

Volusia County School District
No. 08-0092E
Initiated By: Parent
Hearing Officer: Suzanne F. Hood
Date Of Final Order: May 4, 2009

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 08-0092E
)
VOLUSIA COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

A final hearing was conducted in this case on February 18 through 22, 2008, and April 28 through May 2, 2008, in Daytona Beach, Florida, and on September 12, 2008, by telephone conference, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████, parent
(Address of record)

For Respondent: Andrew B. Thomas, Esquire
1625 Lakeside Drive
Deland, Florida 32720

STATEMENT OF THE ISSUES

This case presents the following issues: (a) whether Respondent provided Petitioner a free appropriate public education (FAPE) in the least restrictive environment (LRE); (b) whether Respondent failed to provide Petitioner with a required functional behavioral assessment (FBA), a required speech and language evaluation, and/or any other component of an independent educational evaluation (IEE); (c) whether Respondent failed to fully evaluate and/or to develop an appropriate individual education plan (IEP) for all of Petitioner's suspected and identified disabilities; (d) whether Respondent properly implemented Petitioner's IEP and behavior intervention plan (BIP); (e) whether Respondent failed to conduct IEP meetings as requested by Petitioner; (f) whether Respondent offered to provide Petitioner with an appropriate extended school year (ESY); and (g) whether Respondent committed any procedural or substantive violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400 et seq., relative to Petitioner's suspensions from school.

PRELIMINARY STATEMENT

On or about January 2, 2008, Petitioner filed a request for a due process hearing. On January 4, 2008, Respondent referred the case to the Division of Administrative Hearings.

On January 9, 2008, the undersigned conducted a telephone conference with the parties. During the conference, the parties stated that a resolution meeting was scheduled for January 15, 2008. The parties agreed to a date for the final hearing and to extend the date for issuance of the final order beyond the 45-day period to March 17, 2008. On January 10, 2008, the undersigned issued an Order Documenting Pre-hearing Conference.

A Notice of Hearing dated January 10, 2008, scheduled the final hearing to commence on February 18, 2008. That same day, the undersigned issued a Pre-hearing Order.

On January 24, 2008, Petitioner filed a request for another telephone conference to discuss multiple issues. The telephone conference took place on January 25, 2008.

The first week of testimony was heard on February 18-22, 2008. During the week, Petitioner presented the testimony of the following witnesses: (a) Patricia Gibson, compliance coordinator of exceptional student education (ESE); (b) Melissa Love, behavioral specialist; (c) Mary Alice Myers, coordinator of school psychological services; (d) Donald Bradley, ■■■ grade teacher; (e) Laura Haynes, ■■■ grade teacher; and (f) ■■■, Petitioner's parent. Because Petitioner did not complete the presentation of Petitioner's case, the parties agreed to continue the hearing.

On February 26, 2008, the undersigned issued an Order Re-scheduling Hearing and Extending Time. The order re-scheduled the hearing for April 28-May 2, 2008, and extended the time for the issuance of the final order to June 11, 2008.

On April 16, 2008, the Florida Department of Education filed a Motion to Quash a Subpoena Duces Tecum for one of its employees to appear at the hearing. Petitioner filed a response in opposition to the motion on April 23, 2008. The Motion to Quash was granted that same day.

On April 18, 2008, Respondent filed a Motion for Case Management Conference to determine the anticipated length of the remainder of the hearing and to discuss the number of Petitioner's potential witnesses. On April 21, 2008, Petitioner filed a response in opposition to the motion.

The undersigned conducted a telephone conference with the parties on April 25, 2008. During the conference, the undersigned reminded the parties of the time limitations of the second week of hearing and the need for both parties to have sufficient time to present their cases.

The hearing reconvened April 28, 2008, through May 5, 2008. During the week, Petitioner presented the testimony of the following witnesses: (a) ■■■■, Petitioner's parent; (b) Cynthia Goodknecht, gifted teacher/consultant; (c) Tracia Culver, teacher-on-assignment/assistant principal; (d) Jennifer Tyser,

behavioral specialist; (e) Michael Strouse, physical education teacher; (f) Marla DeLoach Griffin, school counselor; (g) Tucker Harris, exceptional student education (ESE) teacher; (h) June Weaver, school counselor; (i) Claire Phillips, ESE administrator/IEP facilitator; (j) Lynda Moore, principal; (k) Susan MacDermant, ■■■ grade paraprofessional; (l) Jama Boden, ESE teacher; (m) Stacey Wiggins, ESE resource/consultation teacher; (n) Linda Foster, ESE program specialist; (o) Theresa Weaver, ESE teacher; and (p) Kathryn Kistler Harris, elementary placement administrator/compliance specialist. Respondent presented the testimony of one witness, Diane Twachtman-Cullen, Ph.D.

Petitioner did not complete the presentation of Petitioner's case during the second week of hearing. The parties agreed to continue the proceeding so that Petitioner could present the telephone testimony of one additional witness.

As agreed by the parties, the undersigned issued an Order Granting Continuance, Requiring Status Report, and Extending Time for Issuance of Final Order on May 5, 2008. Pursuant to the agreement of the parties, the order extended the time for issuance of the final order to July 31, 2008.

On May 16, 2008, the parties filed a Joint Status Report. On May 21, 2008, the undersigned conducted a telephone conference with the parties. During the conference, Petitioner

agreed that its witness would be available to provide telephone testimony on July 3, 2008. Respondent requested that the presentation of its case be deferred until after August 12, 2008, the first day of staff pre-planning.

On May 23, 2008, the undersigned issued a Notice of Telephonic Final Hearing. The notice scheduled the telephone testimony of Petitioner's witness on July 3, 2008.

On June 10, 2004, a 17-volume transcript was filed with the Division of Administrative Hearings.

On June 23, 2008, Petitioner filed a request to reschedule the telephonic testimony of Petitioner's witness to the week of August 11, 2008. On June 24, 2008, the undersigned issued an Order Denying Continuance of Final Hearing.

On June 27, 2008, Petitioner filed an amended motion to reschedule the telephonic testimony of Petitioner's witness. The amended motion stated that Respondent did not oppose a continuation of the hearing. On June 30, 2008, the undersigned issued an Order Granting Continuance and Re-scheduling Hearing for August 13-15, 2008.

On July 30, 2008, Petitioner filed a request to reschedule the telephonic testimony of Petitioner's witness and the presentation of Respondent's case. Respondent immediately filed a Response to Petitioner's Motion to Reschedule, stating the

conditions under which Respondent would agree to further continuance.

On August 4, 2008, the undersigned conducted a telephone conference with the parties. As agreed during the conference, the undersigned issued an Order Documenting Telephone Conference, Granting Continuance and Re-scheduling Hearing by Telephone on September 12, 2008.

On September 12, 2008, Petitioner presented the telephone testimony of Gary M. Eisenburg, Ph.D. At the conclusion of Dr. Eisenburg's testimony, the parties agreed that Respondent would have an opportunity to present its case on November 19-20, 2008. On September 23, 2008, the undersigned issued an Order rescheduling the hearing as agreed.

On September 30, 2008, the 18th volume of transcript was filed the Division of Administrative Hearings.

On November 18, 2008, Respondent filed a Waiver of the opportunity to present further evidence in this cause.

During the course of the hearing, Petitioner offered the following exhibits that are accepted as evidence: P1-P47, P48-P59, P61-P104, P106-P122, P125-P134, P136-P149, P152, P154-P158, P160, P162-P165, P168-P169, P173-P175, P178-P184, P186, P189-P192, P195-P197, P199-P212, and P214-P225, subject to exclusion of uncorroborated hearsay that may be included in any exhibit.

Petitioner proffered/offered the following exhibits that are not admitted as evidence: P47a, P60, P105, P123-P124, P135, P150-P151, P153, P159, P161, P166-P167, P170-P172, P176-P177, P185, P187-P188, P193-P194, P198, and P213.

Respondent offered one exhibit, R1, which was accepted as evidence.

On November 19, 2008, the undersigned conducted a telephone conference with the parties. As agreed during the conference, the undersigned immediately issued an Order, setting forth the time for the filing of proposed final orders as January 23, 2009, and the issuance of this Final Order as February 27, 2009.

