**Miami-Dade County School District**
**No. 08-2399E**
**Initiated By: Parent**
**Hearing Officer: Stuart M. Lerner**
**Date Of Final Order: April 17, 2009**

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| [redacted], | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 08-2399E |
| | ) | |
| MIAMI-DADE COUNTY SCHOOL BOARD, | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

FINAL ORDER ON PLACEMENT

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(1)(e), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on October 20 and 21, 2008, November 10, 2008, and February 3, 2009, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Rochelle Marcus, Esquire
Lauren McBride, Esquire
Ann Siegel, Esquire
Legal Aid Service of Broward County, Inc.
491 North State Road 7

Plantation, Florida 33317

For Respondent: Barbara J. Myrick, Esquire
Office of the School Board Attorney
Broward County School Board
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## STATEMENT OF THE ISSUE

Whether Petitioner (who will also be referred to herein as " [redacted]" or "[redacted]") needs to be placed in a residential treatment facility (specifically, the Florida Institute for Neurologic Rehabilitation), at public expense, in order to receive a free appropriate public education in the least restrictive environment or is the placement that Petitioner has been offered at a special day school (specifically, [redacted] Center) adequate for that purpose.

## PRELIMINARY STATEMENT

On May 15, 2008, Petitioner, through counsel, submitted to the Broward County School Board (School Board) a request for a due process hearing (Complaint). In the Complaint, Petitioner stated a due process hearing was being requested "for the following reasons":

> (1) The School Board of Broward County, Florida (hereafter "District") has failed and refused to provide [Petitioner] with a free and appropriate public education, and more specifically has not provided [Petitioner] with an individual education to meet [Petitioner's] unique needs as [Petitioner] has been only receiving hospital homebound instruction for two hours

a week since the fifth grade. [Petitioner] was denied access to the Center School placement on the basis that the school could not meet [Petitioner's] medical/educational needs.

[Petitioner] is an [redacted]-year-old . . . with intractable epilepsy. [Petitioner] is currently under the exceptional education services eligibility of Trainable Mentally Handicapped, Autism Spectrum Disorder, Language Impaired and Occupational Therapy.

[Petitioner] has been educated by the District from preschool to the present. [Petitioner] attended preschool at the District contracted program known as [redacted] School. [Petitioner] attended [redacted] for kindergarten through fifth grade. [Petitioner's] mother . . . was advised that none of the District's educational settings could accommodate [Petitioner's] unique educational/medical needs. Upon transitioning to middle school, [Petitioner] was placed on hospital homebound where [Petitioner] remained until April 29, 2008. The District's IEP Committee overrode the determination of [Petitioner's] treating physicians, Dr. Duchowny and Dr. Linn. They submitted the required reports that state [Petitioner] cannot safely attend school. The District nurse, Rhonda [E]lba, informed the IEP committee that she has the authority to override the doctors' determination that [Petitioner] cannot safely attend school. She informed the committee that it was solely the decision of the Medical Fragile Committee to have [Petitioner] attend school, regardless of any doctors' determination to the contrary. The parent has requested that the District provide [Petitioner's] education at the Florida Institute for Neurologic[] Re[habilitation], as recommended by Dr. Duchowny, [Petitioner's] treating neurologist.

> The District has offered [redacted] [s] as the educational placement. The parent does not believe that [redacted] [s] can meet her [child's] unique educational, medical and safety needs.
>
> (2) The District has failed to provide [Petitioner] an appropriate education by providing two hours of hospital homebound services from middle school (2002) to present (2008).
>
> Due to the District[']s misrepresentation to the parent we should not be limited to the two-year statute of limitations. The District's misrepresentation and violation of the IDEA have continued since [Petitioner's] transition to middle school. The District informed [the parent] that [Petitioner] could only receive two hours of education a week on hospital homebound. This two hour determination of services was not based on [Petitioner's] unique educational needs, but rather, it was solely based on the service delivery model of hospital homebound and administrative convenience.
>
> (3) The District has failed and refused to provide [Petitioner] with appropriate occupational therapy services for the 2006-2007 and 2007-2008 school years.
>
> (4) The District has failed to provide [Petitioner] with an appropriate transition plan to meet [Petitioner's] unique needs and prepare [Petitioner] for further education and independent living for the 2006-2007 and 2007-2008 school years.

Petitioner indicated in the Complaint that a due process hearing "would not be necessary if the District would provide":

> (1) Tuition for [Petitioner] to attend the [redacted];

> (2) [Petitioner] with an appropriate transition plan to meet [Petitioner's] unique needs and prepare [Petitioner] for further education and independent living;
>
> (3) [Petitioner] with compensatory education for six years beyond [Petitioner's] [redacted] birthday; and
>
> (4) Attorney's fees.

The Complaint was transmitted to DOAH on May 19, 2008. The case was assigned to the undersigned, who, on May 20, 2008, issued a Case Management Order. After receiving the parties' Joint Scheduling Report and hearing from the parties in a telephonic prehearing conference, the undersigned scheduled the due process hearing in this case for July 29 through August 1, 2008 (dates on which the parties indicated that they would be available for hearing).

On July 2, 2008, the parties filed a motion jointly requesting that the hearing be continued to allow them additional time to complete discovery. By order issued July 8, 2008, the undersigned granted the motion and directed the parties to advise him by August 28, 2008, "as to the status of this matter and as to the length of time required for the final hearing in this cause and several mutually-agreeable dates for re-scheduling the final hearing should one be necessary." In his order, the undersigned further stated:

> The deadline for the issuance of the final order in this case is hereby extended. The

> length of the extension shall be equal to the number of days from the last day of the "Hearing Period" specified in the Case Management Order (July 11, 2008) to the yet-to-be determined first day of the rescheduled hearing in this case.

On August 28, 2008, the parties timely filed the status report required by the undersigned's July 8, 2008, order. The undersigned thereafter, on September 2, 2008, rescheduled the due process hearing in this case for October 1 through 3, 2008 (which were among the "mutually-agreeable dates" cited in the parties' status report).

On September 22, 2008, the School Board filed an unopposed motion requesting the rescheduled due process hearing be continued. A hearing on the motion was held by telephone conference call on September 23, 2008. By order issued September 24, 2008, the motion for continuance was granted and the due process hearing was again rescheduled, this time for October 20 and 21, 2008, and November 10, 2008.

On October 14, 2008, the School Board, on behalf of both parties, filed a Joint Pre-Hearing Stipulation, which read as follows:

> 1. Petitioner's Counsel has authorized The School Board to file the Pre-Hearing Stipulation on behalf of both parties.
>
> 2. The controversy of the instant case is whether or not Petitioner needs to be placed in a residential treatment facility, at

public expense, to receive a free appropriate public education.

3. The Petitioner asserts that [redacted] needs to be placed in a residential facility in order for [redacted] to receive a free appropriate public education.

4. The School Board asserts it can provide [redacted] with a free appropriate public education in a day school and/or through hospital homebound.

5. Each party has provided to the other party the exhibits they anticipate offering at the hearing. Neither party objects to any of the exhibits the other party anticipates offering at the hearing.

6. Each party has provided to the other party a list of witnesses to be called at the hearing.

7. The following are facts which are admitted and will require no proof at the hearing:

a. [redacted] is an [redacted]-year-old . . . [redacted's] date of birth is [redacted].

b. [redacted] has been diagnosed with severe intractable epilepsy (seizure disorder).

c. [redacted] is currently eligible for exceptional education services in the areas of Trainable Mentally Handicapped, Autism Spectrum Disorder, Language Impaired and Occupational Therapy.

d. [redacted] was previously eligible for exceptional education services in the areas of Hospital or Homebound, Educable Mentally Handicapped, Autistic, Language Impaired and Occupational Therapy.

e. [redacted] has been educated by The School Board from preschool to the present.

f. [redacted] attended preschool at The School Board's contracted program known as [redacted] School.

g. [redacted] attended [redacted] School for kindergarten through fifth grade.

h. Upon transitioning to middle school, [redacted] was made eligible for hospital homebound services. On April 29, 2008, eligibility for hospital homebound services was removed from [redacted]'s IEP, however [redacted] has continued to receive hospital homebound services under the "stay-put" provision of IDEA. [redacted] has received two hours per week of hospital homebound instruction from middle school (2002) to present (2008).

i. [redacted] has received sixty minutes of speech and language services per week from middle school (2002) to present (2008).

j. [redacted] received 60 minutes per month of occupational therapy consultant services for the 2007-2008 school year. [redacted] received 15 minutes per week of occupational therapy services for the 2006-2007 school year.

k. [redacted] requires continuous supervision to ensure physical safety.

l. [redacted].'s treating physicians, Dr. Duchowny and Dr. Linn, submitted the required physician's reports that state [redacted] cannot safely attend school.

m. [redacted]'s parent has requested that The School Board provide [redacted] education at the [redacted].

n. The School Board does not believe a residential facility is necessary for [redacted] to receive a free appropriate public education.

o. The School Board has offered [redacted] [s] Center as the educational placement for [redacted].

L. Additionally, The School Board has offered to provide a full-time nurse and aide to be with [redacted] while [redacted] attends [redacted] [s] Center.

p. The parent does not believe that [redacted] [s] can meet her [child's] unique educational, medical and safety needs.

q. In an attempt to control [redacted]'s seizures that had increased, [redacted] was placed in a medically induced coma in 2007.

r. [redacted]'s seizures are currently not under control and are unpredictable.

8. The parties believe the hearing will require a minimum of three days.

During a telephone conference call in which the undersigned and the parties participated on October 14, 2008, it was agreed that the due process hearing scheduled for October 20 and 21 and November 10, 2008, would be devoted exclusively to the issue (set forth in paragraph 2 of the of parties' Joint Pre-Hearing Stipulation) of "whether or not Petitioner needs to be placed in a residential treatment facility, at public expense, to receive a free appropriate public education" (Placement Issue) and that the remaining issues raised in the Complaint would be litigated, if they still remained in dispute, only after the Placement Issue had been resolved.

The due process hearing on the Placement Issue was held on October 20 and 21, 2008, and November 10, 2008, as scheduled, but was not completed. After consulting with the parties, the

undersigned scheduled an additional day of hearing for December 19, 2008. On December 18, 2008, the School Board filed an unopposed motion requesting a continuation of the December 19, 2008, hearing date on the ground that its attorney was "unavailable to attend the hearing due to illness." The undersigned granted the motion and directed the parties to advise him in writing no later than January 7, 2009, as to when they would be available for hearing. Such a written advisement was timely filed on January 7, 2009. It indicated that the earliest date on which both parties would be available for hearing was February 3, 2009. The undersigned thereafter issued a notice advising the parties that the due process hearing in this case would resume on February 3, 2009. The hearing resumed on February 3, 2009, as scheduled, and was completed on that date.

Over the course of the four days of hearing, the following witnesses testified: Lanetta Henry; Mary Hohmann; Ines Negron; Janet Hooper; Merle Mazzarino; Jim Fowler; Michael McGinty; Patricia Sanchez; William Adrian Young, LPN; Rhonda Elba, RN; Debbie Hemans; Patricia Dean, ARNP; Victoria Graef; Michael Duchowny, M.D.; Felicia Droze Starkes; Petitioner's mother, [redacted] (who will also be referred to herein as "Mother"); Hector Troche; Maureen O'Keefe, RN; Carol Farrell; Wanda Williams; Petitioner's father, [redacted] (who will also be referred to herein as

"Father"); Lida Yocum; Stacy Wolfe; and Laszlo Mate, M.D. In addition to the testimony of these witnesses, the following exhibits were offered and received into evidence: Petitioner's Exhibits 1 through 8, 13, 17 through 61, 63 through 73, 75 through 77, 79 through 84 and 86 (the deposition of Henry Lin, M. D., which was offered and received in lieu of his live testimony); and Respondent's Exhibits 3, 10, 26, and 39.

At the hearing, the parties agreed to the following extended deadlines, which the undersigned thereupon imposed: proposed final orders on the Placement Issue to be filed no later than 30 days from the date of the filing of the complete hearing transcript; the final order on the Placement Issue to be issued no later than 30 days after the filing of the parties' proposed final orders on the Placement Issue; a joint statement of unresolved issues to be filed no later than 20 days after the issuance of the final order on the Placement Issue; and the final order on the remaining unresolved issues raised in the Complaint, if any, to be issued no later than 30 days after the filing of the parties' proposed final orders on any such remaining unresolved issues.

The fourth and final volume of the Transcript of the due process hearing was filed with DOAH on February 25, 2009.

Petitioner and the School Board both timely submitted their Proposed Final Orders on the Placement Issue on March 27, 2009.

