, 102 S. Ct. 3034; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, No. 97-3125, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

see also M. H. v. Nassau Cnty. Sch. Bd., 918 So. 2d 316, 318 (Fla. 1st DCA 2005) ("A free appropriate public education 'provided under the Act does not require the states to satisfy all the particular needs of each handicapped child,' but must be designed to afford the child a meaningful opportunity to learn.") (citation omitted); C. P. v. Leon Cnty. Sch. Bd., 483

F.3d 1151, 1153 (11th Cir. 2007) ("This standard, that the local school system must provide the child 'some educational benefit,' Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, has become known as the Rowley 'basic floor of opportunity' standard."⁴⁵); M. M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1101-1102 (11th Cir. 2006) ("The sole issue is whether the two proposed IEPs, which provided for VT instead of AVT, were 'reasonably calculated to enable the child to receive educational benefits,' and, thus, were sufficient to provide C.M. with a FAPE. . . . [U]nder the IDEA there is no entitlement to the 'best' program."); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001) ("[A] student is only entitled to some educational benefit; the benefit need not be maximized to be adequate."); Doe v. Bd. of Educ., 9 F.3d 455, 459-460 (6th Cir. 1993) ("The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the

requirements of the IDEA."); and Sch. Bd. of Lee County v. M. M., Case No. 2:05-cv-5-FtM-29SPC, 2007 U.S. Dist. LEXIS 21582 *9-10 (M.D. Fla. Mar. 27, 2007) ("Under the United States Supreme Court's Rowley standard, a child must be provided 'a basic floor of opportunity' that affords 'some' educational benefit, but the outcome need not maximize the child's education.").

93. "The [law] does not demand that [a district school board] cure the disabilities which impair a child's ability to learn, but [merely] requires a program of remediation which would allow the child to learn notwithstanding [the child's] disability." Indep. Sch. Dist. No. 283, St. Louis Park, Minn. v. S. D. By and Through J. D., 948 F. Supp. 860, 885 (D. Minn. 1995), aff'd, 88 F.3d 556 (8th Cir. 1996); see also D. B. v. Houston Indep. Sch. Dist., Case No. H-06-354, 2007 U.S. Dist. LEXIS 73911 *31 (S.D. Tex. Sept. 29, 2007) ("It is not necessary for a student to improve in every area to obtain an educational benefit from his IEP. Nor is a school district required to 'cure' a disability.") (citation omitted); and Coale v. State Dep't of Educ., 162 F. Supp. 2d 316, 331 n.17 (D. Del. 2001) ("If the IDEA required the State to 'cure' Alex's disability or to produce 'meaningful' progress in each and every weakness demonstrated by a student, then the State's decision to accommodate Alex's 'fine motor skills' problems with adaptive

technology might be more problematic. But the court does not understand the IDEA to impose such requirements on the State.").

94. District school boards may take cost into consideration in determining what instruction and services to provide an "exceptional student," but only "when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, then there is no choice." Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 517 (6th Cir. 1984); see also Barnett by Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 153-54 (4th Cir. 1991) ("Plaintiffs also argue that the district court erroneously allowed the Board, in making [the] placement decision, to consider the lack of financial resources and the impact on the other students of providing one student an interpreter. The district court found that in light of the finite resources available for the education of handicapped children, a school system is not required to duplicate a small, resource-intensive program at each neighborhood school. Although we agree with plaintiffs that the Board should not make placement decisions on the basis of financial considerations alone, 'appropriate' does not mean the best possible education that a school could provide if given access to unlimited funds. . . . [I]n reviewing the defendant's placement decision, the district court correctly considered these factors and properly found that the program offered at

Annandale was appropriate."); J. P. ex rel. Popson v. West Clark Cmty. Schs., 230 F. Supp. 2d 910, 945 (S.D. Ind. 2002) ("[T]aking financial or staffing concerns into account when formulating an IEP or when providing services is not a violation of the IDEA. A school district is not obligated by law to provide every possible benefit that money can buy. A school district need only provide an 'appropriate' education at public expense. Therefore, it may deny requested services or programs that are too costly, so long as the requested services or programs are merely supplemental."); and Matta By and Through Matta v. Bd. of Educ.-Indian Hill Exempted Vill. Schs., 731 F. Supp. 253, 255 (S.D. Ohio 1990) ("When devising an appropriate program for individual students, cost concerns are legitimate. . . . However, costs may be taken into consideration only when choosing among several appropriate education options. . . . When only one alternative for an appropriate education is available, the state must follow that alternative irrespective of the cost.").

95. For each student found eligible for special education and related services, there must be developed an IEP addressing the unique needs of that student. See R. B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 941 (9th Cir. 2007) ("Once the child qualifies for special education services, 'the district must then develop [a]n IEP which addresses the unique needs of

the child[.]'"). The IEP has been called "the centerpiece of the [IDEA's] education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988); see also K. M., 2011 U.S. Dist. LEXIS 71850 **17-18 ("The core of the IDEA is the cooperative process that it establishes between parents and schools That cooperative process in providing students with a FAPE is achieved through the development of an individualized education program ('IEP') for each student with a disability "). It provides the "the road map for a disabled child's education." M. C. ex rel. J.C. v. Cent'l Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996). "An appropriate IEP must contain statements concerning a disabled child's [present] level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." C. H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 65 (3d Cir. 2010).

96. "[I]n developing an IEP for 'a child whose behavior impedes the child's learning [or that of others], [the IP team] must consider 'the use of positive behavioral interventions and supports, and other strategies, to address that behavior.'" A. C. ex rel. M. C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 (2d Cir. 2009), quoting from 20 U.S.C. § 1414(d) (3) (B) (i); see also 34 C.F.R. § 300.324(a) (2) (i) (same); and Fla. Admin. Code R. 6A-6.03028(3) (g) 5.(same). "Whether a

child needs positive behavioral interventions and supports is an individual determination that is made by each child's IEP Team." Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg at 46683.

