

Broward County School District
No. 06-5028E
Initiated by: Parent
Hearing Officer: Claude B. Arrington
Date of Final Order: March 14, 2008

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 06-5028E
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was conducted on August 20, 21, and 22, on November 6, 7, 8, 27, 29 and 30, and on December 17, 18, and 19, 2007, at Fort Lauderdale, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH). In addition, proceedings were conducted by telephone conference call between Tallahassee and Fort Lauderdale, Florida, on December 5 and 13, 2007.

APPEARANCES

For Petitioner: Jeffrey H. Minde, Esquire
Dr. Elle Furlong
Jeffrey H. Minde Attorney at Law
4613 North University Drive, Suite 242
Coral Springs, Florida 33067

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

STATEMENT OF THE ISSUE

Whether Respondent denied Petitioner a free, appropriate public education (FAPE) within the meaning of the Individuals With Disabilities Education Act, (IDEA), 20 U.S.C. § 1400, et. seq., and, if so, whether the student or the student's parents are entitled to reimbursement for expenses related to the student's unilateral placement in a therapeutic wilderness program and the student's subsequent unilateral placement in a residential boarding school.

PRELIMINARY STATEMENT

The student and the student's parents are referred in this Final Order by their initials to protect their privacy. This Final Order is being written in compliance with the standing request of the Florida Department of Education that DOAH ALJs write orders involving IDEA in a gender-neutral fashion.

At the times relevant to this proceeding prior to November 6, 2006, [REDACTED] was enrolled in the public schools of Broward County, Florida, and receiving services from Respondent's Exceptional Student Education (ESE) program at [REDACTED] School ([REDACTED]). On November 7, 2006, the parents enrolled the

student in ■■■ (■■■), a wilderness program in North Carolina.¹

On November 8, 2006, the student's parents withdrew the student from school in Broward County.

On December 12, 2006, the student's parents filed a request for a due process hearing that asserted that Respondent could not provide an education that would meet the student's needs and requested that Respondent provide the student with a residential boarding school.

On January 3, 2007, the parents enrolled Petitioner in ■■■ (■■■), a residential program in Delaware, where ■■■ remained a student as of the conclusion of the formal hearing.

At the final hearing, Petitioner presented the testimony of Petitioner's mother (hereafter referred to as ■■■); Petitioner's father (hereafter referred to as ■■■); Mary Shalyn Pierce (social worker and therapist at ■■■); Pamela Annette Mark, Ph.D. (psychologist); Brian Greer, M.D. (psychiatrist); Harold Robert Frank (ESE teacher at ■■■ with a Doctorate in Special Education); Rachael Schmalenberger (director of special education at ■■■); Maria Hocker (child clinical social worker and therapist at ■■■); Christine Hill (guidance counselor at ■■■); Jana Raskin, Ph.D. (ESE psychologist and behavior specialist at ■■■); Deborah Mulligan (ESE specialist at ■■■); and Sheneen Daniels, Ph.D. (a psychologist licensed in North Carolina). Petitioner presented Exhibits 1, 2, 3A, 3B and 4-

148, each of which was admitted into evidence with the exception of Petitioner's Exhibit 100 and 105, which were marked for identification purposes only.

Respondent called as witnesses Elizabeth Williams (curriculum supervisor for Respondent's ESE department); Grace McDonald (Respondent's due process coordinator); Christina Brown (an ESE program specialist in Respondent's ESE department); and Noel Cabrera, M.D. (a psychiatrist). Respondent offered nine sequentially-numbered exhibits, each of which was admitted into evidence.

On December 22, 2006, the undersigned entered an Order Extending Deadline, which advised the parties to keep open trial dates of February 13-15, 2007, and extended the deadline for the filing of the final order to 45 days from the conclusion of the formal hearing. On February 2, 2007, the parties filed a joint motion to continue the formal hearing to dates in March 2007. On March 16, 2007, Respondent filed a motion to continue the hearing, which was heard by telephone conference call. On March 23, 2007, the undersigned accepted the trial dates requested by the parties in August 2007, and entered a second order extending the filing of the final order until 45 days following the final hearing. At the conclusion of the final hearing, the parties requested 30 days from the filing of the last volume of the transcript in which to file their proposed

final orders (PFOs). The undersigned granted that request on the record and extended the deadline for the filing of the final order 30 days from the deadline for the filing of PFOs. On January 28, 2008, the undersigned entered an order setting February 8, 2008, as the deadline for the filing of PFOs and March 10, as the deadline for the filing of the final order. On January 30, 2008, Petitioner requested an extension of those deadlines based on medical considerations. On January 30, 2008, the undersigned extended the deadline for filing PFOs to February 22, 2008, and the deadline for the filing of the final order to March 24, 2008.

Volumes 1-3 of the Transcript were filed September 17, 2007. Volumes 4-6 of the Transcript and the deposition of Petitioner were filed December 24, 2007. Volumes 7-14 of the Transcript were filed January 9, 2008. The transcribed testimony of a witness that should have been included as part of Volume 9 of the Transcript, was on February 1, 2008, filed with the designation "Appendix to Volume 9." Respondent timely filed a PFO, which has been duly considered by the undersigned in the preparation of this Final Order. Petitioner did not timely file a PFO.

FINDINGS OF FACT

██████'S FAMILY

1. [REDACTED] was born on [REDACTED]. [REDACTED] adopted [REDACTED] when [REDACTED] was three days old and moved to Coral Springs, Florida, in 1995. Although [REDACTED] has two older children by a prior marriage, [REDACTED] and [REDACTED] have essentially raised [REDACTED] as an only child. Both parents have been very involved with [REDACTED]. [REDACTED] has been more involved than [REDACTED] in working with the Broward County School Board staff prior to this due process proceeding.

DR. GREER'S DIAGNOSIS

2. Dr. Brian Greer is a psychiatrist who, at the time of the formal hearing, had been treating [REDACTED] for at least eight years. Dr. Greer's role was mainly to manage [REDACTED]'s medication. His charts only went back to 2003, but he testified that he treated [REDACTED] for several years before the chart began. At the request of [REDACTED], Dr. Greer wrote a letter, dated October 20, 2006, containing the following brief discussion of [REDACTED]'s course of treatment and his diagnosis for [REDACTED]:

[REDACTED] is a patient that I have been seeing for over 5 years for psychopharmacology treatment. [REDACTED]'s treatment course has been marked by extreme fluctuations from depressive dysphoria to euphoric mania to profound distractibility, impulsivity and motor restlessness. [REDACTED] has been on multiple medication regimens, some of which [sic] has produced long periods of stability, however [REDACTED] eventually accommodates to medication and different approaches have become necessary. In a structured academic setting, [REDACTED] struggles with sustaining attention but is not aggressive or violent. [REDACTED]'s diagnosis:

Axis I- A.D.H.D., NOS
Bipolar Disorder-Mixed
Axis II- 0
Axis III- 0
Axis IV - Severe

3. Dr. Greer explained that A.D.H.D., NOS, is a diagnosis of Attention Deficit Hyperactivity Disorder, not otherwise specified, and that Bipolar Disorder-Mixed is a diagnosis of Bipolar Disorder that contains episodes of depression and episodes of euphoria. The Axis IV diagnosis reflects that [REDACTED]'s home environment and school placement were stressful.

GRADES K - 8

4. [REDACTED] attended Broward County Public Schools from kindergarten until seventh grade. [REDACTED] attended [REDACTED] School from kindergarten through fifth grade. While at [REDACTED] School (the record is unclear as to the year), [REDACTED] was evaluated and determined to be eligible for services pursuant to Section 504 of the American with Disabilities Act, 42 USC § 1211, et. seq. The school psychologist who evaluated [REDACTED] believed that [REDACTED] suffered from Attention Deficit Hyper Activity Disorder (ADHD) and Oppositional Defiant Disorder (OPDD). [REDACTED] was thereafter placed on what was referred to as a 504 plan that allowed [REDACTED] extra time for testing and allowed [REDACTED] to take tests in a room smaller than the assigned normal classroom. [REDACTED] also was given less homework.