Thus, pursuant to the specific extension of time the undersigned granted at the due process hearing, the extended deadline for the issuance of this Final Order on Placement is Monday, April 27, 2009.

## FINDINGS OF FACT

Based on the evidence adduced at the due process hearing and the record as a whole, the following findings of fact are made to supplement and clarify the extensive factual stipulations set forth in the parties' Joint Pre-Hearing Stipulation[2]:

1. Petitioner was born to [redacted] and [redacted] in [redacted], the "product of an uncomplicated pregnancy" and a delivery that was "without incident."

2. Petitioner developed normally until the age of 18 months, when there was a "significant change."

3. At times, Petitioner would "stare and be unresponsive." These events were determined to be seizures, and a diagnosis of epilepsy was made.

4. "Other medical conditions were also discovered," including those involving the gastrointestinal tract. Petitioner's "gastrointestinal anomalies eventually caused [Petitioner] to develop central anorexia and necessitated tube feeding."

5. Despite having a G-tube, Petitioner "does eat regular food sometimes."

6. Petitioner has "global neurological delay particularly in the cognitive domain" and functions within the range of a three-to-five-year-old, needing help with various activities of daily living.

7. It is suspected that Petitioner suffers from Angelman syndrome, a genetic disorder characterized by cognitive and developmental delay, impulsive behavior, and seizures.

8. Of the medical problems Petitioner has, the one that presents perhaps the greatest challenge from an educational perspective is Petitioner's epilepsy.

9. Notwithstanding that Petitioner has received the most "advanced" care available in North America, Petitioner's epilepsy has been resistant to treatment. Nothing has been able to stop Petitioner from having seizures, and these seizures "are unpredictable in severity and in timing and duration."

10. There is, however, a medication -- Diastat --that is generally effective in "break[ing]" Petitioner's seizure activity once it starts. Diastat is a gel form of Valium. It is administered rectally (which can present a challenge when there is flailing or thrashing). If properly trained, a layperson can administer Diastat.

11. Petitioner has not always responded to Diastat. In November 2006, Petitioner went into status epilepticus, a condition where seizure activity continues unabated, and was hospitalized at [redacted] Hospital for approximately three months under the supervision of Michael Duchowny, M. D. Dr. Duchowny directs the hospital's Comprehensive Epilepsy Program, and he is board-certified in pediatrics and neurology. Petitioner has been Dr. Duchowny's patient since December 2005.

12. In the hospital, Petitioner "receiv[ed] the strongest medications [in an effort] to bring [Petitioner's] seizures under control." The treatment included placing Petitioner in a drug-induced coma. Most of Petitioner's hospital stay was spent in the hospital's intensive care unit.

13. At the time of Petitioner's discharge on February 14, 2007, although Petitioner was no longer in status epilepticus, Petitioner's "seizures continue[d] to be a problem." There was evidence of "neurological regression at that time as well."

14. The discharge summary that Dr. Duchowny "authenticated" contained the following "final diagnosis":

> Intractable seizure disorder, status post pediatric intensive care unit admission for 2-1/2 months, status post PENTOBARBITAL and VERSED drip; Angelman mosaicism; neurogenic bladder, status post gastrostomy tube placement; peptic ulcer disease; and severe neurodevelopmental delay.

15. Petitioner suffered "a degree of [permanent brain] cell loss or atrophy . . . as a consequence of the status epilepticus," causing a loss of cognitive ability. In addition, there were "behavioral and motor changes." Behaviorally, Petitioner was "more prone to antisocial behaviors, behavioral outburst[s], and aggressive episodes." In terms of Petitioner's "motor abilities," Petitioner "was unsteady in terms of . . . walking and [Petitioner's] muscle tone had changed," resulting in a decrease in strength.

16. Cognitively, Petitioner is "very compromised" and the "prognosis is limited." "[F]rom a behavioral standpoint," there is greater hope for improvement. A "behavior modification program" that would help Petitioner's brain systems to reorganize "could be [of] significant benefit" in helping Petitioner "to adapt more to society."

17. Unfortunately, Petitioner's medical "situation . . . has been deteriorating" since [Petitioner's] discharge from the hospital in February 2007. There has not been another episode of status epilepticus, but the seizures have "increased a little bit" in frequency. Every day, Petitioner has several petit mal seizures and one or two grand mal seizures on average. Most of the seizures occur "when [Petitioner] sleeps." It is usually not "until between 10 and 11 [in the morning] before Petitioner "get[s] up" out of bed after a night of seizure activity.

18. There has been much turmoil in Petitioner's life as a result of the medical-related issues discussed above. In the midst of this turmoil, one constant has been the love, affection, and nurturing Petitioner has received from Mother and Father, who both want the best for their child.

19. Mother and Father have been divorced since the spring of 2006. They were separated for approximately eight months prior to their divorce becoming final.

20. Petitioner lives with Mother on weekdays and with Father on weekends.

21. A home health care aide, Debbie Hemans, helps Mother care for Petitioner when Petitioner is at Mother's home. Ms. Hemans usually works an eight-to-12-hour shift, which begins in the morning hours.

22. In the morning, after Petitioner wakes up, when Ms. Hemans tries to get Petitioner to do something, "90 percent of the time [Petitioner] is . . . aggressive." Petitioner will kick, spit on, or scratch Ms. Hemans. Petitioner will also grab Ms. Hemans, as well as Mother, "so hard that it leaves bruises."

23. At Mother's home, Petitioner also engages in self-injurious conduct such as "peeling skin off the side of [a] finger . . . to where it bleeds," "scrat[ching] . . . to make a big sore," and "beating . . . on the legs." One time, Petitioner "put five pennies in [Petitioner's] nose." One of

the pennies became "lodged way in the back of [Petitioner's] sinus cavity" and had to be removed by medical personnel at the hospital. (At no time prior to Petitioner's November 2006 hospitalization did Mother witness Petitioner engage in any self-injurious conduct.)

24. Mother further reports that, when in her care, Petitioner has "climb[ed] on [the] refrigerator and pushe[d] out [the] drop ceiling in the kitchen"; "escaped out of [the] house"; and "run in front of cars." Petitioner also throws and breaks things in Mother's home.

25. Because Petitioner is "impulsive" and unpredictable, Petitioner is "hard [for Mother] to handle at times."

26. Mother had an easier time redirecting and controlling Petitioner prior to Petitioner's November 2006 hospitalization than she does now.

27. On weekends, Father takes care of Petitioner himself, without any assistance.

28. He picks up Petitioner at Mother's home on Saturdays in his "two-seater" van. It is just Father and Petitioner in the van. Petitioner is "always in a seatbelt." Petitioner has "fiddle[d] with the door," but "has never actually tried to open the door and jump out" during the "short ride" between Mother's and Father's homes.

29. When Father pulls into his driveway, he tells Petitioner to "go get the mail." Petitioner will go to the mailbox and either come back with the mail or tell Father "no mail today."

30. Recently, when in Father's kitchen, without any help from Father, Petitioner went to the refrigerator, took out a container of leftover Chinese food, opened the container, and ate the food.

31. At no time has Father had to call "any kind of outside medical personnel" to his home when Petitioner has been there.

32. Petitioner has, however, engaged in conduct that placed Petitioner's safety at risk while with Father. Approximately two years ago, when Father was outside talking to a neighbor, Petitioner "climbed up a ladder" and onto the roof of Father's home. At around that same time, Petitioner "climbed up on the top of [Father's] van too." There have also been instances where Petitioner "has walked away from [Father] [and] head[ed] toward the street."

33. Father finds that Petitioner "does better behaviorally if [Petitioner] has a strict routine" and "knows what's expected."

34. Petitioner "communicates relatively complex thoughts" to Father and "speak[s] [to him] in more than just simple two and three-word sentences." Sometimes, Petitioner will tell

Father that Petitioner is "about to have a seizure" and is "going to go lie down." Petitioner has expressed to Father a desire to "go back to [redacted] Hospital" to receive treatment to "make[] [the] seizures] go away."

35. Petitioner receives School Board-provided special education and related services at Mother's home.

36. Petitioner has not been in a school setting since the end of Petitioner's fifth grade year (the last year of elementary school) in 2002. (From kindergarten through fifth grade, Petitioner attended [redacted] School.[3])

37. Petitioner has been in the School Board's Hospital Homebound Program from sixth grade (the first year of middle school) to the present.

38. [redacted] School (which was Petitioner's boundaried home school) and [redacted] Center were considered, but rejected, as possible placements when Petitioner was transitioning from elementary school to middle school in 2002.

39. Mother "had concerns with [Petitioner] being at [redacted]." With respect to placement at [redacted], Mother consulted with the then-assistant principal (and now principal) of [redacted], Michael McGinty, and asked him whether he thought [redacted] would be an "appropriate placement" for Petitioner. Mr. McGinty knew Petitioner inasmuch as he had taught at [redacted] School during 1998-1999 school year when Petitioner was a student there. He told

Mother that, based on what he knew about Petitioner (and his last contact with Petitioner had been three years earlier), [redacted] "probably wouldn't be a good placement for [Petitioner] at the time" because Petitioner's "level of functioning was really high in comparison to the other children [at] [redacted]." Mother "valued [Mr. McGinty's] recommendation" and therefore did not "pursue a placement [at [redacted]] at that point."

40. The Hospital Homebound service providers who come to Mother's home to serve Petitioner are Janet Hooper (who provides one hour of occupational therapy consultation services a month and has been servicing Petitioner since January 2003); Victoria Graef (who provides one hour of academic instruction twice a week and has been working with Petitioner since August 2006); and Mary Hohmann (who provides one hour of speech and language services a week and has been working with Petitioner since August or September 2005).[4]

41. Petitioner's behavior has not materially interfered with Petitioner's receipt of Hospital Homebound services.

42. According to Ms. Hooper, Petitioner has the ability to grasp a writing utensil and make marks on paper, but is not a "functional writer." Ms. Hooper further reports that, "[w]ith cues [and assistance] [Petitioner] can find and locate the letters of [Petitioner's] name" on a standard keyboard and

perform certain basic computer tasks, but is not able to do so on a consistent basis.

43. According to Ms. Graef, Petitioner's "academic work performance" is currently "on a pre-K level, . . . between a three and five-year-old." From the time Ms. Graef started servicing Petitioner, Petitioner's performance has been marked by inconsistency, but it has been somewhat less inconsistent this year.

44. Ms. Graef has two one-hour instructional sessions with Petitioner a week. Petitioner is "able to participate [for] the [duration of each] lesson." "[All] [Ms. Graef] has to do to redirect [Petitioner] if [Petitioner] gets off task [is to] give [Petitioner] verbal prompts . . . or just wait for [Petitioner] to respond."

45. In her instruction, Ms. Graef employs, among other things, a "computer and pictures [to meet Petitioner's] visual learning style." She uses the computer program, Intellitools, to teach Petitioner a step-by-step process for learning table setting and other functional skills.

46. In arithmetic, Petitioner is working on the numbers 1, 2, and 3. Petitioner "can match and [Petitioner] can sort," but is unable to count.

47. Petitioner is in the "pre-reading stage," having "a limited sight-word vocabulary" and the ability to "match . . . some pictures with words."

48. Ms. Hohmann reports that Petitioner is a "good effective communicator [who] can maintain a back and forth dialogue." On September 20, 2005, shortly after she had begun servicing Petitioner, Ms. Hohmann wrote the following report describing Petitioner's communication skills:

> [redacted's] communication skills are commensurate with [redacted's] mental level of functioning which is reported to be in the educable range. [redacted] engages in appropriate social discourse, volunteering relevant information, answering and posing questions, and making choices and comments.
>
> [redacted's] frequent and severe seizure activity impacts [redacted's] attention, continuity of thought and memory during language lessons. [redacted] is observed to be temporarily inattentive numerous times during a session and may not remember recent directions or facts. This has been determined to be beyond [redacted's] control as [redacted] is social, cheerful and compliant when [redacted's] physical state allows.
>
> [redacted] has an appropriate vocabulary for [redacted's] functional level and acquires new words at a reasonable rate. [redacted] routinely uses correct tenses, regular and irregular, forms plurals and uses "ing" endings habitually. [redacted's] length of utterance is suitable within the conversational context and [redacted] is capable of producing multi-word sentences, which include simple, compound and complex forms.

> [[redacted]] responds well to a structured and predictable therapy format, with frequent review and repetition. [[redacted]] requires the visual material be presented on a plain, solid color background.
>
> [[redacted]] is a delightful student, stays engaged easily for a full hour and works to the best of [[redacted]'s] ability insofar as [[redacted]'s] physical considerations allow.

