

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████,)
)
Petitioner,)
)
vs.) Case No. 10-1242E
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Administrative Law Judge, John D. C. Newton, II, of the Division of Administrative Hearings, heard this case, as noticed, on June 7, 2010, through June 10, 2010, at the Miami-Dade Courthouse.

APPEARANCES

For Petitioner: Mark Kamleiter, Esquire
2509 First Avenue South
St. Petersburg, Florida 33712

For Respondent: Mary C. Lawson, Esquire
The School Board of Miami-Dade County
1450 Northeast Second Avenue, Suite 400
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STATEMENT OF THE ISSUES¹

The parties presented the issues A through E described below. Issues A, B, C, and D all are components of one overriding question: Is the School Board of Miami-Dade County required to reimburse ██████'s parents the costs of placement of

█████ in private school. Answering that question requires determining if the School Board of Miami-Dade County made a Free and Appropriate Public Education (FAPE) available to █████ and if █████'s parents provided sufficient notice of their intent to enroll █████ in private school.

Issue E presents a simple procedural question of what issues the Amended Request for Due Process raised.

The issues the parties presented are:

A. Did Respondent, Miami-Dade County School Board (School District), violate █████'s procedural safeguard rights when it assigned █████ to █████ Center?

B. Did the School District appropriately implement the Individual Education Plan (IEP) for Petitioner, █████ dated September 10 and 15, 2009, to provide █████ with a FAPE?

C. Were the placement on █████'s IEP dated December 2 and 3, 2009, and assignment to █████ reasonably calculated to provide █████ with a FAPE?

D. Did █████'s parents provide at least ten days' written notice prior to removing █████ from public school and enrolling █████ in private school as contemplated in Title 34 Code of Federal Regulations Section 300.148(d) and Florida Administrative Code Rule 6A-6.03311(8) (d)?

E. Did [REDACTED]'s Amended Request for Due Process present the issue of whether the IEP dated September 10 and 15, 2009, was reasonably calculated to provide [REDACTED] with a FAPE?

PRELIMINARY STATEMENT

On March 11, 2010, [REDACTED] sent the School Board a Request for Due Process hearing. The School Board referred the request to the Division of Administrative Hearings (DOAH) to conduct the final hearing. On March 17, 2010, the undersigned scheduled the hearing for May 11, 2010, through May 14, 2010. The School Board filed a Response and Notice of Insufficiency, or in the Alternative, Request for Judge to Define Issues for Hearing.

By Order dated March 24, 2010, the undersigned determined that the Due Process hearing request was insufficient and canceled the hearing. The Order granted [REDACTED] 15 days to file an Amended Request for Due Process.

[REDACTED] filed an Amended Request for Due Process Hearing on April 6, 2010. The Board filed a Response to Amended Request for Due Process Hearing. On April 19, 2010, DOAH issued a second Notice of Hearing, setting the Due Process Hearing for June 7, 2010, through June 10, 2010. The parties filed a Joint Written Pre-hearing Statement. Administrative Law Judge John D. C. Newton, II, conducted the hearing as noticed.

[REDACTED] called the following witnesses: (1) [REDACTED], mother of [REDACTED]; (2) Anita Pensanka, Miami- Dade County Public School

System (M-DCPS) Physical Therapist, ██████ Elementary School;
(3) Cynthia Magnus, M-DCPS Curriculum Support, Florida
Diagnostic Learning and Resource Center; (4) Ira Gardner, M-DCPS
Physical Education Teacher, ██████ Center; (5)
Dr. Richard Sasseville, M-DCPS Psychologist; (6) Deborah
Knox; (7) Michele Carol; and (8) Dr. Robert Fifer.

█████ introduced the following exhibits: A (pp. 1-16, 17-
31), B (pp. 32-35, 45-48), D (pp. 75-103, 104-125, 144-164,
65-176), G (pp. 478-481), K (pp. 500-512), L (pp. 521, 526),
M (p. 534), P (pp. 554, 556, 557, 558), Q (pp. 568-572, 573-576),
R (pp. 584-592), T (pp. 647-648, 745, 746, 839-841, 841),
W (pp. 999-1001, 1012-1043, 1044-1047), and Y (p. 569).

The School Board called the following witnesses: (1)
Angeles Fleites, M-DCPS Principal, ██████ Center, (2) Rebecca
Watkins, M-DCPS ESE Staffing Specialist; (3) Luisa Rodriguez, M-
DCPS Special Education Teacher, Expert in Sign Language; (4)
Ryan VanDusen, M-DCPS Physical Therapist, ██████ (5)
Lorienne Watson, M-DCPS Occupational Therapist, ██████ (6)
Patricia Ramirez, M-DCPS Staffing Specialist; (7) Will Gordillo,
M-DCPS Administrative Director, Division of Special Education;
and (8) Dr. Ann Marie Sasseville, M-DCPS Instructional
Supervisor for Special Education Programs/Expert in Education of
Children with Developmental Disabilities.

