

Clay County School District
No. 08-3944E
Initiated By: Parent
Hearing Officer: Barbara J. Staros
Date Of Final Order: May 29, 2009

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█,)
)
Petitioner,)
)
vs.) Case No. 08-3944E
)
CLAY COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

A final hearing was conducted in this case on February 4, 5, 19 and 20, 2009, in Green Cove Springs, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Doris L. Raskin, Esquire
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For Respondent: J. Bruce Bickner, Esquire
Clay County School Board
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STATEMENT OF THE ISSUES

The issues are whether Respondent provided a free appropriate public education (FAPE) to Petitioner from April 7, 2008, until the end of the school year; whether Respondent's proposed placement set forth in the Individual Education Program (IEP) dated July 10, 2008, provides Petitioner with FAPE; and whether Respondent denied Petitioner an independent educational evaluation.

PRELIMINARY STATEMENT

On August 8, 2008, Petitioner's parents filed a Request for Due Process Hearing on behalf of [REDACTED] (Petitioner) with Respondent, the Clay County School Board (School Board). The request alleged that Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, et seq., raising the following issues: (a) whether Respondent failed to provide [REDACTED] with FAPE from April 7, 2008, to the end of the 2007-2008 school year; (b) whether Respondent's proposed action of changing [REDACTED]'s placement from a regular classroom to a self-contained classroom was appropriate; and (c) whether Respondent denied Petitioner's right to an independent educational evaluation.

Respondent referred Petitioner's request for a hearing to the Division of Administrative Hearings on August 14, 2008. On August 15, 2008, the undersigned entered an Order Requiring

Status Report. The parties filed a Status Report on August 26, 2008, informing that a resolution session was set for August 29, 2008. On September 5, 2008, the parties filed another Status Report stating that the resolution session was held but the parties failed to resolve the issues.

As a result, a telephone conference call with the attorneys for the parties was held September 8, 2008. During the conference call, counsel for the parties agreed upon hearing dates of November 6 and 7, 2008. The undersigned issued a Notice of Hearing and a Pre-Hearing Order dated September 9, 2008. The notice scheduled the hearing for November 7 and 8, 2008, and noted that because of the agreed hearing date, the parties necessarily extended the 45-day timeline as set forth in Florida Administrative Code Rule 6A-6.03311(11).

On October 30, 2008, the parties filed a Joint Motion to Continue Hearing, which was granted. The hearing was rescheduled for December 11 and 12, 2008.

At the request of the parties, another telephone conference call took place on December 9, 2008, during which counsel for the parties made an ore tenus Joint Motion for Continuance. After hearing arguments of counsel and being advised of the parties' available dates, the undersigned entered an Order Granting Continuance and Rescheduling Hearing, rescheduling the

hearing for February 4 and 5, 2009. On January 28, 2009, the parties filed a Joint Pre-hearing Statement.

The hearing took place on February 4 and 5, 2009, as scheduled. However, the hearing did not conclude at the end of the second scheduled day, and the continuation of the hearing was scheduled for February 19 and 20, 2009.

At hearing, Petitioner offered the testimony of nine witnesses. Petitioner's Exhibits numbered 1 through 12 were admitted into evidence. Exhibit numbered 13 was proffered.

Respondent presented the testimony of four witnesses. Respondent's Exhibits numbered 2, 5, 9, 11, 14 through 18, 20, 28 and 29 were admitted into evidence.

The parties requested 30 days after the filing of the transcript in which to file proposed final orders. Due to the length of the hearing and complexity of the issues, that request was granted. The Transcript consisting of two volumes was filed on March 13, 2009. On March 31, 2009, Respondent filed an unopposed Motion for Extension of Time to File Proposed Final Orders. In consideration of the extensive hearing record, the motion was granted by Order dated April 6, 2009. On April 6, 2009, Petitioner filed an unopposed Motion for Extension of Time for Filing Proposed Final Orders. For the same reasons, the motion was granted by Order dated April 14, 2009. The parties

filed Proposed Final Orders which have been duly considered in the preparation of this Final Order.

FINDINGS OF FACT

Stipulated Facts

1. Petitioner, ■■■, who was born on ■■■, is a child with autism.

2. ■■■ attended ■■■ home school (hereinafter "School A") from April 7, 2008, through the end of the 2007-2008 school year. During that period of time, Petitioner was in a general education/regular ■■■ grade classroom with a one-to-one aide to assist ■■■.^{1/}

3. ■■■ failed to demonstrate knowledge of the Sunshine State Standards for the ■■■ grade, and was retained. ■■■ has remained in a general education/regular classroom at School A throughout the 2008-2009 school year, pursuant to "stay-put."

4. In July 2008, Petitioner's IEP team decided Petitioner should be placed in a self-contained special education classroom for children with autism at another elementary school in Clay County, "School B." The parents disagree with that proposed placement and filed the request for due process hearing which gave rise to this proceeding.

5. School A is the school ■■■ would attend if ■■■ did not have an IEP, as it is the home or zoned school for ■■■'s residence.

Background

6. ■■■ moved to Clay County from another Florida school district in March 2008. ■■■'s family lived in the prior Florida school district only 30 days. Prior to that, the family lived in Maryland where ■■■ attended ■■■ and began ■■■ grade. While ■■■ was in ■■■ in Maryland, ■■■ volunteered in ■■■'s classroom and was, in effect, ■■■'s aide for a period of time. ■■■ was in a regular education setting in Maryland. ■■■ is a certified teacher in both regular education and special education, with an endorsement in autism. ■■■'s teaching experience includes a one-year internship, half of which was spent with third grade regular education students and half of which was spent with special education students in grades Kindergarten through fifth. ■■■ also taught fifth grade regular education, taught in a sixth grade varying exceptionalities classroom, and taught reading. She volunteered over a thousand hours in Maryland, primarily in ■■■'s classroom. ■■■ is devoted to ■■■, and spends an hour to an hour and a half with ■■■ every day working on homework and academics.

7. Prior to relocating to Clay County, ■■■'s mother contacted someone at the Clay County School District. It was ■■■'s impression from that phone call that the school district would assign ■■■ to one of two schools, School B or C, because

█ was autistic.^{2/} However, that is not where █ began instruction in Clay County.

End of 2007-2008 School Year

8. An IEP meeting took place on March 27, 2008, which resulted in an IEP of the same date. Under the heading, "Present Level of Academic Achievement and Functional Performance," the IEP reflects that it was primarily based on information from █'s previous school in another Florida school district and from an out-of-state school. The IEP also contains numerous hand-written notations reflecting input from █'s mother who attended the IEP meeting. These hand-written notations appear, for the most part, on the "Present Level of Functioning Addendum" and under the heading "Parent Concerns". In addition to providing information about █'s abilities and informing the IEP team that █ was on a gluten-free diet, █'s mother requested that a communication log be sent home daily, that she would like █ to understand the grade level objectives, that she would like █ to ride the regular bus with █'s sibling, and that █ did not want █ to attend summer school. Under the heading "Parent Input," the hand-written words "parent concurs" appear. However, at hearing, █ indicated that she did not agree with all of the goals and objectives, but also stated that she feels that this initial IEP meeting went smoothly.

9. The "Present Level of Academic Achievement and Functional Performance" page of the IEP indicated that, based on transfer information, [REDACTED] had been in a general education classroom with support. [REDACTED]'s strengths were described as independent with educationally relevant self care skills, such as toileting and self feeding. Also noted as a strength was that [REDACTED] was able to read 80 percent of the curriculum and had mastered high frequency words, was able to write sentences, and able to draw pictures regarding situations.

