Broward County School District
No. 07-3041E
Initiated by: Parent
Hearing Officer: Robert E. Meale
Date of Final Order: October 5, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-3041E
	)	
BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Lauderdale, Florida, on August 23 and 24, 2007.

APPEARANCES

For Petitioner: Rochelle Marcus, Esquire
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For Respondent: Edward Marko, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the refusal of Respondent to add to Petitioner's individual education plan (IEP) a limitation upon [redacted] class size to 12-15 students deprives Petitioner of a free appropriate public education (FAPE).

PRELIMINARY STATEMENT

By Request for Due Process dated July 3, 2007, and received by Respondent on July 5, 2007, Petitioner, citing the procedural safeguards of the Individuals with Disabilities Education Act, 20 United States Code Sections 1400, et seq. (IDEA), alleged that Respondent denied Petitioner FAPE by refusing to document on Petitioner's IEP a provision for a maximum class size of 12-15 students, as recommended by the IEP team. The request states that Petitioner suffers from traumatic brain injury, so [redacted] is easily distracted and agitated. The request alleges that a small class size enables Petitioner to access the curriculum, but the IEP team claimed that it could not specify class size on an IEP. The request is explicitly based on the "four corners of the Notice of Refusal document," which is set forth below, but adds that Petitioner reserves the right to raise other issues.

By Notice of District's Response to Due Process Complaint, dated July 5, 2007, Respondent stated that it declined to specify in the IEP the optimal class size because the IEP team

did not determine that such a provision was necessary to provide FAPE.

Based on the date on which Petitioner filed with Respondent the Request for Due Process, the original deadline for issuing the final order was September 18, 2007. Accordingly, after conducting a pre-hearing conference on July 11, 2007, the Administrative Law Judge set the final hearing for August 23 and 24, 2007.

On August 13, 2007, the Administrative Law Judge conducted a second pre-hearing conference devoted largely to discovery, evidentiary, and witness issues. The Administrative Law Judge did not enter an order memorializing any rulings, but no serious discovery disputes remained after the second pre-hearing conference.

Prior to the second pre-hearing conference, Petitioner had filed, on July 24, 2007, a Motion to Limit Hearing to those Issues Raised in Petitioner's Request for Due Process and to Strike the Notice of District's Response to Due Process Complaint. This motion states that Petitioner raised in [redacted] due process request two issues: 1) "is it within the boundaries of the [IEP team] to determine class size?" and 2) "if so, must the school board document that decision on the IEP?" The motion objects to a rephrasing of these issues in Respondent's response. The motion states that Petitioner has not raised the

issue of what is FAPE for [redacted] and adds that Petitioner agrees with the IEP team that FAPE demands a class size of no more than 12-15 students. On August 7, 2007, Respondent filed a response to the motion and stated essentially that the motion to strike should be denied because Respondent was legally obligated to file a response. The record contains no order addressing any issues raised in the second pre-hearing conference, but the scope of the issues was later resolved prior to the hearing.

Shortly after the second pre-hearing conference, the case was transferred to the undersigned Administrative Law Judge, who conducted a third pre-hearing conference on August 17, 2007. During that conference, the Administrative Law Judge, noting a lack of jurisdiction, denied Petitioner's Motion to Invoke Stay Put, which was filed on August 17, 2007. The Administrative Law Judge also confirmed with the parties that the scope of the issues would be limited to the occurrences at the IEP meeting of April 27, 2007, and whether Respondent deprived Petitioner of a FAPE when the IEP team refused to add to the IEP a provision limiting Petitioner's class size to 12-15 students.

At the start of the hearing on August 23, 2007, the Administrative Law Judge, again noting a lack of jurisdiction, denied Petitioner's Motion to Amend the Due Process Complaint to Plead for Attorney Fees, which was filed on August 22, 2007. After confirming the availability of a speakerphone, the

Administrative Law Judge granted Petitioner's Motion for Order Allowing Telephonic Testimony, which was filed at the start of the hearing. The testimony of Petitioner's physician, Dr. Jacinta Magnus, was taken by telephone later during the hearing.

In her opening statement, counsel for Petitioner restated that the two issues were whether the IEP team had the authority to specify a maximum class size and whether Respondent was obligated to document in the IEP the recommendation of the IEP team regarding class size. Counsel stated that FAPE required a class-size provision in Petitioner's IEP. Counsel stated that the facts necessary to resolve the legal question in this case were all in the Notice of Refusal.

In her opening statement, counsel for Respondent stated that this case was premature because the IEP team never completed the task of preparing an IEP.

At the hearing, Petitioner called six witnesses and offered into evidence ten exhibits: Petitioner Exhibits 1-5 and 6-11. Respondent called three witnesses and offered into evidence two exhibits: Respondent Exhibits 1 and 3. All exhibits were admitted except Petitioner Exhibits 1, 3, and 4, which were proffered.