On January 20, 2008, Petitioner filed an unopposed request to extend the time for the filing of proposed final orders to March 9, 2009. An Order Granting Extension of Time dated January 21, 2009, extended the time for proposed final orders as requested.

On March 9, 2009, Petitioner filed a Combined Motion for Leave to Exceed Page Limit and for Extension of Time. Petitioner also filed a Motion to Append the Record. Respondent filed an Objection to Petitioner's Combined Motion.

An Order dated March 9, 2009, extended the time for filing proposed final orders to March 16, 2009. The Order also increased the number of pages for the proposed final orders from

40 pages to 50 pages. Finally the Order states that this Final Order would issue no later than April 16, 2009.

Respondent filed its Proposed Final Order in a timely manner on March 16, 2009.

On March 19, 2009, Petitioner filed a Motion to Append the Record and a Motion for Leave to File Late Proposed Findings and Proposed Order and a Renewal Motion to File Additional Pages. On March 19, 2009, Respondent filed an Objection to Petitioner's motions.

The undersigned issued an Order dated March 20, 2009, denying Petitioner's Motion to Append the Record. Petitioner's Motion for Leave to File Late Proposed Findings and Proposed Order and a Renewal Motion to File Additional Pages are hereby denied.

On March 20, 2009, Petitioner filed a Memorandum and Points of Authority. On March 23, 2009, Respondent filed a Motion to Strike Petitioner's Memorandum. On March 24, 2009, Petitioner filed a response in opposition to the motion. Respondent's Motion to Strike is hereby granted.

On or about April 16, 2009, the parties were contacted by the undersigned's office. During that conversation, both parties advised that they had no objection to a brief extension of time for the filing of the Final Order.

FINDINGS OF FACT

1. In January 2005, Petitioner was evaluated by Ivan Fleishman, Psy.D. Dr. Fleishman found that Petitioner had attention deficit/hyperactivity disorder (ADHD). Dr. Fleishman concluded that he could not determine at that time whether Petitioner suffered from Asperger's Syndrome.

2. On or about July 28, 2005, Respondent's school psychologist performed a psychological reevaluation of Petitioner. At that time, Petitioner was approximately [REDACTED] years old. Child Find requested the evaluation to assist in determining Petitioner's eligibility for services from the [REDACTED] ESE program.

3. The evaluation included many tests, including Gilliam Asperger's Disorder Scale (GADS). Based on information provided by Petitioner's parent, the Asperger's Disorder Quotient indicated that Petitioner had a high probability of suffering from Asperger's Syndrome.

4. Petitioner attended [REDACTED] at [REDACTED] School ([REDACTED]) for the 2005/2006 school year. Initially, Petitioner was placed in a gifted classroom taught by Ms. Goodknecht. Petitioner was the only [REDACTED] in a small primary class of [REDACTED] grade students.

5. On or about August 2, 2005, Respondent's staff developed an educational plan (EP) for Petitioner.

6. On or about August 4, 2005, Petitioner received a medical diagnosis of ADHD. The physician prescribed Ritalin as a treatment for ADHD.

7. On or about August 17, 2005, Respondent's staff performed a FBA and developed a BIP for Petitioner. According to the BIP, some of Petitioner's strengths included oral communication and inquisitiveness. Petitioner's behaviors targeted for increase were following directions and staying on task. Behaviors targeted for reduction were running on campus or in the classroom and touching peers with hands or feet.

8. According to Petitioner's BIP, strategies for crisis management included redirection and provision of a safe area. The BIP required the school's guidance counselor to provide specific social skill training.

9. The BIP required Ms. Goodknecht to keep a daily behavior report/chart and to send a daily behavior journal to Petitioner's parent. Ms. Goodknecht met her obligations in this regard as long as Petitioner remained her student.

10. Ms. Goodknecht observed Petitioner in the gifted class for three weeks before requesting assistance on August 26, 2005. Ms. Goodknecht formally requested assistance for Petitioner in the following areas: (a) follows oral directions; (b) listens to what others have to say; (c) begins and completes tasks;

(d) maintains attention; (e) adjusts to changes in routine; and (f) follows class rules.

11. Ms. Goodknecht's request stated that Petitioner had no concept of safety; therefore, Petitioner needed adult supervision at all times on the school campus. Ms. Goodknecht listed the following as Petitioner's medical issues: (a) severe ADHD; (b) asthma; (c) allergies; and (d) possible Asperger's disorder. Ms. Goodknecht concluded that Petitioner's safety, behaviors, and health established a need for an IEP and FBA/BIP rather than an EP.

12. On November 28, 2005, Petitioner's teachers and parents met to discuss the following: (a) the EP with 504 accommodations; (b) the FBA/BIP; and (c) the Emergency Care Plan.

13. As of January 2006, Petitioner was reading at or above the [REDACTED] level. Petitioner also was working above grade level in mathematics.

14. On or about January 22, 2006, Petitioner began his day on a self-described wacky/weird note. Petitioner alternated between being lethargic and being unable to sit still, running around and around. Ms. Goodknecht finally had to have Petitioner removed from the gifted class.

15. The guidance counselor called Petitioner's parent, learning that Petitioner's behavior medication had recently been

changed. When Petitioner's parent arrived at school, Petitioner became whiney and resisted physical contact with the parent. Petitioner's parent wrapped a blanket tightly around Petitioner, in an effort to help Petitioner de-escalate. Petitioner then became very loud and had to be removed from the office to the clinic with the parent. Petitioner's parent stated that she was glad the school was finally experiencing what had been happening at home all along.

16. On January 31, 2006, Petitioner was suspended from school for a period of two days. The suspension involved an incident in the restroom. Apparently, Petitioner used profanity, tried to urinate on other students, and punched some students.

17. On February 3, 2006, Petitioner's ESE team determined that the restroom incident was a manifestation of Petitioner's disability. The team also concluded that Petitioner had been improving academically and making progress with social skills until the end of January 2006. Petitioner's parent shared recent changes at home that might have accounted for the change in Petitioner's behavior.

18. On February 3, 2006, Petitioner's ESE team discussed the need for reevaluation documentation. During the meeting, Petitioner's parent gave consent for the following evaluations:
(a) a psychological evaluation to assess behavioral/emotional

functioning; (b) an evaluation of pragmatic language; (c) a FBA; (d) a fine motor skills evaluation; and (e) a sensory profile.

19. During the February 3, 2006, meeting, Petitioner's ESE team concluded that Petitioner should be placed in the ESE program with "other health impaired" and "gifted" as primary and secondary exceptionalities respectively. The team reviewed Petitioner's EP and continued its goals and objectives in the new IEP.

20. Under the February 3, 2006, IEP, Petitioner was to receive special instruction in communication in a small group/therapy room (mild varying exceptionalities (VE) classroom) setting for part of the day and the balance of the day in the gifted classroom. Petitioner's parent strongly objected to Petitioner's placement in the VE classroom even for part of the school day.

21. The rationale for Petitioner to begin the school day in the VE classroom was appropriate to allow Petitioner an opportunity to receive more intensive behavioral attention. The VE classroom, with a more favorable student/adult ratio, gave Petitioner time to calm down and focus before embarking on academic subjects in the regular education classroom.

22. On February 3, 2006, the ESE team discussed Petitioner's behaviors relative to ADHD and Asperger's Syndrome. The ESE team was advised that the [REDACTED] ([REDACTED]) declined to attend

the meeting and was closing Petitioner's case until Petitioner was diagnosed with an Asperger spectrum disorder. Petitioner's parent stated that Dr. Fleishman wanted to reevaluate Petitioner at age seven or eight to consider a formal diagnosis of Asperger's Syndrome.

23. Sometime after the February 3, 2006, meeting, Petitioner's parent took Petitioner out of school but allowed Petitioner to attend school for testing and/or special functions like parties and field trips. Petitioner's parent did not want Petitioner to attend class in the VE setting.

24. On February 21, 2006, the ESE team reviewed Petitioner's BIP, deciding that the BIP needed modification to be implemented when Petitioner returned to school. Respondent's staff subsequently modified Petitioner's BIP regarding a safe person/place for Petitioner to access when agitated.

