

Collier County School District
No. 06-5088E
Initiated by: Parent
Hearing Officer: Carolyn S. Holifield
Date of Final Order: April 26, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 06-5088E
)
COLLIER COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Carolyn S. Holifield, held a final hearing in this case on February 7, 8, and 14, 2007, in Naples, Florida.

APPEARANCES

For Petitioner: ██████████ ██████████'s mother)
(Address of record)

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

STATEMENT OF THE ISSUES

The issues are: (1) whether Respondent, the Collier County School Board (School Board), failed to implement Petitioner,

■■■■'s (Petitioner), "stay-put" Individual Educational Plan (IEP) dated August 12, 2005, from November 4, 2005, through the end of the 2005-2006 school year; and (2) whether the School Board is required to reimburse Petitioner's parents for the costs associated with ■■■■ attendance at a private out-of-state residential school.

PRELIMINARY STATEMENT

On or about December 14, 2006, Petitioner and ■■■■ filed a request for a due process hearing with the School Board. The request alleged that the School Board had failed to implement the current IEP (August 12, 2005) under the "stay-put" provisions of the Individuals with Disabilities Education Act (IDEA).

The School Board referred the matter to the Division of Administrative Hearings (DOAH) on December 15, 2006, for assignment of an Administrative Law Judge to conduct the due process hearing and prepare a final order. A pre-hearing conference was scheduled for January 17, 2007, but was rescheduled for January 19, 2007, due to the unavailability of the School Board's counsel. After the pre-hearing conference, the due process hearing was scheduled for February 7 and 8, 2007. During the due process hearing, it was determined that an additional day was necessary to complete the hearing. By agreement of the parties and the undersigned and pursuant to

notice, the third and final day of the due process hearing was held February 14, 2007.

At hearing, Petitioner presented the testimony of [REDACTED], [REDACTED] Carl Johnson, Petitioner's chemistry teacher; Elizabeth Keech, an occupational therapist; Eliut Gonzalez, Petitioner's Spanish teacher; Major Reuben Gonzalez, Petitioner's ROTC teacher; [REDACTED] Petitioner's friend; and Victoria Sartorio, director of exceptional education for the School Board. Petitioner's exhibits consist of multiple documents with pre-marked page numbers. At hearing, the exhibit numbers were referred to and corresponded with the pre-marked page numbers. For clarity and convenience, all of Petitioner's exhibits offered and received into evidence are hereby designated as Petitioner's Composite Exhibit 1.^{1/} Petitioner's Exhibits 306, 307, 328, 464 through 544, and 548 through 555 were proffered. The undersigned reserved a ruling on the admission of Petitioner's Exhibits 640 through 643.^{2/} However, after due consideration, Petitioner's Exhibits 640 through 643 are not received into evidence.

The School Board presented the testimony of the following four School Board employees assigned to [REDACTED] High School ([REDACTED] or [REDACTED] High School): (1) Carl Defurio, assistant principal of curriculum and instruction; (2) Valerie Rowan, exceptional student education program specialist; (3)

John Stanley, Jr., exceptional student education inclusion teacher; and (4) Mary Catherine Ely, guidance counselor. The School Board also presented the testimony of Katrina Nedley, a family therapist and family sociologist. The School Board's Composite Exhibit 1 was offered and received into evidence.

The record was left open until February 21, 2007, to allow Petitioner to late-file some of ■ exhibits. As of February 26, 2007, all of Petitioner's exhibits admitted into evidence had been filed at DOAH.^{3/}

After the due process hearing, several motions were filed. On February 26, 2007, the School Board filed an Objection and Motion to Strike Late-Filed Exhibits and an Amended Objection and Motion to Strike Late-Filed Exhibits (Amended Motion to Strike Late-Filed Exhibits). That same day Petitioner filed a Response to Amended Objection and Motion to Strike Late-Filed Exhibits. Upon consideration of the School Board's Amended Motion to Strike Late-Filed Exhibits and Petitioner's response thereto, the Amended Motion to Strike Late-Filed Exhibits is denied.

On March 13, 2007, after the Proposed Final Orders were filed, Petitioner filed a Motion to Dismiss Facts by Respondent as False Facts (Motion to Dismiss Facts). On March 16, 2007, the School Board filed a Response to the Motion to Dismiss Facts, to which Petitioner filed a rebuttal on March 21, 2007.

After consideration of the Motion to Dismiss Facts, the response thereto, and the rebuttal, the Motion to Dismiss Facts is denied.^{4/}

A post-hearing telephonic conference took place on April 2, 2007, during which the parties agreed to a due date of April 9, 2007, for issuance of the Final Order. Subsequently, during a conference on April 9, 2007, the parties agreed to further extend the time for issuance of the Final Order.^{5/}

Volumes 1, 2, and 3 of the hearing Transcript were filed on February 22, 2007. Volume 4 of the hearing Transcript was filed on February 23, 2007. The parties filed Proposed Final Orders on March 5, 2007, both of which have been considered in preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner, [REDACTED] is an 18-year-old [REDACTED] student who attended [REDACTED] for the 2005-2006 school year, when [REDACTED] was a high school junior.

2. Petitioner did not attend [REDACTED] the first semester of the current school year, the 2006-2007 school year, but is currently attending [REDACTED] the second semester of this school year.

3. At all times relevant to this proceeding, Petitioner was identified as a student qualified to receive special

education and related services under the IDEA pursuant to Florida Administrative Code Rule 6A-6.03023.

4. For the 2005-2006 school year, Petitioner was to receive special education and related services pursuant to an IEP developed on August 12, 2005, which, for the purposes of this proceeding, is the "stay-put" IEP.

5. On November 4, 2005, Petitioner filed a Petition for Due Process Hearing challenging several IEPs, including the November 2005 IEP, which was proceeding to an evidentiary hearing in DOAH Case No. 05-4061E. During the pendency of this proceeding, the August 12, 2005 IEP (August IEP or "stay-put" IEP) remained in effect and was to be implemented. However, while the hearing in the foregoing case was pending, Petitioner's parents unilaterally removed [REDACTED] from the Collier County public school system.