At the end of the hearing, Respondent ordered a transcript, and the parties requested one month after the end of the hearing

within which to file proposed final orders. The Administrative Law Judge granted this request and granted a specific extension of eight days for the issuance of the final order. The deadline for the final order was thus September 26, 2007.

The court reporter filed the transcript on September 17, 2007.

On September 21, 2007, the parties filed Petitioner's and Respondent’s Unopposed Motion for an Extension of Time to File Proposed Final Orders. Citing an unscheduled hospitalization of one of the attorneys, the parties requested the extension of one week within which to file their proposed final orders. By order entered September 21, 2007, the Administrative Law Judge granted the motion, setting a new deadline of noon, October 1, 2007, for the filing of proposed final orders and granting a specific extension of one week, to October 3, 2007, for the issuance of the final order.

On October 1, 2007, Petitioner filed Petitioner's Second Unopposed Motion for Additional Time to File Proposals of Fact and Law. By order entered October 1, 2007, the Administrative Law Judge granted the motion, setting a new deadline of noon, October 5, 2007, for the filing of proposed final orders and granting a specific extension of five days, to October 8, 2007, for the issuance of the final order.

FINDINGS OF FACT

1. On [redacted], Petitioner was born, at about 28 weeks' gestation. [redacted] suffered respiratory distress, seizures, and intraventricular hemorrhages. Petitioner received ventilation for 30 days and was discharged from the hospital after three and one-half months. During [redacted] first two years, Petitioner was re-hospitalized three times, primarily due to upper respiratory tract infections that proceeded to pneumonia.

2. Petitioner experienced "mild delays" in development and acquisition of fine motor skills, gross motor skills, and cognitive skills. Petitioner had major problems in executive functions with "fairly severe" attention deficit/hyperactivity disorder, difficulties in planning, and difficulties in problem solving. Petitioner's learning and social development during [redacted] early years at school were impeded by [redacted] inattentiveness, distractibility, impulsivity, and disorganization.

3. Petitioner enrolled in Respondent's school district while [redacted] was still in elementary school. Petitioner has never been held back, and, in August 2004, [redacted] started sixth grade in [redacted] School.

4. By letter dated October 1, 2004, Petitioner's physician, Dr. Jacinta Magnus, who had been treating [redacted] for three years at the time, diagnosed Petitioner with attention deficit disorder, status post brain injury syndrome,

developmental and psychological delay, pervasive personality disorder, expressive language disorder, and autism spectrum disorder. In this letter, Dr. Magnus requested a 1:1 aide and stated that Petitioner required "structure and calm routines."

5. While attending Respondent's schools, Petitioner has always had a 1:1 aide. The record is not well-developed as to sixth and seventh grades, although seventh grade was "touch and go" for Petitioner. However, eighth grade went better for Petitioner.

6. In eighth grade, as in seventh grade, Petitioner's main class was a varying exceptionalities (VE) class taught by Brian Schwer. In eighth grade, this class numbered 12-15 students. Mr. Schwer testified that, for most of the year, the class was 12 students, which was a "good class size" for Petitioner, who was eager to please his teacher and wanted to do good work.

7. Mr. Schwer identified Petitioner's main impediments to learning as aggressive behavior and misreading social cues, but Petitioner's aide always helped [redacted] with transitioning and staying on task. The academic year went well until FCAT time, which was early in 2007, at which time Petitioner began to show some stress and became more aggressive.

8. Petitioner reported to Mr. Schwer's class each morning. [redacted] was pulled out for special instruction or speech therapy each day from 8:00 a.m. to 10:00 a.m. During this time, Rodney

Sell, a behavior support staff person, sometimes worked with Petitioner. Teaching Petitioner anger management skills 30-60 minutes weekly for almost all of Petitioner's middle school years, Mr. Sell reported "tremendous improvement" and maturation in Petitioner over this period. Mr. Sell identified consistency and the 1:1 aide as key requirements for Petitioner's educational progress.

9. The speech language pathologist, Margaret Michael, met with Petitioner for speech therapy in a class of 4-6 students. Petitioner enjoyed the low-key class and behaved well in order to continue to be allowed to attend.

10. Petitioner returned to Mr. Schwer's class until 11:00 a.m. each day, when [redacted] went to a reading class until lunch. At lunch, Petitioner sat in the lunchroom or outside at a picnic table, always with [redacted] 1:1 aide. If at the picnic table, Petitioner would also be accompanied by some peer counselors and possibly [redacted] mother. During Petitioner's lunch, hundreds of other students would be eating in the cafeteria. Sometimes, Petitioner left school for the day prior to lunch, sometimes [redacted] left school for the day immediately after lunch, and sometimes [redacted] returned to Mr. Schwer's VE class after lunch.

