Collier County School District
No. 06-0274E
Initiated By: District and Parent
Hearing Officer: Daniel Manry
Date Of Final Order: September 15, 2009

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-0274E
	)	
COLLIER COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the due process hearing in this case for the Division of Administrative Hearings (DOAH) on May 1 through 5, May 8 through 10, May 30 through June 1, 2006, and on June 6, 21, and 22, 2006.

APPEARANCES

For Petitioner: Stephanie Leigh Langer, Esquire
Law Offices of Matthew W. Dietz, P.L.
2990 Southwest 35th Avenue
Miami, Florida 33133

For Respondent: Richard W. Withers, Esquire
Collier County School District
5775 Osceola Trail
Naples, Florida 34109-0919

STATEMENT OF THE ISSUES

The issues are whether Individualized Education Plans (IEPs), identified in the record as the [redacted] transitional IEP and [redacted] IEP, both developed pursuant to the Individuals with Disabilities Education Act (IDEA), 20 United States Code (U.S.C.) Section 1401 et seq,[1] failed to provide Petitioner with a free appropriate public education (FAPE); whether numerous alleged procedural violations either impeded Petitioner's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE to the child, or caused a deprivation of educational benefits required by the IDEA; and whether Respondent improperly used the stay-put provision in 20 U.S.C. Subsection 1415(j) to refuse to modify the [redacted] IEP.

PRELIMINARY STATEMENT

This proceeding includes a lengthy procedural history. Procedural aspects of the case that are relevant to a resolution of the issues are discussed in the Findings of Fact.

By letter dated January 17, 2006, Petitioner, through Petitioner's parents, filed a due process complaint in accordance with the requirements of 20 U.S.C. Subsection 1415(c)(2). Respondent referred the complaint to DOAH to conduct a due process hearing.

At the hearing, Petitioner presented the testimony of 11 witnesses and submitted 43 exhibits for admission into evidence. Respondent presented the testimony of 13 witnesses and submitted 31 exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the 15-volume Transcript of the hearing that was returned to DOAH by the Department of Education on August 24, 2009. The parties timely filed their respective proposed final orders (PFOs) on July 13, 2009.

FINDINGS OF FACT

1. Respondent is the agency responsible for the School District of Collier County, Florida (the District). Respondent receives state and federal funds to provide special education and related services to disabled students in District public schools.

2. Petitioner is a disabled student, born in [redacted], who attended District public schools until January 17, 2006. Petitioner's primary exceptionality is autism. Petitioner is also language impaired and uses sign language as Petitioner's primary mode of expressive and receptive communication.

3. Petitioner understands verbal communication, but Petitioner's receptive communication is enhanced when verbal communication is accompanied by sign language. Petitioner

manifests no maladaptive behavior except that needed for self stimulation.

4. Petitioner attended District public schools from the beginning of the 2001-2002 school year until January 17, 2006. At the start of the 2005-2006 school year, Petitioner transitioned from [redacted] ([redacted]) to [redacted] ([redacted]). Between the start of the school year at [redacted] and November 9, 2005, Respondent provided special education and related services to Petitioner pursuant to an IEP developed at [redacted] (the transitional IEP). The services included monthly parent conferences and monthly progress reports.

5. On November 9, 2005, the [redacted] IEP team developed an IEP that they used to provide Petitioner with special education and related services through January 17, 2006. On January 17, 2006, the parents of Petitioner filed with the District a letter that is dated January 12, 2006, and is the due process complaint in this proceeding. The due process complaint challenges both the transitional IEP developed at [redacted] and the [redacted] IEP.

6. The undersigned conducted a 14-day, due process hearing that began on May 1, 2006, and ended on June 22, 2006. On August 24, 2006, Petitioner enrolled in a public school in the [redacted] School District ([redacted]) and began attending school in [redacted] on September 5, 2006. Petitioner has not attended any public

school in the District or any private school between January 17, 2006, and the date of this Final Order.

7. In response to a motion filed by Respondent on September 11, 2006, the undersigned entered a Final Order of Dismissal on October 18, 2006. The Final Order of Dismissal determined, in relevant part, that the due process complaint was moot because Petitioner was not attending a public school in the District or any private school. The Final Order of Dismissal is part of the record of this proceeding and is incorporated herein by this reference as though fully stated in this Final Order.

8. Petitioner appealed the Final Order of Dismissal to the United States District Court, Middle District of Florida, Fort Myers Division (the appellate court). The Magistrate for the appellate court recommended that the case be remanded to DOAH for a determination of two issues. The Magistrate limited the issues to whether Petitioner is entitled to a trained service dog in order to receive FAPE, and whether the IEP must be modified to include seizure disorder for Petitioner to receive FAPE.

9. The appellate court did not limit the issues to be determined on remand to the two issues identified by the Magistrate. Rather, the appellate court left to DOAH "in the first instance the determination of those issues properly before it."[2]

10. The issues properly before DOAH in this, or any other due process hearing, are defined by Congress in 20 U.S.C. Subsection 1415(f)(3)(E). Congress limits the decision of the undersigned in this Final Order to a decision:

> (i) [M]ade on substantive grounds based on a determination of whether the child received a free appropriate public education.
>
> (ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate education only if the procedural inadequacies-–
>
> (I) impeded the child's right to a free appropriate education;
>
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
>
> (III) caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(3)(E)(i) and (ii).

