Duval County School District
No. 08-0354E
Initiated By: Parent
Hearing Officer: P. Michael Ruff
Date Of Final Order: March 4, 2009

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-0354E
	)	
DUVAL COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to appropriate notice this cause came on for final hearing on September 29 and 30, 2008, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The appearances were as follows:

APPEARANCES

For Petitioner: [redacted], Parent, pro se
(For hearing)
(Address of record)

Warren Anderson, Jr., Esquire
2029 North Third Street
Jacksonville Beach, Florida 32250
(For preparing and filing the Petitioner's Proposed Recommended Order)

For Respondent: Michael B. Wedner, Esquire
Duval County School Board
117 West Duval Street, Suite 480
Jacksonville, Florida 32202-3700

STATEMENT OF THE ISSUES:

The issues to be resolved in this proceeding concern whether the Petitioner was denied a Free Appropriate Public Education (FAPE), under the Individuals With Disabilities Education Act, as amended (IDEA), 20 U.S.C. Section 1400, et. seq.[1/] It must be determined whether the Petitioner's classification should be changed from autistic to Educable Mentally Handicapped (EMH), and whether the Petitioner should receive "qualified professional services," to allow the Petitioner to receive FAPE. A requested secondary designation of "language delayed," with "attention disorder" is sought as well. The Petitioner also seeks to have the Respondent pay the costs of an Independent Education Evaluation (IEE), performed by Psychologist Michael Sisbarro.

The Counter-Petition filed by the Respondent, Duval County School Board, addresses the issue of whether the Respondent's educational evaluation of the Petitioner was appropriate, whether the Respondent should be required to reimburse the Petitioner for the costs of the IEE, and whether an addendum to the Petitioner's IEP, attached to and included within the Counter-Petition, should be implemented.

PRELIMINARY STATEMENT

This matter arose upon the filing of a Petition for a Due Process Hearing filed by [redacted], the parent of [redacted]. Pursuant to notice, thereafter, a Pre-hearing Conference was set and conducted by telephonic conference call on January 30, 2008. [redacted], the parent of the Petitioner, [redacted], was present on the conference phone call as was the above-named counsel for Duval County School Board (the Board). Upon discussing discovery schedules and hearing schedules, the parties advised that they were conducting a resolution conference. The parties also stipulated that they would engage in a mediation effort in order resolve their disputes, in accordance with 20 U.S.C. Section 1415(f)(1)(B)(ii) and 34 C.F.R. Section 300.510(b)(4) and 300.515. The parties concomitantly extended/waived the 45-day period for resolution of this dispute. By their agreement, an additional Pre-hearing Conference was then scheduled for February 19, 2008.

An Order of Pre-hearing Instructions was issued. The matter was noticed for hearing by agreement of the parties, for March 6, 2008. On February 19, 2008, an Order was entered denying a Motion to Dismiss filed by the Respondent.

On February 27, 2008, an Order was entered upon a Motion for Continuance filed by the Petitioner. The Petitioner was thus seeking another opportunity for a mediation as well as a delay in the setting of another due process hearing by "80 days

so that evaluations can be done in a timely manner."

It being apparent that the Petitioner, the moving party in this proceeding, was not prepared to proceed to hearing on the date set and that the Petitioner had waived, in writing, the relevant 45-day time period, the Motion was granted and the parties were given an additional 30 days during which to conduct mediation, if possible, and to take all necessary steps to conduct and complete discovery by March 31, 2008 (not 80 days). The parties were to advise of agreeable hearing dates by that date.

In a status conference conducted on April 15, 2008, the Petitioner requested an independent educational evaluation of [redacted], the Petitioner. This was opposed by the Board and is the subject of the Board's Counter-Petition opposing having to pay the costs of such an independent educational evaluation and the need therefore. The Petitioner was allowed to obtain an independent education evaluation and was required to supply dates to opposing counsel and the undersigned for the evaluation. The question of whether the Board should pay for such an evaluation was reserved as an issue for hearing.

Thereafter, the Petitioner, by letter response of May 8, 2008, provided dates for the scheduled Independent Education Evaluation (IEE).

Due to the delay in completing the IEE and obtaining the

report from the examining psychologist, an Order was entered on June 5, 2008, requiring the Petitioner to advise immediately whether the evaluation had been completed, and whether the relevant report had been rendered by the psychologist. It reminded the parties that the matter could not proceed to hearing before such was accomplished. The undersigned advised the parties that the case would be set for hearing on July 15, 2008, after examining the state of discovery at that point, and the dates the parties had indicated availability. That Order also included revised discovery service and response time requirements. The case was then noticed for hearing for July 15, 2008.

Thereafter, pursuant to the Respondent's Motion for Continuance and for Clarification and Modification of Issues, explained in detail in that Motion of June 18, 2008, an Order was entered on July 2, 2008. In that Order the parties were admonished to, in the case of the Petitioner, make no more communication save by written motion, when directing communication to the undersigned, and that no additional informal correspondence copied to the judge would be allowed.

In view of the evolution of the issues and remedies being sought by the Petitioner, especially in view of the recent opinions rendered by the IEE Psychologist, Dr. Sisbarro, the Petitioner was directed to submit its Amended Petition within

seven days of the date of the Order of July 2, 2008. The Amended Petition was to succinctly and finally state the issues on which the Petitioner wished to proceed to hearing, concerning perceived deficiencies in the provision of FAPE and the remedies the Petitioner believed appropriate. That Order also set a response time directed toward the Amended Petition, for the Respondent, and addressed matters such as the schedule for Dr. Sisbarro's deposition.

Moreover, based on the Respondent's Motion, and good cause being shown due to a substantial number of School Board witnesses being unavailable on the date the matter was set for hearing, the hearing of July 15, 2008, was cancelled and the parties were directed to immediately confer and provide agreeable hearing dates within seven days of that Order. The parties were again advised that resolution of the case must be accomplished without further delay and that deadlines contained in the Order and in prior Orders would be enforced, as well as referencing consequences for failure to properly exchange the identity of witnesses, exhibits, etc.

The cause was set for hearing again on August 25 and 26, 2008, after receipt of the Amended Petition and allowance of a time for response to the Amended Petition. Thereafter, a dispute arose concerning the deposition of the Petitioner's IEE evaluating Psychologist, Dr. Sisbarro, concerning the scheduling

of the deposition, the matter of copying of materials which he was required to bring to his deposition, and payment for copying. After the entry of an August 14, 2008, Order resolving that dispute, a further Pre-hearing Conference was conducted on August 21, 2008, and the Pre-hearing Stipulation was filed and received August 19, 2008.

Thereafter, pursuant to an emergency, ore tenus Motion from the Respondent, joined by the Petitioner, the hearing set for August 25 and 26, 2008, in Jacksonville, Florida, was continued, due to Jacksonville and Duval County being struck by Tropical Storm Fay. The parties submitted proposed alternative hearing dates for October 2008. The hearing was re-scheduled, however, for September 29 and 30, 2008, and conducted on those dates.

In the meantime, no changes in the services provided [redacted] have been effected and those under the prevailing IEP have been provided in accordance with the "stay put" provisions of the IDEA. The Respondent Board has requested a determination that proposed revisions to the IEP, based upon the position taken by the re-evaluation team after its meeting of April 7, 2008, be adopted. The Respondent has requested that those proposed revisions to the IEP be done through its own Petition for due process hearing.

The cause came on for hearing as noticed. The Petitioner, [redacted], presented the testimony of Ms. Caroline Wells; [redacted], the

Petitioner's parent; and Psychologist Dr. Michael Sisbarro. The Respondent presented the testimony of 10 witnesses in response to the Petitioner's case, as well as in support of its Counter-Petition. Those witnesses were Ms. Rhonda W. Said; Mr. Mike McAuley; Ms. Caren Jones; Ms. Beverly Harris; Ms. Alyssa Pierce; Ms. Jill Evans; Ms. Marjorie Willingham; Ms. Deidra Johnson; Ms. Terrie Bennett; and Ms. Meredith Fredeking-Osgathorpe. No rebuttal evidence was presented.