11. Petitioner attended physical education with 25-40 other students and [redacted] aide. Mostly, these sessions took place

outside, and Petitioner rarely displayed any stress while participating in various sports. However, after doing well in art during the second semester of seventh grade, Petitioner did not do so well in art--taught by the same teacher--in eighth grade. Due to noise issues, [redacted] discontinued attending art after just a few sessions, but the class was late in the school day, so [redacted] abbreviated school day may also have played a role in this discontinuation of art.

12. The present dispute concerns the contents of an IEP that is not yet in existence and arises out of an IEP meeting that took place on April 27, 2007. Petitioner's current IEP is dated October 24, 2006. [redacted] exceptional student education (ESE) classifications are language impaired and other health impaired. [redacted] stated goals are to graduate high school and attend college. [redacted] educational needs are to develop math computational skills, writing skills, and word-recognition skills. The IEP states that Petitioner is working on Sunshine State Standards on another grade level.

13. The goals on Petitioner's IEP are to socially interact without interrupting others at least 85 percent of the time; write a paragraph of at least five sentences, with proper spacing and sizing, at least 90 percent of the time without prompting; improve [redacted] word recognition to the seventh grade level with 70 percent accuracy; solve, with minimal prompting,

multi-digit subtraction problems involving borrowing at least 75 percent of the time; use math to perform a variety of real life functions with 90 percent accuracy at least 80 percent of the time; show understanding of nonverbal body language of others by identifying facial and body gestures and identifying the meaning of gestures with at least 70 percent accuracy; answer, with at least 80 percent accuracy, five simple multiplication problems of double-digit numbers with regrouping; transition in the school setting with a visual schedule, in an unstructured environment, at least 80 percent of the time; finish a writing assignment, using a keyboard, in three out of five trials with at least 80 percent accuracy; show appropriate inter-personal skills, with minimal prompting; and, at least 90 percent of the time, use appropriate eye contact by looking at the speaker when [redacted] name is called and maintaining eye contact while the speaker asks a question at least 60 percent of the time.

14. The IEP identifies Petitioner's placement by stating the type and amount of ESE services that he is to receive each week. These services include speech language therapy, specialized instruction in an ESE class in all academic areas, and behavior support. The IEP adds: "[Petitioner] receives continuous supervision to ensure physical safety. [Petitioner] receives continuous interventions related to behavior." The IEP notes that Petitioner is removed from general education 74.36

percent of the time, so [redacted] is classified as being in a "separate class." The IEP states that Petitioner is in a general educational elective class, as well as lunch, hallway passages, and grade level activities.

15. The IEP identifies supplementary aids and services, such as alternate textbooks, oral presentation of written test directions (if allowable), flexible responding, reduced assignments, and small-group testing. The IEP states that Petitioner requires a functional behavioral assessment/positive behavior intervention plan.

16. In the spring of 2007, Respondent's staff began a process of reviewing the IEP in preparation for Petitioner's matriculation into high school. On April 13, 2007, Respondent sent a Parent Participation Form (PPF) to Petitioner's [redacted], advising [redacted] of a meeting on April 27, 2007. The PPF states that the purpose of the meeting is to "review the current IEP . . . and discuss . . . Matriculation." Petitioner's [redacted] indicated on an extra copy of the PPF that [redacted] would attend and returned that copy to the school.

17. On April 27, 2007, Respondent's ESE specialist, Marilyn Ospina, convened a meeting attended by the IEP team. Ms. Ospina intended to prepare a new IEP for Petitioner, who was about to finish middle school and start high school. Accordingly, Ms. Ospina prepared to update the present levels of

performance, goals, objectives, and other elements of the IEP. However, Petitioner's [redacted] and counsel objected to an update of the IEP at that time, preferring instead to wait until Petitioner had finished the first few of weeks of high school before preparing a new IEP.

18. Ms. Ospina and the rest of the IEP team had no problem with this request of Petitioner's [redacted] and counsel, so the meeting turned into a parent conference, and everyone stayed through what turned out to be a meeting of about one hour's duration. The discussion focused on Petitioner's transition into high school. Some discussion addressed the continued provision of a 1:1 aide and shortened school day.

19. Then, the discussion turned to class size. Some IEP team members indicated that the size of some of Petitioner's classes in high school could go up to 25 students. Petitioner's counsel asked about the current size of Petitioner's various classes and then posed a question to each member of the IEP team.

20. The phrasing of the question is in dispute. Respondent's three employees present at the meeting who had substantial experience with Petitioner recalled being asked to offer an opinion as to the "ideal" class size for Petitioner or what class size was "best" for [redacted]. Respondent's District ESE Program Specialist, Valorie Paulison, thought the question might

have asked what size class would be "appropriate," and Ms. Ospina thought the question asked what was the "maximum" class size that would be "appropriate." Petitioner's [redacted] recalled the question as asking for an opinion as to the class size that would be "appropriate."