11. A preponderance of evidence supports a finding, based on substantive grounds authorized in 20 U.S.C. Subsection 1415(f)(3)(E)(i), that Petitioner received FAPE, defined in 20 U.S.C. Subsection 1401(a)(9), under the transitional IEP developed at [redacted] and under the [redacted] IEP. Evidence comprising the testimony of teacher observations, data collection, and work samples shows that Petitioner received the benefit of special

education services and related services in the least restrictive environment and in conformity with the Florida Sunshine State Standards within the meaning of 20 U.S.C. Subsection 1401(a)(9). Petitioner's mother testified, in relevant part, that Petitioner made academic progress at [redacted], and Petitioner's father testified that he deferred to Petitioner's mother on that issue.[3]

12. A finding based on substantive grounds that Petitioner received FAPE under the transitional IEP developed at [redacted] and under the [redacted] IEP obviates the need for findings pertaining to the alleged procedural violations. Assuming arguendo that the alleged procedural violations occurred, they were not so egregious that they satisfied the requirements in 20 U.S.C. Subsection 1415(f)(3)(E)(ii).[4] Because Petitioner received FAPE under the [redacted] and [redacted] IEPs, the alleged procedural violations did not impede Petitioner's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process pertaining to FAPE, or cause a deprivation of educational benefits defined as FAPE in 20 U.S.C. Subsection 1401(a)(9).[5]

13. From the time that the parents of Petitioner refused to allow Petitioner to attend public school, on or about January 20, 2006, until the parents enrolled Petitioner in public school in Pennsylvania on or about September 5, 2006, Petitioner was not enrolled in either a public or private school

in Florida or elsewhere. Judicial decisions discussed in the Conclusions of Law hold that Petitioner was not entitled to FAPE while Petitioner was not enrolled in either a public or private school.

14. Assuming arguendo that Petitioner was entitled to FAPE while Petitioner was not enrolled in either a public or private school, the filing of the due process complaint on January 17, 2006, automatically invoked the stay—put requirement that Congress enacted in 20 U.S.C. Subsection 1415(j). The statutory stay-put requirement provides in relevant part:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child. . . .

20 U.S.C. § 1415(j).

15. After Petitioner filed the due process complaint in this proceeding, Respondent refused to agree to a change in the then-current educational placement of Petitioner that was prescribed in the [redacted] IEP (the stay-put IEP). Judicial decisions discussed in the Conclusions of Law make clear that Respondent is not required to agree to a change in the educational placement of Petitioner that is prescribed in the stay-put IEP and that the authority of DOAH, as the trial

tribunal, is limited to a finding of what constitutes the current educational placement of Petitioner.

16. Counsel for Petitioner was not without a judicial remedy in relief of the stay-put IEP. Counsel was entitled to seek a court order requiring Respondent to change the educational placement of Petitioner prescribed in the stay-put IEP. However, DOAH is not a court, and an order from DOAH changing the educational placement of Petitioner would be an order for affirmative action that is in the nature of equitable relief and would circumvent Article V of the Florida Constitution.

17. A written Order entered by the undersigned on May 17, 2006, discussed the judicial remedies available to Petitioner in relief of the stay-put IEP. However, Petitioner's counsel opted not to pursue judicial relief from the stay-put IEP and continued to seek an administrative remedy from DOAH, in the form of an order modifying the stay-put IEP which only a court, and not DOAH, is authorized to grant.

18. Many of the procedural violations that counsel for Petitioner asserts in this proceeding, as well as two alleged substantive violations, are, in substance, attempts to obtain an order from DOAH modifying the stay-put requirement enacted by Congress in 20 U.S.C. Subsection 1415(j). For example, Petitioner's PFO characterizes as a denial of FAPE based on

substantive grounds: the refusal to amend the IEP to reflect seizure disorder; and the refusal to amend the IEP to provide requested related services including a full-time nurse, health action plan (HAP), and a service animal.[6]

19. The stay-put IEP developed at [redacted] on November 9, 2005, did not authorize any of the 25 changes that counsel for Petitioner seeks in this proceeding. For convenience of analysis, the 25 changes proposed by counsel for Petitioner are divided into two parts. One part consists of alleged deficiencies in the stay-put IEP that predated the IEP meeting on January 17, 2006 (a Part I deficiency). The second part consists of changes to the stay-put IEP that necessarily would have to be implemented on or after January 17, 2006 (a Part II change).

20. The finding that Petitioner received FAPE under the [redacted] and [redacted] IEPs obviates the practical utility of a finding relevant to alleged Part I deficiencies. The statutory stay-put requirement imposed by Congress obviates the practical utility of a finding relevant to requested Part II changes. Nevertheless, the fact-finder addresses each of the 25 issues raised by counsel for Petitioner in the remaining Findings of Fact.

21. Refusal to amend stay-put IEP to include a service dog in the classroom (a Part II change). The service dog is a

Labrador Retriever trained to comfort Petitioner during a seizure. The dog is not trained to alert teachers or other supervising adults of the onset of a seizure.

22. A preponderance of evidence does not support a finding that the refusal to amend the stay-put IEP to require a service dog, as a related service or otherwise, denied FAPE to Petitioner, within the meaning of 20 U.S.C. Subsection 1415(f)(3)(E)(i). A preponderance of evidence does not support a finding that the refusal to change the stay-put IEP to authorize the service dog impeded Petitioner's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits within the meaning of 20 U.S.C. Subsection 1415(f)(3)(E)(ii).