5. On June 3 and 5, 2003, school psychologist Jennifer Wells evaluated [REDACTED]. Ms. Wells concluded that [REDACTED] presented characteristics of an emotionally handicapped student.

6. [REDACTED] is a public charter school located in Broward County, Florida. [REDACTED] and [REDACTED] tried to have [REDACTED] placed in [REDACTED] the 2003-2004 ([REDACTED]'s 8th grade year). Because of the demand, admission to [REDACTED] was subject to a lottery drawing. The lottery number drawn for [REDACTED] did not qualify [REDACTED] for admission. In lieu of placing [REDACTED] in [REDACTED] School, the parents placed [REDACTED] in [REDACTED] School, a private school, for the 2003-2004 school year.

7. Although [REDACTED] was attending [REDACTED] School at the time, on October 1, 2003, an ESE eligibility team met to determine whether [REDACTED] met eligibility for services from Respondent's ESE program. [REDACTED] met with the team.² As a result of the meeting, [REDACTED] was determined eligible for services as an emotionally handicapped student.

EMOTIONALLY HANDICAPPED

8. Petitioner's Exhibit 148 contains Respondent's definitions of the term "emotional handicap," together with eligibility criteria for ESE services under the category "Emotionally Handicapped" (EH) as of December 2004.

9. Petitioner's Exhibit 148 defines emotional handicap as follows:

An emotional handicap is defined as a

condition resulting in persistent and consistent maladaptive behavior, which exists to a marked degree, which interferes with the student's learning process, and which may include but is not limited to any of the following characteristics:

1. an inability to achieve adequate academic progress which cannot be explained by intellectual, sensory, or health factors;
2. an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. inappropriate types of behavior or feelings under normal circumstances;
4. a general pervasive mood of unhappiness or depression; or,
5. a tendency to develop physical symptoms or fears associated with personal or school problems.

10. This definition is consistent with Florida Administrative Code Rule 6A-6.03016.

11. Petitioner's Exhibit 148 contains, in relevant part, the following EH eligibility criteria:

Emotionally Handicapped - A student is eligible for a special program for emotionally handicapped if there is evidence that:

1. the student, after receiving supportive educational assistance and counseling services available to all students, still exhibits an emotional handicap;
2. an emotional handicap exists over an extended period of time, and in more than one situation;
3. the emotional handicap interferes with the student's own learning, reading, arithmetic or writing skills, social-personal development, language development, or behavioral progress and control; and
4. when intellectual, sensory or physical deficits exist, they are addressed by other

appropriate interventions or special programs. . . .

12. This criteria is consistent with Florida Administrative Code Rule 6A-6.03016.

GRADE 9

13. ■■■ enrolled in ■■■ for the 2004-2005 school year (■■■'s 9th grade). On September 14, 2004, an appropriately constituted individual education plan (IEP) meeting was convened for the purpose of drafting an IEP for ■■■. ■■■ attended this meeting and actively participated in the process.

14. The resulting IEP, dated September 15, 2004, focused on improvement in the following areas: organizational skills, interactions with peers, and self-control when angry. Accommodations for each class included: highlighted materials for reading and emphasis, a visual schedule; extra time for processing/responding to written work; extra time to take tests; extra time for assignments; preferential seating in close proximity to the teacher giving directions or presenting lessons; written notes, outlines, and study guides; and weekly consultation with parent. The IEP also provided for weekly counseling sessions for ■■■ with ESE staff and weekly consultation between general education teachers and ESE staff.

15. The IEP of September 15, 2004, provided for all of ■■■'s classes to be taught by non-ESE teachers in regular classrooms.

16. ■■■ believed that the IEP dated September 15, 2004, met ■■■'s needs. On September 15, 2004, ■■■ signed a Notice of Procedural Safeguards indicating that ■■■ had ". . . read the Procedural Safeguards for Exceptional Students and understand my rights and responsibilities as described." ■■■ had the option of selecting the statement that ■■■ ". . . would like an explanation of the procedural safeguards for Exceptional Students," but ■■■ did not do so. Sherry Brown, a member of the IEP team, signed a statement on September 15, 2004, that an explanation of the Procedural Safeguards for Exceptional Students had been provided.

17. ■■■ testified that no one sat down and explained the Procedural Safeguards booklet to ■■■. ■■■ testified that ■■■ was asked to sign the Procedural Safeguards statement and that ■■■ did so without reading the booklet. ■■■ received a copy of the Procedural Safeguards, but ■■■ did not know what ■■■ did with the booklet.

18. The IEP team followed all required procedural steps in developing the IEP dated September 15, 2004. The greater weight of the credible evidence established that ■■■ was appropriately advised of the Procedural Safeguards.

19. ■■■'s IEP dated September 15, 2004, provided ■■■ FAPE for the 2004-2005 school year. ■■■ had a positive 9th grade year in that ■■■ improved in all targeted areas.

GRADE 10

20. An interim IEP meeting was convened on April 28, 2005, following ■■■'s request that ■■■ be permitted to take a Learning Strategies class the first semester of the 2005-2006 school year (■■■'s tenth grade year). The Learning Strategies class is a class taught by an ESE teacher in an ESE classroom. ■■■ participated in this meeting. ■■■'s IEP dated September 15, 2004, was amended to permit ■■■ to take the Learning Strategies class.

21. ■■■ agreed with the IEP as amended on April 28, 2005, and felt it met ■■■'s needs.

22. On April 28, 2005, ■■■ signed another Notice of Procedural Safeguard signature page, reflecting that ■■■ had read and understood ■■■ rights and responsibilities.

23. On August 17, 2005, ■■■ signed a Notice of Procedural Safeguards stating that ■■■ had read and understood ■■■ rights and responsibilities.

24. On August 30, 2005, an IEP meeting occurred to update ■■■'s IEP. ■■■ attended and participated in that meeting. The August 30, 2005, IEP continued the accommodations from the September 15, 2004, IEP, and added the provisions of a universal

binder to assist ■■■ with ■■■'s organizational skills. The IEP increased services by having specialized instruction for behavior and learning strategies on a daily basis; continued the counseling from the IEP dated September 15, 2004; identified math as an FCAT remediation goal; and placed ■■■ in the Learning Strategies class. The greater weight of the credible evidence established that the IEP developed August 30, 2005, was appropriately drawn in compliance with all applicable procedural requirements.

25. In 2005-2006 school year ■■■ enrolled in a Learning Strategies class taught by Dr. Frank. In that class Dr. Frank taught students how to learn, how to schedule their time, how to organize themselves, how to organize their workspaces, how to take tests, how to give speeches, how to prepare long-term projects, how to deal with peer pressure, and how to make decisions.

26. The Learning Strategies class was the only ESE class that ■■■ took at ■■■. ■■■ took the Learning Strategies class as an elective course, an option that was available because ■■■ was an ESE student. ■■■ did well in Dr. Frank's class. Dr. Frank described ■■■ as being one of his best students. Dr. Frank opined that ■■■ did not need any other ESE classes because ■■■'s academic level was above that taught in ESE classes.

27. At the times relevant to this proceeding, Dr. Frank provided support services for ESE students, including ■■■ An ESE student could get a pass to go to Dr. Frank's class to get help

from him or to work in a relatively quiet, distraction-free environment. For example, if ■■■ had difficulty understanding a math assignment, ■■■ could obtain a pass from ■■■'s math teacher to go to Dr. Frank's classroom, where he would help ■■■ understand and solve the problem. ■■■ could also go to Dr. Frank's classroom if ■■■ needed a respite from ■■■'s normal schedule. ■■■ could also access Dr. Frank's support if ■■■ was having behavior issues in a regular class or social issues with peers.