6. Based on Petitioner's parents' removing/withdrawing Petitioner from the Collier County public school system, the School Board filed a Motion to Dismiss the petition in DOAH Case No. 05-4061E. Administrative Law Judge Daniel Manry granted the Motion to Dismiss and issued a Final Order of Dismissal on October 18, 2006. Petitioner timely appealed that decision to the Florida Second District Court of Appeal. Several months later, on January 26, 2007, Petitioner filed a dismissal of the

appeal. In an Order issued on January 30, 2007, the Court dismissed the appeal.^{6/}

August 12, 2005 IEP

7. The "stay-put" period, applicable to this proceeding, was in effect beginning November 4, 2005, when Petitioner filed a Petition for Due Process Hearing through the end of the 2005-2006 school year. During the "stay-put" period, the August IEP was in effect. This IEP listed Petitioner's primary exceptionality as "Specific Learning Disabled" and [REDACTED] secondary exceptionality as "Gifted."^{7/}

8. Petitioner, represented by [REDACTED], raised numerous issues related to the August IEP. However, the only issues considered herein are those related to implementation of the August IEP during the "stay-put" period.

9. Mrs. [REDACTED]'s specific challenges to the August IEP are discussed below.

Progress Reports/Reporting Requirement

10. The August IEP identifies the instructional structure (i.e., domains and transitional services activity area) that are addressed in that IEP. "Domains" identified and addressed in the August IEP are curriculum and learning, social emotional behavior, and independent functioning. "Transition services activity areas" identified in the August IEP include instruction, related services, and daily living skills. Based

on and related to those identified domains and/or transitional services activity areas, the August IEP established measurable annual goals and benchmarks or short-term objectives (short-term objectives) for Petitioner.

11. The August IEP requires that Petitioner's progress on the established measurable annual goals and short-term objectives be reported to [REDACTED] family.

12. Mrs. [REDACTED] alleges that Petitioner's teachers did not provide [REDACTED] parents with a progress report on the measurable annual goals and short-term objectives listed on the IEP.

13. Petitioner's teachers reported [REDACTED] progress on [REDACTED] report cards, issued four times a year, and on interim reports. None of the teachers prepared separate or specific progress reports on [REDACTED] measurable annual goals or [REDACTED] short-term objectives.

14. Petitioner's teachers discussed [REDACTED] progress with the exceptional student education specialist, as well as members of the IEP team. However, there is no indication that these discussions were memorialized in writing and provided to Petitioner and/or [REDACTED] parents.

15. With regard to reporting progress, the August IEP provides the following:

The student's progress toward annual goals and the extent to which progress is sufficient to enable the student to achieve

the annual goal by the end of the year will be reported to the student's family by progress reports at least as often as that of the general education peers. Progress is to be reported as often as is reported for students in regular education.

16. The "progress reporting" provision requires that Petitioner's progress be reported to ■■■ family "at least as often" as such reports are provided to students in regular education. The School Board provides progress reports for general education students and students in regular education four times a year by sending out report cards twice each semester. During each of the grading periods, an interim report is sent out a few weeks before the report card in order to advise the student and ■■■ family of the student's progress at that time.

17. Undoubtedly, Mrs. ■■■ wanted more information about Petitioner's academic progress than was provided in the report cards and interim reports. ■■■ expected and interpreted the IEP to mean that ■■■ would receive a "measurable annual goal report," as often as ■■■ received a report card and interim reports. None of the teachers or any other person charged with evaluating Petitioner's progress relative to the measurable annual goals and short-term objectives in the August IEP prepared and/or provided the family the type of report that Mrs. ■■■ expected or wanted.

18. The August IEP provides that Petitioner's academic progress with regard to many of the short-term objectives was to be evaluated, as evidenced by student performance, work samples, teacher grade book, teacher observation, and discipline records. As to those objectives, the School Board complied with the "reporting progress" provision of the August IEP by sending Petitioner's family interim reports and report cards, which reported Petitioner's progress.

19. The August IEP does not require that school personnel prepare a report separate and apart from the report card that addresses Petitioner's progress with respect to the annual measurable goals and/or short-term objectives, included therein. Hence, the School Board has not violated the August IEP provisions requiring "progress reporting."

Accommodation Provision Exceeded

20. The August IEP provides that Petitioner would be given certain accommodations. One such accommodation required that Petitioner be given "extra time to complete tests."

21. Mrs. ■ does not dispute that Petitioner was given extra time to complete tests, if and when ■ requested the extra time. However, ■ alleges that the School Board failed to strictly adhere to this accommodation provision in that Petitioner was given extra time not only to complete tests, but also to turn in homework or other assignments. Mrs. ■ believes

that by allowing Petitioner extra time to complete assignments, teachers are not helping █████ and "are giving █████ a false sense of what █████ can do." Moreover, Mrs. █████ believes that allowing Petitioner extra time on assignments "does not prepare █████ for post-high school," especially the military.

22. Some of Petitioner's teachers allowed █████ extra time to complete assignments and to submit homework. However, it was not unusual for teachers to offer this type of accommodation to regular education students. In fact, one of Petitioner's teachers indicated that he extended this accommodation not only to Petitioner, but to other students who missed a major assignment. The teacher testified that in those instances, he deducted points for the late assignments.

23. It is within a teacher's discretion to allow students (i.e., regular education students or exceptional students) additional time to complete and submit homework and other types of assignments. Moreover, a teacher who exercises such discretion in Petitioner's favor may do so without violating the provision of the August IEP, which states that Petitioner may have extra time to complete tests, but does not state █████ may have extra time to complete assignments.

Assistive Technology Device

24. The August IEP provides that Petitioner will be provided with the use of a portable word processor and will be

available to Petitioner on a daily basis. According to the detailed conference notes of the August IEP meeting (IEP conference notes), the consensus agreement reached was that "the Dana assistive technology device will be provided as previously proposed." The Dana was to be provided to Petitioner on August 15, 2005. The use of a portable word processor was to assist Petitioner with time management skills, organizational skills, and academic achievement.