97. Although an IEP need not identify a specific school location, it must specify the "general environment" or setting in which the services described in the IEP will be provided to the student (referred to as the student's "educational placement"). See T. Y. v. N.Y. City Dep't of Educ., 584 F.3d 412, 419-420 (2d Cir. 2009); see also Park Hill Sch. Dist. v. Dass, Case Nos. 10-2187 and 10-2189, 2011 U.S. App. LEXIS 18663 *8 (8th Cir. Sept. 9, 2011) (IEP must contain "an explanation of the extent to which the student will not be in the regular classroom."). A district school board must have a "continuum of alternative [educational] placements" available for its students, including (from least restrictive to most restrictive) "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions."⁴⁶ 34 C.F.R. § 300.115(b)(1). It also must, when necessary, "[m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." 34 C.F.R. § 300.115(b)(1).

98. Educational placement decisions must be made "on an individual case-by-case basis depending on each child's unique educational needs and circumstances," (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg at 46587) and be in accordance with the following "mainstreaming" or "LRE" principles:

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment^[47] occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 CFR § 300.114(a)(2); see also Fla. Admin. Code R. 6A-6.03028(3)(i) ("Placement determinations shall be made in accordance with the least restrictive environment provisions of the IDEA").

99. Notwithstanding the IDEA's "general preference" for educating children with disabilities in the "regular educational environment" (Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895, 905 (7th Cir. 1996)), there are circumstances where a more restrictive setting on the continuum is the appropriate

choice for a particular child. See Regan-Adkins v. San Diego Unified Sch. Dist., 37 Fed. Appx. 932, 934 (9th Cir. 2002) ("[T]he mainstreaming presumption can be rebutted by a showing that the student's educational needs require removal from the regular education system."); Heather S. v. State of Wisconsin, 125 F.3d 1045, 1056-1057 (7th Cir. 1997) ("Mainstreaming is not required in every case."); Hartmann by Hartmann v. Loudoun Cnty. Bd. of Educ., 118 F.3d 996, 1001, 1005 (4th Cir. 1997) ("[T]he IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate."); Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991), withdrawn, 956 F.2d 688 (1992), reinstated in part, 967 F.2d 470 (1992) ("[T]he [IDEA's] mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom. Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education."); D. F. v. Western Sch. Corp., 921 F. Supp. 559, 571 (S.D. Ind. 1996) ("The IDEA does not require mainstreaming to the maximum extent possible or to the maximum extent conceivable. It requires mainstreaming to the maximum extent appropriate.");

Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg at 46585 ("The LRE requirements in §§ 300.114 through 300.117 express a strong preference, not a mandate, for educating children with disabilities in regular classes alongside their peers without disabilities."); and Letter to Wohle, 50 IDELR 138 (OSEP Feb. 1, 2008) ("IDEA's LRE principle expresses a strong preference, not a mandate, for educating every child with a disability in the regular educational environment.").

100. In determining whether such circumstances exist in a particular case, consideration should be given to the academic and non-academic educational effects (both positive and negative) that a mainstream placement, with appropriate supplementary aids and services,⁴⁸ will have on the child, as compared to a more restrictive placement. See Hartmann by Hartmann v. Loudoun Cnty. Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997) ("[M]ainstreaming is not required where . . . any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting"); Greer, 950 F.2d at 697 ("[T]he school district may compare the educational benefits that the handicapped child will receive in a regular classroom, supplemented by appropriate aids and services, with the benefits

he or she will receive in a self-contained special education environment. We caution, however, that 'academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself.' Accordingly, a determination by the school district that a handicapped child will make academic progress more quickly in a self-contained special education environment may not justify educating the child in that environment if the child would receive considerable non-academic benefit, such as language and role modeling, from association with his or her nonhandicapped peers. If, however, the school board determines that the handicapped child will make significantly more progress in a self-contained special education environment and that education in a regular classroom may cause the child to fall behind his or her handicapped peers who are being educated in the self-contained environment, mainstreaming may not be appropriate."); Cody H. v. Bryan Indep. Sch. Dist., Case No. H-03-5598, 2005 U.S. Dist. LEXIS 32335 *21 (S.D. Tex. June 24, 2005) ("[T]he court must evaluate Cody's 'overall educational experience in the mainstreamed environment,' and balance the benefits of the regular class setting with the special education proposed."); and 34 CFR § 300.116(d) ("In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.").

The "potential harmful effect" that the student's placement will have on other students should also be considered. See Hartmann, 118 F.3d at 1001 ("[M]ainstreaming is not required where . . . the disabled child is a disruptive force in a regular classroom setting"); Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1402 (9th Cir. 1994) ("The record supports the district court's finding that Ryan's behavioral problems interfered with the ability of other students to learn. Disruptive behavior that significantly impairs the education of other students strongly suggests a mainstream placement is no longer appropriate. While school officials have a statutory duty to ensure that disabled students receive an appropriate education, they are not required to sit on their hands when a disabled student's behavioral problems prevent both him and those around him from learning") (citation omitted); Greer, 950 F.2d at 697 ("[T]he school district may consider what effect the presence of the handicapped child in a regular classroom would have on the education of other children in that classroom. . . . The school district must balance the needs of each handicapped child against the needs of other children in the district. If the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate."); Daniel R. R., 874 F.2d at 1048-

1049 ("[T]he Act does not require regular education instructors to devote all or most of their time to one handicapped child If a regular education instructor must devote all of her time to one handicapped child, she will be acting as a special education teacher in a regular education classroom. Moreover, she will be focusing her attentions on one child to the detriment of her entire class, including, perhaps, other, equally deserving, handicapped children who also may require extra attention."); and Greenwood v. Wissahickon Sch. Dist., 571 F. Supp. 2d 654, 666 (E.D. Pa. 2008), aff'd, 374 Fed. Appx. 330, 332 (3d Cir. 2010) ("[T]he effect Angela's presence has on the other student's in the regular classroom must be considered. This factor focuses on the School District's obligation to educate all of its students and recognizes that, even if a disabled student might benefit from inclusion, she 'may be so disruptive in a regular classroom that the education of other students is significantly impaired.' Additionally, the court must consider whether . . . Angela 'will demand so much of the teacher's attention that the teacher will be required to ignore the other students.'") (citation omitted).

101. "The [IDEA's] preference for mainstreaming does not require that a [district school board] reject intermediate degrees of mainstreaming when such a placement is otherwise justified by a [disabled] child's educational needs." Lachman

v. Ill. State Bd. of Educ., 852 F.2d 290, 296 n.7 (7th Cir. 1988); see also Hartmann, 118 F.3d at 1005 ("Loudoun County properly proposed to place Mark in a partially mainstreamed program which would have addressed the academic deficiencies of his full inclusion program while permitting him to interact with nonhandicapped students to the greatest extent possible."); and Daniel R. R., 874 F.2d at 1050 ("[T]he school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops.").