49. Petitioner has maintained (but not built on) these communication skills.

50. The "basic quality of [Petitioner's] work" has remained the same, notwithstanding the episode of status epilepticus Petitioner experienced in November 2006. It, however, takes Petitioner considerably more time to respond to Ms. Graef's and Ms. Hohmann's questions than it did before this episode, although Petitioner's "response time" has gotten "a little faster" compared to what it was last year.

51. It would be to Petitioner's advantage to be in a program "where language is infused throughout the day" and there is an opportunity for Petitioner to have "speech language experiences" and to socialize and interact with peers. Petitioner's "socialization skills are fine," but there is a risk they will diminish if Petitioner is not given the chance "to use them."

52. When Petitioner was in elementary school, Petitioner tended to do "whatever the other kids [were] doing."

53. Ms. Hohmann is easily able to redirect Petitioner when Petitioner engages in non-compliant conduct by "presenting things that [are of] high interest" to Petitioner.

54. On only about four occasions (two before Petitioner's November 2006 hospitalization and two after) has Ms. Hohmann had to request Mother's assistance to deal with a behavioral problem.

55. Petitioner presently "works with [Ms. Hohmann] nicely for a complete hour with a few breaks to change from one subject to another."

56. In Ms. Hohmann's opinion, Petitioner's "attention span . . . is appropriate to both [Petitioner's] age level and [Petitioner's] mental level of functioning."

57. In or around the fall of 2007, Mother requested that Petitioner be removed from the Hospital Homebound Program and placed at the [redacted] ([redacted]), a private residential facility housing 150 brain-injured clients located in [redacted], Florida, more than two hundred miles from where Petitioner, Mother, and Father now reside.[5]

58. [redacted] had been "recommended to [Mother] by Pat Dean [an ARNP] who works with Dr. Duchowny at [redacted] Hospital."

59. On or about October 6, 2007, Ms. Dean wrote the School Board a letter expressing her opinion that the School Board could not "offer [[redacted]] what they can offer [[redacted]] at [redacted]"

inasmuch as the School Board "do[es] not have the same staffing or expertise."

60. Adrian Young, LPN, [redacted]'s regional director, provided information to School Board personnel at a meeting held in October 2007.

61. On November 7, 2007, a Referral for Psychological Evaluation Services form, asking that a reevaluation of Petitioner be conducted by a school psychologist, was submitted by Petitioner's boundaried home school, [redacted] School ([redacted]). The following was given as the reason for the referral:

> Parent requested reevaluation due to recent behaviors at home.[6] Mom would like [redacted] to attend a neurological center.

62. The School Board's North Area Coordinator of Student Services signed off on the request. He believed a revaluation was needed "because [Petitioner] was coming back to school and . . . had not been evaluated in quite a while." (Petitioner's "last psychological testing [had been done] in 1997.")

63. Wanda Williams, a school psychologist, tested Petitioner over a two-hour period on December 5, 2007. She also "obtained input from individuals [who] deal[t] with [Petitioner]." This included getting Mother and Ms. Graef to complete rating scales based on their observations of Petitioner.

64. Ms. Williams issued her report on December 21, 2007.

65. The report contained the following "[b]ehavioral [o]bservations and [i]mpressions":

> [redacted]'s father accompanied [redacted] to the evaluation. [redacted] willingly accompanied the examiner to the testing area. [redacted] listened to directions and attempted each task. [redacted] attempted to discuss other topics and was redirected to stay on task. [redacted]'s expressive skills appeared very limited and spoke in a very low tone of voice. [redacted] responded well to praise, encouragement and incentives. [redacted] attempted to write letters and [redacted]'s name; however, it was not legible. The examiner administered nonverbal instruments due to [redacted]'s limited language skills. On the Triangles subtest, [redacted] placed the foam triangles on the matching picture in the book instead of the table. [redacted] was able to complete the evaluation with praise, encouragement and incentives. It should be noted that [redacted] was able to sit with the examiner and complete task[s] at [redacted]'s level. The results of the evaluation are regarded as valid estimates of [redacted]'s current functioning.

66. The report went on to list those "results," including: an "[a]ge [s]tandard [s]core" (Nonverbal Index) of 47 on the Kaufman Assessment Battery for Children, Second Edition, which was 3.53 standard deviations from the mean, placing Petitioner in "the 1st percentile, compared with other children the same age in the general population"[7]; scores on the Kaufman Test of Educational Achievement, Second Edition, reflecting that, "[i]n the area of reading, math, and writing, [redacted] [was] performing

below grade level and age expectancy[,] [but that] [redacted] performance [was] commensurate with [redacted] ability"; and scores on the Adaptive Behavior Assessment System, Second Edition, indicating that "[[redacted]'s] overall level of adaptive behavior f[ell] within the extremely low range of functioning."

67. At the end of the report were the following "Summary and Recommendations":

> [[redacted]] is a [redacted] year-old [redacted] grader educationally classified as Educable Mentally Handicapped, Autistic Spectrum Disorder and Language Impaired. [[redacted]] also receives Occupational Therapy services. [[redacted]] has been referred for a reevaluation to determine appropriate educational programming. Current test results are consistent with prior testing placing [[redacted]'s] cognitive ability within the very low range. [[redacted]'s] academic skills are commensurate with [[redacted]'s] cognitive ability. [[redacted]'s] adaptive skills are in the extremely low range and consistent with [redacted] measured ability.
>
> To assist [[redacted]'s] parents and teachers, the following recommendations are suggested:
>
> - Increase vocabulary and pre-academic concept knowledge (i.e., letters, colors, numbers, shapes, sizes and categories).
>
> - A reinforcement system may be useful in addressing inappropriate behaviors, off-task[] behaviors, distractibility, poor social skills, and motivation.
>
> - [[redacted]'s] curriculum should include integrated language development.
> - [[redacted]] should focus on activities of daily living and [be] encouraged to perform them independently. Skills related to safety and

functional self-help skills should be addressed.
- The curriculum should be adapted to [[redacted]'s] rate of learning.

68. Eleven days prior to the issuance of Ms. Williams' report, a Transition Individual Education Plan (December 10 IEP) had been developed for Petitioner.

69. The December 10 IEP listed Petitioner's "[p]rogram [e]ligibilities" as "Trainable Mentally Handicapped,[8] Hospital or Homebound, Autism Spectrum Disorder, Language Impaired, [and] Occupational Therapy," and it stated that Petitioner would be receiving the following "special education services" and "related services," all in an "ESE Home/Homelike" setting:

- Direct Speech/Language Therapy, one time a week for a total of 60 minutes a week;

- Intensive Instruction in All Academic Areas, two times a week for a total of 120 minutes a week.

- Occupational Therapy, Consult/Collaborate, one time a month for a total of 60 minutes a month.

The December 10 IEP also identified the following "[s]pecial [c]onsiderations" that would be "necessary for the student to benefit from [the] educational program and are funded through the Local Education Agency":

<u>Health Care Needs</u>

-seizure monitoring/management
-tube feeding
-self care needs

-other

Details: Due to receiving educational services in the home, all health care needs are addressed by family members. [[redacted]'s] skills appear to have been impacted by [redacted] recent medical condition. [redacted] was hospitalized or in rehabilitation for six months during the last school year.

Assistive Technology Needs

-specialized access software
-adapted keyboard
-onscreen keyboard
-other
-touch screen

Details: Pictoral sequencing strips.

No other "[s]pecial [c]onsiderations" were mentioned.

70. On February 2, 2008, Petitioner's primary care physician, Henry Lin, M.D., wrote a letter expressing his opinion regarding Petitioner's placement. The letter read, in pertinent part, as follows:

> [Petitioner] will always require assistance and monitoring to take care of [Petitioner's] medical issues and achieve [Petitioner's] activities of daily living. Additionally, [Petitioner] will most likely be unable to work due to frequent and unpredictable seizures and is unlikely to advance beyond functioning at the level of a 5 year old child. [Petitioner] will be better cared for in a facility with medical personnel present[9] than in a school that will at best have one registered nurse present in the whole facility.

71. The School Board had its Medical Fragile Committee, headed by Rhonda Elba, RN, gather information and determine

whether the School Board had the necessary resources to meet Petitioner's medical and safety needs in a school setting.[10]

72. Ms. Elba authored a Medical Fragile Report, dated April 2008, the "Results/Interpretations" portion of which read as follows:

> There are two major concerns from the medical professionals involved in [redacted's] care regarding [redacted's] re-entry into Broward County Public Schools. These being [redacted's] seizure disorder and [redacted's] behavior issues. Concerns about [redacted's] seizures are the frequency and unpredictability of them. Concerns about [redacted's] behavior are that [redacted] runs/escapes and may injure [redacted].
>
> Based on the current medical issues/needs presented by the treating physicians, the School System of Broward County, specifically Health Services/Medical Fragile team reviewing the current information, feels that [redacted's] medical needs can be met within a public school environment. This committee refers this recommendation to the IEP staffing committee for the purpose of reviewing these results and determining the most appropriate and least restrictive educational plan and program for [redacted] at this time.

73. The "IEP staffing committee" met on April 29, 2008.[11] Petitioner was represented at the meeting by Mother and an attorney.

74. When the discussion at the meeting turned to placement, among the options considered were a general education class, as well as a specialized varying exceptionalities class, at [redacted]. Continuation in the Hospital Homebound Program was also

discussed. These options were ultimately rejected in favor of a placement at [redacted], where, it was determined, Petitioner's healthcare, behavioral, and academic needs could be met.[12] Petitioner's representatives at the meeting did not agree with this determination.

75. The placement decision and other determinations made by the committee at the April 29, 2008, meeting were incorporated in a Transition Individual Education Plan (April 29 IEP).

76. The April 29 IEP contained "[p]resent [l]evels of [p]erformance" and "[a]nnual [m]easurable [g]oals" that were drafted by the Hospital Homebound staff who had been servicing Petitioner. The "[a]nnual [m]easurable [g]oals" were as follows:

> Instruction
>
> 1. In communication, when presented with new vocabulary, concept language and sequencing words, [redacted] will use correctly in verbal requests and responses with 80% accuracy with verbal and visual prompts by April 2009.
>
> 2. Given various educational programs, [redacted] will learn to use the keyboard and the mouse to access a given computer program 80% of opportunities with physical and verbal prompts as needed by April 2009.
>
> 3. When given a choice between two developmentally appropriate stories, [redacted] will select material to be read by an adult and answer questions about the story with

prompts as needed with 80% accuracy by April 2009.

Employment

4. Upon request, [redacted] will state [redacted's] first and last name, address and phone number with verbal and visual prompts at 80% accuracy by April 2009.

5. Given a situation requiring self-advocacy, [redacted] will request clarification of directions with verbal prompts as indicated 80% of opportunities by April 2009.

Community Experience

6. When given two choices in a social setting, [redacted] will select the more appropriate behavior using pictures and verbal suggestions to cue 80% of instances by April 2009.

Post School Adult Living

7. Given a personal space situation, [redacted] will stay or move within arms length of another person who initiates contact[] with [redacted] with prompts as required, with 80% accuracy by April 2009.

Daily Living

8. When presented with a daily living task, [redacted] will sequence it into three steps with picture symbols to cue at 80% accuracy by April of 2009.

9. Given physical assistance and visual/verbal prompts, as needed, [redacted] will participate in life skills with 80% accuracy by April 2009.

77. The April 29 IEP stated that the following "special education services" and "related services" would be provided (in an "ESE Class") to Petitioner:

> - Direct Speech/Language Therapy, three times a week for a total of 90 minutes a week;
>
> - Intensive Instruction in Academics, Behavior,[13] Independent Functioning, Communication, five times a week for a total of 1680 minutes a week.
>
> - Occupational Therapy, one time a week for a total of 30 minutes a week;
>
> - School Nursing Services (Consult/Collaborate), one time a day for a total of five minutes a day.

78. The April 29 IEP identified the following "[s]pecial [c]onsiderations" and "[s]upports for [s]chool [p]ersonnel" "necessary for the student to benefit from [the] educational program and are funded through the Local Education Agency":

> Health Care Needs
>
> -seizure monitoring/management
> -tube feeding
> -specialized administration of medication (E.g., Epi-pen/insulin injections, nebulizer, suppositories)
> -self care needs
> -other
>
> Details: [redacted]'s] skills appear to have been impacted by [redacted]'s] medical condition. [redacted] was hospitalized or in rehabilitation for four months during the last school year. Oral suctioning and/or oxygen administration may be required while [redacted] is having a seizure. [redacted] is on numerous mediation[s].

Mom states that [redacted] must be prompted to drink liquids throughout the day. [redacted] has seizures throughout the day. The type and intensity of [redacted's] seizures vary throughout the day. Currently [redacted's] more intense seizures occur during the night. Health care needs will be met by trained personnel. Daily communication with home.