28. Dr. Frank maintained a log to document the support services he provided to ESE students. Every time a student entered his classroom, Dr. Frank would write down the student's name and note the type of support that had been provided the student. Dr. Frank's log did not include services to an ESE student while the student was in one of the ESE classes taught by Dr. Frank. For example, the log would not include services to ■■■ during the time ■■■ was taking the Learning Strategies class taught by Dr. Frank.

29. Dr. Frank's log reflected that ■■■ utilized his support services 63 times during the 2005-2006 school year. Towards the end of the 2005-2006 school year, ■■■ utilized Dr. Frank's classroom as a resource more frequently and for longer periods of time.

30. ■■■ agreed with the August 30, 2005, IEP and felt it met ■■■'s needs. ■■■ also agreed at that time that ■■■ did not need a re-evaluation in any area.

31. ■■■ was hospitalized for 3.5 days in January 2006. After failing to take the medicines that had been prescribed by Dr. Greer, ■■■ destabilized and expressed thoughts of suicide. While hospitalized, ■■■ received psychiatric services, which included monitoring ■■■'s medications, behavior modification, and group therapy. The hospitalization improved ■■■'s mental status. This was ■■■'s only psychiatric hospitalization.

32. ■■■ returned to ■■■ upon discharge from the hospital. While the staff of ■■■ knew that ■■■ was absent from school, the staff did not know about the psychiatric hospitalization until December 2006.

33. ■■■'s grades deteriorated during the second semester of the 2005-2006 school year as compared to the first semester. For the second semester ■■■ failed "Algebra IB" and "Intensive Mathematics"; made a D+ in "Spanish II"; made Ds in "English II", "Biology I", and "World History"; and made an A in "Learning Strategies". For the first semester, ■■■ made a D in "Spanish II"; made Cs in "English II", "Intensive Mathematics", and "World History"; made C+s in "Algebra IB" and "Biology I"; and made an A in "Learning Strategies".

34. Dr. Raskin provided weekly counseling to ■■■ during ■■■'s tenure at ■■■. Dr. Raskin observed that ■■■ had greater difficulty during the second semester of the 2006-2007 school year than ■■■ had had during the first semester of that school

year. ■ became more emotional and was less attentive to school work. Dr. Raskin did not view ■'s deterioration to be unusual for an EH student. Dr. Raskin expected a student such as ■ to have more difficulties during certain periods than others. Dr. Raskin believed that ■ would overcome the difficulties experienced during the second semester of the 2005-2006 school year. In April 2006, Dr. Raskin did not believe that ■ needed a more restrictive placement for the second semester of the 2005-2006 school year or for the upcoming 2006-2007 school year.

35. The greater weight of the credible evidence established that ■ received FAPE during the 2005-2006 school year pursuant to the IEP developed August 30, 2005.³

GRADE 11

36. ■ attended an IEP meeting for ■ on April 26, 2006. The purpose of the meeting was to establish ■'s IEP for the 2006-2007 school year (■'s 11th grade year). The IEP developed on April 26, 2006, continued all of the accommodations from previous IEPs, continued specialized instruction for learning strategies on a daily basis, provided for weekly counseling, and removed specialized instruction for behavior. The IEP reflected that ■ was able to access the community appropriately and could care for ■'s daily living skills independently. ■ continued to have access to Dr. Frank's

classroom and continued to receive weekly counseling from Dr. Raskin. ■ did not request any change to the IEP as it was presented at the meeting, and she did not disagree with the IEP during the meeting or after having taken the IEP home to read it. On April 26, 2006, ■ signed the Notice of Procedural Safeguards and checked the box that contained the following acknowledgement: "I have read the Procedural Safeguards for Exceptional Students and understand my rights and responsibilities as described." The greater weight of the credible evidence established that the IEP developed April 26, 2006, was appropriately drawn in compliance with all applicable procedural requirements.

37. ■ went from a rotating scheduling system to a block scheduling system for the 2006-2007 school year. In a rotating system, students would take 6 or 7 classes a day. In a block system, students would take 4 classes per day, with each class being of a longer duration. The April 26, 2006, IEP provided that one of ■'s classes for the first semester of the 2006-2007 school year would be a Learning Strategies class that was scheduled to be taught by Dr. Frank. After the scheduling system class, Dr. Frank was not scheduled to teach the Learning Strategies class for the first semester of the 2006-2007 school year. An IEP meeting was convened on August 21, 2006, because of the scheduling changes. At the IEP meeting on August 21,

2006, ■■■ and ■■■ requested that ■■■ be taken out of the first semester Learning Strategies class since Dr. Frank would not be the teacher. The IEP team accommodated that request. The remaining accommodations set forth in the April 26, 2006, IEP were maintained, including ■■■'s ability to access Dr. Frank's class as a resource and the provision of counseling services by Dr. Raskin.

38. The greater weight of the credible evidence established that the IEP developed April 26, 2006, and the changes thereto developed August 21, 2006, were drawn in compliance with all applicable procedural requirements and would have provided ■■■ with FAPE if ■■■ had not continued to deteriorate.

39. Dr. Raskin consulted with Dr. Mark during the school years 2005-2006 and 2006-2007. This consultation helped coordinate the services that were being provided by Dr. Mark and by the school.

■■■' DETERIORATION

40. At the beginning of the 2006-2007, Dr. Raskin observed that ■■■ was depressed and the deterioration in performance she had observed toward the end of the 2005-2006 school year had been carried forward. Dr. Raskin attributed ■■■'s downturn in part to a failed relationship with a student of the opposite sex. Dr. Raskin hoped that the deterioration was situational

and would improve. As the 2006-2007 school year progressed, Dr. Raskin continued to closely monitor [REDACTED] and observed that [REDACTED]'s condition became worse. After reviewing [REDACTED]'s behavior and grades for the first grading period, Dr. Raskin and the [REDACTED] staff in general came to believe that [REDACTED] needed to be re-evaluated to determine whether [REDACTED] met the criteria for services under the category Severely Emotionally Disturbed (SED). If it were determined that [REDACTED] needed SED services, those services would have to be provided at an SED center.

RE-EVALUATION - SED

41. On October 11, 2006, Dr. Raskin wrote the following email to the members of the [REDACTED] child study team:

I would like for us to discuss [REDACTED] (11th grade) at our next [team] meeting. [REDACTED] already receives ESE services through [REDACTED]'s E.H. eligibility. [REDACTED] has been having extreme difficulty getting along at home and outside of school for several years, but was functioning at an overall average level up until this school year. This year [REDACTED] has decompensated, as evidenced by extreme emotionality, failing grades (in at least 3 classes; borderline D or F in 4th class), and non-compliance/disregard for several school policies. I strongly believe we need to consider an S.E.D. eligibility and would like to find out if this process could be expedited. [REDACTED]'s mother would support this change of eligibility, as she is at a loss for how to help [REDACTED].

42. Petitioner's Exhibit 148 contains Respondent's definition of the term "severe emotional disturbance," together

with eligibility criteria for ESE services under the SED category.

43. Petitioner's Exhibit 148 defines a severe emotional disturbance as follows:

A severe emotional disturbance is defined as an emotional handicap, the severity of which results in the need for a fulltime program and extensive support services.