25. Mrs. ■ contends that Petitioner was not provided with a portable word processor as provided for in the August IEP.

26. Petitioner was provided with a Dana, but ■ did not use it. According to Mrs. ■ ■ did not use the Dana because of the stigma associated with that particular device. For this reason, Mrs. ■ requested a case for the Dana that did not have the words "Office Smart" on it. The School Board did not comply with this request. In the alternative, Mrs. ■ stated that the School Board could have provided Petitioner with a different kind of portable word processor and/or also provided Petitioner with a home computer with appropriate software included. Again, according to the conference notes, the consensus agreement of the IEP team was that the school district would not provide a home computer to Petitioner. Given that there was no consensus agreement regarding the home computer, the August IEP did not provide for that assistive technology device.

27. Mrs. [REDACTED] stated that the teachers were to download course-related documents/handouts into the Dana so that Petitioner could upload documents to his personal computer. According to the IEP conference notes, Mrs. [REDACTED] made this request, but a "consensus agreement was not reached to have all teachers download all handouts into the Dana." Instead, a consensus agreement was reached that Petitioner would be given the opportunity to download any handouts/material given in "WORD."

28. Because the August IEP did not provide for teachers to download material into the Dana, there is no violation because the teachers did not perform this task.

29. Petitioner was provided with a portable word processor, the Dana, in accordance with the August IEP. That Petitioner chose not to use the Dana, does not change the fact that the School Board provided Petitioner with a portable word processor. Moreover, the School Board was under no obligation to provide a special model or type of portable word processor, as suggested by Petitioner's [REDACTED]. Therefore, the School Board did not fail to implement the August IEP requirement to provide Petitioner with a portable word processor.

30. Even though Petitioner did not use the Dana or another type of assistive technology device, [REDACTED] had access to a computer while at school for the courses in which a computer was

needed. The only courses that required Petitioner to have use of a computer were honors chemistry and advanced placement chemistry. In one or both of those courses, weekly quizzes and other course materials had to be accessed on a computer. In those classes, the chemistry teacher had computers on carts brought to the class for students to use. In addition to the computers brought to the chemistry class, Petitioner had after-school access to the computers in the school Library.

31. While it is unknown what computer Petitioner used, [REDACTED] apparently had access to a computer, because according to his chemistry teacher, Carl Johnson, Petitioner was able to do [REDACTED] chemistry work that had to be done on a computer. Finally, Petitioner never told Mr. Johnson that [REDACTED] had no access to a computer at home.

Training on Use of Assistive Technology

32. One of the short-term objectives on the August IEP was that Petitioner "will use his assistive technology device to assist [REDACTED] in organizing his written assignments." To meet this objective, the August IEP provided that Petitioner would receive training on the use of the portable word processor on August 15, 2005.

33. Petitioner did not testify at this proceeding, but [REDACTED] reported that Petitioner told [REDACTED] that [REDACTED] did not know how to use the Dana. However, based on the record, as a whole,

and in absence of testimony from Petitioner, no determination can be made as to whether Petitioner knew how to use the Dana or simply did not want to use it. Also, it is unclear if Petitioner was ever trained to use the Dana or any assistive technology as provided for in the August IEP, or the extent of such training.

34. The August IEP provided that school staff, regular education teachers, would be trained on Petitioner's use of the assistive technology device.

35. Mrs. ■■■ asserts that Petitioner's teachers were never trained on the use of the Dana or any other assistive technology device, as required by the August IEP.

36. As asserted by Mrs. ■■■ there is no evidence that any of Petitioner's teachers participated in staff training on Petitioner's use of the assistive technology device. However, the failure to participate in such training, even when provided for on the August IEP, is of no consequence if Petitioner chose not to use an assistive technology device.

Social Work Services

37. The August IEP provided that Petitioner would receive social work services. According to the August IEP, these services would be provided in two 60-minute sessions per month in the social worker's office and would begin on August 15, 2005.

38. The social work services did not begin as scheduled. The reason was that on or about August 18, 2005, during a conference, Petitioner's mother told Tim Shaughnessy, the social worker initially assigned to work with Petitioner, and Mary Ely, a guidance counselor at ■■■, that ■■■ did not want the social work services for Petitioner prescribed in the August IEP.^{8/} Instead, Mrs. ■■■ said she wanted Petitioner to have private counseling with the School Board paying for such services.

39. Almost three months after she rejected the social work services provided for in the August IEP, Mrs. ■■■ changed her mind about this related service. In a letter dated November 7, 2005, and received by the School Board the following day, Mrs. ■■■ wrote, "I am requesting that the related service of social worker services in [Petitioner's] IEP to immediately begin."

40. Immediately after receiving the letter from Mrs. ■■■ the School Board took steps to begin the social work services required by the August IEP. The social work activities relative

to implementation of the August IEP were described and recorded on "Encounter Audit Report" forms (encounter reports).

41. Tim Shaughnessy, a master's level social worker, provided the social work services as provided for in the August IEP in November and December 2005 and January and February 2006.

42. In November 2005, Mr. Shaughnessy did not have any sessions with Petitioner. Prior to having any sessions with Petitioner, Mr. Shaughnessy spent time in November reviewing data, interviewing and consulting with staff, and meeting with Petitioner's parent(s). The encounter reports indicate that Mr. Shaughnessy met Petitioner's "parent" twice in November 2005, on November 17 and 28, 2005. The first meeting is described as parent consultation to discuss beginning counseling services with Petitioner. The second meeting is described as one that involved data review and a parent interview. According to the encounter reports, each of these meetings lasted 30 minutes.

43. The encounter reports for December 2005 indicate that on December 9, 2005, Mr. Shaughnessy interviewed Petitioner. How long this interview took is not clear from the report.^{9/} Also, the encounter report for December 9, 2005, indicates that Mr. Shaughnessy reviewed the file and consulted with staff.