21. In addition to Petitioner's reading teacher and the middle school's guidance counselor, who appeared briefly at the April 27 meeting before being excused by all of the parties, the only other person present, besides those named above, was Carol Iris Fischer, the ESE Specialist at the high school to which Petitioner has been assigned. Ms. Fischer testified that no one at the meeting could say whether Petitioner needed a maximum class size of 12-15 students to succeed educationally.

22. Mr. Sell replied 12-15 students "maximum," Mr. Schwer replied 12-15 students, and Ms. Michael replied that she agreed with 12-15 students. Ms. Ospina agreed with 12-15 students, although she testified that she said that this was an "ideal" range.

23. In posing the question, Petitioner's counsel disallowed discussion, insisting that each member answer only with a number. There was, in fact, no discussion or analysis of any educational, behavioral, or social data, nor were data present at the meeting that would assist in addressing an appropriate class size. As soon as everyone had answered her

question, Petitioner's counsel, saying that she had to leave, asked the IEP team to document the maximum range of 10-12 students on the IEP. Ms. Paulison said that she did not think that the IEP should include a maximum class size, but agreed to call the District office for advice. When she could not find her supervisor, she talked to another ESE staff person, who asked about the data the team had at the meeting.

24. After Ms. Paulison finished speaking to her co-worker, she told Petitioner's counsel that the IEP team had not had the data on which to base a decision as to class size, and she did not believe it was appropriate to include class size on the IEP. Petitioner's counsel asked for something to document the refusal of the IEP team to document the class-size opinions, and Ms. Ospina, who was inexperienced, agreed to prepare a Notice of Refusal.

25. With the assistance of Petitioner's counsel, Ms. Ospina typed the following information on the form. For the action that was the subject of the refusal, she wrote: "The IEP committee recommended a class size of 12-15 students for [Petitioner]. Parent and Legal Counsel requested that this information be documented onto the IEP." For the reason for the action that was the subject of the refusal, Ms. Ospina wrote: "IEP committee can't determine class size, so at the time of the meeting, we did not document it on the IEP." For the bases

underlying the action that was the subject of the refusal, Ms. Ospina wrote: "Subjective recall of previous data, Committee input."

26. Ms. Ospina tried unsuccessfully to schedule another IEP meeting for May 31, 2007, but Petitioner's [redacted] or counsel was unable to attend. No further action was taken with respect to modifying or replacing the IEP, which remains in effect, according to its term, at this time. At the time of the final hearing, Petitioner was not attending school, which started during the week of the final hearing.

27. Ms. Fischer testified that Petitioner would be assigned to a VE class at the high school that [redacted] will attend. Ms. Fischer added that, during the 2006-07 school year, one VE class at Petitioner's high school had up to 18 students, and the other VE classes were smaller. She had no information on the VE classes for the 2007-08 school year.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter. § 1003.57(1)(e), Fla. Stat. (2007).

29. Section 1001.42(4)(l), Florida Statutes, provides that School Boards must provide an appropriate program of special instruction, facilities, and services for ESE students, as prescribed by the State Board of Education in accordance with

the provisions of Section 1003.57, Florida Statutes. Florida Administrative Code Rule 6A-6.03028 requires School Districts to develop IEPs for every ESE student.

30. Florida Administrative Code Rule 6A-6.03028(7)(a)-(g) describes the contents of IEPs:

> Contents of the IEP for students with disabilities. Each district, in collaboration with the student's parents, shall develop an IEP for each student with a disability. . . . The IEP for each student with a disability must include:
>
> (a) A statement of the student's present levels of educational performance, including how the student's disability affects the student's involvement and progress in the general curriculum. For students with disabilities who participate in the general statewide assessment program, consistent with the provisions of Rule 6A-1.0943, F.A.C., a statement of the remediation needed for the student to achieve a passing score on the statewide assessment, . . .;
>
> (b) A statement of measurable annual goals, including benchmarks or short term objectives related to meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum . . .;
>
> (c) A statement of the specially designed instruction and related services and supplementary aids and services to be provided to the student, or on behalf of the student, and a statement of the classroom accommodations, modifications or supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals; to be involved and progress in the general curriculum in accordance with paragraph (7)(a) of this rule; to participate in extracurricular and other nonacademic

activities; and to be educated and participate with other students with disabilities and nondisabled students in the activities described in this paragraph;

(d) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in the activities described in paragraph (7)(c);

(e) A statement of any individual accommodations in the administration of the state or district assessments of student achievement that are needed in order for the student to participate in state or district assessments. . . . Accommodations that negate the validity of a statewide assessment are not allowable in accordance with Section 1008.22(3)(c)6., Florida Statutes. If the IEP team determines that the student will not participate in the Florida Comprehensive Assessment Test (FCAT) or district assessment of student achievement or part of an assessment, a statement of why that assessment is not appropriate for the student and how the student will be assessed. If a student does not participate in the FCAT, the district must notify the student's parent and provide the parent with information regarding the implications of such nonparticipation in accordance with Section 1008.22(3)(c)6., Florida Statutes.