44. Petitioner's Exhibit 148 contains, in relevant part, the following SED eligibility criteria:

[SED] - A student is eligible for a special program for severely emotionally disturbed if:

1. the student meets the [EH criteria], and
2. there is evidence that the student requires a program which:
 - a. serves the student for the full school week in a special class;
 - b. provides a highly structured academic and affective curriculum, including but not limited to, art, music, and recreation services which are specifically designed for severely emotionally disturbed students;
 - c. provides for a lower adult to pupil ratio than programs for emotionally handicapped are designed to accommodate;
 - d. provides for extensive support services specifically designed for severely emotionally disturbed students. These services include but are not limited to:
 - (1) individual or group counseling;
 - (2) parent counseling or education, and
 - (3) consultation form mental health, medical, or other professionals; and
 - e. cannot be provided in a less restrictive environment. . . .

45. In October 2006, Dr. Raskin discussed with [REDACTED] various placement options for [REDACTED], including [REDACTED] School, an SED Center, and the need for an expedited re-evaluation of [REDACTED]. [REDACTED] asked that Dr. Greer write a letter regarding [REDACTED] to help expedite the re-evaluation process. Dr. Greer's letter of October 20, 2006, was in response to [REDACTED]'s request. In addition to the brief discussion of [REDACTED]'s course of treatment and diagnosis, Dr. Greer's letter of October 20, 2006, contained the following recommendation, which was consistent with the Dr. Raskin's recommendation:

I strongly recommend that [REDACTED] be placed in an S.E.D. school setting, preferably [REDACTED] as I am familiar with the quality of that facility and feel [REDACTED] would be a good fit.
. . . .

46. Dr. Greer explained his recommendation in his response to the following question asked on behalf of Petitioner in Volume 4 page 806, beginning at line 10:

Q: At the time you wrote the letter [the letter dated October 20, 2006], Dr. Greer, you had recommended that [REDACTED] would go to [REDACTED] and a question was asked by the opposing counsel as to whether or not [REDACTED] would have benefited at that time from attending [REDACTED] living at home and continue to be medicated and your answer was yes. And my question is to what extent do you feel that [REDACTED] would have benefited from that environment and would that benefit have been meaningful where [REDACTED] would have been able to continue to access appropriate services and an appropriate education and get better?

A: Okay, I'm sorry, your voice was fading in and out, but I will say that its always customary to first, if a patient has never been in a severely emotionally disturbed school setting, that's the first step and its beneficial at first if you could delay or prevent a student from being away from home, that's what we try to do. So the first step is trying to have [REDACTED] remain at home and that would be beneficial if [REDACTED] really did the trick and stabilize [sic] [REDACTED]. The next step if that doesn't work is to have [REDACTED] sent away to a residential treatment center. And in all fairness, that's for the reason of providing a different kind of treatment, A, and also for the reasons of giving the family a break, B. And that's reasonable and customary care.

47. [REDACTED] was frequently non-compliant with the medications prescribed by Dr. Greer. [REDACTED]'s mental health would deteriorate within a few days if [REDACTED] stopped taking the prescribed medication. [REDACTED] would become more unstable with greater fluctuations in mood and thinking. [REDACTED]'s behavior would become more difficult to control. Dr. Greer observed [REDACTED] to be in crisis two or three times a month. In October 2006, [REDACTED] was the most unstable he had seen [REDACTED] during the course of [REDACTED]'s treatment. Non-compliance with medication and the progression of [REDACTED]'s illness resulted in [REDACTED]'s hospitalization in January 2006 and in [REDACTED]'s decompensation in the fall of 2006.

48. On October 23, 2006, an interim IEP meeting was held to discuss [REDACTED]'s apparent deterioration and to review the services and accommodations that were being provided. [REDACTED] was

present and participated in the interim IEP meeting. Relatively minor changes were made to ■■■'s IEP. ■■■ disagreed with the interim IEP developed October 23, 2006, because she believed that ■■■ should be in more ESE classes and she wanted ■■■ to be changed from a regular diploma track to a special diploma track. The greater weight of the credible evidence established that placing ■■■ in more ESE classes would have been inappropriate because ■■■ has the intellect to pass the regular curriculum.

49. On October 23, 2006, ■■■ signed the Notice of Procedural Safeguards statement reflecting that ■■■ had ". . . the Procedural Safeguards for Exceptional Students and understand my rights and responsibilities as described."

50. Despite ■■■ disagreement with the interim IEP on October 23, 2006, ■■■ signed a consent form for the Respondent to begin a re-evaluation of ■■■. The purpose of the re-evaluation was to determine whether ■■■ met the criteria to become eligible for the category SED and to be placed at an SED center.

51. Changing ■■■'s placement to an SED center would constitute a more restrictive placement. ■■■ knew, or should have known, that Respondent could not place ■■■ in an SED center without the re-evaluation.

52. The October 23, 2006, IEP was developed to provide ■■■ FAPE pending ■■■'s re-evaluation.

53. Petitioner's Exhibit 148 provides that the following must be done before a student's eligibility can be changed from EH to SED:

For students enrolled in programs for emotionally handicapped the minimum evaluation for determining eligibility for special programs for severely emotionally disturbed include evidence of the following procedures:

(1) conferences concerning the student's specific problem in the program for emotionally handicapped;

(2) anecdotal records or behavioral observations made by more than one person in more than one situation which cite the specific problems causing the need for a program for severely emotionally disturbed;

(3) interventions and adjustments that have been tried with the student while enrolled in the program for emotionally handicapped;

(4) an update of the social history. . .;

(5) additional psychological, psychiatric or other evaluations deemed appropriate by the administrator of the exceptional student education programs.

54. Dr. Raskin began gathering the information necessary to re-evaluate ■■■ the same day ■■■ signed the consent form. Ms. Poynton and Dr. Frank completed an assessment of ■■■ using a Behavior Assessment System for Children, Second Edition (BASC-2) form. Ms. Poynton was one of ■■■'s teachers and had known the student for two years. Dr. Frank indicated that he had known ■■■ for 1.5 years. The date Ms. Poynton completed her BASC-2 form was not established. Dr. Frank completed his BASC-2 form on October 23, 2006.

55. ■■■ also completed a BASC-2 form for ■■■, as well as a form from Conner's Parent Rating Scale. The completed form was dated October 23, 2006.

56. ■■■ and ■■■ together completed a Parent Information Form Social and Developmental History (Parental Form). ■■■ completed ■■■ portion of the form on October 23, 2006. ■■■ completed ■■■ portion of the form on October 24, 2006.

57. In response to the question on the Parental Form "What are your feelings about your child's current educational program?" ■■■ responded: "I feel that at this time, [■■■] needs smaller classes, more individualized help. I do feel that [■■■]'s present school is doing all they can for [■■■]."

58. There was extensive testimony as to the difficulties ■■■ and ■■■ experienced with ■■■ from early childhood onward. Their testimony pertaining to the ninth and tenth grade years established that ■■■ was very defiant and very difficult to live with. As ■■■ aged, the problems at home were getting worse instead of better. ■■■'s behavior was worse at home than at school. At home, ■■■ refused to abide by the rules set down by ■■■ and ■■■. In the fall of 2006, ■■■ neglected ■■■'s hygiene and dressed in a bizarre fashion. ■■■'s bedroom at home was in a state of disarray.

59. In the mother's comments section of the Parental Form, ■■■ wrote as follows:

[] is not motivated at all - [] feels []'s friends are never there for []. We don't understand []; [] is very angry most of the time; [] feels more like an equal to us than a child; generally its []'s way or nothing; [] is very immature and often disrespectful. (Emphasis in the original.)

60. In the father's comments section of the Parental Form, [] wrote as follows:

[] has no respect for authority. [] is very self-centered and thinks the world revolves around []. [] is very nasty, talks back, and uses foul language.

61. [] completed an Adolescent Symptom Inventory - 4 form on October 31, 2006. Among the answers reflected on that form, [] indicated that [] has never run away from home, is not violent, and has never acted reckless with no concern for safety of self or others.

62. Expediting the re-evaluation was discussed at the October 23, 2006, IEP meeting. All agreed that the re-evaluation would be expedited because of []'s deterioration.