44. The encounter report indicates that on January 9, 2006, Mr. Shaughnessy reviewed data and interviewed Petitioner.

The time spent on these social work services is reported as 45 minutes. A second encounter report indicates that on January 19, 2006, Mr. Shaughnessy interviewed Petitioner, consulted with staff, and observed Petitioner. The time spent on these activities is reported as 30 minutes, with 15 minutes for direct service and 15 minutes for indirect services.

45. The encounter report notes that on February 1, 2006, Mr. Shaughnessy reviewed data and consulted with staff and that on February 2, 2006, [REDACTED] interviewed Petitioner for 45 minutes. On February 9, 2006, the encounter report notes that Mr. Shaughnessy observed Petitioner and consulted with staff.

46. Some time in or about February 2006, Katrina Nedley took over the counseling of Petitioner.

47. Ms. Nedley first met with Petitioner on March 1, 2006, for about 30 minutes. Initially, Petitioner seemed reluctant to meet with Ms. Nedley, but Petitioner agreed to meet with [REDACTED] the following week, on March 7, 2006. Despite agreeing to do so, Petitioner did not show up for the scheduled March 7, 2006, meeting with Ms. Nedley. The following day, on March 8, 2006, when Ms. Nedley went to BCHS to meet with Petitioner, a staff person told her that Petitioner did not want to come to counseling and that [REDACTED] said [REDACTED] had lacrosse practice.

48. On March 15 and 29, 2006, Ms. Nedley had individual counseling sessions with Petitioner, with each session lasting 30 minutes.

49. Petitioner met briefly with Ms. Nedley on April 4 and 12, 2006. On both days, Petitioner told Ms. Nedley he had to leave, because ■■■ did not want to miss ■■■ ride to lacrosse practice. On April 18, 2006, Petitioner was called to the office to meet with Ms. Nedley, but ■■■ left school without coming to the office. Ms. Nedley was to meet with Petitioner on April 26, 2006, but it was reported that ■■■ was sick.

50. At Ms. Nedley's direction, Valerie Rowan, the exceptional student education program specialist at ■■■, met with Petitioner for an individual session on May 4, 2006, which lasted 30 minutes. On May 16, 2006, Ms. Nedley met with Petitioner for what the encounter report describes as "individual counseling and social work services."

51. Petitioner was to meet with Ms. Nedley on May 10, 2006, but did not because ■■■ was absent from school that day.

52. Ms. Nedley's impression was that Petitioner was resistant and did not want to come to counseling. This impression appears to be accurate in light of Mrs. ■■■'s testimony that Petitioner thought counseling was not worthwhile or effective. Notwithstanding ■■■ statements to ■■■ about counseling, it appears that one reason Petitioner was unable to

fully participate in the social work services (i.e., counseling) was that it conflicted with ■■■ lacrosse practice after school.^{10/}

53. The social work services were offered by the School Board, but for several reasons, Petitioner did not, or was not always able to participate or fully participate in the social work services. Consequently, Petitioner did not receive two 60-minute sessions per month of social work services as specified in the IEP.

54. Based on the circumstances described, the School Board substantially complied with the provision of the August IEP that required two 60-minute sessions of social work services per week.

Transition Services

55. Beginning no later than a student's 16th birthday, the student's IEP must include a statement that identifies the needed transition services for the student in the specified transition services activity areas. If no services are needed in any of the transition services activity areas, the team must develop a statement to that effect.

56. The August IEP provided for transition services in the following transition services activity areas: (1) instruction; (2) related services; (3) employment; and (4) daily living skills.^{11/} The services to be provided under instruction were

academic instruction and career and technical education. The services to be provided under related services were vocational rehabilitation services. Under the area, employment, the IEP states that Petitioner will explore career options of interest. Under the activity area, daily living skills, the IEP lists "social-communication and self-advocacy skills."

57. Mrs. ■ contends that Petitioner needs transition services and that ■ did not receive those services even though they were listed in the IEP.

58. During the "stay-put" period, Petitioner received academic instruction, one of the two services listed under the transition services activity area of instruction. However, there was no evidence presented that Petitioner received career and technical education, the second service listed under the area of "instruction."

59. No evidence was presented that Petitioner received any of the services listed under the transition services activity areas of related services--employment and/or daily living skills.

Organizational Skills

60. Mrs. ■ asserts that the School Board has not provided services related to Petitioner's documented difficulties in organizational skills.

61. The August IEP notes that one effect of Petitioner's exceptionalism is that [REDACTED] experiences difficulties in organizational areas. Related to this issue, the August IEP lists the following measurable annual goal: Petitioner will demonstrate academic and organizational skills appropriate for an enhanced high school education as evidenced by daily use of [REDACTED] organizational planner or tool of [REDACTED] choice 100 percent of the time. According to the IEP, persons responsible for working on this goal are general education teachers, exceptional student education teachers, and Petitioner.

62. The August IEP lists three short-term objectives under the annual measurable goal noted in paragraph 62. The first short-term objective is that Petitioner "may use the mastery lab for assistance in [REDACTED] classes, and as a support for all [REDACTED] assignments in the general education classes, or for an organizational skill support." Petitioner's performance, with regard to this objective, was to be evaluated by teacher observation, student performance, and the teacher of the gifted. The second short-term objective is that Petitioner "will use tool of choice daily to identify [REDACTED] required assignments, activities, and upcoming events that are either academic or nonacademic in nature." This objective was to be evaluated by teacher observation, including teacher of the gifted, and by the student's performance. The third short-term objective related

to organization is that Petitioner "will complete and turn in all short and long term projects, assignments and test[s] on time." Petitioner's success relative to this objective was to be evaluated by student observation, teachers' grade books, and student work samples.

63. The evidence established that one of Petitioner's general education teachers, Major Reuben Gonzalez, Petitioner's junior ROTC teacher, worked with Petitioner on [REDACTED] organizational skills for the entire 2005-2006 school year. Major Gonzalez utilized a strategy which required that Petitioner organize papers from each of [REDACTED] classes into the folder specifically designated for that class. Each folder was appropriately labeled, and Petitioner was required to organize and place the materials for each of the classes in the folders, chronologically.