25. Ms. Love, a Board Certified Behavior Analyst (BCBA), participated in updating the BIP. Ms. Love had worked with Petitioner to collect data and to update the BIP since February 2006.

26. On February 21, 2006, Petitioner's IEP team met to review Petitioner's IEP. The team decided to make no changes to the IEP until after new evaluations were completed. The team agreed that Petitioner would have the following schedule when Petitioner returned to school: (a) mild VE classroom, 8:00-

9:30 a.m.; (b) gifted classroom, 9:30-11:30 a.m.; (c) general education kindergarten classroom, 11:30 a.m.-12:10 p.m.; and (d) gifted classroom, 12:20-2:00 p.m.

27. On February 24, 2006, Petitioner's ESE team met to clarify "safe place" or "break" procedures. The team also amended the BIP to require a timed reinforcement schedule. Petitioner's parent continued to refrain from sending Petitioner to school.

28. On or about February 24, 2006, Respondent's staff completed a language evaluation of Petitioner.

29. On or about March 9, 2006, Respondent's school psychologist, Frank Coker, performed a psychological reevaluation of Petitioner. The evaluation included the use of the Behavior Assessment System for Children-2nd Edition: Teacher/Parent Rating Scales-Child (BASC-2). The results of Ms. Goodknecht's ratings indicated that the following areas were either clinically significant or at risk: (a) externalizing problems composite (hyperactivity, aggression, and conduct problems scales); (b) school problems (attention problems and learning problems scales); and (c) behavior symptoms index (hyperactivity, aggression, depression, attention problems, atypicality, and withdrawal scales).

30. The March 9, 2006, evaluation also indicated that Petitioner was exhibiting significant behavioral problems as

revealed on the Devereux Scales of Mental Disorders (DSMD). Petitioner's highest rating was on the externalizing composite, a measure of behaviors that involve conflicts between the individual and the environment. The conflict behaviors include, but are not limited to, aggressiveness, disobedience, disruptiveness, restlessness, and inattentiveness.

31. On March 14, 2006, Petitioner's parent provided Respondent with a written request for an independent medical evaluation and an IEE. Acting on Petitioner's behalf, Petitioner's attorney subsequently withdrew the request for a medical evaluation and an IEE.

32. Petitioner's parent also advised Respondent that Petitioner's parent would send Petitioner to school each day after the 8:00 to 9:30 a.m. VE class was over. However, the record indicates that Petitioner did not begin to follow this schedule immediately.

33. On March 25, 2006, Respondent's school psychologist, Frank Coker, continued the psychological reevaluation of Petitioner. This time Petitioner's parent completed the BASC-2 rating scales, revealing significant elevation in the externalizing problems composite and the behavior symptoms index.

34. On March 25, 2006, Petitioner's parent completed the DSMD. The results of the evaluation showed that Petitioner

exhibited significant elevations on the externalizing, internalizing, and critical pathology composites and on the attention, depression, autism, and anxiety scales.

35. On March 29, 2006, Petitioner's ESE team met to review and update Petitioner's BIP. At that time, Petitioner had been absent from school for all but two full days and two half days since the last BIP meeting in February 2006. The team was unable to resolve all of the issues raised by Petitioner's parent during the time allotted for the meeting; therefore, the team decided to reconvene on April 26, 2006.

36. Mr. Coker completed the report of the psycho-educational evaluation on April 10, 2006. An addendum to the evaluation was completed on April 24, 2006.

37. On April 11, 2006, Respondent's staff performed a sensory profile to measure Petitioner's responses to sensory events in daily life. Petitioner's parent completed the questionnaire that formed the basis for the profile.

38. The sensory profile report stated that Petitioner had difficulty in the following areas: (a) sensory processing, a measure of responses to things seen; (b) modulation, the ability to organize input to create appropriate adaptive responses; and (c) behavioral and emotional responses, a measure of ability to use sensory input and modulation to produce appropriate responses in daily life.

39. The sensory profile report included the following recommendations: (a) allow opportunities for frequent movement; (b) use of a Disc o'Sit to allow movement while sitting; (c) use of headphone with or without music to increase concentration; (d) avoid distractions by seating Petitioner at the front of the room; (e) use of a weighted vest to provide kinesthetic input; (f) avoid approaching and touching Petitioner from the rear; and (g) make sure Petitioner is paying attention before giving directions.

40. On April 24, 2006, Respondent's staff completed a second language evaluation of Petitioner. The evaluation indicated that Petitioner's language skills were within the normal range for Petitioner's age.

41. On May 11, 2006, Respondent provided Petitioner's parent with an Informed Notice of Change in Placement. The notice states that Petitioner's placement would be changed to a general education classroom with gifted consultation and daily ESE support for social, emotional, and behavior issues.

42. Petitioner's IEP team convened on May 11, 2006. According to the IEP developed at that meeting, Petitioner's parent requested an IEE, a FBA, a language evaluation, and an updated social history. Petitioner's parent had previously requested a complete medical evaluation to assess the full scope

of Petitioner's disability including pervasive developmental disorder, Asperger's Syndrome and autism.

43. During the May 11, 2006 IEP meeting, the IEP team reviewed and revised Petitioner's present levels of performance, goals, and objectives. The team also addressed due process rights, ESY, and reevaluation. Respondent's staff provided Petitioner's parent with due process request documents and advised the parent that Petitioner qualified for ESY in a mild VE classroom.

44. The May 11, 2006, IEP states that Petitioner's primary Exceptionality was "other health impaired." Petitioner's secondary Exceptionality was "gifted."

45. The May 11, 2006, IEP states that Petitioner will use a general education curriculum with accommodations and support in the following areas: (a) social/emotional behavior; (b) independent functioning; (c) academic curriculum; and (c) communication. Petitioner's accommodations included a weekly consultation from a gifted teacher to enhance Petitioner's academic skills. The accommodations also included daily instruction in the VE class to address Petitioner's needs in communication, social skills, and independent functioning.

46. The May 11, 2006, IEP indicates that Petitioner's ESE team met four times between February 3, 2006, and March 29, 2006, to review and revise Petitioner's FBA/BIP. The ESE team

was especially concerned with Petitioner's attendance (52 unexcused absences for the school year to date), off-task behavior, attention-seeking behaviors, and impulsivity.

47. The May 11, 2006, IEP states that Petitioner's occupational therapist would do an initial orientation for a Disc o'Sit and a weighted vest when they arrived. The purpose of the Disc o'Sit was to provide Petitioner with a sensory seating system to allow increased sensation and movement while seated. The purpose of the weighted vest was to provide Petitioner with increased kinesthetic input.

48. All of Petitioner's IEPs included a section relative to state and district assessment accommodations and or modifications. The IEPs indicated that Petitioner would participate in state and district-wide assessment programs with accommodations and/or modifications as set forth on the ESE support services page. The IEPs also included the following statement with a space for parent acknowledgment:

I understand the implications of the continued use of instructional accommodations/modifications that are not permitted on state and district-wide standardized testing. I give my consent for my child to receive these accommodations in the classroom.

Petitioner's parent did not sign the acknowledgment on the May 11, 2006, IEP. Instead, Petitioner's parent decided to review the document at a later date.

49. Petitioner's [REDACTED] report card indicates that Petitioner attended 43 out of 43 days for the first grading period, 45 out of 45 days for the second grading period, and 33 out of 50 days for the third grading period. Petitioner attended zero out of 42 days for the fourth grading period. Petitioner was administratively assigned to [REDACTED] grade for the 2006/2007 school year.

50. Petitioner's [REDACTED] report card showed progress at or above grade level in all academic subjects. Petitioner's third grading-period grades show satisfactory progress in working independently, taking care of materials, participating in group activities, and respecting authority.

51. Petitioner's areas of concern included the following as of the third grading period: (a) listening attentively; (b) following directions; (c) staying on task; (d) getting along with other children; (e) respecting rights and properties of others; (f) accepting correction; (g) demonstrating verbal control; and (h) demonstrating physical control.