10. [REDACTED]'s needs/areas of improvement on the IEP included needing to improve communication skills, pragmatic skills, and social skills. Based upon information from the previous school's IEP, [REDACTED] needed prompts to complete tasks or to make appropriate decisions and had difficulty following classroom routine and multi-step directions.

11. Under the heading, "How the disability affects progress in the regular education classroom," is the notation "[REDACTED]'s] inability to communicate effectively, work independently, as well as under developed pragmatic and social skills impacts [REDACTED]'s] progress in regular education without the utilization of an aide and specialized instruction...[REDACTED]'s] deficits in functional skills affect independence in classroom performance."

12. Under the heading "medical/health information," "autism spectrum disorder" is typed, and "gluten-casein free diet" is hand-written.

13. Under the heading "parent concerns for enhancing the education of their child," there is a hand-written note that appears to relate to occupational therapy which states:

Parents attended meeting. Mother stated that [REDACTED] was being served 15 mins/week at other school. It was agreed upon that [REDACTED] will be served at 30 mins/week in order to determine approp. means of service. OT testing will be performed in [remainder of sentence cut off page.]

14. Goals and objections were written for language therapy, functional independence within the educational environment, social skills and peer interaction, writing, reading, and math.

15. Kathleen Edden is an ESE teacher, a support facilitator, and the response to intervention coordinator for Clay County Schools. She has taught in various counties in Florida totaling 21 years. She is certified in both regular and special education. Ms. Edden attended the March 2008 IEP meeting and wrote the goals that were discussed at that meeting. Mrs. Edden wrote these goals based upon the information from the county from which [REDACTED] was transferring and from the representations of [REDACTED]'s mother. In particular, Mrs. Edden understood from [REDACTED] that [REDACTED] was high functioning, that [REDACTED]

could read, and that ■■■ needed an aide to maintain focus or to redirect ■■■'s attention.

16. Additionally, the IEP notes reflect that ■■■ expressed her desire that ■■■ be graded on and meet regular education standards, and that she and ■■■'s father were not interested in ■■■ pursuing a special diploma.

17. The March 27, 2008 IEP placed ■■■ in a "Regular Class with support (1-380 min.)" The classroom was at School A, ■■■'s home school. An aide was hired for ■■■. ■■■ offered to help train the aide but was not permitted to do so.

18. A review of the signature page reveals that ■■■'s regular education teacher, Ms. Bazley, did not attend the March 27, 2008, IEP meeting.^{3/} However, the signature page reveals that another regular education teacher, Heather Graves, did attend the IEP meeting.

19. ■■■ was in Mrs. Edden's small reading class (eight students). The class comprised both special education and regular education students. Mrs. Edden found that ■■■ could read well and was good at spelling, as far as memorizing a list. However, Mrs. Edden also found that ■■■'s comprehension skills were not good. Mrs. Edden observed that ■■■ lacked communication skills, made little eye contact and no conversational speech, was not able to work independently, and could not attend to instructions. Mrs. Edden used reinforcers

with ■■■ that ■■■ had brought in to class, e.g., different kinds of edible reinforcers in small containers, or toys. No other students in the reading class were provided with reinforcers.

20. Mrs. Edden described ■■■'s behaviors while in the small reading class: "[■■■] would fall on the floor, wrap [■■■'s] legs around the leg of the desk, around the leg of a chair, crawl under the big table that we had in the corner. [■■■] would scream out on occasion. [■■■] would repeat shows that ■■■ had either seen that morning or the day before. [■■■] would recite shows and all that ■■■ had seen. [■■■] would rip papers. [■■■] may throw pencils. [■■■] may kick off [■■■'s] shoes. [■■■] would leave the learning area and go to the book area. A variety of disruptive. . .behaviors."

21. These behaviors were disruptive to the other children in the class. The other children would focus on ■■■ instead of Mrs. Edden and would show interest in the reinforcers that ■■■ would receive. The disruptions slowed the pace of the class and disrupted the class's momentum. ■■■ did not pass reading.

22. Tara Sipe was the program behavior specialist for Respondent in the spring and fall of 2008. Ms. Sipe has a bachelor's degree in psychology, a master's degree in special education, and has completed post-graduate work to fulfill the requirements to sit for the board examination in applied behavior analysis. She has experience in working with autistic

children, and has worked in a residential facility for individuals with autism who had serious behavior problems.

23. As program behavior specialist, Ms. Sipe was a support for teachers who taught students with various disabilities, including autism. Teachers experiencing behavior problems with students would call on Ms. Sipe, who would observe the student in the classroom, consult with the teachers, make suggestions, or write a behavior plan. She also conducted school-wide trainings on various topics, including characteristics of autism. She first observed [REDACTED] in class sometime in spring 2008.

24. Ms. Sipe observed [REDACTED] in Mrs. Bazley's class on more than one occasion. Ms. Sipe observed [REDACTED] having difficulty staying in [REDACTED]'s seat. She observed that [REDACTED] did not attend well to [REDACTED]'s aide and did not seem to understand what was being asked of [REDACTED] in terms of the regular education teacher providing instruction or direction. Ms. Sipe observed [REDACTED] engage in loud scripting, i.e., verbal replay of a favorite story or something the student saw or heard. She observed behavior problems including throwing blocks when frustrated with an assignment and what Ms. Sipe termed "escape behaviors."

25. While Ms. Sipe testified that she did not "train" the aide, she provided the aide with some modeling to assist her in working with [REDACTED], such as shortening assignments and folding up

her math work paper so ■■■ would not see so many math problems at one time. Ms. Sipe noted that these strategies helped during the times she observed ■■■.

26. Because there was concern at the school and district level that ■■■ was functioning at a beginning ■■■ grade level, not at an ending ■■■ grade level, an Interim IEP review took place on May 8, 2008, at which another IEP was written. The Interim IEP Review reviewed ■■■'s current level of functioning and goals. Again, Mrs. Edden wrote the math, reading, and writing goals. The goals and objectives were reviewed and revised, and accommodations were added for assessments.

27. There was also concern about ■■■'s behaviors in the classroom, as described above. Ms. Sipe indicated a need for a more systematic approach to teaching social skills to ■■■.

28. The IEP notes (Present Level of Functioning Addendum sheet) reflect that Dr. Becton, the Exceptional Student Education (ESE) Director, suggested to ■■■ that ■■■ may not be benefiting from the experience at School A and may benefit from the teachers trained in autism and the program offered at School B. The IEP notes further reflect that Mrs. Williams, ESE Curriculum Specialist, described School B as "an inclusive campus with teachers trained in autism." The IEP notes reflect that ■■■ suggested that more training is needed for ■■■'s teachers, that the teachers do not understand autism, that she

had concerns regarding ■■■ being placed in a separate environment, and that the school's concerns raised about ■■■ had not been raised at ■■■'s previous schools. ■■■ explained that she is able to teach academics, and that she is more concerned about ■■■ receiving social skills. The IEP notes reflect that ■■■ stated that she would look at the program at School B.

29. ■■■ wrote a four-page single-spaced detailed set of guidelines that she gives to ■■■'s aide every year. The guidelines contain what ■■■ believes should be done by the aide. The guidelines in evidence indicate that they were written on 9/4/06 and updated on 8/16/08.

30. The Interim IEP dated May 8, 2008, did not change ■■■'s placement. ■■■ remained in the ■■■ grade regular education classroom at School A with the one-on-one aide.

