STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1986E
	)	
BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, a due process hearing was conducted in this case pursuant to Florida Administrative Code Rule 6A-6.03311 and section 1003.57, Florida Statutes,[1/] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on July 18, 2012, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: [redacted], Parent
(address of record)

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

STATEMENT OF THE ISSUES

1. Whether the Individual Educational Plan developed for [redacted] in May 2012, suffers from the deficiencies alleged in the due process hearing request filed by [redacted] mother, [redacted] (Mother), with the Broward County School Board (School Board)?

2. Whether the relief requested in the Mother's due process hearing request should be granted?

PRELIMINARY STATEMENT

On June 4, 2102, the Mother submitted to the School Board a request for a due process hearing (Complaint), in which she alleged the following:

> -The IEP that was developed for [redacted] on May 10 and May 21, 2012, is in direct opposition to critical key aspects of both IDEA and Section 504 of the Rehabilitation Act.
>
> -Parent was not provided meaningful participation in said IEP's development as the final IEP only reflects the placement recommendations of the School District IEP members and not the recommendations or considerations of the Mother nor certain considerations presented by the school psychologist.
>
> -Said IEP is in direct opposition to the least restrict[ive] environment component of IDEA in that the District never showed that [redacted] cannot be successfully educated in the least restrict[ive] environment of a gen. ed. classroom with all needed supports and services.

> -Said IEP does not provide [redacted] with a free, appropriate public education.

The Mother, in her complaint, proposed the following resolution:

> Broward County School District should place [redacted] in a general educational environment and provide [redacted] with all the supports and services that are necessary to support and sustain [redacted] in that environment in order to provide [redacted] a free, appropriate public education as is required by IDEA

The Complaint was transmitted to DOAH on June 5, 2012. The case was assigned to the undersigned, who, on June 6, 2012, scheduled the requested due process hearing for July 20, 2012. On June 22, 2012, the School Board filed a motion requesting that the due process hearing be rescheduled. By Order issued June 25, 2012, the undersigned granted the motion and rescheduled the hearing for July 18, 2012.

The due process hearing was held on July 18, 2012, as scheduled. At the hearing, the Mother presented her own testimony, as well as the testimony of Kathleen Keller. She also offered eight exhibits into evidence (Petitioner's Exhibits A through E, K, L, and P), all of which were received. Testifying on behalf of the School Board were Kendra Meyer, Mari Crawford, Lori Henricksen, and Felicia Starke. In addition to the testimony of these witnesses, the following School Board exhibits were offered and received into evidence: School Board Exhibits 1, 2, 4 through 7, 9, and 20 through 24.

At the conclusion of the evidentiary portion of the due process hearing on July 18, 2012, the undersigned, with input from the parties, established an August 10, 2012, deadline for the filing of proposed final orders.

The Transcript of the due process hearing (consisting of one volume) was filed with DOAH on July 31, 2012.

The School Board timely filed its Proposed Final Order on Friday, August 10, 2012.

The morning of Monday, August 13, 2012, the Mother filed a motion requesting an extension of time, until later that day, to file her proposed final order (Motion). Several hours later, the School Board filed a response to the Motion, advising that it had no objection to the Mother's receiving an extension of time to file her proposed final order, provided that the deadline was not extended beyond 5:00 p.m. on August 13, 2012. The undersigned hereby GRANTS the extension of time sought by the Mother and therefore will treat the Mother's Proposed Final Order, which was filed before 5:00 p.m. on August 13, 2012, as having been timely filed. Pursuant to paragraph 7 of the Order of Pre-Hearing Instructions issued in this case on June 6, 2012,[2/] the deadline for the issuance of this Final Order is extended three days (the length of the extension of time granted to the Mother), to August 23, 2012.

For stylistic convenience, the undersigned will use masculine pronouns in this Final Order when referring to [redacted]. The masculine pronouns are neither intended, nor should they be interpreted, as a reference to [redacted] actual gender.

FINDINGS OF FACT

1. [redacted] is the [redacted] [redacted] autistic child of the Mother and [redacted] (Parents). [redacted] was born in [redacted] [redacted].

2. The Parents have been separated since March 2011, and they are in the midst divorce proceedings. Both reside in Broward County.

3. [redacted] received services through Part C of the Individuals with Disabilities Education Act prior to [redacted] third birthday.

4. In September 2008, it was determined that [redacted] was eligible to receive special education and related services from the School Board as a Student with Autism Spectrum Disorder and a Student who Requires Occupational Therapy. An Individual Educational Plan (IEP) was thereafter developed for [redacted].

5. During the 2008-2009 school year, [redacted] attended Baudhuin Pre-School (Baudhuin), a private school which, pursuant to a contract with the School Board, provides intensive educational services to Broward County students with Autism Spectrum Disorder.

6. On January 8, 2009, [redacted] IEP was updated to reflect that [redacted] was also eligible to receive special education and

related services from the School Board as a Student with a Speech Impairment. ([redacted] suffers from apraxia, which is a speech disorder.)

7. At an annual IEP meeting held on July 28, 2009, a successor IEP, covering the period from August 24, 2009, to June 10, 2010, was developed for [redacted] (July 2009 IEP).

8. The "Parent Input" section of the July 2009 IEP included the following statement:

> Mom feels [redacted] would benefit from being with typical peers. Mom feels that [redacted] needs intense therapy because that's how [redacted] makes progress (1:1). She feels that is where [redacted] makes steady progress and then carries this progress over in school.

9. The "Placement" section of the July 2009 IEP indicated that [redacted] would be in a "separate class," apart from non-disabled students, 100 percent of the time, and it provided the following explanation for such a placement:

> [redacted] demonstrates a need for intensive specialized instruction in a small class environment with a low pupil teacher ratio to address development of cognitive, communication, independent functioning, and social/behavioral skills.

10. The Parents disagreed with the placement, and they advised the Baudhuin administration, in writing, of their disagreement.[3/]

11. The Parents kept [redacted] out of school following the development of the July 2009 IEP and, as a result, that IEP was never implemented.

12. It was not until approximately two years later (at the start of [redacted] kindergarten year) that [redacted] returned to a school setting, specifically a general education kindergarten class at [redacted], a Broward County public school in which [redacted] was enrolled by [redacted] father.[4/] [redacted] remained in that class for only two days. When school district personnel advised the Parents that [redacted] needed to be transferred to a self-contained autism cluster class at [redacted], the Mother (who, unlike [redacted] opposed such a placement) began teaching [redacted] at home. [redacted] never attended [redacted] School. Instead, the Mother taught [redacted] at home (one-on-one) for the rest of the 2011-2012 school year. (It was not until October 10, 2011, however, that the Mother first registered [redacted] with the School Board as a home schooled student.)

13. At the end of January 2012, the Mother requested that the School Board have [redacted] reevaluated.

14. The School Board's response to [redacted] request was the subject of a due process hearing request the Mother filed February 23, 2012. The dispute concerning the matter was resolved by a Resolution Agreement,[5/] and the Mother's due

process hearing request (which had been referred to DOAH and docketed as DOAH Case No. 12-0754E) was withdrawn pursuant to that agreement.

15. At a Reevaluation Plan meeting held on March 9, 2012, the Parents signed a Consent for Reevaluation, in which they gave their permission for [redacted] to be assessed by the School Board in the following areas: Vision; Hearing; Speech Articulation, Fluency, and Voice; Expressive and Receptive Language; Academic Achievement; Intellectual Functioning; Personality and Emotional Functioning; Psychological Process Functioning; Adaptive Behavior and Behavioral Functioning (with a Functional Behavioral Assessment to be done); and Occupational Therapy.

16. Kathleen Keller was employed by the School Board for 38 years (from 1974 until she retired on June 30, 2012)--the first 13 as a teacher and the last 25 as a school psychologist.

17. Ms. Keller tested [redacted] on March 29 and 30, 2012, and she had separate one-hour telephone conversations with each of the Parents during the first two weeks of April 2012.

18. Ms. Keller administered the following tests as part of the assessment process: the Stanford Binet Intelligence Scale, Fifth Edition (Stanford Binet) to assess [redacted] cognitive ability; selected subtests of the Woodcock-Johnson III - Tests of Achievement (Woodcock-Johnson) and the Bracken Basic Concept Scale, Third Edition, Receptive (Bracken) to assess [redacted]

academic skills; the Gilliam Autism Rating Scale, Second Edition (GARS) to assess [redacted] behavioral functioning; and the Vineland Adaptive Behavior Scales, Second Edition (Vineland) to assess [redacted] adaptive behavior.

19. On the Stanford Binet administered to [redacted] by Ms. Keller, [redacted] received the following scores: IQ Score--Nonverbal IQ--Standard Score: 55 (.1 percentile); Factor Index Scores--Standard Scores: Quantitative Reasoning: 67 (1st percentile), Visual Spatial: 48 (<.1 percentile), and Working Memory: 65 (1st percentile); Subtest Scaled Scores--Nonverbal Domain: Fluid Reasoning (matching three-dimensional shapes): 1, Knowledge (nonverbal response to common commands): 6, Quantitative Reasoning (comparing size and quantity): 1, Visual-Spatial Processing (placing shapes in a form board): 1, and Working Memory (sorting visual information in short-term memory): 6; and Subtest Scaled Scores--Verbal Domain: Quantitative Reasoning (counting, number identification): 7, Visual-Spatial Processing (understanding of visual terms/position): 1, and Working Memory (short-term verbal memory): 2.

20. Passage Comprehension was the only Woodcock-Johnson subtest administered by Ms. Keller that [redacted] completed. On this

subtest, [redacted] received a grade equivalent and a standard score of K.9 (kindergarten, ninth month) and 95, respectively, placing [redacted] in the 36th percentile.

21. On the Bracken, [redacted] performed as follows: School Readiness: four years, five months[6/] (<1st percentile, very delayed); Direction/Position: <three years (<1st percentile, very delayed); Self/Social Awareness: <three years (<1st percentile, very delayed); Texture/Material: <three years (<1st percentile, very delayed); Quantity: <three years (<1st percentile, very delayed); and Time/Sequence <three years (<1st percentile, very delayed).

22. The GARS and the Vineland were completed individually by the Parents. Their responses on the GARS reflected that [redacted] had stereotyped behaviors and problems with communication and social interaction. The Mother's responses on the Vineland yielded the following Standard Scores: Communication-63 (1st percentile, low/mild deficit); Daily Living Skills-62 (1st percentile, low/mild deficit); Socialization-57 (<1st percentile, low/mild deficit); Motor Skills-70 (2nd percentile, low/mild deficit); and Adaptive Behavior Composite-60 (<1st percentile, low/mild deficit). Mr. [redacted] responses on the Vineland yielded the following Standard Scores: Communication-57 (<1st percentile, low/mild deficit); Daily Living Skills-60 (<1st percentile, low/mild deficit); Socialization-55 (<1st

percentile, low/mild deficit); Motor Skills-61 (<1st percentile, low/mild deficit); and Adaptive Behavior Composite-56 (<1st percentile, low/mild deficit).

23. On April 17, 2012, Ms. Keller issued a Psychological Report.

24. The last two paragraphs of the "Background Information" section of Ms. Keller's Psychological Report read as follows:

> A Parent Information Form (3/29/12 and 4/4/12) was completed individually by both of [redacted] parents. [redacted] parents separated in March 2011, and a divorce is pending. They reportedly each have 50% custody of [redacted]. [redacted] has a [redacted]-old brother who currently is in the fifth grade at [redacted]. [redacted] grandmother resides with the family at the home of [redacted] mother. [redacted] reportedly gets along well with family members. Problem areas reported at home are associated with autism and include the following per mother and father: over-activity, inattentiveness, and following rules. [redacted] father also notes that [redacted] has problems getting along with others, running away, unusual fears, and nervous twitching. Regarding school, [redacted] mother reports that [redacted] loves learning and has a strength in the area of reading. [redacted] reportedly is interested in words, numbers, and letters and [redacted] mother is concerned that [redacted] be placed in a school with higher expectations and adequate challenges. [redacted] father feels [redacted] should be in a full-time school program because "home-schooling by [redacted] mother falls short of meeting [redacted] needs." [redacted] father is concerned that [redacted] "lacks daily contact with peers." He further notes that [redacted] made progress with the use of food

reinforcers, learned skills through repetition, and required reinforcers to stop self-stimulatory behaviors.

[redacted] passed a school screening for vision on 3/19/12. [redacted] required the assistance of [redacted] mother to help [redacted] with head placement during the vision screening. The speech/language pathologist at Riverside attempted to screen [redacted] hearing at school, but [redacted] was not able to tolerate the earphones. Subsequently, the school referred [redacted] for audiological testing, and [redacted] mother took [redacted] to the North Area soundbooth on 3/26/12. Results suggested hearing essentially within normal limits for at least the better ear for speech frequencies. Tympanometry revealed normal middle ear compliance and pressure bilaterally. The parent was advised to monitor [redacted] hearing status. It was noted that audiological reevaluation for ear-specific information might be requested in the future, if warranted.