64. The method, described above, and utilized by Major Gonzalez allowed Petitioner to apply the organizational skills which were taught as part of the ROTC curriculum.

65. Major Gonzalez enlisted the assistance of another student in the ROTC class to assist Petitioner in implementing the organizational strategy. Such peer assistance is consistent with the ROTC course methods which encourage students to help one another with various projects/assignments.

66. Major Gonzalez checked Petitioner's folders on a weekly basis and found that the strategy he used with Petitioner was effective in Petitioner's improving █████ organizational skills.

Parents' Concerns Not Attached to IEP

67. Mrs. █████ asserts that a one-page document which listed █████ concerns was not attached to the August IEP. Mrs. █████ contends that this is a violation of the August IEP in that the IEP states that "additional input from Mrs. █████ is attached to this IEP."^{12/}

68. The evidence established that the undated one-page document of parents' concerns was not attached to the August IEP, even though the IEP stated that it was attached. Based on the record in this case, it is unclear whether the failure to attach that document was inadvertent or deliberate.

69. The failure to attach the parents' concerns to the February IEP does not does not violate the August IEP. A careful review of the document of parents' concerns reveals that the contents of the document, as its title suggests, refers to the parents' concerns and does not include or exclude any services offered to Petitioner in the August IEP. Moreover, the undated document of parents' concerns does not otherwise modify the August IEP, which Mrs. █████ agreed to and signed.

Petitioner's Academic Progress

70. During the 2005-2006 school year, ■■■ junior year, Petitioner took the following courses: honors chemistry, advanced placement chemistry, advanced placement American history, advanced placement English, advanced placement calculus, honors Spanish, and leadership education training (ROTC).

71. Honors courses provide above-grade level work in the subject area for students who have talents/interests and who meet specific placement criteria. Advanced placement courses are college-level courses for exceptionally high-achieving and self-motivated students who meet specific placement criteria.

72. Petitioner earned a final grade of "A" in ROTC; a final grade of "B" in honors Spanish, advanced placement English, and advanced placement calculus; and a final grade of "C" in honors chemistry, advanced placement chemistry, and advanced placement American history.^{13/}

73. Mr. Johnson, who taught Petitioner's honors chemistry, describes the honors chemistry course as a step above regular chemistry and more intense in math and in conceptual skills.

74. Notwithstanding the challenging content of honors chemistry, Petitioner made a lot of progress in and received an educational benefit from the course, earning a final grade of "C" in the course.

75. Mr. Johnson also taught Petitioner's advanced placement chemistry course, which, as noted above, is a college-level course. Based on Petitioner's performance in the course, Petitioner received some educational benefits from advanced placement chemistry and earned a final grade of "C" in the course.

76. Major Gonzalez taught Petitioner's ROTC class. According to Major Gonzalez, Petitioner was a student leader who performed slightly above average in ROTC and performed all assigned class responsibilities very well.

77. Petitioner made academic progress in the ROTC class and received educational benefits from the instruction. Petitioner earned a final grade of "A" in ROTC for the 2005-2006 school year.

78. In the honors Spanish class, Petitioner's overall performance was above average. ■ earned a final grade of "B" for the year and gained academic benefits from the honors Spanish course.

79. Petitioner earned and was awarded credit toward high school graduation for all the courses ■ took during the 2005-2006 school year. At the time of this proceeding, Petitioner was ranked in the top 20 percent of ■ class and is scheduled to graduate with a standard diploma in May 2007.^{14/}

80. The evidence establishes that Petitioner made academic progress under the August IEP. Moreover, [REDACTED] has received educational benefits from the special education and related services provided to [REDACTED] by the School Board pursuant to that IEP.

Unilateral Placement at Private Out-of-State School

81. At all times relevant to this proceeding, Major Gonzalez and Petitioner's mother knew that Petitioner wanted to attend the [REDACTED] ([REDACTED]) after [REDACTED] graduated from [REDACTED]. Given Petitioner's interest in the [REDACTED] Academy, Major Gonzalez referred Mrs. [REDACTED] to Colonel McHenry, who was the liaison for [REDACTED] and the [REDACTED].

82. Major Gonzalez discussed with Mrs. [REDACTED] the possibility of Petitioner's attending a preparatory school in California. Major Gonzalez recommended this school to Mrs. [REDACTED] because [REDACTED] believed Petitioner's attendance at the school would enhance Petitioner's chance of being admitted to the [REDACTED].

83. Typically, students enroll in the preparatory school for one semester, after they have graduated from high school. If the students complete one semester at the preparatory school and are then admitted to the [REDACTED], their admission is usually for the fall term of the year after they graduated from high school.

84. Although most students attend the preparatory school after high school graduation, the school allows students to attend during their senior year in high school. Students who attend the preparatory school during their senior year in high school and are admitted to the [REDACTED] Academy, would be eligible to attend the [REDACTED] Academy in the fall term immediately after their high school graduation (assuming such graduation is in May or June).

85. Mrs. [REDACTED] was very interested and involved in Petitioner's education and [REDACTED] post-secondary plans. Moreover, [REDACTED] took steps to facilitate and assist Petitioner in accomplishing [REDACTED] goal of attending the [REDACTED].

86. After discussions with Major Gonzalez and/or Colonel McHenry, Mrs. [REDACTED] requested and obtained information about [REDACTED] in [REDACTED], California ([REDACTED]).

87. In a letter dated March 8, 2006, Mrs. [REDACTED] advised Major Gonzalez that she had spoken to Colonel McHenry, who told her that "he felt that the [REDACTED] [REDACTED] would give [Petitioner] the additional edge and training to give [REDACTED] at least a better chance to get into the [REDACTED]." Mrs. [REDACTED] also stated that [REDACTED] "sounds like just what [Petitioner] needs to organize [REDACTED], get [REDACTED] physically fit, and continue a rigorous academic course schedule." Finally, in [REDACTED] letter

to Major Gonzalez, Mrs. ■ indicated that she had checked with the ■ guidance office about graduation requirements and learned that Petitioner "will be able to take ■ final English class and Social Studies/History [class] required for graduation in the second half of the year [2006-2007] when ■ returns."