102. In the end, selecting the appropriate educational placement (as part of the IEP development process) involves "balanc[ing] the goal of providing [the] disabled child with some educational benefit with the goal of providing that benefit in the least restrictive environment." O'Toole By and Through O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 223, 963 F. Supp. 1000, 1010 (D. Kan. 1997), aff'd, 144 F.3d 692, 709 (10th Cir. 1998).

103. The parents of the child must be provided a meaningful opportunity to participate in that IEP development

process. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 530 (2007) ("The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program."); and Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 274 (7th Cir. 2007) ("Throughout, the statute assures the parents an active and meaningful role in the development or modification of their child's IEP."). This requires that they be provided adequate advance notice of the meeting at which the IEP is developed. See 34 C.F.R. § 300.322; and Fla. Admin. Code R. 6A-6.03028(3)(b).

104. "The [parents'] right to provide meaningful input [in the development of the IEP, however] is simply not the right to dictate an outcome and obviously cannot be measured by such." White ex rel. White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380 (5th Cir. 2003); see also Lessard, 518 F.3d at 30 ("[P]arents cannot unilaterally dictate the content of their child's IEP."); Bradley v. Ark. Dep't of Educ., 443 F.3d 965, 975 (8th Cir. 2006) ("[T]he IDEA does not require that parental preferences be implemented, so long as the IEP is reasonably calculated to provide some educational benefit."); AW ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004) ("[T]he right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not

constitute a veto power over the IEP team's decisions."); J. C. v. New Fairfield Bd. of Educ., Case No. 3:08-cv-1591, 2011 U.S. Dist. LEXIS 34591 *48 (D. Conn. Mar. 31, 2011) ("[T]he Parents may attend and participate collaboratively, but they do not have the power to veto or dictate the terms of an IEP."); and B. B. v. Haw. Dep't of Educ., 483 F. Supp. 2d 1042, 1050-1051 (D. Haw. 2006) ("[T]he IDEA does not explicitly vest within parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement. Rather, the IDEA requires that parents be afforded an opportunity to participate in the IEP process and requires the IEP team to consider parental suggestions.") (citation omitted). "The mere fact that the [p]arents were unsuccessful [at the meeting] in securing all of their wishes . . . does not equate [to] a lack of meaningful opportunity for parental involvement." J. C., 2011 U.S. Dist. LEXIS 34591 *49; see also L.G v. Fair Lawn Bd. of Educ., Case No. 2:09-cv-6456 (DMC), 2011 U.S. Dist. LEXIS 69232 *15 (D. N.J. June 27, 2011) ("If the standard for measuring meaningful parental participation was that the parents always prevailed, there would be no process at all. The standard must be based not on the outcome, but on the extent to which the parents were allowed to advocate for their child.").

105. "[T]he IDEA does not require the [district school board] and the parents [in developing an IEP] to reach a consensus regarding the education . . . of a disabled child. Instead, if a consensus cannot be reached, the [district school board] must make a determination, and the parents' only recourse is to appeal that determination." Fitzgerald v. Fairfax Cnty. Sch. Bd., 556 F. Supp. 2d 543, 558 (E.D. Va. 2008) A district school board, though, may not predetermine the contents of an IEP in advance of the meeting of the IEP team (which must include the parents⁴⁹). See Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 857 (6th Cir. 2004) ("The evidence reveals that the School System, and its representatives, had pre-decided not to offer Zachary intensive ABA services regardless of any evidence concerning Zachary's individual needs and the effectiveness of his private program. This predetermination amounted to a procedural violation of the IDEA. Because it effectively deprived Zachary's parents of meaningful participation in the IEP process, the predetermination caused substantive harm and therefore deprived Zachary of a FAPE."); Melodee H. v. Dep't of Educ., Case No. 07-000256 HG-LEK, 2008 U.S. Dist. LEXIS 39656 *27 (D. Haw. May 13, 2008) ("Pre-determination of a child's placement is a violation of IDEA because it deprives the parents of meaningful participation in the IEP process."); and Doyle v. Arlington Cnty. Sch. Bd., 806 F. Supp. 1253, 1262 (E.D. Va.

1992) ("[I]f the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input.").

106. "[P]redetermination [however] is not synonymous with preparation. Federal law 'prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions.'" Nack ex rel. Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 (6th Cir. 2006); see also Deal, 392 F.3d at 858 ("[S]chool officials are permitted to form opinions and compile reports prior to IEP meetings . . . , however, . . . such conduct is only harmless as long as school officials are 'willing to listen to the parents.'") (citation omitted); M. M. v. New York City Dep't of Educ., Case No. 07 Civ. 2265, 2008 U.S. Dist. LEXIS 84483 *17 (S.D. N.Y. Oct. 20, 2008) ("So long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process, . . . draft IEPs are not impermissible under the IDEA."); and S. K. v. Parsippany-Troy Hills Bd. of Educ., Case No. 07-4631 (SRC), 2008 U.S. Dist. LEXIS 80616 *34 (D. N.J. Oct. 9, 2008) ("The School District's preparation of a draft IEP does

not, without more, indicate that S. K. was excluded from the process.").

107. After the student's IEP has been developed, the specific school or other physical location where the IEP is to be implemented must be chosen "based on the . . . IEP." 34 C.F.R. § 300.116(b) (2); and Fla. Admin. Code R. 6A-6.03028(3) (i)4.b.(II); see also Brad K. v. Bd. of Educ. of the City of Chicago, Case No. 10 C 0534, 2011 U.S. Dist. LEXIS 38819 *11 (N.D. Ill. Apr. 7, 2011) ("[P]lacing a student at a location where the IEP cannot be implemented would be a failure to provide adequate educational benefits."); and O. O. v. Dist. of Columbia, 573 F. Supp. 2d 41, 53 (D. D.C. 2008) ("Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP."). The site selected should be "as close as possible to the student's home," and "[u]nless the IEP . . . requires some other arrangement," should be the "school that [the student] would attend if nondisabled." 34 C.F.R. § 300.116(b) (2)-(3) and (c); and Fla. Admin. Code R. 6A-6.03028(3) (i)4.b.(III) and c. The "IDEA [however] does not require that each school building in a [school district] be able to provide all the special education and related services for all types and severities of disabilities[.] . . . If a [student]'s IEP requires services

