STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted]

Petitioner,

vs. Case No. 13-3503E

HENDRY COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held on November 18 through 22, 2013, in LaBelle, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Matthew Trail, Esquire
John Sommer, Esquire
Trail and Sommer Legal Services, P.A.
Post Office Box 62279
Ft. Myers, Florida 33906

For Respondent: Robert Sherman, Esquire
Richard Akin, Esquire
Henderson, Franklin, Starnes
and Holt, P.A.
1715 Monroe Street
Ft. Myers, Florida 33902-0280

STATEMENT OF THE ISSUES

Whether the Hendry County School Board (School Board) violated the Individuals with Disabilities Act of 2004, 20 U.S.C.

§ 1400 et seq., (IDEA), by not providing [redacted] (or the student) with procedural protections and failing to provide a free and appropriate public education (FAPE);

Whether the School Board violated the anti-discrimination provisions of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. section 794, and its implementing regulation, 34 C.F.R. Part 104 (Section 504), by failing to re-evaluate [redacted] when the student re-enrolled in the school district in 2013; and

Whether the School Board's actions of contacting the employer of [redacted] parent, [redacted], was retaliation for [redacted] engaging in protected activities.

PRELIMINARY STATEMENT

On September 3, 2013, [redacted] filed a Request for Exceptional Student Education (ESE) Due Process Hearing with the School Board on behalf of [redacted]. The hearing request alleged that the School Board had denied [redacted] a FAPE in violation of the IDEA, 34 C.F.R. section 300.00 et seq.; violated sections 1003.57, 1003.571 and 1003.573, Florida Statutes (2013); and Florida Administrative Code Rule 6A-6 et seq. [redacted] also alleged that the School Board violated the anti-discrimination provisions found in 29 U.S.C. section 794 et seq., commonly referred to as section 504 claims; as well as claims under the Americans with Disabilities Act, 42 U.S.C. section 12101 et seq. and 45 C.F.R. section 84.31 et seq.; and violations of civil rights under 42 U.S.C. section 1983. The

request for the due process hearing alleged facts related to [redacted] education in the Hendry County School District (School District), but did not set out any individual counts for each alleged statutory violation.

On September 13, 2013, the School Board referred the request for due process hearing to DOAH for a final hearing. On September 17, 2013, the undersigned issued a Case Management Order concerning scheduling the final hearing. The parties timely responded, and on September 24, 2013, the undersigned conducted a telephonic case management hearing. After the telephonic hearing, the undersigned entered a Notice of Hearing, setting the final hearing for the week of October 14, 2013.

On October 7, 2013, [redacted] filed an unopposed motion to continue the final hearing based on a work conflict for [redacted] parent. The undersigned granted the motion to continue, and rescheduled the hearing for the week of November 4, 2013. The result of the continuance was the extension of the 45-day time period for final resolution established by Florida Administrative Code Rule 6A-6.03311(9)(v)6.

On October 28, 2013, [redacted] filed a Motion to Amend Complaint in order to add a retaliation claim under 29 U.S.C. section 794, et seq. [redacted] alleged that the School Board had engaged in a

retaliatory action against [redacted] parent, [redacted] alleged that the retaliatory action had occurred during the week of October 22, 2013.

On October 31, 2013, the undersigned conducted a telephonic hearing and granted [redacted] motion to amend. In granting the motion to amend and continue the final hearing, the undersigned determined that new time lines for the completion of the case were required by rule 6A-6.03311(9)(h). On November 7, 2013, the parties filed a Notice of Waiver of Resolution Session. Based on the Notice of Waiver, the undersigned set the final hearing for the week of November 16, 2013.

The final hearing was held in Labelle, Florida, the week of November 16, 2013 for five days. The parties introduced into evidence Exhibits 1 through 7, 9 through 15, 17 through 21, 23, 24, 26 through 28, 31, 34 through 37, 39 through 43, 50, 51, 54, 58, 61 through 65, 67, 70 through 77, 80, 82 through 86, 89, and 106 through 108, and 111. [redacted] also offered an exhibit, which was rejected, but is filed as Proffer Exhibit A. The School Board introduced into evidence Exhibit 115.