88. About four months after Mrs. ■ informed Major Gonzalez of ■ plans to send Petitioner to ■, ■ sent an e-mail to the School Board staff stating ■ was rejecting the proposed IEP.

89. In an e-mail dated July 8, 2006, Mrs. ■ advised School Board personnel that "we" are rejecting the proposed IEP and ineligibility decision of the IEP team.^{15/} ■ stated that "our" concerns about the inadequacies of the IEP and the current finding of ineligibility amount to a denial of a free, appropriate public education (FAPE). The e-mail concluded as follows:

Do [sic] to these concerns and denial of FAPE; [sic] it is our intent to enroll [Petitioner] in a private school at public expense as a temporary answer to this situation. We intend on [Petitioner] returning to ■ [High School] in January.

90. Mrs. ■ sent a second e-mail dated July 31, 2006, to Valerie Rowan. This e-mail was almost identical to the July 8, 2006, e-mail described in paragraph 89. The only difference was that the later e-mail specified the year, as well as the month

that Petitioner would return to [REDACTED]. According to the July 31, 2006, e-mail, Mrs. [REDACTED] intended for Petitioner to return to [REDACTED] in January 2007.

91. Mrs. [REDACTED] contends that no one from the school district or IEP team responded to [REDACTED] July 2006 e-mails, which notified the appropriate School Board staff that [REDACTED] was placing Petitioner in a private school.

92. Petitioner enrolled in and attended [REDACTED] the first semester of the 2006-2007 school year. After completing [REDACTED] one-semester enrollment at [REDACTED], Petitioner returned to the Collier County public schools system for the second semester of the 2006-2007 school year. [REDACTED] is currently a senior at [REDACTED] and is taking honors and advanced placement courses.

93. [REDACTED] specializes in assisting students seeking admission to the [REDACTED]. According to a document provided by Mrs. [REDACTED] the curriculum at [REDACTED] consisted of the following: language structure, vocabulary, spelling, reading, study skills, standardized testing, mathematics, chemistry, and physical conditioning. There is no indication that the curriculum at [REDACTED] was in any way modified for Petitioner to address any exceptionality under IDEA or that the school developed and/or implemented any IEP for Petitioner. Neither was there any indication or evidence that Petitioner was afforded any accommodations at the preparatory school.

94. For the semester that Petitioner attended [REDACTED], the cost for [REDACTED] room, board, books, and tuition was \$6,945.00. Petitioner's parents paid the entire costs in five payments. The first three payments of \$100.00; \$1,600.00; and \$2,500.00 were made on March 15, April 12, and June 18, 2006, respectively, well before Mrs. [REDACTED] sent the e-mails notifying the appropriate staff and/or IEP team members of [REDACTED] intent to enroll Petitioner in a private school. Petitioner's parents made an additional payment of \$1,000.00 on July 18, 2006, about two weeks before Mrs. [REDACTED] sent the second e-mail to Ms. Rowan notifying her of the parents intent to place Petitioner in a private school.

95. During the time Petitioner was enrolled at [REDACTED], [REDACTED] was able to complete [REDACTED] application packet, something [REDACTED] had not done during the 2005-2006 school year when [REDACTED] was attending [REDACTED].

96. At the time of this proceeding, Petitioner had recently received a congressional appointment/nomination to the [REDACTED]. Having completed [REDACTED] application and received a congressional nomination, the only thing Petitioner needed to do to complete [REDACTED] packet was to have a physical examination at the designated facility in Miami.

97. The only reason Petitioner's parents enrolled [REDACTED] in [REDACTED] to participate in the one-semester course of

study was to enhance [REDACTED] chances for an appointment to the [REDACTED].

98. The reason Petitioner's parents enrolled Petitioner in [REDACTED] in the fall of 2006 was because this would give [REDACTED] the best opportunity to be admitted for enrollment to the [REDACTED] in the 2007 fall semester. If Petitioner's parents had enrolled Petitioner in [REDACTED] in the fall of 2007, after [REDACTED] graduated from high school, as is typical of most students attending [REDACTED], assuming [REDACTED] was admitted to the [REDACTED] Academy, [REDACTED] could not enroll prior to the fall of 2008. Mrs. [REDACTED] testified that [REDACTED] did not want Petitioner to have to sit out a year, but instead wanted [REDACTED] to begin college in the fall of 2007, when most of [REDACTED] high school classmates would be starting college.

99. [REDACTED] was not an accredited school when Petitioner was enrolled there. Consequently, Petitioner received no academic credit for any of the courses [REDACTED] took at the private preparatory school.

100. Petitioner's enrollment at [REDACTED] was not to cure any deficiency in the FAPE [REDACTED] was then receiving from Respondent.

CONCLUSIONS OF LAW

101. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding. See § 1003.57(5), Fla. Stat. (2006), and Fla. Admin. Code R. 6A-6.03311(5)(e).

102. The IDEA, 20 U.S.C. Section 1400, et seq., requires a school district to provide a FAPE to any student with a disability. See 20 U.S.C. § 1400(d)(1)(A).

103. At all times relevant to this proceeding, Petitioner was eligible for services as a student under IDEA.

104. To provide a FAPE, a school district must develop and implement an IEP that is "reasonably calculated to enable the child to receive educational benefits."

105. In this case, Petitioner alleges that (1) the School Board failed to implement Petitioner's "stay-put" IEP from November 4, 2005, through the end of the 2005-2006 school year; (2) the School Board is required to reimburse Petitioner's parents for the cost of █████ attending a private residential school; and (3) the School Board violated Petitioner's procedural due process rights by failing to respond to the July 2006 notices of private school placement.