23. A preponderance of the evidence shows that the stay-put IEP provided FAPE to Petitioner without a service dog in the classroom. An adult human severity aide attended Petitioner on a full-time, one-on-one basis; provided comfort to Petitioner during Petitioner's first seizure; and provided a basic floor of opportunity for Petitioner to access Petitioner's education. The choice between a human severity aide and a dog as the method for providing comfort to Petitioner during a seizure disorder is a choice of methodologies that is the exclusive province of the District.

24. The issue of the service dog was thoroughly discussed by the parents and the IEP team. The IEP team provided the parents written notice of the District's decision.

25. The amendment of the stay-put IEP to require a service dog in addition to the human severity aide already attending Petitioner on a full-time, one-on-one basis would arguably "maximize" the educational benefit to Petitioner and would exceed the "basic floor of opportunity" required by the IDEA. Counsel for Petitioner submitted evidence that a service dog in the classroom would enable Petitioner to enjoy meaningful gains across settings outside the classroom. Relevant judicial decisions discussed in the Conclusions of Law limit the phrase "meaningful gains across settings" to measurable gains in the classroom.

26. Refusal to amend stay-put IEP to include medical prescription for a nurse to administer seizure medication (a Part II change). A child-neurologist evaluated Petitioner on January 19, 2006, and wrote a prescription for Diastat. The prescription required the Diastat to be administered rectally to Petitioner by a registered nurse. The District did not employ a full-time registered nurse at [redacted]. Counsel for Petitioner alleges that a full-time nurse must be on school premises to administer Diastat rectally to Petitioner during a seizure episode.

27. A preponderance of evidence does not support a finding that Respondent's refusal to amend the stay-put IEP at the meeting of January 17, 2006, to include a requirement for staffing by a full-time nurse to administer Diastat to Petitioner denied FAPE to Petitioner. The testimony of Dr. Brian Wolff, a board-certified neurologist, is credible and persuasive. That testimony shows that rectal Diastat, a tranquilizer, in a pre-measured dose, can be safely administered in a simple rectal syringe by non-medical staff trained to administer the medication.

28. The evidence shows that the [redacted] principal and assistant principal received adequate training from a registered nurse, consistent with Subsection 1006.062(5), Florida Statutes (2006),[7] to administer Diastat should it be required in the future when and if the parents returned Petitioner to the public school. Expert testimony shows that status epilepticus, given the Trileptal maintenance medication prescribed for Petitioner since January 19, 2006, would be very unlikely to occur.

29. Emergency Medical Services (EMS) remained a viable alternative. When Petitioner suffered Petitioner's first seizure at school, school officials called EMS, over the objection of Petitioner's parents, and EMS personnel responded.

30. The refusal to amend the IEP as of January 17, 2006, to include a requirement for a nurse did not violate 20 U.S.C.

Subsection 1415(f)(3)(E)(ii) by impeding Petitioner's right to FAPE. The refusal to amend the IEP did not significantly impede the parents' opportunity to participate in the decision-making process, and it did not cause a deprivation of educational benefits required in the IDEA.

31. Based upon the testimony of all of the witnesses, including the parents, it is clear that Petitioner was removed from the school before the prescription for (nurse-only administered) Diastat or a full-time nurse was issued on January 19, 2006. It is clear from the evidence that Petitioner did not thereafter return to the school, attend private school, or attend a school-district approved program of home instruction.

32. Refusal to amend stay-put IEP to include seizure disorder (a Part II change). Counsel for Petitioner contends that the IEP team should have amended the stay-put IEP at the IEP meeting conducted on January 17, 2006, to add seizure disorder as a disability. Counsel argues that the failure to amend the stay-put IEP constitutes a procedural violation that impeded Petitioner's right to FAPE and significantly impeded the parents' right to participate in the decision-making process. Counsel argues that the subsequent removal of Petitioner from school was "caused" by the school and resulted in a deprivation of educational benefits to Petitioner.[8]

33. A preponderance of the evidence does not support the stated claims. Respondent had already determined that Petitioner was qualified for special education and related services as an autistic student. When the IEP team met on January 17, 2006, no information satisfied the criteria in Florida Administrative Code Rule 6A-6.03015(3) to qualify Petitioner for special education and related services a second time as "other health impaired."

34. A "seizure disorder" is not one of the defined disability categories under Florida Administrative Code Rules 6A-6.0311 through 6A.03018, 6A-6.03020 through 6A-6.03027, and 6A-6.030 through 6A-6.03031. At the time, the parents did not offer any information, including peer-reviewed research, evidencing specific forms of treatment or medical care that they wanted incorporated into the IEP. However, the parents advised the IEP team that the parents had scheduled an appointment with Dr. Tuchman, a child neurologist, for diagnosis and recommendations on January 19, 2006, two days after the IEP team meeting. The parents then filed the due process complaint that precipitated this proceeding and invoked the statutory stay-put requirement.

35. The HAP that the District adopted for Petitioner adequately addressed the seizure disorder. The HAP included a program of seizure training for the principal and assistant

principal, pending the IEP team's subsequent consideration of medical prescriptions which might qualify as related services under IDEA. The IEP team did not refuse at the IEP meeting conducted on January 17, 2006, to amend the stay-put IEP to include medical findings and prescriptions that did not exist until January 19, 2006.