Assistive Technology Needs

-specialized access software
-switch
-visual schedule
-other
-touch screen

Details: Pictoral sequencing.

Behavioral Needs

A behavior plan will be developed for [redacted] by 05/15/2008.

Details: Goals address social skills in home, school and community settings. Parent reports that [redacted] needs to be closely monitored due to a history of elopement. Daily communication with home.

Transportation needs

-oxygen
-air conditioning
-transport to non-boundaried school
-wheelchair
-bus attendant
-safety vest

Does the student receive the same or similar services during the school day? Yes

Rationale for Request: Student needs transportation to and from school on a wheelchair accessible bus should [student] need the wheelchair to get . . . on or off the bus due to medical needs. While sitting

in a regular bus seat student will need a safety vest. Student needs door to door transportation. The student will need one to one supervision on the bus to meet her medical and behavioral needs.

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

Staff will need to be trained in Oxygen administration, [D]iastat administration, G-tube feeding, seizure monitoring and first aid. Training in behavioral strategies.

79. On May 8, 2008, in a Notice of Refusal, the School Board advised Petitioner, Mother, and Father of the following:

After a careful review of your child's education program, we are refusing to take the following action(s): To provide a residential placement in a private neurological rehabilitation center.

The action(s) described above are refused because:

Broward County Schools has the ability to provide [[redacted]] with a Free Appropriate Public Education in a lesser restrictive environment than a residential facility. The two areas of need identified by [[redacted]'s] physicians are seizure management and behavior. Broward County Schools can provide the supports and services necessary in order for [[redacted]] to access [[redacted]] education in a separate day school.

Evaluation procedures, tests, records, or reports that were used as a basis for the actions described above include: Physician's Statement, informal therapist observation, Medical Fragile Report.

Before making this decision, the following options were considered and rejected:

> Option(s) Considered:
>
> To place [redacted] in a private residential neurological rehabilitation center.
>
> Why Rejected:
>
> Broward County Schools can provide [redacted] with the supports and services needed for [redacted] to access [redacted's] education in [a] lesser restrictive environment.
>
> If other factors were relevant to this decision, they are described below:
>
> On April 29, 2008 in an IEP committee meeting, the team determined that all services (Intensive Instruction in Academics, Behavior, Independent Functioning, Communication, Speech and Language Therapy and Occupational Therapy), based on [redacted's] own current needs, are requiring a more intensive setting and services.

80. Ines Negron, a behavior analyst with the School Board, was assigned by her supervisor the task of observing Petitioner and "giv[ing] some input and feedback" based on the information she obtained. Over a period of several months in the first half of 2008, Ms. Negron observed Petitioner at Mother's home on approximately five occasions. She also obtained information from Mother about Petitioner's behavior.

81. During Ms. Negron's visits to Mother's home, she did not witness Petitioner engaging in the negative behaviors that Mother had expressed concerns about, such as trying to elope or inflicting self-injury. Although Petitioner appeared to be "a

little slow" and had to be redirected at times, Petitioner was generally "attentive." When receiving instruction, Petitioner "tired" and "started to get off task" after 40 minutes.

82. Based on the information Mother had provided about Petitioner's negative behaviors, Ms. Negron prepared a draft Functional Behavioral Assessment (Draft FBA) and a draft Positive Behavior Intervention Plan (Draft PBIP), both dated May 20, 2008.

83. The Draft FBA contained the following "Summary (Hypothesis) Statements":

> When [redacted] feels uncomfortable whether it is an outside situation or an internal cause (seizure activity)
>
> [redacted] may grab the person next to [redacted], grab and/or destroy objects around [redacted] and/or elope from the house
>
> To avoid uncomfortable situation
>
> ---
>
> When [redacted] wants to engage with the people around [redacted]
>
> [redacted] may try to kick, not follow directions or place hands by inappropriate part of [v's] own body
>
> To gain attention.

84. The Draft PBIP contained the following "Intervention Components," "Maintenance Strategies," and Crisis Management Strategies":

> <u>Intervention Components</u>

Proactive Strategy: When [redacted] starts to look around and lose interest on task, [redacted] will be redirected to activity and offer[ed] a preferred activity when done. At this time task should be broken into smaller segment[s] and [redacted] should be allowed to stop while still successful at it.
Replacement Skill: [redacted] will increase [redacted's] on task behavior.
Consequence Strategy: [redacted] will get to choose a preferred activity after task is completed.

Proactive Strategy: In the morning [redacted] will go over [redacted's] schedule and choose the preferred activities that [redacted] would like to engage [i]n after each task.
Replacement Skill: Follow daily schedule and engage in meaningful activities.
Consequence Strategy: [redacted] will have numerous alternatives during the day to choose [redacted's] activities.

Proactive Strategy: Close proximity should be exercise[d] at all times to avoid elopement. When [redacted] seems to be getting frustrated, [redacted] will be asked if [redacted] would like to go for a walk[.] [I]f [redacted] says yes, honor the request immediately. In order to avoid dangerous situation try to take [redacted] to a safe enclosed place for the walk.
Replacement Skill: Requesting release from uncomfortable situations.
Consequence Strategy: [redacted] will get to engage [i]n preferred activity if [redacted] walks appropriately and does not elope.

Proactive Strategy: Sensory items will be kept close by for [redacted] to choose when [redacted] feels anxious. Some of these items could be a loofa, a sponge, weights, gloves, vibrating massage, creams, brushing, rolling massage or a stress ball to squeeze.
Replacement Skill: Coping skills.
Consequence Strategy: [redacted] will be verbally praised when [redacted] chooses a

sensory item and takes a break appropriately.

Maintenance Strategies

As [[redacted]'s] time on-task increases, demands will be increased also. During the beginning of the plan [[redacted]] should be allowed to do a preferred activity every 20 minutes for at least 20 minutes[;] after 4 successful weeks, time on-task should increase gradually by 5 minutes and thereafter every two weeks for 5 more minutes.

Crisis Management Strategies

If [[redacted]] elopes from assigned area [[redacted]] will be followed and escorted back to assigned area.

85. The Draft FBA and Draft PBIP were not "finalized" because the "IEP staffing committee" never met to consider them. Ms. Negron did, however, show these documents to Mother during a visit to Mother's home in June 2008. During the visit, Ms. Negron suggested that, "instead of placing a lot of attention on [Petitioner's negative behaviors]," Mother should "redirect Petitioner to do something more positive."

86. On Monday, July 14, 2008, [[redacted]]'s regional director, Mr. Young, went to Mother's home to assess Petitioner. He arrived at 11:00 a.m. and stayed for approximately three and half to four hours. Based on his observations, he concluded that Petitioner was "extremely behavioral" and "very attention-

seeking." During the time he was in the home, Petitioner "tr[ied] to escape," "tr[ied] to climb on" things in the home, "mimick[ed]" others, and interrupted his conversation with Mother.

87. After his visit, Mr. Young prepared an assessment that he provided to [redacted]'s Director of Neuropsychology, who, in turn, prepared a Proposed Treatment Plan for Petitioner based on the information provided by Mr. Young, as well as a "review of limited medical records." The Proposed Treatment Plan (which was dated July 23, 2008) read, in pertinent part, as follows:

> Based on the information provided by the field evaluation and records from [redacted] Hospital, Dr. Lin, Dr. Duchowny and School Board of Broward County, [redacted] is appropriate for a 60 to 90 day course of evaluation and treatment at the [redacted].[14] During [redacted's] stay, [redacted] will be evaluated, treated and followed by the Medical Director. Referrals for consultations will be made as appropriate. [redacted] will be evaluated by the neuropsychology department to determine [redacted's] ability to participate in standardized assessment, to monitor cognitive functioning and to make treatment and discharge recommendations. The physical, occupational and speech and language departments will evaluate [redacted's] specific needs and treat [redacted] in the appropriate group and/or individual sessions. The behavioral service department will establish protocols to aid in [redacted's] returning to optimal independence. The nursing staff will monitor [redacted's] overall health and provide medication education as needed.

These interdisciplinary evaluations will be used to develop an individualized comprehensive treatment plan. This plan will guide [redacted's] treatment during [redacted's] stay and will be re-evaluated and updated as needed. The therapists will communicate with the Program Case Manager to help meet [redacted's] needs and to keep [redacted's] family aware of [redacted's] program.

- Health. [redacted] has mild difficulties with . . . bowel and bladder management. [redacted] has been diagnosed with neurogenic bladder and kidney reflux. [redacted] experiences episodes of incontinence during seizures. [redacted] wears incontinence briefs for protection. [redacted] has mild difficulties chewing and swallowing. [redacted] has been prescribed a ketogenic diet, but generally refuses to eat. [redacted] has been diagnosed with central anorexia. [redacted] has a Button PEG tube in place and is receiving bolus tube feedings of Resource 2.0 80 cc, 3 times per day. [redacted] is also receiving continuous tube feedings of Resource 2.0 at 60 cc per hour for 11 hours per day, which will be changed to bolus tube feeding upon admission by the Medical Director. [redacted] is 5'1" tall and weighs 94 pounds. The Dietician will evaluate [redacted's] nutritional needs and will recommend an appropriate feeding schedule. Client has been unable to complete a modified barium swallow study as [redacted] refuses to swallow the barium. [redacted] has no reported difficulties with . . . hearing or vision. . . . [redacted] is allergic to Ativan, Dilantin, Suprox, milk and Morphine. [redacted] continues to experience seizures, mostly at night. [redacted's] mother will at times administer oxygen via mask and will suction [redacted's] oral cavity following the seizure. However, Dr. Lin does not feel there is any significant oxygen desaturation that would render [redacted] medically unstable. The nursing staff and physician will monitor [redacted's] overall health and medication compliance. Referrals for consultations

will be made as indicated by the Medical Director. [redacted's] current medications include Topomax, Seroquel, Felbatol, Calcium Carbonate, Levocarnitine, Zantac, Metadate, Resource 2.0 and Diastat.

- Personal and Self-Care. [redacted] is unable to [self-]feed . . . and requires tube feedings. [redacted] requires maximal assistance for toileting, bathing and grooming tasks. [redacted] requires maximal assistance for dressing [the] upper and lower body. The Occupational Therapy Department will evaluate [redacted's] self-care skills and potential. Interventions will be aimed at increasing [redacted's] participation in self-care and [redacted's] use of adaptive equipment. Protocols will guide the staff in providing the proper degree of physical assistance during [redacted's] activities of daily living.

- Physical Functioning and Mobility. [redacted] is independent for bed mobility tasks. [redacted] is able to ambulate without assistance. [redacted] completes transfers independently. [redacted] tends to wander at night and [redacted] wears bells on [redacted's] shoes so [redacted's] parents can locate [redacted] in the home. [redacted] will require a hospital bed upon [redacted's] admission. The Physical Therapy Department will verify [redacted's] overall level of functioning with an emphasis on [redacted's] balance and gait. If appropriate, an exercise program will be developed to increase [redacted's] overall strength, stamina and endurance.

- Neuropsychological Skills/Academic Functioning. [S.] is alert and disoriented. [redacted] has poor attention span and limited concentration skills. [redacted] has severe deficits in [redacted's] ability to learn and retain new information. [redacted] has mild to moderate difficulties with problem solving and judgment skills. [redacted] requires significant external supports to help [redacted] modulate [redacted's] emotions and behaviors.

[redacted] continues to receive special education support and is currently in the 11th grade. [redacted] has a current transitional individual education program. The Neuropsychology Department will complete an updated assessment of [redacted's] cognitive and academic skills. [redacted] will receive individualized attention aimed at assisting [redacted] in achieving [redacted's] academic goals.

- Community Integration. [redacted] has not been employed and currently has no vocational skills. The Vocational Department will evaluate [redacted's] potential to participate in structured and supervised work settings. [redacted] will participate in activities designed to increase [redacted's] attention to task and [redacted's] ability to follow directions. [redacted] requires total assistance to initiate leisure activities. [redacted] requires total assistance for money management, telephone use, meal preparation, clothing care and household cleaning tasks. [redacted] will be engaged in activities designed to strengthen [redacted's] community level access skills. [redacted] will be afforded the opportunity to participate in on and off campus recreational activities and community outings, designed to increase [redacted's] socialization with peers and [redacted's] use of appropriate community skills.

- Communication. [redacted] can speak clearly, but does not verbalize often. [redacted] is able to follow simple spoken commands. [redacted] tends to mimic behavior she sees demonstrated. [redacted] is not able to read or write. [redacted] cannot participate in extended conversation. [redacted] does have times when [redacted] will speak and verbalize for extended periods of time. The Speech Language Pathology Department will evaluate [redacted's] communication and cognitive-linguistic skills. Interventions will be aimed at increasing [redacted's] functional communication through verbalization or possibly picture communication.