25. Ms. Keller set forth the following "Behavioral Observations and Impressions" in her Psychological Report:

On 3/22/12, [redacted] was observed briefly by this examiner as the speech/language pathologist attempted a hearing screening. As [redacted] entered the room with [redacted] mother, [redacted] smiled broadly, showing [redacted] missing two front teeth. [redacted] explored the room and sometimes flapped or clapped [redacted] hands while walking. [redacted] mother quietly reminded [redacted] not to clap [redacted] hands, and [redacted] stopped, at least temporarily. After a few attempts at completing the hearing screening, allowing for different methods of responding, such as saying "beep" instead of raising the appropriate hand, the screening had to be discontinued. [redacted] seemed to enjoy playing with a musical dancing Snoopy in the room. [redacted] pointed to a few items and apparently said a word, which this

examiner found to be unintelligible. All of [redacted] utterances seemed to consist of a single vowel sound combined with some consonants. When asked to name numbers of two digits, such as 48, [redacted] responded readily. Though [redacted] speech was unintelligible to this examiner and sounded somewhat robotic, this examiner was able to discern enough of a pattern to indicate that [redacted] was probably naming the numbers correctly. When the examiner asked [redacted] what color [redacted] shirt was, [redacted] was unable to respond. Later, with some practice [redacted] gave a response, which [redacted] mother stated was [redacted] way of saying "purple," but again was unintelligible to this examiner.

[redacted] was evaluated over two different days. On both days of testing [redacted] sat in [redacted] seat throughout the evaluation and worked cooperatively. On the first day of testing, [redacted] participated readily for about 30 minutes on pre-academic tasks in which [redacted] was required to point to one of four pictures to express an answer. When [redacted] did not know an answer, [redacted] consistently counted the four responses. When requested to do so, [redacted] attempted to write [redacted] name without any help. [redacted] wrote a number of letters or letter-like forms that might have been part of [redacted] name, but the writing would not have been recognized as [redacted] name. When this examiner attempted to begin a nonverbal reasoning activity involving matching, [redacted] briefly attempted the task, but soon became frustrated and began to flap [redacted] hands. At that point, this examiner immediately stopped the testing. On the second day of testing, [redacted] sat in [redacted] chair and worked with the examiner for approximately 45 minutes. [redacted] attended well and seemed interested in some of the activities. Certain accommodations were made in language-based testing to allow for qualitative, rather than quantitative analysis of those items. On an auditory memory test, [redacted] was able to repeat some

> words clearly enough that the examiner was able to score [redacted] response.
>
> [redacted] appeared to put forth the best effort of which [redacted] was capable. Test results should provide a valid estimate of [redacted] current functioning.

26. In her Psychological Report, Ms. Keller, in addition to reporting [redacted] Stanford-Binet test results, provided the following commentary regarding these results:

> [redacted] was administered the nonverbal portion of the Stanford-Binet Intelligence Scale, Fifth Edition. As indicated in the Stanford-Binet examiner's manual, it is considered best practice to administer the nonverbal portion of the intellectual measure to students whose vocal speech may be less effective, such as those within the autistic spectrum. Because [redacted] is able to perform some of the verbal tasks, these were attempted as well, though some were administered with modifications and primarily for qualitative, rather than quantitative interpretation.[7/] Thus, neither a Verbal IQ nor a Full Scale IQ can be reported. . . .
>
> [redacted] overall nonverbal ability, as measured by the Stanford-Binet Intelligence Scale, Fifth Edition, falls on the borderline of the mildly and moderately delayed range of ability. [redacted] performance is exceeded by approximately 999 out of 1,000 children [redacted] age in a group representative of the general population. [redacted] does show relative strengths and weaknesses within areas, however.
>
> In the nonverbal area, [redacted] performs best in the areas of Knowledge and Working Memory. Tasks in the knowledge area primarily indicate an ability to follow common commands related to tasks such as

> waving goodbye or clapping [redacted] hands. In the working memory area, [redacted] is able to imitate the examiner in tapping patterns of up to three blocks. In contrast, [redacted] has significant difficulty with matching 3-dimensional shapes and understanding quantity and size words such as "more" and "bigger." Though [redacted] is able to place simple shapes in a form board, [redacted] is unable to complete the tasks when the shapes are divided in half (e.g., two half circles).
>
> Within the verbal area, [redacted] performs relatively well on tasks involving counting and pointing to numbers. [redacted] is able to repeat a few simple sentences. When [redacted] hears the names of some pictures and objects, [redacted] is able to point to them. [redacted] also named a few actions, such as "cutting," which the examiner was able to understand when it was clear what [redacted] should be saying.

27. In her Psychological Report, Ms. Keller, in addition to reporting [redacted] Bracken test results, provided the following commentary regarding these results:

> [redacted] performance on the Bracken suggests strong rote memorization skills. [redacted] shows good ability to identify colors, upper and lower case letters, numbers to at least 99, and common shapes. When provided with a model on just one occasion, [redacted] subsequently showed good ability to maintain one-to-one correspondence in counting at least nine objects. In contrast, [redacted] language-based readiness skills are severely deficient as might be anticipated for a child of [redacted] developmental level with autism spectrum disorder. [redacted] has difficulty with size/comparison words such as "big" and "little." As noted on the intellectual measure, [redacted] lacks understanding of the concepts of "in" and

> "on." Though [redacted] parents have indicated that [redacted] learned such words as "therapy," [redacted] does not appear to have generalized them to other situations. [redacted] has difficulty with words related to social awareness, such as when [redacted] is asked to identify the child who is "crying." Again, as noted on the intellectual measure, [redacted] shows difficulty with words related to quantity. [redacted] also has difficulty understanding words that describe attributes of an object, such as "old" or "wet."

28. In her Psychological Report, Ms. Keller, in addition to reporting [redacted] Woodcock-Johnson test results, provided the following commentary regarding these results:

> [redacted] performance on a reading comprehension subtest of the academic measure indicates that [redacted] is able to read color words along with some common nouns. [redacted] is able to associate a phrase such as "yellow bird" with the appropriate picture. In contrast, [redacted] is unable to read a short sentence and name a word that is missing in the sentence. [redacted] overall performance on this measure falls within the average range for [redacted] age. As [redacted] becomes older and reading is more complex, [redacted] is likely to have much more difficulty with comprehension skills.
>
> This examiner attempted to administer the Writing Samples portion of this test for information purposes. On this measure, [redacted] did not attempt to write [redacted] name. [redacted] did, however, write the word "cat," writing the C and the A on the cat itself and writing the T on the line provided for the word.
>
> Again for information purposes, this examiner attempted to have [redacted] complete the Developmental Test of Visual-Motor Integration, Sixth Edition. [redacted] imitated the examiner in drawing a vertical line.

> After that point, [redacted] started to trace the examiner's drawings and then gave up. In the classroom, [redacted] is likely to show weak pencil-paper control and copying skills.

29. In her Psychological Report, Ms. Keller, in addition to reporting [redacted]'s Vineland scores, provided the following commentary regarding these scores:

> [redacted] overall level of adaptive behavior, as rated by both parents, falls within the low range, below the 1st %ile for [redacted] age. Ratings by both parents are fairly consistent with one another and indicate significant difficulties in the area of adaptive behavior. As noted previously on other testing, such difficulties would be anticipated for a student of [redacted] developmental level with Autism Spectrum Disorder.
>
> In the area of communication, [redacted] parents agreed that [redacted] points to at least five major and minor body parts, points to common objects, and demonstrates understanding of the meaning of "yes" and "no." Expressively, [redacted] parents report that [redacted] says at least 100 recognizable words, identifies and names colors, states [redacted] first and last name, and gives [redacted] correct age when asked. In the area of written communication, [redacted] identifies all upper and lower case letters and reads at least ten words aloud.
>
> In the area of daily living skills, [redacted] uses a cup, fork, and spoon. [redacted] is toilet trained, but needs some help with wiping. [redacted] can pull up clothing with elastic waistbands. [redacted] is able to help with simple household chores. [redacted] demonstrates understanding of the function of a telephone, uses a television without help, and shows good computer skills including turning on the computer and starting or playing games on [redacted] own.

> In the socialization area, [redacted] shows affection to familiar persons, shows a preference for certain people and objects, and shows interest in children the same age. [redacted] plays simple interaction games, such as peek-a-boo or patty-cake. [redacted] sometimes parallel plays. [redacted] usually changes easily from one activity to another.
>
> In the area of motor skills, [redacted] climbs on and off high objects and walks down stairs, alternating feet. [redacted] runs smoothly, with changes in speed and direction. With regard to fine motor skills, [redacted] opens doors by turning doorknobs, stacks at least four small blocks or other objects and turns pages of a book or magazine one by one.

30. Ms. Keller stated the following in her Psychological Report concerning the GARS completed by the Parents:

> The [GARS] was completed individually by both of [redacted] parents. Responses by both parents document the stereotyped behaviors as well as problems with communication and social interaction typical of Autism Spectrum Disorder. In the area of stereotyped behaviors, both parents endorsed [redacted] problems with flicking fingers rapidly in front of [redacted] eyes, flapping hands or fingers, making high-pitched sounds, making lunging or darting movements when moving from place to place, and spinning objects not designed for spinning. In the communication area, [redacted] frequently echoes words verbally, repeats phrases over and over, and does not initiate conversation with peers or adults, and uses pronouns such as "I" inappropriately. In terms of social interaction, [redacted] often withdraws and remains aloof, avoids eye contact, and does certain things repetitively or ritualistically. [redacted] sometimes becomes upset with changes in routine.

31. Kendra Meyer has been employed by the School Board as a speech-language pathologist for the past 17 years. She is certified in the area of speech-language impaired and to teach in both general education and exceptional student education settings.

32. Ms. Meyer evaluated [redacted] in the areas of speech and language on April 4, 2012. Also present during the testing that day was the Mother and Carol Steelman, an ESE-Speech Language Program Specialist with the School Board.

33. [redacted] was able, with prompting, to attend to the testing. Although [redacted] did get distracted at times and occasionally engaged in self-stimulatory behavior, it was generally easy for Ms. Meyer, with prompting, to get [redacted] back on task. [redacted] displayed no aggressive behavior during the evaluation process.

34. [redacted] had difficulty answering questions, even those that called for simply a "yes" or "no" answer.

35. [redacted] speaks in a "robotic type of voice," and [redacted] speech was difficult for Ms. Meyer to understand.

36. Ms. Meyer's testing revealed that [redacted] language skills were significantly below those of [redacted] peers.

37. On April 27, 2012, Ms. Meyer issued a report (Meyer Report), which detailed the results of her evaluation of [redacted]

38. The Meyer Report contained the following discussion concerning the Test of Language Development-Primary: Fourth Edition (TOLD-P: 4) Ms. Meyer administered to [redacted]:

> The TOLD-P: 4 may be used to measure language abilities of most children ages 4yrs. to 8yrs., 11 months. This test is used to identify children who have deficits in oral language and to determine specific strengths and weaknesses in language skills. Composite Indexes represent six language concepts and are the most reliable scores on the TOLD-P: 4. The Composites are standard scores with a mean of 100 and a standard deviation of 15.
>
> [redacted] achieved the following Index Scores: Listening Index-74: this represents the child's ability to understand spoken language (receptive language). Organizing Index-60: this represents the child's ability to relate incoming speech with memory and associations necessary to formulate oral responses. Speaking Index-52: this represents the child's ability to communicate thoughts orally (expressive language). Grammar-58: this measures the child's knowledge of how words are constructed and how the words are used to produce sentences. Semantics-65: this consists of 3 vocabulary sub-tests to measure the child's ability to define words, recognize multiple meaning of words and to use words accurately in speech. Spoken Language-56: this provides a comprehensive estimate of a child's overall oral language ability. The following is a summary of the TOLD-P: 4 sub-test results. Picture Vocabulary: to determine the child's ability to understand words spoken by others. [redacted] answered 19/34 correctly. Correct examples include Point to: beehive, anchor, medieval. Incorrect examples include Point to: tray, salmon, weep. Relational Vocabulary: to determine the

> child's ability to associate a specific spoken word with previously acquired knowledge of that word. [redacted] answered 0/34 correctly. Incorrect examples include: Tell me how a: kite and bird, red and yellow, book and newspaper are alike. Oral Vocabulary: to determine the child's ability to define words. [redacted] answered 0/38 correctly. Incorrect examples include: What is a: hat, chair, cup? Syntactic Understanding: to determine the ability to understand the syntax (arrangement of words in a sentence) of spoken words. [redacted] answered 0/30 correctly. Incorrect examples include Point to the picture that matches what I say: She went quickly. They sat up and listened. The leaves had fallen to the ground. Sentence Imitation: determines the child's ability to imitate complex sentences accurately. [redacted] answered 7/36 correctly taking into consideration that [redacted] speech impairment impacts [redacted] ability to produce all words perfectly.
>
> Morphological Completion: to determine the child's ability to use common morphemes (structure of words) in speech-expressive morphology. [redacted] answered 1/38 correctly. The correct example: Complete the sentence: Here is a cat. Over there are four more ___. [redacted] response=cats). Incorrect examples include: Lorena is a girl. Irene is a girl. They are both ___. ([redacted] did not respond) The dog has a bone. Whose bone is it? It is the ___. [redacted] responded deeay.