52. On June 30, 2006, Respondent provided Petitioner with an Informed Notice of Proposal or Refusal to Take a Specific Action. The notice advised Petitioner that Respondent denied the request for a medical evaluation and an IEE. Respondent then filed a due process complaint with the Division of Administrative Hearings.

53. During the summer of 2006, Petitioner did not attend ESY in the VE classroom. The ESY would not have been too restrictive for Petitioner given the need to prevent regression in language and social issues.

54. In a letter dated July 26, 2006, Respondent agreed to provide Petitioner with an IEE. The letter required Petitioner's parent to select a psychologist from a list of four local psychologists, including Dr. Fleishman. Respondent agreed to pay for the evaluation.

55. On August 7, 2006, Respondent and Petitioner's parent entered into a Settlement Agreement that states as follows in pertinent part:

RECITALS

A dispute has arisen regarding the provision of Independent Educational Evaluations for Student.

That dispute led to the initiation of administrative proceedings by School Board before the Division of Administrative Hearings.

* * *

. . . Parent and School Board agree as follows:

1) Parent shall promptly select a Psychologist, from a list provided by School Board to parent dated July 26, 2006, and schedule a psycho-educational evaluation of Student to be done by said Psychologist.

(a) The scope of the report shall be as set forth in Attachment "A."

(b) Parent shall use her best efforts to assure that the psycho-educational

evaluation is completed and a written report submitted by the Psychologist to the parties on or before September 15, 2006.

(c) The written report shall be submitted by Psychologist to both School Board and parent simultaneously.

* * *

4) School Board shall pay the reasonable fees charged by the independent evaluators for the evaluation designated in Paragraphs 1, 2, and 3, above, and Parent shall have no obligation to pay any portion of said fees.

The settlement agreement contained similar language regarding the selection of a private speech/language specialist and a private behavior analyst.

56. Attachment A to the Settlement Agreement provided the scope of the psycho educational evaluation. It listed two speech/language specialists and two behavior analysts that Respondent approved to evaluate Petitioner.

57. As to the selection of a psychologist, one psychologist concluded that he had a conflict of interest and would not perform the evaluation. Petitioner's parent refused to select one of the three remaining psychologists. Testimony that none of the three remaining psychologists were acceptable for whatever reason is not credible.

58. Petitioner's parent admitted that Respondent provided the name of another psychologist who was unacceptable because the psychologist only evaluated preschool children.

59. Petitioner's parent also admitted that Respondent provided the names of three or four more psychologists. According to Petitioner's parent, one psychologist could not be located and the others usually evaluated preschool children but only would evaluate Petitioner if Petitioner enrolled in their clinic over 100 miles from home. Petitioner's uncorroborated testimony in this regard is not credible.

60. Petitioner enrolled in [REDACTED] grade at [REDACTED] School ([REDACTED]) for the 2006/2007 school year. However, Petitioner did not begin attending classes at [REDACTED] until November 2, 2006.

61. On August 22, 2006, Respondent provided Petitioner with an Informed Notice of Proposal or Refusal to Take a Specific Action. The notice advised that Respondent would not pay for Petitioner's private school placement.

62. Harold Johanessen, Jr., a private BCBA, performed a FBA and developed a BIP for Petitioner in September 2006. Mr. Johanessen recommended that all caregivers in Petitioner's home and community undergo training to implement step-by-step procedures for reducing or increasing target behaviors. Neither the FBA nor the BIP referenced Petitioner's school. Mr. Johanessen did not testify at the hearing.

63. Before Petitioner enrolled at [REDACTED], Petitioner filed an application dated September 7, 2006, for hospital/homebound

instructional services. Respondent's staff subsequently denied the application.

64. Petitioner also filed an in-district student transfer application dated September 7, 2006. Respondent allowed Petitioner to transfer to Edgewater.

65. In September 2006, Petitioner's parent offered the name of Dr. Eisenberg, located in Boca Raton, Florida, as the psychologist chosen to perform the independent psycho educational evaluation. Respondent objected to the offer.

66. Respondent did not agree to pay for the evaluation by Dr. Eisenberg. Respondent did not object to Dr. Eisenberg's qualifications and/or to scope of his proposed evaluation. However, Petitioner knew or should have known that Respondent objected to the location of the proposed evaluation in Boca Raton, almost 200 miles from Petitioner's home. The testimony of Petitioner's parent that she did not know the Respondent's criteria for the geographical location of the psycho-educational evaluation is not credible.

67. Before Petitioner enrolled at ■■■, Respondent's ■■■ staff convened an IEP meeting on October 17, 2006. During the meeting, the ESE team determined that Petitioner would continue to receive ESE services with "other health impaired" and "gifted as the named exceptionalities.

68. The October 17, 2006, IEP indicates that Petitioner would spend most of the school day in a general education classroom and thirty minutes per day in a mild VE classroom. The IEP specified that Petitioner would receive a gifted consultation for special instruction in pre-academic skills once per week.

69. During the October 17, 2006, IEP meeting, the ESE team decided that the May 11, 2006, IEP continued to be appropriate. Because Petitioner had been out of school since February 2006, the team decided to reassess Petitioner's academic, social, and emotional needs after Petitioner began daily attendance at [REDACTED].

70. At [REDACTED], Petitioner was in Ms. Boden's VE class for the first thirty minutes of the day. Ms. Boden specifically addressed Petitioner's social, critical thinking, and pragmatic language skills and goals.

71. For the balance of the school day, Petitioner attended a regular education [REDACTED] grade class taught by Ms. Haynes. Persuasive evidence indicates that Ms. Haynes and Ms. Boden properly implemented Petitioner's IEP.

72. In November 2006, Ms. Haynes and Ms. Goodknecht consulted with each other to provide Petitioner with enrichment materials such as activities that teach social skills, math, and reading. The enrichment materials were the same that Ms. Goodknecht's gifted primary students were using. The

materials included above-grade reading, mathematics, language arts, and Spanish lessons.

73. The enrichment materials were sent home when Petitioner did not have time in class to work on them. Eventually, Ms. Haynes gave Petitioner a ten-minute "gifted time" in the afternoon.

74. Ms. Hayes had a parent/teacher conference with Petitioner's parent on November 29, 2006. The purpose of the conference was to review Petitioner academic progress. The notes from the conference indicate that Petitioner was participating in class more. Petitioner was beginning to turn in writing assignments. Petitioner's parent agreed to work on spelling, writing, and reading at home.

75. On December 15, 2006, Petitioner was suspended from school for one day. According to the Notice of School Suspension, Petitioner punched a female student in the nose, punched a male student on the shoulder, and continued to put hands on fellow students.

76. After the December 15, 2006, incident, Petitioner's parent requested a manifestation hearing. Respondent agreed to a parent/teacher conference on December 18, 2007, and to set up a FBA/BIP team meeting as soon as possible.

77. On January 16, 2007, Petitioner's IEP team met to review Petitioner's progress at [REDACTED]. During the meeting, the

team discussed the following items: (a) reading progress indicators and curriculum based assessments; (b) interest in mathematics; and (c) behaviors such as completing work, staying on task, staying in seat, yelling out, crawling under tables, and putting hands on students.

78. The IEP team set a schedule for the BIP team to meet. The team listed the following as topics for the next meeting: (a) safe place; (b) lunch room; (c) melt downs; (d) loss of control; (e) eating and nutritional needs; (f) discipline; (g) on-task behaviors; (h) reward system; (i) social interaction; (j) motivation and daily communication.

79. The gifted teacher reported on strategies, enrichment work, and resources that had been provided to the general education teacher for Petitioner's benefit. The team decided that the enrichment work would be added to Petitioner's homework packet if Petitioner could not complete it at school.

80. Petitioner's parent requested a paraprofessional for Petitioner's class. Respondent's program specialist agreed to pass the request on to the Support Needs Assessment Team (SNAT).

81. Petitioner's ESE team met on January 25, 2007, to address the following behaviors/concerns as requested by Petitioner's parent: (a) safe place; (b) staying on task in the lunchroom; (c) meltdown procedures; (d) peer

interaction/socializing appropriately; (e) motivation;
(f) monthly BIP meeting.