The School Board introduced the following exhibits: 1B (20-46), 1B (53-60), 1C (47-52), 1A (1-19), 8 (113-181), 2C (72-91), Pet. P (554), and Pet. L (521).

On June 11, 2010, an Order Establishing Post-Hearing Procedures and Proposed Order Requirements that reiterated deadlines and requirements announced at the conclusion of the hearing was entered. The Order required the parties to file proposed final orders by June 21, 2010. A subsequent Order changed the due date of the proposed final orders to June 18, 2010.

The School District requested an extension of time in order to obtain transcripts of the hearing. A specific extension of time for filing proposed orders and concluding the proceeding was granted.

Due to delays in obtaining the transcript, the School District requested another extension of time. After a telephone conference on the subject on June 29, 2010, during which the parties agreed to an extension, an Order Granting Second Specific Extension of Time and Establishing Amended Date for Submitting Proposed Orders was entered. The Order permitted the parties to file proposed final orders 21 days after filing of the final transcript volume and provided that the final order would issue 42 days after filing of the last transcript. The

final transcript volume was filed July 26, 2010. The parties timely filed Proposed Orders.

The parties identified a claim under Title 29 United States Code Section 794 (Rehabilitation Act of 1972, § 504) for denial of school aftercare on account of a disability as an issue in this proceeding. They presented evidence on the subject. They proposed Findings of Fact and Conclusions of Law on the claim. On September 7, 2010, the undersigned conducted a telephone conference with counsel for the parties to advise them that the Division of Administrative Hearings did not have jurisdiction over the 504 claim as it had been submitted and that the Final Order would not contain Findings of Fact or Conclusions of Law on the subject. At the parties' request, on September 7, 2010, the undersigned issued an Order of Specific Extension of Time. That Order extended the time for resolution of this matter until September 14, 2010, in order to provide the parties time to present a claim under Title 29 United States Code Section 794 (Rehabilitation Act of 1973, § 504) for consolidation with this matter and resolution on the record of this proceeding. That claim is the subject of a separate Recommended Order.

FINDINGS OF FACT

Background

1. [REDACTED] was born on [REDACTED]. While [REDACTED]'s birth mother was pregnant with [REDACTED], she was repeatedly physically abused. The abuse included kicking her in the stomach.

2. Soon after birth [REDACTED] entered foster care. [REDACTED] and her husband adopted [REDACTED] from foster care when [REDACTED] was three years old. At that time [REDACTED] could not walk or speak. [REDACTED] and her husband are loving and committed parents. They have cared for [REDACTED] and sought help for [REDACTED].

3. [REDACTED] has consistently displayed several behaviors that affect others, including classmates, and require the services of classroom personnel. Although [REDACTED]'s mother describes the behaviors as cyclical, they persist and affect how, where, and with whom it is appropriate to educate [REDACTED]. They include disrobing, physical outbursts, great difficulty with transitions, and vocal outbursts. [REDACTED] is also very hard of hearing and has great difficulty speaking.

4. [REDACTED] has a prescription for a drug, Foccolin, which helps [REDACTED] focus and calm down. [REDACTED]'s mother provides it to [REDACTED] on and off as she thinks it is needed.

5. [REDACTED]'s mother, [REDACTED] took American Sign Language (ASL) classes and began teaching [REDACTED] a few signs she had learned.

████ and █████ also developed family signs and learned a few English signs.

6. Later removal of ASL from █████'s Individual Education Plan (IEP) became a prime motivating factor in █████'s decision to enroll █████ in private school.

7. █████'s parents enrolled █████ in the School District's educational system. While █████ was enrolled in the School District schools, █████, the mother of █████, was the sole contact with the School District about █████'s education. She is also the parent who requested the hearing and testified.

8. █████ is an informed, engaged, and effective parent advocate. █████ is well versed in the various requirements of state law and the IDEA. In her dealings with the School District █████ also has had the substantial assistance of a professional advocate.

9. In the School District, █████ came into the care of numerous qualified, caring and responsive professionals, both teachers and administrators. Throughout █████'s time as a student in the School District, the District has committed considerable effort, attention, thought, time, personnel, and resources to providing █████ a FAPE.

10. The School District determined █████ eligible for Exceptional Student Education (ESE) programs in the following areas: Intellectual Disabilities (InD), Autism Spectrum

Disorder (ASD), Deaf or Hard of Hearing (DHH), Language Impaired, Speech Impaired, and Other Health Impaired (OHI).

11. [REDACTED] functions at the "participatory" level. This is the lowest level of the Florida Sunshine State standards.

12. [REDACTED] also requires maximum prompting and maximum repetition to acquire new skills. [REDACTED] needs the grade-level curriculum to be modified. This means that [REDACTED] learns limited concepts, in very small steps, with a lot of repetition. [REDACTED] is unlikely to be able to learn to read.