36. A preponderance of the evidence does not support a finding that the failure of the IEP team to amend the IEP to include a "seizure disorder" impeded Petitioner's right to FAPE, that it significantly impeded the parents' opportunity to participate in the decision-making process, or that it caused a deprivation of educational benefits required in the IDEA. Rather, a preponderance of the evidence shows that the parents of Petitioner removed Petitioner from school and did not place Petitioner in a private or public school in Florida.

37. Refusal to convene IEP meeting after implementation of the stay-put provision (a Part II change). After Petitioner filed a due process complaint dated January 17, 2006, A preponderance of the evidence shows that the local education agency and the parents did not "otherwise agree," for the purposes of 20 U.S.C. Subsection 1415(j), to convene an IEP meeting and amend the stay-put placement of Petitioner. The failure to amend the stay-put placement of Petitioner was not a procedural violation within the meaning of 20 U.S.C.

Subsection 1415(f)(3)(E)(ii), Section 1003.57, and Florida Administrative Code Rule 6A-6.0311(11)(d).

38. Alleged inadequacy of the classroom (a Part I deficiency). A preponderance of the evidence does not show that alleged deficiencies in the physical layout of the classroom in which Petitioner received most of Petitioner's instruction denied FAPE to Petitioner, impeded Petitioner's right to a FAPE, or resulted in a deprivation of educational benefits required by the IDEA. Rather, a preponderance of the evidence adduced from the testimony of teachers and specialists, data collection, work samples, and the Florida Sunshine State Standards shows that Petitioner received FAPE while attending [redacted] in the allegedly deficient classroom.

39. Alleged deficiencies in assessing Intelligence Quotient (IQ) (a Part I deficiency). A preponderance of the evidence does not support a finding that alleged deficiencies in assessing Petitioner's IQ denied FAPE to Petitioner. A preponderance of the evidence does not support a finding that school personnel improperly assessed the IQ of Petitioner. Assuming that either alleged deficiency occurred, neither deficiency resulted in a denial of FAPE to Petitioner.

40. Alleged inadequacy of monthly progress reports (a Part I deficiency). A preponderance of the evidence does not support a finding that alleged deficiencies in monthly progress

reports issued to the parents denied FAPE to Petitioner or significantly impeded the parents' participation in Petitioner's education. The progress reports were sufficient to allow the parents of Petitioner to stay involved in the decision-making process regarding Petitioner's education and to adequately inform Petitioner's parents of the educational progress that Petitioner was making.

41. Refusal to provide a certified sign interpreter (a Part I deficiency and Part II change). Petitioner was at all times furnished with an adult, on-on-one severity aide while attending [redacted]. A preponderance of the evidence shows that Petitioner made educational progress without a certified sign interpreter. A preponderance of the evidence does not support a finding that Petitioner required a certified sign interpreter to receive FAPE. The refusal to furnish a certified sign interpreter did not impede Petitioner's right to FAPE, significantly impede the parents' right to participate in the decision-making process, or deprive Petitioner of the educational benefits required in the IDEA.

42. Decisions concerning methodology and staffing are the exclusive province of Respondent. Petitioner was making academic progress, was learning to put basic sentence structures together, and was learning some verbalization. A certified sign interpreter arguably may have maximized Petitioner's educational

progress, but such an interpreter was not required for Petitioner to make the educational progress required for FAPE.

43. Instruction from Susan Potantus (a Part I deficiency). Ms. Susan Potantus served as an aide for Petitioner. Ms. Potantus has extensive experience as a certified teacher in Florida public schools. To the extent that Ms. Potantus taught Petitioner during the performance of her duties as an aide, a preponderance of the evidence does not support a finding that the additional teaching denied FAPE to Petitioner, created an impediment to Petitioner's right to FAPE, or deprived Petitioner of the educational benefit required in the IDEA.

44. Refusal to provide alternate assistive device (a Part I deficiency). A preponderance of evidence does not support a finding that a particular assistive device was necessary to provide Petitioner with FAPE. A preponderance of the evidence shows that Petitioner received FAPE under the [redacted] IEP and the stay-put IEP utilizing the assistive devices chosen by the District.

45. A preponderance of the evidence does not support a finding that the alleged failure of Respondent to utilize a specific assistive device denied FAPE to Petitioner. Respondent utilized at least two assistive technology devices identified in the record as the Dyna-Vox and the Go-Talk 20.

46. Direction for parents to "be patient" and that Petitioner would "catch up" (a Part I deficiency). A preponderance of the evidence does not support a finding that Petitioner was denied FAPE by directions from instructional staff for the parents of Petitioner to be patient with the instruction being provided to Petitioner and that Petitioner would catch up with the goals and objectives of the [redacted] IEP. Rather, a preponderance of the evidence shows that Petitioner made the educational progress required by the IDEA.

47. Qualification of exceptional student education (ESE) teacher and speech language specialists (a Part I deficiency). A preponderance of the evidence does not support a finding that Ms. Elise Robbins, the ESE teacher; Ms. Karen Losin, the speech language therapist; and Ms. Elizabeth Keech, the occupational therapist, were unqualified in their respective fields of education. Counsel for Petitioner alleges that the three teachers lacked adequate signing skills to teach Petitioner. A preponderance of the evidence does not support a finding that the alleged lack of signing skills on the part of these three teachers denied FAPE to Petitioner, impeded Petitioner's right to FAPE, or deprived Petitioner of the educational benefits required by the IDEA.

48. A preponderance of evidence shows that the three teachers provided Petitioner with the basic floor of opportunity

required by the IDEA. A preponderance of the evidence shows that Petitioner benefited from verbal instruction and the degree of signing actually utilized by Petitioner's teachers and specialists.