The Petitioner offered and had admitted Composite Exhibits one and two. The Respondent submitted 147 separately numbered documents as exhibits, which were admitted into evidence, and also introduced and had admitted Composite Exhibit 148, composed of several documents. Additionally, a Motion filed on behalf of Dr. Sisbarro, concerning expert witness fees and costs related to his deposition, will be decided by separate order.

Upon conclusion of the proceedings, the parties ordered a transcript thereof and availed themselves of the opportunity to submit proposed final orders. The transcript was delayed, and after its filing, two agreed-upon extensions for proposed final orders were granted. The result was that the Proposed Final Orders were timely-filed December 12, 2008, and have been considered in the rendition of this Final Order.

FINDINGS OF FACT

1. The Petitioner is a student in the school system operated by the Duval County School Board. The relevant school years at issue in this proceeding are the 2006-2007, school year when the Petitioner was a student in pre-kindergarten class at [redacted] School, and the 2007-2008 school year, when [redacted] was attending kindergarten classes at [redacted]School.

2. During the Petitioner's pre-kindergarten school year at [redacted], the parent, [redacted], became concerned about the frequent use of substitute teachers and the absence of a permanent exceptional student educational (ESE) teacher. The Petitioner was being taught by various substitute teachers because the Board and the school principal had a difficult time hiring a certified ESE teacher. The Petitioner was in a program for autistic children during that year.

3. Although substitute teachers were indeed used for the Petitioner's education that year, there were really two main substitute teachers, rather than a frequently changing compliment of substitute teachers. These two teachers taught the Petitioner a total of 165 days out of the 180 days available during that school year. They also received ongoing support by an ESE-trained teacher assigned as a support person to the school staff. This was Ms. Beverly Harris, who has had some 31 years of experience with exceptional student education and was shown to be well-qualified to provide the services mandated by

the Petitioner's IEP. Ms. Harris served as the autistic site coach for the school and taught in the Petitioner's class essentially each day of that school year.

4. At some point, apparently earlier in the 2007-2008 school year, [redacted], the parent, requested an additional psychological education evaluation for [redacted]. A re-evaluation was conducted by the Respondent Board, with the parent's consent, which took place over three days and was conducted by Ms. Caren Jones and Mr. Mike McAuley, who are psychologists employed by the Board. As a result of their evaluation they were of the belief that the Petitioner is not autistic, as currently classified, but rather that a new eligibility criteria or classification was appropriate, which they believe to be Educable Mentally Handicapped (EMH).

5. An earlier IEP team, which met when the Petitioner was first found to be eligible for special education services during the Child-Find process conducted by the Board, had arrived at an autism classification. The evaluation and examinations conducted at that time indicated test scores more in the EMH range, but a classification of autism was arrived at for reasons that are not clear. The Petitioner's [redacted] wanted the autism classification, at least, because [redacted] believed that it would lead to a smaller class size for [redacted] child and was of the belief that the classification would control what services were

available. The evidence establishes, however, that the classification or label a child is assigned does not determine what services are needed and made available to the student.

6. During the re-evaluation and examination conducted by Mr. McAuley and Ms. Jones, at the behest of the Board, a test was administered called the Autism Diagnostic Observation Schedule (ADOS). Other test instruments were administered as well. The ADOS test instrument is generally deemed to be the most accurate and efficacious available for determination of whether a student occupies a place on the "autism spectrum." It is a test specifically designed to establish whether autism is present in children. Those psychologists evaluating [redacted] for the Board are specifically trained in the administration of the ADOS test. They found, after receiving the results of the ADOS evaluation, that the Petitioner is not actually autistic.

7. The test results indicate that the Petitioner scores in the range for a classification of EMH. If that indeed is the case, the classification appears to be a borderline one, in terms of IQ scores, because the original child-find psycho-educational report found an intellectual ability within the mentally handicapped range, which is an IQ score below 70. The District psychologist conducting the re-evaluation found a score of 69 and Dr. Sisbarro, in advocating that the Petitioner falls on the autism spectrum, found an IQ score of 71. All of those

scores are within the margin of error ascribable to the score determined by Dr. Sisbarro.

8. It was established, however, and the Board's staff members who testified uniformly agreed, that once eligibility for special education services is determined, then the services needed can be determined and implemented by an IEP team and do not depend on whether a student is classified as EMH or autistic. The educational services and supports determined to be needed and necessary can be incorporated in an IEP and implemented for the student regardless of the eligibility label or classification.

9. Because the testing conducted by the Board's re-evaluation personnel, referenced above, did not show eligibility based upon autism spectrum disorder, the Petitioner thus met "dismissal criteria" for autism spectrum disorder. It was also demonstrated that [redacted] met eligibility criteria for EMH classification. The Petitioner was also clearly found to demonstrate a continued need for language-impaired services.

10. The Board attempted to set up an IEP meeting with the Petitioner's [redacted] for the month of February 2007. [redacted] refused to participate in an IEP meeting at that time, however. Thereafter, an IEP meeting was scheduled and actually convened on March 28, 2007, and a revised IEP was adopted with the parent's participation. That is the IEP under which the student

[redacted] is being educated at the present time in a "stay put" status, pending the results of this due process proceeding.

11. An IEP meeting was noticed for April 7, 2008. The notice was thus given that the results of the Board's re-evaluation of [redacted] would be reviewed and that this would be an IEP meeting. The parent, [redacted], was duly notified of this and that the IEP would be considered.

12. The Petitioner has not raised an issue of lack of proper notice for the April 7, 2008, meeting. The Petitioner's [redacted] attended that meeting, with an "advocate," and stayed for the first portion of it when the results of the re-evaluation, conducted by Ms. Jones and Mr. McAuley, were discussed. Thereafter [redacted] refused to stay for the eligibility and IEP portion of the meeting and left the meeting. The various Board staff members remained and completed the eligibility portion of the meeting.

13. The Board's staff members, in considering the re-evaluation results, determined that the Petitioner did not meet the criteria for autism spectrum disorder and therefore made their own determination that eligibility for such services should be terminated, and that eligibility for EMH services should be approved, with continuation of language-impaired services. This initial determination took into account the results of a speech and language evaluation conducted by the

Board's speech and language pathologist, Ms. Marjorie Willingham.

14. A draft IEP was prepared and is in evidence as part of Petitioner's Composite Exhibit One. At the April 7, 2008, meeting, however, the IEP team determined not to proceed to complete the IEP portion of the meeting or to finalize the draft IEP because they wanted the parents' participation. In their testimony at hearing, the District staff maintained that the additional services listed in that draft IEP are appropriate for the Petitioner. Because of the pendency of this proceeding the Board is continuing to educate the Petitioner under the "stay put" IEP of March 28, 2007. Although the Board wishes to provide additional services to the Petitioner, in Petitioner's IEP, it has been hampered in doing this because of the parent's refusal to attend or participate fully in the meetings. In any event, such changes could not be implemented once the request for due process hearing was filed by the Petitioner's parent, due to the stay put provisions of IDEA.[2/]

15. [redacted], the Petitioner's parent, has requested that the Board pay for an IEE by letter of April 7, 2008, asserting that request in [redacted] Amended Petition as well. [redacted] contests the results of the psychological re-evaluation conducted by the Board and asserts [redacted] position that [redacted] child suffers from autism spectrum disorder and should be classified and provided

services accordingly.

16. Following receipt of the request for the IEE, a Counter-Petition was filed by the District, opposing the IEE and opposing having to pay for it. Additionally, in its Counter-Petition, the Respondent Board requested approval of the proposed addendum to the Petitioner's IEP.

17. The Petitioner was authorized by the undersigned to obtain an IEE, although not, at that time, authorized to do so at the Board's expense. Rather, the question of payment for the IEE was reserved as an issue for the hearing on the merits.