31. Another Interim IEP review meeting took place on May 28, 2008. The meeting was attended by ■■■'s parents, ■■■'s attorneys, an advocate for ■■■, Dr. Becton, the ESE teacher, the regular education teacher, the ESE curriculum specialist, the staffing specialist, the one-on-one aide, the occupational therapist, the speech and language therapist, the program specialist for behavior, the school principal, the assistant principal, a teacher from School B, and the school board attorney.

32. More concerns were expressed by school board staff and teachers regarding ■■■'s continued difficulties in the classroom. In particular, there was concern regarding ■■■'s extremely disruptive behavior. ■■■'s mother again expressed concern with the training of teachers and aides since ■■■ began attending school at School A. ■■■ wanted to be able to come into the classroom to train the aide and the teachers, and felt she was not allowed to do this. The notes reflect that counsel for ■■■ also asserted that ■■■ should be able to come into the classroom to train the teachers and aide.

33. Sometime between the May 8, 2008 meeting and the May 28, 2008 meeting, ■■■ visited School B. The parents made it clear at the May 28, 2008 meeting that they were not interested in ■■■ attending School B as it is much farther from their home than School A, and that ■■■ did not see anything in her observation of the classroom at School B that would benefit v. If ■■■ attended School B, the bus ride would be approximately two hours each way. It is not clear from the record how long the bus ride is to and from School A.

34. At the May 28, 2008, IEP meeting, classroom and testing accommodations were maintained. The meeting included a review of ■■■'s current level of academic and functional performance. There are eight hand-written pages of notes on the Present Level of Functioning Addendum. In sum, classroom work had been

accommodated, but the classroom teacher had not seen the ability of ■■■ to be able to perform ■■■ grade work. The teacher and district staff continued to be concerned with ■■■'s behaviors. ■■■'s parents continued to question the training of the teacher and aide, and ■■■ again expressed a desire to be able to come into the classroom and train the aide and the teacher.

35. At some point during the May 28, 2008 IEP meeting, promotion to the second grade was discussed. The parents requested further evaluation by a teacher trained in autism to assess ■■■ on Sunshine State Standards with accommodations.

36. The parents also requested a functional behavioral analysis (FBA). Mr. Becton indicated the district behavior specialist was available to do this. The IEP meeting was then suspended to be reconvened after testing.

Testing by Ms. Swenson

37. Erin Swenson is employed by Respondent as a teacher in a special education classroom for children with autism. She teaches at School C in a "bridge" class, which is part of a pilot program in Clay County Schools for high functioning children with autism. The bridge class has elements of both the self-contained classroom and regular education.

38. Ms. Swenson received a bachelor's degree in psychology in 2001. Immediately after graduating from college, she worked part time for various organizations providing applied behavior

analysis (ABA) for children with autism in the home setting and adults with autism in a group home. She then moved to Jacksonville where she worked at a preschool for children with developmental disabilities as a teacher for the pre-K classroom for children ages three to five with autism.

39. Ms. Swenson then worked at the Jacksonville Center for Autism and Related Disabilities (CARD). She was the educational coordinator, providing support services to educators and parents of children with autism in the home and school settings. These services included training workshops, hands-on consultation, visiting classrooms, visiting homes, helping with communication, social skills acquisition, increasing adaptive behavior, decreasing challenging behaviors, and whatever the individual circumstances called for.

40. Ms. Swenson worked for CARD for a little over a year, and is still associated with CARD. She recently was a speaker at a CARD regional workshop, speaking about teaching children with autism, and has an ongoing relationship with CARD. She also has taken postgraduate courses in ABA and autism.

41. Ms. Swenson was contacted by Peggy Williams, ESE curriculum specialist, and was asked to administer the tests to ■■■. Ms. Swenson conducted two tests for ■■■ on June 1 and 2, 2008. One test was the Diagnostic Assessment of Reading (DAR)

and the second test was the Dynamic Indicators of Basic Early Literacy Skills (DIBELS).

42. The DAR tests several skills within the subject of reading; vocabulary, sight word recognition, phonological awareness, spelling, and beginning writing analysis.

43. Although the DAR is not a timed test, the DAR typically takes about 45 minutes for a general education student and an hour and a half for a student with autism. The test administration for ■■■ lasted four hours because during testing, ■■■ needed a high level of support. While at the table during the test, ■■■ would appear to become frustrated and turn away from the material and engage in scripting and singing. ■■■ was allowed to leave the table, play with toys, play with manipulatives, sing songs, and engage in sensory activities such as hugs, tickles, and spinning around. These are preventative strategies which Ms. Swenson used to help keep ■■■ on track. She also made accommodations such as retyping a lot of the words so they were in large print and cutting them into strips so ■■■ would not be overwhelmed by seeing a page of ten tiny words.

44. The DAR is graded on grade level. In word recognition, ■■■ tested on grade level. In oral reading, ■■■ tested at beginning ■■■ grade level. In spelling, ■■■ tested at level (1-2), as spelling was ■■■ strength. In vocabulary, ■■■ did not achieve the ■■■ grade level. In phonological awareness,

█ demonstrated a beginning understanding of four out of five components. █ was able to write words and name both capital and lowercase letters. The word analysis portion of the DAR was difficult for █, who achieved four out of nine components.

45. In sum, Ms. Swenson found that █ has some "pretty solid" pre-reading skills, but that █ behaviors were hindering █ progress in reading: "I feel like if we could get █ behavior on track, then some of the reading skills would fall into place."

46. Ms. Swenson also administered the DIBELS, which tests different skills depending on the student's grade. █ was tested on three skills: phoneme segmentation fluency, nonsense word fluency, and oral reading fluency. █ tested at high risk (seriously below grade level and in need of substantial intervention) in phoneme segmentation fluency; low risk (at grade level) for nonsense word fluency, and moderate risk (moderately below grade level and in need of additional intervention) for oral reading fluency. Ms. Swenson noted that while █ scored in the moderate risk range for oral reading fluency, █ was within two points of the high risk range, which indicated a strong need for supports. The overall results were that █ tested below grade level for two out of three skills. "So this says that [█] needs to somehow get a lot of extra instruction and support in these categories."

47. Looking back to the May 8, 2008 IEP, it is noted that DIBELS test scores are listed under the category "Describe the results of state and district-wide assessments." It is noted that ■■■ scored in the high risk range for phoneme segmentation fluency, moderate risk in nonsense word fluency, and high risk in oral reading fluency. ■■■'s reading level was listed as beginning ■■■ grade, and ■■■ math level was listed as mid-K.^{4/}

48. Thus, in the June 1 and 2, 2008 administration of DIBELS by Ms. Swenson, ■■■ tested in the same category as indicated on the May 8 IEP from a previous DIBELS testing in phoneme segmentation fluency; improved from moderate risk to low risk in the nonsense word fluency; and improved from high risk to moderate risk in oral reading fluency.

July 10, 2008 IEP

49. Following the testing conducted by Ms. Swenson, another IEP meeting was noticed for July 10, 2008. In attendance were ■■■'s ■■■ grade teacher, Ms. Beazley, the curriculum specialist, Tara Sipe, program specialist for behavior, and ESE teacher, a staffing specialist, the principal of School A, the principal for school B, an ESE teacher from School B, Dr. Becton, ■■■'s parents, ■■■'s attorney, and the school board attorney.