39. In her report, Ms. Meyer stated the following with respect to the results of the other portions of her evaluation of [redacted]:

> [redacted] parents were each given a Parent Checklist for Language. Both parents indicated that [redacted] follows directions and responds to questions. They both indicated

that [redacted] does not describe events/stories, initiate verbal/social interactions or use basic conversational skills.

The Broward County Speech Mechanism Evaluation was given to [redacted]. No abnormalities were noted.

The Goldman Fristoe Test of Articulation-2 (GFTA-2) Goldman, Ronald, PhD and Fristoe, Macalyne PhD, 2000, by Pearson, Inc.

The GFTA-2 is a systematic means of assessing an individual's articulation of the consonant sounds of Standard American English for individuals 2 through 21.

[redacted] achieved a standard score of 85. [redacted] was able to correctly produce most consonant speech sounds correctly. The following errors were noted: k for final ng; w for l; l for medial v; ai for final r; f for unvoiced th (as in think); n/v for voiced th (as in that); s for sw, f for fl, and [redacted] substituted w for l in the rest of the l blends (bl, kl, gl, pl). Stimulability for correct sound production was attempted, but not able to be determined due to passive non-compliance.

Through informal probing and modeling [redacted] was able to correctly produce long e, i, o and oo vowels with a model. Most of the time vowels in words are pronounced ai as in pie or uh as in shut.

[redacted] parents were each given a Parent Checklist for Speech Sounds. [redacted] mother indicated that she does not have difficulty understanding [redacted] but others do. She indicates that [redacted] does not avoid speaking and will repeat [what [redacted] says] when others do not understand [redacted]. She has sometimes heard [redacted] correct [redacted] speech sound errors. [redacted] father indicated that he and others have difficulty understanding [redacted] due to [redacted] articulation errors. He

> indicated that [redacted] does avoid speaking but will restate what [redacted] said if asked. [redacted] father has not heard [redacted] self correct.
> [redacted] parents were each given a Checklist of Pragmatic Language Skills. [redacted] father indicated that [redacted] skills in the areas of attending behavior (e.g. eye contact, maintaining attention to speaker), auditory listening skills (e.g. responding to sounds, maintaining attention to sounds), comprehension of meaning (e.g. carrying out requests, understanding much of what is said to [redacted], understanding questions) are in critical need for improvement. [redacted] communicative functions (e.g. acknowledging what others have said, initiating and maintaining conversation, telling a story) and social interactive skills (expresses feelings in a socially acceptable way[], initiate contact, engage in interactive play) are non-existent. [redacted] mother indicated that [redacted] skills in the area of attending behavior need improvement, auditory listening skills are mostly acceptable, comprehension of meaning range from acceptable to non-existent, communicative functions range from acceptable to non-existent, conversation competence is mostly non-existent and social interactive skills are mostly in critical need for improvement.

40. Ms. Steelman, the ESE-Speech Language Program Specialist who was present during the April 4, 2012, testing session, also authored a written report, albeit a less comprehensive and lengthy one, following the testing. Her report focused on [redacted] speech production. The final paragraph of her report read as follows:

> Errors included sound substitutions, omissions and additions. Vowel distortions

> tended to be produced as (ai) as in "pie." The sound errors increased as length and complexity of the utterance increased, with the exception of some possibly familiar phrases such as "How are you? I don't know." Limited awareness of stress on words was evident. These characteristics are associated with a diagnosis of verbal apraxia, a verbal motor programming disorder.

41. Lori Henricksen is a Florida-licensed occupational therapist with whom, for the past six years, the School Board has contracted to provide occupational therapy services. She has worked as an occupational therapist, and served autistic children, for approximately the past 12 or 13 years.

42. Ms. Henricksen conducted an evaluation of [redacted] functional skills in the educational environment on April 9, 2012. The evaluation took place in a small room with only Ms. Henricksen, [redacted], and the Mother present. [redacted] was very distracted and required a considerable amount of redirection and prompting during the evaluation. It appeared to Ms. Henricksen that [redacted] was "prompt-dependent for a lot of [redacted] skills."

43. Ms. Henricksen issued her Evaluation Summary on May 10, 2012.

44. In her Evaluation Summary, Ms. Henricksen reported the following regarding [redacted] "functional status" in the area of "Curriculum and Learning":

> [redacted] receives [redacted] schooling in the home environment. [redacted] currently has an

> eligibility of Autism Spectrum Disorder. [redacted] was evaluated by said therapist in a small room with parent observing. [redacted] sits independently in a standard issue classroom chair without arms; [redacted] is able to transfer into and out of the chair appropriately and without loss of balance.

45. In her Evaluation Summary, Ms. Henricksen reported the following regarding [redacted] "functional status" in the area of "Self-Help":

> Per parent report, [redacted] is able to push down [redacted] pants and pull up [redacted] pants with verbal prompts. Parent reports that [redacted] requires prompts for cleaning [redacted]. [redacted] was able to follow the hand washing routine with verbal prompts. [redacted] requires adult physical assistance to manipulate medium size buttons on an Activities of Daily Living Board. [redacted] typically wears pants with elastic bands. Per parent report, [redacted] is able to independently drink out of an open cup and straw and feed [redacted] using a utensil.

46. In her Evaluation Summary, Ms. Henricksen reported the following regarding [redacted] "functional status" in the area of "Mobility":

> [redacted] is able to ambulate throughout the school campus demonstrating functional mobility skills.

47. In her Evaluation Summary, Ms. Henricksen reported the following regarding [redacted] "functional status" in the area of "Gross Motor":

> [redacted] demonstrated functional gross motor skills. [redacted] maintains upright head/trunk control and can transition from standing to

> sitting on the floor independently. [redacted] maintains appropriate sitting and standing balance to participate in educational activities. [redacted] is able to step over and around obstacles in [redacted] pathway.

48. In her Evaluation Summary, Ms. Henricksen reported the following regarding [redacted] "functional status" in the area of "Fine Motor/Visual Motor":

> [redacted] demonstrates a Right hand dominance using a digital pronated grasp with digits 4 and 5 in extension. [redacted] demonstrated a closed web space when holding [redacted] writing utensil. [redacted] inconsistently used [redacted] Left Hand to stabilize the paper when completing handwriting tasks. During writing tasks, [redacted] wrist and forearm elevated off the writing surface. [redacted] demonstrated difficulty with accurately copying pre-writing strokes and shapes.[8/] [redacted] was able to copy [a] vertical line and a circle with overshoot noted. [redacted] had light pressure and light grasp on [redacted] pencil.
>
> [redacted] was able to accurately identify letters of [redacted] name, colors and shapes with prompting. [redacted] is able to complete simple inset puzzles. [redacted] required maximum prompts and grading for more complex visual perceptual tasks. [redacted] required physical prompts to position [redacted] left hand to stabilize the paper and snip. After [being] positioned, [redacted] had a proximal grasp on [redacted] scissors and pronation of [redacted] wrist during cutting tasks. Given adult physical assistance, [redacted] was able to make snips on the paper.
>
> [redacted] has emerging grasp patterns for handling various sized objects. [redacted] demonstrated difficulty with finger isolation and finger dexterity. [redacted] had decreased distal control when completing more refined motor tasks. [redacted] demonstrated

> difficulty with completing bilateral coordination activities as demonstrated by effectively using both hands to complete tasks. [redacted] was able to remove and replace caps to a marker with verbal prompts. [redacted] was unable to string small beads.[9/] [redacted] was able to complete a stereognosis with 1/5 accuracy.

49. In her Evaluation Summary, Ms. Henricksen reported the following regarding [redacted] "functional status" in the area of "Sensory Processing":

> Sensory Processing refers to the ability to register, perceive, process or integrate and respond to incoming information from both internal and external stimuli.
>
> The Short Sensory Profile was completed by [redacted] mother to identify sensory sensitivities. Parent reported that [redacted] is in the Definite Difference for the following sections: Underresponisve/Seeks Sensation, Auditory Filtering, Low Energy/Weak and Visual/Auditory Sensitivity. Parent reports that [redacted] touches people and objects, becomes overly excited during movement activities and jumps from one activity to another. [redacted] has difficulty paying attention and is distracted if there is a lot of noise around and responds negatively to unexpected or loud noises. [redacted] has a weak grasp and appears to have weak muscles. [redacted] mother scored [redacted] in the typical range for Taste/Smell Sensitivity and had Probable Difference in the area of Tactile Sensitivity. Overall, based on the Short Sensory Profile [redacted] scored in the Definite Difference range.
>
> [redacted] was able to attend to and participate in table top activities with verbal and visual prompts and close adult supervision. [redacted] was able to tolerate various levels of noise with adverse reaction or responses.

> [redacted] had difficulty tolerating sticky/wet media. Per parent report, [redacted] is able to play on a variety of playground equipment independently and enjoys the slide/swing and playing in the sand. [redacted] enjoyed vestibular and proprioceptive movement to assist with attending to tasks. [redacted] also responded well to the use of the First/Then strategy. [redacted] is easily distracted by visual stimuli and particularly enjoys looking through windows and doors. [redacted] has fleeting attention and required continuous prompting to attend to and participate in table top activities.

50. Under the headings "Observation" and "What is interfering with the student's ability to perform in the education environment" in her Evaluation Summary, Ms. Henricksen wrote the following:

> Observation
>
> [redacted] presented with decreased muscle tone and decreased proximal and distal strength in [redacted] upper extremities. (Muscle tone refers to the amount of tension or resistance to movement in a muscle which enables us to keep our bodies in a certain posture or position such as sitting, standing, balancing and holding objects for functional tasks.)
>
> What is interfering with the student's ability to perform in the education environment?
>
> [redacted] demonstrates delayed fine motor, visual motor and sensory motor skills. [redacted] has poor bilateral coordination skills and poor kinesthetic awareness. [redacted] skills in these domains are affecting [redacted] ability to participate and complete classroom related tasks independently. The school's Individual Educational Plan committee will

> use the results of this evaluation along with other pertinent information to make appropriate educational recommendations to address identified needs.[10/]

51. The School Board sent the Parents a Parent Participation form, dated April 26, 2012, advising them that a meeting would be held on May 10, 2012, to review the assessment information described above and "to develop a new Individual Educational Plan" for [redacted]

52. The meeting was held as scheduled on May 10, 2012 (May 10 Session) and lasted several hours. Participating were the Parents; Ms. Keller; Ms. Meyer; Ms. Henricksen; Margaret Gorra-Porter, who served as the LEA Representative; Mari Crawford, a general education kindergarten teacher at the School Board's Riverside Elementary School with 30 years of teaching experience[11/]; Bonnie Feldman, an exceptional student education teacher; and Jill Davis, an Area Program Specialist with the School Board (referred to collectively as the "Team").

53. At the May 10 Session, the evaluations that had been conducted by Ms. Keller, Ms. Meyer, and Ms. Henricksen were reviewed, and the Parents provided information regarding how [redacted] was doing in the home environment. (This parentally-supplied information included anecdotal information provided by the Mother concerning [redacted] home schooling progress, but no academic assessment data.) The Team determined, based on the information

presented to it, that [redacted] met "eligibility criteria for the following disabilities: Autism Spectrum Disorder[,] Occupational Therapy[,] Speech Impaired[,] and Language Impaired[.]" Then, after discussing what [redacted] present levels of performance and educational needs were, what goals and objectives [redacted] could reasonably be expected to meet, and what services [redacted] would require to meet these goals and objectives, the Team tackled the issue of [redacted] placement. The full continuum of alternative placement options were discussed and considered, but no consensus was reached and a stalemate ensued. The Mother, along with Ms. Keller, maintained that [redacted] should be placed in a general education class, with an aide and other supports,[12/] while the rest of the Team members believed (reasonably, based on the information available concerning [redacted] abilities and needs) that [redacted] could not be satisfactorily educated in such a setting and that a more restrictive environment--a small, self-contained autism cluster class (offering the structure, routine, repetition, instructional attention, and minimally distracting learning environment [redacted] requires), with opportunities for interaction with non-disabled students during certain portions of the school day--was the least restrictive appropriate placement for [redacted].[13/] The May 10 Session ended several hours after it had begun without a new IEP for [redacted] having been completed.

54. The School Board thereafter sent the Parents a Parent Participation form, dated May 10, 2012, advising them that the IEP development process that had begun earlier that day would continue at a follow-up meeting to be held on May 21, 2012 (May 21 Follow-Up Meeting). Attached to the Parent Participation form was what was referred to in the form as a "Draft IEP from the previous meeting" (Draft IEP). The Draft IEP indicated, among other things, that [redacted] would be in a "regular class," with non-disabled students, 100 percent of the time.

55. Sometime after the May 10 Session and before the May 21 Follow-Up Meeting, some, but not all, of the school district members of the Team met outside the presence of the Parents to go over the Draft IEP and talk about the placement options that had been discussed during the May 10 Session (Interim Meeting). No final decisions were made at this meeting.