(f) The projected date for the beginning of the specially designed instruction, services, accommodations and modifications described in paragraph (7)(c) of this rule and the anticipated frequency, location, and duration of those services; [and]

(g) A statement of how the student's progress toward the annual goals will be measured and how the student's parents will be regularly informed (at least as often as parents are informed of their nondisabled children's progress) of the student's progress toward the annual goals and the extent to which that progress is sufficient

to enable the student to achieve the goals by the end of the year[.]

31. Florida Administrative Code 6A-6.03411 confirms that ESE students are entitled to FAPE:

> This rule shall apply beginning with the procedures documents submitted for the 2004-05 school year and thereafter, in accordance with Section 1003.57(4), Florida Statutes. All students with disabilities aged three (3) through twenty-one (21) residing in the state have the right to a free appropriate public education (FAPE) consistent with the requirements of Title 34, Sections 300.300-300.313, Code of Federal Regulations (CFR). FAPE shall be available to any individual student with a disability who needs special education and related services, even though the student is advancing from grade to grade. . . .
>
> (1) Definitions.
>
> * * *
>
> (f) Free Appropriate Public Education (FAPE). FAPE refers to special education, specially designed instruction, and related services for students ages three (3) through twenty-one (21) . . . that:
>
> 1. Are provided at public expense under the supervision and direction of the local school board without charge to the parent;
>
> 2. Meet the standards of the Department of Education;
>
> 3. Include preschool, elementary, or secondary programs in the state as applicable; and
>
> 4. Are provided in conformity with an individual educational plan (IEP) for students with disabilities that meet the requirements of Rule 6A-6.03028, F.A.C., ...

32. The burden of proof is on the party seeking relief. Schaffer v. Wuest, 546 U.S. 49, 126 S. Ct. 528 (2005). Petitioner has the burden of proof in this case.

33. As stated in Rowley v. Board of Education, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051 (1982), FAPE encompasses procedural[1] and substantive elements: "First, has the State complied with the procedures set forth in the Act? [Footnote omitted.] And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"

34. As stated above, Petitioner poses two questions in this case: first, whether the IEP team has the authority to specify a maximum class size and, second, if the IEP team has the authority and exercises it, whether Respondent must document this specification on Petitioner's IEP. In [redacted] Request for Due Process, Petitioner alleged that the refusal of Respondent to document the small-class requirement on the IEP denied Petitioner FAPE. Reinforcing [redacted] intent to limit the issues in this case, Petitioner argued in [redacted] Request for Due Process that the issues were limited to the four corners of the Notice of Refusal, and [redacted] stated in the Motion to Limit Hearing to those Issues Raised in Petitioner's Request for Due Process and to Strike the Notice of District's Response to Due Process Complaint that Petitioner has not raised the issue of what is

FAPE for [redacted]--only whether FAPE requires the inclusion of a maximum class-size specification in his IEP.

35. The jurisdiction of the Division of Administrative Hearings is limited, by the language of Section 1003.57(1)(e), Florida Statutes, to questions of the "identification, evaluation, and placement" of ESE students and, by the language of Florida Administrative Code Rule 6A-6.03311(11), to questions of the "identification, evaluation, and educational placement of the student or the provision of [FAPE]." Clearly, the Division of Administrative Hearings has no jurisdiction to issue an advisory opinion that would answer Petitioner's two questions outside of the context of addressing the issue of FAPE, nor may the Division of Administrative Hearings apply a limited concept of FAPE that deviates from the clear legal meaning of the term.

36. Factually, the record does not support part of the premise in Petitioner's second question: that the IEP team specified a maximum class size for FAPE. Although a couple of Respondent's witnesses recalled the use of the word, "appropriate" in the question posed by Petitioner's counsel, the persons actually answering the question testified that Petitioner's counsel asked for an "ideal" or "best" class size. "Appropriate" is consistent with FAPE; "ideal" or "best" is not. The recollection of the witnesses on whose answers Petitioner attempts to rely is credited; thus, their answers provided

information useful for crafting an education plan that would help Petitioner maximize his potential, not one that would merely provide [redacted] with FAPE. By preventing the IEP team members from providing context for their answers, Petitioner's counsel, although trying to avoid confusion, inadvertently set the conditions for the ensuing confusion by depriving the IEP team of each member's analysis of the relationship between maximum class size and FAPE for Petitioner.

37. The relief sought by Petitioner is thus unavailable on the factual basis set forth above. However, the relief is also unavailable on several legal bases. As argued by Respondent, this proceeding is premature because there is not yet an IEP, through no fault of Respondent.