106. With regard to the August IEP, Petitioner does not dispute that the August IEP, as developed, is reasonably calculated to enable █████ to receive educational benefits. Rather, it is alleged that the School Board failed to implement the August IEP and, thereby, denied Petitioner a FAPE.

107. Petitioner has the burden of proof in this case. See Schaffer v. Weast, 126 S. Ct. 528 (2005). To prevail, Petitioner must prove the allegations by a preponderance of evidence.

Implementation of "stay-put" IEP

108. There is no dispute that Petitioner filed a due process request on November 4, 2005, and, subsequently, appealed the Final Order. Petitioner later withdrew the appeal and the Order dismissing the appeal was granted on January 30, 2007.

109. 20 U.S.C. Section 1415(j) provides that during the pendency of any proceedings pursuant to the section, unless the State or local education agency and parents otherwise agree, the child shall remain in the then current educational placement until all proceedings have been completed. See § 1003.57(1)(e), Fla. Stat. (2006).

110. The parties agreed that the "stay-put" IEP is Petitioner's August IEP. Moreover, the parties agree that the August IEP, when developed, was agreed to by both parties. There is no dispute that the IEP, as developed, meets Petitioner's needs and that this is the last IEP upon which the parties agree.

111. In Houston Independent School District v. Bobby R., 200 F.3d 341 (5th Cir. 2000), the court held as follows in relevant part:

[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEPs, but still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

112. Petitioner did not establish that the School Board failed to implement substantial or significant provisions of the "stay-put" IEP.

113. The preponderance of the evidence established that the School Board made the substantial provisions of the "stay-put" August IEP available to Petitioner. For example, Petitioner was offered and received help with organizational skills, as provided for in the IEP.

114. The evidence also showed that Petitioner was offered social work services, assistive technology, and extended accommodations for taking examinations, but that [REDACTED] did not utilize these services. Undoubtedly, Petitioner, who was [REDACTED] years of age at the time relevant to this proceeding, could not be forced to utilize these services.^{16/}

115. The preponderance of evidence established that during the relevant time period, Petitioner successfully completed all [REDACTED] courses, earning a grade of either "B" or "C" in [REDACTED]

"Honors" and "Advanced Placement" courses. It was further established that for each of these courses, Petitioner was awarded credit toward high school graduation.

116. The preponderance of the evidence shows that the School Board implemented the substantial and significant portions of the August IEP. Furthermore, the evidence shows that Petitioner received an educational benefit as a result of implementation of the August IEP.

Reimbursement for Tuition at Out-of-State School

117. Petitioner's parents seek reimbursement of all costs, including the cost of tuition, room, board, and books for Petitioner's attendance at a private residential school in ██████████ during the first semester of the 2006-2007 school year.

118. In this case, there is no dispute that Petitioner's parents unilaterally placed ██████ in a private school without the consent of the School Board, prior to completion of the proceedings which triggered the "stay-put" provision.

119. 20 U.S.C. Section 1412 addresses the reimbursement of private school costs to parents who unilaterally place their child in a private school.

120. 20 U.S.C. Section 1412(a)(10)(C) provides, in relevant part, the following:

- (10) Children in private schools.

* * *

(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 subchapter 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 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 division (aa);

121. In the instant case, it is undisputed that Petitioner is a student with a disability who previously received special education and related services from a public agency and that the parents enrolled █████ in a private school without consent or referral by the public entity.

122. 20 U.S.C. Section 1412(a)(10)(C)(ii), quoted above, requires that, in order to prevail, parents seeking reimbursement of private school costs must establish that the School Board has failed to provide FAPE and that the private school placement was appropriate under IDEA. See Florence County School District v. Carter, 510 U.S. 7, 114 S. Ct. 361 (1993); and School Committee of Town of Burlington, Massachusetts v. Mass. Department of Education, 471 U.S. 359, 105 S. Ct. 1996 (1985).

123. For the reasons stated above, Petitioner did not establish that the School Board failed to implement the August IEP during the "stay-put" period and, thus, failed to provide FAPE.

124. Petitioner's parents' unilateral decision to send Petitioner to a private residential school in [REDACTED] in order to enhance [REDACTED] chances of being admitted to the [REDACTED], was one they were free to make. However, where there is no showing that the School Board failed to implement the August IEP^{17/} and, thereby, failed to provide FAPE, the parent's decision to enroll Petitioner in a private out-of-state school imposes no financial responsibility on the School Board.

125. 20 U.S.C. Section 1412(a)(10)(C)(iii)(I)(aa) and (bb) provides for reduction or denial of the reimbursement to parents who unilaterally place their children in private school, when they fail to notify the School Board prior to such placements.^{18/} Here, it is undisputed that Petitioner's [REDACTED] gave prior notice to the School Board that she was enrolling Petitioner in a private residential school in [REDACTED]. By doing so, she provided the statutorily prescribed notice. However, because the School Board provided FAPE to Petitioner, the parents are not entitled to reimbursement. Therefore, the fact that the parents provided prior notice of their intent to enroll Petitioner in a private school is of no consequence.

Procedural Issues

126. Petitioner's [REDACTED] asserts that the School Board never responded to [REDACTED] July 2006 e-mail notifying appropriate

staff of [REDACTED] intent to enroll Petitioner in a private school. [REDACTED] contends that by not responding to [REDACTED] notices of the private school placement, the School Board violated the procedural requirements of IDEA in two ways. According to Petitioner, the School Board (1) failed to provide prior written notice of its refusal to change Petitioner's educational placement to a private school, and (2) failed to provide Petitioner's mother with a copy of the procedural safeguards.