50. An IEP was developed which changed ■■■'s placement to a self-contained classroom for autistic students in School B.

The Informed Notice of Change in Placement and/or Free Appropriate Public Education form indicates that the current placement is "regular class with support," and the proposed placement is "separate class." It is important to note that this IEP has never been implemented, as the parents filed for due process shortly thereafter. Accordingly, the July 10, 2008, IEP will be discussed only in so far as it represents the proposed change in placement of [REDACTED]. A great deal of evidence was presented by both parties regarding academic year 2008-2009. The 2008-2009 school year will also be discussed to a limited extent, but not in the context of whether FAPE was provided in the 2008-2009 school year, as it occurred after the filing of the due process request. [REDACTED] has remained in a regular education classroom with an aide pursuant to the parents invoking "stay-put" when due process was requested.

51. The July 10, 2008, IEP added some accommodations for test taking and added transportation with an aide or monitor. The Present Level of Academic Achievement and Functional performance portion included the following:

1. Student strengths

Based on teacher observation and input from school staff, [REDACTED] is a talented artist who enjoys drawing and has demonstrated a desire to look at picture books of choice. Given a systematic approach to instruction and social interaction with adults and peers, [REDACTED] has demonstrated success toward

compliance and task completion, utilizing a variety of preferred reinforcers that frequently change based on [REDACTED]'s motivation for those materials at the time of the demand.

2. Student's Current Level of Academic and/or Functional Performance:

Based on teacher observation and input from district staff, [REDACTED] continues to demonstrate behaviors that impede [REDACTED]'s learning in the regular education setting. These behaviors include dropping to the floor, leaving assigned areas, throwing instructional materials, non-compliance with simple, concise directives for academic and social opportunities, screaming, knocking over furniture such as student desks and chairs. [REDACTED] has demonstrated an increase in the above behaviors even with classroom staff implementing suggestions for success provided by the parents and the use of an individual assistant. The amount and intensity of supports and modifications necessary to support [REDACTED] in academic and social success are common supports found in a more restrictive setting. [REDACTED] responds readily to systematic, individualized instructions incorporating behavior analytic principles such as reinforcement, capturing, manipulating, and sustaining motivation and attention in order to promote focus, compliance, and successful task completion.

3. Student's Needs/Areas of Improvement:

Based on evaluation, previous report cards and teacher observation, [REDACTED] has been retained in the v grade. [REDACTED] is currently functioning at the beginning first grade level. An evaluation was administered on June 2, 2008 with the following results: [results of DIBELS and DAR]

These two evaluations were administered by an ESE certified teacher with extensive

experience in varying ages and skill levels for children with Autism Spectrum Disorder.

4. Describe the results of state and district-wide assessments:

[REDACTED] will participate in all State and District Wide Assessments appropriate for [REDACTED] grade level.

5. How the disability affects progress in the regular education curriculum, etc.:

Based on classroom observations, [REDACTED] requires extensive support and prompting in order to attend to the curriculum and instruction. [REDACTED] has not consistently demonstrated the basic skills required to attend, focus, and complete regular academic curriculum. [REDACTED] doesn't seek out interaction with or assistance from adults or peers and will not articulate [REDACTED]'s preferences or needs independently. [REDACTED] will not readily reference [REDACTED]'s peers or adults to aide [sic] [REDACTED] in what [REDACTED] needs to do to access the regular curriculum. Classroom staff has not noted consistent independent behaviors that are often required for success in a regular education setting. Many situations require most to least prompting in order for [REDACTED] to complete a task, such as toileting.

6. Medical (If appropriate):

Gluten/Casein free diet.

7. Parent concerns for enhancing the education of their child: (Required even if parents are not in attendance.)

Parents do not agree with IEP.

52. Goals and objectives were written in the areas of language therapy (speech language), social skills, functional

independence within the educational environment (occupational therapy), reading, writing, math, specially designed physical education, and behavior/social-emotional. ■■■ believes that no objective in this proposed IEP is adequate.

53. There are eight pages of hand-written notes on the Present Level of Functioning Addendum noting comments from the IEP participants including the parents and the principal and teacher from School B. regarding what their school offered for ■■■. All members of the IEP team, with the exception of ■■■'s parents, recommended that ■■■'s placement for the 2008-2009 school year be at a self-contained classroom for children with autism at school B.

54. The hand-written pages also contain the following: "The parent's attorney would like to request an independent psychological evaluation to be conducted by Dr. Sissbarro paid for by the Clay Co. School Board." Dr. Becton responded that it would not be a problem, but asked, "what would we be testing for?" He also indicated that the parents or attorneys would need to call the office. At hearing, while testifying regarding her dissatisfaction with the level of communication between her and the school, ■■■ noted that she had received a call from Mrs. Milburn, one of ■■■'s teachers during the 2008-2009 school year, informing her "that the paperwork that I needed for the independent evaluation, she called to tell me that they were

working on it and they were almost finished." The record is not clear as to the time frame of this phone call.

55. The hand-written pages also contain the following:
"The parents and attorney are requesting [REDACTED] be placed in a [REDACTED] grade regular education classroom whether [REDACTED] is getting the [REDACTED] grade curriculum or not. They would like a trained aide to be with [REDACTED]. Mom is not concerned with academics. She wants [REDACTED] to learn social skills, social reciprocity, spontaneous requesting."

56. Tara Sipe explained the Functional Behavior Assessment and Positive Behavior Intervention Plan (FBA/PBIP) at the July 10, 2008 IEP meeting. The FBA/PBIP focused on four target behaviors: increase compliance with teacher instructions, decrease leaving assigned area, decrease dropping to the floor, and decrease throwing of instructional materials. It also specifies various interventions for each target behavior.^{5/}

57. [REDACTED]'s parents, through their attorney, filed a request for due process hearing which was received by Respondent on August 12, 2008, approximately one month after the July 10, 2008 IEP meeting. The parents invoked "stay-put." As a result, [REDACTED] has remained at School A in a regular classroom with a one-on-one aide. [REDACTED] remained in a [REDACTED] grade class for the 2008-2009 school year because [REDACTED] was retained.

2008-2009 School Year

58. Michelle Haynes is a [REDACTED] grade regular education teacher at School A. She has a bachelor's degree in elementary education, a master's degree in education, and is national board certified. Ms. Hayes teaches [REDACTED]'s class on Monday, Tuesday, and Friday. The class is taught on Tuesdays and Thursdays by Nicole Milburn. Ms. Haynes had experience with [REDACTED] from the previous year and asked the school principal to assign [REDACTED] to her classroom.

59. [REDACTED]'s behaviors in class in the 2008-2009 school year have been similar to the behaviors exhibited at the end of the 2007-2008 school year. Ms. Haynes has observed [REDACTED] yelling, scripting, falling to the floor, leaving the desk to run to the library or the front of the classroom, and throwing things. [REDACTED] displays disruptive behaviors every day in the classroom.

60. Ms. Haynes and the one-on-one aide have tried interventions suggested by [REDACTED] and by Tara Sipe to eliminate these behaviors. These include using a first/then board, using tokens or other incentives as rewards, and using picture schedules with limited success.

61. [REDACTED] has greater difficulty during the afternoons, when the behaviors escalate. Ms. Haynes described behavior during math, which is taught to the class during the afternoon:

If we were working with manipulatives, which makes an abstract concept more concrete. We would use manipulatives. [REDACTED] would throw

the blocks. On a dry erase, [B.] tried to throw the pen. []'s thrown the board. [] will yell, [] will script, recite cartoons or a computer program or recite my PowerPoint presentation from the earlier morning. []'s very very distracted and []'s very verbal. [] may decide [] doesn't want to do what we're doing. [] runs to the library within our classroom. It's constant motion, constant noise. . . . When you're teaching with [] in the classroom, especially when you're trying to include [] into the discussion, really reach [] along with your other students, it's constant interruptions. You're trying to teach a concept, trying to reach these other students who are having a difficult time picking up the information as well. You're stopped.