49. Qualifications of replacement severity aide (a Part I deficiency). Judicial decisions discussed in the Conclusions of Law hold that the selection of staff to provide educational services pursuant to an IEP is an element of the methodology by which a school district provides educational services and, as such, is a school district function. The function of an IEP team does not include the selection of personnel to provide special education services or the determination of the qualifications of those individuals.

50. The administrators at [redacted] selected Ms. Jan Lents to replace Ms. Potantus as the severity aide for Petitioner when Ms. Potantus left [redacted]. A preponderance of the evidence does not support a finding that Ms. Lents was unqualified to serve as Petitioner's severity aide or that her service as Petitioner's severity aide would have denied FAPE to Petitioner under 20 U.S.C. Subsection 1415(f)(3)(E)(ii). In any event, the parents removed Petitioner from [redacted] before Ms. Lents worked with Petitioner as Petitioner's severity aide.

51. Partial absence of nurse from December 13, 2005 IEP meeting (a Part I deficiency). A preponderance of the evidence

does not support a finding that the absence of the school nurse from part of the meeting conducted on December 13, 2005, denied FAPE to Petitioner. The parties dispute whether the meeting conducted on December 13, 2005, was a progress conference, which was not either scheduled or conducted as an IEP team meeting, or an IEP meeting. Regardless of the function of the meeting, a preponderance of the evidence shows that, notwithstanding the absence of the school nurse, Petitioner made educational progress under the [redacted] IEP.

52. A preponderance of the evidence does not support a finding that the absence of the school nurse on December 13, 2005, was a procedural violation that denied FAPE to Petitioner. Nor does the evidence support a finding that the partial absence of the school nurse significantly impeded the parents' opportunity to participate in the decision-making process or caused a deprivation of educational benefits required under the IDEA.

53. No District experts at the IEP meeting conducted to discuss the use of a service animal (a Part I deficiency). Respondent had no experts on service animals at the IEP meeting conducted on January 17, 2006. Counsel for Petitioner cites no legal authority that required Respondent to call an expert at the IEP meeting. Members of the IEP team listened to the expert provided by Petitioner, and the IEP team was not persuaded.

54. IEP team decision contrary to expert opinion (a Part I deficiency). The IEP meeting conducted on January 17, 2006, was not a trial with competing expert opinions. The IEP team members listened to the opinion of Petitioner's expert and were not persuaded by the expert. District personnel researched the issue of whether a service dog was necessary to provide FAPE and found no research-based support, peer-reviewed or otherwise, in the literature supporting such a requirement.

55. Section 504 Meeting on February 3, 2006 (a Part II change). Respondent held a 504 conference on February 3, 2006, at the request of the parents of Petitioner. At the meeting, the father of Petitioner had an adequate opportunity to convince the 504 team that the service dog was necessary for Petitioner to access Petitioner's public education.

56. A preponderance of the evidence does not support a finding that the conduct of the meeting denied FAPE to Petitioner. Nor does a preponderance of the evidence support a finding that the conduct of the meeting impeded the ability of Petitioner to access Petitioner's education, significantly impeded the parents' right to participate in the decision-making process, or deprived Petitioner the educational benefits required by the IDEA.

57. District rule regarding clinical diagnosis and medical orders for a health care plan (a Part I deficiency). A

preponderance of the evidence does not support a finding that Respondent's requirement for a clinical diagnosis of epilepsy or seizure disorder and for the provisions of medical orders for the health care plan or related services component of Petitioner's IEP resulted in a procedural denial of FAPE to Petitioner, that it significantly impeded the parents' right to participate in the decision-making process, or that it caused a deprivation of educational benefits to Petitioner. The parents of Petitioner denied the IEP team the opportunity to fully consider a health care plan after Petitioner's neurological consultation with Dr. Tuchman on January 19, 2006, by filing a due process complaint on January 17, 2006, and removing Petitioner from public and private school in Florida.

58. Failure to draft HAP based on emergency room records (a Part I deficiency). A preponderance of evidence does not support a finding that Respondent's refusal to draft a HAP based upon a seizure that Petitioner suffered on December 6, 2005, denied FAPE to Petitioner. Respondent conducted a meeting on December 13, 2005, and took reasonable steps to establish an interim health care plan.

59. A preponderance of the evidence does not support a finding that Respondent's failure to draft a HAP specifically based upon the ER records was a procedural violation that impeded Petitioner's right to FAPE, that significantly impeded

the parents' right to participate in the decision-making process, or that caused a deprivation of educational benefits authorized in the IDEA.

60. Petitioner continued to attend school regularly following Petitioner's treatment in a hospital emergency room on December 6, 2006. Petitioner continued attending [redacted] until the IEP team declined to agree to the service dog as a related service at the meeting on January 17, 2006.

61. Exclusion of parents from the classroom (a Part I deficiency). A preponderance of the evidence does not support a finding that the alleged limitation of parental visitation to Petitioner's classroom denied FAPE to Petitioner or violated 20 U.S.C. Subsection 1415(f)(3)(E)(ii) and Florida Administrative Code Rule 6A-6.03028 (3).

62. Failure to supply raw data (a Part I deficiency). The testimony of [redacted] shows that raw data was not requested for Petitioner until the IEP meeting conducted on January 17, 2006. At the conclusion of the IEP meeting, Petitioner's parents filed the due process complaint that precipitated this proceeding. A preponderance of the evidence does not support a finding that the failure to provide raw data after the imposition of the stay-put provision on January 17, 2006, denied FAPE to Petitioner or constituted a procedural violation in 20 U.S.C. Subsection 1415(f)(3)(E)(ii).