- Behavioral Adjustment/Psychosocial. [redacted] is unable to tolerate frustration. [redacted] responds impulsively and is constantly agitated. [redacted] destroys property and is egocentric. [redacted] engages in inappropriate behaviors to gain attention. [redacted] will spit and lick things. . . . [redacted] will bite and scratch [redacted]. [redacted] has put coins in [redacted's] nose. [redacted] has hit [redacted] in the face with [redacted's] legs. [redacted] will rip up paper and books. [redacted] is a flight risk and has run into the street purposefully to get hit by a car. [redacted] will climb on objects and fall purposefully to harm [redacted]. [redacted] enjoys going to the hospital. [redacted] has severe deficits in [redacted's] social and interpersonal skills. [redacted] has symptoms consistent with a moderate to severe level of anxiety and depression. [redacted] is emotionally labile and hostile. [redacted] has limited understanding of appropriate sexuality and [redacted's] deficits. [redacted] tends to be noncompliant with therapeutic interventions. The Medical Director will evaluate [redacted's] current medications and will recommend adjustments to increase [redacted's] emotional and behavioral stability. The Behavior Department will create protocols to block [redacted's] inappropriate self-injurious and self-stimulating behavior. [redacted] will be reinforced for using alternative appropriate methods to express [redacted] desires. The Neuropsychology Department will determine [redacted's] ability to benefit from counseling and education. Family education and training will be scheduled through the Program Case Manager.

- Discharge Recommendations. The current discharge plan is for [redacted] to return home with [redacted's] family once [redacted's] seizures are controlled and after a period of pharmacologic assessment, intervention and stabilization as well as neurobehavioral evaluation with development and implementation of an individualized behavior

> program for management of [[redacted]'s] neurologic and behavioral difficulties and [[redacted]] is demonstrating more appropriate behaviors. This course of treatment would provide [[redacted]] with the greatest opportunity for a successful return home. The Program Care Manager will begin evaluating this and other discharge options upon [[redacted]'s] admission. Discharge plans will be shared with [[redacted]'s] family members as the evaluations proceed through [[redacted]'s] stay at the [[redacted]].[15]

88. The "focus" of the treatment Petitioner would receive at [redacted], were Petitioner admitted to the facility, would be on "seizure management" and "behavioral change."

89. [redacted] has an on-site Medical Director who is a physician board-certified in both neurology and psychiatry.

90. [redacted] also has a nursing staff that provides round-the-clock coverage.[16]

91. A family practice doctor visits the facility on Thursdays to treat residents.

92. Most of the residents at the facility are seizure-prone and take seizure medications.

93. The Medical Director and nursing staff develop individualized protocols to be followed when these residents have a seizure.

94. The nurses at the facility are trained to deal with seizures.

95. When a resident has a seizure, it is the nursing staff that responds. "[M]ild seizure[s]" are "treat[ed] . . . on-

site." If the seizure is one that the nurse cannot treat on-site, the resident will be "medically transported to the local hospital."

96. The facility has "a behavioral management staff" responsible for developing "behavior programs" for residents that need them. These "behavioral" residents are assigned "one-on-one caregivers" who are "with them 24 hours a day, seven days a week." Among other things, these "one-on-one caregivers" implement their assigned residents' "behavior programs" and attempt to ensure their safety.

97. [redacted] offers cognitive retraining to residents in an effort to help improve their memory, but makes no "guarantee[s] [as to] the outcome" of this therapy.

98. [redacted] has a "fully accredited high school program." However, "because of [Petitioner's] age, [Petitioner] would have to be put into [the facility's] adult education program." There would be no more than six to eight students in Petitioner's classroom. Petitioner's teacher would be certified with "ESE qualifications." Petitioner's classmates would be as similar in age (both chronologically and mentally) to Petitioner as possible.

99. Petitioner would have "lots" of "verbal peers" at [redacted]. Only a small number of the residents "are completely non-verbal."

100. If Petitioner were not able, for a "medical reason rather than a behavioral reason," to get to class at [redacted] in the morning, there are classes later in the day and in the evening that Petitioner could attend at the facility.[17]

101. [redacted] ordinarily allows no more than eight parental visits a year. Mother, however, was told that an exception would be made for her and she would be permitted to visit Petitioner once a month.

102. Unlike [redacted], which is a 24-hour residential facility, [redacted] is a special day school whose hours of operation are from 8:00 a.m. to 2:00 p.m.

103. There are approximately 130 to 135 students attending [redacted]. They range from kindergarten age to the age of 22. All are "exceptional [education] students" who require an "intense full-time type of program." "[A]bout 25 students . . . have . . . unique assistance on the bus."[18] The school is able to accommodate students who require a "shortened [school] day."

104. The school's students are served by approximately 110 staff members, including ESE-certified teachers; paraprofessional aides; three full-time registered nurses; two behavior specialists (one a board-certified behavior analyst and the other a masters-level behavior specialist); 12 "behavior technicians"; three and half speech pathologists; a social

worker; a vocational coordinator; job coaches; and physical and occupational therapists, among others.

105. Each classroom at [redacted] has a minimum of three adults present at any one time.

106. Classroom instruction "is based upon the IEP of each student."

107. In addition to receiving individualized instruction, the students also participate in group activities.

108. Twice a day, once in the morning and once after lunch, the students in each classroom work on hygiene-related skills. Other self-help skills are also taught.

109. The school offers physical education classes, taught by a physical education teacher, "two or three times a week depending on the child."

110. There is a swimming pool on campus.

111. "Most classes" have "leisure time outside" once a day.

112. "[S]ocial skills training [takes place] throughout the day" in the classroom. There are also special school-wide events, such as dances, "difference assemblies," and parades, where students have an opportunity to further hone their social skills.

113. Cognitive retraining strategies are used at [redacted].

114. In addition to the services it offers on campus, [redacted] has a community-based instruction (CBI) program, where students in the 14 to 22-year-old age range are able to go out to various employment sites in the community, such as North Broward Hospital, Pizza Fusion, TJ Maxx, and Publix, and perform "very basic but functional vocational jobs."[19] Students in the program "learn [the skills necessary] to transition into the workplace." They "learn how to behave appropriately, learn how to communicate with [other] employees, and learn a job skill."

115. Currently, approximately 25 to 30 [redacted] students "go out into the community."[20] These students are provided "one-on-one support . . . whether it be [a] teacher or [a] job coach."[21] Some of the students had "behavioral problems or elopement problems" that initially "prevented them from going out into the community," but which they have since overcome (at least to the extent that they now are able to participate in the CBI program).

116. When an appropriately-aged student first enters [redacted], the school's vocational coordinator conducts an assessment to determine whether the student is a suitable candidate for the CBI program.

117. There is the opportunity for those students deemed not ready to immediately "go out into the community" to work in an on-campus "vocational lab" intended to simulate a real work

environment. Students clock-in and "work on . . . real job [task baskets] that get[] picked up each week by [participating] companies." There is also a "living skills lab" "designed for students to learn how to have better self-help skills [and] how to communicate appropriately."

118. The [redacted] nursing staff "go[es] into [each] classroom every morning" and spends approximately five minutes "check[ing] on each student just to make sure that everything is okay."

119. There are "many" students at [redacted] with seizure disorders, some of whom "seize a fair amount throughout the day." There have been instances where students have had "10 to 15 [grand mal] seizures a day." Over 25 of the students at the school have a physician's order for Diastat.

120. Staff at [redacted] are trained to know "what to look for when seizures occur" and "what actions to take."

121. When a [redacted] student has "multiple seizures [in] the classroom," the nursing staff is summoned to provide assistance. A nurse (knowledgeable in seizure management) quickly responds, obtains information from the adults in the classroom, assesses the situation, and determines the medically appropriate course of action to take.

122. As a matter of course, the nurse does a respiration check and, if necessary, administers oxygen.

123. In an appropriate case, the nurse may administer Diastat (provided there is a physician's order on file authorizing Diastat administration and the school has been provided with Diastat for the student). An effort is made to administer the Diastat without moving the student from where he or she is in the classroom. Mobile "cloth standup partitions" are used to afford the student some privacy. "[T]he majority of the time that [the nurse] administers the Diastat it does work." If, however, "the seizing continues," "911 [is] called."

124. Whether a Diastat-sedated student whose seizing has ceased remains in the classroom "depend[s] on [the student's] functioning."

125. "911 is not automatically called when Diastat is administered to a student at [redacted]." The student's parents are always called, however.

126. Another responsibility of the nursing staff at [redacted] is to "monitor[]" G-tube feedings "administer[ed]" by the classroom staff."

127. The negative behaviors of Petitioner noted in the Draft FBA prepared by Ms. Negron are "pretty typical for many children" at [redacted].

128. It is "very common" for students at [redacted] to attempt to elope. None has been successful in the past year, however.

129. [redacted] has a "very self-contained secure campus." "There is only one entrance and exit" and the entire perimeter is fenced.

130. The majority of times students attempt to elope they are redirected before they make it out of the classroom.

131. In those instances where the classroom staff is unsuccessful in preventing a student from leaving the classroom, a "behavioral code" is "call[ed]" and a team of 35 walkie talkie-carrying staff members is mobilized to redirect the student to the student's assigned area.

132. [redacted]' behavior specialists are responsible for devising and revising "behavioral plans" for students at the school (with the certified behavior analyst taking the lead). They also provide training and guidance to the staff responsible for implementing these plans, including the school's 12 behavior technicians.[22]

133. These 12 behavior technicians, along with the principal and the two behavior specialists, comprise a "crisis team" that "handle[s] anything from [a] minor crisis . . . to [a] more involved crisis [requiring] direct intervention." All team members are "well-trained in behavior . . . crisis management."

134. The team employs strategies designed to stop students from engaging in self-injury. "Prone restraint" is used only if "medical clearance" has been obtained.

135. [redacted] has an arrangement with a Ph.D.-level behavior analyst who, on a consultative basis, helps the school deal with students with more challenging behaviors. Additionally, there are specialists in the School Board's North Area Office who provide support to the school.

136. [redacted]' speech pathologists, along with the school's classroom teachers, help develop "communication goals" for students. These goals are "implemented throughout the day."

137. Most, but not all, of the students at [redacted] are "non-verbal" (that is, they are unable to speak on their own). Just because a student is "non-verbal" does not mean that that student does not communicate. Some "non-verbal" students at [redacted] communicate by signing or using gestures. Others use "augmentative communication devices," including "high tech" devices that produce, through digitization, simulated human speech and "more low tech" voice output devices, such as "Big Macks."

138. If placed at [redacted], Petitioner "would be in a high school autism class" that currently has five students, aged 15 to 19. Each of these students is of Petitioner's gender and is "non-verbal." Two of the students use "augmentative

communication devices" of the "high tech" variety. The other three students have the "more low tech" voice output devices.

139. An effort would be made by [redacted] staff to teach Petitioner to exercise patience when communicating verbally with those using "augmentative communication devices."

140. In addition to communicating with classmates, Petitioner would also have the opportunity to have "speech language experiences" with students at the school who speak without the aid of "augmentative communication devices," as well as with the adults working at the school, including those in Petitioner's classroom. There will be further opportunities for "speech language experiences" if Petitioner participates in the CBI program.

141. If a verbal student at [redacted] "needs to be around" others who are also verbal, the school has the capacity to "set up that situation."

142. Petitioner "could use her verbal skills . . . throughout the day" at [redacted].

## CONCLUSIONS OF LAW

143. District school boards are required by the "Florida K-20 Education Code"[23] 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. Pursuant

to Section 1003.57(1)(f), Florida Statutes,"[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."

144. "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; a speech impairment; a language impairment; 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), Fla. Stat.

145. According to the "rules of the State Board of Education," "speech and language impaired" students have "disorders of language, articulation, fluency, or voice which interfere with communication, preacademic or academic learning, vocational training, or social adjustment." Fla. Admin Code R. 6A-6.03012(1).

146. Students with "autism spectrum disorder" are described in the "rules of the State Board of Education" as follows:

> 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, Aspergers Syndrome, 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.").