62. Many of the other students were not doing well in math as a result of the disruptions. At some point, Ms. Haynes went to her principal and asked for help in how to deal with the situation in math. [] began getting math instruction separately. Since Christmas, [] has been going to a separate room with Ms. Edden and the one-on-one aide for math instruction while the other students are in math class.

63. Ms. Haynes believes that she, Ms. Milburn, and the one-on-one aide have tried everything they could do regarding teaching and strategies for [].

64. Ms. Haynes sends a weekly grade sheet home with [], which is not something she does for her other students. At the time of the hearing (February 2009,) [] was not passing math, language arts, and social studies, and is passing reading with a

"D." According to Ms. Haynes, [REDACTED] has shown minimal progress while in her class, but has made progress in phonemic awareness.

65. Shelly Crews is the one-on-one aide who has been assigned to [REDACTED] for the 2008-2009 school year. She assists [REDACTED] in the classroom throughout the day with all subjects. Ms. Crews passed a paraprofessional exam to work for Respondent. She has personal experience helping to care for an autistic relative on a daily basis. She attended a CARD workshop and has received a great deal of guidance from Tara Sipe regarding strategies to deal with [REDACTED]'s behavior. She is currently working on her college degree with the goal of being a special education teacher.

66. Ms. Crews maintains a daily log for her own use, for the purpose of following [REDACTED]'s behavior and trying to make changes in how she approaches things with [REDACTED]. Her desire is to elicit positive behaviors and eliminate the disruptive behaviors.

67. Her description of [REDACTED]'s behaviors is consistent with those of Ms. Haynes. Her testimony is also consistent with Ms. Haynes' regarding the level of disruption to the class. When B.L. is disruptive, the entire class gets out of sync. When [REDACTED] sings or scripts loudly, the other students tend to get loud, are more prone to talk to each other, ignore the teacher, and the momentum of the class is changed.

68. Despite these challenges, Ms. Crews' affection for [REDACTED] is quite evident.

69. [REDACTED] gave a communication log to the school to be completed every day. The communication log is detailed with categories (i.e., morning session, reading block misc., math block, and other subjects.) There are then sub-categories with numbers from 1 through 10. There is a key which explains what number should be assigned that best describes [REDACTED]'s behavior. "1" indicates that [REDACTED] worked independently. "3" indicates that few prompts were needed, "5" indicates "typical, needs prompting and incentives to continue to work," "8" means [REDACTED] has tuned out, is not working, but not having tantrums, and "10" means tantrums/refusing to work/ crying/ ripping paper." There is a portion on the top to be completed by [REDACTED], indicating whether [REDACTED] slept well and whether [REDACTED] went to the bathroom in the morning. There is space for additional comments on the bottom.

70. Ms. Crews completes the communication logs after each activity. Sometimes Ms. Haynes will add something to the log, but the logs are primarily completed by Ms. Crews. There are individually dated daily logs in evidence, with dates ranging from August to December 2008. On each one, the top part was completed by [REDACTED], usually with a hand-written note at the top of the page. For each sub-category, Ms. Crews has circled the appropriate number describing [REDACTED]'s behavior for that activity.

On most days, the aide wrote comments at the bottom of the page under "additional comments."

71. In addition to her observations of [REDACTED] in the spring of 2008, Ms. Sipe has played a large role in training Ms. Crews regarding [REDACTED]. Ms. Sipe reviewed [REDACTED]'s behavior plan with Ms. Crews, and came to the school to observe numerous times. Ms. Sipe instructed Ms. Crews as to appropriate strategies, including the following:

Ongoing training provided to classroom staff including but not limited to:

- Least to most restrictive prompting techniques.
- First/Then Board
- Preference selection of reinforcers
- Sabotage environment in order to elicit communication
- Identify precursor behaviors to problem behavior and prompt more socially appropriate alternatives (asking for a break)
- Token strip
- Visual schedule
- Embedding tacts (labels) and Receptive by Feature, Function Class (what do you do with this?) verbal operants into daily lessons and activities in order to facilitate and increase spontaneous and functional communication

- Manipulate motivating operations to increase compliance with adult requests (what she is motivated to work for)
- Pairing conditioned reinforcers (social praise, high fives) with unconditioned reinforcers in order to promote generalization across people and settings
- Extinction used in conjunction with:
 - o Differential reinforcement of alternate behaviors-a procedure for decreasing problem behavior in which reinforcement is delivered for a behavior that serves as a desirable alternative to the problem behavior (asking for a break instead of throwing instructional materials in order to escape work demands)
 - o Differential reinforcement of incompatible behaviors- a procedure for decreasing problem behavior in which reinforcement is delivered for a behavior that is physically incompatible with the behavior targeted decrease (reinforcing on-task behaviors when the target behavior is leaving assigned area. The two behaviors are incompatible.)
 - o Differential reinforcement of other behaviors- a procedure for decreasing problem behavior in which reinforcement is delivered in absence of problem behavior.
- Behavioral Momentum- An antecedent intervention in which two to five easy tasks with a known history of learner compliance are presented quickly and immediately prior to a more challenging task.
- Magnitude reinforcement
- Errorless teaching

- Fade ESE Paraprofessional during lessons in order to promote learner independence
- Response Blocking

72. Ms. Sipe is of the opinion that ■■■ lacks the pre-learner skills necessary to be successful in an academic setting, and that ■■■ should be in a self-contained setting to learn the skills that are necessary to participate in a regular classroom setting. According to Ms. Sipe, the skills she taught to Ms. Crews are things that are "imbedded" in a self-contained classroom.

73. Ms. Edden works with ■■■ 30 minutes per week on social skills (e.g., eye contact, socialization with other students, taking turns.) While on bus duty, she also greets ■■■ in the mornings, says goodbye in the afternoon, and asks ■■■ questions at lunch to try to stimulate conversation. Ms. Edden also teaches ■■■ math in a conference room a few doors down from the classroom. In this setting, ■■■ is more successful at completing math assignments than when in the regular classroom. According to Ms. Edden, the setting ■■■ is in is similar to a self-contained setting. In her opinion, ■■■ would function better in a self-contained classroom at this point to enable ■■■ to acquire some skills so that ■■■ can function in a regular classroom one day.

74. Staci Holleran is a speech-language pathologist who is employed by a private company and works with █ two days a week at school. She has been working since August 2008 on the goals in █'s IEP. At the time of the hearing, █ had not met █'s short-term goals or over-all goals. Ms. Holleran describes █ as low functioning in the educational setting because █ has such a hard time with the pragmatics of language and functional communication. She also describes █ as having high intelligence.

75. █ also receives speech-language services from Ashley Brannon, a speech language pathologist who works with █ twice a week for 30 minutes each session away from school. Ms. Brannon works with █ on language goals and social goals.

Observations of █ made at the request of the parent

76. At the request of █'s parents, two persons from CARD observed █ in the classroom in October 2008.

77. Katrina Ressa is an educational coordinator with CARD. She consults with teachers, parents, and school staff regarding working with persons with autism. She is a board-certified Associate Behavior Analyst. She observed █ for approximately an hour and a half during math and during story time. A substitute teacher was teaching that day, but █'s one-on-one aide was there. During math, she observed █ having difficulty maintaining focus. Her aide had to prompt █ back to work.