[REDACTED] Elementary

13. [REDACTED] first enrolled in [REDACTED] Elementary School. With [REDACTED]'s agreement, the School District transferred [REDACTED] to [REDACTED] Elementary school to participate in an experimental elementary classroom program taught by Lisa Rodriguez.

14. Lisa Rodriguez was eminently qualified. Her qualifications include a bachelor's degree in Special Education, a master's degree in Pre-K and Primary Education, and certification as an ESE teacher, with a specialization in Autism. She is also fluent in ASL and English Based sign language. Ms. Rodriguez has been signing for 23 years. Until this year, she was a state-certified sign language interpreter. She is skilled in teaching special education and DHH students.

15. The [REDACTED] classroom included a "ball pit," a bicycle, a trampoline, working baskets, and other aids for [REDACTED] These

items helped provide [REDACTED] sensory input, which calmed [REDACTED]'s many outbursts. The items also helped with locomotion, and helped organize [REDACTED]'s learning. At the time they were appropriate for [REDACTED]'s age and development level.

16. [REDACTED]'s parents were happy with the program at [REDACTED]. [REDACTED] thought Ms. Rodriguez was an excellent and committed teacher.

Reassignment to [REDACTED] [REDACTED] [REDACTED] Center and Implementation of the September 2009 IEP

17. In the summer of 2009, the School District decided to close the experimental classroom at [REDACTED]. In late July or early August, School District officials informed [REDACTED] of the decision. The School District proposed assigning [REDACTED] to a separate DHH class at [REDACTED] [REDACTED] [REDACTED] Center ([REDACTED]). Ms. Rodriguez was establishing this class.

18. School District representatives discussed the proposal with [REDACTED]. They also offered the alternative of assignment to a separate DHH class setting in [REDACTED] [REDACTED]. [REDACTED] was happy that Ms. Rodriguez could continue as [REDACTED]'s teacher and approved of the move to [REDACTED] [REDACTED]. She agreed to the move, before receiving the official notification letter. On August 11, 2009, the School District mailed [REDACTED] a letter officially advising of the change in school assignment.

19. When [REDACTED] moved to [REDACTED] [REDACTED]'s IEP did not change immediately. The change in schools was not a change in placement. [REDACTED]'s placement remained a separate class room. The IEP in effect at [REDACTED] remained in effect at [REDACTED] [REDACTED] until September 2009.

20. [REDACTED] was, however, apprehensive about the change. She communicated regularly with Ms. Rodriguez, the school administration, and the district administration. Although [REDACTED] was getting older, [REDACTED] wanted [REDACTED] to remain in an elementary school.

21. She expressed concerns about equipment. So shortly after school started, the [REDACTED] Principal moved [REDACTED]'s class to a larger room to enable Ms. Rodriguez to add equipment for [REDACTED]

22. In September 2009, the School District conducted two IEP review meetings on September 10 and 15, 2009. [REDACTED] and her professional advocate participated. The School District adopted a revised IEP for [REDACTED]

23. Among other things the IEP provided for visual aids, a voice output device, occupational therapy, physical therapy, nursing services, respiratory therapy services, paraprofessional assistance in all classes, itinerant DHH consultant services for all classes, ESE teacher in all classes, and ESE instruction in all subjects except for physical education. It also provided

for specialized instruction in functional academics, communication skills, social skills, fine and gross motor skills, and self-help skills. The IEP established a spectrum of specialized service providers for [REDACTED]. They were a general education teacher, ESE teacher, Speech/Language Pathologist, Physical Therapist, Occupational Therapist, Nurse, and Paraprofessional. [REDACTED]'s classroom remained a "separate class," with 0-40 percent of the time with non-disabled peers, as it was at [REDACTED].

24. The September 2009 IEP included a specific assignment to [REDACTED]. [REDACTED] implemented the September IEP with Ms. Rodriguez as [REDACTED]'s classroom teacher.

25. [REDACTED] provided sufficient equipment to meet [REDACTED]'s needs and fulfill the requirement of [REDACTED] IEP. The occupational therapists and physical therapists from [REDACTED] and [REDACTED] collaborated with Ms. Rodriguez to determine what equipment [REDACTED] needed for sensory breaks. The [REDACTED] equipment was more age-appropriate for [REDACTED] than some of the equipment at [REDACTED]. This was an important factor for [REDACTED] to mature as [REDACTED] aged with the accompanying physical and emotional changes. These items were a mat, wedges, scooter boards, and bolsters. The classroom provided those items. Ms. Rodriguez knew [REDACTED] very well after teaching [REDACTED] over two years, and she had sufficient materials

at her disposal to teach [REDACTED] effectively in compliance with the IEP.