[redacted] presented the following witnesses: [redacted], [redacted] parent; [redacted], a home health care nurse who has worked with [redacted]; [redacted], [redacted] work supervisor; [redacted], the School Board's former ESE director; [redacted], a physical therapist who has worked with [redacted];

[redacted], a former school counselor who had worked for the School Board; [redacted], a music therapist who has worked extensively with [redacted]; [redacted], a speech-language pathologist who had worked for the School Board and was familiar with [redacted]; [redacted], Ph.D., the director of The private school, a private school [redacted] attended for school year 2011-2012; [redacted], M.D., a pediatric neurologist with Lee Physician's Group; [redacted], an ESE paraprofessional who worked with [redacted]; [redacted], a school psychologist employed by the School Board; and [redacted], the School Board's current ESE director.

The School Board presented the following witnesses: Merrill Winston, Ph.D., an expert in behavioral analysis; [redacted]; [redacted], a speech-language pathologist employed by the School Board; and [redacted], [redacted] current teacher at the [redacted] school.

A ten-volume Transcript was filed with DOAH on December 10, 2013; and the parties filed proposed final orders on December 13, 2013. Following the filing of the proposed final orders, [redacted] sought permission to supplement the record, which was granted. The School Board was given an opportunity to file a response to the supplemental filing. The time for issuing the Final Order was extended by the undersigned until February 12, 2014, in order to complete the Final Order.

FINDINGS OF FACT

1. [redacted] is an [redacted]-year-old child with disabilities, who is currently enrolled in the [redacted] grade at a middle school in the School District.

2. [redacted] is qualified as a child with a disability based on the exceptionalities of being [redacted].

3. [redacted] was born with [redacted]. In [redacted] instance, [redacted] is missing a portion of the brain known as the corpus callosum, which connects the right and left brain hemispheres. The corpus callosum is responsible for the transfer of communication, sensory information, and motor skills. As a result of this congenital defect, [redacted] is non-vocal in any communication and has poor gross and fine motor skills. [redacted] behaviors and skill deficits are caused by the underlying medical diagnoses, and have resulted in the student being diagnosed as [redacted].

4. In addition to the [redacted], [redacted] suffers from [redacted], a condition where [redacted] To correct this medical problem, [redacted] had a surgical shunt installed to relieve the pressure from the excessive fluid. Also, as a result of the student's congenital birth defects, [redacted] optic nerve was damaged and has resulted in impaired vision measured at 20/140 in both eyes. Consequently, [redacted] wears glasses

and the field of vision is limited to approximately three to four feet from the face. Finally, [redacted] has been diagnosed with [redacted] which also affect the student's mobility and ability to communicate.

5. Despite these severe congenital defects, [redacted] by all accounts is a happy child with a sense of humor. [redacted] parent and caregivers shared instances where [redacted] would "push the buttons" of new caregivers or teachers by pretending not to understand a skill that had been mastered, such as eating with a spoon or having a sly smile when wanting to avoid a certain task. [redacted] testified that [redacted] could tell when [redacted] was playing one of those games by the student's smile. Similarly, [redacted] current teacher, [redacted] ([redacted]), shared stories of [redacted] communicating with classmates through use of an iPad, by waving, smiling, and flirting with students of the opposite sex, just being an overall "very cool kid."

6. [redacted] is a tireless advocate for [redacted], and has been active in the student's education. Over the years, [redacted] has provided [redacted] with many different therapies in order to improve the student's quality of life, such as music and physical therapy. Moreover, the record showed the extraordinary efforts to which [redacted] has gone to help [redacted] develop. For example, through [redacted] efforts and work with private therapists, [redacted] is now able to ride a modified bike without assistance.

7. [redacted] lack of verbal communication skills has been addressed by teaching the student sign language or hand signals that approximate sign language. Further, [redacted] uses augmented communication devices such as an iPad and picture cards to communicate.

8. [redacted] requires daily assistance for most life activities, such as toileting, eating, and transportation.

9. Initially, [redacted] began as a homebound student in the School District. However, on the student's enrollment into [redacted] grade in 2008, [redacted] started attending school.

10. The most current psycho-educational evaluation of [redacted] was conducted by [redacted], Ph.D., for the School District on October 8, 2008. This evaluation occurred with [redacted] enrollment in an [redacted] school.