63. A preponderance of the evidence shows that the parents of Petitioner were well informed of Petitioner's educational progress by teacher conferences, conferences with school staff, monthly progress meetings, and IEP team conferences. A preponderance of the evidence does not support a finding that the failure to provide raw data after it was requested on January 17, 2006, denied FAPE to Petitioner or resulted in a prohibited procedural violation.[9]

64. Failure to provide or conduct evaluation of Petitioner after the due process complaint was filed (a Part II change). A preponderance of the evidence does not support a finding that Respondent denied FAPE to Petitioner by failing to conduct evaluations of Petitioner after the filing of the due process complaint on January 17, 2006. After January 17, 2006, Petitioner did not attend a public or private school in Florida.

65. Alleged failure to collect data properly (a Part I deficiency). A preponderance of the evidence does not support a finding that the alleged failure of Respondent to collect data denied FAPE to Petitioner. Rather, a preponderance of the evidence shows that Petitioner received FAPE under each of the challenged IEPs.

66. Alleged failure to collect data on all goals and objectives in the IEP (a Part I deficiency). A preponderance of the evidence does not support a finding that Respondent failed

to collect data on all of the goals and objectives prescribed in either of the challenged IEPs. Petitioner received FAPE under each IEP and made educational progress.

CONCLUSIONS OF LAW

67. DOAH has jurisdiction over the subject matter and parties in this proceeding. 20 U.S.C. § 1400; § 1003.57(5), Fla. Stat. (2005); Fla. Admin. Code R. 6A-6.03311. DOAH provided the parties with adequate notice of the due process hearing.

68. Petitioner has the evidentiary burden of proving that the [redacted] IEP and [redacted] IEP denied FAPE to Petitioner based on substantive grounds, within the meaning of 20 U.S.C. Subsection 1415(f)(3)(E)(i). Petitioner also has the evidentiary burden of showing that Respondent committed one or more of the alleged procedural violations recognized in 20 U.S.C. Subsection 1415(f)(3)(E)(ii). Petitioner is the party seeking relief from the two IEPs. The burden of proof is properly placed upon the party seeking relief from an IEP. Schaffer v. Weast, 546 U.S. 49, 61, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387, 399 (2005); West Platte R-II School District v. Wilson, 439 F.3d 782, 784-785 (8th Cir. 2006); JH v. Henrico County School Board, 395 F.3d 185, 197 (4th Cir. 2005).

69. A preponderance of the evidence supports a finding that the [redacted] and [redacted] IEPs provided Petitioner with FAPE based on

substantive grounds within the meaning of 20 U.S.C. Subsection 1415(f)(3)(E)(i). Teacher observations, data collection, and work samples evidence the educational progress of Petitioner.

70. Respondent's correction of the alleged Part I deficiencies and Respondent's implementation of the requested Part II changes that were discussed in paragraphs 19 through 66 of the Findings of Fact, arguably, would have maximized the educational benefit to Petitioner. However, Congress does not intend for the IDEA to maximize educational benefits to disabled children. Rather, Congress intends the IDEA to provide a basic floor of opportunity for Petitioner to access Petitioner's education. See Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)(deaf child making educational progress is not entitled to sign language interpreter).

71. Counsel for Petitioner alleges that Respondent committed several procedural violations, but the evidence does not show that the alleged procedural violations denied FAPE to Petitioner. When procedural violations are not shown to actually interfere with FAPE, the procedural violations cannot support a conclusion that Respondent failed to provide FAPE within the meaning of 20 U.S.C. Subsection 1415(f)(3)(E)(ii). See Dibuo v. Board of Education of Worcester County, 309 F.3d

184, 190 (4th Cir. 2002)(procedural violation that does not actually interfere with FAPE does not deny FAPE); Maine School Administrative District No. 35, 321 F.3d 9, 25-26 (1st Cir. 2003)(compensatory education is not appropriate remedy for purely procedural violation).

72. Counsel for Petitioner complains in substantial part that Respondent refused to amend the stay-put IEP after the due process complaint was filed. After the due process complaint was filed, Respondent engaged in negotiations intended, in relevant part, to reach agreement on an alternative placement. Respondent's actions satisfied the statutory requirement for periodic review. See CP v. Leon County School Board, 483 F.3d 1151 (11th Cir 2007), vacating and replacing 466 F.3d 1318 (11th Cir. 2006)(educational agency that conducts IEP meeting and thereafter attempts agreement on alternative placement satisfies statutory requirement for periodic review of IEP).

73. The refusal of Respondent to agree to alternative placements proposed by the parents, irrespective of Respondent's motives, is not a procedural violation. An educational agency is not obligated to implement an alternative placement proposed by the parents. Id. In the absence of an agreement between the parties, the stay-put requirement is unequivocal. Honig v. Doe, 484 U.S. 305, 323, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686 (1988).

74. The stay-put requirement is a statutory injunction that is automatic. Wagner v. Board of Education of Montgomery County, 335 F.3d 297, 301 (4th Cir. 2003). A party need not satisfy the requirements for preliminary injunctive relief in order to enjoy the benefit of the statutory stay-put injunction. Id.