She observed ■■■ sing, rock in ■■■'s seat, and talk to ■■■self throughout ■■■ work.

78. During story time, Ms. Ressa observed ■■■ sitting at ■■■'s desk. ■■■ one-on-one aide had stepped back and was not sitting next to ■■■. ■■■ had some difficulty paying attention to the story. ■■■ raised ■■■ hand, as did other students, when the class was asked a question. ■■■ got up and left ■■■'s seat twice, once to go to an adjoining classroom and once to go to the library area. ■■■'s aide followed ■■■, turned ■■■ around, pointed to the desk and told ■■■ to sit back in ■■■'s seat. ■■■. and ■■■'s aide walked back to ■■■'s seat. While doing ■■■'s work, Ms. Ressa observed ■■■ having difficulty in social situations.

79. During her classroom observations, Ms. Ressa observed ■■■'s aide being attentive to ■■■ and working well with ■■■, observed the aide using strategies to help ■■■ with attending, such as the use of tokens, and providing ■■■ with sufficient praise and reinforcement. Ms. Ressa felt that the aide was well trained.

80. As a result of the classroom observation and observations made of ■■■ in Ms. Ressa's office and at ■■■'s home, Ms. Ressa wrote some recommendations and discussed them with Tara Sipe and the school principal.

81. Angela Mann is also an educational coordinator for CARD. She observed [REDACTED] with Ms. Ressa and found that [REDACTED] was well supported in the classroom. Ms. Ressa and Ms. Mann made some recommendations for possible extra support but did not make recommendations as to placement.

82. Dr. Mary Belkin is a clinical psychologist employed by the University of Florida in the Department of Pediatrics. Dr. Belkin conducted a psychoeducational evaluation of [REDACTED] over a period of two days in late October and early November 2008. Part of the evaluation was the administration of the Weschler Intelligence Scale for Children (WISC). Based on this test, Dr. Belkin determined that [REDACTED]'s full scale IQ was 91, which is in the average range of functioning. One of the most significant weaknesses evident on the IQ testing was [REDACTED]'s working memory skills. [REDACTED] also had significant weaknesses in attention and concentration skills, language abilities, social skills and difficulty in applied math.

83. Dr. Belkin did not observe [REDACTED] in the classroom or speak to [REDACTED]'s teachers. She did have input from the teachers and parents from a questionnaire. Dr. Belkin found the overall responses of the teachers and parents to be similar.

84. Throughout the observations, [REDACTED] did not always immediately grasp what it was [REDACTED] was being asked to do. But

with extra guidance or extra explanation, [REDACTED] was able to respond correctly.

85. Dr. Belkin summarized her recommendations:

I think the first thing, and it's a little bit difficult to determine whether or not the attention deficits that were demonstrated both behaviorally also on the parent and teacher rating form if they were essentially associated with [REDACTED]'s autism or if they may in fact be suggestive of an underlying attention deficit disorder.

And one of my recommendations was that a referral to either a psychiatrist or a developmental pediatrician be considered to help smooth that out but also to help [REDACTED] explore ways to managing behaviors.

My understanding was that the family had had some support from the CARD Center and obviously that's their specialization in working with families and schools and children in order to help manage behaviors.

And I felt like it would be useful if the family was comfortable with that they needed that resource to work with [REDACTED] in a classroom setting.

In addition I felt like as is happening now but I felt like it was useful for the results of testing to be shared with the school personnel so that the information could be combined with parent input, teachers' observations, [REDACTED]'s peers in the classroom to make a decision regarding [REDACTED]'s placement and just in general academic planning.

The other thing that I felt is that the supports that were in place. My understanding is that [REDACTED] had a classroom aide, that [REDACTED] was receiving speech therapy at school, that [REDACTED] was receiving

occupational therapy and than even speech therapy outside of the school. And my thought that those supports, it was very important those continue to be in place for [] in order to help [] be more successful. Regular communication between all of the therapists working with [], the teachers working with [] and then the family I thought was critical in order to help ensure that the progress being made in one setting was generalizing to other settings.

I think a keener focus is so much more effective in order to help support a child and help change behaviors that can be problematic.

There's one area of weakness that was noted that's also a part of the definition of autism, and that is social skills. And my recommendation that social skills can be considered to address those ongoing issues and to also help make sure that again improvements made in one setting could be generalized to other settings and situations.

And given the strengths that were evident in []'s nonverbal thinking skills, I think it's important that the teachers and individuals working with [] recognize that and consider using different modalities that will help enhance []'s learning.

86. Diane Ryndak is an associate professor in the field of special education at the University of Florida. She has an undergraduate degree in general education, elementary education, and special education for students with mild disabilities. She received a master's degree with a specialization in services to persons with severe and multiple disabilities. She received her

Ph.D. with a focus on teacher preparation and education for students with moderate through severe disabilities. She also has completed post-doctoral work in qualitative research methodology related to inclusive education and the effects on it.

87. Dr. Ryndak is of the opinion that children with any level of disability should be placed with students of the same chronological age. The students with disabilities get access to students without disabilities with support from special education for instructional modifications, instructional strategies, and adaptive materials. The teachers collaborate strategies and figure out how to provide support instruction for all students in the classroom which results in a win/win situation for all of the students.

88. Dr. Ryndak did not observe [REDACTED] in the classroom or anywhere else.

Classes for students with autism in Clay County

89. Ms. Swenson, who conducted the testing for [REDACTED] during the summer of 2008, is a teacher in a self-contained classroom for autistic students at School C. School C has five self-contained classrooms for children with autism. The students are not necessarily divided by age or grade level. They are divided by level of functioning.

90. Ms. Swenson teaches what is called a "bridge" class, part of a pilot program, that has the highest level of students who are working on their academic skills. The ultimate goal is for her students to increase their confidence and move from a self-contained classroom into regular education. There are two bridge classes at School C. At the time of the hearing, there were five students in her bridge class.

91. School C incorporates "reverse inclusion" where typically developing students in general education classes will visit the self-contained classrooms, sit with her students, play games, engage in turn-taking activities, and facilitate interactions.

92. Based upon the testing she conducted of ■■■, Ms. Swenson believes that the self-contained classroom would be more appropriate for ■■■ to solidify ■■■ behavior and learn prerequisite skills to help ■■■ become a good learner. Ms. Swenson targets three things: get confidence up, get behavior under control, and get the academics on board. Then, she slowly takes the supports away while the student's independence is rising and increasing. Ultimately, the goal is for the student to transfer back into the regular classroom.

93. Ms. Swenson believes that ■■■ would benefit from the smaller classes, the increased level of staff, and the individualized level of instruction in a self-contained

classroom to prepare ■■■ to transition back to a regular classroom.

94. While Ms. Swenson teaches at School C, she is aware that School B also has the goal of inclusion of the autistic students in the regular classroom. Another school in Clay County is going to have self-contained classes for student with autism in the upcoming academic year. Ms. Swenson assumes that will be the goal at the new program as that is the trend at Schools B and C.

CONCLUSIONS OF LAW

95. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. See § 1003.57(5), Fla. Stat. (2005); 20 U.S.C. § 1400, et seq.

96. The IDEA requires a school district to provide FAPE to any student with a disability. See 20 U.S.C. § 1400(d)(1)(A). In general, a school district must develop an IEP for each eligible student and follow certain procedures in that process. See 20 U.S.C. § 1414.

97. In Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed. 2d 690 (1982), the United States Supreme Court set the legal standard for determining whether a state has violated IDEA. "[A] court's inquiry . . . is twofold. First, has the state complied with the procedures set forth in the Act?