11. Past measurements of [redacted] abilities in the classroom have provided inconsistent information about the student's abilities and skills. This conclusion is clearly seen by comparing the inconsistent information reported in different Individualized Education Plans (IEP)s prepared for [redacted].

12. In an IEP dated January 19, 2010, under a section titled "Student Strengths and Challenges," the IEP team reports that in the Star Reading test, [redacted] scored a grade equivalency of [redacted] grade, and that [redacted] could:

> point to sight words when named; spell words by pointing to magnetic letters; and point or answer yes or no questions about letters sounds; beginning and ending sounds about 80% correct daily. In math, the student will point to numbers 0-20 when named; do simple addition and subtraction up to 5 and simple patterns by pointing to the object or number card about 80% accuracy daily.

(See also IEP dated February 2, 2009, containing a description of [redacted] knowledge of numbers and concepts up to number 20, as well as money and values).

13. In contrast with the January 19, 2010, IEP, an IEP dated September 22, 2011, under the section titled "Student Strengths and Challenges" states, in part, the following:

> [[redacted]] is able to identify the word "a" with 60% accuracy; the word "and" with 40% accuracy; and the word "blue" with 60% accuracy. The student can also identify number 1 with 100% accuracy; number 2 with 40% accuracy; number 4 with 80% accuracy; number 5 with 40% accuracy; and was unable to identify the number 3.

14. The record shows that the discrepancy between these wildly different results is due, in part, to assistance given to [redacted] by the the teacher in 2010. In taking the assessment tests, the teacher would place her hand over [redacted] hand on a computer mouse and help select the answer. Consequently, reports and data showing [redacted] reading at a [redacted] grade level or performing math problems is not based on reliable data.

15. Unfortunately, the reported results from 2009 and 2010, which showed that [redacted] had significant abilities, led [redacted] to request that [redacted] be given an opportunity to participate in more general education classes. After a short stint, it was determined to return [redacted] to an ESE classroom in September 2011, much to [redacted] disappointment. [redacted] felt that the school district was not helping [redacted] reach the student's potential, and in some respects, the school was not challenging [redacted]

16. In the Spring of 2012, [redacted] approached [redacted] ([redacted]), the ESE Director for the School Board, about enrolling [redacted] in a private school located in Lee County, Florida. After reviewing different schools, [redacted] had determined that the private school, which specializes in teaching functional communication to students with autism, would be the best fit for [redacted].

17. Prompted by [redacted], [redacted] visited the private school, and determined that it was an appropriate school for [redacted].

18. The State of Florida provides financial assistance to qualified disabled students in order to attend a private school that can meet the individual student's needs. This financial assistance is given through a program commonly known as the McKay Scholarship program. The determination of how much financial assistance is available for a McKay scholarship is tied to an educational matrix number by the Florida Department of Education.

This matrix number is an evaluation of a student's specific disabilities by the student's IEP team. While enrolled in a private school under the McKay Scholarship program, a student is not considered as enrolled in the public school district.

19. Prior to July 20, 2012, [redacted] funding matrix score was a 254, which represented the second highest rating. On July 20, 2012, [redacted] unilaterally changed [redacted] matrix score to 255, which represents the highest rating. On the form changing [redacted] funding matrix number, [redacted] falsely stated that the change was the result of an IEP meeting held on July 20, 2012.

20. In addition to the changed matrix score, [redacted] directed that the school district transport [redacted] to the private school, even though [redacted] was not enrolled in the public school district.

21. Generally, the school district does not provide transportation to students enrolled in a McKay Scholarship program. Despite this rule, the school district provided [redacted] with free, daily public transportation to and from the private school during the 2012-2013 school year. The School Board does provide transportation to some students, who have disabilities that cannot be met by the school district, in order to attend schools outside of the district. Those students, however, unlike

[redacted] attending the private school, remained enrolled in the School District.

22. By April 2013, [redacted] was removed as the head of the School Board's ESE Department. [redacted] ([redacted]) was tapped to begin as the new ESE Director on July 1, 2013. Although she had not formally started as ESE Director, [redacted] began making budget and personnel decisions concerning the ESE Department in April 2013.