75. When presented with an application for stay-put relief, the trial tribunal is limited to a determination of the then-current educational placement and an order maintaining the child in that placement. Id. It is error for the tribunal to order Respondent to seek out an alternative placement. Id.

76. In this case, the stay-put IEP is the then-current educational placement, and that placement did not authorize any of the remedies requested by counsel for Petitioner. It would be error for DOAH to order Respondent to seek out, or agree to, alternative placements in the absence of an order issued by a court of competent jurisdiction. Id.

77. In the typical stay-put case, a school district is attempting to remove a child from his or her current educational placement, and the parents assert the stay-put requirement to stop the removal of the child. This case is atypical in that Respondent does not seek to change Petitioner's educational placement but asserts the stay-put requirement to maintain the educational placement prescribed in the stay-put IEP.

78. The fact that Petitioner may not benefit from the stay-put requirement does not mean Petitioner is without a judicial remedy. A court of competent jurisdiction has equitable power to order a change in the stay-put IEP upon a sufficient showing that maintenance of that placement would cause irreparable harm. Compare Wagner, 335 F.3d at 302 (for the proposition cited), with Komninos v. Upper Saddle River Board of Education, 13 F.3d 775, 780 (3d Cir. 1994)(questioning in dicta whether regression per se constitutes such irreparable harm as to justify an exception to the exhaustion requirement). Counsel for Petitioner never sought judicial relief from the stay-put requirement.

79. Petitioner suffered from epileptic seizure disorder and was entitled to special education and related services for that handicap. Warner v. Independent School District No. 625, 134 F.3d 1333 (8th Cir. 1998). However, the parents of Petitioner did not allow Petitioner to attend a public or private school in Florida after Petitioner developed seizure disorder. No legal authority required Respondent to provide FAPE to Petitioner while Petitioner did not attend a public or private school in Florida. Hooks v. Clark County School District, 228 F.3d 1036, 1039 (9th Cir. 2000); M.C.G. v. Hillsborough County School Board, Case No. 02-1265E (DOAH

July 29, 2003), aff'd per curiam, 902 So. 2d 150 (Fla. 2d DCA 2005)(decision without published opinion).

80. If Petitioner were entitled to FAPE while Petitioner was not enrolled in a school defined by Florida law and if Respondent were under a legal obligation to amend the stay-put IEP after Petitioner filed the due process complaint, the issue of whether the IDEA required Respondent to provide a full-time nurse would become ripe for determination. Nursing services are related services, within the meaning of 20 U.S.C. Subsection 1401(a)(17), that an educational agency must provide if the nursing services are required for a student to access his or her special education. See Cedar Rapids Community School District v. Garret F., 526 U.S. 66, 119 S. Ct. 992, 143 L. Ed. 2d 154 (1996)(one-to-one nursing services required for ventilator-dependent student to remain in school); Irving Independent School District v. Tatro, 468 U.S. 883, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984)(nursing services required for clean intermittent catheterization every three to four hours for kidney patient). However, school health services may be provided by either a school nurse or other qualified person, including trained school staff. See Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809, 813-815 (9th Cir. 1983)(maintenance of student's tracheotomy tube may be performed by trained school staff and does not require services of a nurse

in order to provide FAPE). For reasons stated in the Findings of Fact and not repeated here, a preponderance of the evidence does not support a finding that Respondent's refusal to amend the stay-put IEP to require a full-time nurse to administer Diastat to Petitioner denied FAPE.

81. The stay-put IEP provided a full-time, one-to-one aide for Petitioner at [redacted], and the IEP team determined that the addition of a service dog was not necessary to provide FAPE to Petitioner. The IDEA does not authorize parents to choose the methodology used to provide educational and related services to a student. See Rowley, 458 U.S. at 208 (parents of a deaf student receiving FAPE cannot compel use of a sign language interpreter). See also M.M. v. School Board of Miami-Dade County, Florida, 437 F.3d 1085, 1102 (11th Cir. 2006)(parents of deaf student receiving FAPE cannot compel method of communication with disabled student); White v. Ascension Parish School Board, 343 F.3d 373, 380 (5th Cir. 2003)(parents cannot prescribe location for delivery of services); Renner v. Board of Education of the Public Schools of the City of Ann Arbor, 185 F.3d 635, 645-646 (6th Cir. 1999)(parent has no right to compel Lovaas and other methods for treating autism); E.S. v. Independent School District, No. 196, 135 F.3d 566 (8th Cir. 1998)(parents cannot compel method for treating dyslexia); Lachman v. Illinois State Board of Education, 852 F.2d 290

(7th Cir. 1988)(parents cannot prescribe that deaf student be educated using a cued speech instructor).

82. Allegations that the refusal to amend the stay-put IEP to allow a service dog to accompany Petitioner at [redacted] impedes Petitioner's ability to "fully benefit" from Petitioner's education and that the presence of the service dog "maximizes" Petitioner's educational benefit do not state a claim upon which relief can be granted under the IDEA. See Rowley, 458 U.S. at 198 (IDEA does not require services to maximize each child's potential), and M.M., 437 F.3d at 1103 (complaint seeking to maximize educational benefit and choose best and most desirable methods of education does not state a cause of action under the IDEA).

83. Counsel for Petitioner submitted evidence that many of the proposed changes to the stay-put IEP were necessary for Petitioner to make meaningful gains across settings outside of the classroom. However, the phrase "meaningful gains across settings" is limited to measurable gains in the classroom and does not require gains across settings outside of the classroom. J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1573 (11th Cir. 1991).