that are not available at the school closest to the [student]'s home, the [student] may be placed in another school that can offer the services that are included in the IEP and necessary for the [student] to receive a free appropriate public education." Letter to Trigg, 50 IDELR 48 (OSEP Nov. 30, 2007); see also AW ex rel. Wilson, 372 F.3d at 682 ("To the extent § 300.552(b) [now 34 C.F.R. § 300.116(b)] states that school officials shall ensure that the placement 'is as close as possible to the child's home,' this language does not mandate that the student be assigned to the closest school, but simply to one that is as 'close as possible.'"); White, 343 F.3d at 380 ("34 C.F.R. § 300.552(b) only requires that the student be educated as close as possible to the child's home. 34 C.F.R. § 300.552(c) [now 34 C.F.R. § 300.116(c)] specifies that the child is educated in the school he would attend if not disabled unless the IEP requires some other arrangement. Here, it was not possible for Dylan to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement. Of course, as the Whites point out, neighborhood placement is not possible and the IEP requires another arrangement only because Ascension has elected to provide services at a centralized location. This is a permissible policy choice under the IDEA. Schools have significant

authority to determine the school site for providing IDEA services."); Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 (E.D. Pa. 2011) ("[T]hough educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, IDEA does not create a right for a child to be educated there."); and Lamoine Sch. Comm. v. Ms. Z., 353 F. Supp. 2d 18, 31 (D. Me. 2005) ("Although the default placement for a student under the IDEA is the local school, an IEP can override this default in situations where the student would not receive an educational benefit at the local school.").

108. While district school boards have "some flexibility in implementing IEPs," they are nonetheless "accountable for material failures and for providing the disabled child a meaningful educational benefit." Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); see also Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 (8th Cir. 2003) ("[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."). Deviations from an IEP not resulting in a deprivation of meaningful educational benefit, however, are not actionable. See Sumter Cnty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011) ("[T]he failure to perfectly

execute an IEP does not necessarily amount to the denial of a free, appropriate public education."); Melissa S. v. Sch. Dist. of Pittsburgh, 183 Fed. Appx. 184, 187 (3d Cir. 2006) ("To prevail on a claim that a school district failed to implement an IEP, a plaintiff must show that the school failed to implement substantial or significant provisions of the IEP, as opposed to a mere de minimis failure, such that the disabled child was denied a meaningful educational benefit."); D. D-S. v. Southold Union Free Sch. Dist., Case No. 09-CV-5026(JS) (WDW), 2011 U.S. Dist. LEXIS 100809 *41 (E.D. N.Y. Sept. 2, 2011) ("[T]hese minor deviations from the IEP for a three-day period did not constitute a failure to implement a substantial portion of the IEP."); and A .L. v. New York City Dep't of Educ., Case No. 10-cv-6841(BSJ), 2011 U.S. Dist. LEXIS 85995 *26 (S.D. N.Y. Aug 2, 2011) ("[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a 'material failure' to implement the IEP and therefore deny the student a FAPE.").

109. Changes to an IEP may be made "by amending the IEP rather than by redrafting the entire IEP." If the district school board and the parents agree, the changes may be made without convening an IEP team meeting 34 CFR § 300.324(a)(4) and (6); and Fla. Admin. Code R. 6A-6.03028(3)(k).

110. Under the IDEA, parents with "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" must "have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f). In Florida, by statute, a DOAH administrative law judge must conduct the "impartial due process hearing" to which a complaining parent is entitled under the IDEA. § 1003.57(1)(b).

111. Absent the district school board's consent, the administrative law judge may only consider those issues raised in the parent's due process complaint.⁵⁰ See 20 U.S.C. § 1415(f)(3)(B) ("The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise."); and 34 CFR § 300.511(d) ("The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise."); see also Pohorecki v. Anthony Wayne Local Sch. Dist., 637 F. Supp. 2d 547, 555 (N.D. Ohio 2009) ("Under the IDEA, the party filing the due process

complaint cannot raise issues outside of the complaint unless the other party agrees otherwise."); and Dep't of Educ., State of Hawaii v. D. K., Case No. 05-00560 ACK/LEK, 2006 U.S. Dist. LEXIS 37438 *13 (D. Haw. June 6, 2006) ("[T]he Court concludes that the parties are precluded from raising new issues at an administrative hearing that were not previously raised. All parties should have fair notice of the contested issues and the right to defend themselves at the hearing. In addition, a hearings officer should limit the issues he considers in reaching his determination to those that were raised prior to the hearing").

112. "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer, 546 U.S. at 62; see also Ross, 486 F.3d at 270-271 ("[T]he burden of proof in a hearing challenging an educational placement decision is on the party seeking relief."); Brown v. Bartholomew Consol. Sch. Corp., 442 F.3d 588, 594 (7th Cir. 2006) ("The Supreme Court recently has clarified that, under the IDEA, the student and the student's parents bear the burden of proof in an administrative hearing challenging a school district's IEP."); and Sebastian M. v. King Philip Reg'l Sch. Dist., Case No. 09-10565-JLT, 2011 U.S. Dist. LEXIS 35501 *32 (D. Mass. Mar. 31, 2011) ("Sebastian's parents

had the burden of proof to demonstrate that BICO was an inappropriate placement for Sebastian.").