82. On February 9, 2007, SNAT provided the following recommendations: (a) use of visual symbols rather than repetitive verbal interactions; (b) use of a timer to encourage task completion; (c) initiate a request for VAATT services; (d) update the personal visual schedule to facilitate transitions; (e) allow access to and prompt use of Disc o'Sit and weighted vest; (f) provide tangible reinforcement in the VE class instead of waiting to reward Petitioner in regular classroom; and (g) use of a behavior tutor to coach staff on consistent implementation of BIP.

83. On or about February 22, 2007, Petitioner's BIP team met and recommended that Petitioner receive support from a behavior specialist. Ms. Tyser began providing that support by developing and teaching Petitioner the use of visual supports relative to school rules and appropriate social behaviors. Ms. Tyser also developed a system for teaching Petitioner how to make more independent transitions. She taught Petitioner how to self-manage task/activity sequencing using a personal schedule with a first/then structure.

84. On March 6, 2007, Petitioner was suspended from school for one school day. The suspension was based on Petitioner's

aggressive behavior in punching, kneeling, and pushing another student to the ground.

85. Petitioner had a one-on-one behavior tutor from February 26, 2007, to March 12, 2007. Petitioner's behavior improved during and after the time the tutor was in the classroom in the areas of on-task behavior, following directions, keeping hand/body to self, talking nice, and making safe choices.

86. The behavior tutor made the following recommendations: (a) reinforce Petitioner's classmates for ignoring Petitioner's inappropriate behavior; (b) allow Petitioner to sit at the art table to work; and (c) move Petitioner's carrel to the front of the room. Petitioner's teacher implemented these recommendations. However, moving Petitioner's carrel to the front of the room was not effective because it was even more distracting for Petitioner.

87. On March 13, 2007, Petitioner's ESE team met to conduct a manifestation review of the two behavioral incidents that occurred in December 2006 and March 2007. The team concluded that the incidents were a manifestation of Petitioner's disability.

88. The ESE team discussed SNAP's recommendations, which did not include placing a paraprofessional in Petitioner's

classroom. Instead, SNAT recommended that the FBA/BIP team meet every six weeks until Petitioner's behavior improved.

89. During the March 13, 2007, meeting, the ESE team reviewed Petitioner's present level of performance in the areas of curriculum/learning, social/emotional, independent functioning, and communication.

90. On March 20, 2007, Dr. Gary Eisenberg performed an IEE for Petitioner. Petitioner's parents paid \$1,500 for the evaluation and \$670 for other travel expenses.

91. Petitioner was seven years old when Dr. Eisenberg was retained. There is no persuasive evidence that any psychologist could have diagnosed Petitioner with Asperger's Syndrome at an earlier age.

92. Testing performed during the evaluation placed Petitioner in the very likely range for Asperger's Syndrome. Dr. Eisenberg's reports states as follows in pertinent part:

This youngster exhibits all of the symptoms of Asperger's Syndrome, including the fixations and deficits in social perception. The latter includes a lack of empathy and an inability to understand the rules governing social behavior. The youngster does not follow social cues and has a limited interest in satisfying friends. [Petitioner] struggles with pragmatics and perceiving subtleties and may interpret conversation literally. [Petitioner] may tantrum due to difficulties with transition, unscheduled events, or violations of his obsessive rituals. Tantrums can also be caused by [Petitioner's] sensory

oversensitivity. Such tantrums are not predictable and could be due to noises, smells, or other sights. Like many Asperger's kids, [Petitioner] is uncoordinated yet bright, yet unorganized, and without common sense.

93. Dr. Eisenberg diagnosed Petitioner as having Asperger's Syndrome and ADHD (combined type) [secondary] with obsessive-compulsive tendencies. Dr. Eisenberg's recommendations included but are not limited to the following:

- (a) Petitioner should be placed in a mainstream public school with supports, including a full-time aide;
- (b) Petitioner should have a "safe room" for completing class work with no positive or negative adult attention when Petitioner needs discipline;
- (c) Petitioner's educational program should include an opportunity for role playing of appropriate behavior;
- (d) Petitioner should have a behavior reinforcement program designed by a behaviorist;
- (e) Petitioner needs advance warning regarding changes in classroom routine;
- (f) Petitioner should have gifted-level work available when Petitioner's regular work is completed;
- (g) Petitioner requires a system for organizing school assignments and homework;
- (h) Petitioner's written homework and class work should be reduced;
- (i) Petitioner should have a technology consultation for the use of a laptop;
- (j) Petitioner should have an occupational therapist consultation to aid in developing better handwriting. Except

for providing Petitioner with a one-on-one aide and a laptop computer, Respondent's staff had implemented these strategies in the past and/or was implementing these strategies with Petitioner at that time.

94. On March 27, 2007, Ms. Goodknecht presented Petitioner with the Star Fish Award. The award was for outstanding achievement in Math Superstars III.

95. On April 12, 2007, Ms. Haynes had a parent/teacher conference with Petitioner's parent. The discussion involved the parent's concern over Petitioner's academic progress. Ms. Haynes and Ms. Moore stated that Petitioner was making progress in math class. They also reviewed the packets of math and reading enrichment materials prepared by Ms. Goodknecht. There is no persuasive evidence to show that the enrichment materials were inappropriate to provide Petitioner with a challenging curriculum.

96. On April 12, 2007, the Volusia Adaptive Assistive Technology Team (VAATT) evaluated Petitioner. The evaluation report listed the following tools then in place: (a) visual schedule; (b) visual point system chart; (c) classroom rules chart; and (d) "Great Day" chart (clothespin on a level).

97. VAATT recommended the following for a trial basis: (a) a portable word processor for [REDACTED] grade to facilitate participation in writing tasks; (b) a transparency envelope to

keep the point sheet in Petitioner's work area; (c) a reminder card about the point system attached by Velcro to Petitioner's pencil box; (d) use of a "super symbol" on a lanyard to remind Petitioner about a rule rather than having a verbal interaction; and (e) selective use of a response/cost system to refine the point system.

98. On April 17, 2007, Petitioner's ESE team revised Petitioner's BIP again. The revisions included adding and/or modifying proactive and educative strategies. Specifically, the ESE team added the following strategies: (a) provide Petitioner with reminders of any upcoming schedule changes; (b) teach Petitioner how to recognize early signs of anger and how to cope in advance of an outburst/meltdown; and (c) provide Petitioner with adult supervision between classes.

99. On April 30, 2007, a professional employed by Behavior Analysis Support Services, Inc. performed a Comprehensive Behavioral Assessment for Petitioner. Mrs. Gibson, Respondent's ESE Coordinator, arranged for the assessment at the request of Petitioner's parent.

100. The behavior assessment involved direct observation of Petitioner, interviews with Petitioner's parents and Respondent's staff, and review of school records over a two-day period at Petitioner's home and school. The assessment included

the use of FBA assessment tools as well as other screening devices such as the Autism Diagnostic Observation Scales.

101. The behavior assessment report approved of Petitioner's goals and objectives in some areas. In other areas, the report recommended clarification of goals and objectives in the IEP. The report recommended the use of a specific type of social/relationship curriculum and an autistic interpreter with Petitioner.

102. On May 3, 2007, Petitioner's parent provided the IEP team with a copy of Dr. Eisenberg's report. At that meeting, the ESE team determined that Petitioner needed ESY in a mild VE classroom in the areas of written language and social skills.

103. On or about May 22, 2007, Respondent issued a Prior Written Notice, refusing Petitioner's request for ESY services in a regular education classroom. The notice properly determined that in order to prevent regression of Petitioner's critical life skills related to academics in the areas of written language and social/emotional needs, Petitioner needed to attend ESY in a mild VE classroom. Petitioner refused Respondent's offer.

104. The record shows that Petitioner made academic progress in ■■■ grade. The final average on Petitioner's report card indicates that Petitioner was performing at or above grade level in reading, mathematics, science, social studies, art,

music, and physical education. The only area of concern was language arts, which includes the writing process, English, and Spelling. Petitioner's ability to write legibly was satisfactory.