18. The Petitioner initially scheduled appointments for the IEE with Dr. Michael Sisbarro, Ph.D. on May 7, 9, and 20, 2008. Ultimately, Dr. Sisbarro met with the Petitioner on four different occasions for a total of four and one-half to five hours. He also consulted with [redacted], the parent, as well as Ms. Popp, the parent's advocate, on at least one other occasion for approximately one and one-half hours. He spent a total of approximately seven hours on the issue of evaluation of the Petitioner.

19. Dr. Sisbarro selected a variety of examinations and sub-tests to administer to the Petitioner in performing his evaluation. They are noted in his evaluation report, in evidence as Respondent's Exhibit 12. He opined that the Petitioner has a qualifying exceptionality falling on the autism

spectrum. His conclusion differs from the conclusions of the Respondent's school psychologists Ms. Jones and Mr. McAuley, who believe the Petitioner is not autistic. It differs from the conclusion of Ms. Rhonda Said, the Supervisor of School Psychology and Social Work Services for the Board. She supervises 60 District psychologists and 20 related staff personnel, as well as the administration of the various District psychological examinations. She and Ms. Terrie Bennett, the District's autism specialist, who mentors and trains teachers and principals concerning autism, concluded that the Petitioner is not autistic. In this regard, Ms. Bennett has some 35 years of experience with the Board, with extensive training and experience involving autism.

20. The Petitioner offered no testimony or evidence actually critical of the protocols administered by the Board's psychologists. Dr. Sisbarro believed that very few academic measures were included in the Board's evaluation and he differed with the ultimate conclusion by the Board's psychologists as to the Petitioner's appropriate classification. There was a difference of opinion on whether the Diagnostic and Statistic Manual, volume IV-TR (DSM-IV-TR) criteria indicate that the Petitioner actually has autism, or, conversely, EMH.

21. Dr. Sisbarro did not criticize the methodology used by the Board's psychologists but did elect to use different tests

and sub-tests that they employed. Dr. Sisbarro did not use the most current version of at least one of the instruments, the Peabody Picture Vocabulary Test and used a Third Edition, instead of the more recent Fourth Edition, which resulted in a distortion of the scores obtained. He later corrected this situation by offering different scoring, by letter, after his deposition was taken. Additionally, he did not establish a baseline or upper limit in his examinations on several of the instruments he used.

22. He did not administer an autism rating scale to the Petitioner's teachers, Ms. Evans and Ms. Medders, who instructed the Petitioner and saw the Petitioner in an educational setting. The only instrument he used which directly assessed autism was the Child Autism Rating Scale (CARS). That instrument is a questionnaire which Dr. Sisbarro gave to the Petitioner's [redacted], [redacted], to complete. Thus he had an autism rating scale from the [redacted], but not from the Petitioner's teachers, with respect to any observed autistic behavior which might have occurred in an educational setting. Although he contended that the teachers were not trained regarding autism, neither was the Petitioner's [redacted] so trained, although [redacted] was given the CARS instrument to complete, while the teachers were not. The failure to obtain rating scales from behavior in the educational setting calls into question Dr. Sisbarro's conclusions.

23. Dr. Sisbarro made observations of the Petitioner's behavior during evaluation sessions and found several behaviors he considered unusual. He admitted that such unusual behaviors are not limited only to autistic children, however, but can be found in children with other exceptionalities. Additionally, the teachers testified that the behaviors are not unusual at all for kindergarten children who did not require special education services. The teachers also established that they never saw some of the behaviors Dr. Sisbarro listed in his report.

24. Ms. Said established one area of unreliability concerning the results obtained by Dr. Sisbarro on one of the instruments that he administered, the Wechsler Preschool and Primary Scale of Intelligence (WPPSI). That instrument was used with the Petitioner only a few months after the district personnel had administered it to the Petitioner. The professional standard is to wait at least a year before a repeat administration of that instrument is made. Waiting a year avoids "practice effects" which could somewhat invalidate test scores. Because he administered the test substantially less than a year after the first administration, it could be expected that a slightly better score would result on that second occasion, and, in fact, that was the case. The Petitioner scored 2 or 3 points higher upon the re-administration of the test by Dr. Sisbarro.

25. Dr. Sisbarro also gave various sub-tests from among different instruments, but did not give complete clusters of any of the sub-tests. On the Woodcock-Johnson III test and on the WIAT-II, he did not obtain a full composite score for either one. Rather he selectively chose which sub-parts to administer. Dr. Sisbarro also used various age-inappropriate tests or sub-tests. The Woodcock-Johnson III has very few items designed specifically for young children. According to one of the founders of the test, as established by Ms. Said's testimony, it was not designed for use with children under the age of 8.

26. The examinations administered by the Board's psychologists followed the school district protocol and followed best practices. The WPPSI is appropriate for young children, from ages 2 through 7, such as the Petitioner. Additionally, the report of the Board's psychologists followed standard format and was not intended to be an IEP itself or to be exhaustive about what educational services the Petitioner required. The decisions concerning whether to provide services, and what sorts of services to provide, must be made by an IEP team collectively and not by the Board's psychologists when they give evaluations. Neither the Board's psychologists nor Dr. Sisbarro determined specifically what services should be provided in the IEP.

27. Dr. Sisbarro and the Board's psychologists reached essentially the same scores and conclusions as to cognitive

ability of the Petitioner. The original child-find evaluation determined an IQ of 61. Dr. Sisbarro found an IQ of 71. The Board's psychologist found an IQ of 69, which is within the margin of error of the score determined by Dr. Sisbarro.

28. The original Child-Find-Psycho-Educational Report did not contain a determination that the Petitioner was autistic. Rather, it contained a finding that [redacted] ineligibility was within the mentally handicapped range, which was an IQ score below 70. Whether the Petitioner was labeled and found eligible as having autism spectrum disorder or as EMH, however, would not limit the services that the IEP team could determine were needed.

29. Dr. Sisbarro did not administer the most recent edition, the Fourth Edition, of the Peabody Picture Vocabulary Test. It had been available for over a year before Dr. Sisbarro instead used the older Third Edition. The difference was of some significance in that the Third Edition referenced students during the 1980's as the norm, while the Fourth Edition, the current edition, uses student norms from the years 2005-2006. As a result, using the older edition, resulted in a higher score than otherwise would have been the case, if the newer current version had been used. Once the Peabody Picture Vocabulary protocols were re-scored, the Petitioner's scores came down a few points.

30. Dr. Sisbarro used several sub-tests in which base levels and ceilings were not established, because he either did not record results or did not ask all the necessary questions when incorrect responses were given by the Petitioner. He also did not complete the test by pages. Accordingly, the Petitioner was not given the opportunity to do as well as he otherwise could have if the tests had been appropriately administered. Additionally, as shown by Ms. Said, the efficacy of Dr. Sisbarro's methodology regarding the calculation portion of the exam; spelling; comprehension; and picture vocabulary, was not clearly established. Further, one of the instruments he used dealt with science, social studies and humanities. These are not areas typically used for kindergarten-aged children and therefore it was not age appropriate.

31. Another of [redacted] concerns was his use of the Wexler Individual Achievement Test, Second Edition (WIAT II). He established the base level in [redacted] grade, even though the Petitioner was not yet in [redacted] grade at the time. Thus, the Petitioner had a higher starting place than was appropriate. If the appropriate grade level was used for the basal starting point, the Petitioner's score would have been lower. Similar concerns were shown by Ms. Said concerning numerical operations, where no ceilings were established, and pseudo-word decoding, where various items were not marked and no ceilings were

established. With respect to the Expressive One Word Picture Vocabulary Test (EOPVT), no ceiling was established. Additionally, Dr. Sisbarro's methodology did not provide for the administration of a "complete cluster" for oral language. One of his principal concerns was an alleged language delay of the Petitioner. It is thus unusual, if he had that concern, that no comprehensive language evaluation was conducted.