113. The appropriateness of an IEP and a placement decision must be judged, not in hindsight, but prospectively, taking into consideration the circumstances as they existed at the time the IEP was developed and the placement decision was made. See K. E. v. Indep. Sch. Dist. No. 15, Case No. 10-2176, 2011 U.S. App. LEXIS 15902 **32-33 (8th Cir. Aug 3, 2011) ("[W]hen the District developed K. E.'s IEPs it had received contradictory information about whether K. E. suffered from bipolar disorder. The District also did not yet have the benefit of Dr. Unal's testimony from the administrative hearing concerning the severity and complexity of K.E.'s mental illness and the psychological and social work services that might be necessary for the District to monitor and address it. For those reasons, while we may agree with K. E. that additional services and adaptations may well be warranted now in light of the information that Dr. Unal has provided, it would be improper for us to judge K. E.'s IEPs in hindsight."); B. S. v. Placentia-Yorba Linda Unified Sch. Dist., 306 Fed. Appx. 397, 399 (9th Cir. 2009) ("An IEP cannot be judged in hindsight; rather, the court looks to the IEP's goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer a meaningful benefit on the

student."); Luke P., 540 F.3d at 1149 ("[B]ecause the question before us is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, our precedent instructs that 'the measure and adequacy of an IEP can only be determined as of the time it is offered to the student.'"); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 (3d Cir. 1995) ("[A]ppropriateness [of an IEP] is judged prospectively. . . ."); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990) ("[A]ctions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."); and J. R. ex rel. S. R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 (S.D. N.Y. 2004) ("[W]e turn our attention to the SRO's decision upholding the IHO's determination that the IEP at issue is 'reasonably calculated to enable [S. R.] to receive educational benefits.' This determination is necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of S. R.'s subsequent progress at Eagle Hill, but rather consider the propriety of the IEP with respect to the likelihood that it would benefit S. R. at the time it was

devised."). "Although a [district school board] can meet its statutory obligation even though its IEP proves ultimately unsuccessful, the fact that the program is unsuccessful is strong evidence that the IEP should be modified during the development of the child's next IEP. Otherwise, the new IEP would not be reasonably calculated to provide educational benefit in the face of evidence that the program has already failed." Bd. of Educ. of the Cnty. of Kanawh v. Michael M., 95 F. Supp. 2d 600, 609 n.8 (S.D. W.Va. 2000).

114. In making a determination as to the appropriateness of an IEP and a placement decision, the administrative law judge should give deference to the reasonable opinions of those witnesses who have expertise in education and related fields. See MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 532-33 (4th Cir. 2002) ("We have always been, and we should continue to be, reluctant to second-guess professional educators. . . . In refusing to credit such evidence, and in conducting its own assessment of MM's IEP, the court elevated its judgment over that of the educators designated by the IDEA to implement its mandate. The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also must give appropriate deference to the decisions of professional educators. As we have repeatedly recognized, 'the task of education belongs to the educators who

have been charged by society with that critical task"); Sch. Dist. of Wisc. Dells v. Z. S. ex rel. Littlegeorge, 295 F.3d 671, 676-77 (7th Cir. 2002) ("Administrative law judges . . . are not required to accept supinely whatever school officials testify to. But they have to give that testimony due weight. . . . The administrative law judge substituted his own opinion for that of the school administrators. He thought them mistaken, and they may have been; but they were not unreasonable."); Devine, 249 F.3d at 1292 ("[G]reat deference must be paid to the educators who develop the IEP."); Wagner v. Bd. of Educ. of Montgomery Cnty., 340 F. Supp. 2d 603, 611 (D. Md. 2004) ("[T]his court owes generous deference (as did the ALJ) to the educators on Daniel's IEP Team."); and Johnson v. Metro Davidson Sch. Sys., 108 F. Supp. 2d 906, 915 (M.D. Tenn. 2000) ("[I]f the district court is to give deference to the local school authorities on educational policy issues when it reviews the decision from an impartial due process hearing, it can only be that the ALJ presiding over such a [due process] hearing must give due weight to such policy decisions. For it to be otherwise, would be illogical; to prevent an ALJ from giving proper deference to the educational expertise of the local school authorities and then require such deference by the district court would be inefficient and thus counter to sound jurisprudence."). If the expert's opinion testimony is

unrebutted, it may not be rejected by the administrative law judge unless there is a reasonable explanation given for doing so. See Heritage Health Care Ctr. v. AG for Health Care Admin., 746 So. 2d 573, 573-74 (Fla. 1st DCA 1999); Weiderhold v. Weiderhold, 696 So. 2d 923, 924 (Fla. 4th DCA 1997); Fuentes v. Caribbean Elec., 596 So. 2d 1228, 1229 (Fla. 1st DCA 1992); and Brooks v. St. Tammany Sch. Bd., 510 So. 2d 51, 55 (La. App. 1987).

115. It is not the function of the administrative law judge, in passing upon the appropriateness of an educational program, to determine the "best methodology for educating [the] child. That is precisely the kind of issue which is properly resolved by local educators and experts" and is not subject to review in a due process hearing O'Toole By and Through O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 709 (10th Cir. 1998); see also M. M., 437 F.3d at 1102, quoting Lachman, 852 F.2d at 297 ("Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child."); Tucker By and Through Tucker v. Calloway Cnty. Bd. of Educ., 136 F.3d 495, 506 (6th Cir. 1998) ("Case law is clear that the Tuckers are not entitled to dictate educational methodology or to compel a

school district to supply a specific program for their disabled child."); Joshua A. v. Rocklin Unified Sch. Dist., Case No. CV 07-01057 LEW KJM, 2008 U.S. Dist. LEXIS 26745 *6-7 (E.D. Cal. Mar. 31, 2008) ("[A]s long as a district offers an appropriate educational program, the choice regarding the methodology used to implement the IEP is left to the district's discretion."); and Leticia H. v. Ysleta Indep. Sch. Dist., 502 F. Supp. 2d 512, 519 (W.D. Tex. 2006) ("Once a court concludes that a student's IEP is reasonably calculated to provide him with a FAPE, the court must leave 'questions of methodology' to the state.").

116. "An [administrative law judge's] determination of whether a student received FAPE must be based on substantive grounds. In matters alleging a procedural violation, an [administrative law judge] may find that a student did not receive FAPE only if the procedural inadequacies impeded the student's right to FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or caused a deprivation of educational benefit. This [does not, however] preclude an [administrative law judge] from ordering a school district to comply with the procedural safeguards set forth in Rules 6A-6.03011 through 6A-6.0361, F.A.C." Fla. Admin. Code R. 6A-6.03311(9)(v)4.; see also 34 C.F.R. § 300.513.

117. In the instant case, in their Complaint, the Parents allege that the School Board has failed to meet its obligation to provide ■ with a "free appropriate public education" (FAPE) at ■ (Denial of FAPE Claim) and that the placement decision made at the June 9, 2011, IEP meeting (and incorporated in the June 2011 Interim IEP) was made without their meaningful participaton and is violative of ■ "right to an individual education based on [■'s] unique learning needs . . . in the Least Restrictive Environment" at a "school as close as possible to [■'s] home" (Placement Claim).