23. In April 2013, [redacted] learned about an audit of the district's transportation unit that showed the school district was transporting [redacted], a child not enrolled in the School District, to a private school under a McKay Scholarship. [redacted] confirmed the fact and learned that [redacted] had directed the transportation.

24. On May 23, 2013, the School Board sent [redacted] a letter informing [redacted] that it would not provide [redacted] with transportation to the private school after the conclusion of the current school year on June 6, 2013.

25. [redacted] was upset with the School Board's decision not to continue [redacted] transportation. In response, [redacted] met with [redacted] and other officials in an attempt to reinstate the transportation. [redacted] reiterated the School Board's decision that it would not provide [redacted] with transportation.

[redacted] credibly testified that [redacted] was very upset with her based on the decision.

26. Because of work and family commitments, [redacted] determined that [redacted] would not be able to transport [redacted]. to and from the private school during the next school year. Consequently, [redacted]. reluctantly determined to forgo [redacted] McKay Scholarship rights, and re-enrolled [redacted] in the School District on July 25, 2013.

27. On August 8, 2013, the School Board provided [redacted] with a Parent Invitation to Exceptional Student Education meeting, commonly referred to as the IEP meeting. This notice set the meeting for August 14, 2013, and complied with the IDEA procedural safeguards.

28. Before the August 14, 2013, IEP meeting, [redacted] discussed with [redacted] ([redacted]), the school psychologist, whether it would be appropriate to conduct an updated evaluation of [redacted]. Although [redacted] thought that [redacted] should be re-evaluated, she determined that "the timing did not seem right to broach the subject too strongly with [redacted]." [redacted] and [redacted] wanted to get [redacted] into the classroom and "have some positive things happen with the student, and then try to get the parent's permission for evaluation." Therefore, the issue of a re-evaluation was not pursued at the IEP meeting by the school officials.

29. At the August 14, 2013, IEP team meeting, the record shows that [redacted] and [redacted] legal counsel were present, as well as all the required school participants.

30. At the beginning of the IEP meeting, school officials brought forward a draft IEP based on the information from [redacted] prior enrollment with the school district. Two members of the IEP team, [redacted] and [redacted], had attempted to contact the private school in order to obtain information about [redacted] academic progress. Unfortunately, the IEP team did not have information from the private school before the initial IEP meeting. Therefore, during the discussion, the IEP team determined that it lacked the most recent information from the private school in order to develop an appropriate IEP. Consequently, the IEP team suspended the meeting in order to obtain recent information from the private school.

31. During this initial meeting, [redacted] reported that [redacted] had been receiving applied behavioral analysis therapy, a discrete trial training for the student's communication and behavior skills. Further, it was noted in the Conference Notes contained in the IEP meeting that [redacted] "sign language skills are very limited and communication is almost exclusively with the iPad" and that [redacted] would provide "recent evaluations for OT and PT" to the school district.

32. The IEP team reconvened on August 29, 2013, to draft the IEP with [redacted] and legal counsel present, and the appropriate school officials.

33. Before the August 29, 2013, IEP meeting, [redacted] had an opportunity to speak with a teacher from the private school, and the IEP team obtained educational records from the private school concerning [redacted] progress while enrolled in the private school.

34. [redacted] learned from the private school that [redacted] was able to complete certain tasks. However, [redacted] was not able to replicate some of the same reported levels of performance when [redacted] arrived in the classroom in August 2013. [redacted] shared her re-assessment of [redacted] skills with the IEP team during the writing of the current IEP.

35. The August 29, 2013, IEP expressly states that [redacted], [redacted] parent, wanted [redacted] to return to the private school and the school district to provide the transportation. In fact, [redacted] candidly admitted during the hearing that at the time of the IEP team meeting on August 29, 2013, [redacted] had already decided to file a Request for a Due Process hearing because [redacted] wanted [redacted] placed back into the private school and for the school district to provide the transportation.

36. On August 30, 2013, IEP team members, [redacted], [redacted], [redacted], and [redacted], re-evaluated [redacted]

educational matrix score. Based on this re-evaluation, [redacted] matrix score was changed from 255 to 254, and this information is included in the August 29, 2013, IEP.