26. The student-to-adult ratio in the classroom at [REDACTED] (4-5 students) was similar to the ratio at [REDACTED] (3-4 students). The students in the classroom at [REDACTED] were functioning at various levels. All were below grade level except one. Some of the students in the class at [REDACTED] were DHH students just as some of the students in the classroom at [REDACTED] had been.

27. Ms. Rodriguez was well aware of [REDACTED]'s equipment needs. She made sure that the class had and instructors used appropriate equipment. For instance, Ms. Rodriguez created work baskets for [REDACTED] the first week of school because the baskets [REDACTED] had been using at [REDACTED] had not yet been moved. The baskets she created served the same task transition function as the baskets she had created for [REDACTED] at [REDACTED]. Also, [REDACTED] had a voice output device in the [REDACTED] class although it did not arrive at the start of the school year. The device was not the one [REDACTED] had used at [REDACTED]. But the IEP does not specify a certain device. And [REDACTED] did not like using the device at [REDACTED] or at [REDACTED]

28. As she had at [REDACTED] and consistent with the IEP, Ms. Rodriguez used "total communication" with [REDACTED] at [REDACTED]

This means she communicated by signing and speaking simultaneously.

29. Ms. Rodriguez helped [REDACTED] identify letters throughout the classroom. In order to help [REDACTED] express needs and wants, Ms. Rodriguez used a set of flash cards that introduced [REDACTED] to vocabulary representing foods, shapes, and animals among other objects.

30. Instructors Mr. VanDusen and Ms. Watson also fulfilled the IEP, while working with Ms. Rodriguez, to achieve the goals of walking safely and tracing strokes using different forms of media. The staff implemented [REDACTED]'s Behavioral Intervention Plan. Collectively they provided all of the related and supplemental services delineated on [REDACTED]'s IEP. They included paraprofessional assistance, physical therapy, occupational therapy, speech-language therapy, consultation/collaboration, as well as implementation of accommodations, curriculum modifications, Individual Student Planning, district-level autism support, district level curriculum support, assistive technology, and nursing services.

31. Ms. Rodriguez utilized materials effectively for [REDACTED]. She used differentiated instruction modified specifically for [REDACTED]. She also used learning centers in the classroom. Ms. Magnus, an expert in instructional development for students with learning disabilities and mental health conditions,

consulted with Ms. Rodriguez to enhance the techniques.

Ms. Magnus provided support by making the learning centers more defined and visible.

32. Although Ms. Rodriguez noted once on a home communication log that it was "hard to get [] to work," she was able to teach []. Numerous home communication logs indicate that [] participated in classroom activities, including using []'s Occupational Therapy equipment, Physical Therapy equipment, dancing, and taking interest in a friend.

33. [] received educational benefit during []'s assignment to []. [] was able to follow the classroom routines and schedule. [] made some progress on several goals. For example, [] greeted []'s peers, was exposed to letters of the alphabet, used manipulatives to learn counting, received direct instruction on social skills, and developed the ability to express need or want for water and juice. [] was also able to alert Ms. Rodriguez when [] needed to use the bathroom. [] made improvements in transitioning from one activity to another and made the letter "A" while tracing strokes in shaving cream.

34. [] navigated the classroom and school campus with the teacher and Mr. Van Dusen. [] gained social skills by interacting with students in Mr. Gardner's physical education class. Overall, [] gained more confidence.

35. The School District fully implemented ██████'s September 2009 IEP at ██████. The school also implemented ██████'s BIP. The School District provided ██████ a FAPE at ██████ under the September 2009 IEP.

December 2009 IEP

36. On December 2, 2009, the School District convened an IEP team of over 12 people with broad range of areas of expertise to for the annual review of ██████'s IEP. The IEP team reviewed educational services and to considered the continued need for the present placement and school assignment. The School District ensured ample opportunity for input by ██████'s parents. ██████, her attorney, and her advocate all participated.

37. The IEP team conducted a thorough review of ██████'s levels of performance ██████ progress to that time, ██████ multiple disabilities, the effect of those disabilities, the range of alternative resources available, ██████'s increasing medical problems, including development of a swallowing disorder, and ██████ behavior issues.

38. Ms. Rodriguez was a member of the IEP team. Based upon experience implementing the IEP, working daily with ██████ and her considerable expertise, Ms. Rodriguez had concluded that the September 2009 IEP goals should be revised. Ms. Rodriguez recommended rewriting ██████'s goals to make them more realistic

and to allow [REDACTED] a genuine opportunity to succeed in achieving them. The team agreed.