118. The Complaint identifies the following purported School Board conduct as the factual bases of the Parents' Denial of FAPE Claim: the School Board's "removal" of Ms. Hart from the team of School Board personnel working with ■ (Alleged Act One); the School Board's "abruptly mov[ing]" ■ to Ms. McAteer's class six weeks before the end of the school year⁵¹ (Alleged Act Two); the School Board's "failure to provide adequate training and resources to ■" staff resulting in IEP-required "Supplementary Aids and Services" designed "to help [■] access the general curriculum "not being used consistently" (Alleged Act Three); the School Board's not providing the Parents "with Home Notes for the last several weeks of the 2010-2011 school year" (Alleged Act Four); and the School Board's "sen[ding] [■] home on at least two undocumented occasions for issues related

to [redacted]'s] disability without being offered an alternative place to do [redacted]'s] school work" (Alleged Act Five).⁵² Some of these Alleged Acts (specifically, Alleged Acts Three and Five) were not proven at the due process hearing. The remaining Alleged Acts (Alleged Acts One, Two,⁵³ and Four), neither individually nor collectively, had the effect of denying [redacted] a FAPE, a conclusion necessitated by the indisputable fact that, "since [redacted] started school at [redacted], [redacted] has made non-trivial (albeit, non-optimal) educational improvement."⁵⁴ See Lee Cnty. Sch. Bd. v. S. W., 789 So. 2d 1162, 1166 (Fla. 2d DCA 2001) ("[T]he record reveals that S.W. had significantly improved her quality of communication using augmentative communication and she also had increased her verbal output although that improvement was more limited. Indeed, in the findings of fact, the ALJ found that S. W.'s communication skills had improved and stated that 'the communication improvement must have been the result of the Cypress Lakes program.' Neither the record nor the ALJ's findings of fact support the finding that the ESE speech and language services provided to S. W. fell below the standard required to provide S. W. with a free appropriate public education where the evidence demonstrated improvement and progress, and the ALJ's findings of fact demonstrated that S.W. had derived benefit from the educational process.").

119. The Parents' Placement Claim includes both a procedural and a substantive component. Procedurally, the Parents contend that the School Board denied them the opportunity to meaningfully participate in the decision made at the June 9, 2011, IEP meeting regarding █████ placement. The record evidence, however, does not support this contention. Rather, the evidence affirmatively establishes that, at this lengthy IEP meeting, the Parents and their advocate, Ms. Hoagland, were able to explain their position on █████ placement and the School Board representatives at the meeting listened to what they had to say with an open mind (notwithstanding that, in the end, these representatives did not agree with the Parents that █████ should remain in a general education classroom at █████⁵⁵). E.G., M. C. E. v. Bd. of Educ. of Frederick Cnty., Case No. RDB-09-3365, 2011 U.S. Dist. LEXIS 74266 **25-26 (D. Md. July 11, 2011) ("There was credible evidence before the ALJ that the school board came to the IEP meetings with an open mind, and that M. C. E.'s parents and representatives were given an opportunity to provide meaningful input as to her placement. Though the school board may have come to the meeting with the idea that the Pyramid Program was the best place for M.C.E., that is not a violation of IDEA.").

120. The Parents' substantive challenge to the self-contained autism cluster classroom placement proposed in the

June 2011 Interim IEP also lacks sufficient record evidentiary support. Evaluating, in light of the legal principles set forth above in these Conclusions of Law, the record evidence in the instant case (including the evidence concerning [REDACTED] unique needs and the learning environment in which they can best be met, as well as the evidence concerning the education-impairing disruptions [REDACTED] caused in the general education classroom at [REDACTED] despite having been provided a host of supplementary aids and services), it cannot be said that the Parents have proven that this proposed placement (which provides for considerable mainstreaming opportunities, with its 59.44%/40.56% "Removed"/"Not Removed" ratio) is not reasonably calculated to provide**FAPE in the LRE.

121. The June 2011 Interim IEP does not specify a school location where it will implemented. Although Park Springs has been mentioned by the School Board as a possible location, no final decision has yet been made. Unless the parties agree on another arrangement, the autism cluster school selected for [REDACTED] must be "as close as possible to [REDACTED]'s] home." 34 C.F.R. § 300.116(b) (3); and Fla. Admin. Code R. 6A-6.03028(3) (i)4.b.(III).

122. In view of the foregoing, the Parents' Denial of FAPE Claim and their Placement Claim fail and are therefore rejected. Accordingly, no relief can be awarded.

DONE AND ORDERED this 17th day of October, 2011, in
Tallahassee, Leon County, Florida.

S

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of October, 2011.

ENDNOTES

¹ Unless otherwise noted, all references in this Final Order to Florida Statutes are to Florida Statutes (2011).

² Paragraph 7 of the Order of Pre-Hearing Instructions (which the undersigned had issued on June 22, 2011) provided as follows:

The parties are hereby notified that any request for extension of time shall be deemed to seek, and if granted shall effect, a like extension of the final order deadline.

³ The undersigned has accepted these factual stipulations and incorporated them in this Final Order. See Columbia Bank for Coops. v. Okeelanta Sugar Coop., 52 So. 2d 670, 673 (Fla. 1951) ("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation."); Schrimsher v. Sch. Bd. of Palm Beach Cnty., 694 So. 2d 856, 863 (Fla. 4th DCA 1997) ("The hearing officer is bound by the parties' stipulations."); and Palm Beach

Cnty. Coll. v. Dep't of Admin., Div. of Ret., 579 So. 2d 300, 302 (Fla. 4th DCA 1991) ("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

⁴ Although Tamarac is ■'s "home school," Riverside Elementary School is actually located closer to ■'s residence.

⁵ Parkside is the closest elementary school to ■'s residence that has an autism cluster program.

⁶ Except for the last few months of second grade (April 2010 to June 2010) when ■ was at Parkside and ■ was at Maplewood, the twin siblings have attended the same schools. In third grade, ■ and ■ were in different classes (which followed essentially the same curriculum).

⁷ CARD personnel have visited Maplewood monthly during the time ■ has been going to school there.

⁸ ■ had such a negative experience at Parkside that the School Board will not even consider returning ■ there.