And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Rowley, 458 U.S. at 206-207. Accord, School Board of Collier County, Fla. v. K.C., 285 F. 3d 977 (11th Cir. 2002). This requirement is satisfied when the state provides personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction, and that the instruction should reasonably calculated to enable the child to advance from grade to grade. Rowley, at 206-207.

98. In School Board v. Martin County, 727 So. 2d 1071 (Fla. 4th DCA 1999), the court discussed the nature and extent of the educational benefits which Florida school districts must provide to exceptional students:

Federal cases have clarified what 'reasonably calculated to enable the child to receive educational benefits' means. Education benefits under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County School District, 941 F. 2d 1563 (11th Cir. 1991): Doe v. Alabama State Department of Education, 915 F. 2d 651 (11th Cir. 1990). Although they must be 'meaningful,' there is no requirement to maximize each child's potential. Rowley (citation omitted).

99. The burden of proof (burden of persuasion) in an administrative proceeding challenging an IEP is properly placed upon the party seeking relief. Schaeffer v. Weast, 546 U.S. 49,

126 S. Ct. 528 (2005). Therefore, the burden of proof rests with Petitioner.

100. Petitioner alleges the following procedural errors: That the general education teacher was not present at the March 27, 2008 IEP meeting (the initial IEP meeting for Clay County) and that the IEPs, in particular, the proposed IEP dated July 10, 2008, were predetermined by Respondent.

101. A procedurally defective IEP does not automatically entitle a party to relief. School Board of Collier County v. K.C., supra at 982. IDEA specifies the parameters of this Order. 20 U.S.C. § 1415(f)(E), provides as follows:

(E) Decision of hearing officer.

(i) In general. Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

102. 34 C.F.R. § 321 reads in pertinent part as follows:

300.321 IEP Team

(a) General. The public agency must ensure that the IEP team for each child with a disability includes.—

(1) The parents of the child;

(2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment)

103. The attendance of a regular education teacher at the March 27, 2008 IEP meeting meets this requirement. Thus, the evidence establishes that the School Board did not commit a procedural violation regarding this issue.

104. Petitioner alleges that all the IEPs, in particular, the July 10, 2008 IEP, were predetermined. Such predetermination would constitute a procedural violation. Nack v. Orange City School District, 454 F.3d 604 (6th Cir. 2006).

105. The instant case bears remarkable similarities to the facts in Nack. Mrs. Nack was a special education teacher with a master's degree in the field and extensive experience, and was very involved in her son's education and the development of his IEPs. Because her son began experiencing disciplinary problems, an IEP was developed to address these concerns. Three IEPs were developed which ultimately identified a social skills special

education classroom as the least restrictive environment.

Mrs. Nack continually voiced her disagreement with this decision and ultimately filed for due process. The court found that Mrs. Nack actively participated in all three IEP meetings and repeatedly made her disapproval of her son's participation in the special class, and her desire for him to remain in a regular education classroom. The court opined:

While there clearly had been ongoing discussions concerning David and certain portions of the IEP had been drafted in advance, '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.' [citation omitted] Here, Mrs. Nack was given many opportunities to comment on the IEP and, by every indication, Orange took her suggestions seriously. In the end, there is insufficient evidence in the record to prove a procedural violation of the IDEA through predetermination.

545 F.3d 604 at 611.

106. In the instant case, █████ expected that Respondent would attempt to place her child in a special education setting from the very first IEP meeting. However, that is not what happened. █████ was placed in a regular education classroom. When problems occurred, they were addressed in the May 8, IEP meeting, which notes reflect that Dr. Becton commented that █████ may not be benefiting from the experience at School A and may

benefit from a continuum of services for more intensive needs. Despite these concerns, the IEP continued ■■■'s placement at School A in a general education class with a one-on-one aide as requested by the parents. Again at the May 28, 2008 IEP meeting, Dr. Becton and teachers expressed their belief that ■■■ needed a smaller, more intensive setting and that despite the supports that were being provided in the regular education classroom, ■■■ was not successful. This IEP meeting was suspended for testing. It was not until the July 10, 2008, IEP meeting, with the benefit of testing results administered by a competent, experienced teacher of autistic students, that the IEP team proposed placement in a special education class at School B.

107. While portions of the IEPs were prepared ahead of time (in particular, goals and objectives,) it is concluded that the proposed placement of ■■■ in self-contained classroom for autistic students was not predetermined. See Id.

Training of teachers and aides

108. Underlying Petitioner's argument that FAPE was not provided is that ■■■'s teacher(s) and aide(s) were not properly trained. Further, Petitioner contends that ■■■ should be allowed to come into the classroom and train the teacher(s) and aide(s).

109. There is no basis in law for this request. First, while the federal regulations require that special education teachers be highly qualified, a challenge to a teacher's credentials or qualifications cannot be the basis of a due process hearing. 34 C.F.R. § 300.18(f) reads as follows:

Highly Qualified Special Education Teachers

(f) Rule of construction. Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint under 300.151 through 300.153 about staff qualifications with the SEA as provided for under this part.

110. Additionally, the "highly qualified" language applies to special education teachers, not general education teachers or paraprofessionals. 34 C.F.R. § 300.18(b).

111. Further, there is no requirement in law that a school district be required to allow a parent to train their teachers. While parents must have input into their child's education, that is separate and apart from "training" a school district employee. While the previous school districts where B.L. attended school may have allowed this, it was discretionary on their part. Moreover, the weight of the evidence established

that the school district did implement many of the guidelines and suggestions provided by ■■■, with limited success.

112. The weight of the evidence established that the teacher made great efforts to accommodate ■■■ and to learn interventions regarding ■■■'s behavior. See Hartmann v. Loudoun County Board of Education, 118 F. 3d 996 (4th Cir. 1997.) The one-on-one aide also received training from Ms. Sipe regarding behavior issues. "To demand more from this regular education personnel would essentially require them to become special education teachers trained in the full panoply of disabilities that their students might have." Id. At 1004.

113. Accordingly, the remainder of the discussion and analysis of whether FAPE was or was not provided will not be based on whether ■■■'s teacher(s) and aide(s) were properly trained.

114. Having analyzed the alleged procedural violations, the analysis turns to the allegations of substantive violations.

Least Restrictive Environment

115. Petitioner argues that the placement proposed by Respondent would be inappropriate because it would not place Petitioner in the least restrictive environment. 20 U.S.C. Section 1412(a)(5) reads as follows:

Least Restrictive Environment

(A) In general.

* * *

(5) 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.

116. Case law sets forth a well-established analysis of this issue. In Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989), opinion withdrawn by, 956 F.2d 1025 (11th Cir. 1992), reinstated by, in part, amended by 967 F.2d 470 (11th Cir. 1992). The court established a two-prong test to determine whether an IEP places a student in the least restrictive environment. The first prong is to consider whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for the student. In its analysis, the court looked at several factors. First, the court examined whether the school district has made reasonable efforts to accommodate the child in the regular classroom. Another factor is to examine the educational benefits available to the child in the regular classroom as compared to those in a special education classroom. Finally,

the court examined the possible negative effects of the inclusion of the child on other students in the regular classroom.

117. Respondent made reasonable efforts to accommodate ■■■ in the classroom. A dedicated one-on-one aide was hired, who performed her duties with help and direction from the classroom teacher, ESE teacher, and behavior specialist. Accommodations were made in an attempt to give ■■■ an opportunity to succeed. ■■■ also received speech and occupational therapy.