32. Dr. Sisbarro gave single sub-tests for expressive language from two different vocabulary tests. He got results of "average," and an expressive, one-word picture vocabulary test with a low score of 75. All three of the sub-tests administered were single-word kind of responses, and the results indicated a wide spread. Dr. Sisbarro's report does not contain an explanation for such a spread in the scores. Another of the sub-tests he used was a sub-test designed for children between ages two and three. The Petitioner was much older than that, so [redacted] would have been expected to do better on that particular sub-test and he did.

33. Contrastingly, the sub-tests administered by the Board's psychologists were designed for children of the Petitioner's age. Because they were age and grade appropriate they gave a more thorough, accurate evaluation of the Petitioner's skills.

34. When Dr. Sisbarro testified that he gave 13, 14, or 15 tests or measures of academic performance, in actuality he gave various select sub-tests which measured similar skills repeatedly from among two principal examinations (the Woodcock Johnson and the WIAT II). He did not, however, give a complete battery of sub-tests from either instrument, as there was, in particular, no reading cluster. There were no cluster scores reported.

35. Mr. Mike McAuley holds a bachelor's degree in psychology, as well as a master's degree in mental health. He obtained a Specialist in Education Degree (EDS) degree as well. His work focuses on training and development of school psychologists. He has researched extensively in communication disorders (ADHD and autism).

36. Mr. McAuley is presently assigned to the kindergarten through eighth grade "south cluster" of the Duval County School District and has three schools as his primary assignment. He has also received significant training in the area of autism. This includes specific training regarding administration of the Autism Diagnostic Observation Schedule (ADOS), referenced above. He established that the ADOS instrument was designed specifically to elicit a pattern of behaviors consistent with an autism profile.

37. Mr. McAuley assisted Ms. Jones in administering an age-appropriate module of the ADOS for the Petitioner, Module I. That is the lowest of the four available. Administration took about an hour and fifteen minutes. Following that, he and Ms. Jones reported the results in two separate reports. He has administered the ADOS during his career approximately 200 times or more and has administered approximately 1,000 other evaluations during his professional career.

38. Mr. McAuley and Ms. Jones administered the ADOS in accordance with the standard procedures of the Board and school psychologists who administer examinations for children suspected of being on the autism spectrum. All appropriate protocols were observed. Among the activities performed, the Petitioner was afforded the opportunity to play with various toys and [redacted] behaviors were noted. No unusual behaviors were observed which might indicate autism. Language and communication abilities were observed, including gestures, pointing and nodding, as well as socializing abilities. The results were coded in accordance with the test criteria.

39. Ms. Jones and Mr. McAuley also considered teacher and parent rating scales, on the autism rating scales, as well as Asperger's Disorder Scales. Unlike Dr. Sisbarro, who considered only a scale obtained from the Petitioner's parent, the school psychologists, in their re-evaluation, considered autism rating

scales from both the parent and from two of the Petitioner's teachers, Ms. Evans and Ms. Medders. There was some variation in the scales reported which is not unusual. The Board's psychologists also considered the results of the IQ examination from the Child-Find Administration as well as the results from their own examination. They obtained a full scale IQ of 69. In 2006, the Child-Find Results showed an IQ of 61. There was some improvement shown, and some variation in result, but the scores indicated a low-level cognitive deficiency.

40. One of the factors the psychologists observed, upon the re-evaluation, was that the Petitioner exhibited a great deal of social reciprocity and personal engagement. [redacted] had better social skills than one ordinarily finds with autism spectrum children. [redacted] interacted with Mr. McAuley at a level of interest and interaction not often seen in a classic autistic profile. Ms. Terry Bennett, another witness for the District, testified in a similar vein. While the Petitioner had some limitations on [redacted] cognitive abilities, the language levels and delay were found to be consistent with [redacted] level of cognitive functioning and development.

41. Mr. McAuley did not agree with Dr. Sisbarro's conclusion that the Petitioner falls on the autism spectrum. He questions Dr. Sisbarro's contention regarding language therapy, as there is no indication that Dr. Sisbarro has appropriate

training in speech and language. Dr. Sisbarro admitted on cross-examination that he is not trained as a speech and language pathologist.

42. Mr. McAuley took issue with two of the tests used by Dr. Sisbarro to measure academic achievement, the Woodcock Johnson Test of Achievement and the Wexler Individual Achievement Test (WIAT-II). Those tests are considered to make it difficult to adequately evaluate the academic skills of very young children, according to Mr. McAuley. This is because of the limited sample of children at the younger end of the spectrum for those instruments. Mr. McAuley also differed with Dr. Sisbarro's contention that the Petitioner has language weaknesses. The general language composite instrument Dr. Sisbarro employed is not designed for children of the Petitioner's age. Moreover, Dr. Sisbarro's report contained a variation in results on numerous site vocabulary instruments he used. There was focus at the word level, but no much on the complex function of language level. Additionally, he did not administer a comprehensive language evaluation, which should have been administered if the use of language was a concern.

43. Mr. McAuley found that the Petitioner had no significant expressive language disorder. That is consistent with the results obtained by the speech and language pathologist, Ms. Marjorie Willingham, addressed below.

44. Mr. McAuley established that the instruments that he and Ms. Jones employed were no more complicated and difficult than the ones Dr. Sisbarro used. The District also used two tests specifically designed for young children, the Test of Early Reading Ability (TERA) and the Test of Early Math Ability (TEMA). Additionally, the Board's psychologists administered a more updated and recent version of the rating scale than the one employed by Dr. Sisbarro. Dr. Sisbarro used the Child Autism Rating Scale (CARS) while the board psychologists used the Gilliam Autism Rating Scale II (GARS-II), an updated version of CARS. The CARS instrument was one of the standards 15 to 20 years ago, but has not been updated since that time. The GARS-II instrument on the other hand has been more recently updated to better reflect autism spectrum behaviors. Although there was some indications in the scales completed that the Petitioner could be considered as having an average probability for autism, based upon a close look at the behaviors, the two psychologists for the Board determined that those behaviors did not fit an autistic profile under the diagnostic criteria.

45. Mr. McAuley also considered the DSM-IV-TR and its criteria for autistic disorder. He discussed the various aspects of social interaction, communication and patterns of behavior addressed by the DSM-IV-TR and the scores required to satisfy the diagnostic criteria for autism. The Petitioner did

not meet the criteria for an autistic disorder specified by that diagnostic manual.

46. Mr. McAuley and Ms. Jones further determined that the Petitioner does not qualify for a diagnosis of Expressive Language Disorder. Such a diagnosis would be characterized by one's expressive language being significantly below non-verbal intellectual capacity. This was not the case, as determined by the Board's psychologists and by the speech and language pathologist.

47. Mr. McAuley administered the ADOS test to the Petitioner. During his assessment of the Petitioner he did not observe [redacted] exhibit repetitive behaviors and observed that [redacted] exhibited social reciprocity. [redacted] showed typical behaviors of a [redacted]-year-old as opposed to autistic behaviors. Mr. McAuley opined that any delay in language development in the Petitioner was related to cognitive limitations he observed, rather than to any characteristics of autism.

48. Ms. Caren Jones, the other Board psychologist, administered the psychology re-evaluation along with Mr. McAuley. She has been employed as a school psychologist for a little over four years. (Her last name was Johnson at the time she administered her portion of the examination.) She holds a bachelor's degree in Family and Child Services and an Educational Specialist Certification in School Psychology. She

conducts all private assessments for the school district and she and Mr. McAuley performed the full psycho-educational evaluation for the Petitioner.

49. In determining which battery of test instruments to administer, Ms. Jones consulted with her supervisor, Rhonda Said. One of the instruments used was the Ados. For the IQ portion the Wechsler Pre-School and Primary Scale of Intelligence Instrument (WPPSI) was used. For academics, the team used the TEMA and the TERA instruments referenced above. Those instruments assess pre-academic skills and foundational skills in reading and math.