63. On occasions between October 23, 2006, and November 7, 2006, [] was unstable psychiatrically. On October 24, 2006, Dr. Greer observed [] to be psychotic. At no time during this period was [] considered to be a danger to self or others.

64. As of November 8, 2006, Dr. Raskin had gathered all information necessary to have [] re-evaluated by the school psychologist with the exception of a report from Dr. Mark, []'s

private psychologist. Dr. Mark's report would not have held up the evaluation by the school psychologist. As of November 8, 2006, ■■■ was the next student scheduled to be evaluated by the school psychologist. The staff at ■■■ acted timely in arranging to have ■■■ re-evaluated.

65. On November 8, 2006, ■■■ formally withdrew ■■■ from ■■■. On that date, ■■■ informed the staff that ■■■ had been placed in ■■■. ■■■ also brought notes of appreciation and small gifts to Dr. Raskin, Dr. Frank, and to another staff member named Tammy. ■■■'s notes told them that she thought they had done whatever they could for ■■■ and thanked them for trying to help ■■■

NO PRIOR NOTICE OF WITHDRAWAL

66. On or before November 2, 2006, Mr. and ■■■ decided to enroll ■■■ in ■■■ to be followed by ■■■'s enrollment in ■■■. Mr. and ■■■ enrolled ■■■ in ■■■ on November 7, 2006. This enrollment was accomplished by having ■■■ escorted to the ■■■ facility by hired escorts during the night of November 6, 2006. ■■■ received no notice that Mr. and ■■■ intended to withdraw ■■■ from school until November 8, 2006. ■■■ testified that ■■■ did not tell the school about the planned withdrawal of ■■■ from school until after ■■■ had been physically taken to ■■■ because ■■■ was fearful that word of the intended placement would be leaked to ■■■ and that ■■■ would run away or react violently.

That explanation for not notifying the school is not persuasive because [REDACTED] had no reason to believe that the staff at [REDACTED], particularly Dr. Raskin (the individual at [REDACTED] with whom [REDACTED] communicated most frequently), would have breached [REDACTED] confidence about the plans for [REDACTED]

67. [REDACTED] and [REDACTED] were not satisfied with the progress being made towards the re-evaluation of [REDACTED] and the inability of the ESE department to make any firm recommendations prior to the completion of the re-evaluation. In short, they ran out of patience with the ESE department and took the action they felt was in the best interest of [REDACTED]. They considered the recommendations of the educational consultant they had hired, the professional advice of Dr. Greer and Dr. Mark, the very difficult conditions at home, the traumatic experience of the January 2006 psychiatric hospitalization, and [REDACTED]'s deterioration in deciding to place [REDACTED] in [REDACTED]. The timing of their action was undoubtedly influenced by their knowledge that their intended placements ([REDACTED] and [REDACTED]) would not enroll a student unless the student was less than 17.5 years old. The timeline of having [REDACTED] complete the [REDACTED] program and then enroll in [REDACTED] before [REDACTED] turned 17.5 put additional pressure on [REDACTED] and [REDACTED] to act when they did since [REDACTED] had turned 17 years of age on [REDACTED].

[REDACTED]

68. ■■■ is an intensive, wilderness program for adolescents between the ages of 13 and 18. The typical adolescent stays in the program for six to eight weeks. ■■■ stayed in the program from November 7, 2006, to January 3, 2007, a period of 58 days. The program is designed to be a powerful intervention for those that need structure, supportive counseling, motivational improvement, and the development of self-esteem, self-reliance, and self-respect. The program involves camping and hiking under 24-hour-a-day supervision from a camp counselor. Camp sites are moved daily and the program enrollees are expected to perform designated tasks relating to breaking camp, hiking, and setting camp on a daily basis.

69. At the time ■■■ and ■■■ enrolled ■■■ in ■■■, ■■■ thought that ■■■ was educationally accredited. It was not. ■■■ was licensed as a foster care camp when ■■■ attended. ■■■ became a mental health care facility after ■■■'s attendance. There was no evidence as to the credentials of the camp counselors who supervised the enrollees. Those camp counselors would have been the ■■■ employees who would have provided any instruction to the enrollees.

70. ■■■ received no academic credits based on ■■■'s stay at ■■■. The greater weight of the credible evidence established that ■■■ had no formal, accredited educational component.

71. Dr. Daniels, a psychologist with offices in Asheville, North Carolina, evaluated [REDACTED] in person at [REDACTED] on November 28, 2006. Dr. Daniels had telephone input on December 1, 2006, from Shalene Pierce, [REDACTED]'s therapist at [REDACTED], and Gwynne Hales, the educational consultant employed by [REDACTED] and [REDACTED]. Dr. Daniels had telephone input from [REDACTED] on December 4, 2006. Dr. Daniels' thorough report (Petitioner's Exhibit 5) details the tests she administered and the history she elicited. Dr. Daniels found [REDACTED] to be of average intelligence, with a weakness in math.

72. Dr. Daniels made the following Axis I diagnoses on DSM-IV (the Diagnostic and Statistical Manual, Fourth Edition):

296.90 Mood disorder, NOS
313.00 ADHD, inattentive type
300.82 Undifferentiated Somatoform Disorder
312.90 Disruptive Behavior Disorder, NOS

73. Dr. Daniels deferred diagnosis on Axis II and Axis III.

74. On Axis IV, Dr. Daniels noted the following:

Parent-child conflict, social difficulties, academic struggles, prior in-patient hospitalization, poor response to outpatient treatment, placement in wilderness program.

75. On Axis V, Dr. Daniels noted a current GAF of 40.⁴

76. Dr. Daniels thereafter made specific treatment recommendations which are, in relevant part:

Following [REDACTED]'s placement at [REDACTED], it is recommended that [REDACTED] continue in a structured, residential, therapeutic setting

where [] can learn basic functional life skills and develop skills for independent living. This should include at a basic level, instruction and teaching of appropriate hygiene, taking care of one's self and belongings, managing daily routines, and skills to interact more appropriately with others. The school or program needs to be nurturing but also very structured with a level system and clear expectations and positive consequences. Social skills training and coaching needs to be an integral part of everyday activities to help [] develop a greater repertoire of age-appropriate skills.

[] should participate in individual psychotherapy. . . .

Group therapy will be an important component to []'s treatment. . . .

Family therapy should provide []'s parents with the requisite support and assistance needed to maximize []'s potential for success at home and in the community when [] returns home. Before [] returns home, a behavioral contract should be put in place that delineates clear guidelines, operational definitions of behavior, expectations, and consequences. The behavioral contract should address []'s behavioral excesses (e.g., verbal outbursts, oppositional behavior) as well as behavioral deficits (e.g., poor hygiene, unwillingness to engage in self-help skills) and should reward behaviors that are critical to []'s success, such as individual therapy, holding down a job or attending school regularly, keeping []'s self and room clean, etc.

[] is currently prescribed an antidepressant and mood stabilizing medications, which seemed to have positive effects initially, although it is uncertain if these effects have been maintained.

Possibly, in a structured setting, where [REDACTED]'s behavior and mood are monitored, it can be determined if these medications are necessary. [REDACTED] is stabilized in regard to [REDACTED]'s mood with [REDACTED]'s current medication regime, although issues relating to functional life skills and interpersonal skills have not improved. It will be important for [REDACTED] to continue to be monitored by a psychiatrist for continuation of this medication or adjustment to this medication regime. Pharmacotherapy should target mood and attentional [sic] deficits as well as monitor for any deterioration in affective, cognitive, and behavioral functioning.