56. Ms. Davis organized the Interim Meeting. She sent (by email) invitations to all of the school district members of the Team, including Ms. Keller (who, as noted above, had disagreed with the other school district members of the Team and sided with the Mother at the May 10 Session on what was the least restrictive appropriate placement for [redacted]), but not to the Parents. Ms. Davis not only invited Ms. Keller to attend the

Interim Meeting, she urged her to come. Ms. Keller, however, was unable to attend due to a scheduling conflict.

57. The May 21 Follow-Up Meeting was held as scheduled. All of the May 10 Session participants attended, except for Ms. Gorra-Parker, whose role as the LEA Representative at the follow-up meeting was assumed by Ms. Meyer. By the end of the meeting, which lasted several hours, a new IEP for [redacted] (May 2012 IEP) had been developed and finalized, notwithstanding that there was continuing disagreement on the issue of [redacted] placement.

58. The May 2012 IEP contained descriptions of [redacted] "Present Level of Academic Achievement and Functional Performance" in the domains of "Curriculum and Instruction," "Social/Emotional Behavior," "Independent Functioning," and "Communication." It also described, as follows, with respect to each of these domains, the "impact of [redacted] disability on [redacted] involvement and progress in the general curriculum" and [redacted] "priority educational need(s)":

> Domain: Curriculum and Instruction
>
> The impact of the disability on [redacted] involvement and progress in the general curriculum:
>
> [redacted] Autism Spectrum Disorder impacts [redacted] ability to complete academic tasks in reading, writing and math.

Based on the educational impact of the disability, the priority educational need(s) for the duration of the IEP is/are the following:

To improve reading, writing, and math skills.

Domain: Social/Emotional Behavior

The impact of the disability on [redacted] involvement and progress in the general curriculum:

[redacted] Autism Spectrum Disorder impacts [redacted] ability to follow directions and interact with peers.

Based on the educational impact of the disability, the priority educational need(s) for the duration of the IEP is/are the following:

To improve the ability to follow directions.
To increase peer interaction.

Domain: Independent Functioning

The impact of the disability on [redacted] involvement and progress in the general curriculum:

[redacted] Autism Spectrum Disorder impacts [redacted] ability to complete tasks independently. Due to [redacted] Autism Spectrum Disorder, [redacted] has difficulty completing classroom related fine motor and visual motor tasks independently.

Based on the educational impact of the disability, the priority educational need(s) for the duration of the IEP is/are the following:

To complete tasks independently. To improve cutting and writing skills.

Domain: Communication

The impact of the disability on [redacted] involvement and progress in the general curriculum:
[redacted] Autism Spectrum Disorder impacts [redacted] ability to communicate effectively.

Based on the educational impact of the disability, the priority educational need(s) for the duration of the IEP is/are the following:

To improve expressive and receptive language skills and articulation skills.

59. The May 2012 IEP had 15 "Annual Measurable Goals": four in the domain of "Curriculum and Instruction"; three in the domain of "Social/Emotional Behavior"; three in the domain of "Independent Functioning"; and five in the domain of "Communication." The Mother's suggestions were incorporated in some of these goals.

60. The "Curriculum and Instruction" annual goals were as follows:

1. Annual Measurable Goal: By May 2013, given a group of pictures/objects in a small group setting, [redacted] will identify verbally or with a gesture (point to) the item described by the following math vocabulary (i.e. big, little, short, long, tall, more, fewer etc.) with 80% accuracy in 4 out of 5 trials.

2. Annual Measurable Goal: By May 2013, given cues in a small group setting, [redacted] will answer "what" questions after listening to a page from the story with 80% accuracy in 4 out of 5 trials.

3. Annual Measurable Goal: By May 2013, with no more than 3 verbal, visual and/or gestural prompts and adaptive equipment as needed, given a choice of 2 words and a picture cue, [redacted] will copy the word describing the picture with 80% accuracy in 4 out of 5 trials.

4. Annual Measurable Goal: By May 2013, given two sets of numerals up to 10 and manipulatives [redacted] will combine sets to determine sums in 4 out of 5 approximations.

61. The "Social/Emotional Behavior" annual goals were as follows:

5. Annual Measurable Goal: By May 2013, given a picture cue, wait times, and a verbal repetition, [redacted] will follow one step directions throughout the school day in 4 out of 5 days.

6. Annual Measurable Goal: By May 2013, given no more than 2 teacher prompts, [redacted] will protest by verbalizing: "I don't like that. I don't want that. No thank you," in 4 out of 5 opportunities.

7. Annual Measurable Goal: By May 2013, given verbal prompting during a teacher directed activity with another student, [redacted] will take 2 reciprocal turns with [redacted] peers in 4 out of 5 trials.

62. The "Independent Functioning" annual goals were as follows:

8. Annual Measurable Goal: By May 2013, given verbal instructions, a model, and two verbal prompts in a small group setting, [redacted] will complete a short (no more than 10 minutes) two step classroom related activity in 4 out of 5 trials.

9. Annual Measurable Goal: By May 2013, given no more than 3 verbal, visual and[/]or gestural prompts and adaptive equipment as needed, [redacted] will trace [redacted] name on classroom papers demonstrating proper start and sequence of letters in 4 out of 5 trials.

10. Annual Measurable Goal: By May 2013, given no more than 3 verbal, visual and/or gestural prompts and adaptive equipment as needed, [redacted] will complete a classroom related cutting and writing worksheet demonstrating functional grasp patterns on school materials in 4/5 opportunities.

63. The "Communication" annual goals were as follows:

11. Annual Measurable Goal: By May 2013, given nonverbal placement cues, [redacted] will correctly produce vowel sounds in CV/VC and CVC words in 4 out of 5 trials.

12. Annual Measurable Goal: By May 2013, given nonverbal placement cues, [redacted] will correctly produce /l/ blends at the word level in 4 out of 5 trials.

13. Annual Measurable Goal: By May 2013, given verbal or nonverbal prompting, [redacted] will request (e.g. May I have . . . ? Can I play with . . . ?) an object from a peer or an adult in 4 out of 5 opportunities.

14. Annual Measurable Goal: By May 2013, given verbal or nonverbal prompting, [redacted] will respond (e.g. Hello . . . , I'm fine. How are you?) to social greetings from a peer or an adult in 4 out of 5 opportunities.

15. Annual Measurable Goal: By May 2013, given verbal or nonverbal prompting, [redacted] will answer "What" questions about an object/picture in 4 out of 5 opportunities.

64. The May 2012 IEP enumerated the "Special Education Services," "Related Services," and "Supplementary Aids and Services" that G. would be receiving from May 21, 2012, to June 7, 2012, and August 20, 2012, to May 9, 2013.

65. The "Special Education Services" provided for in the May 2012 IEP were: "Direct Language Therapy," five times a week for a total of 75 minutes a week, in the "ESE Class"; "Direct Speech Therapy," five times a week for a total of 75 minutes a week, in the "ESE Class"; and "Intensive Instruction in Academics, Behavior, Independent Functioning, Communication," five times a week for a total of 1155 minutes a week, in the "ESE Class."

66. The May 2012 IEP indicated that [redacted] would receive, as a "Related Service," "Occupational Therapy," two times a week for a total of 45 minutes a week, in the "ESE Class." No other "Related Service" was listed on the IEP.

67. The "Supplementary Aids and Services" provided for in the May 2012 IEP were:

> Other-Daily/Weekly reporting and collaboration with the parent;
>
> Other-Peer assistance;
>
> Flexible Presentation-Repeat, clarify, summarize directions (teacher);
>
> Flexible Presentation-Student uses means to maintain/enhance visual attention;

Flexible Presentation-Verbal encouragement;

Flexible Responding-Illustrate, label, simulate, or dramatize rather than written response;

Flexible Responding-Pointing to answer;

Flexible Scheduling/Timing-Add'l time for tasks (Total time = more than twice the allotted time);

Flexible Setting-One on one testing;

Flexible Setting-Allow movement as needed;

Flexible Setting-Close proximity when giving directions or lessons;

Flexible Setting-Preferential seating.

68. The "Special Considerations" section of the May 2012 IEP provided as follows:

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

Health Care Needs

(x) Yes ( ) No

Details: [redacted] drinks rice milk instead of cow's milk

Specially Designed/Adaptive PE (description of student needs)

( ) Yes (x) No

Assistive Technology Needs

(x) Yes ( ) No

-visual schedule
-other

Details: slant board[,] visual supports[,] pencil grip

Behavioral Needs

(x) Yes ( ) No

Details: Goals written to address current concerns.

Transportation Needs

(x) Yes ( ) No

-bus attendant
-seat belt

Rationale for Request: Due to language delays and elopement issues, seatbelt and bus attendant would be required.

Communication Needs

(x) Yes ( ) No

Details: [[redacted]] will benefit from a language based curriculum to address communication needs.

Communication is addressed through Goals and Objectives

(x) Yes ( ) No

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

> Ongoing training in strategies for autistic like learners

69. The "Placement" section of the May 2012 IEP indicated that [redacted] would be "with non-disabled students" 18.17% of the time (for "electives/specials, grade level activities,[14/] lunch, math,[15/] and recess") and "Removed," in a "Separate Class," the rest (81.83%) of the time, and it gave the following "reason for [redacted] separation from instruction with nondisabled peers":

> Intensive curriculum or instructional approach for most learning activities, Other: Occupational Therapy, Speech/Language Therapy, Specialized instruction approaches.

This placement choice represented the views of not all, but a majority, of Team members (Team Majority). The lone dissenters on the Team were the Mother and Ms. Keller, who both thought it would be best for [redacted] primary placement to be in a general education class, with an aide and other supports. The Team Majority considered, but rationally rejected as unsatisfactory, such a proposed placement. They were reasonably concerned, given the information with which they had been presented, that [redacted] lacked the necessary foundational knowledge and skills to be successful and make meaningful educational progress in a mainstream placement, even with supports, including a one-on-one aide.[16/] It was their belief that their placement choice would provide [redacted] with a superior education, giving [redacted] the best opportunity to acquire the knowledge and skills [redacted] needed,

while at the same time enabling [redacted] to interact with [redacted] general education peers during the school day to the maximum extent appropriate, a belief that the undersigned finds was objectively reasonable.[17/]

70. The following statement was included in the "Parent Input" section of the May 2012 IEP:

> Mother reports that [redacted] strength is that [redacted] enjoys learning. She stated that [redacted] weakness is [redacted] distractibility. Mother reports that [redacted] is interested in the written form of language. She would like [redacted] goals to be the goals of children [redacted] age. Father agrees that [redacted] strength is that [redacted] enjoys learning and has the potential to learn more. Father stated that [redacted] placement on the Autism Spectrum Disorder Scale is hindering [redacted] from being a typical child. [redacted] interests are all things electronic (computers, tv[]s, phones, etc.). Father reports that his goal is to place [redacted] at a public school as soon as possible to work on [redacted] strengths and weaknesses according to [redacted] evaluations.

71. Both Parents were given the opportunity--which they took advantage of--to meaningfully participate in the IEP development process. At the two IEP meetings (the May 10 Session and the May 21 Follow-Up Meeting), they not only provided information, they expressed their respective opinions, including what they thought about [redacted] placement, and the other Team members listened to and considered what they had to say. While the May 2012 IEP does not incorporate the placement option

the Mother advocated for at these meetings, there has been no showing that the Team Majority, whose contrary views on the placement issue prevailed, entered the IEP development process not having an open mind on the matter.

72. On June 4, 2012, following the development of the May 2012 IEP, the Mother submitted to the School Board the due process hearing request that is the subject of the instant proceeding.

CONCLUSIONS OF LAW

73. District school boards are required by the "Florida K-20 Education Code"[18/] 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)(l) and 1003.57, Fla. Stat. "Exceptional students," as that term is used in the "Florida K-20 Education Code," are students who have "been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who have an intellectual disability; autism spectrum disorder[19/]; a speech impairment[20/]; a language impairment[21/]; an orthopedic impairment; an other health impairment; traumatic brain injury; a visual impairment; an emotional or behavioral disability; or a specific learning disability, including, but not limited to,

dyslexia, dyscalculia, or developmental aphasia; students who are deaf or hard of hearing or dual sensory impaired; students who are hospitalized or homebound; children with developmental delays ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e)." § 1003.01(3)(a). Pursuant to section 1003.57(1)(d), "[i]n providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

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

75. It is undisputed that [redacted] is an "exceptional student," within the meaning of section 1003.01(3)(a), eligible for exceptional student education as a student with an autism

spectrum disorder, a speech impairment, and a language impairment. It is also undisputed that [redacted] is eligible to receive occupational therapy.

76. The "Florida K-20 Education Code's" imposition of the requirement that "exceptional students" receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., as most recently amended (IDEA),[22/] which mandates, among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education [FAPE] is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school."[23/] 20 U.S.C. § 1412(a)(1); see also Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2488 (2009)("The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq., requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State."); Ridley Sch. Dist. v. M.R., 680 F.3d 260, 268 (3d Cir. 2012)("The IDEA requires states receiving federal education funding to provide every disabled child with a 'free appropriate public education.'"); and J.P. v. Cnty. Sch.