84. The scope of this Final Order is limited by Congress to the matters authorized in 20 U.S.C. Subsection 1415(f)(3)(E). The ALJ is not authorized to order Respondent to take

affirmative action that requires specific educational and related services or to prescribe an IEP that maximizes the educational benefits to Petitioner. School Board of Martin County v. A.S., 727 So. 2d 1071, 1074-1075 (Fla. 4th DCA 1999); O'Toole v. Olathe District Schools Unified School District No. 233, 144 F.3d 692 (10th Cir. 1998); E.S. v. Independent School District No. 196, 135 F.3d 566 (8th Cir. 1998).

85. The rule of construction in 20 U.S.C. Subsection 1415(f)(3)(E)(iii) provides, in substance, that nothing in 20 U.S.C. Subsection 1415(f)(3)(E) shall be construed to preclude the ALJ from ordering Respondent to comply with procedural requirements in the IDEA. Such an order, however, would be affirmative action that is in the nature of equitable relief. Under the state constitution, equitable relief is the exclusive province of state courts. Art. V, Fla. Const. DOAH is not a court but is an agency of the executive branch of state government. DOAH has no constitutional authority to grant affirmative relief that Congress arguably authorized in 20 U.S.C. Subsection 1415(f)(3)(E)(iii).

ORDER

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

ORDERED AND ADJUDGED that:

The [redacted] and [redacted] IEPs do not deny FAPE to Petitioner, as that term is defined in 20 U.S.C. Subsection 1401(8), and do not violate the provisions of 20 U.S.C. Subsection 1415(f)(3)(E).

DONE AND ORDERED this 15th day of September, 2009, in Tallahassee, Leon County, Florida.

S

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

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of September, 2009.

ENDNOTES

[1/] References to subsections, sections, and chapters are to U.S.C. (2006), unless otherwise stated.

[2/] Two logistical issues have delayed the entry of this Final Order. First, DOAH did not receive notice of the decision of the appellate court until May 4, 2009, when counsel for Petitioner filed a letter notifying DOAH of the Opinion and Order of the appellate court. The letter attached a copy of the Opinion and Order of the appellate court and the recommendation of the Magistrate. Second, although the parties filed their respective PFOs on July 13, 2009, DOAH did not receive the 15-

volume Transcript from the Department of Education until August 24, 2009.

[3/] The finding that Petitioner received FAPE based on substantive grounds disposes of the allegation described in Petitioner's PFO as:

> (1) the failure to properly implement the goals and objectives of the IEP [presumably the [redacted] and [redacted] IEPs] as written;

Petitioner's PFO at 2.

[4/] See Dibuo v. Board of Education of Worcester County, 309 F.3d 184, 190 (4th Cir. 2002)(procedural violation that does not actually interfere with FAPE does not deny FAPE).

[5/] No judicial decisions have been found by the undersigned that explain the Congressional distinction between procedural violations that "significantly impede" the parents participation, within the meaning of 20 U.S.C. Subsection 1415(f)(3)(E)(ii)(II), from procedural violations that only "impede" the parents' participation. Compare the term "impede" in 20 U.S.C. Subsection 1415(f)(3)(E)(i)(I) with the term "significantly impede" in 20 U.S.C. Subsection 1415(f)(3)(E)(ii)(I). In the absence of any judicial construction explaining the distinction between "impede" and "significantly impede," the finding that Petitioner received FAPE based on substantive grounds is construed by the ALJ to mean that the alleged procedural violations in Petitioner's PFO at pages 1-2, paragraphs (A)(1) through (8), if proven, did not satisfy the "significantly impede" requirement in 20 U.S.C. Subsection 1415(f)(3)(E)(ii)(II).

[6/] Petitioner's PFO, paragraphs (B)(2) and (3), page 2.

[7/] References to subsections, sections, and chapters in Florida Statutes are to Florida Statutes (2006), unless otherwise stated.

[8/] Assuming arguendo that the District "caused" the removal of Petitioner from [redacted], the appropriate legal remedy is for the parents to either enroll Petitioner in a different school, which may be a private school for which the parents would be entitled to seek reimbursement, or seek judicial relief from the stay-put IEP. The parents are not authorized to seek FAPE while Petitioner is not enrolled in a school. See judicial decisions

at paragraph 79.

[9/] In any event, the due process hearing is a de novo proceeding in which counsel for Petitioner was entitled to obtain the raw data through discovery and adduce evidence during the hearing that would have demonstrated the inadequacy of the raw data. However, counsel for Petitioner focused most of the evidentiary hearing on alleged procedural violations.

COPIES FURNISHED:

Kim C. Komisar, Section Administrator
Bureau of Exceptional Education
and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Richard W. Withers, Esquire
Collier County School District
5775 Osceola Trail
Naples, Florida 34109-0919

Stephanie Leigh Langer, Esquire
Law Offices of Matthew W. Dietz, P.L.
2990 Southwest 35th Avenue
Miami, Florida 33133

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Dennis L. Thompson, Superintendent
Collier County School Board
5775 Osceola Trail
Naples, Florida 34109-0919

Carlos E. Mustelier, Jr., Esquire
Vernis & Bowling of Miami, P.A.
1680 Northeast 135th Street
North Miami, Florida 33181-1725

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

a) brings a civil action within 90 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is “gifted”] or
b) brings a civil action within 90 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(b), Florida Statutes; or
c) only if the student is identified as “gifted”, files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(b) and 120.68, Florida Statutes.