39. The IEP team reviewed the supplementary aids and services that [REDACTED] needs. It considered the fact that [REDACTED]'s need for sensory input to calm [REDACTED] was increasing. [REDACTED] was not shifting into more developmentally or age-appropriate kinds of activities. This is one of the many reasons that the IEP team concluded that placement in a program at [REDACTED] was appropriate. It was a small campus with a sensory room and a full inventory of sensory equipment available for regular access. It also had a pool, nursing services, and staff trained in the total communication approach. The student population consisted of students with low developmental levels like [REDACTED] and a curriculum that was appropriate for [REDACTED]

40. The team correctly concluded that [REDACTED] did not require instruction in ASL to receive a FAPE. [REDACTED]'s IEPs had required ASL instruction. But the requirement grew from some misunderstanding of sign languages and the serendipitous availability of Ms. Rodriguez at [REDACTED]. In addition, several years with ASL instruction had not proved effective.

41. [REDACTED] used only about 15-20 approximated signs spontaneously after two and a half years of being with a teacher who is fluent in ASL and used it whenever communicating with [REDACTED]. This means that [REDACTED] had acquired only five signs, since

█ had started with Ms. Rodriguez using approximately 10-15 approximated signs spontaneously. Additionally, █ had only a total of 40-65 approximated signs that could match or repeat at the end of the two and a half year period.

42. █ was not learning language at a rate sufficient to require placement with a teacher who is fluent in ASL. █ was not close to conversational sign after two and a half years of immersion.

43. █ disagreed with revising the ASL requirement.

44. There are several sign languages in use in the United States. Two are English based sign languages. American Sign Language is another.

45. In all sign languages facial expressions and gestures are used to communicate instead of sounds. In English based sign languages, the grammar, syntax, sentence organization, and other elements of the language are the same as spoken English. For instance the subject - verb sequence in "Jane went fishing" would be the same whether the sentence was communicated by spoken or signed English.

46. In contrast, the grammar, syntax, sentence organization, and basic structure of ASL are different from spoken and signed English. ASL is a separate and complicated language, more complicated than English. It has its own idioms and syntax.

47. Simultaneously learning ASL and spoken English is learning two languages at once. It would be similar to trying to learn English and Spanish or Russian simultaneously.

48. Due to severe cognitive limitations, [REDACTED] has a very limited ability to learn any language, signed or spoken. Learning the complexities of ASL, while also dealing with English as a spoken language, even with both languages supplemented by pictorial cues, photo prompts, and assistive technology, is unreasonably difficult for [REDACTED]. For this reason [REDACTED] has made little progress in learning ASL and is unlikely to.²

49. Efforts to teach [REDACTED] spoken English and ASL were working at cross purposes. Effectively, the result was trying to teach someone with severe cognitive limitations, two languages simultaneously. Instruction in English, both spoken and signed, with supplements from finger spelling, pictorial cues, and photo prompts is the appropriate means of communication for [REDACTED] education.

50. [REDACTED]'s needs could be met with consultation by a DHH teacher for four hours per day to learn [REDACTED]'s signs and train [REDACTED] teacher on [REDACTED] signs and additional signs.

51. A certified deaf/hard of hearing itinerant teacher would be appropriate to work with the staff and [REDACTED] at [REDACTED] to assist and facilitate communication and language. The teacher

and the consultation would accomplish appropriate communication with [REDACTED] and teach [REDACTED] how to communicate.

52. [REDACTED]'s physical therapist communicated with [REDACTED] using speech. He gave [REDACTED] verbal directions, which [REDACTED] followed without a problem.

53. [REDACTED]'s occupational therapist communicated with [REDACTED] by using speech, gestures, and basic sign language. When she did not understand [REDACTED]'s signs, she learned them.

54. [REDACTED] can sometimes hear sounds and responds occasionally to spoken words. [REDACTED]'s progress in learning both sign language and spoken language is comparable.

55. If [REDACTED] had no disability other than deafness, [REDACTED] would be much further along in communication skills. [REDACTED]'s cognitive level significantly impedes the ability to learn sign language or any other communication system.

56. In determining the appropriate placement for [REDACTED] the December 2009 IEP team properly considered many factors. The factors included [REDACTED]'s sensory, communication, socialization, and behavior needs. The team also considered [REDACTED]'s progress under the previous IEP and the fact that [REDACTED]'s motor skills were significantly below those of [REDACTED]'s peers.

57. The IEP team heard presentations from different schools with different program models, including programs in traditional schools with emphases on Intellectual Disabilities

and Autism Spectrum Disorders. The team also heard a presentation about [REDACTED], a separate day school for children with profound disabilities.

58. The team created an IEP that provides FAPE for [REDACTED]. The IEP included an ESE teacher in all classes, paraprofessional assistance in all classes, DHH consultation in all classes, visual aids, a voice output device, occupational therapy, physical therapy, nursing services, and respiratory therapy services. The IEP provided for ESE instruction in language arts, math, science, social studies, music, art, language therapy, and speech therapy.

59. The IEP resulting from the December IEP review was the basis for assigning [REDACTED] to [REDACTED]. [REDACTED] is a separate day school that meets all of the requirements for providing [REDACTED] FAPE in the least restrictive environment.