Bd. of Hanover Cnty., 516 F.3d 254, 257 (4th Cir. 2008)("Under the IDEA, all states receiving federal funds for education must provide disabled schoolchildren with a 'free appropriate public education' ('FAPE').."); cf. State of Fla. v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976)("Once a state chooses to participate in a federally funded program, it must comply with federal standards.").

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

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

> specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--
>
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. § 1401(29).

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

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

20 U.S.C. § 1401(26)(A). It has been said that "related services are those 'that enable a disabled child to remain in school during the day [to] provide the student with the meaningful access to education that Congress envisioned.'" Ortega v. Bibb Cnty. Sch. Dist., 397 F.3d 1321, 1324 (11th Cir. 2005).

80. To meet its obligation under sections 1001.42(4)(l) and 1003.57 to provide an "appropriate" public education to each of its "exceptional students," a district school board must

provide "personalized instruction with 'sufficient supportive services to permit the child to benefit from the instruction.'" Hendry Cnty. Sch. Bd. v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986), quoting from, Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188 (1982); see also § 1003.01(3)(b) ("'Special education services' means specially designed instruction and such related services as are necessary for an exceptional student to benefit from education.").

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

> Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198, 102 S. Ct. 3034. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer."

> Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997)(citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. of Educ., 938 F.2d at 715, and Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208, 102 S. Ct. 3034; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, No. 97-3125, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

see also M.H. v. Nassau Cnty. Sch. Bd., 918 So. 2d 316, 318 (Fla. 1st DCA 2005)("A free appropriate public education 'provided under the Act does not require the states to satisfy all the particular needs of each handicapped child,' but must be designed to afford the child a meaningful opportunity to learn.")(citation omitted); C.P. v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1153 (11th Cir. 2007)("This standard, that the local school system must provide the child 'some educational benefit,' Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, has become known as the Rowley 'basic floor of opportunity' standard."[24/]); Z.W. v. Smith, 210 Fed. Appx. 282, 285 (4th Cir. 2006)("The IDEA's requirements regarding a FAPE are 'modest.' A school system satisfies its statutory obligation when it provides sufficient personalized instruction and support services to 'permit the child to benefit educationally.' The IDEA's requirements are

this modest, according to the Supreme Court, because Congress intended the IDEA to increase access to public education more so than to 'guarantee any particular level of education once inside.'")(citations omitted); M.M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1101-1102 (11th Cir. 2006)("The sole issue is whether the two proposed IEPs, which provided for VT instead of AVT, were 'reasonably calculated to enable the child to receive educational benefits,' and, thus, were sufficient to provide C.M. with a FAPE. . . . [U]nder the IDEA there is no entitlement to the 'best' program."); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001)("[A]student is only entitled to some educational benefit; the benefit need not be maximized to be adequate."); Doe v. Bd. of Educ. of Tullahoma City Schs., 9 F.3d 455, 459-460 (6th Cir. 1993)("The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements

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

82. "The [law] does not demand that [a district school board] cure the disabilities which impair a child's ability to learn, but [merely] requires a program of remediation which would allow the child to learn notwithstanding [the child's] disability." Indep. Sch. Dist. No. 283, St. Louis Park, Minn. v. S.D. By and Through J.D., 948 F. Supp. 860, 885 (D. Minn. 1995), aff'd, 88 F.3d 556 (8th Cir. 1996); see also Klein Indep. Sch. Dist. v. Hovem, Case No. 10-20694, 2012 U.S. App. LEXIS 16293 *21 (5th Cir. Aug. 6, 2012)("[O]verall educational benefit, not solely disability remediation, is IDEA's statutory goal."); L.F. v. Houston Indep. Sch. Dist., Case No H-08-2415 (Civil), 2009 U.S. Dist. LEXIS 86065 *51 (S.D. Tex. Sept. 21, 2009)("A school district is not required to 'cure' a disability . . . ."); D.B. v. Houston Indep. Sch. Dist., Case No. H-06-354, 2007 U.S. Dist. LEXIS 73911 *31 (S.D. Tex. Sept. 29, 2007)("Nor is a school district required to 'cure' a disability."); and Coale v. State Dep't of Educ., 162 F. Supp. 2d 316, 331 n.17 (D. Del. 2001)("If the IDEA required the State

to 'cure' Alex's disability or to produce 'meaningful' progress in each and every weakness demonstrated by a student, then the State's decision to accommodate Alex's 'fine motor skills' problems with adaptive technology might be more problematic. But the court does not understand the IDEA to impose such requirements on the State.").

83. District school boards may take cost into consideration in determining what instruction and services to provide an "exceptional student," but only "when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, then there is no choice." Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 517 (6th Cir. 1984); see also J.P. ex rel. Popson v. West Clark Cmty. Schs., 230 F. Supp. 2d 910, 945 (S.D. Ind. 2002)("[T]aking financial or staffing concerns into account when formulating an IEP or when providing services is not a violation of the IDEA. A school district is not obligated by law to provide every possible benefit that money can buy. A school district need only provide an 'appropriate' education at public expense. Therefore, it may deny requested services or programs that are too costly, so long as the requested services or programs are merely supplemental."); and Matta By and Through Matta v. Bd. of Educ.-Indian Hill Exempted Vill. Schs., 731 F. Supp. 253, 255 (S.D. Ohio 1990)("When devising an appropriate program for

individual students, cost concerns are legitimate. . . . However, costs may be taken into consideration only when choosing among several appropriate education options. . . . When only one alternative for an appropriate education is available, the state must follow that alternative irrespective of the cost.").

84. For each student found eligible for special education and related services, there must be developed annually an IEP addressing the unique needs of that student. See Forest Grove Sch. Dist., 129 S. Ct. at 2489 n.1 ("An IEP is an education plan tailored to a child's unique needs that is designed by the school district in consultation with the child's parents after the child is identified as eligible for special-education services."); and R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 941 (9th Cir. 2007)("Once the child qualifies for special education services, 'the district must then develop [a]n IEP which addresses the unique needs of the child[.]'"). The IEP has been called "the centerpiece of the [IDEA's] education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988); see also D.B. v. Esposito, 675 F.3d 26, 34 (1st Cir. 2012)("The 'primary vehicle' for delivery of a FAPE is an IEP."); and K.M., 2011 U.S. Dist. LEXIS 71850 at **17-18 ("The core of the IDEA is the cooperative process that it establishes between parents and schools . . . . That cooperative process in

providing students with a FAPE is achieved through the development of an individualized education program ('IEP') for each student with a disability "). It provides the "the road map for a disabled child's education." M.C. ex rel. J.C. v. Cent'l Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996). "An appropriate IEP must contain statements concerning a disabled child's [present] level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 65 (3d Cir. 2010).

85. Although an IEP need not identify a specific school location, it must specify the "general environment" or setting in which the services described in the IEP will be provided to the student (which is referred to as the student's "educational placement"). See T.Y. v. N.Y. City Dep't of Educ., 584 F.3d 412, 419-420 (2d Cir. 2009); see also Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 766 (8th Cir. 2011)(IEP must contain "an explanation of the extent to which the student will not be in the regular classroom."). A district school board must have a "continuum of alternative [educational] placements" available for its students, including (from least restrictive to most restrictive) "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals

and institutions." 34 C.F.R. § 300.115(b)(1). It also must, when necessary, "[m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." 34 C.F.R. § 300.115(b)(1).

86. Educational placement decisions must be made "on an individual case-by-case basis depending on each child's unique educational needs and circumstances," (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46540, 46587 (Aug. 14, 2006) and be in accordance with the following "mainstreaming" or "LRE" principles:

> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
>
> (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment[25/] occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 CFR § 300.114(a)(2); see also Fla. Admin. Code R. 6A-6.03028(3)(i)("Placement determinations shall be made in accordance with the least restrictive environment provisions of the IDEA . . . .). On the continuum, "[o]ne-to-one instruction

is clearly more restrictive than instruction in a resource room where other peers are present." Grant v. Indep. Sch. Dist. No. 11, Case No. 02-795 ADM/AJB (Civil), 2005 U.S. Dist. LEXIS 13073 *29 (D. Minn. June 30, 2005); see also W.R. v. Union Beach Bd. of Educ., Case No. 09-2268 (MLC), 2009 U.S. Dist. LEXIS 108148 *16 (D. N.J. Nov. 19, 2009)("One-on-one instruction is more restrictive than a small group resource room setting.").

87. Notwithstanding the IDEA's "general preference" for educating children with disabilities in the "regular educational environment" (Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895, 905 (7th Cir. 1996)), there are circumstances where a more restrictive setting on the continuum is the appropriate choice for a particular child. See B.S. v. Placentia-Yorba Linda Unified Sch. Dist., 306 Fed. Appx. 397, 400 (9th Cir. 2009)("The findings that the educational and non-academic benefits to be derived from a mainstream program were minimal and the blended program would be better suited to meet B.S.'s unique abilities and needs are sufficient to overcome the preference for mainstreaming."); Beth B. v. Van Clay, 282 F.3d 493, 497 (7th Cir. 2002)("The LRE requirement shows Congress's strong preference in favor of mainstreaming, but does not require, or even suggest, doing so when the regular classroom setting provides an unsatisfactory education.")(citation omitted); Regan-Adkins v. San Diego Unified Sch. Dist., 37 Fed.

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

Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. at 46585 ("The LRE requirements in §§ 300.114 through 300.117 express a strong preference, not a mandate, for educating children with disabilities in regular classes alongside their peers without disabilities."); and Letter to Wohle, 50 IDELR 138 (OSEP Feb. 1, 2008)("IDEA's LRE principle expresses a strong preference, not a mandate, for educating every child with a disability in the regular educational environment."). Such circumstances may exist even in those cases where a mainstream placement would meet the "Rowley 'basic floor of opportunity' standard." As the Seventh Circuit explained in Van Clay, 282 F.3d at 498-499:

> Rowley requires, in its analysis of the FAPE provision, "that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." 458 U.S. at 200. The Court's rationale behind using this standard was "to leave the selection of educational policy and methods where they traditionally have resided--with state and local school officials." Daniel R.R., 874 F.2d at 1044 (citing Rowley, 458 U.S. at 207). The standard is intended to give school districts "flexibility in educational planning." Id. By applying it to the LRE directive and arguing that the school district cannot remove Beth from the regular classroom if she receives any benefit there, Beth's parents turn the "some educational benefit" language on its head. Instead of granting flexibility to educators and school officials, it places an extreme restriction

> on their policymaking authority and the deference they are owed; it essentially vitiates school districts' authority to place any disabled children in separate special education environments. Neither Congress nor the Supreme Court intended such a result. Rowley, 458 U.S. at 181, fn. 4 ("Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children.").

see also L.G. v. Fair Lawn Bd. of Educ., Case No. 11-3014, 2012 U.S. App. LEXIS 13227 *14 (3d Cir. June 28, 2012), citing with approval, L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 393 (3d Cir. 2006)("Whether an education is 'appropriate' for the purposes of determining whether a school district has offered a student a free and appropriate public education is, of course, a distinct question from whether the student has been integrated 'to the maximum extent appropriate.'"); A.G. v. Wissahickon Sch. Dist., 374 Fed. Appx. 330, 334 (3d Cir. 2010)("Contrary to A.G.'s conflation of the two concepts, FAPE and LRE are distinguishable . . . ."); Jennifer D. v. N.Y. City Dep't of Educ., 550 F. Supp. 2d 420, 430 (S.D. N.Y. 2008)("[The] test established in Rowley is not directly aimed at resolving the question of whether the IDEA's mainstreaming requirement has been satisfied.); and A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 540-541 (D. Conn. 2002)("[T]he test set forth in Rowley for determining whether the IDEA's FAPE requirement has been met is ill suited to determining compliance with the IDEA's

mainstreaming requirement. Although there is no question that Rowley demarcates an outer limit to the IDEA's LRE preference, Rowley does not provide guidance for determining whether, in a specific case, the IDEA's LRE requirement has been met.")(citation omitted).

88. In determining whether the circumstances of a particular case warrant something other than a mainstream placement, consideration should be given to the academic and non-academic educational effects (both positive and negative) that a mainstream placement, with appropriate supplementary aids and services,[26/] will have on the child, as compared to a more restrictive placement. See Hartmann, 118 F.3d at 1001 ("[M]ainstreaming is not required where . . . any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting."); Greer, 950 F.2d at 697 ("[T]he school district may compare the educational benefits that the handicapped child will receive in a regular classroom, supplemented by appropriate aids and services, with the benefits he or she will receive in a self-contained special education environment. We caution, however, that 'academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself.' Accordingly, a determination by

the school district that a handicapped child will make academic progress more quickly in a self-contained special education environment may not justify educating the child in that environment if the child would receive considerable non-academic benefit, such as language and role modeling, from association with his or her nonhandicapped peers.[27/] If, however, the school board determines that the handicapped child will make significantly more progress in a self-contained special education environment and that education in a regular classroom may cause the child to fall behind his or her handicapped peers who are being educated in the self-contained environment, mainstreaming may not be appropriate."); Cody H. v. Bryan Indep. Sch. Dist., Case No. H-03-5598, 2005 U.S. Dist. LEXIS 32335 *21 (S.D. Tex. June 24, 2005)("[T]he court must evaluate Cody's 'overall educational experience in the mainstreamed environment,' and balance the benefits of the regular class setting with the special education proposed."); and 34 CFR § 300.116(d)("In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.").