50. Ms. Jones gave checklists to both the Petitioner's [redacted] and to [redacted] teachers. One was a Behavioral Assessment for Children, Second Edition and she also distributed to them the GARS. She also gave them the Gilliam Asperger's Disorder Scale. She employed the Beery-Buktenica Developmental Test for visual motor integration. The administration of these testing instruments was performed over three evaluation dates. Approximately two and one-half hours in time was spent in the administration of the instruments.

51. Ms. Jones determined that the Petitioner was functioning at a lower cognitive ability level. The Petitioner's results, however, did not fall within the autism spectrum disorder range. There were some delays in language

noted. [redacted] exhibited some avoidance behaviors during administration of the ADOS test, which are behaviors typically observed in other children without disabilities.

52. The Petitioner exhibited scores within the low average range on one set of sub-tests and on an additional range of subtests the total test composite score was within an extremely low range. That additional battery of sub-tests involved more conceptually based tasks. The scores obtained indicated that the Petitioner had a good foundation in colors, letters, and shapes. More complex issues required more complex thinking and presented more difficulty.

53. Ms. Jones attended the meeting noticed for April 7, 2008. This was an eligibility determination meeting to review the results of the Board psychologists' re-evaluations. Also to be reviewed was the social history and the full language assessment. The Petitioner's [redacted] was present at the beginning of the meeting, which included some 18 people. Ms. Jones reviewed the results of her evaluations with the Petitioner's parent, including the diagnostic impressions in question and current levels of performance. After that the Petitioner's [redacted] and [redacted] advocate decided to leave the meeting. The parent and [redacted] advocate were encouraged to stay so that a "team decision" could be made, but they did not. The team then proceeded to the eligibility determination portion of the meeting but were unable

to complete discussions in the parent's absence. Therefore, the draft IEP Addendum that had been developed for discussion at the meeting was not implemented.

54. Ms. Jones's results do not support a clinical finding of autistic behavior. The Petitioner does not fall on the milder end of the spectrum, or among children having Asperger's Syndrome.

55. Ms. Jones had conversations with the Petitioner's teachers concerning re-direction strategies. She took into account the ratings scales information completed by the Petitioner's parent in reaching her conclusions, as well as the evaluation procedure she used, the information she received from the teachers and the Petitioner's history.

56. Ms. Jones did not believe that the Petitioner's language delay interfered with the results obtained. It was taken into consideration in evaluating those results, however. The TERA-III administered was an appropriate valid measure for younger children, with sub-tests involving alphabet, conventions, and meaning. It is not a test with instructions of a highly verbal level. This stands in contrast to Dr. Sisbarro's earlier testimony as to the level of skills needed by the Petitioner for the instructions on the test administered by the Board psychologists.

57. The psycho-educational evaluation report by the Board psychologist does not expressly state that the Petitioner is educable mentally handicapped. Such a determination is actually made by the eligibility determination team. Although the Child-Find eligibility team found a classification of autism in 2006, given the Petitioner's performance on the Board's evaluation in February and March of 2008, Ms. Jones concluded that autism is no longer an appropriate classification. The Petitioner has developed as a child and has obtained more experience in a classroom setting. The Petitioner's current level of functioning and [redacted] current pattern of behavior do not warrant a finding on the autism spectrum.

58. Additionally, Ms. Jones does not believe, based upon the Petitioner's test results, that an increase in language services is appropriate for Petitioner. She did not observe significant attention deficit problems. She believes the Petitioner has a deficit in attention but also believes that there is the ability to remain on task.

59. Ms. Beverly Harris has 31 years of experience in ESE education. She is a pre-k autism teacher and has a Master's of Education degree in Special Education for the Emotionally Disturbed from American University. During her career she has had extensive experience with all types of disabilities, including autism. She served as Supervisor of Special Education

in the District of Columbia. She has a number of years experience as an SED teacher and an LD teacher, two exceptionalities in the ESE field.

60. Ms. Harris served as an autism site coach during the Petitioner's first year at [redacted] School, in the pre-k class. Since then she has served as a pre-k teacher for the last two years at [redacted]. Ms. Harris had the responsibility for training teachers, supporting their programs and designing their classrooms at [redacted]. Since the program was a new program, those duties were a large part of her experience at [redacted].

61. Because there were two long-term substitutes in the Petitioner's pre-k classroom, due to the District's difficulty in hiring a certified ESE teacher, Ms. Harris served many times as classroom support. She was in the Petitioner's classroom approximately 80 percent of each day. She also picked [redacted] up from extended daycare and they ate breakfast together each morning. At the end of the day she escorted [redacted] to the bus. Given this extensive contact, she knew the Petitioner and the Petitioner's performance well. On occasion, when a substitute teacher was needed for one of the two long-term substitutes, Ms. Harris would stay in the Petitioner's classroom the entire day.

62. Ms. Harris also assisted in sending home daily notes to the parent. She signed the progress reports. She assisted

in developing the Petitioner's IEP and ensuring that IEP goals were addressed in the classroom.

63. Ms. Harris established that the Petitioner made progress during [redacted] year at [redacted] in pre-kindergarten. In considering [redacted] performance against the result of [redacted] first evaluation done by the school system (the Child-Find evaluation), and comparing [redacted] progress on the Bracken Test and Brigance examinations, the Petitioner progressed up to a year and one-half to two years in growth while at [redacted]. Before the new IEP was done on March 28, 2007, [redacted] had mastered all of the goals in the outstanding IEP. Ms. Harris administered the Brigance test herself. She was familiar with the results.

64. Among the results observed on gross motor measurements, the Petitioner performed at a five-year level. In speech and language skills, including participation in conversations, the Petitioner was at a five-year level. In social, emotional growth [redacted] performed higher than most of the children in the classroom. [redacted] interacted well with the children in the class and had many friends.

65. The Petitioner had some difficulty at the beginning of the year with impulsiveness in interaction with others. The Petitioner improved in this area during the school year and was much better by the end of the year. [redacted] was at the six-year

level in terms of general social and emotional growth. In this regard [redacted] played well with other children.

66. In the area of academics, by the end of the year the Petitioner had good skills in recognizing upper case letters. In the area of words and sounds recognition, the Petitioner's ability with consonants was at the six-year level, which was above the expected level. In basic math skills, [redacted] could count objects up to nine. The Petitioner also had numerical comprehension and could match one-to-one correspondents. In addition, the Petitioner could answer why and when questions, and 90 percent of Petitioner's speech was intelligible. The Petitioner's verbal directions ability and picture vocabulary skills ranged between a three-year level and 4.9 or 5.0 year level. With respect to receptive and expressive language, involving identification of body parts, [redacted]'s expressive ability was better than receptive ability.

67. The Petitioner made excellent progress in recognizing the alphabet. [redacted] also made good progress in checking the schedule and in the ability to learn and use new words. [redacted]'s ability to use words in every day language improved greatly. In summarizing that year's progress, Ms. Harris established that the Petitioner was much more social and much more academically ready to take on new tasks and a lot less impulsive.

68. Ms. Harris testified that [redacted] had 15 students in three autism classrooms during the 2006-2007 school year, when the Petitioner was there. This was a very small number of students and each classroom had a teacher and an assistant. Ms. Harris stated that when either of the two long-term substitutes was absent that she would be in the Petitioner's classroom and provided continuity of services virtually all day. In this connection one of the issues concerning which the Petitioner's parent complained is that [redacted] was unaware of substitute teachers being used in the pre-kindergarten class at [redacted]. Ms. Harris established that notes are sent home each day, with the signature of the person in charge of the classroom. Additionally, [redacted], the parent, visited the classroom [redacted]self on a number of occasions.

69. Ms Harris did not observe repetitive behaviors exhibited by the Petitioner. She saw immature behaviors at first. She was not concerned that [redacted] behaviors were autistic, but rather that they represented social concerns of impulsiveness. The Petitioner had the ability to influence classmates. The Petitioner liked to be in charge and was more advanced socially than some peers. The Petitioner came to pre-kindergarten class with already well-developed self-help skills, including the ability to use the bathroom and to open and close a zipper.