38. An IEP must be individualized, and the members of an IEP team must participate in the meeting with open minds, willing to consider all reasonable options for the educational program that they are designing for the child. In Deal v. Hamilton County Board of Education, 392 F.3d 840, 858 (6th Cir. 2004), the court noted that the right to participate at an IEP meeting must be "meaningful," and the IEP team members must have "open minds." But see Hjortness v. Neenah Joint School District, 2007 U.S. App. LEXIS 19744 (7th Cir. 2007) (school district's predetermination to educate ESE student in public

school required by legal requirement to educate child in least restrictive environment).

39. In Deal, the parents had, for several years, been teaching their autistic child with an applied behavioral analysis program developed by Dr. Ivar Lovaas. The parents wanted the IEP to mainstream their child and provide fairly extensive Lovaas training at home.

40. The school offered instead, among other things, 150 minutes weekly of speech and language therapy, a classroom assistant, and various specific teaching techniques, such as one-on-one discrete trial teaching, the use of picture cues, incidental teaching to allow carry-over and application of learned skills, continual use of functional communication techniques, and activity-based instruction. The school's program was known as TEACCH (Treatment and Education of Autistic and Related Communication Handicapped Children), which is less expensive than the Lovaas method. However, TEACCH assumed: 1) the autistic child will require a cradle-to-grave support system because 2) the core clinical symptoms of autism are necessarily lifelong.

41. The Deal court held that the school system's predetermined selection of its method of teaching children with autism was a procedural violation of IDEA. The court rejected

the school system's argument that it had invested in TEACCH and must be allowed to recover its investment:

> But this is precisely what it is not permitted to do, at least without fully considering the needs of the child. A school district may consider cost in determining appropriate services for a child. *E.g., Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 516-17 (6th Cir. 1984). The school district is required, however, to base its placement decision on the child's IEP, 34 C.F.R. § 300.552, rather than on the mere fact of a pre-existing investment. In other words, the school district may not, as it appears happened here, decide that because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability, *regardless of any evidence to the contrary of the individualized needs of a particular child*. A placement decision may only be considered to have been based on the child's IEP when the child's individual characteristics, including demonstrated response to particular types of educational programs, are taken into account. *See Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 177 (3d Cir. 1988) (noting that the "system of procedural protection only works if the state devises an *individualized* program and is willing to address the handicapped child's 'unique needs'") (quoting 20 U.S.C. § 1401(16)). A "one size fits all" approach to special education will not be countenanced.

392 F.3d at 859.

42. In general, then, no member of an IEP team may enter into the planning process with a fixed idea of the contents of the IEP (although a bias favoring mainstream may be permissible,

as long as the IEP team member is willing to set aside her bias based on the data developed in the IEP meetings). This prohibition applies to parents, as it does to school-district employees. In this case, Petitioner's [redacted] violated this prohibition by [redacted] initial and unwavering insistence on a small class size, regardless of any data or analysis that other team members may have raised, if given a chance, concerning larger classes and any other provisions of Petitioner's still-to-be-developed IEP.

43. The next legal question, which approximates Petitioner's first question, is whether class size is a proper element of an IEP. The answer is, it depends.

44. The court in McGovern v. Howard County Public Schools, 2001 U.S. Dist. LEXIS 13910 (D. Md. 2001), squarely answered the question of whether an IEP must specify a small class size. The court stated:

> First, it is alleged that FAPE was denied because class size was not included in the IEP in violation of federal and state law. The ALJ correctly found that there is no such requirement in state or federal law. There is no doubt that class size is relevant to a child's learning experience and that this is particularly so when the student has special needs. That, however, is not the issue in this case. The court acknowledges the wisdom of the articles submitted by plaintiffs on the educational benefit of more favorable student-teacher ratios and supposes that the defendants would also acknowledge such benefit. Thus,

> the importance of class size to a child's program is really not a legal issue in this case. The IDEA requires that a child qualified for services under the statute receive an educational program that meets his or her individualized and unique needs. Depending on the needs identified, a small class may be deemed necessary to provide the student FAPE. In other cases, modifications other than altered class size may be appropriate to provide FAPE. See Letter to Shelby, 21 IDELR 676 (OSEP May 23, 1994); Letter to Williams, 25 IDELR 634 (OSEP May 15, 1996). If a certain class size or student-teacher ratio is required to provide FAPE then it must be included in the IEP.

2001 U.S. Dist. LEXIS at pp. 53-54.

45. Among the decisions in which a small class played a role in determining whether the student received FAPE are: Frank G. v. Board of Education, 459 F.3d 356, 365-67 (2d Cir. 2006) (court found appropriate a parent's unilateral enrollment of child in private school with small classes, among other things); Capistrano Unified School District v. Wartenberg, 59 F.3d 884, 895-96 (9th Cir. 1995) (same); M. S. v. Fairfax County School Board, 2007 U.S. Dist. LEXIS 33735 (E.D.Va. 2007) (noting that inadequacy of the IEP overrode the flexibility sought to be reserved by the school board, the court found the public school's IEP did not provide FAPE, but the private-school program violated least restrictive environment); M. H. and J. H. v. Monroe-Woodbury Central School District, 2006 U.S. Dist. LEXIS 34731 (S.D.N.Y. 2006) (court found appropriate a parent's

unilateral enrollment of child in private school with small classes, among other things); and Gellert v. D.C. Public Schools, 435 F. Supp. 2d 18, 24-27 (D.D.C. 2006) (same).