60. A number of factors made assignment to a separate day school the least restrictive environment for [REDACTED]. [REDACTED] requires a small structured setting with individual behavior management systems and constant supervision for [REDACTED] own safety. [REDACTED] requires assistance in all academic areas and with social and motor skills. Additional considerations leading to placement in a separate day school include behaviors that disrupt students in a general education class, disruptive behavior in special education classes, distractibility, need for a lower pupil-to-

teacher ratio, need for technological assistance, a low frustration level, safety concerns, lack of emotional control, mobility problems, and difficulty completing tasks.

61. [REDACTED] places an emphasis on sensory needs, low student-to-teacher ratios, a faculty with the varied expertise that [REDACTED] needs, a functional academic curriculum, and self-help skills. [REDACTED] serves a population of students with varying cognitive abilities. The students at [REDACTED] [REDACTED] have the need for an intensity of services similar to [REDACTED]'s. Also, students at [REDACTED] participate in community-based instruction where they learn life skills and job skills. This is the appropriate student population for [REDACTED] to be educated with.

62. Students from a neighboring middle school attend [REDACTED] [REDACTED] approximately once a week. Students from private schools also work with [REDACTED] students in the "Best Buddies" program. These activities provide [REDACTED] students with an opportunity to socialize and interact with peers who do not have disabilities.

63. The December 2009 IEP provided a FAPE for [REDACTED] Separate day school placement and assignment to [REDACTED] are appropriate for [REDACTED] and place [REDACTED] in the least restrictive environment.

The Private Placement

64. At the December 3, 2009, IEP meeting, ██████ disagreed with the proposed ██████████ assignment. ██████ stated verbally and in written conference notes that she reserved all of her rights "including the right to enroll my child in a private school at public expense." The handwritten note also stated: "A letter detailing objections/dissent will be produced in the next week to ten days." It was not.

65. In a December 18, 2009, e-mail to School District officials, ██████ stated for the first time that she was removing ██████ from school and that she was going to pick up all ██████'s belongings on December 18, 2009. That day she removed ██████ from ██████████ to enroll ██████ in ██████████ School, a private school in Miami, Florida.³

66. ██████████ School is similar to ██████████. It is a separate day school like ██████████. Each of the 40 students it serves has disabilities, just like ██████████. Both schools provide services from speech therapists, occupational therapists, music therapists, and classroom assistants for ██████

67. ██████████, however, has more students and a more diverse population. Although neither school has non-disabled students, ██████████ provides its students with

more regular and natural contact with students in the general student population.

68. The December 2009 IEP that would be implemented at [REDACTED] [REDACTED] proposes an education similar to the program for [REDACTED] at [REDACTED] School. Both schools provide [REDACTED] occupational therapy, speech therapy, sign language instruction and a classroom assistant.

69. [REDACTED], however, offers more and better sensory support. It has a sensory room and a swimming pool, for instance. [REDACTED] offers neither.

70. The School District IEP provides [REDACTED] instruction by an ESE teacher. [REDACTED] does not. It only provides consultation with an ESE teacher for the therapists and assistants who provide instruction throughout the day.

71. The IEP includes a full-time paraprofessional who accompanies [REDACTED] throughout the day and assists [REDACTED] with [REDACTED]'s tasks and communications. [REDACTED] does not.

72. The IEP provides a nurse to tend to [REDACTED]'s medical problems. [REDACTED] does not even have a nurse on staff.

73. The one service [REDACTED] provides that [REDACTED] *does not is an instructor for [REDACTED] who is fluent in ASL.* It is this omission and the removal of ASL from [REDACTED]'s IEP that lie at the heart of the complaints about [REDACTED]'s assignment and placement.

CONCLUSIONS OF LAW

74. This case arises under the Individuals with Disabilities Education Improvement Act ("IDEA"), Title 20 United States Code Section 1400 (2004), and corresponding Florida Statutes and Florida Administrative Code provisions.

75. DOAH has jurisdiction over the parties and the claims under IDEA in this proceeding. § 1003.57, (1) (e), Fla. Stat. (2009); Fla. Admin. Code R. 6A-6.03311 (11) (2008).

76. █████ and █████ parents bear the burden of proof. They must prove their claims by a preponderance of the evidence. See Schaffer v. Weast, 546 U.S. 49, 62 (2005); Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1313 (11th Cir. 2003).

Individuals with Disabilities Education Improvement Act (IDEA)

77. In the Florida, "exceptional students" are students who have "been determined eligible for a special program in accordance with rules of the State Board of Education." The term includes, among others, "students who have an intellectual disability; autism spectrum disorder, a speech impairment; a language impairment; . . . another health impairment; . . . [and] students who are deaf or hard of hearing." § 1003.01 (3), Fla. Stat. (2009). █████ is an exceptional student. The parties stipulate to █████ eligibility for ESE services.