70. Ms. Harris had conversations with the Petitioner's parent [redacted], when the Petitioner's IEP of May 30, 2006, was closed out. At that time the Petitioner's parent agreed that the Petitioner had made progress while at [redacted]. Additionally, the Petitioner's parent was offered the opportunity to place the Petitioner at another school, but instead chose to have the Petitioner stay at [redacted] for the reminder of the school year.

71. Ms. Alyssa Pierce, is a speech and language pathologist employed by the Board. She received bachelor's and master's degrees from Florida State University and received training in autism while in graduate school from the Center for Autism and Related Disabilities ("CARD"). She has worked at Hope Haven's Childrens' Clinic providing speech and language services and development of an autism diagnostic and treatment program. She has also worked at Jewish Community Alliance providing speech and language therapy. She is trained and certified to administer the ADOS.

72. Ms. Pierce found the Petitioner to be one of her better performing students. [redacted] was very verbal, was developing pragmatic skills such as good eye contact and turn-taking, and was typically attentive. Ms. Pierce provided the language services indicated on the Petitioner's IEP. She saw [redacted] for 60 minutes a week for language services. [redacted] was highly verbal

compared to some of the children in the classroom and was very consistent in using phrases to speak.

73. When Ms. Pierce saw the Petitioner at [redacted] [redacted] made progress in talking in words and phrases, although not quite as much progress in speaking in sentences. At the March 28, 2007, IEP meeting the Petitioner's [redacted] requested 90 minutes of language time per week, but the team decided that the 60 minutes for language services should be left in the IEP.

74. Ms. Jill Evans is a 17-year employee of the Board. She holds a master's degree in elementary education and has taught at several Duval County schools before her assignment to [redacted]. She was selected teacher of the year in 2004 when at [redacted] School and presently provides a model demonstration classroom where other teachers can observe instruction taking place.

75. Ms. Evans taught the Petitioner in kindergarten at [redacted]. When the Petitioner arrived in Ms. Evans' kindergarten class the Petitioner had many readiness skills already. [redacted] recognized 25 of 26 upper case letters and 25 of 26 lower case letters. The Petitioner recognized numerals 0 through 10 and could name all the colors assessed as well as eight or nine shapes. The Petitioner could write [redacted] first name independently. [redacted]'s skills were equivalent to or above the level expected of kindergarteners for readiness upon [redacted] arrival

at [redacted]. This demonstrates that [redacted] had received good quality instruction in the pre-kindergarten year.

76. The Petitioner was a non-reader when [redacted] first began [redacted] kindergarten class at [redacted]. [redacted] made great progress in that area, however, and by the end of the year was at a standard level in reading. On sight-words, or high frequency words, he was able to read 60 out of 63 words. Sight words are foundational words needed in beginning reading and which cannot be "sounded out." The Petitioner had a good foundation of knowledge of those words.

77. During the first quarter of that school year the Petitioner received an unsatisfactory grade in math. The Petitioner improved that as the year progressed, however, and finished the year with an S+ grade in math, which is satisfactory. Communication was graded as satisfactory by the year end. Ms. Evans was with the Petitioner every day and delivered all services required by the IEP. She found that good progress was made towards annual goals and short term objectives.

78. The Petitioner was reading at reading level B by the end of [redacted] kindergarten year. That is the level necessary to be considered prepared for first grade work. The Petitioner thus made substantial progress after starting out the year as a non-reader. [redacted] also progressed well in writing and drawing during

the kindergarten year. [redacted] came into the kindergarten year at the "scribbling stage" of writing development. [redacted] was able to write sentences using the high frequency words and was able to "stretch out" words and write down the letters by the end of the school year. This was considered to be good grade level progress. In writing, the Petitioner performed satisfactorily in three basic types of writing: narrative, functional, and responsive literature. The Petitioner was not particularly disruptive for a child of that age, according to Ms. Evans.

79. Ms. Evans observed that the Petitioner had some difficulty communicating in lengthy sentences. The Petitioner socially interacted well with other students, however. She found [redacted] to be an average student who made satisfactory progress. There were have some difficulties with attention, but these were no more unusual than such difficulties with other kindergarten students. The Petitioner was very easy to redirect, however, when wavering from the task at hand.

80. When the Petitioner received the unsatisfactory grade in math, a letter was sent to the parent advising of that first quarter result. It was accompanied by an explanatory statement stapled to the letter to clarify that the Petitioner needed to make better progress. This was accomplished. The Petitioenr's progress as to [redacted] math performance is documented in Respondent's Exhibits 79, 80, and 81, in evidence.

81. In her instruction of the Petitioner, Ms. Evans provided the accommodations set forth in [redacted] IEP. These included preferential seating, visual picture cues, peer assistance, and extra opportunities and time to complete assignments and re-take tests, if needed.

82. The Petitioner made progress in reading, as found above, and as evidenced by the developmental reading assessment instrument which was administered. [redacted] also showed progress in letter naming, awareness and decoding. Ms. Evans found [redacted] to be ready to enter first grade and believes [redacted] received a FAPE. She acknowledged [redacted] language weakness, but did not believe it to be an obstacle to [redacted] being successful, as [redacted] progress shows. The Petitioner was following the regular "Sunshine State Standards" and earned [redacted] promotion to first grade based upon those standards. The Petitioner got access to instruction in the general curriculum and the IEP was complied with during instruction by Ms. Evans. The Petitioner's parent did not observe the Petitioner in Ms. Evans's classroom or on related field trips.

83. Ms. Evans was among those Board personnel present when the Petitioner's parent and [redacted] advocate attended the initial portion of the IEP meeting noticed for April 7, 2008. Like the other Board personnel who testified, Ms. Evans believes that the

proposed addendum for the Petitioner's IEP, prepared for that IEP meeting, was appropriate and should be implemented.

84. Ms. Marjorie Willingham holds a bachelor's and master's degree in Speech Language Pathology. She is a speech language pathologist, and has had 24 years experience with the Duval County system, and nine years previously in the Manatee County School System. She is certified by the American Speech and Hearing Association, has a State of Florida license and a teaching certificate in speech pathology. Ms. Willingham has worked at [redacted] School since it opened. She worked at various other Duval County Schools before that time and has been honored as teacher of the year twice by the Duval County School District. She also received that honor in her prior district in Manatee County. She has taught as an adjunct professor of Speech and Language Development at Nova University and has been practicing in the area of speech and language pathology for 35 years.

85. Ms. Willingham initially provided 60 minutes of language services to the Petitioner under the original IEP at [redacted]. This was done in 30 minute sessions, bi-weekly. When the IEP was revised, the sessions increased to three for a total of 90 minutes per week.

86. Ms. Willingham performed an updated language evaluation for the Petitioner in February 2008. This included a

global language test, which measures receptive and expressive language skills. The tests included the Test of Language Development Primary; the Pre-K Clinic Evaluation of Language Fundamentals; and the Test of Auditory Comprehension of Language, among other instruments. In all the measures, using the Communication Severity Rating Guidelines of the State of Florida, the Petitioner's language scores fell within expected levels, compared to his performance IQ score. [redacted]'s non-verbal and language scores were evenly developed, which indicates that current language performance is consistent with ability level. By the state's standards there is thus no severe problem or deficit.

87. Ms. Willingham also participated in selecting the language goals on the Petitioner's IEP. When the IEP was updated, the goals included working on "WH" words; sentence structure; concepts; and categories. [redacted] made progress on all of those goals. For example, in the area of categories, performance improved to a level where [redacted] could identify 36 categories with over 80 percent accuracy. [redacted] had started out being able to identify 26 categories. Ms. Willingham also established progress with regard to the other goals in the IEP.

88. Ms. Willingham performs approximately 30 to 50 language evaluations every year. She has performed over 2,000 language evaluations in the course of her career. The results

of her evaluations were sent to the parent before the scheduled parent conference.