⁹ The School Board did not promise the Parents, as an inducement to execute the Resolution Agreement, that ■ would remain at ■ for the remainder of ■'s elementary school years. (Even if such a promise had been made, it would not be enforceable in a due process proceeding. See H. C. v. Colton-Pierrepont Cent. Sch. Dist., 341 Fed. Appx. 687, 690 (2d Cir. 2009) ("[A] due process hearing before an IHO was not the proper vehicle to enforce the settlement agreement."); D. B. A. v. Special Sch. Dist. No. 1, Case No. 10-1045 (PAM/FLN), 2010 U.S. Dist. LEXIS 134525 *9 (D. Minn. Dec. 16, 2010) ("It is certainly true that a Hearing Officer has no authority to enforce settlement agreements."); 20 U.S.C. § 1415(f)(1)(B)(iii)(II) ("In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is . . . enforceable in any State court of competent jurisdiction or in a district court of the United States.").

¹⁰ Throughout the school year, ■ kept a visual schedule (made using Velcro) on [■'s] desk and took it wherever ■ went. There was also a "First/Then" visual chart prepared for ■ that

was designed to help ■ transition through the school day from one activity/location to another with minimal upset.

¹¹ Accordingly, from the beginning to the end of the 2010-2011 school year, there was "a Behavior Technician . . . assigned to be with ■ throughout the school day," as required by paragraph 6. of the Resolution Agreement.

¹² Mr. James does not have a Florida teaching certificate, but he does have a bachelor's degree in psychology/elementary education, with a minor in reading.

¹³ When Ms. Lentz worked with ■ in the general education classroom, ■ was very distracted, much more so than when G. was alone with Ms. Lentz in Ms. Lentz's classroom where G. was better able to focus and complete academic work.

¹⁴ Ms. Lentz had a special relationship with G. that enabled her to redirect ■ when others could not (although even Ms. Lentz, at times, was unsuccessful).

¹⁵ Interventions to control ■'s disruptive behavior were tried, unsuccessfully, before ■ was removed from the general education classroom and brought into Ms. Lentz's classroom.

¹⁶ ■ remained in Ms. Lentz's classroom only as long as it was necessary to get ■ to regain ■'s focus and composure, at which time Ms. Lentz returned with ■ to the general education classroom.

¹⁷ ■ was doing so well in October 2010 that Ms. Bees invited Ms. Starke to come to ■ to see for herself the progress ■ had made. (Ms. Starke, however, did not visit the school to observe ■ until January 2011.)

¹⁸ ■'s physical aggression was directed primarily at the adults with whom ■ worked, although on rare occasion ■ would hit, or pull the hair of, a fellow student (usually a playmate). (■ made friends with a group of girls in her class with whom ■ played during recess.)

¹⁹ There were occasions that, even when ■ was in Ms. Lentz's classroom, ■ screamed loudly enough to be heard by the students in Ms. Forney's classroom and to interfere with their learning.

²⁰ ■ had medication-related and other health issues during the school year that may have at times exacerbated her behavioral problems.

²¹ The four "Mastered" goals were in the domains of Curriculum and Instruction (two) and Communication (two).

²² This "adult" was usually Mr. James.

²³ This was a "Supplementary Aid" that was not originally included in the aforementioned May 2010 IEP, but had been added to that IEP by amendment on March 4, 2011. It was then carried over into the April 2011 IEP.

Another amendment had been made on March 4, 2011, to the May 2010 IEP: the "Related Service" of "Family Counseling," one time a week for a total of 30 minutes, on the "General Education Campus," had been changed to "Counseling Services, "Consult/Collaborate," two times a month, on the "General Education Campus." At the due process hearing, the Parents advised that they were not alleging in this proceeding that any violation was committed in connection with this IEP amendment.

²⁴ The intent was for ■ to continue to receive this "social skills [training] and academic reinforcement" in Ms. Lentz's classroom.

²⁵ In their Proposed Final Order, the Parents allege that the "daily removals [from the general education classroom to Ms. Lentz's classroom] constitute[d] a change in [p]lacement." This issue, however, was not raised in their Complaint, and therefore it will not be addressed in this Final Order.

²⁶ FCAT testing was being conducted at Maplewood the week of this meeting and therefore the students (including ■) were not following their regular schedules that week.

²⁷ Social stories on other topics were reviewed with ■ during the school year by Maplewood staff to help ■ feel more comfortable in the school setting.

²⁸ Ms. Forney continued to tutor ■ on Mondays after school, however.

²⁹ Mr. James also interacted with Mrs. ■ on a daily basis throughout the school year. This daily interaction occurred in

the morning when he escorted G. from the car drop off area to the classroom.

³⁰ Much of whatever academic success ■ has achieved at Maplewood can be attributed to the one-on-one instruction ■ has received in Ms. Lentz's classroom.

³¹ The parties so stipulated in their Joint Written Statement of Undisputed Facts, filed August 3, 2011. It therefore appears that it is undisputed that G. has at least received some meaningful educational benefit during the time she has been at Maplewood.

³² The record evidence does not reveal any specific untried intervention that, if it had been employed by the School Board, would have resulted in ■'s classroom behavior not having been the significant problem it was.

³³ This "ongoing communication" with Dr. Parker was in compliance with paragraph 3. of the Resolution Agreement.

³⁴ Ms. Miscio and Ms. Tyman were the School Board employees who had initialed and dated the Cluster Form indicating that the checklist items had been reviewed.

³⁵ The Florida Diagnostic Learning Resource System is part of the School Board's Exceptional Student Education Department.

³⁶ Less than a week before the meeting, Ms. Hoagland had conducted an observation of ■ at Maplewood about which she spoke (among other things) at the meeting.

³⁷ Concerning ■'s experience at Parkside, the school to which the Parents were referring, it is worth noting that ■ was in a self-contained autism cluster classroom only for ■'s first year at the school. The rest of ■'s time there, ■ was in a general education classroom setting.

³⁸ In fact, financial considerations did not play a role in the determination to propose this change in placement.

³⁹ Chapters 1000 through 1013, Florida Statutes, are known as the "Florida K-20 Education Code." § 1000.01(1), Fla. Stat.