147. Florida Administrative Code Rule 6A-6.03011 describes those students who qualify for special education and related services because they have "intellectual disabilities."[24] An "intellectual disability," as that term is used in the rule, is defined in Subsection (1) thereof, as "significantly below average general intellectual and adaptive functioning manifested during the developmental period [birth to 18 years of age], with significant delays in academic skills." To qualify as a student with an "intellectual disability," the following criteria must be met:

> (a) The measured level of intellectual functioning is more than two (2) standard deviations below the mean on an individually measured, standardized test of intellectual functioning;
>
> (b) The level of adaptive functioning is more than two (2) standard deviations below the mean on the adaptive behavior composite or on two (2) out of three (3) domains on a standardized test of adaptive behavior. The adaptive behavior measure shall include parental or guardian input;

> (c) The level of academic or pre-academic performance on a standardized test is consistent with the performance expected of a student of comparable intellectual functioning;
>
> (d) The social/developmental history identifies the developmental, familial, medical/health, and environmental factors impacting student functioning and documents the student's functional skills outside of the school environment; and
>
> (e) The student needs special education as defined in Rules 6A-6.0331 and 6A-6.03411, F.A.C.

Fla. Admin. Code R. 6A-6.03011(4).

148. "Students who [r]equire [o]ccupational [t]herapy" are described in Florida Administrative Code Rule 6A-6.03025(1) as "exceptional student[s] whose physical motor or neurological deficits result in significant dysfunction in daily living skills, academic learning skills or adaptive social or emotional behaviors."

149. Florida Administrative Code Rule 6A-6.03020(1) discusses "Students [w]ho [a]re [h]omebound or [h]ospitalized," and it provides as follows:

> (1) Homebound or hospitalized. A homebound or hospitalized student is a student who has a medically diagnosed physical or psychiatric condition which is acute or catastrophic in nature, or a chronic illness, or a repeated intermittent illness due to a persisting medical problem and which confines the student to home or hospital, and restricts activities for an

extended period of time. The medical diagnosis shall be made by a licensed physician.

(2) The term licensed physician, as used in this rule, is defined in Chapters 458 and 459, F.S., and is one who is qualified to assess the student's physical or psychiatric condition.

(3) Criteria for eligibility. A student, who is homebound or hospitalized, is eligible for specially designed instruction if the following criteria are met:

(a) A licensed physician must certify that the student:

1. Is expected to be absent from school due to a physical or psychiatric condition for at least fifteen (15) consecutive school days, or the equivalent on the block schedule, or due to a chronic condition, for at least fifteen (15) school days, or the equivalent on a block schedule, which need not run consecutively;
2. Is confined to home or hospital;

3. Will be able to participate in and benefit from an instructional program;

4. Is under medical care for illness or injury which is acute, catastrophic, or chronic in nature; and

5. Can receive instructional services without endangering the health and safety of the instructor or other students with whom the instructor may come in contact.

(b) The student is enrolled in a public school in kindergarten through twelfth grade prior to the referral for homebound or hospitalized services, unless the student meets criteria for eligibility under Rules 6A-6.03011, 6A-6.03012, 6A-6.03013, 6A-6.03014, 6A-6.030151, 6A-6.030152, 6A-

6.030153, 6A-6.03016, 6A-6.03018, 6A-6.03022, 6A-6.03023, and 6A-6.03027, F.A.C.; and

(c) A parent, guardian or primary caregiver signs parental agreement concerning homebound or hospitalized policies and parental cooperation.

(4) Procedures for student evaluation.

(a) The minimum evaluation for a student to determine eligibility shall be an annual medical statement from a licensed physician(s) including a description of the disabling condition or diagnosis with any medical implications for instruction. This report shall state that the student is unable to attend school, describe the plan of treatment, provide recommendations regarding school re-entry, and give an estimated duration of condition or prognosis. The team determining eligibility may require additional evaluation data. This additional evaluation data must be provided at no cost to the parent.
(b) A physical reexamination and a medical report by a licensed physician(s) may be requested by the administrator of exceptional student education or the administrator's designee on a more frequent basis than required in paragraph (4)(a) of this rule and may be required if the student is scheduled to attend school part of a day during a recuperative period of readjustment to a full school schedule. This physical reexamination and medical report shall be provided at no cost to the parent.

(5) Procedures for determining eligibility. Procedures for determining eligibility shall be in accordance with Rule 6A-6.0331, F.A.C.

(6) Procedures for providing an individual educational plan. The individual educational plan shall be developed or revised prior to assignment to the homebound

or hospitalized program placement as required in Rule 6A-6.03028, F.A.C. A student may be alternatively assigned to the homebound or hospitalized program and to a school-based program due to an acute, chronic, or intermittent condition as certified by a licensed physician, as specified in subparagraph (3)(a)1. of this rule. This decision shall be made by the individual educational plan (IEP) team in accordance with the requirements of Rule 6A-6.03028, F.A.C.

(7) Instructional services. The following settings and instructional modes, or a combination thereof, are appropriate methods for providing instruction to students determined eligible for these services:

(a) Instruction in a home. The parent, guardian or primary caregiver shall provide a quiet, clean, well-ventilated setting where the teacher and student will work; ensure that a responsible adult is present; and establish a schedule for student study between teacher visits which takes into account the student's medical condition and the requirements of the student's coursework.

(b) Instruction in a hospital. The hospital administrator or designee shall provide appropriate space for the teacher and student to work and allow for the establishment of a schedule for student study between teacher visits.

(c) Instruction through telecommunications or computer devices. When the individual education plan (IEP) team determines that instruction is by telecommunications or computer devices, an open, uninterrupted telecommunication link shall be provided at no additional cost to the parent, during the instructional period. The parent shall ensure that the student is prepared to

actively participate in learning.

150. The parties have stipulated that Petitioner is "currently eligible for exceptional education services in the areas of Trainable Mentally Handicapped,[25] Autism Spectrum Disorder, Language Impaired and Occupational Therapy."

151. 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),[26] which mandates, among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education 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." 20 U.S.C. § 1412(a)(1); see also J. P. v. County School Board of Hanover County, 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')."); and Shore Regional High School Board of Education v. P. S., 381 F.3d 194, 198 (3d Cir. 2004)("All states receiving federal education funding under the IDEA must comply with federal requirements designed to

provide a 'free appropriate public education' ('FAPE') for all disabled children."); cf. Agency for Health Care Administration v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998)("[A] state that has elected to participate [in the Medicaid program], like Florida, must comply with the federal Medicaid statutes and regulations."); Public Health Trust of Dade County, Florida v. Dade County School Board, 693 So. 2d 562, 564 (Fla. 3d DCA 1996)("The State of Florida elected to participate in the Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1994), which provides federal funds to states for the purpose of providing medical assistance to needy persons. However, once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with the federal Medicaid statutes and regulations"; held that where a Florida administrative rule is in direct conflict with federal Medicaid statutes and regulations, the federal Medicaid law governs); and State of Florida 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.").

152. 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)").

153. "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).

154. 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 County School District, 397 F.3d 1321, 1324 (11th Cir. 2005).

155. While "school nurse" and other "school health" services are included within the definition of "related services," services provided by a licensed physician are not, unless they are solely for "diagnostic and evaluation purposes." See Cedar Rapids Community School District v. Garret F, 526 U.S. 66, 73-76 (1999)("In Tatro we concluded that the Secretary of Education had reasonably determined that the term 'medical services' referred only to services that must be performed by a physician, and not to school health services. . . . [W]e see no sufficient reason to revise Tatro . . . . Whatever its imperfections, a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute."); Richardson

Independent School District v. Michael Z., 561 F. Supp. 2d 610, 619 (N.D. Tex. 2008)("Although the IDEA and its interpretive regulations do not specifically authorize reimbursement for EKG/ECG tests, they broadly permit reimbursement for non-medical services required to enable a child with disability to benefit from special education. 'Medical services,' on the other hand, are only reimbursable if they confer an educational benefit and are for diagnostic or evaluation purposes. The Supreme Court has narrowly defined medical services to embrace only services that must be performed by a licensed physician."); 34 C.F.R. § 300.34(a)("Related services also include school health services and school nurse services . . . ."); 34 C.F.R. § 300.34(c)(5)("Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services."); and 34 C.F.R. § 300.34(c)(13)("School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person.").

156. To meet its obligation under Sections 1001.42(4)(l) and 1003.57, Florida Statutes, 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 County School Board v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986), quoting from, Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982); see also § 1003.01(3)(b), Fla. Stat. ("'Special education services' means specially designed instruction and such related services as are necessary for an exceptional student to benefit from education. Such services may include: transportation; diagnostic and evaluation services; social services; physical and occupational therapy; speech and language pathology services; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board.").

157. The instruction and services provided must be "'reasonably calculated to enable the child to receive

educational benefits.'" School Board of Martin County 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 School Board of Martin County, 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 County School Board, 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 County School Board, 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."[27]); M. M. v. School Board of Miami-Dade County, 437 F.3d 1085, 1102 (11th Cir. 2006)("[U]nder the IDEA there is no entitlement to the 'best' program."); Doe v. Board of Education, 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."); Devine v.

Indian River County School Board, 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."); and School Board of Lee County v. M. M., No. 2:05-cv-5-FtM-29SPC, 2007 U.S. Dist. LEXIS 21582 *9-10 (M.D. Fla. March 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.").

158. "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." Independent School District No. 283, St. Louis Park, Minn. v. S. D. By and Through J. D., 948 F. Supp. 860, 885 (D. Minn. 1995); see also D. B. v. Houston Independent School District, 2007 U.S. Dist. LEXIS 73911 *31 (S.D. Tex. Sept. 29, 2007)("It is not necessary for a student to improve in every area to obtain an educational benefit from his IEP. Nor is a school district required to 'cure' a disability.")(citation omitted); Coale v. State Department of Education, 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.").

159. 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 School Board, 744 F.2d 514, 517 (6th Cir. 1984); see also Barnett by Barnett v. Fairfax County School Board, 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."); J. P. ex rel. Popson v. West Clark Community Schools, 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. Board of Education-Indian Hill Exempted Village Schools, 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.").

160. If a district school board is providing an "appropriate" public education to an "exceptional student," it matters not whether the district school board has used an apt label to describe the student's disability. See Heather S. by

Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045, 1055 (7th Cir. 1997)("[W]hether Heather was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child. In Heather's case, the school is dealing with a child with several disabilities, the combination of which in Heather make her condition unique from that of other disabled students. The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe Heather's multiple disabilities.")(citations omitted); School District of Wisconsin Dells v. Littlegeorge, 184 F. Supp. 2d 860, 876 (D. Wis. 2001), aff'd, 295 F.3d 671 (7th Cir. 2002)("Not only does Z. S. meet all but one of the criteria for emotional disturbance (he is able to learn), making him eligible for services, the correctness of his label is essentially irrelevant under IDEA."); J. W. ex rel. K. W. v. Contoocook Valley School District, 154 F. Supp. 2d 217, 228 (D. N.H. 2001)("The IDEA does not 'require that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is

regarded as a child with a disability under [the IDEA].' . . . So, the real question is not whether J. W. is eligible for SED, OHI, and/or MD codes, but whether his emotional and attention problems cause learning difficulties, requiring services not being delivered by or not available in ConVal, thus constituting unique needs not addressed by the IEPs."); Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,737 (August 14, 2006)("The Act does not require children to be identified with a particular disability category for purposes of the delivery of special education and related services. In other words, while the Act requires that the Department collect aggregate data on children's disabilities, it does not require that particular children be labeled with particular disabilities for purposes of service delivery, since a child's entitlement under the Act is to FAPE and not to a particular disability label."); and 34 C.F.R. § 300.111(d) ("Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.").

161. "[T]he IDEA expresses the will of Congress that disabled students be educated with non-disabled students 'to the maximum extent appropriate.'" Independent School District No. 284 v. A. C., 258 F.3d 769, 774 (8th Cir. 2001). It does so in 20 U.S.C. § 1412(a)(5)(A), which provides as follows:

> Least restrictive environment.
>
> In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

"Despite th[is] statutory preference for mainstream placements, the IDEA recognizes that some disabled students need full-time care in order to receive educational benefit [as evidenced by the fact that] [i]t defines 'special education' [in 20 U.S.C. § 1401(29)(A)] to include 'instruction conducted . . . in hospitals and institutions[.]'" Independent School District No. 284, 258 F.3d at 774; see also Tennessee Department of Mental Health and Mental Retardation v. Paul B., 88 F.3d 1466, 1471 (6th Cir. 1996)("Notwithstanding the IDEA's mandate that students be placed in the least restrictive environment, the IDEA does provide for residential placement if such a placement

is necessary to meet the child's individual educational needs."); and Heather S. by Kathy S., 125 F.3d at 1056-1057 ("Mainstreaming is not required in every case. What the law requires is that a district maintain a 'continuum of program options which range from regular classrooms with supplementary aids to separate schools and residential facilities.'[28] While IDEA requires that children with disabilities be mainstreamed to the extent possible, it does not require their integration at the expense of other IDEA mandates, such as minimum educational opportunities.")(citations omitted).