89. Ms. Willingham believes that the level of language services given the Petitioner is appropriate, given that there is not a significant communication severity ranking for the Petitioner. The 90 minutes of service, provided in the least restrictive environment, are appropriate. Besides therapy, the Petitioner's exposure to oral language in the classroom experience is developing language and social skills with peers.

90. As shown by Ms. Willingham's testimony, the Petitioner has made substantial progress through the course of the kindergarten year. Language skills are consistent with cognitive level and non-verbal skills. [redacted]'s non-verbal or performance IQ is 73. The language score on the global evaluation was 68, only five points below that, or a 1.27 difference on the standard deviation. Similarly, [redacted]'s other global score was .47 standard deviations, or less than one standard deviation below the Petitioner's non-verbal skills.

91. The Petitioner had entered kindergarten knowing all of the letters, shapes, all of the sounds and all of the required numbers. This is a very good performance level compared to other children under Ms. Willingham's charge. This demonstrates the effectiveness of the services delivered to the Petitioner at [redacted] School. Ms. Willingham opined that the Petitioner's

language impairment would not affect the outcome of any testing in which the Petitioner participates.

92. Ms. Terrie Bennett testified on behalf of the District. She has been employed by the Board for some 35 years. She holds a bachelor's degree in elementary education from Florida Statute University and a master's degree in learning disabilities from the University of Florida. She has 300 hours of specialized training in English as a Second Language (ESOL) and also has an autism endorsement.

93. Ms. Bennett has taught for some 10 years in a self-contained pre-school handicapped class, involving all disabilities in one classroom. These included specific learning disabilities, trainable mentally handicapped students, educable mentally handicapped students and emotionally handicapped students. She is a member of the Autism Society of America and a past president of the Council for Exceptional Children. She was runner-up for the State of Florida Counsel for Exceptional Children, Teacher of the Year. She mentors new teachers in ESE for the District as one of her job duties and also mentors site coaches as well. She works with the Center for Autism and Related Disabilities as part of her job duties.

94. Ms. Bennett met the Petitioner's parent and went to the school with [redacted] to observe a classroom. While there she discussed with the Petitioner's parent the autism training

received by District teachers. Following this discussion she agreed to do a training for the teachers. Among her other trainings conducted in her career, she has made presentations to some 30 faculties in the District and has been a presenter at the "Tools Conference" on autism. She provides training for District principals and guidance counselors as well.

95. She noted that the Petitioner had a lot of verbal ability for a child classified as autistic. The Petitioner remembered Ms. Bennett's name which is very unusual for autistic children. Ms. Bennett had not experienced any child in one of the self-contained classrooms remembering her name. Ms. Bennett observed that the Petitioner had not exhibited a lot of characteristics seen or expected in a child with autism, such as deficit in communication. [redacted] is a very social child and children with autism typically have a deficit in social interaction. The Petitioner, rather, was the "star of the class" and had friends in the class. She never observed restrictive, repetitive patterns of behavior or self-stimulatory behavior in the Petitioner. Ms. Bennett thus had doubts that the classification of autism for the Petitioner was appropriate, from her first encounter with the Petitioner.

96. Ms. Bennett has participated in over 1,000 IEP meetings during her career and has reviewed proposed draft IEP addenda including the draft addendum prepared for the April 7,

2008, meeting. She concurred with the other Board personnel testifying that the addendum would provide additional services to meet the Petitioner's needs. It would, for one thing, increase language services from 60 minutes to 90 minutes per week.

97. Children with Autism Spectrum Disorder demonstrate similar behaviors across different settings according to Ms. Bennett. If they have social interaction difficulties or communication issues at school they would exhibit those same difficulties in the community, as well as in their behavior with their parents. Ms. Bennett would expect the Petitioner to exhibit autistic behaviors at school if indeed the Petitioner were autistic.

98. Ms. Bennett opined that one-on-one para-professional services would be inappropriate for the Petitioner. They would not allow the Petitioner to gain independence in the educational setting and would tend to result in obtaining educational instruction from a para-professional, rather than from a teacher. Such form of provision of services would also negatively affect socialization skills and interactions.

99. Although Ms. Bennett acknowledged that children can have multiple levels under the IDEA, she has never seen a high-functioning autistic child act normal one day and autistic the next. She does not believe the Petitioner should be considered

to be autistic, at least any longer. She was familiar with the pre-kindergarten classes at [redacted] School, including the autistic students there. She established that the children in that class did make progress on behavior, goals, objectives, and communication.

100. It was Ms. Bennett's understanding that the Petitioner's parent wanted a classification of autism with respect to the Child-Find effort and IEP of 2006 because that would result in a smaller classroom setting. Ms. Bennett questioned that decision at the time and called the school to inquire why the Petitioner was in a self-contained classroom. The person she conversed with at the school confirmed that it was based upon [redacted]'s decision, rather than agreeing to a placement in the developmentally delayed classroom.

101. Ms. Bennett has not observed the Petitioner having difficulties with transitions, such as autistic children typically have, even in a big classroom. Ms. Bennett also was present for the meeting which was to occur April 7, 2008. Classification for eligibility purposes does not control what services are included in a child's IEP. Rather, the services are based on the needs of the child without regard to what the child's classification or eligibility is.

CONCLUSIONS OF LAW

102. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding pursuant to Section 1003.57(1)(e), Florida Statutes (2008), and Florida Administrative Code Rule 6A-6.03311.

103. The Petitioner herein has the burden of proof on the Amended Petition and the Respondent has the burden of proof on its Counter-Petition. Schaffer ex rel Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005); Devine v. Indian River County School Board, 249 F.3d 1289, 1291-92 (11th Cir. 2001).

104. 20 U.S.C. Section 1400, et seq., "the IDEA" requires the School District to provide FAPE to a student with exceptionalities or who is in need of special education services. See 20 U.S.C. § 1400(d)(1)(A). A school district generally must develop an IEP for each student identified as eligible for special education services, and must follow certain procedures in the process of arriving at an IEP. See 20 U.S.C. § 1414.

105. The IDEA defines FAPE at 20 U.S.C. § 1401(a)(8), as:

> [S]pecial education and related services that have been provided at public expense, at public supervision and direction, without charge; meet the standards of the State Educational Agency; include an appropriate pre-school, elementary or secondary school education in the state involved; and are

> provided in conformity with the individualized program required under Section 1414(d).

106. The United State Supreme Court in 1982 set forth the legal standard for determining whether an educational agency (state or local) has provided FAPE or has violated the IDEA. In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982), the court set forth the two-part standard:

> [A] court's inquiry . . . is two fold. First, has the state complied with the procedures set forth in the IDEA? And second, is the individualized education program developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by congress.

458 U.S. at 206. See also School Board of Collier County, Florida v. K.C., 285 F.3d 977 (11th Cir. 2002).

107. The nature and extent of educational benefits required to be provided by Florida School Districts was discussed in School Board of Martin County v. A.S., 727 So. 2d 1071 (Fla. 4th DCA 1999), wherein the court held, regarding the standard of educational benefits which should be provided to exceptional students:

> Federal cases have clarified what 'reasonably calculated to enable the child to receive educational benefits' means. Education benefits under IDEA must be more

> than trivial or de minimis. J.S.K. v. Hendry County School District, 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990). Although they must be 'meaningful,' there is no requirement to maximize each child's potential. Rowley, (citation omitted).

108. It must be determined whether there has been compliance with the second portion of the Rowley test, cited above, at issue in this case. In this regard, an appropriate education does not mean a "potential-maximizing education." Rowley, at 198, n.21. The issue in reviewing an IEP is whether the student has received "the basic floor of opportunity" to receive an education benefit. J.S.K. v. Hendry County School Board, 941 F.2d at 1572-1573; Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991). FAPE does, however, require "more than a trivial educational benefit." See Ridgewood Board of Education v. N.E., 172 F.2d 238, 247 (3rd Cir. 1999). An IEP must provide "significant learning" and "meaningful benefit" when considered in light of a student's potential and individual abilities. Ridgewood Board of Education v. N.E., supra at 248.