105. The record also shows that Petitioner made some progress but still needed to improve in the following areas: (a) listens attentively; (b) completes assignments; (c) uses time wisely; (d) works independently; (e) cooperates with others; (f) follows rules/directions; (g) practices self-control; and (h) accepts responsibility.

106. Petitioner did not attend the ESY in the VE classroom during the summer of 2007. Petitioner's parent declined the opportunity for Petitioner to have additional individualized attention to prevent regression in Petitioner's language and social skills.

107. On August 2, 2007, Respondent provided Petitioner with an Informed Notice of Proposal or Refusal to Take Specific Action. The notice advised that Respondent denied Petitioner's request for private placement at Respondent's expense.

108. Petitioner's [REDACTED] grade teacher at [REDACTED] was Mr. Bradley. Ms. MacDermant was the paraprofessional assigned to Petitioner's class.

109. At the beginning of school, a VAATT representative recommended the following: (a) use of Type 2 Learn Software,

geared to start at ■■■ grade; (b) visually mark the floor around Petitioner's seat; (c) use of a Porta-Book book rest; (d) word processor on trial basis in the fall; and (e) low tech writing tools.

110. On August 17, 2007, Mr. Bradley had a parent/teacher conference with Petitioner's parent. During the conference, Mr. Bradley stated that with assistance, Petitioner would continue to make progress.

111. On or about August 17, 2007, Petitioner's ESE team reviewed and revised Petitioner's FBA/BIP. Petitioner's target behaviors included the following: (a) not following directions; (b) off task behavior; and (c) violation of personal space. The BIP revisions included adding and/or modifying appropriate proactive, educative, and functional strategies for Petitioner.

112. In a memorandum dated August 17, 2007, Respondent's expert/consultant in autism spectrum disorders, Dr. Twachtman-Cullen, provided input to a draft IEP for Petitioner. Dr. Twachtman-Cullen recommended the following refinements: (a) make the present levels of functioning more specific as to strengths and weaknesses; (b) in the communication domain, change the wording to make the goal less ambitious; (c) refine the emotional behavior domain to make the goal and objectives to a judgment that can be measured more accurately and that is less ambitious; (d) the expectations for the independent functioning

goal should be increased and the objectives more specific;
(e) change the curriculum and learning goals to clearly express expectations and make the objectives more specific; (f) the social/emotional behavior communication domain should contain less ambitious objectives; (g) the accommodations for subject presentation should reflect assignments in small blocks of time over the course of the school day.

113. On August 21, 2007, Respondent provided Petitioner's parent with prior written notice of Petitioner's dismissal from the gifted program. The notice also advised that Petitioner's ESE small group service in the VE program was changed to consultation within the general education setting.

114. On August 21, 2007, Petitioner's ESE team met to review Petitioner's IEP. The IEP developed at the meeting indicates that Petitioner's primary exceptionality was Autism Spectrum Disorder. Petitioner's secondary exceptionality was "other health impaired."

115. The changes in the labels of Petitioner's exceptionalities do not mean that Respondent failed to timely identify Petitioner's special education needs or failed to implement an IEP that provided Petitioner with FAPE. To the contrary, the greater weight of the evidence indicates that Petitioner's IEPs were more than adequate to address

Petitioner's needs at any point in time and were sufficient to ensure that Petitioner made some educational progress.

116. The August 21, 2007, IEP indicates that the ESE team added the following strategies and/or assistive technology:

- (a) use of visually marked areas on the floor around Petitioner's desk to create space for movement with a boundary;
- (b) use of an electronic word processor on a trial basis; and
- (c) use of low technology writing tools such as pencil grips.

117. A representative from the [REDACTED] attended the August 21, 2007, IEP meeting. The [REDACTED] representative suggested that Petitioner's teacher create a checklist for bathroom rules.

118. The August 21, 2007, IEP states that Petitioner should use a private bathroom in the classroom. When outside of the classroom, Petitioner should have adult supervision in the bathroom.

119. The August 21, 2007, IEP indicates that Petitioner was working on grade level in reading and math. Petitioner had not mastered the IEP goals and objectives for writing; therefore, the goals and objectives were modified to meet Petitioner's present level of performance in that regard.

120. At the August 21, 2007, meeting, the IEP team reviewed Dr. Eisenberg's psychological evaluation report. The team discussed Dr. Eisenberg's conclusion that Petitioner did not qualify for gifted classes but that Petitioner needed

interesting and gifted-level work available in the general education classroom as a reward for completing regular work. Respondent's staff already was implementing this strategy.

121. The August 21, 2007, IEP indicates that Petitioner continued to have problems with off-task behavior during transitions. Petitioner already had a picture schedule to assist with changes in classroom routine. Petitioner used a timer to assist with task completion and transitions in activities.

122. The August 21, 2007, IEP reveals that Petitioner needed repeated prompts to remain on task and follow class rules. Petitioner's off-task behaviors were often attention seeking and impulsive. Petitioner was easily redirected when the reward for task completion involved a matter of particular interest.

123. The August 21, 2007, IEP states that Petitioner had not fully met the goals and objectives in the social/emotional domain. For that reason, the IEP team modified the goals to meet Petitioner's present needs.

124. Regarding the independent functioning goals and objectives, the August 21, 2007, IEP indicates that Petitioner earned points for appropriate behavior. The points accumulated to provide Petitioner rewards in the form of time for a preferred activity.

125. According to the August 21, 2007, IEP, Petitioner continued to use the Disc-o'Sit and the weighted vest as part of a sensory diet. Petitioner used headphones to listen to music when class noise became distracting.

126. The August 21, 2007, IEP addressed Petitioner's communication goals and objectives. The IEP team agreed that Petitioner needed to increase his communication skills in all settings, i.e. develop appropriate methods to communicate feelings and emotions when frustrated or angry.

127. The August 21, 2007, IEP indicates that Petitioner would take State and District-wide assessments with certain accommodations. The IEP also states that accommodations are not permitted on standardized tests.

128. In September 2007, Petitioner's parent requested that Petitioner be given M&Ms or other small chocolates as tangible rewards for good behavior. Petitioner's teacher complied with this request even though other students were not given candy for good behavior.

129. On September 13, 2007, Petitioner's parent participated in a parent/teacher conference. During the meeting, Mr. Bradley stated that Petitioner was growing in independence. Petitioner's behaviors targeted for increase had increased significantly. The ESE team decided that modifications to Petitioner's BIP were not required.

130. Respondent's interoffice memorandum dated October 1, 2009, sets forth the requirements for elementary testing coordinators to administer the [REDACTED] grade Otis-Lennon School Ability Test (OLSAT) on October 16-19, 2007. The memorandum states as follows in relevant part:

STUDENTS TO BE TESTED: All standard curriculum students should participate. The test protocol should be followed exactly as written. Previously identified gifted students and students with an IEP (except for speech) should be excluded from the OLSAT. To maintain the validity of the test results, LEP students and students with 504 plans should only participate if their accommodations remain within the guidelines of the test exactly as they are written.

DIRECTIONS FOR ADMINISTRATION: The Directions for Administering Manual provides detailed instructions regarding testing procedures. Because the Otis-Lennon is a standardized test, it is important that all students test under the same conditions.

Because the OLSAT is a standardized test that cannot be administered using the accommodations required by Petitioner's IEP, Respondent properly excluded Petitioner from taking the test.

131. On October 15, 2007, Petitioner's ESE consultant prepared an ESE progress report. The report indicates that Petitioner was making satisfactory progress toward achieving the IEP annual goals. Specifically, Petitioner was making good progress in the communication domain and getting better in the

emotional behavior communication domain. As for Petitioner's social emotional goals, Petitioner knew the school and class rules but did not always choose to follow them. Likewise, Petitioner met his independent functional goals when he was willing to listen to the paraprofessional, Ms. MacDermant.

132. On October 29, 2007, Petitioner's ESE team concluded that Petitioner's behavior had improved. However, the team determined that Petitioner's BIP required one modification. The modification was to teach Petitioner about the need to keep certain body areas private and the need to follow rules associated with that privacy in the bathroom.