[REDACTED]'s academic curriculum should be structured around [REDACTED]'s specific needs. At this time, [REDACTED]'s academic needs can not be separated from [REDACTED]'s emotional and behavioral needs, which are primary. Still, [REDACTED]'s education is an important component of [REDACTED]'s overall role function and should be encouraged. [REDACTED] is likely to do best in a small classroom setting where there is a high degree of individualized or small group attention and where social distractions are minimized. All accommodations and interventions customarily made for students with ADHD should be implemented. [REDACTED] needs to be taught study skills, organizational skills, and meta-cognitive strategies. [REDACTED] will need individualized support in the area of math particularly. In general, [REDACTED]'s therapists should be involved in developing appropriate consequences for completing or not completing work, and [REDACTED]'s school functions should be part of how [REDACTED] advances and gains privileges. [REDACTED] should be encouraged to develop the skills [REDACTED] will need to obtain [REDACTED]'s GED or high school diploma. [REDACTED] should also be encouraged to develop skills and goals in areas that will correspond to vocational interests and functional life skills.

Furthermore, [REDACTED] should be encouraged to participate in activities where [REDACTED] has strengths such as sewing and creative outlets. This [sic] will likely lead to improved self-confidence in [REDACTED]'s abilities.

77. The greater weight of the credible evidence established that [REDACTED] was more stable upon discharge from [REDACTED] than upon admission.

[REDACTED]

78. The Mission Statement for [REDACTED] is as follows:

[REDACTED] is a residential school for middle and high school students with ADHD, NLD [non-specific learning disabilities], and Asperger's Syndrome, which provides a nurturing environment that embodies a well balanced and structured academic program preparing students for career and college entrance with a social skills curriculum. [REDACTED] emphasizes time management, accountability, and responsibility. Personal and social awareness, including life skills, are incorporated throughout the school and in the student's daily life. The academic curriculum is presented in small learning blocks which accommodates specific learning needs and styles, yet prepares students for success in a career or at the college level.

79. The greater weight of the credible evidence established that [REDACTED] was an appropriate educational placement for [REDACTED]. [REDACTED]'s curriculum is based on the Delaware regular school curriculum. [REDACTED] has received appropriate educational and support services at [REDACTED] and is on target to receive a regular diploma at the end of the 2007-2008 school year.

80. With the exception of providing a residential placement, the evidence established that [REDACTED] SED center could have provided educational and support services for [REDACTED] comparable to those provided by [REDACTED].

81. On the continuum of placements, [REDACTED] is a more restrictive placement than [REDACTED], but it is a less restrictive placement than [REDACTED].

82. After Dr. Greer wrote his letter of October 20, 2006, he wrote a second, undated letter. He testified that the letter was written before [REDACTED] was placed in a residential care facility. The record was unclear whether Dr. Greer was referring to the [REDACTED] placement on November 7, 2006, or the [REDACTED] placement on January 3, 2007. The record is clear that the undated letter was written between October 20, 2006, and December 8, 2006 (the date the letter was faxed to some unidentified recipient.) On October 24, 2006, Dr. Greer observed that [REDACTED] was in a psychotic delirium and he discussed with [REDACTED] the need to either hospitalize [REDACTED] or place [REDACTED] in a therapeutic residential school. Dr. Greer wrote an undated letter that summarized his opinion:

[REDACTED] . . . requires placement in a residential care facility. [REDACTED]'s current condition precludes [REDACTED] from living at home and from attending classes in a mainstream school setting.

It is medically necessary for [REDACTED] to be placed in a residential school setting away from home, and this will likely be extremely stabilizing for [REDACTED].

83. On August 13, 2007, Dr. Greer, at the request of [REDACTED], wrote a letter that included the following:

I am a Psychiatrist board certified in both Child/Adolescent and Adult Psychiatry. I have treated [REDACTED] . . . for over seven years. [REDACTED] has a complex combination of Bipolar Disorder, A.D.H.D., Oppositional Defiant Disorder and a history of self-mutilation.

My session in October 2006 with [REDACTED] revealed [REDACTED] revealed [REDACTED] to be in a mixed state of dysphonic mania. Several regimens of neurostimulants, mood stabilizers and anti-depressants were prescribed. It was finally decided that [REDACTED] needed to be placed in a therapeutic wilderness program ([REDACTED] School) followed by a therapeutic boarding school, [REDACTED] in Delaware.

I last saw [REDACTED] in June of 2007. There was a marked improvement in [REDACTED]'s attitude, demeanor, response to questions, level of respect, and mental status and academic intervention-[REDACTED] is now pleasant, respectful and appropriate. . . .

84. When he wrote the undated letter and the letter of August 13, 2007, Dr. Greer thought that the [REDACTED] placement had been tried and that it had failed. Dr. Greer did not learn that [REDACTED] had never been placed in [REDACTED] until he testified at the hearing in this proceeding. As he explained in his testimony and in his letter dated October 20, 2006, Dr. Greer believed that [REDACTED] should have been tried first.

85. Dr. Mark is a licensed clinical psychologist who treated [REDACTED] from September 14, 2005, through October 18, 2006. Dr. Mark saw [REDACTED] for 23 individual sessions and 15 family therapy sessions. [REDACTED], [REDACTED], and [REDACTED] attended five of the family therapy sessions. [REDACTED] and [REDACTED] attended the remaining ten family therapy sessions without [REDACTED]

86. On March 16, 2007, Dr. Mark wrote the following Treatment Summary:

[REDACTED] was treated from September 14, 2005 to October 18, 2006 for 23 individual therapy sessions and 15 family therapy sessions.

At the time of intake, [REDACTED] was a 16 year-old . . . high school student, who was referred to treatment by [REDACTED]'s prescribing clinician due to family conflict, patient's mood disturbance, and struggles at school both socially and academically. This patient presented with mood instability, irritability, difficulties sleeping, self-injurious behaviors such as cutting [REDACTED]'s arms and hands and generalized anxiety and worry. [REDACTED] also reported having many rituals that [REDACTED] felt [REDACTED] had to perform or [REDACTED] would experience negative consequences, but was unable to articulate what the consequences might be. [REDACTED]'s thinking was at times rigid and obsessive and at other times loose and tangential. Patient's behavior was reported by [REDACTED]'s mother as socially inappropriate and at times bizarre. Patient's mother also reported a prior diagnosis of Attention Deficit/Hyperactivity Disorder by [REDACTED]'s prescribing clinician.

Over the course of treatment, [REDACTED]'s mood often cycled between intense depression and mania; irritability, impulsiveness and explosiveness being expressed during both

phases. Often, [REDACTED] was unable or unwilling to wash [REDACTED's self], change [REDACTED's] clothes, brush [REDACTED's] teeth, or perform other daily living skills. When psychotropic medications appeared to become ineffective, [REDACTED] symptomatology worsened and [REDACTED] presented as increasingly psychotic, reporting running commentary and command auditory hallucinations, paranoia, volatile behavior, body dysmorphic disturbances, and suicidal ideation with intent. At the height of [REDACTED's] illness during this course of treatment, [REDACTED] was hospitalized for crisis stabilization at a local psychiatric facility for several days.

This writer met with [REDACTED's] school psychologist, but was unable to create a support system that would enable this patient to utilize [REDACTED's] educational system because [REDACTED's] symptoms were too severe. Due to [REDACTED's] serious mental illness, [REDACTED] was a poor match for the school [REDACTED] was attending.

Diagnostic Impressions

Axis I:	296.63	Bipolar Disorder I, with psychotic features
	300.3	Obsessive Compulsive Disorder
	313.81	Oppositional Defiant Disorder
	314.01	Attention Deficit Hyperactivity Disorder
Axis II:		Schizotypal Personality Disorder
		Borderline Personality Disorder
		Antisocial Personality Disorder features
Axis III		Deferred
Axis IV		academic problems, discord with teachers and classmates
Axis V		GAF: 45 (discharge)
		GAF: 52 (at intake)

87. The following questions were asked on behalf of Respondent and the following answers were given by Dr. Mark as to the time period of October 2006:

Q: I'm not exactly sure how to word this, but could you describe what you would have, what would have been the best program for [REDACTED] to go into last October, the optimal program?