89. The "potential harmful effect" that the student's placement will have on other students should also be considered. See Hartmann, 118 F.3d at 1001 ("[M]ainstreaming is not required where . . . the disabled child is a disruptive force in a

regular classroom setting."); Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1402 (9th Cir. 1994)("The record supports the district court's finding that Ryan's behavioral problems interfered with the ability of other students to learn. Disruptive behavior that significantly impairs the education of other students strongly suggests a mainstream placement is no longer appropriate. While school officials have a statutory duty to ensure that disabled students receive an appropriate education, they are not required to sit on their hands when a disabled student's behavioral problems prevent both him and those around him from learning.")(citation omitted); Greer, 950 F.2d at 697 ("[T]he school district may consider what effect the presence of the handicapped child in a regular classroom would have on the education of other children in that classroom. . . . The school district must balance the needs of each handicapped child against the needs of other children in the district. If the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate."); Barnett by Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 153-54 (4th Cir. 1991)("Plaintiffs also argue that the district court erroneously allowed the Board, in making [the] placement decision, to consider the lack of financial resources and the impact on the

other students of providing one student an interpreter. The district court found that in light of the finite resources available for the education of handicapped children, a school system is not required to duplicate a small, resource-intensive program at each neighborhood school. Although we agree with plaintiffs that the Board should not make placement decisions on the basis of financial considerations alone, 'appropriate' does not mean the best possible education that a school could provide if given access to unlimited funds. . . . [I]n reviewing the defendant's placement decision, the district court correctly considered these factors and properly found that the program offered at Annandale was appropriate."); Daniel R.R., 874 F.2d at 1048-1049 ("[T]he Act does not require regular education instructors to devote all or most of their time to one handicapped child . . . . If a regular education instructor must devote all of her time to one handicapped child, she will be acting as a special education teacher in a regular education classroom. Moreover, she will be focusing her attentions on one child to the detriment of her entire class, including, perhaps, other, equally deserving, handicapped children who also may require extra attention."); and Greenwood v. Wissahickon Sch. Dist., 571 F. Supp. 2d 654, 666 (E.D. Pa. 2008), aff'd, 374 Fed. Appx. 330, 332 (3d Cir. 2010)("[T]he effect Angela's presence has on the other student's in the regular classroom must be

considered. This factor focuses on the School District's obligation to educate all of its students and recognizes that, even if a disabled student might benefit from inclusion, she 'may be so disruptive in a regular classroom that the education of other students is significantly impaired.' Additionally, the court must consider whether . . . Angela 'will demand so much of the teacher's attention that the teacher will be required to ignore the other students.'")(citation omitted).

90. "The [IDEA's] preference for mainstreaming does not require that a [district school board] reject intermediate degrees of mainstreaming when such a placement is otherwise justified by a [disabled] child's educational needs." Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 296 n.7 (7th Cir. 1988); see also Fort Bend Indep. Sch. Dist., 2012 U.S. App. LEXIS 15481 at *11 ("Schools are required to take incremental steps where appropriate in placing disabled students in general education classes. Incremental steps may include creating a program that involves both mainstream and special education courses."); Hartmann, 118 F.3d at 1005 ("Loudoun County properly proposed to place Mark in a partially mainstreamed program which would have addressed the academic deficiencies of his full inclusion program while permitting him to interact with nonhandicapped students to the greatest extent possible."); and Daniel R.R., 874 F.2d at 1050 ("[T]he school must take

intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops."). Nor must "a disabled student actually be placed in the regular classroom and fail before a more restrictive placement is considered." Letter to Cohen, 25 IDELR (OSEP Aug. 6, 1996).

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

92. The parents of the child must be provided a meaningful opportunity to participate in the IEP development process. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 530 (2007)("The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program.");

and Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 274 (7th Cir. 2007)("Throughout, the statute assures the parents an active and meaningful role in the development or modification of their child's IEP."). This requires, as a threshold matter, that they be provided adequate advance notice of the meeting at which the IEP is developed. See 34 C.F.R. § 300.322; and Fla. Admin. Code R. 6A-6.03028(3)(b).

93. "The [parents'] right to provide meaningful input [in the development of the IEP, however] is simply not the right to dictate an outcome and obviously cannot be measured by such." White ex rel. White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380 (5th Cir. 2003); see also Lessard, 518 F.3d at 30 ("[P]arents cannot unilaterally dictate the content of their child's IEP."); Bradley v. Ark. Dep't of Educ., 443 F.3d 965, 975 (8th Cir. 2006)("[T]he IDEA does not require that parental preferences be implemented, so long as the IEP is reasonably calculated to provide some educational benefit."); AW ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 n.10 (4th Cir. 2004)("[T]he right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions."); J.C. v. New Fairfield Bd. of Educ., Case No. 3:08-cv-1591, 2011 U.S. Dist. LEXIS 34591 *48 (D. Conn. Mar. 31, 2011)("[T]he Parents may attend and participate collaboratively, but they do not have

the power to veto or dictate the terms of an IEP."); Fitzgerald v. Fairfax Cnty. Sch. Bd., 556 F. Supp. 2d 543, 551 (E.D. Va. 2008)("While this focus on parental involvement is understandable based on the IDEA's goals, there is a difference between parental involvement and parental consent. Congress certainly intended parents to be involved in the decisions regarding the education of their disabled child; nevertheless, this participation does not rise to the level of parental consent or a parental veto power absent an explicit statement by Congress."); B.B. v. Haw. Dep't of Educ., 483 F. Supp. 2d 1042, 1050-1051 (D. Haw. 2006)("[T]he IDEA does not explicitly vest within parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement. Rather, the IDEA requires that parents be afforded an opportunity to participate in the IEP process and requires the IEP team to consider parental suggestions.") (citation omitted); and A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 (D. Conn. 2006)("Both of the IEP's were legally sufficient, despite the fact that the parents did not agree with the content. Nothing in the IDEA requires the parents' consent to finalize an IEP. Instead, the IDEA only requires that parents have an opportunity to participate in the drafting process."). "The mere fact that the [p]arents were unsuccessful [at the meeting] in securing all of their

wishes . . . does not equate [to] a lack of meaningful opportunity for parental involvement." J.C., 2011 U.S. Dist. LEXIS 34591 at *49; see also L.G. v. Fair Lawn Bd. of Educ., Case No. 2:09-cv-6456 (DMC), 2011 U.S. Dist. LEXIS 69232 *15 (D. N.J. June 27, 2011), aff'd, 2012 U.S. App. LEXIS 13227 (3d Cir. June 28, 2012)("If the standard for measuring meaningful parental participation was that the parents always prevailed, there would be no process at all. The standard must be based not on the outcome, but on the extent to which the parents were allowed to advocate for their child.").

94. "[T]the IDEA does not require the [district school board] and the parents [in developing an IEP] to reach a consensus regarding the education . . . of a disabled child. Instead, if a consensus cannot be reached, the [district school board] must make a determination, and the parents' only recourse is to appeal that determination." Fitzgerald, 556 F. Supp. 2d at 558; see also J.T. v. Dep't of Educ., Case No. 11-00612 LEK-BMK (Civil), 2012 U.S. Dist. LEXIS 76115 *28 (D. Haw. May 31, 2012)("[I]n the absence of agreement between IEP team members, the agency has a duty to formulate the IEP to the best of its ability.").

95. A district school board, though, may not predetermine the contents of an IEP in advance of the meeting of the IEP team (which must include the parents[28/]) and thereby deprive the

parents of the opportunity to meaningfully participate in the development of the IEP. Doing so deprives the child of a "free appropriate public education" and is remediable under the IDEA. See M.B. v. Hamilton Se. Schs., 668 F.3d 851, 861 (7th Cir. 2011)("M.B.'s parents argue that the School predetermined M.B.'s placement in advance of the May conference committee meeting. Such a predetermination may, in some instances, be the type of procedural defect that deprives a child of a FAPE."); Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 857 (6th Cir. 2004)("The evidence reveals that the School System, and its representatives, had pre-decided not to offer Zachary intensive ABA services regardless of any evidence concerning Zachary's individual needs and the effectiveness of his private program. This predetermination amounted to a procedural violation of the IDEA. Because it effectively deprived Zachary's parents of meaningful participation in the IEP process, the predetermination caused substantive harm and therefore deprived Zachary of a FAPE."); Melodee H. v. Dep't of Educ., Case No. 07-000256 HG-LEK, 2008 U.S. Dist. LEXIS 39656 *27 (D. Haw. May 13, 2008)("Pre-determination of a child's placement is a violation of IDEA because it deprives the parents of meaningful participation in the IEP process."); and Doyle v. Arlington Cnty. Sch. Bd., 806 F. Supp. 1253, 1262 (E.D. Va. 1992), aff'd, 1994 U.S. App. LEXIS 30495 (4th Cir. Oct. 31, 1994)("[I]f the

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

96. "[P]redetermination [however] is not synonymous with preparation. Federal law 'prohibits a completed IEP from being presented at the IEP [t]eam meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions.'" Nack ex rel. Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 (6th Cir. 2006); see also Deal, 392 F.3d at 858 ("[S]chool officials are permitted to form opinions and compile reports prior to IEP meetings . . . , however, . . . such conduct is only harmless as long as school officials are 'willing to listen to the parents.'")(citation omitted); M.C.E. v. Bd. of Educ. of Frederick Cnty., Case No. RDB-09-3365, 2011 U.S. Dist. LEXIS 74266 **25-26 (D. Md. July 11, 2011)("There was credible evidence before the ALJ that the school board came to the IEP meetings with an open mind, and that M.C.E.'s parents and representatives were given an opportunity to provide meaningful input as to her placement. Though the school board may have come to the meeting with the idea that the Pyramid Program was the best place for M.C.E.,

that is not a violation of IDEA."); and Doyle, 806 F. Supp. at 1262 ("[S]chool officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind. . . . [W]hile a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement. That is exactly what the school system did here."). It is also permissible for district school board members of the IEP team to meet without the parents in advance of the IEP team meeting to discuss matters related to the development of the student's IEP and to prepare a draft or proposed IEP for presentation at the upcoming meeting of the full IEP team. See Fair Lawn Bd. of Educ., 2012 U.S. App. LEXIS 13227 at **12-13 ("[P]arents need not be included in 'preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.' In this context, the fact that school district staff met without the child's parents to develop a proposed IEP does not constitute a procedural violation of the IDEA.")(citations omitted); Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1036 (3d Cir. 1993)("The Fuhrmanns were presented with a draft IEP at a meeting on August 16, 1990. The CST's draft IEP was discussed, and the Fuhrmanns made several suggestions as to how the plan might be changed. The CST considered the Fuhrmanns'

suggestions and incorporated some into the IEP. Although the Fuhrmanns ultimately did not sign the revised IEP, there was clearly more than after the fact involvement here. The record indicates that the Fuhrmanns had an opportunity to participate in the IEP formulation process in a meaningful way."); R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 (S.D. N.Y. 2009)("[E]ven if CSE members had discussed placement recommendations before the June 15, 2005 CSE meeting, 'IDEA regulations allow school districts to engage in preparatory activities . . . to develop a proposal . . . that will be discussed at a later meeting.'"); M.M. v. N.Y.C. Dep't of Educ., Case No. 07 Civ. 2265, 2008 U.S. Dist. LEXIS 84483 *17 (S.D. N.Y. Oct. 20, 2008)("So long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process, . . . draft IEPs are not impermissible under the IDEA."); and S.K. v. Parsippany-Troy Hills Bd. of Educ., Case No. 07-4631 (SRC), 2008 U.S. Dist. LEXIS 80616 *34 (D. N.J. Oct. 9, 2008)("The School District's preparation of a draft IEP does not, without more, indicate that S.K. was excluded from the process.").