46. The cases cited in the preceding paragraph reveal a pattern among courts considering claims that FAPE requires small classes. Citing the lack of authority to impose educational methodology upon the educators and an unwillingness to disregard their educational expertise, courts tend not to find, prospectively, that an IEP's failure to specify small classes denies FAPE. However, after the parent has unilaterally transferred her child in a private school that, among other things, provided small classes and produced significant educational gains, courts are less reluctant, retrospectively, to determine that the public-school IEP failed to provide FAPE and the private-school program was appropriate.

47. In another case in which the court retrospectively determined that the public-school IEP did not provide FAPE, even though the IEP specified small classes, the court imposed a more demanding standard. In A. K. v. Alexandria City School Board, 484 F.3d 672 (4th Cir.), rehearing, en banc, denied, 2007 U.S. App. LEXIS 17925 (4th Cir. 2007), the court held that the school district denied FAPE when its IEP specified a day school, which the court construed to mean small class sizes, but failed to identify the specific school. This decision relied on the

requirement, contained in federal and Florida law, that an IEP specify the "location" of the services.[2]

48. It remains to be seen whether the Eleventh Circuit will interpret the meaning of "location" as does the Fourth Circuit, so as to require the specification of a particular school in the IEP and, if so, whether this requirement would extend to the specification of a specific classroom, including the number of students in the classroom and, perhaps, the number of adults, teaching assistants, and aides in the classroom. Regardless of whether the Eleventh Circuit eventually construes "location" in this manner, it is clear that, even if Petitioner were to permit the IEP-planning process to run to completion, [redacted] may still find it very difficult to obtain relief in a challenge seeking a prospective ruling--prior to unilateral enrollment in a private school with small classes--that an IEP that fails to specify small classes necessarily deprives [redacted] of FAPE.

49. At present, it suffices, legally, to acknowledge that Petitioner is not an uncomplicated student, and [redacted] is about to embark upon the last stage of [redacted] pre-college education. Informed educational planning is crucial for the success of this undertaking. Informed educational planning requires, among other things, that the parties conduct the IEP planning process to close out the objectives from the last IEP, document the

present levels of performance, develop suitable goals and objectives, and identify the various services, modifications, and accommodations required for Petitioner to make educational progress. It is in recognition of the factual nature of this planning process that the courts have held that the determination of whether an IEP provides FAPE is a mixed question of fact and law. C. P. v. Leon County School Board, 483 F.3d 1151, 1155-56 (11th Cir. 2007); Roland M. v. The Concord School Committee, 910 F.2d 983, 990 (1st Cir. 1990) (citing appellate cases from the Seventh and Ninth circuits). It is abundantly clear that the nature of the sought-after specification of a maximum class size--on the facts of this case--does not lend itself to resolution as a question of law, but instead must, at minimum, await the preparation of the remainder of the IEP.[3]

ORDER

It is

ORDERED that the Request for Due Process is dismissed.

DONE AND ORDERED this 5th day of October, 2007, in Tallahassee, Leon County, Florida.

S

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ROBERT E. MEALE
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2007.

ENDNOTES

1/ Elaborating on the procedural requirements, the Supreme Court added, in Rowley at 458 U.S. at 205, 102 S. Ct. at 3050:

> When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, *e. g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

2/ Florida Administrative Code Rule 6A-6.03028(7)(f), quoted above, requires that an IEP state the anticipated "location" of ESE services. This requirement is also found in 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2007) and 34 C.F.R. § 300.320(a)(7) (2007).

The distinction between "placement" and "location," as used in the state rule, federal statute, and federal regulation cited immediately above, is explained by the following discussion of the U.S. Department of Education accompanying the promulgation of the final version of the latest regulations. Although this discussion avoids stating that the school district is required to identify the location in the IEP, it clearly distinguishes between "placement" and "location" and relieves the school district of any duty to discuss why it has rejected a parent's preferred location.