127. Procedural violations must be analyzed in view of whether any actual harm results. See Michael P. v. Indian River County School Board, 37 IDELR 186 (11th Cir. 2002); Doe v. Alabama State Department of Education, 915 F.2d 651, 661-62 (11th Cir. 1990) (no relief where procedural deficiencies have no impact on the parents' full and effective participation in the IEP development); Weiss v. School Board of Hillsborough County, 141 F.3d 990 (11th Cir. 1998) (in evaluating FAPE deprivation, the court must consider the impact of the procedural defect, and not the defect per se); Jane Parent v. Osceola County School Board, 59 F. Supp. 2d 1243 (M.D. Fla. 1999) (district's procedural errors did not deny the student FAPE); and Joshua S. v. School Board of Indian River County, 37 IDELR 218 (S.D. Fla. 2002) (court found no evidence that procedural violation had harmed the student).

128. Here, the evidence established that the School Board violated the procedural rights of Petitioner by failing to provide prior written notice of its refusal or rejection of the private school placement. As it had a few months earlier, the School Board was obligated to provide prior written notice of its denial of the private school placement for Petitioner. Notwithstanding this procedural violation, there is no evidence of actual harm to Petitioner.

129. In failing to provide prior written notice of its refusal or denial to change Petitioner's placement from BCHS to a private school, the School Board did not provide Mrs. ■ with a copy of the procedural safeguards. However, the evidence established that Petitioner's ■ has been actively involved in ■ education as evidenced by ■ attendance at and participation in many IEP team meetings. Moreover, the evidence established that ■ has requested several due process hearings and been involved in at least three such hearings or proceedings related thereto. Thus, there can be no doubt that Mrs. ■ was well aware of her procedural rights, having exercised those rights on numerous occasions.

130. Even though the School Board violated the procedural requirements of IDEA by failing to provide Petitioner's mother with a copy of the procedural safeguards, after it received notice that ■ was enrolling ■ in a private school, there has

been no showing of actual harm to Petitioner or [REDACTED] parents by this procedural violation.

ORDER

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

ORDERED that:

1. Petitioner's request for reimbursement for any and all costs incurred as a result of [REDACTED] attending [REDACTED] is denied.

2. Petitioner's request for reimbursement for any and all expenses incurred by Mr. and Mrs. [REDACTED] in connection with this action, including copying costs and fees to serve subpoenas, is denied.

DONE AND ORDERED this 26th day of April, 2007, in Tallahassee, Leon County, Florida.

S

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of April, 2007.

ENDNOTES

^{1/} Petitioner's Composite Exhibit 1 consists of the exhibits noted in the hearing Transcript as being admitted.

^{2/} These are four invoices from Speedy Courier & Process Serving, Inc., to Mrs. ■ for "service fee" and "rush fee."

^{3/} On February 28, 2007, Petitioner filed Petitioner's Exhibit 651, but an original of that document had been previously filed with DOAH.

^{4/} The facts referred to in Petitioner's Motion to Dismiss Facts are "proposed" facts, which are in the School Board's "Recommended Final Order."

^{5/} This extension was necessary due to the time required the week of April 2, 2007, addressing preliminary matters in Case Nos. 07-1032E and 07-1130E and preparing for the due process hearing in those consolidated cases, which involved the same parties in this proceeding. The due process hearing in the foregoing cases was held on April 9 through 11, 2007.

^{6/} Case No. 2D06-5144, District Court of Appeal of the State of Florida, Second District, Lakeland, Florida.

^{7/} The IDEA includes "Specific Learning Disability" as an exceptionality, not giftedness. See 20 U.S.C. § 1401(3)(A) and 34 C.F.R. § 300.7(c)(10). "Giftedness" is listed as an exceptionality under Florida rules. See Fla. Admin. Code R. 6A-6.030191.

^{8/} The conference notes of this meeting indicate that the August IEP would be reviewed and/or updated at a date to be determined, presumably to reflect Mrs. ■'s decision to decline the social work services. However, there is no indication this was ever done.

^{9/} There were two encounter reports for December 9, 2005, both of which show that Mr. Shaughnessy interviewed Petitioner and also reviewed the file, consulted with, and interviewed staff. One of the encounter reports lists the time spent on these activities as 30 minutes and the other one indicates the time as 45 minutes.

^{10/} Petitioner's mother had requested that the social work services be offered after school so as not to interfere with ■

classes. However, given that [REDACTED] lacrosse practice was after school, scheduling counseling after school would not have been effective.

^{11/} The August IEP provided that under the transitional services activity area, functional vocational evaluation, "vocational rehabilitation will be contacted during [Petitioner's] senior's [sic] year."

^{12/} This undated one-page document lists of parent concerns was initially received by the school district staff on or about January 26, 2005. Mrs. [REDACTED] requested that this document be attached to the January 14, 2005, IEP, and a notation by Karen Stelmacki states that the School Board agreed to attach the document to the January 14, 2005, IEP. The February 9, 2005, IEP also indicated that the undated one-page document of parents' concerns was attached to that IEP.

^{13/} Section 1003.437, Florida Statutes (2006), defines the grading system and interpretation of letter grades used in public high schools as follows: Grade "A" equals 90 percent through 100 percent and is defined as "outstanding progress"; Grade "B" equals 80 percent to 89 percent and is defined as "above average progress"; and Grade "C" equals 70 percent to 79 percent and is defined as "average progress."

^{14/} Petitioner's graduation is subject to successful completion of English and an economics and government course.

^{15/} The e-mail indicates that it was sent to Valerie Rowan, Carl Defuricio, Sarah Cammarata, Rich DeMeyer, and Allman Todd. There is no evidence that the e-mail was received by these individuals.

^{16/} Because Petitioner indicated to teachers that did not want to use the assistive technology device, the failure to provide training for teachers on the use of these devices is not a significant failure provision of the IEP. Also, there is no showing that the transition services included on the IEP were substantial.

^{17/} The parties do not dispute that the August IEP meets procedural and substantive requirements of IDEA and Florida law.

^{18/} These subsections require parents to inform the IEP team at the most recent IEP meeting that they were rejecting the proposed placement to provide FAPE and stating their concerns

and their intent to enroll their child in a private school at public expense; or ten days prior to the removal of the child from public school, give written notice to the public agency that they are rejecting the proposed placement and stating their concerns and intent to enroll the child in a private school.

COPIES FURNISHED:

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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.