97. After the student's IEP has been developed, the specific school or other physical location where the IEP is to be implemented must be chosen "based on the . . . IEP." 34 C.F.R. § 300.116(b)(2); and Fla. Admin. Code R. 6A-

6.03028(3)(i)4.b.(II); see also Brad K. v. Bd. of Educ. of the City of Chicago, 787 F. Supp. 2d 734, 740 (N.D. Ill. 2011)("[P]lacing a student at a location where the IEP cannot be implemented would be a failure to provide adequate educational benefits."); and O.O. v. Dist. of Columbia, 573 F. Supp. 2d 41, 53 (D. D.C. 2008)("Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP."). The site selected should be "as close as possible to the student's home," and "[u]nless the IEP . . . requires some other arrangement," should be the "school that [the student] would attend if nondisabled." 34 C.F.R. § 300.116(b)(2)-(3) and (c); and Fla. Admin. Code R. 6A-6.03028(3)(i)4.b.(III) and c. The "IDEA [however] does not require that each school building in a [school district] be able to provide all the special education and related services for all types and severities of disabilities[.] . . . If a [student]'s IEP requires services that are not available at the school closest to the [student]'s home, the [student] may be placed in another school that can offer the services that are included in the IEP and necessary for the [student] to receive a free appropriate public education." Letter to Trigg, 50 IDELR 48 (OSEP Nov. 30, 2007); see also AW ex rel. Wilson, 372 F.3d at 682 ("To the extent § 300.552(b) [now 34 C.F.R. § 300.116(b)]

states that school officials shall ensure that the placement 'is as close as possible to the child's home,' this language does not mandate that the student be assigned to the closest school, but simply to one that is as 'close as possible.'"); White, 343 F.3d at 380 ("34 C.F.R. § 300.552(b) only requires that the student be educated as close as possible to the child's home. 34 C.F.R. § 300.552(c) [now 34 C.F.R. § 300.116(c)] specifies that the child is educated in the school he would attend if not disabled unless the IEP requires some other arrangement. Here, it was not possible for Dylan to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement. Of course, as the Whites point out, neighborhood placement is not possible and the IEP requires another arrangement only because Ascension has elected to provide services at a centralized location. This is a permissible policy choice under the IDEA. Schools have significant authority to determine the school site for providing IDEA services."); Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 (E.D. Pa. 2011)("[T]hough educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, IDEA does not create a right for a child to be educated there."); and Lamoine Sch. Comm. v. Ms. Z., 353 F. Supp. 2d 18, 31 (D. Me. 2005)("Although the default placement

for a student under the IDEA is the local school, an IEP can override this default in situations where the student would not receive an educational benefit at the local school.").

98. While district school boards have "some flexibility in implementing IEPs," they are nonetheless "accountable for material failures and for providing the disabled child a meaningful educational benefit." Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); see also Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 (8th Cir. 2003)("[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."). Deviations from an IEP not resulting in a deprivation of meaningful educational benefit, however, are not actionable.[29/] See Sumter Cnty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011)("[T]he failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education."); and Melissa S. v. Sch. Dist. of Pittsburgh, 183 Fed. Appx. 184, 187 (3d Cir. 2006)("To prevail on a claim that a school district failed to implement an IEP, a plaintiff must show that the school failed to implement substantial or significant provisions of the IEP, as opposed to

a mere de minimis failure, such that the disabled child was denied a meaningful educational benefit.").

99. Under the IDEA, parents with "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" must "have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f). In Florida, by statute, a DOAH administrative law judge must conduct the "impartial due process hearing" to which a complaining parent is entitled under the IDEA. § 1003.57(1)(b). During the pendency of this "impartial due process hearing," the child must remain in his or her current educational placement, unless the parents and the district school board agree to another placement. See 20 U.S.C. § 1415(j); 34 CFR § 300.518; and Fla. Admin. Code R. 6A-6.03311(9)(y).

100. Absent the district school board's consent, the administrative law judge may only consider those issues raised in the parent's due process complaint. See 20 U.S.C. § 1415(f)(3)(B) ("The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection

(b)(7), unless the other party agrees otherwise."); and 34 CFR § 300.511(d)("The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise."); see also Pohorecki v. Anthony Wayne Local Sch. Dist., 637 F. Supp. 2d 547, 555 (N.D. Ohio 2009)("Under the IDEA, the party filing the due process complaint cannot raise issues outside of the complaint unless the other party agrees otherwise."); and Dep't of Educ., State of Hawaii v. D.K., Case No. 05-00560 ACK/LEK, 2006 U.S. Dist. LEXIS 37438 *13 (D. Haw. June 6, 2006)("[T]he Court concludes that the parties are precluded from raising new issues at an administrative hearing that were not previously raised. All parties should have fair notice of the contested issues and the right to defend themselves at the hearing. In addition, a hearings officer should limit the issues he considers in reaching his determination to those that were raised prior to the hearing.").

101. "The burden of proof in an administrative hearing challenging an IEP [including its educational placement component] is properly placed upon the party seeking relief." Schaffer, 546 U.S. at 62; see also Ross, 486 F.3d at 270-271 ("[T]he burden of proof in a hearing challenging an educational placement decision is on the party seeking relief."); Brown v.

Bartholomew Consol. Sch. Corp., 442 F.3d 588, 594 (7th Cir. 2006)("The Supreme Court recently has clarified that, under the IDEA, the student and the student's parents bear the burden of proof in an administrative hearing challenging a school district's IEP."); Ramsey Bd. of Educ., 435 F.3d at 392 ("Appellants would also have us limit the holding in Schaffer to the FAPE aspect of the analysis. Although, to be sure, the facts in Schaffer implicated only the FAPE analysis, the Supreme Court made it quite clear that its holding applied to the appropriateness of the IEP as a whole. Appellants quote limiting language - 'We hold no more than we must to resolve the case at hand,' Schaffer, 126 S. Ct. at 537 - in arguing that the decision does not reach the LRE analysis. The Court's holding, which directly followed the quoted language, however, vitiates that attempt: 'The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.' Id. (emphasis added). It would be unreasonable for us to limit that holding to a single aspect of an IEP, where the question framed by the Court, and the answer it provided, do not so constrict the reach of its decision."); Sebastian M. v. King Philip Reg'l Sch. Dist., Case No. 09-10565-JLT, 2011 U.S. Dist. LEXIS 35501 *32 (D. Mass. Mar. 31, 2011)("Sebastian's parents had the burden of proof to demonstrate that BICO was an inappropriate placement for Sebastian."); and N.M. v. Cent. York

Sch. Dist., Case No. 1:09-CV-00969, 2010 U.S. Dist. LEXIS 124148 **15-16 (M.D. Pa. Sept. 10, 2010)("[I]t is incumbent upon plaintiffs in this case to prove, by a preponderance of the evidence, that the IEP for N.M. did not place her in the least restrictive environment.").

102. The appropriateness of an IEP must be judged, not in hindsight, but prospectively, taking into consideration the circumstances as they existed at the time the IEP was developed. See Hamilton Se. Schs., 668 F.3d at 863 ("[T]the appropriateness of an IEP 'can only be judged by examining what was objectively reasonable at the time' the case conference committee created the IEP."); K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 808 (8th Cir. 2011)("[W]hen the District developed K.E.'s IEPs it had received contradictory information about whether K.E. suffered from bipolar disorder. The District also did not yet have the benefit of Dr. Unal's testimony from the administrative hearing concerning the severity and complexity of K.E.'s mental illness and the psychological and social work services that might be necessary for the District to monitor and address it. For those reasons, while we may agree with K.E. that additional services and adaptations may well be warranted now in light of the information that Dr. Unal has provided, it would be improper for us to judge K.E.'s IEPs in hindsight."); B.S. v. Placentia-Yorba Linda Unified Sch. Dist., 306 Fed. Appx. 397, 399 (9th

Cir. 2009)("An IEP cannot be judged in hindsight; rather, the court looks to the IEP's goals and goal achieving methods at the time the plan was implemented and ask[s] whether these methods were reasonably calculated to confer a meaningful benefit on the student."); Luke P., 540 F.3d at 1149 ("[B]ecause the question before us is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, our precedent instructs that 'the measure and adequacy of an IEP can only be determined as of the time it is offered to the student.'"); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 (3d Cir. 1995)("[A]ppropriateness [of an IEP] is judged prospectively. . . ."); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990)("[A]ctions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."); L.R. v. Bellflower Unified Sch. Dist., Case No. CV 11-06396 RGK (VBKx), 2012 U.S. Dist. LEXIS 89999 *5 (C.D. Cal. June 27, 2012)("An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. Whether a student was denied a FAPE must be evaluated in terms of what was objectively reasonable at the

time the IEP was developed.")(citation omitted); and J.R. ex rel. S.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 (S.D. N.Y. 2004)("[W]e turn our attention to the SRO's decision upholding the IHO's determination that the IEP at issue is 'reasonably calculated to enable [S.R.] to receive educational benefits.' This determination is necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of S.R.'s subsequent progress at Eagle Hill, but rather consider the propriety of the IEP with respect to the likelihood that it would benefit S.R. at the time it was devised.").[30/] Furthermore, it must be remembered that the educational program/placement decisionmaking process is a forward-looking, predictive exercise which necessarily involves some degree of uncertainty. See Honig, 484 U.S. at 321 ("Overarching these statutory obligations, moreover, is the inescapable fact that the preparation of an IEP, like any other effort at predicting human behavior, is an inexact science at best."); J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 84 (N.D. N.Y 2008)("The requirement that defendant's CSE annually develop an IEP that is reasonably calculated to benefit plaintiff's educational development necessarily implies the CSE must make rational predictions about what will be best for plaintiff in the future."); and Gonzalez v. Puerto Rico Dep't of Educ., 969

F. Supp. 801, 814 (D. P.R. 1997)("E]very IEP contains educational plans for the future, and is therefore subject to a degree of speculation and guesswork.").

103. In making a determination as to the appropriateness of an IEP, the administrative law judge should give deference to the reasonable opinions of those witnesses who have expertise in the field of education. See Hamilton Se. Schs., 668 F.3d at 86 ("[I]t is inappropriate to defer to the opinion of a single psychologist, particularly where that opinion is in conflict with the opinions of 'teachers and other professionals.'"); MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 532-33 (4th Cir. 2002)("We have always been, and we should continue to be, reluctant to second-guess professional educators. . . . In refusing to credit such evidence, and in conducting its own assessment of MM's IEP, the court elevated its judgment over that of the educators designated by the IDEA to implement its mandate. The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also must give appropriate deference to the decisions of professional educators. As we have repeatedly recognized, 'the task of education belongs to the educators who have been charged by society with that critical task . . . .'"); Sch. Dist. of Wisc. Dells v. Z.S. ex rel. Littlegeorge, 295 F.3d 671, 676-77 (7th Cir. 2002)("Administrative law judges . . . are not required to

accept supinely whatever school officials testify to. But they have to give that testimony due weight. . . . The administrative law judge substituted his own opinion for that of the school administrators. He thought them mistaken, and they may have been; but they were not unreasonable."); Van Clay, 282 F.3d at 499 ("The school officials' decision about how to best educate Beth is based on expertise that we cannot match. . . . Although we respect the input Beth's parents have given regarding her placement and the their continued participation in IEP decisionmaking, educators 'have the power to provide handicapped children with an education they consider more appropriate than that proposed by the parents.'"); Devine, 249 F.3d at 1292 ("[G]reat deference must be paid to the educators who develop the IEP."); Heather S., 125 F.3d at 1057 ("[T]he deference is to trained educators, not necessarily psychologists."); Bd. of Educ. of the City of Chicago, 787 F. Supp. 2d at 738 ("Like the IHO, the court is to give deference to the opinions of professional educators as regards educational issues. The same deference does not necessarily apply to psychologists and other non-educators involved in developing the IEP.")(citations omitted); Wagner v. Bd. of Educ. of Montgomery Cnty., 340 F. Supp. 2d 603, 611 (D. Md. 2004)("[T]his court owes generous deference (as did the ALJ) to the educators on Daniel's IEP Team."); and Johnson v. Metro Davidson Sch. Sys., 108 F.

Supp. 2d 906, 915 (M.D. Tenn. 2000)("[I]f the district court is to give deference to the local school authorities on educational policy issues when it reviews the decision from an impartial due process hearing, it can only be that the ALJ presiding over such a [due process] hearing must give due weight to such policy decisions. For it to be otherwise, would be illogical; to prevent an ALJ from giving proper deference to the educational expertise of the local school authorities and then require such deference by the district court would be inefficient and thus counter to sound jurisprudence."). If the expert's opinion testimony is unrebutted, it may not be rejected by the administrative law judge unless there is a reasonable explanation given for doing so. See Heritage Health Care Ctr. v. Ag. for Health Care Admin., 746 So. 2d 573, 573-74 (Fla. 1st DCA 1999); Weiderhold v. Weiderhold, 696 So. 2d 923, 924 (Fla. 4th DCA 1997); Fuentes v. Caribbean Elec., 596 So. 2d 1228, 1229 (Fla. 1st DCA 1992); and Brooks v. St. Tammany Sch. Bd., 510 So. 2d 51, 55 (La. App. 1987).

104. "An [administrative law judge's] determination of whether a student received FAPE must be based on substantive grounds. In matters alleging a procedural violation, an [administrative law judge] may find that a student did not receive FAPE only if the procedural inadequacies impeded the student's right to FAPE; significantly impeded the parent's

opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or caused a deprivation of educational benefit. This [does not, however] preclude an [administrative law judge] from ordering a school district to comply with the procedural safeguards set forth in Rules 6A-6.03011 through 6A-6.0361, F.A.C." Fla. Admin. Code R. 6A-6.03311(9)(v)4.; see also 34 C.F.R. § 300.513.