37. On September 3, 2013, [redacted] filed the Request for Due Process.

38. On August 26, 2013, shortly after [redacted] returned to school, the student attended an intensive physical therapy program at All Children's Hospital in order to strengthen the student's body. During this time, [redacted] did not attend class. By the time [redacted] had filed for the due process hearing on September 3, 2013, [redacted] had attended the school for nine days.

39. Two of [redacted] IEPs fall within the two-year period concerning the filing of a due process complaint: 1) the September 22, 2011, IEP; and 2) the August 29, 2013, IEP. Therefore, it is appropriate to make specific in-depth factual findings concerning each of the IEPs.

September 22, 2011, IEP

40. On September 8, 2011, the School Board provided [redacted] with the proper IEP meeting notice. This notice complies with the IDEA's procedural safeguards, and provided a parental input questionnaire.

41. [redacted] ([redacted]), a former speech-language pathologist with the School Board, prepared a memorandum concerning a continuum of care for [redacted] that set out the levels

for [redacted] language therapy covering the time period of September 2010 through March 2012. This continuum of care memorandum provides a credible and contemporaneous evaluation of [redacted] educational progress during the September 22, 2011, IEP meeting.

42. [redacted] notes show that [redacted] was capable of educational progress, but had to re-learn tasks that had been previously mastered. For example, [redacted] noted in December 2010, [redacted] had mastered the colors "red, yellow, green, blue and orange with 100% accuracy given three choices." However, by September 2011, [redacted] "was reintroduced to colors and shapes through the use of large, plastic multi-colored 'buttons,' achieving less than 60% accuracy on these skills." [redacted] note indicates that it could not be determined "if the decrease in accuracy was [the result of [redacted]] shunt that had malfunctioned over the summer (surgery was required to repair this), or if [[redacted]] had just forgotten these skills."

43. Despite the setback of having to re-learn colors and shapes, [redacted] note clearly shows that when [redacted] received the iPad on October 6, 2011, the student made significant educational progress. The School Board purchased and programmed the iPad with an application called Proloquo2go for [redacted] in order to help [redacted] communicate. As [redacted] states, "[b]y October 20, [2011], [redacted] was able to use Proloquo2go with verbal cues and

minimal hand-over-hand assistance to greet and tell the therapist and one other student [redacted] name, age, grade, town, and school name." Other comments by [redacted] show [redacted] being able to consistently ask for "more" to keep an activity going and using a hand signal of "all done" when the student is tired of an activity. Finally, [redacted] note states that [redacted] had "made strides forward in functional communication using the application Proloquo2go." [redacted] testimony at the final hearing reiterated that she saw [redacted] receive educational benefit.

August 29, 2013, IEP

44. There is no persuasive evidence that the August 29, 2013, IEP is procedurally deficient. On August 8, 2013, the School Board provided proper notice for the IEP team meeting to occur on August 14, 2013. Moreover, [redacted] and legal counsel were both present at the meeting. [redacted] had an opportunity to fully participate in the preparation of the IEP.

45. At the outset, the undersigned finds that it is questionable whether or not [redacted] participated in the IEP team meeting on August 29, 2013, and the subsequent writing of the IEP in good faith. As stated earlier, before the IEP was finished, [redacted] had determined to file for due process hearing because the parent wanted [redacted] to attend the private school and for the school district to provide transportation. Having decided that [redacted] wanted [redacted] to attend the private school, the undersigned finds

that [redacted] did not fully participate in the development of the IEP. One specific area of concern is that [redacted] did not raise the issue of conducting another re-evaluation of [redacted].

46. Further, as stated earlier, before the IEP team meeting, [redacted] and [redacted] had discussed whether or not to re-evaluate [redacted]. However, the school officials decided not to advocate for a re-evaluation at the August 14, 2013, IEP meeting, in the hope of building some good will with [redacted]. Consequently, the school IEP team did not request [redacted] permission for re-evaluating [redacted] before the formation of the current IEP.

47. Before the August 14, 2013, IEP team meeting, the School Board had prepared a draft IEP. This draft IEP was not finalized, nor was it presented as a final IEP at the initial meeting. The IEP team recognized that the draft IEP would be modified as the team obtained more information from the private school and discussed [redacted] abilities and needs.