109. In applying these standards it is clear that the Respondent has provided the Petitioner with a FAPE. Preponderant, persuasive evidence shows that a FAPE was provided at both [redacted] School and at [redacted] School in the pre-kindergarten and kindergarten school years and under the IEPs in effect at those

times. The above Findings of Fact support the conclusion that the Petitioner made good progress at both schools, in both school years, in essentially all the areas concerning academics and socialization upon which evidence was adduced at hearing. The verbal skills improved. The Petitioner went from being a non-reader to a grade-level reader. Writing skills went from scribbling to identifiable written words and sentences. Social skills improved with respect to learning how to deal with strangers, teachers, and fellow students. [redacted]'s letter recognition improved substantially and the ability to string words together into sentences improved. Math, which was a weak point early in the kindergarten year, improved significantly by the end of that year to a satisfactory level. There is no question, based upon the preponderant, persuasive evidence adduced by the Board through its witnesses, that the Petitioner improved significantly and certainly sufficiently to be promoted to first grade. The Petitioner was promoted.

110. Concerning the issue of use of substitute teachers during the pre-k year for the Petitioner, the evidence establishes that the services required by the Petitioner's IEP were rendered and actually exceeded. If, in fact, any of the substitute teachers did not meet the state's criteria (AA degree), which the Petitioner did not prove, no such deficiency resulted in a denial of FAPE in any manner. Moreover, by the

earlier ruling and Order in this case, it has been established that the qualifications of any particular substitute were not an appropriate issue for hearing based upon the provisions of the IDEA and other authorities cited in that Order.

111. The Petitioner sought the provision of an Independent Educational Evaluation. By earlier Order, that was allowed, although the question of which party would bear the expense of such an IEE was reserved as an issue to be litigated at hearing.

112. With respect to Count I of the Respondent's Counter-Petition for due process, raising the IEE issue, the federal regulation at 34 C.F.R. Section 300.502 provides in pertinent part as follows concerning the IEE:

> § 300.502 Independent educational evaluation.
>
> (a) General. (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraph (b) through (e) of this section.
>
> * * *
>
> (3) For the purposes of this subpart-
> (i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and
> (ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either-

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

* * *

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent agrees.

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation-

> (1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provisions of FAPE to the child; and
>
> (2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.
>
> * * *
>
> (e) Agency criteria. (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.
>
> (2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1) and (d)(2)(A)). (See also Fla. Admin. Code R. 6A-6.03311(7), the substantively comparable state counterpart.)

113. The forgoing authority shows that the Petitioner is entitled to an IEE at public expense if the parent disagrees with an evaluation obtained by the Board, pursuant to sub-section 300.502(b)(i), quoted above, but subject to the three conditions specified in sub-sections (b)(2) through (b)(4),

quoted above. One of those sub-sections, (b)(2)(i), affords the Respondent the opportunity to file a due process complaint to show that its evaluation is appropriate, which the Respondent did in this case.

114. A parent's right to an IEE at public expense is overcome if the Board is able to show that the evaluation obtained by the parent did not meet agency criteria. 34 C.F.R. § 502(b)(2)(ii). There was extensive evidence presented as to the appropriateness of the Respondent's psychologists' evaluation, and as to the frailties of the evaluation, in testing manner and procedures, employed by Dr. Sisbarro, in terms of the Board's criteria. The preponderant, persuasive evidence establishes that the evaluation obtained by the District from the psychologists Ms. Jones and Mr. McAuley, was appropriate and that the evaluation performed by Dr. Sisbarro was deficient as to a number of areas, District criteria and methodology, described in more detail in the above Findings of Fact, concerning the testing instruments he used, the protocols, the assessment tools, the lack of age appropriateness of one or more testing instruments and the use of rating scales given only to the parent, but not to the Petitioner's teachers. In light of those reasons, the evaluation findings, protocols, methods, testing instruments, their mode of application, and the results obtained and used by psychologists McAuley and Jones are more

persuasive and are accepted over those of Dr. Sisbarro. Thus their opinions are accepted as having greater weight and persuasiveness.

115. In view of the above circumstances, the Petitioner's parent was entitled to obtain the IEE performed by Dr. Sisbarro, but is not entitled to have the Respondent pay for the charges Dr. Sisbarro may have imposed for his evaluation. See Board of Education of the Croton-Harmon Union Free School District, 49 IDELR 265, 108 LRP 549 (SEA NY 2007); Broward County School District, 5 ECLPR 118, 108 LRP 11678 (SEA Fla. 2007). See generally M.T.V. v. Dekalb County School District, 447 F.3d 1153 (11th Cir. 2007); Herbin v. Dist. Of Columbia, 372 F. Supp. 2d (D.C. Dist. 2005); DeMerchant v. Springfield School District, 2007 U.S. Dist. Lexis 65233 (D. Vt. September 4, 2007).

116. The preponderant, persuasive evidence also establishes that Count II of the Respondent's Counter-Petition has been proven. The Respondent's witnesses testified that the proposed IEP addendum, received in evidence, as part of the Respondent's Composite Exhibit One, was an appropriate educational program for the Petitioner for services on a prospective basis. The fact that the Petitioner's [redacted] elected not to remain at the April 7, 2008, meeting to discuss the contents of the IEP addendum, despite the District personnel urging [redacted] to do so, does not bar adoption of the addendum. The

parent made a voluntary election not to continue to participate, but more importantly has had an opportunity to present evidence in opposition to the Respondent Board's position in this proceeding, including its position that the addendum to the IEP should be adopted. The preponderant, persuasive evidence in the form of the testimony of the Respondent's witnesses, their testing and evaluating as referenced in more detail in the above Findings of Fact, shows that the addendum would provide a starting point for the provision of an appropriate educational program and services for the Petitioner.

117. In consideration of the foregoing, the addendum to the IEP initially advanced by the Board at the April 7, 2008, meeting is approved as a starting point for adoption of an operative IEP for the Petitioner. This shall be after an IEP meeting is held with appropriate participants, including the parent and with all appropriate discussion, consultations and approvals being arrived at with appropriate signatures. This determination is with the qualification and limitation that the exceptionality for the Petitioner may be Educable Mentally Handicapped but, based upon the preponderant, persuasive evidence in this record, it shall not be Autism or Autism Spectrum Disorder. The Petitioner has not proven with persuasive evidence that the exceptionality sought in [redacted] amended petition is appropriate and should be adopted. The

evidence also establishes, and indeed the Respondent Board agrees, that the language-related services presently provided to the Petitioner should be increased from 60 minutes to 90 minutes per week.

ORDER

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and the arguments of the parties, it is, therefore,

ORDERED: That the Petitioner's claims advanced in the Amended Petition are denied.

The Respondent's claim in Count I of its Counter-Petition is granted, as to the IEE performed by Dr. Sisbarro and the Respondent is not responsible for payment of any charges that have been incurred with or billed by Dr. Sisbarro.

The Respondent's claim in Count II of the Counter-Petition is granted in part, insofar as the proposed IEP addendum advanced at the April 7, 2008, meeting is approved as an appropriate starting point for completion of an IEP, by a duly convened team for adoption as to the Petitioner, with the eligibility classification of educable mentally handicapped, and with the language-related services to be provided thereby increased from 60 minutes to 90 minutes per week.

DONE AND ORDERED this 4th day of March, 2009, in Tallahassee, Leon County, Florida.

S

P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2009.

ENDNOTES

[1/] The recent amendments to the Act have now named it "Individuals With Disabilities in Education Improvement Act." Nonetheless it is referred to henceforth in this Final Order by its familiar name and acronym IDEA.

[2/] See C.P. v. Leon County School Board of Florida, 483 F.3d 1151 (11th Cir. 2007); cert. denied, ___ U.S. ___, 128 S. Ct. 232, 169 L.Ed. 2nd 175 (2007).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

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