133. On November 13, 2007, Petitioner had a rash on [REDACTED] back. Petitioner's parents went to the school to check on Petitioner. When the parents decided not to take Petitioner home, Petitioner started screaming and crying. Petitioner's parents had to physically restrain Petitioner for about 15 minutes.

134. On December 4, 2007, Petitioner's ESE team met to review Petitioner's BIP. The team agreed that Petitioner had made some progress in meeting his FBA/BIP goals and objectives. The team also agreed that the BIP needed modification relative to the crisis procedure and the use of safe persons and a safe room.

135. On December 4, 2007, Petitioner's ESE team specifically identified specific "safe persons." The new crisis procedure required "safe persons" to provide Petitioner with manipulative blocks during de-escalation and to perform a written or verbal "social autopsy" with Petitioner.

136. In an e-mail dated December 4, 2007, Petitioner's parent continued to question Respondent's failure to administer the OLSAT to Petitioner.

137. In a letter dated December 13, 2007, Respondent explained that the OLSAT is used as a screening test for the gifted program. Students, like Petitioner, who had taken intelligence tests did not require screening.

138. Respondent's staff performed a social autopsy when Petitioner became disruptive and/or disrespectful in class. They used a form identified as Analyze This. The form asks questions such as: (a) What happened? (b) What was the social error? (c) What should be done to correct the error? (d) What could be done next time?

139. A social autopsy was performed on December 17, 2007, after Petitioner was sent to the office for being off-task and refusing to work. On that occasion, Petitioner's behavior caused other students to pay attention to Petitioner's negative behavior.

140. A social autopsy was performed on December 18, 2007, because Petitioner was disrespectful, stabbing ■■■self with a pencil, and refusing to work. During the time out, Respondent's staff counseled Petitioner to follow instructions and to respect adults.

141. The record shows that Petitioner made academic progress in ■■■ grade. Petitioner's January 2008 progress reports and report cards indicate Petitioner's progress as follows: (a) outstanding progress in mathematics and social studies; (b) above average progress in reading; and (c) average progress in language arts and science. Petitioner was learning/developing skills and concepts in art and physical education. The only area of concern was music. Persuasive testimony supports these progress indicators.

142. A progress report dated January 24, 2008, shows that Petitioner made some progress in the following areas: (a) communication; (b) social/emotional skills; (c) independent functioning; and (d) curriculum and learning.

143. During the hearing, Ms. Love, BCBA, provided persuasive testimony that Petitioner's instances of aggression have significantly decreased. Petitioner has had far fewer disciplinary referrals in second grade.

144. Dr. Myers, Respondent's coordinator of school psychological services provided persuasive testimony at the

hearing. According to Dr. Myers, Petitioner may meet the minimal requirements for gifted services based on Petitioner's full-scale intelligence quotient (IQ) alone. However, Petitioner did not otherwise demonstrate a need for gifted services in accordance with Florida Administrative Code Rule 6A-6.030192(2).

145. Petitioner's [REDACTED] grade teacher, Mr. Bradley, testified persuasively that Petitioner is working on grade level in all areas of the academic curriculum. Mr. Bradley stated that Petitioner had mastered the IEP goal related to the restroom. Most importantly, Petitioner's behavior has improved over time and is generally manageable in Mr. Bradley's regular education classroom.

146. Dr. Twachtman-Cullen testified that other conditions, such as ADHD, can be confused with Asperger's Syndrome. Dr. Twachtman-Cullen gave a convincing opinion as to Petitioner being appropriately placed in a resource room (VE classroom) for part of the school day in [REDACTED] and [REDACTED] grade.

CONCLUSIONS OF LAW

147. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 1003.57, Florida Statutes (2008), and Florida Administrative Code Rule

6A-6.03313. The parties have standing to participate in the proceedings.

148. As required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400 et. seq., Florida law gives the parents of an exceptional student the general right to a "due process" hearing on the identification, evaluation, and placement, or lack thereof, of the student. See § 1003.57(5), Fla. Stat. (2005); Fla. Admin. Code R. 6A-6.03311(11).

149. Petitioner has the burden of proving by a preponderance of the evidence that Respondent did not provide FAPE and that the parents are entitled to reimbursement of the cost of the IEE or other expenses incurred by Petitioner's parents. See Schaffer v. Weast, 126 S. Ct. 528, 537 (2005); M.M. V. School District of Greenville County, 303 F.3d 523, 537-538 (4th Cir. 2002).

150. FAPE is defined as follows in Title 20, United States Code Service, Section 1401(9):

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

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

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

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

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

151. In order to satisfy its duty to provide FAPE, a state or local educational agency must provide an educational plan "reasonably calculated to enable the child to receive educational benefits". See Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-207 (1982). The "basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, at 210.

152. Title 20, United States Code Service, Section 1401, provides the following relevant definitions:

(14) Individualized education program; IEP. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 614(d)[20 U.S.C.S. §1414(d)].

* * *

(29) Special education. The term "special education" means 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.

153. Title 34, Code of Federal Regulation, Section 300.106, provides in relevant part:

- 300.106 Extended school year services.
 - (a) General.
 - (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
 - (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

154. Under Rowley, the first question is whether Respondent complied with IDEA's procedures. See Rowely, at 206. The next question is whether Respondent has provided FAPE to Petitioner. See Rowley, at 207. The first test focuses on whether the correct procedures were followed. The second test relates to the substance of the IEP.

155. Title 34, Code of Federal Regulation, Section 300.513, speaks to hearing decisions as follows in pertinent part:

- 300.513 Hearing decisions.
 - (a) Decisions of hearing officer on the provision of FAPE.
 - (1) Subject to paragraph (a)(2) of this section, a hearing officer's

determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies--

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

PROCEDURAL COMPLIANCE

156. Applying the standard referenced above, Respondent has not committed procedural errors. Respondent did not fail to provide Petitioner's parents with adequate notice of the procedural safeguards. Respondent never deprived Petitioner's parents of an opportunity to participate in the IEP and FBA/BIP meetings. Any failure to provide more advance notice of a proposed change in placement did not impact the parents' opportunity to meet and interact with a properly constituted IEP team before action was taken.

157. Respondent did not have to immediately provide Petitioner with an IEP or FBA/BIP meeting every time Petitioner's parent demanded a meeting. Respondent's response to the numerous requests for meetings was more than reasonable and as timely as possible under the circumstances of each request.

158. Additionally, there is no persuasive evidence that Respondent's staff predetermined any decision made in Petitioner's IEP. The IEP team may not have been able to meet all of the demands of Petitioner's parent, but the team certainly considered all requests.

159. Petitioner has not proven that FAPE was denied due to procedural shortcomings. See Weiss v. School Board of Hillsborough County, 141 F.3d 990, 996 (11th Cir. 1998)(Petitioner did not show harm as a result of alleged procedural violations).

SUBSTANTIVE COMPLIANCE

160. In developing IEPs, the team must consider the following provisions of Title 34, Code of Federal Regulations, Section 300.324, which states as follows in relevant part:

300.324 Development, review, and revision of IEP.

(a) Development of IEP.

(1) General. In developing each child's IEP, the IEP Team must consider--

(i) The strengths of the child;
(ii) The concerns of the parents for enhancing the education of their child;
(iii) The results of the initial or most recent evaluation of the child; and
(iv) The academic, developmental, and functional needs of the child.

(2) Consideration of special factors. The IEP Team must--

(i) in the case of a child whose behavior impeded the child's learning or that of others, consider the use of positive

behavioral interventions and supports, and other strategies, to address that behavior;

161. All of Petitioner's IEPs demonstrate a need for positive behavior interventions or strategies. The IEPs must be considered together with the FBA/BIPs that were initiated when Petitioner enrolled in kindergarten and appropriately revised over time.

162. Petitioner's IEPs, beginning in February 2006 through August 2007, were not word perfect in every instance. At times, some of the objectives could have been more specific; others were too ambitious or did not set high enough expectations. Nevertheless, the present levels of performance, as well as the goals and objectives in each domain for each IEP, provided Petitioner with FAPE.

163. Petitioner's ESE team was always willing to consider the most recent assessment and/or evaluation. Additionally, the team worked to ensure that the goals and objectives were sufficiently measurable.