A: I don't think that I can speak to that. No, I don't think that I can tell you what the best optimal thing was for [REDACTED]. I'm not an educational psychologist, so -

Q: Well, to treat [REDACTED]'s mental illness?

A: I think at that time, [REDACTED] could have used a residential treatment program in my opinion.

Q: Anything about that program that would - I mean, what would be the components?

A: A program that had therapy in it. [REDACTED] needed . . . more psychotherapy. [REDACTED] needed a controlled environment with stricter rules and specific consequences where the consequences could be forced on [REDACTED], where [REDACTED] couldn't wiggle out of them, where in a home environment it's much easier to steal money when you want it or go somewhere when you want to or yell at someone until they cave. [REDACTED] needed an environment that wouldn't bend to [REDACTED]'s will, something bigger than [REDACTED], so I think [REDACTED] needed more confines than at home.

Q: Could [REDACTED] have benefited at the time and maybe not optimally, but could [REDACTED] have benefited from a partial hospitalization program or day treatment program where [REDACTED] would get the therapy and the education and all of that family thing at the time?

A: Probably. Probably.

88. The following question was asked on behalf of Petitioner on redirect with the following answer being given by

Dr. Mark as to what Dr. Mark's recommendation would have been to the parents in November 2006:

Q: Would your recommendation have been to leave [] at home at that point in time and not send [] away?

A: I think I would have looked at many solutions, one of which would be sending [] away. I think I had recommended throughout treatment for [] to be in a residential home. I think from the beginning of treatment to the end of treatment, I had recommended [] on and off to be placed elsewhere.

Dr. Cabrera

89. Dr. Cabrera evaluated [] on August 13, 2007. Dr. Cabrera interviewed [] and [], reviewed Dr. Daniels' report, reviewed the psychological evaluation prepared June 16, 2004, reviewed Dr. Greer's medical records, and reviewed the discharge-summary letter from [] dated January 3, 2007.

90. Dr. Cabrera made the following diagnoses:

Axis I Bipolar Disorder Type II
 ADHD - by history
 ODD
Axis II Borderline Personality Traits
Axis III None
Axis IV Moderate
Axis V 55

91. Dr. Cabrera made the following recommendations:

1. [] would benefit from on-going individual therapy to address []'s anger, sadness, anxiety, frustrations, abandonment/loss issues, family issues and coping skills.
2. Family therapy to address parent-child relational issues.

3. Continued psychiatric follow-up to manage [REDACTED]'s medications and monitor for depression, anxiety, manic or psychotic symptoms.

4. [REDACTED] has been an ideal candidate for placement in a program for Severely Emotionally Disturbed Children. An SED program would have and can address [REDACTED]'s emotional, behavioral and academic difficulties. It would provide the structure, individual group and family therapy [REDACTED] has required and benefits from. In addition, the academic stress would be minimized or eliminated.

92. Dr. Cabrera's diagnostic impressions did not differ significantly from those of Dr. Greer, Dr. Mark, or Dr. Daniels. Based on his review of [REDACTED]'s records, history, and his evaluation, Dr. Cabrera opined that [REDACTED]'s condition in November 2006 did not require a residential placement. Dr. Cabrera testified, convincingly, in Volume 14, beginning on page 2096, line 23 as follows in response to the question of why he did not feel residential placement was required in November 2006 and what he would have recommended:

A: There's [sic] a number of factors that I look at when I make a recommendation. I look at the frequency of psychiatric admission, failure of outpatient treatment, possibility of harming self, harming others. I look at all these factors to make a determination and I didn't feel at that time [REDACTED] met those criteria for residential placement. I believe that there were other avenues, other treatments that could have been provided that may have helped [REDACTED] without residential.

Q: And what would you have recommended at that point?

A: At that point, I would have recommended more intensive therapy, including individual therapy [and] possibly group therapy. And this would have been done through a possibility like Smith's day treatment program or a referral to an SED school.

93. On Axis V, the GAF rating is a means of rating the patient's ability to function. The Axis V rating for ■■■ of 40, assessed by Dr. Daniels, is the lowest rating assigned to ■■■. Dr. Mark assigned a GAF rating of 52 when she first started seeing ■■■ and a rating when she last saw ■■■. Dr. Cabrera assigned a GAF rating of 60 when he saw ■■■ in August 2007. A GAF rating of 40 is assigned to an individual with significant emotional, psychological, and behavioral impairment. The GAF rating assigned by Dr. Cabrera reflects impairment, but not as severe as that observed by Dr. Daniels or Dr. Mark. Dr. Cabrera testified, credibly, that ■■■ could have functioned in a non-residential setting with a GAF score of 40.

94. Dr. Cabrera's testimony that ■■■ would have been an appropriate placement for ■■■ is consistent with Dr. Greer's testimony. Based on their credible testimony, it is found that ■■■ would have been an appropriate placement for ■■■ and that the ■■■ placement could have provided FAPE to ■■■

95. On December 11, 2006, ■■■ and ■■■ met with the IEP team at a meeting that was characterized as being an "Interim IEP Meeting." A general discussion occurred as to ■■■'s

placement should [REDACTED] and [REDACTED] re-enroll [REDACTED] in the Broward County Public Schools. The IEP that was presented proposed that [REDACTED] be re-enrolled at [REDACTED] with additional counseling and other support services pending the completion of the re-evaluation process for SED eligibility determination. [REDACTED] and [REDACTED] discussed Dr. Daniels' evaluation at that meeting, but there was no evidence that they provided a copy of Dr. Daniels' evaluation to any representative of the Respondent.

96. On December 12, 2006, [REDACTED] and [REDACTED] filed the due process hearing request that triggered this proceeding.

97. On January 3, 2007, [REDACTED] and [REDACTED] placed [REDACTED] in [REDACTED]. Prior to that placement, [REDACTED] and [REDACTED] had not made [REDACTED] available for the evaluation that was necessary to determine whether [REDACTED] met the criteria for placement at [REDACTED], nor had they provided Respondent with a copy of Dr. Daniels' evaluation.

CONCLUSIONS OF LAW

98. The DOAH has jurisdiction over the subject matter and parties to this case pursuant to Sections 120.569, 120.57(1), and 1003.57(5), Florida Statutes. See also Fla. Admin. Code R. 6A-6.03311(11).

99. In this proceeding, Petitioner is seeking reimbursement of tuition and all costs associated with [REDACTED]'s enrollment in [REDACTED] and [REDACTED]. Because of the ultimate conclusions reached, there is no need to detail the amounts claimed.

100. Petitioner has the burden of proving by a preponderance of the evidence that ■■■ failed to offer ■■■ a FAPE and that the placements for which they are seeking reimbursement were appropriate placements for ■■■. Petitioner must prove the elements of Petitioner's case by a preponderance of the evidence. Schaffer v. Weast, 126 S. Ct. 528 (2005).

101. Because ■■■ is a public charter school, Petitioner and Petitioner's parents retain their full rights under the IDEA and Respondent is responsible for ensuring full compliance with IDEA. See 34 C.F.R. § 300.312.

102. The determination of whether a district school board has provided an exceptional student with a FAPE involves a twofold inquiry, as the United States Supreme Court explained in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982). First, has Respondent (including ■■■ staff) complied with the procedures set forth in IDEA? And second, were the IEP's developed in compliance with IDEA's procedures reasonably calculated to enable ■■■ to receive educational benefits? If these two questions are answered in the affirmative, then Respondent has met its obligation to provide ■■■ FAPE.