162. "To assess whether a residential placement is appropriate, a determination must be made whether full time residential placement is necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process." Tennessee Department of Mental Health and Mental Retardation, 88 F.3d at 1471. "If residential placement is necessitated by medical, social, or emotional problems that are segregable from the learning process, then the [district school board] need not fund the residential placement." Burke County Board of Education v. Denton, 895 F.2d 973, 980 (4th Cir. 1990); see also L. G. ex rel. B. G. v. School Board of Palm Beach County, 255 Fed. Appx. 360, 367 (11th Cir. Fla. 2007)("Because a free appropriate

public education means that the student is making meaningful gains in the classroom, Dr. Mallenbaum's testimony regarding B. G.'s at-home behavior does not raise a genuine issue of material fact regarding whether Indian Ridge provided B. G. with a free appropriate public education. Because all of the plaintiffs' evidence relates to B. G.'s behavior at home, and none of it shows that he was not making progress inside the classroom, the plaintiffs failed to raise a genuine issue of material fact about whether Indian Ridge provided B. G. with a free appropriate public education.")(citation omitted); Abrahamson v. Hershman, 701 F.2d 223, 227, n.7 (1st Cir. 1983)("It follows from Rowley that the Act does not authorize residential care merely to enhance an otherwise sufficient day program. A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential. A school committee is required by the Act merely to ensure that the child be placed in a program that provides opportunity for some educational progress. Placing a child in a residential program when that is unnecessary for enabling the child to make educational progress may also violate the Act's mainstreaming provisions."); Hall v. Freeman, 700 F. Supp. 1106, 1119 (N.D. Ga. 1987)("The court believes that Andrew's problems are

segregable from the learning process and that there is nothing intrinsic in Andrew's condition that would necessitate residential placement in order for him to learn. Andrew's behavioral problems are specifically reactive to his environment and especially to his family environment which is stressful."); and Swift v. Rapides Parish Public School System, 812 F. Supp. 666, 673 (W.D. La. 1993), aff'd, 12 F.3d 209 (5th Cir. 1993)("As for David's home environment, it is clear that David's parents feel that they can no longer control him. As David grows older, becoming physically stronger and no doubt more rebellious, they also are growing older. Mr. Swift is retired and Mrs. Swift is disabled. While this court is sympathetic to their position, it is not the legal responsibility of the School Board to remedy problems with David in the home."). On the other hand, "[i]f a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.104.

163. Because it is the "most restrictive" placement available,[29] a residential placement should "be treated as a 'last resort' when no other environment [or placement] can provide educational benefits." El Paso Independent School District v. Robert W., 898 F. Supp. 442, 450-451 (W.D. Tex.

1995)[30]; see also M. H. v. Monroe-Woodbury Central School District, 296 Fed. Appx. 126, 128 (2d Cir. 2008)("In general, the Second Circuit requires that a court point to objective evidence of a child's regression in a day-program before finding that a residential placement is required by the IDEA."); Lewisville Independent School District v. Charles W., 81 Fed. Appx. 843, 847 (5th Cir. 2003)("Similarly, we noted that an IEP proposed by a school district which would have permitted a child to live at home and attend some regular classes was 'obviously less restrictive than the [out-of-state] residential placement' proposed by the parents."); Evans v. District No. 17, 841 F.2d 824, 832 (8th Cir. 1988)("[C]hildren who can be mainstreamed should be mainstreamed, if not for the entire day, then for part of the day; similarly, children should be provided with an education close to their home, and residential placements should be resorted to only if these attempts fail or are plainly untenable. Thus, Millard properly indicated to the Evanses that less restrictive placements would have to be thoroughly considered before the out-of-state placement at Logopedics could be. There was no guarantee that the programs proposed by Millard would have accommodated Christine. However, the school district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement.")(citations omitted);

Carlisle Area School v. Scott P. By and Through Bess P., 62 F.3d 520, 534 (3d Cir. 1995)("Residential placement is, by its nature, considerably more restrictive than local extended day programming."); Salley v. St. Tammany Parish School Board, 57 F.3d 458, 467 (5th Cir. 1995)("The IEP proposed by St. Tammany, which would have allowed Danielle to live at home and attend some regular classes, is obviously less restrictive than the residential placement in New York and New Hampshire sought by the Salleys."); P. K. and P. K. v. Bedford Central School District, 569 F. Supp. 2d 371, 381 (S.D. N.Y. 2008)("But in light of the IDEA's 'strong preference for mainstreaming' children with disabilities, courts must 'proceed cautiously' when considering residential placement, which is, 'by its nature, considerably more restrictive' than local services.")(citation omitted); L. G. ex rel. B. G. v. School Board of Palm Beach County, 512 F. Supp. 2d 1240, 1247 (S.D. Fla. 2007), aff'd, 255 Fed. Appx. 360 (11th Cir. 2007)("The goal of the IEP team is to provide a FAPE in the least restrictive means. Since placement in a residential facility is more restrictive than placement in a therapeutic day school and since the number and variety of services at Indian Ridge [the proposed therapeutic day school placement] was greater than those offered in New York, Defendant was required to first attempt to implement the IEP without residential placement."); and Brandon

H. v. Kennewick School District No. 17, 2001 U.S. Dist. LEXIS 3606 *33 (E.D. Wash. Feb. 28, 2001)("[D]ay treatment and participation in special education classes at the local high school provide a less restrictive environment than residential placement.").

164. An IEP must be developed for each student found eligible for special education and related services. The parents of the student must be provided a meaningful opportunity to participate in the IEP development process. See Board of Education of Township High School District 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."). "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 School Board, 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."); T. F. v. Special School District of St. Louis County, 449 F.3d 816, 821 (8th Cir. 2006)("S. F.'s parents rejected the IEP, concluding that only a full-time residential placement would provide their son 'meaningful' education benefit. But 'IDEA mandates individualized appropriate education for disabled

children, it does not require a school district to provide a child with the specific educational placement that [his] parents prefer.' The May 2002 IEP offered unique services tailored to S. F.'s needs. That may not have satisfied S. F.'s parents, but it satisfied the requirements of IDEA.")(citation omitted); Bradley v. Arkansas Department of Education, 443 F.3d 965 (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."); and AW ex rel. Wilson v. Fairfax County School Board, 372 F.3d 674, 683 n.10 (4th Cir. 2004) ("Although AW's parents indicated their dissatisfaction with AW's April IEP by declining to sign it, the 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.").

165. While a district school board may not predetermine the contents of an IEP in advance of the meeting of the IEP team (which must include the parents[31]), "predetermination is not synonymous with preparation. Federal law 'prohibits a completed IEP from being presented at the IEP Team 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 School District, 454 F.3d 604, 610 (6th Cir. 2006); see also M. M. v. New York City Department of Education, 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.").

166. 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).

167. "[A]n IEP must respond to all significant facets of the student's disability, both academic and behavioral. That is why a school district's IEP team is required [pursuant to 20 U.S.C. § 1414(d)(3)(B)(i)] to assess whether the student's disability-related 'behavior impedes his or her learning or that of others' in the classroom. . . . An IEP that fails to address disability related actions of violence and disruption in the classroom is not 'reasonably calculated to enable the child to receive educational benefits.' Nor does it address an important aspect of the student's disability. It also does not reflect the IEP's team's consideration of whether the student's 'behavior impedes his or her learning or that of others" in the

classroom.'" Alex R. v. Forrestville Valley Community Unit School District # 221, 375 F.3d 603, 613 (7th Cir. 2004).

168. 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." Students of the "age of majority" (18 years of age in Florida) to whom "parental rights" have been transferred pursuant to 34 C.F.R. § 300.520(a) and Florida Administrative Code Rule 6A-6.03311(8) have a similar entitlement. 20 U.S.C. § 1415(f).

169. In Florida, by statute, a DOAH administrative law judge must conduct the "impartial due process hearing" to which a complaining parent or student is entitled under the IDEA. § 1003.57(5), Fla. Stat.

170. DOAH was created by the Florida Legislature through the exercise of its lawmaking power. § 120.65, Fla. Stat. As a "mere creature" of Florida statute, DOAH's "powers, duties and authority [and those of its administrative law judges] are those and only those that are conferred expressly or impliedly by statute of the State. Any reasonable doubt as to the lawful

existence of a particular power that is being exercised by [DOAH or its administrative law judges] must be resolved against the exercise thereof and the further exercise of the power should be arrested." City of Cape Coral v. GAC Utilities of Florida, 281 So. 2d 493, 495-96 (Fla. 1973); see also S.T. v. School Board of Seminole County, 783 So. 2d 1231, 1233 (Fla. 5th DCA 2001)("The authority of an administrative law judge to conduct a due process hearing in ESE cases is conferred solely by Section 231.23(4)(m)5 [the predecessor of current Sections 1001.42(4)(l) and 1003.57, Florida Statutes] and Rule 6A-6.03311(5) of the Florida Administrative Code. Neither of these authorities, however, discuss, contemplate, or otherwise support the allowance of discovery in this particular circumstance. . . . Unless created by the constitution, an administrative agency has no common law powers, and has only such powers as the legislature chooses to confer upon it by statute. . . . Here, the legislature chose not to confer upon the administrative law judge the power to allow discovery in this particular variety of hearing. The administrative law judge, therefore, erred in authorizing this practice, and the lower court erred in its sanctioning of it."); and Department of Environmental Regulation v. Puckett Oil Company, Inc., 577 So. 2d 988, 991 (Fla. 1st DCA 1991)("It is well recognized that the powers of administrative agencies are measured and limited by the statutes or acts in

which such powers are expressly granted or implicitly conferred"; held that DOAH exceeded its authority in establishing a jurisdictional time limit for the filing of a response to a petition for attorney's fees and costs filed pursuant to Section 57.111, Florida Statutes.).

171. The authority of a DOAH administrative law judge to grant relief to parents and students who request "impartial due process hearings" is therefore statutorily limited. For instance, while authorized to determine the appropriateness of a challenged educational placement, the judge is not empowered to order, by mandatory injunction or otherwise, a specific alternative placement. See School Board of Martin County, 727 So. 2d at 1074, quoting from, Hendry County School Board, 498 So. 2d at 568 ("The hearing officer is limited to determining the appropriateness of the IEP. If the hearing officer determines that the school district's proposed placement is not appropriate, the hearing officer must remand the matter to the school district. In addition, he may recommend an appropriate placement. The hearing officer, in the instant case, exceeded his authority by sua sponte ordering a residential placement.").

172. "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 [or student's] opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or caused a deprivation of educational benefit." Fla. Admin. Code R. 6A-6.03311(9)(v)4.

173. To take advantage of the opportunity to have a "impartial due process hearing," the parent or majority-aged student must file a due process complaint requesting such a hearing within two years of "the date the parent or [filing student] knew or should have known about the alleged action that forms the basis of the due process hearing request. This limitations period does not apply to a parent [or filing student] if the parent [or filing student] was prevented from filing a due process hearing request because of: 1. Specific misrepresentations by the school district that it had resolved the problem forming the basis of the due process hearing request; or 2. The school district's withholding of information from the parent [or filing student] that was required under [Florida Administrative Code] Rules 6A-6.03011 through 6A-6.0361 . . . to be provided to the parent [or filing student]." Fla. Admin. Code R. 6A-6.03311(9)(b).

174. 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."); see also Saki v. Hawaii, No. 07-00209 JMS/LEK, 2008 U.S. Dist. LEXIS 36090 *20 (D. Haw. April 30, 2008)("That a petitioner cannot raise issues outside the complaint is well-established.").

175. "The burden of proof or persuasion at the [impartial due process] hearing lies with the party who is seeking relief." School Board of Lee County v. E. S., 561 F. Supp. 2d 1282, 1291 (M.D. Fla. 2007); see also Schaffer v. Weast, 546 U.S. 49, 62 (2005)("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."); Board of Education of Township High School District No. 211 v. Ross, 486 F.3d 267, 270-271 (7th Cir. 2007) ("[T]he burden of proof in a hearing challenging an educational placement decision is on the party seeking relief."); Brown v. Bartholomew Consolidated School 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."); and West Platte R-II School District v. Wilson, 439 F.3d 782, 784 (8th Cir. 2006)("[T]the burden of proof in an IDEA case lies with the party initiating the challenge to the Individualized Education Plan (IEP).").

176. In determining whether that burden has been met, the administrative law judge should give deference to the reasonable opinions of those witnesses having expertise in education and related fields. See MM ex rel. DM v. School District of Greenville County, 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 . . . .'"); School District of Wisconsin 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."); Devine, 249 F.3d at 1292 ("[G]reat deference must be paid to the educators who develop the IEP."); Gill v. Columbia 93 School District, 217 F.3d 1027, 1038 (8th Cir. 2000)("Federal courts must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives some educational benefit and is educated alongside his nondisabled classmates to the maximum extent possible."); Wagner v. Board of Education of Montgomery County, 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 School System, 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."). Deference, however, does not mean blind, unthinking acceptance. See County School Board of Henrico County v. Z. P., 399 F.3d 298, 307 (4th Cir. 2005)("Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether

a given IEP is appropriate. That is, the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate.").