48. The testimony of [redacted] clearly shows that she is a dedicated, competent teacher, and that [redacted] is receiving a FAPE.

49. In preparing for the August 14 and 29, 2013, IEP team meetings, [redacted] conducted a thorough examination of [redacted] past IEPs and made an independent assessment of [redacted] skills. Moreover, [redacted] also contacted [redacted] teacher at the private school in order to determine what skills [redacted] had learned during the year.

50. In preparation for the IEP team meeting, [redacted] assessed [redacted] skills by comparing the student's skill levels with the results reported from the private school. For example, [redacted] tested [redacted] ability to receptively identify 17 out of 25 objects from an array of three, and [redacted] ability to tact 15 objects from an array of three choices. Despite [redacted] having mastered those concepts at the private school, [redacted], when tested by [redacted], [redacted] was not able to replicate the same skills.

51. [redacted] credibly offered three reasons explaining the difference in [redacted] performance between the private school and her initial assessment:

> a. First, she noted [redacted] performance was affected by the fact that [redacted] was unfamiliar with [redacted] and may have been uncomfortable performing tasks. This explanation was consistent with testimony from [redacted] and other therapists that [redacted] performance improves as the student develops a rapport with a new therapist or teacher;
>
> b. Second, [redacted] credibly explained that the difference in [redacted] performance between the skills shown at the private school and her initial testing were based on differences in the testing. For example, in identifying 17 objects out of 25 objects, the list of the 25 objects may have varied; thus, causing a reduction in items identified; and
>
> c. Finally, a third reason for [redacted] different test results between her initial assessment and the private school assessment is that [redacted] has shown difficulty in generalizing tasks. For example,

> [redacted] explained that [redacted] may say "hello" to classmates in a small group, but has difficulty applying that skill to greeting students entering the classroom. [redacted] testimony here credibly explains why it is appropriate in the current IEP to re-address skills that [redacted] showed proficiency [in the private school].

52. Based on [redacted] failure to replicate the same results that were obtained at the private school, it is appropriate to re-address those skills in the IEP.

53. [redacted] testimony also credibly demonstrates that [redacted] placement and teaching are providing the student with educational progress. This educational progress is seen in the integration of physical therapy, occupational therapy, and speech therapy into [redacted] everyday classroom experience. [redacted] and the school's professionals monitor [redacted] progress and routinely discuss how to improve and carry forward the different therapies into the everyday classroom experience.

54. For example, [redacted] explained that [redacted] physical therapy is "something we do throughout the day." An example is [redacted] using the Kidwalker to stand at a Smartboard and during adaptive physical education class. [redacted] will stand at the Smartboard to work on an academic portion of the class; at the same time, the student is working to strengthen the legs and torso, which integrates physical therapy into the lesson.

55. Similarly, concerning occupational therapy, [redacted] explained that she meets with the occupational therapist, [redacted], and they discuss ways to integrate [redacted] occupational therapy into classroom activities. One such activity that is worked into the classroom is the "jobs" section of [redacted] class. [redacted] had her class complete different "jobs." In one instance, [redacted] was charged with the job of popping tops from cans. This job integrated work on [redacted] fine motor skills, required group cooperation with fellow students, and required [redacted] to focus and complete the task. This example demonstrates how the school integrates different therapies into the overall goal of helping [redacted] to learn and develop functional communication skills.

56. Likewise, [redacted] receives speech therapy that is integrated throughout the classroom experience. [redacted], a speech therapist, works with [redacted] so that the skills covered during the speech therapy are integrated into the classroom. Although [redacted] does not have a master's degree, as required by the Florida Department of Education, the facts show that she is supervised by a speech pathologist, Judy Lapp, who has the required credentials.

57. The August 29, 2013, IEP properly identifies the use of augmented alternative communication to help develop [redacted] communication skills. [redacted] uses an iPad that the School Board

purchased and programmed for the student and this device is integrated into [redacted] everyday activities. In addition to the iPad, [redacted] explained how she and the paraprofessionals work with [redacted] using other communication methods, such as hand signs or a static board. The goal is to teach [redacted] different ways of communicating.