78. The IDEA requires states to provide exceptional students a Free and Appropriate Public Education. Under IDEA, FAPE consists of "special education," and when necessary, "related services." See 20 U.S.C. § 1401 (9) (2010). "Special education means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. . . ." 20 U.S.C. § 1401 (29); see also Fla. Admin. Code R. 6A-6.03411 (1) (kk).

79. "Related services" are supportive services provided to a student with disabilities to assist ██████ to benefit from special education. See 20 U.S.C. § 1401 (26); Fla. Admin. Code R. 6A-6.03411(1) (dd).

80. ██████ maintains that the School District did not provide FAPE in three ways. The first is reassigning ██████ to ██████ without following proper procedures. The second is failing to implement the September 2009 IEP. The third is by adopting the December 2009 IEP and assigning ██████ to ██████. The relief requested is reimbursement of tuition for the 2009-2010 school year, payment of future tuition, and compensatory education.

81. To determine whether a school district has offered a FAPE, "courts . . . ask whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures is reasonably calculated to enable the student to

receive educational benefits." Loren F., 349 F.3d at 1312. Perfection is not required. Id.

82. An IEP is a written statement of the educational program that is designed to meet a child's unique needs. See 20 U.S.C. § 1401(14); Fla. Admin. Code R. 6A-6.03028. Courts give the educators who formulate and implement the IEP due deference. Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1292 (11th Cir.2001), cert. denied, Devine v. Indian River County Sch. Bd., 522 U.S. 1110, 118 S. Ct. 1040, 140 L. Ed. 2d 106 (1998); JSK v Hendry County School Board, 941 F. 2d 1572 (11th Cir. 1991).

83. The educational benefits a student receives from the IEP and resulting instruction must be meaningful. They need not be maximized to be adequate. Id. To meet the IDEA standard of FAPE, the IEP must be reasonably calculated to enable [REDACTED] to receive meaningful educational benefits in light of [REDACTED]'s intellectual potential. Lauren V., et al. v. Colonial School District, Case No. 07-308, 2007 U.S. Dist. LEXIS 78361, 2007 WL 3085854 (E.D. Pa. Oct. 22, 2007). The IEP must provide "personalized instruction with sufficient support services to permit the child to benefit educationally." Weiss v. Sch. Bd. of Hillsborough County, 141 F.3d 990, 996 (11th Cir. 1998); J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991).

Assignment to [REDACTED]

84. The IDEA provides parents and children with important procedural safeguards, including the right to present complaints regarding "the identification, evaluation, or educational placement of the child, or the provision of [FAPE]. . . ." 20 U.S.C. § 1415(b)(6); Doe v. Alabama State Dept of Educ., 915 F.2d 651,655 (11th Cir. 1990). Parents and children have a right to a due process hearing about such complaints. See 20 U.S.C. § 1415(f)(1); Doe, 915 F.2d at 655.

85. [REDACTED] argues that the assignment to [REDACTED] was substantially different placement than the assignment to [REDACTED] Elementary School and therefore changed [REDACTED] IEP without the required process.

86. Educational placement refers to the educational program and not the particular institution or building where the program is implemented. See Hill By and Through Hill v. Sch. Bd. of Pinellas County, 954 F. Supp. 251, 253 (MD. Fla. 1997); Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook County, III. V. Illinois State Bd. of Educ., 103 F.3d 545, 548 (7th Cir. 1996). The reassignment to [REDACTED] did not change [REDACTED]'s IEP or [REDACTED] educational program in any material way. The transfer to [REDACTED] was not a change in educational placement. In both schools, [REDACTED] attended a "separate class" meaning that [REDACTED] had 0-40 percent time with non-disabled peers. The teacher-to-pupil

ratio was nearly identical. The majority of [REDACTED]'s classmates in both schools functioned below grade level. The educational program was unchanged. The type of educational setting remained the same. Even the teacher remained the same.

87. [REDACTED] has not identified any fundamental change that would amount to a change in placement. Since there was no change in placement, the reassignment did not trigger the due process requirements. Also, [REDACTED] was consulted in the reassignment and agreed to it.

FAPE at [REDACTED]

88. [REDACTED] did not prove that the School District did not implement a material or substantial provision of [REDACTED]'s September 2009 IEP or that [REDACTED] was denied an educational benefit as a result of [REDACTED] assignment to [REDACTED]. The School District adequately implemented [REDACTED]'s September 2009, IEP at [REDACTED] for the few months that [REDACTED] was there.