⁴⁰ Students with "autism spectrum disorder" are described in the "rules of the State Board of Education" as follows:

Definition. Students with Autism Spectrum Disorder. Autism Spectrum Disorder is defined to be a range of pervasive developmental disorders that adversely affects a student's functioning and results in the need for specially designed instruction and related services. Autism Spectrum Disorder is characterized by an uneven developmental profile and a pattern of qualitative impairments in social interaction, communication, and the presence of restricted repetitive, and/or stereotyped patterns of behavior, interests, or activities. These characteristics may manifest in a variety of combinations and range from mild to severe. Autism Spectrum Disorder may include Autistic Disorder, Pervasive Developmental Disorder Not Otherwise Specified, Asperger's Disorder, or other related pervasive developmental disorders.

Fla. Admin Code R. 6A-6.03023(1); see also 34 C.F.R. § 300.8(c)(1)(i) ("Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.").

⁴¹ According to Florida Administrative Code Rule 6A-6.030121(1), "[l]anguage impairments are disorders of language that interfere with communication, adversely affect performance and/or functioning in the student's typical learning environment, and result in the need for exceptional student education."

⁴² "An exceptional student whose physical motor or neurological deficits result in significant dysfunction in daily living skills, academic learning skills or adaptive social or emotional behaviors is eligible to receive occupational therapy." Fla. Admin. Code R. 6A-6.03025(1).

⁴³ "The IDEA was [most] recently amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-

446, 118 Stat. 2647 (2004)," effective July 1, 2005. M. T. V. v. Dekalb Cnty. Sch. Dist., 446 F.3d 1153, 1157 n.2 (11th Cir. 2006); see also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 21 n.1 (1st Cir. 2008) ("The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, but the relevant amendments did not take effect until July 1, 2005.").

⁴⁴ In section 1003.571, Florida Statutes, which took effect on July 1, 2009, the Florida Legislature directed that:

(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.

Florida Administrative Code Rule 6A-6.03028, a State Board of Education rule that was most recently amended effective December 15, 2009, "incorporates [the IDEA's FAPE requirement] by reference." It provides, in pertinent part, as follows:

(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,

⁴⁵ Long after it was first articulated by the United States Supreme Court, "the Rowley definition of free appropriate public education (FAPE) still survives." Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6, 538 F. Supp. 2d 298, 301 (D. Me. 2008); see also J. L. v. Mercer Island Sch. Dist., 575 F.3d 1025, 1037-38 (9th Cir. 2009) ("We hold that the district court erred in declaring Rowley superseded. The proper standard to determine whether a disabled child has received a free appropriate public education is the 'educational benefit' standard set forth by the Supreme Court in Rowley. Our holding is necessary to avoid the conclusion that Congress abrogated sub silentio the Supreme Court's decision in Rowley."); Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 n.5 (10th Cir. 2008) ("Rowley involved an analysis of IDEA's statutory precursor, the Education of the Handicapped Act, but the same textual language has survived to today's version of IDEA. Compare Rowley, 458 U.S. at 187-89 (quoting EHA definitions) with 20 U.S.C. § 1401(9), (26), (29) (current IDEA definitions). Indeed, the Supreme Court has recently cited approvingly Rowley's discussion of the meaning of FAPE in Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2000-01, 167 L. Ed. 2d 904 (2007)."); K. M. v. Tustin Unified Sch. Dist., Case No. SACV 10-1011 DOC (MLGx), 2011 U.S. Dist. LEXIS 71850 *19 (C.D. Cal. July 5, 2011) ("[T]he standards set out in Rowley still control."); and Anne D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 816 n.6 (N.D. Ill. 2009) ("Plaintiffs' contention that Rowley is no longer the governing standard, and that the IDEA requires the District to maximize Sarah's potential to read, is incorrect.").

⁴⁶ "One-to-one instruction is clearly more restrictive than instruction in a [setting] where other peers are present."

Grant v. Indep. Sch. Dist. No. 11, Case No. 02-795, 2005 U.S. Dist. LEXIS 13073 *29 (D. Minn. June 30, 2005).

⁴⁷ The "regular educational environment encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate." Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46585.

⁴⁸ "A child with a disability [should] not [be] removed from education in age-appropriate regular classrooms [merely] because of needed modifications in the general education curriculum." 34 CFR § 300.116(e). A district school board, however, need not "modify the regular education program beyond recognition." Daniel R. R. v. State Bd. of Educ., 874 F.2d 1036, 1048-1049 (5th Cir. 1989) ("[M]ainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student."); see also D. F., 921 F. Supp. at 569 ("[G]iven the evidence D. F.'s disabilities, the hearing officer was correct in finding that the regular classroom curriculum would have to be adapted beyond recognition to fit D. F.'s needs. Such efforts are not required in the name of mainstreaming.").

⁴⁹ See Schaffer v. Weast, 546 U.S. 49, 53 (2005) ("Parents are included as members of 'IEP teams.' § 1414(d)(1)(B).").

⁵⁰ Consistent with this limitation on the undersigned's authority, issues raised in the Parents' Proposed Final Order, but not in the Complaint, will not be addressed in this Final Order.

⁵¹ The Complaint alleged that this move was made "in an effort to collect data on [redacted] in an attempt to support [the School Board's] efforts to remove [redacted] from the General Education classroom and move [redacted] to a Cluster classroom in an Autism Cluster School."

⁵² The Parents, in their Complaint, also complained about the School Board's March 4, 2011, amendment of [redacted]'s IEP, but, at the

due process hearing, they announced that they were abandoning this claim.

⁵³ The record evidence establishes that the School Board moved ■ to Ms. McAteer's class six weeks before the end of the school year (as alleged by the Parents in their Complaint), but not for any reason other than to help ■ succeed.

⁵⁴ In their Complaint, the Parents themselves acknowledged having stated at the June 9, 2011, IEP meeting that ■ "had learned more in one year at Maplewood Elementary than she had in the previous four years."

⁵⁵ The School Board representatives at the meeting, while not agreeing to the general education classroom placement urged by the Parents, did determine, after considering the Parents' input at the meeting, that ■ should spend more time during the school day with non-disabled peers than these representatives, going into the meeting, had originally believed would be appropriate.

COPIES FURNISHED:

Lindsey Granger, Program Director
Bureau of Exceptional Education and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Susan Wallitsch, Qualified Representative
c/o Mr. and Mrs. ■
(Address of record)

Mr. and Mrs.**
(Address of record)

Barbara J. Myrick, Esquire
Office of the School Board Attorney
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

Robert W. Runcie, Superintendent
Broward County School District
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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, 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).