IMPLEMENTATION

164. Petitioner alleges that Respondent's staff failed to implement Petitioner's IEPs and/or FBA/BIPs. For example, one finds isolated instances where Respondent's staff may not have properly used the following: (a) a social autopsy; (b) a social story; (c) a quiet/safe room; and/or (d) daily behavior

cards/notes. However, Petitioner has not shown that any such allegation, individually or collectively, constituted a denial of FAPE. See Van Duyn v. Baker School District, 502 F.3d 811, 820(9th Cir. 2007)(failure to implement the proper use of social stories, a quiet room, and daily behavior cards in a behavior management plan was not sufficient to constitute a denial of FAPE).

165. Petitioner's behavioral difficulties have been severe at times, making evidence of academic progress "even more relevant." See C.J.N. v. Minneapolis Public Schools, 323 F.3d 630, 638 (8th Cir. 2003).

166. Respondent assigned highly-trained behavioral specialists and tutors to work with Petitioner and the instructional staff. Respondent arranged frequent meetings with Petitioner's parent and others to review progress and consider different approaches.

167. Petitioner continues to present behavioral challenges. Even so, Petitioner has made educational advances and behavioral improvements from [REDACTED] through the first half of [REDACTED] grade. See Rowley, at 458 U.S. at 207 n.28 (student's better than average performance and easy advancement indicated that the student received FAPE despite the school's failure to provide a particular service). These advances and improvements

would not be possible without appropriate implementation of the IEPs and FBA/BIPs.

LEAST RESTRICTIVE ENVIRONMENT

168. In determining the appropriateness of an IEP, it must be determined whether the placement allows the student to receive educational benefits in the LRE. 20 U.S.C. Section 1412(5)(A) provides as follows:

(5) Least restrictive environment.

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

169. For the period of time that Petitioner actually attended █████ at █████, Petitioner was in a gifted class with non-disabled peers. Petitioner's parent took Petitioner out of school in February 2006, rather than let Petitioner attend the mild VE class for the first part of the school day. The greater weight of the evidence indicates that Petitioner's placement in the VE classroom was necessary to provide Petitioner with intensive and individualized social and communication skills training.

170. In [REDACTED] grade at [REDACTED], Petitioner once again was appropriately placed in a mild VE class for the first period of the day. The VE class gave Petitioner an opportunity to receive intensive work on social skills and problem behaviors. Combined with attendance in a regular education class for the balance of the school day, the VE class was the best and the LRE for Petitioner.

171. Finally, Petitioner alleges that ESY in a mild VE classroom would not have been an appropriate placement in LRE. To the contrary, the most credible evidence shows that Petitioner needed the placement in order to receive necessary individual instruction and to prevent regression in language and writing.

EVALUATIONS AND ASSESSMENTS

172. There is no merit to claims that Petitioner suffered educational harm as a result of Respondent's failure to reach a diagnosis of Asperger's Syndrome at an earlier age. The label of Petitioner's disability did not control the nature or extent of the services provided. Those decisions were made on an individual basis by Petitioner's IEP team.

173. A diagnosis of Asperger's Syndrome is especially difficult to make. Despite many psychological evaluations, only Dr. Eisenberg concluded that Petitioner suffers from Asperger's Syndrome. That diagnosis, together with Dr. Eisenberg's

recommendations, did not require significant changes in the strategies used to accommodate Petitioner's disability. Moreover, there is no persuasive evidence of harm to Petitioner as a result of a delay in reaching a diagnosis of Asperger's Syndrome.

SUSPENSIONS

174. School personnel have the authority to suspend (i.e. totally remove) a disabled student from school for up to ten consecutive school days for misconduct that violates the code of student conduct. See 20 U.S.C. § 1415(k)(1)(B). After ten days of suspension within a single school year, the school must offer some educational services to the student. See 20 U.S.C. § 1415(k)(1)(D)(i).

175. In this case, Petitioner's removals from the classroom to the office or the "safe room" so that Petitioner could deescalate was part of the BIP and did not constitute suspensions. Likewise, the times Petitioner's parents came to the school and voluntarily took Petitioner home did not constitute suspensions. In the two years covered by this proceeding, Respondent's staff suspended Petitioner from school for no more than four days.

176. The right to a determination of whether a student's misconduct was a manifestation of the student's disability does

not apply to suspensions from school for fewer than ten school days. See 20 U.S.C. §§ 1415(k)(1)(B) and 1415(k)(1)(E)(i).

177. After each suspension, Respondent's staff agreed with Petitioner's parents that the misconduct was a manifestation of Petitioner's disability. However, Respondent was not required to make that determination in a formal manifestation proceeding. There is no evidence that Respondent denied Petitioner FAPE, procedurally or substantively, due to the suspensions.

GIFTED EDUCATION

178. Florida Administrative Code Rule 6A-6.03019 requires a student to demonstrate the following characteristics in order to be eligible for gifted education services:

1. Need for a special program.
2. A majority of characteristics of gifted students according to a standard scale or checklist, and
3. Superior intellectual development as measured by an intelligence quotient of two (2) standard deviations or more above the mean on an individually administered standardized test of intelligence.

179. Respondent elected to modify the third characteristic by reducing the minimum IQ score for students who were eligible for "free or reduced lunch." The minimum IQ score for such students in Respondent's school district is 115.

180. Petitioner meets the requirement of the minimum IQ score. Petitioner was placed initially in a full-time gifted class during [REDACTED]. In February 2006, Petitioner was placed in a

mild VE class for a short time every morning with the balance of the day in the gifted class.

181. In first grade, Petitioner continued to receive gifted consultation. Petitioner spent the rest of the school day in a mild VE class for a short period of time and/or in a regular education class.

182. Respondent removed "gifted" as Petitioner's secondary exceptionality in August 2007. From that time to the present, Petitioner did not demonstrate a need for participation in a gifted program. Therefore, Respondent did not deny FAPE by removing the label gifted from Petitioner's IEP.

REIMBURSEMENT

183. Under 300 C.F.R. Section 502, parents have the right to an IEE if the parents disagree with the evaluation obtained by the school. That section provides, in pertinent part, the following:

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational

evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart--

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with 300.103.

(b) Parent right to evaluation at public expense.

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

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

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

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

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

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may

not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

* * *

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

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding the child.

* * *

(e) Agency criteria.

(1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualification of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent education evaluation at public expense.

184. Petitioner is not entitled to reimbursement for any private evaluation. Testimony that Respondent's approved

psychologists were not suitable to perform the IEE is not credible. At the very least, Petitioner's parent showed bad faith by finding fault with every approved local evaluator then selecting a psychologist that did not meet the criteria for geographical location of the evaluation.

185. The same is true regarding any other evaluation that Petitioner funded rather than selecting a private evaluator approved by Respondent. There is no recorded evidence of circumstances that required the exclusive services of the unapproved private evaluators selected by Petitioner's parent.

186. The July 26, 2006, letter listed four private psychologists approved by Respondent. The settlement agreement was not signed until August 7, 2006. Petitioner had ample time to consider the acceptability of the evaluators, but made no objection to any of them prior to executing the agreement.

187. Respondent did not request another due process hearing when it refused to pay for Dr. Eisenberg's evaluation. The question whether Respondent should have requested a hearing or continued to rely on the terms of the August 7, 2006, settlement agreement requires interpretation of that agreement. The undersigned does not have jurisdiction to interpret contracts or to enforce settlement agreements. See S.T. v. Seminole County School Board, 783 So. 2d 1231 (Fla. 5th DCA

2001)(an administrative agency has only such powers as the legislature chooses to confer upon it by statute).

188. In any event, the record reflects that a majority of Dr. Eisenberg's recommendations had been implemented in the past or were being implemented at the time. There is no persuasive evidence that the evaluation contributed anything of substance other than a change in the label of Petitioner's exceptionality.

ORDER

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

ORDERED:

Petitioner's request for relief is hereby denied.

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

S

SUZANNE F. HOOD
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Filed with the Clerk of the
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this 4th day of May, 2009.

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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 230.23(4)(m)5, Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal

pursuant to Sections 230.23(4)(m)5 and
120.68, Florida Statutes.