103. Petitioner did not establish any procedural violation on the part of Respondent or ■■■ staff in developing any of the IEPs discussed in this Final Order.

104. 20 U.S.C. Section 1401(9), defines the term FAPE as follows:

(9) Free appropriate public education. The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

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

(D) are provided in conformity with the individualized education program required under section 614(d) [20 USC §1414(d)].

105. District school boards are required by the Florida K-20 Education Code (Chapters 1000 - 1013, Florida Statutes) to "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) and 1003.57, Fla. Stat. Section 1003.57(1)(f), Florida Statutes, provides, in part, as follows:

. . . [i]n providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

106. "Exceptional students," as that term is used in the Florida K-20 Education Code, are students who have been "been determined eligible for a special program in accordance with rules of the State Board of Education." There is no dispute that

█ is eligible for a special program in accordance with the rules of the State Board of Education. See § 1003.01(3), Fla. Stat.

107. The Florida K-20 Education Code's imposition of the requirement that exceptional students receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under IDEA. See 20 U.S.C. § 1412(a)(1).

108. Florida Administrative Code Rule 6A-6.03028 mandates that an IEP, containing the following "statements," be written for every student eligible for special education and related services:

- (a) A statement of the student's present levels of educational performance;
- (b) A statement of annual goals, including short term instructional objectives;
- (c) A statement of the specific special education and related services to be provided to the student and the extent to which the student will be able to participate in regular educational programs;
- (d) The projected dates for initiation of services and the anticipated duration of the services;
- (e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved; and
- (f) A statement of the needed transition services in accordance with subsection (2) of this rule including, if appropriate, a statement of each school district's and each participating agency's responsibilities or linkages, or both, for each student beginning no later than age sixteen (16) or at a younger age if determined appropriate.

109. The IEP has been called "the centerpiece of the [IDEA's] education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988).

110. The instruction and services provided in the IEP must be reasonably calculated to enable the child to receive educational benefits. As the Fourth District Court of Appeal further stated in its opinion in School Board of Martin County v. A. S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999):

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

111. The appropriateness of an IEP must be judged prospectively, taking into consideration the circumstances that existed at the time of the IEP's development. See Adams v. State of Oregon, 195 F.3d 1141 (9th Cir. 1999); Walczak v. Florida Union Free School District, 142 F.3d 119 (2d Cir. 1998); Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995); Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); and Roland M. v. Concord School Committee, 910 F.2d 983 (1st Cir. 1990); J. R. ex rel. S. R. v. Board of Education of the City of Rye School District, 345 F. Supp. 2d 386 (D. N. Y. 2004); Board of Education of the County of Kanawha v. Michael M., 95 F. Supp. 2d 600 (S.D. W. Va. 2000); and D. B. v. Ocean Township Board of Education, 985 F. Supp. 457 (D. N. J. 1997).

112. In determining the appropriateness of an IEP, it must be determined whether the placement allows the student to receive his or her educational benefits in the least restrictive environment (LRE). Section 1003.57(1)(f), Florida Statutes, provides, as follows:

(f) In providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

113. 20 U.S.C. Section 1412(5)(A) provides as follows:

(5) Least restrictive environment.

(A) In general. 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 or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

114. █████ agreed with all IEPs developed for █████ at █████ until the IEP developed October 23, 2006. █████ disagreed with that IEP because █████ wanted █████ placed in more ESE classes. Despite █████ disagreement, █████ signed the October 23, 2006. The greater weight of the credible evidence established that █████ did not need to be placed in an ESE class because █████ has the intellectual ability to pass the regular curriculum. In late October 2006, █████ agreed that █████ needed to be re-evaluated. █████ knew or should have known that Respondent could not place █████ in the more restrictive placement of █████ without completing the re-evaluation process and she had been told by Dr. Raskin that the process would be expedited. The IEP of October 23, 2006, was developed to provide █████ FAPE pending █████'s re-evaluation.

115. 20 U.S.C. Section 1412(a)(10)(C), provides as follows:

(C) Payment for education of children enrolled in private schools without consent

of or referral by the public agency.

(i) In general. Subject to subparagraph (A), this part [20 USC §§ 1411 et seq.] does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement. The cost of reimbursement described in clause (ii) may be reduced or denied--

(I) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 615(b)(3) [20 USC § 1415(b)(3)], of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception. Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement--

(I) shall not be reduced or denied for failure to provide such notice if--

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 615 [20 USC § 1415], of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if--

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

116. Pursuant to the provisions of 20 U.S.C.

Section 1412(a)(10)(C)(i), Petitioner is not entitled to the reimbursements Petitioner seeks because ■■■ was providing FAPE to ■■■ when ■■■'s parents unilaterally removed ■■■ from the school system without notice. The IEP team at ■■■ acted appropriately

and promptly in reaction to ■■■'s continued deterioration in the fall of 2006.

117. Pursuant to the provisions of 20 U.S.C. Section 1412(a)(10)(C)(iii)(I)(aa) and (bb), Petitioner's claim for reimbursement should be denied because Petitioner's parents failed to give required notice of the withdrawal to Respondent.

118. Pursuant to the provisions of 20 U.S.C. Section 1412(a)(10)(C)(iii)(II), Petitioner's claim for reimbursement should be denied because Petitioner's parents knew that Respondent was in the process of re-evaluating ■■■ and the parents withdrew ■■■ from school without notice, thereby making ■■■ unavailable for the re-evaluation.

119. In addition to the foregoing reasons for denying reimbursement, reimbursement for the costs associated with the ■■■ placement should be denied because ■■■ was a therapeutic placement, not an educational placement. While there was evidence that ■■■ needed to be put back on medication and stabilized, there was no evidence that ■■■ required a 58-day wilderness program in North Carolina to achieve those ends.

120. Petitioner failed to establish that any exception set forth in 20 U.S.C. Section 1412(a)(10)(C)(iii), is applicable.

121. In view of the foregoing, the Parents are not entitled to be reimbursed by the School District for any costs they may have incurred, or will incur, in connection with their decision to withdraw ■■■ from ■■■ and enroll ■■■ in either ■■■ or ■■■.

The premises considered, it is ORDERED that Petitioner's claim for reimbursement is hereby DENIED.

DONE AND ORDERED this 14th day of March, 2008, in
Tallahassee, Leon County, Florida.

S

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

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of March, 2008.

ENDNOTES

1/ ■■■ is an acronym for ■■■.

2/ ■■■ did not recall attending the eligibility meeting on October 1, 2003. ■■■ signature on the documents generated at the meeting established her presence.

3/ In making this finding, the undersigned has considered the cases that discuss FAPE and the overall evidence as to ■■■'s performance during the second semester of the 2005-2006 school year. The undersigned has also considered that ■■■ had throughout the years had difficulty with math. The testimony established that as of the end of the 2005-2006 school year, ■■■ could have pulled up the Fs in the two math classes and graduated on time with a regular diploma if ■■■ had not continued to deteriorate.

4/ The Axis V GAF rating is a rating of a patient's ability to function. Dr. Daniels, Dr. Mark, and Dr. Cabrera all assigned GAF ratings as part of their evaluations of ■■■. The GAF ratings were explained by Dr. Cabrera and will be discussed further under the portion of the Final Order dealing with his testimony.

COPIES FURNISHED:

Edward J. Marko, Esquire
Broward County School Board
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

Jeffrey H. Minde, Esquire
Jeffrey H. Minde Attorney at Law
4613 North University Drive, Suite 242
Coral Springs, Florida 33067

Tripp Scott, Esquire
Tripp Scott, P.A.
110 Southeast Sixth Street, 15th Floor
Fort Lauderdale, Florida 33301

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

James F. Notter, Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301

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

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in

the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(e), Florida Statutes; or c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(e) and 120.68, Florida Statutes.