177. It is not the function of the administrative law judge, in passing upon the appropriateness of an IEP, to determine the "best methodology for educating [the] child. That is precisely the kind of issue which is properly resolved by local educators and experts" and is not subject to review in a due process hearing. O'Toole By and Through O'Toole v. Olathe District Schools Unified School District No. 233, 144 F.3d 692, 709 (10th Cir. 1998); see also M. M., 437 F.3d at 1102, quoting Lachman v. Illinois Board of Education, 852 F.2d 290, 297 (7th Cir. 1988)("Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child."); Tucker By and Through Tucker v. Calloway County Board of Education, 136 F.3d 495, 506 (6th Cir. 1998)("Case law is clear that the Tuckers are not entitled to dictate educational methodology or to compel a school district to supply a specific program for their disabled child."); Joshua A. v. Rocklin Unified School District, No. CV 07-01057 LEW KJM, 2008 U.S. Dist. LEXIS 26745 *6-7 (E.D. Cal. March 31, 2008)("[A]s long as a district offers an appropriate

educational program, the choice regarding the methodology used to implement the IEP is left to the district's discretion."); and Leticia H. v. Ysleta Independent School District, 502 F. Supp. 2d 512, 519 (W.D. Tex. 2006)("Once a court concludes that a student's IEP is reasonably calculated to provide him with a FAPE, the court must leave 'questions of methodology' to the state.").

178. The due process complaint filed in the instant case challenges, among other things, the determination made by the "IEP staffing committee" to reject Mother's request that Petitioner be placed at [redacted], a private residential facility located outside the school district's boundaries, and to instead place Petitioner at [redacted], a School Board-operated special day school located in Broward County. The appropriateness of this placement determination, pursuant to the agreement of the parties, is the only issue of those raised in Petitioner's due process complaint that will be decided in this Final Order.

179. Petitioner has been in the School Board's Hospital Homebound Program since 2002, receiving special education and related services at Mother's home (a non-school setting). The parties agree that Petitioner requires a "more intensive setting and services." They differ, however, as to what the new setting should be.

180. The School Board takes the position that placement at [redacted] is appropriate. According to the School Board, such placement "would provide [redacted] with personalized instruction and numerous support services to permit [redacted] to benefit educationally," and, moreover, [redacted] is "the least restrictive environment that c[an] address [redacted]'s educational, behavioral, and health needs." The School Board asserts that no showing has been made "that [redacted] need[s] [a] residential placement in order to derive educational benefit or that [redacted] could not be provided FAPE in the lesser restrictive environment of [redacted]'s day program."

181. Petitioner, on the other hand, takes the position that "[p]lacement at [redacted] is not only appropriate, it is necessary for [redacted] to receive educational benefit." According to Petitioner, because "[redacted]'s medical and behavioral needs are inseparably intertwined with her ability to make educational gain[,] . . . [redacted] needs the services provided by a comprehensive residential placement in order to be able to learn." Petitioner asserts that a placement at [redacted] would "[f]ail[] to [meet] [redacted]'s medical and behavioral needs [and] would, in effect, prevent [redacted] from making any educational gain."

182. The record evidence fails to support the argument that Petitioner needs to be placed at [redacted] (or any other

residential facility) in order to receive a free appropriate public education.

183. Petitioner has "medical needs" arising from a seizure disorder. Petitioner suffers from "medically resistant seizures." The most "advanced" treatments available have been unable to prevent Petitioner from having seizures. Accordingly, regardless of the educational setting (be it [redacted], [redacted], or anywhere else), Petitioner is at risk of seizing at any time. [redacted] has a staff of three registered nurses with experience in working with seizure-prone students.[32] Were Petitioner to suffer a seizure emergency at [redacted], a nurse would be able to provide Petitioner first-aid and to monitor and assess Petitioner's condition to determine whether Petitioner could remain in school or needed to be transported to the hospital for further treatment. This emergency care Petitioner would receive at [redacted] would not be appreciably different than that Petitioner would receive at [redacted];[33] and there would be no materially greater seizure disorder-related threat to Petitioner's safety and ability to learn at [redacted] than there would be at [redacted].

184. Additionally, it appears that [redacted] has the available resources and means to meet Petitioner's "behavioral needs." It has a "very self-contained secure campus," a low staff-to-student ratio, and a team of behavioral specialists and other staff well equipped to effectively deal with the types of

behaviors that Petitioner has displayed (including trying to inflict self-injury and to elope) that might interfere with Petitioner's learning.[34]

185. In short, there has been no showing made that, because of Petitioner's "medical and behavioral needs" (or, for that matter, any other reason), Petitioner cannot obtain meaningful educational benefit at [redacted]. While no absolute guarantees can be made as to the outcome of such a placement (particularly inasmuch as Petitioner has not been in a school setting since 2002), the School Board must be given the opportunity to try this less restrictive alternative before Petitioner is uprooted and placed in a residential facility more than 200 miles away from Mother and Father, who have nurtured and sustained Petitioner since birth and been the anchors in Petitioner's life.[35]

186. In view of the foregoing, the challenge to the appropriateness of the determination to place Petitioner at [redacted] fails and is therefore rejected.

DONE AND ORDERED this 17th day of April, 2009, in Tallahassee, Leon County, Florida.

S

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings

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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of April, 2009.

## ENDNOTES

[1] Unless otherwise noted, all references in this Final Order on Placement to Florida Statutes are to Florida Statutes (2008).

[2] The undersigned has accepted these factual stipulations and incorporated them in this Final Order. See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So. 2d 670, 673 (Fla. 1951)("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation."); Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations."); and Palm Beach Community College v. Department of Administration, Division of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991)("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

[3] In *** grade, there was a "one-on-one nurse" assigned to Petitioner during the school day.

[4] There were no Hospital Homebound services provided during Petitioner's three-month hospitalization in late 2006 and early 2007. No reevaluation of Petitioner's educational needs was conducted by the School Board following Petitioner's discharge from the hospital.

[5] The evidentiary record does not reveal how much it would cost the School Board to fund this requested placement.

[6] Mother had signed a form consenting to a reevaluation on October 1, 2007.

[7] This score was "consistent" with the "overall composite" score Petitioner had received in 1997 when *** had last been tested.

[8] On Petitioner's immediately previous IEP, Petitioner was identified as eligible for special education and related services under the educable, not trainable, mentally handicapped classification.

[9] Dr. Lin is "not specifically" familiar with ***. He was told about the facility "by somebody else."

[10] The School Board services other students with intractable seizures in schools "throughout the district" (including in general education classes). School Board staff servicing these students are trained in seizure identification and management, including how to properly administer Diastat.

[11] Prior to the "IEP staffing committee" meeting, a pre-meeting was held, attended just by School Board personnel. The purpose of the pre-meeting was to enable the attendees to prepare for the meeting of the full committee.

[12] One of the members of the committee, Patricia Sanchez, the ESE Specialist at ***, in or about February 2008, had expressed the view that *** was an inappropriate placement for Petitioner. After learning more about Petitioner's situation, Ms. Sanchez subsequently changed her opinion.

[13] "[I]ntensive instruction in behavior is a more intensive service than [mere] behavior support."

[14] An initial 60 to 90-day evaluation and treatment period is "typical[]" for students who are admitted to ***. If it is determined, following this initial evaluation and treatment period, that further treatment would be of no benefit, the student is discharged.

[15] Dr. Lin was sent a copy of this Proposed Treatment Plan. When asked during his deposition what he thought about the plan, his response was as follows:

> It's like any other treatment plan. Until they get their hands on the patient, . . .

> it's going to be a general, broad overview of what they intend to do. There are no specifics.

[16] The record does not reveal how many nurses are on duty at any one time.

[17] At ***, "[r]efusal [to participate in an activity] is not an option." Residents are not allowed to "lay in bed all day." Those that refuse to get out of bed in the morning are dealt with by ***'s "behavioral people."

[18] Only one of these 25 students has a one-on-one paraprofessional aide at school, however.

[19] "[S]tocking shelves" and "label[ing] packages" are examples of the job tasks that program participants perform.

[20] The school has "three buses that take [the] students out into the community twice a day.

[21] Job coaches must "have a teacher assistant certification" and take and pass a "job coach test."

[22] The behavior technicians also assist in collecting the data upon which these "behavioral plans" are based.

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

[24] Florida Administrative Code Rule 6A-6.03011 was amended effective January 4, 2009. The prior version of the rule addressed students eligible for special education and related services because they were "mentally handicapped." It defined "mental handicap" as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period," and it recognized three categories of "mentally handicapped" students, which were described as follows:

> (a) Educable mentally handicapped. An educable mentally handicapped student is a student who is mildly impaired in intellectual and adaptive behavior and whose development reflects a reduced rate of learning. The measured intelligence of an

> educable mentally handicapped student generally falls between two (2) and three (3) standard deviations below the mean and the assessed adaptive behavior falls below that of other students of the same age and socio-cultural group.
>
> (b) Trainable mentally handicapped. A trainable mentally handicapped student is a student who is moderately or severely impaired in intellectual and adaptive behavior and whose development reflects a reduced rate of learning. The measured intelligence of a trainable mentally handicapped student generally falls between three (3) and five (5) standard deviations below the mean and the assessed adaptive behavior falls below that of other students of the same age and socio-cultural group.
>
> (c) Profoundly mentally handicapped. A profoundly mentally handicapped student is a student who is profoundly impaired in intellectual and adaptive behavior and whose development reflects a reduced rate of learning. The measured intelligence of a profoundly mentally handicapped student generally falls below five (5) standard deviations below the mean and the assessed adaptive behavior falls below that of other students of the same age and socio-cultural group.

[25] This classification, as of January 4, 2009, no longer exists. Florida Administrative Code Rule 6A-6.03011 now provides for just one catchall category (Intellectually Disabled), instead of three separate categories (Educable Mentally Handicapped, Trainable Mentally Handicapped, and Profoundly Mentally Handicapped). This change to the rule was made following the amendment to Section 1003.01(3), Florida Statutes, effective July 1, 2008, which replaced the term "students who are . . . mentally handicapped" with the term "students with disabilities who have an intellectual disability."

[26] "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 County School District, 446 F.3d 1153, 1157 n.2 (11th Cir. 2006); see also Lessard v. Wilton-Lyndeborough Cooperative School District, 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.").

[27] After more than 26 years 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 School Administrative District No. 6, 538 F. Supp. 2d 298, 301 (D. Me. 2008); see also Thompson R2-J School District v. Luke P., 540 F.3d 1143, 1149 n.5 (10th Cir. Colo. 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).").

[28] See 34 C.F.R. § 300.115, which provides as follows:

> (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
>
> (b) The continuum required in paragraph (a) of this section must--
>
> (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
>
> (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction

with regular class placement.

[29] Pursuant to 34 C.F.R. § 300.115, the provisions of which are set forth above, a district school board must have a "continuum of alternative placements" available for its exceptional students.

[30] The Court went on to state:

> There must be a balance between the child's educational benefit and the restriction of his liberty. If Robert is receiving meaningful educational benefits from the IEP developed for him, the least restrictive environment in which he is receiving those benefits is appropriate. Even if the Court believed Robert was receiving no educational benefits, there are still less restrictive environments that could be tried before Robert was placed in the most restrictive.

Id. at 451.

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

[32] Furthermore, the School Board has committed to "provid[ing] a full-time nurse . . . to be with *** while [***] attends *** [s]," something Petitioner would not have at ***.

[33] *** has a full-time physician on staff who serves as Medical Director, but he does not routinely respond to seizure emergencies. Although he is involved in the treatment of residents with seizure disorders (doing such things as "adjust[ing]" their medications), this type of medical care is not a "related service" under the IDEA that a district school board is required to furnish an "exceptional student."

[34] With respect specifically to elopement, although many attempts have been made, not one student has eloped from *** in the past year.

[35] To be sure, the School Board will likely face challenges in educating Petitioner at ***, including those related to Petitioner's tendency to be a late riser in the morning and to Petitioner's not having any verbal classmates. It has not been

shown, however, that these challenges will be insurmountable and will prevent Petitioner from receiving meaningful educational benefit if Petitioner goes to ***.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not

available under IDEA for students whose only exceptionality is "gifted"] or
b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(e), Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(e) and 120.68, Florida Statutes.