December 2009 IEP and Assignment to [REDACTED]

89. [REDACTED]'s December 2009 IEP was reasonably calculated to provide a FAPE. It contained the required statement of [REDACTED]'s current educational performance, a statement of annual goals, a statement of the specific education and related services to be provided, a statement of how much [REDACTED] would participate in regular education programs, and the dates for and initiation of services. 20 U.S.C. § 1414(d)(1)(A); Weiss v. Sch. Bd. of

Hillsborough County, 141 F.3d 990, 996 (11th Cir. 1998). In other words, it contains all of the components required by federal and state law. See 34 C.F.R. §§ 300.320 - 300.323; Fla. Admin. Code R. 6A-6.03028(7).

90. Florida Statutes and rules governing ESE respond to the federal funding mandates that schools provide ESE students a FAPE in the least restrictive environment. The least restrictive environment is codified in 20 U.S.C. § 1412(5)(A), 34 C.F.R § 300.114, and Florida Administrative Code Rule 6A-6.03028(3)(i).

91. Title 20 United States Code Section 1412(a)(5)(A) states: "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 not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of the disability of a child is such that education in regular classes with the use of supplementary aids cannot be achieved satisfactorily." Accord, 34 C.F.R § 300.114; Fla. Admin. Code R. 6A-6.03411 (3)(a)(2).

92. The presumption in favor of the assignment to a regular classroom is overcome when education in a regular classroom cannot meet a disabled student's unique needs. Daniel

RR v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989);
See also Pachl v. Seagren, 453 F.3d 1064, 1067-68 (8th Cir.
2006) (concurring that mainstreaming should be implemented to
the maximum extent appropriate and does not apply if it cannot
be achieved satisfactorily).

93. The facts establish that the degree of support [REDACTED] requires, both service providers and physical objects, the disruptiveness of [REDACTED]'s behavior, [REDACTED]'s inability to act with much independence, [REDACTED]'s health problems, and [REDACTED]'s difficulties interacting with others preclude assignment to a general population school.

94. [REDACTED] has not proven that [REDACTED] Educational Center is not the least restrictive environment for [REDACTED] as determined by the IEP team. The fact that [REDACTED]'s parents voluntarily placed [REDACTED] in a private school that serves only students with disabilities confirms that a separate day school serving only students with disabilities is the appropriate placement for [REDACTED]. This is the placement they desire and want the School District to pay for. So they are not maintaining that placement in a separate day school is incorrect. Also, through the interaction of visiting students from other schools, [REDACTED] provides more interaction with students who are not disabled than [REDACTED].

95. The School Board did not deny █████ a FAPE by assigning █████ to █████ Center or by failing to implement █████'s IEP at █████ It also did not deny █████ a FAPE by establishing an IEP that provided for a separate day school placement and assigned █████ to █████.

96. Consequently, █████ is not entitled to compensatory education. Sch. Committee of the Town of Burlington, Mass. v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S 359, 374 (1985).

97. In addition, █████'s parents did not provide clear written notice to the School Board of their intent to withdraw █████ from public school and enroll █████ in private school at the most recent IEP meeting or 10 days before withdrawing █████ Even if the private school placement was required, reimbursement would not be appropriate. The notice was not sufficient, especially since the differences between the School Board's proposed placement and assignment and the private placement are so minor. 34 C.F.R. § 300.148(d)(1)(i-ii); Fla. Admin. Code R. 6A-6.03311(8)(d).

Scope of Due Process Request

98. ██████'s Amended Request for Due Process did not present the issue of whether the IEP dated September 10 and 15, 2009, was reasonably calculated to provide ██████ with a FAPE.

CONCLUSION

For the reasons stated in the in Findings of Fact and Conclusions of Law, ██████'s request for compensatory education and reimbursement of private school placement expenses is denied. ██████ is not entitled to payment of private school expenses by the Miami-Dade County School Board.

DONE AND ORDERED this 14th day of September, 2010, in Tallahassee, Leon County, Florida.

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JOHN D. C. NEWTON, II
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of September, 2010.

ENDNOTES

^{1/} The parties identified Issues A, B, C, and E in their Joint Written Pre-Hearing Statement. Issue D was not identified in

the Statement. It was the subject of evidence at the hearing and of proposed Findings of Fact and Conclusions of law by both parties. Thus the issue was tried by consent. Cf. Mondello v. Torres, 35 Fla. L. Weekly D 1624 (Fla. 4th DCA July 21, 2010)

^{2/} ██████ presented testimony from Ms. Knox and Dr. Fifer urging the importance of ASL as the only sign language choice. Their testimony was not persuasive. Both were plainly advocating rather than providing facts. Both also were eager to expand their expertise and opinion testimony to support ██████'s claims into areas where they had no expertise.

^{3/} ██████'s December 18, 2009, e-mail announcing that she is withdrawing ██████ states that she gave verbal "ten day notice" at the December 3, 2009, IEP meeting that she was going to withdraw ██████. She testified much the same. The testimony and the statement in the e-mail are not consistent with ██████'s hand written notes the day of the meeting or the memory of any other participant at the meeting. The claim is not credited.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

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