> Comment: One commenter requested clarifying the difference, if any, between "placement" and "location." One commenter recommended requiring the child's IEP to include a detailed explanation of why a child's educational needs cannot be met in the location requested by the parent when the school district opposes the parent's request for services to be provided to the child in the school that the child would attend if the child did not have a disability.
>
> Discussion: Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided

> that determination is consistent with the decision of the group determining placement. It also should be noted that, under section 615(b)(3) of the Act, a parent must be given written prior notice that meets the requirements of Sec. 300.503 a reasonable time before a public agency implements a proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. Consistent with this notice requirement, parents of children with disabilities must be informed that the public agency is required to have a full continuum of placement options, as well as about the placement options that were actually considered and the reasons why those options were rejected. While public agencies have an obligation under the Act to notify parents regarding placement decisions, there is nothing in the Act that requires a detailed explanation in children's IEPs of why their educational needs or educational placements cannot be met in the location the parents' request. We believe including such a provision would be overly burdensome for school administrators and diminish their flexibility to appropriately assign a child to a particular school or classroom, provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement.
>
> Changes: None.

71 Fed. Reg. 46588 (Aug. 14, 2006).

3/ The court in A.S. & W.S. v. Trumbull Board of Education, 414 F. Supp. 2d 152, 175 (D. Conn. 2006), addressed the inter-relationship between class size and other elements of an IEP. The court stated:

> On the evidence presented, the Court agrees with the Hearing Officer that the IEPs developed for A.S. and W.S. at the May 29, 2003, PPT meetings were appropriately designed to advance their educational

progress. Though A.S.'s classes may not have been as small as her Parents would have preferred, A.S.'s IEP included team-taught classes, in which a special education teacher would have instructed the class alongside the regular education teacher, in order to provide A.S. with additional support. A.S. Ex. B-92 at 5; 11/11/03 Hearing Tr. at 98-99 (testimony of Ms. Hollo). The IEP also included counseling with the school's social worker to ease A.S.'s transition to middle school. A.S. Ex. B-92 at 5; 11/11/03 Hearing Tr. at 99-100 (testimony of Ms. Hollo). The PPT also drafted a series of concrete goals for A.S. spanning a variety of skills, such as reading fluency, writing organization, math computation, and fine-motor performance, all based on A.S.'s progress at Tashua Elementary School and Villa Maria. A.S. Ex. B-92 at 6-12; 11/11/03 Hearing Tr. at 101 (testimony of Ms. Hollo). In addition, the PPT recommended that the Board's speech and occupational specialists provide A.S. with extra help, and that A.S. participate in a summer reading program. The IEP, and the testimony of those who created it, evidence a thoughtful, individually tailored effort to marshal the Board's resources on A.S.'s behalf. Certainly, there was no objective evidence that the Boards' program for A.S. was deficient.

W.S.'s IEP appears similarly well suited to promote his educational development. It called for W.S. to receive substantial one-on-one attention, including five hours a week in the resource room with the special education teacher and an hour-and-a-half per week with the speech and language pathologist to improve his language skills. W.S. Ex. B-85 at 17. In the words of Judith Elkies, a speech and language coordinator for the Board, the services proposed for W.S. represented "a highly cohesive, collaborative program" addressing multiple aspects of his reading and comprehension.

> 12/16/03 Hearing Tr. at 189 (testimony of Ms. Elkies). The Court agrees. The PPT also set forth a series of action-oriented goals, combining those advocated by the staff of Villa Maria as well as those advanced by the Board's experts. W.S. Ex. B-85 at 5-16; 11/19/03 Hearing Tr. at 219-20 (testimony of Ms. Samler). Two such goals explicitly provided that W.S. would use the Lindamood-Bell method that was preferred by the Parents. W.S. Ex. B-85 at 5-6. The record thus supports the Hearing Officer's conclusion that the IEP presented at the May 29, 2003, PPT meetings appropriately accommodated W.S.'s educational needs. Once again, there was no objective evidence that the Board's program for W.S. was deficient.

Nor can Petitioner escape the requirement of a finished IEP by attributing its lack of completion to acts or omissions of Respondent.

It is often noted that the FAPE determination must be based on the IEP alone. See, e.g., Knable v. Bexley City School District, 238 F.3d 755, 768 (6th Cir. 2001); C. G. v. Five Town Community School District, 2007 U.S. Dist. LEXIS 10310 (D. Me. 2007). Conversely, as discussed above, the FAPE determination cannot typically be based on something less than the IEP, as when the IEP team has not finished its preparation, at least when the reason for the failure to complete the IEP is attributable to Petitioner.

Here, Petitioner's [redacted] stopped the IEP-preparation process almost before it started. Respondent tried to restart the process, but was unsuccessful. And, now, Petitioner seeks a determination that, regardless what transpires in the IEP-development process, the resulting IEP must specify a maximum class size of 12-15 students. These facts present no justification for accelerating the educational planning process. Loren F. v. Atlanta Independent School System, 349 F.3d 1309, 1319 (11th Cir. 2003); M. M. v. School District of Greenville County, 303 F.3d 523, 534 (4th Cir. 2002); Doe v. Defendant I, 898 F.2d 1186, 1189 n.1 (6th Cir. 1990); C. B. v. Five Town Community School District, supra.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

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

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