118. The evidence in this case demonstrates that ■■■ made only minimal academic progress in the regular education classroom, despite the provision of adequate supplementary aides and services. The evidence also establishes that the educational benefits to ■■■ in the regular classroom are minimal in comparison to those available in the special education classroom. In reaching this conclusion, the undersigned has carefully considered Dr. Ryndak's researched-based opinion. However, the testimony presented by the classroom teacher, the ESE teacher, the behavior specialist, and the teacher of autistic students from School B have persuaded the undersigned that the educational benefits in the special classroom are, at least at this period of ■■■'s education, greater than those in the regular classroom for B.L.

119. Finally, the Daniel R.R. Court examined what effect the child's disability has on the regular classroom environment. The evidence established that the education of the other students in the regular education classroom was significantly impaired by ■■■'s disruptive behavior.

120. The second prong of the analysis set out by the Daniel R.R. Court is to consider whether the school has mainstreamed the child to the maximum extent appropriate. Respondent placed ■■■ in a regular classroom with a one-on-one aide. They clearly provided the maximum appropriate exposure to non-disabled students. Therefore, Respondent met this prong of the analysis.

121. The Eleventh Circuit applied the above discussed analysis in Greer v. Rome City School District, 950 F.2d 688 (11th Cir. 1991). The court noted that the critical inquiry is whether the school district took steps during the development of the IEP and placement proposal to accommodate the student in the regular classroom. Unlike the school district in Greer, Respondent herein took several steps to accommodate ■■■ in the regular classroom. First, the initial IEP placed ■■■ in the regular classroom and immediately hired a dedicated one-on-one aide. As problems developed, two more IEP meetings were held before the end of the school year. ■■■'s placement remained in the regular education classroom with supplemental supports and

services. Accommodations were made and interventions were attempted. Despite these efforts, ■■■'s progress was minimal. During the 2008-2009 school year, ■■■ remained in the regular classroom under "stay-put." During this time, Respondent continued and expanded its efforts. Ms. Sipe took a larger role in training Ms. Crews regarding behavioral issues. Ms. Edden provided individualized instruction to ■■■ in math.

122. Petitioner argues that Respondent failed to provide FAPE during the spring of 2008, when ■■■ first began ■■■ education in Clay County. However, ■■■'s lack of educational progress does not mean that FAPE was denied. As explained by the court in Nack, supra, "To the extent that Nack relies upon David's lack of progress during his sixth-grade year as proof of the fallibility of Orange's IEP, the argument misses the mark. As stated above, the IDEA does not guarantee success—it only requires a school to 'provide sufficient specialized services so that the student benefits from his education.' (citation omitted)" Nack, 454 F.3d 604 at 614.

123. The undersigned concludes that the proposed placement is a more appropriate setting for ■■■ than the general education classroom. However, the proposed IEP is now almost a year old. The goals and objectives for ■■■ may have changed over time. Another school with a special class for autistic students may be closer to ■■■'s home than School B.

Independent Educational Evaluation

124. Finally, the issue of whether Respondent denied Petitioner's request for an independent educational evaluation must be considered.

125. The notes from the July 10, 2008, IEP meeting clearly reflect that an independent educational evaluation at Respondent's expense, was requested by Petitioner's attorney.

126. What happened after that regarding this request is ambiguous from the record. Dr. Becton testified that the school district does it all the time but asked what would they be testing for, and made reference "calling the office." ■■■'s testimony indicated that at some point in time, she was informed that the "paperwork" was almost complete. Other than those sparse facts, the record is devoid of what exactly happened. There is no evidence of any follow-up letter from Petitioner regarding the request. There is no evidence that Respondent expressly denied the request. It appears that someone simply dropped the ball.

127. Petitioner obtained a psychoeducational evaluation of ■■■ by Dr. Belkin, which was conducted in late October and early November 2008. Petitioner does not expressly request reimbursement for Dr. Belkin's services. Petitioner's Proposed Final Order appears to seek another independent educational evaluation.

128. 34 C.F.R., Section 300.502 reads as follows:

(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 conditions in paragraphs (b)(2) through (4) of this section.

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

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

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to 300.507 through 300.513

that the evaluation obtained by the parent did not meet agency criteria.

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

(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.

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

* * *

(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.

129. As to Dr. Becton's question "what are you testing for," the above regulation permits that inquiry. 34 C.F.R. § 300.502(b)(4). However, the regulation is clear that the school district may not require the parent to provide an explanation and, more importantly, it may not unreasonably delay either providing the independent educational evaluation at public expense or the school district must file a due process complaint to request a due process hearing to defend the public evaluation. For whatever reason, there was unreasonable delay in processing the parents' request.

130. It is concluded that the parents are entitled to an independent educational evaluation at public expense. There is a parent-initiated evaluation. Therefore, if it meets agency criteria, it must be considered by the public agency in any decision made with respect to the provisions of FAPE to the child. 34 C.F.R. § 300.502(c). There is no definition of the

word "consider," but courts have used the plain and ordinary meaning, "to reflect on: think about with a degree of care or caution." T.S. v. Board of Education of the Town of Ridgefield, 10 F.3d 87 at 89 (2nd Cir. 1993), citing Webster's Third World New International Dictionary at 483 (1986).

131. If Dr. Belkin's evaluation does not meet agency criteria, see 34 C.F.R. § 300.502(e), then another independent evaluation needs to take place within the parameters of the regulation. The parent is entitled to either reimbursement for Dr. Belkin's evaluation or to another independent educational evaluation at public expense, but not both. 34 C.F.R. § 300.502(b)(5) Any new evaluation must meet agency criteria as specified in the above regulation.

ORDER

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

ORDERED:

1. Petitioner is entitled to either the reimbursement of Dr. Belkin's psychoeducational evaluation or to another independent educational evaluation at Respondent's expense, as more fully explained above.

2. Petitioner's other claims in the Request for Due Process Hearing are denied.

3. The proposed IEP developed July 10, 2008, is approved as an appropriate starting point of a duly-convened IEP meeting in which goals and objectives are updated to reflect ■■■'s current needs, with placement in a self-contained classroom for autistic students at a school as close to Petitioner's home as possible.

DONE AND ORDERED this 29th day of May, 2009, in Tallahassee, Leon County, Florida.

S

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2009.

ENDNOTES

1/ The Florida Department of Education has requested that Final Orders not contain references to gender or to school names. Accordingly, the schools referenced herein will be referenced by a letter, i.e., School A, School B, etc.

2/ ■■■'s testimony as to what that person said to her is hearsay and is not sufficient in itself to establish a finding of fact as contemplated by Section 120.57(1)(c), Florida Statutes.

3/ Neither [REDACTED]'s classroom teacher for April 2008 until the end of the school year, Mrs. Beazley, or [REDACTED]'s one-on-one aide for that period of time, Ms. Sheppard, testified at the hearing.

4/ The record is unclear as to when this test was administered or by whom.

5/ In the Proposed Final Order, Petitioner asserts that there was no behavior modification plan in place during the end of the 2007-2008 school year in that the FBA/PBIP was not created until school was out. Further, Petitioner argues that the FBA/PBIP is not adequate. However, these issues were not raised in the request for due process hearing and will, therefore, not be considered. Moreover, the IDEA only requires a behavioral plan when certain disciplinary actions are taken against a disabled child. Lessard v. Wilton-Lyndeborough Cooperative School District and New Hampshire Department of Education, 518 F.3d 18 (1st Cir. 2008), citing 20 USC §§ 1415(k)(1)(A) & (B)(1). No such disciplinary action took place against B.L.

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(5), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.