105. In the instant case, in her Complaint, the Mother alleges that the May 2012 IEP is in "direct opposition" to the IDEA. Her challenge has both a procedural and substantive component. Procedurally, she contends that she was "not provided meaningful participation in said IEP's development as the final IEP only reflects the placement recommendations of the School District IEP members and not the recommendations or considerations of the Mother nor certain considerations presented by the school psychologist" and therefore "[s]aid IEP does not provide [redacted] with a free, appropriate public education"[31/] (Meaningful Participation Claim). Substantively, her argument is that "[s]aid IEP is in direct opposition to the least restrict[ive] environment component of IDEA in that the District never showed that [redacted] cannot be successfully educated in the least restrict[ive] environment of a gen. ed. classroom with all needed supports and services" (LRE Claim). The

Complaint identifies no other specific deficiencies from which the May 2012 IEP allegedly suffers.

106. Neither the Meaningful Participation Claim, nor the LRE Claim, is supported by record evidence sufficient to meet the Mother's burden of proof on these matters. With respect to the Meaningful Participation Claim, the evidentiary record affirmatively establishes that, at the meetings at which the May 2012 was developed (the May 10 Session and the May 21 Follow-Up Meeting, both of which lasted several hours), the Mother was given full opportunity to explain her position on [redacted] placement (as was Ms. Keller, who supported the Mother's position), and the Team Majority listened to what the Mother had to say with an open mind (notwithstanding that, in the end, they did not agree with the Mother that [redacted] should be placed in a general education class, with supports, and they included in the May 2012 IEP a placement other than the one advocated by the Mother). Predetermination on the part of the Team Majority was not established. With respect to the LRE Claim, evaluating the record evidence in the instant case (including, most significantly, the evidence concerning [redacted] unique abilities and needs and the learning environment in which [redacted] needs can best be met) in light of the legal principles set forth above in these Conclusions of Law, it cannot be said that the Mother has proven that the placement selected by the Team Majority (which,

although not a mainstream placement, does provide [redacted] the opportunity to be with [redacted] non-disabled peers for academic and non-academic activities 18.17% of the school day) is not reasonably calculated to provide [redacted] FAPE in the LRE. The record evidence simply does not support a finding that it was unreasonable for the Team Majority to conclude, based upon the information available to them at the time they made their placement determination, that [redacted] could not be satisfactorily educated in the mainstream setting urged by Mother and that there was no placement less restrictive than the one that they selected that would be appropriate for [redacted]

107. In view of the foregoing, the Mother's Meaningful Participation Claim and her LRE Claim fail and are therefore rejected. Accordingly, no relief can be awarded to her in this proceeding.[32/]

DONE AND ORDERED this 16th day of August, 2012, in Tallahassee, Leon County, Florida.

S

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STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of August, 2012.

ENDNOTES

[1/] Unless otherwise noted, all references in this Final Order to Florida Statutes are to that version of Florida Statutes in effect at the time of the occurrence of the particular event or action being discussed.

[2/] Paragraph 7. of Order of Pre-Hearing Instructions provided as follows:

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

[3/] The Parents did not, however, file a due process hearing request challenging the placement.

[4/] The Parents had separated earlier that year.

[5/] The resolution meeting at which the groundwork for this agreement was laid was held on February 29, 2012.

[6/] [redacted] was [redacted] years, five months of age at the time [redacted] was tested.

[7/] The Fluid Reasoning and Knowledge subtests were the ones "administered with modifications."

[8/] This was something a child [redacted] age should have been able to do. (The typical kindergarten student can write at least a five to six sentence story.)

[9/] This is a task a three or four-year-old child should be able to perform.

[10/] While it is true (as Ms. Henricksen testified on cross examination at hearing, and as the Mother points out in her Proposed Final Order) that Ms. Henricksen did not "specifically state" in her Evaluation Summary that [redacted] could not be

"satisfactorily educated in an environment that involves nondisabled peers," neither did she "specifically state" in her summary that [redacted] could be "satisfactorily educated" in such a setting. The appropriateness of such a setting was simply a matter that Ms. Henricksen did not address in her summary.

[11/] In past years, Ms. Crawford has also taught regular first, second, and third grade classes.

[12/] "One of the reasons" that Ms. Keller advocated for a mainstream placement was that she "thought [that] it was important for [redacted] to get back into school" and that the Mother would not allow this to happen if [redacted] was placed in a class with other autistic students.

[13/] Although she sided with the Mother, Ms. Keller did acknowledge at the meeting that she "liked" the small class size and the intensive instruction that an autism cluster class would provide [redacted].

[14/] Because reading was a relative strength of [redacted], it was thought that [redacted] would derive some benefit from participating in circle time and shared reading in a general education setting.

[15/] Math was another area of relative strength of [redacted].

[16/] There was the legitimate concern that [redacted] would become overly dependent on a one-on-one aide in such a setting and this would isolate [redacted] from [redacted] classmates and thwart the development of [redacted] functional independence.

[17/] In finding the Team Majority's placement decision to have been the product of reasoned decisionmaking and rational thought, the undersigned has relied on the hearing testimony of the educational professionals who testified, credibly, on behalf of the School Board. The Mother's lone educator witness, Ms. Keller, testified that she disagreed with the Team Majority--it being her view that [redacted] "would probably be best served in a regular education class with additional support"-- but she did not, in her testimony, opine that the Team Majority had acted unreasonably in concluding otherwise, nor did she specifically address the concerns that the Team Majority had with such a "regular education class" placement. Her testimony, therefore, does not give the undersigned sufficient cause to not make the findings he has regarding the reasonableness of the Team Majority's placement decision.

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

[19/] Students with "autism spectrum disorder" are described in the "rules of the State Board of Education" as follows:

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

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

[20/] Florida Administrative Code Rule 6A-6.03012(1) provides that "[s]peech impairments are disorders of speech sounds, fluency, or voice that interfere with communication, adversely affect performance and/or functioning in the educational environment, and result in the need for exceptional student education."

[21/] According to Florida Administrative Code Rule 6A-6.030121(1), "[l]anguage impairments are disorders of language

that interfere with communication, adversely affect performance and/or functioning in the student's typical learning

environment, and result in the need for exceptional student education."

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

[23/] In section 1003.571(1), which took effect on July 1, 2009, the Florida Legislature directed that:

> The State Board of Education shall comply with the Individuals with Disabilities Education Act (IDEA), as amended, and its implementing regulations after evaluating and determining that the IDEA, as amended, and its implementing regulations are consistent with the following principles:
>
> (a) Ensuring that all children who have disabilities are afforded a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
>
> (b) Ensuring that the rights of children who have disabilities and their parents are protected; and
>
> (c) Assessing and ensuring the effectiveness of efforts to educate children who have disabilities.
>
> (2) The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section.

Subsection (1) of Florida Administrative Code Rule 6A-6.03028, a State Board of Education rule that was most recently amended effective December 15, 2009, "incorporates [the IDEA's FAPE requirement] by reference." It provides, in pertinent part, as follows:

> Entitlement to FAPE. All students with disabilities aged three (3) through twenty-one (21) residing in the state have the right to FAPE consistent with the requirements of the Individuals with Disabilities Education Act, 20 USC Section 1400, et. seq (IDEA), its implementing federal regulations at 34 CFR Subtitle B, part 300 et.seq. which is hereby incorporated by reference to become effective with the effective date of this rule, ...

[24/] Long after it was first articulated by the United States Supreme Court, "the Rowley definition of free appropriate public education (FAPE) still survives." Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6, 538 F. Supp. 2d 298, 301 (D. Me. 2008); see also J.L. v. Mercer Island Sch. Dist., 575 F.3d 1025, 1037-38 (9th Cir. 2009)("We hold that the district court erred in declaring Rowley superseded. The proper standard to determine whether a disabled child has received a free appropriate public education is the 'educational benefit' standard set forth by the Supreme Court in Rowley. Our holding is necessary to avoid the conclusion that Congress abrogated sub silentio the Supreme Court's decision in Rowley."); Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 n.5 (10th Cir. 2008)("Rowley involved an analysis of IDEA's statutory precursor, the Education of the Handicapped Act, but the same textual language has survived to today's version of IDEA. Compare Rowley, 458 U.S. at 187-89 (quoting EHA definitions) with 20 U.S.C. § 1401(9), (26), (29)(current IDEA definitions). Indeed, the Supreme Court has recently cited approvingly Rowley's discussion of the meaning of FAPE in Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2000-01, 167 L. Ed. 2d 904 (2007)."); Poway Unified Sch. Dist. v. Cheng, 821 F. Supp. 2d 1197, 1199 (S.D. Cal. 2011)("Rowley is still controlling, even though IDEA has been amended multiple times since it was decided."); K.M. v. Tustin Unified Sch. Dist., Case No. SACV 10-1011 DOC (MLGx), 2011 U.S. Dist. LEXIS 71850 *19 (C.D. Cal. July 5, 2011)("[T]he standards set out in Rowley still control."); Anne D. v. Bd. of

Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 816 n.6 (N.D. Ill. 2009)("Plaintiffs' contention that Rowley is no longer the governing standard, and that the IDEA requires the District to maximize Sarah's potential to read, is incorrect."); and Joshua A. v. Rocklin Unified Sch. Dist., Case No. CV 07-01057 LEW KJM, 2008 U.S. Dist. LEXIS 26745 *8 (E.D. Cal. Mar. 31, 2008)("[I]f Congress intended to modify the Rowley standard, it would have said so.").

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

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

[27/] Mainstream placements do not always yield such "non-academic benefit." See, e.g., J.H. v. Fort Bend Indep. Sch. Dist., Case No. 11-20718, 2012 U.S. App. LEXIS 15481 **9-10 (5th Cir. July 26, 2012)("A student may derive nonacademic benefit from interacting with nonhandicapped peers in mainstream classes. Although he was in the mainstream science and social studies classes, J.H. was taught separately by teaching assistants and tutors and followed an entirely modified curriculum. His teachers and the experts who observed him agreed that J.H. became withdrawn and frustrated in the classroom, and tended to

shut down as the academic assignments became more difficult. His opportunity to interact with his nonhandicapped peers in those classes was thus seriously limited, which supports the district court's conclusion that J.H. did not derive any significant nonacademic benefit from placement in mainstream science and social studies classes."); Rosedale Union Elementary Sch. Dist., 110 LRP 37643 (SEA CA June 29, 2010)("Ms. Bertran-Harris credibly opined that placing Student in general education, where the academic level would be so much higher than Student's abilities, would have the opposite of the desired effect and would isolate him from his peers, while the SDC placement would allow Student to interact with his peers during academic instruction. Student did not meet his burden of showing that there were non-academic benefits to Student from placement in general education."); and Glendale Unified Sch. Dist., 54 IDELR 306 (SEA CA June 23, 2010)("District offered credible evidence that Student was performing at substantially less than her age level in most areas assessed, and that she required full-time one-to-one assistance and a substantially modified curriculum. District demonstrated that placing Student in a general education class would result in Student being isolated for most of the classroom time without peer interaction, thus depriving Student of non-educational benefits that she could experience in a SDC.").

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

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

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

[31/] As noted above, if a parent is deprived of the opportunity to meaningfully participate in the IEP development process, the

IEP that is the product of such a flawed process necessarily denies the child a "free appropriate public education," even if it is reasonably calculated to provide the child with meaningful educational benefit.

[32/] The rejection of the Mother's Meaningful Participation Claim and her LRE Claim is fatal not only to her request for relief under the IDEA, but to her request for relief under Section 504 of the Rehabilitation Act (which is based on the same School Board conduct). See D.H. v. Poway Unified Sch. Dist., Case No. 09-cv-2621-L(NLS), 2012 U.S. Dist. LEXIS 81326 **9-10 (S.D. Cal. June 11, 2012)("[A] plaintiff's failure to show a deprivation of a FAPE under the IDEA dooms a claim under § 504 . . . "); K.C. ex rel. Her Parents v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 832 (E.D. Pa. 2011)("These [§ 504] claims are based on the same facts underlying the IDEA claim. Given that none of the § 504 claims are outside the ambit of the IDEA, and the Court has already concluded that the District did not deny K.C. a FAPE, Plaintiffs' § 504 claim also fails."); K.I. v. Montgomery Pub. Schs., 805 F. Supp. 2d 1283, 1298 (M.D. Ala. 2011)("The Plaintiffs' entire § 504 claim is based on the contention that MPS violated K.I.'s rights by placing her in the Children's Center. This Court has found that MPS did not violate the IDEA by placing K.I. in the Children's Center. Since a plaintiff must demonstrate more than a violation of the IDEA in order to recover under § 504, it is virtually impossible to establish a violation of § 504 if the school district has complied with the IDEA."); and D.F, 921 F. Supp. at 573-574 ("The court has determined above that defendants are entitled to summary judgment on D.F.'s IDEA claim, finding that plaintiffs have failed to meet their burden of proving that D.F.'s placement at Pettit Park violated the IDEA. Thus, plaintiffs also lack the evidence needed to support a Rehabilitation Act claim. . . . Because plaintiffs have failed to meet their burden of proving that D.F.'s IEP violated the IDEA, their claims based on . . . the Rehabilitation Act must also fail.").

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(w); or

b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).