58. Three of the stated goals for [redacted] in the August 29, 2013, IEP are that [redacted] will use augmented alternative communication, which is either hand signals or the iPad, to designate "again," or "more," as well as "stop" and "all done." The record shows that these goals mirror past IEP goals, and [redacted] mastery of those goals in other settings. However, on re-testing by [redacted], [redacted] was unable to consistently use these signals, like "more," in appropriate context. Therefore, it is an appropriate goal to address using these hand signals in different contexts, so that [redacted] learns to generalize the tasks.

59. Although [redacted] requires help with many daily activities, like toileting, the IEP does not provide a one-on-one paraprofessional dedicated solely to [redacted]. Again, [redacted] credibly explained that [redacted] has one-on-one help for activities such as toileting and transportation. However, for academic activities, [redacted] credibly explained that providing [redacted] with a one-on-one paraprofessional would impede the student's ability to develop. In order for [redacted] to have long-term success,

[redacted] pointed out that [redacted] needs to be able to perform tasks for different persons. By having one paraprofessional dedicated to [redacted] might make educational progress with that individual, but not be able to translate that progress with a different person. Moreover, even though [redacted] does not have a paraprofessional assigned solely to meet [redacted] needs, the School Board did hire an additional paraprofessional in [redacted] class to help with [redacted]. Therefore, the decision not to provide a one-on-one paraprofessional is not a denial of a FAPE.

60. The August 29, 2013, IEP does not discuss the use of applied behavioral analysis to help develop [redacted] communication. The record established that the private school effectively used applied behavioral analysis to help [redacted] meet functional communication goals. The School Board incorrectly determined that applied behavioral analysis is a "trade name" and therefore, the term is not incorporated into the IEP. Rather than being a trade name, applied behavioral analysis is a methodology used to modify a person's behavior based on the research of B.F. Skinner. Consequently, identifying a specific methodology, such as applied behavioral analysis, in an IEP is not improper.

61. At the time of the August 29, 2013, IEP team meeting, the School Board did not have a board certified behavioral analyst in its employment. Consequently, the use of applied behavioral analysis and monitoring by a board certified

behavioral analyst was not incorporated into the IEP. In October 2013, the School Board hired a board certified behavioral analyst. However, because of the "stay put" provisions during the due process hearing request, the IEP could not be amended to incorporate the board certified behavioral analyst.

62. [redacted] candidly admitted that once the "stay put" provisions were removed, she thought it would be appropriate to consult with the board certified behavioral analyst concerning [redacted] education. Although it would be better for [redacted] to have applied behavioral analysis to help the development of functional communication, the undersigned does not find that the lack of citing applied behavioral analysis in the August 29, 2013, IEP resulted in a denial of FAPE. The record shows that during the limited time that [redacted] has been in the classroom, the student has been receiving an educational benefit and learning functional communication.

63. Further, the August 29, 2013, IEP and [redacted] testimony shows that [redacted] education meets the IDEA preference of including a portion of interaction with general education students. The record shows that during adaptive physical education, [redacted] is benefiting from interaction with general education students. This interaction also occurs with the school's use of "student assistants," where general education students come into the ESE classroom to help. Finally, in

addition, the evidence showed that [redacted] eats lunch with general education students in a large cafeteria. These experiences show that the School Board is meeting the IDEA preference of integrating [redacted] with general education students, where it is appropriate.[1/] Therefore, the School Board is providing [redacted] with FAPE in the least restrict environment and allowing the student to make educational progress.

64. The August 29, 2013, IEP also cites as a goal having [redacted] eat with a spoon. [redacted] testimony shows that at home [redacted] had already mastered this skill. Although [redacted] had mastered this skill at home, it is not inappropriate to re-address this skill in the current IEP. [redacted]credibly testified that while [redacted] can use the spoon, the student takes bites that are too large. The paraprofessional, who eats lunch with [redacted], is teaching the student to take smaller bite sizes. Further, the educational progress seen during lunch time includes [redacted] communication skills by requiring the student to use the iPad to request different lunch items, such as a drink or more food. Finally, all of this lunch activity is occurring in a cafeteria filled with over 300 children, special education as well as general education students. Therefore, the IEP goal is appropriate because it is directed to [redacted] receiving an educational benefit by eating and communicating in a different setting other than home.

65. Although the August 29, 2013, IEP does not list [redacted] vision as impaired, the IEP does contain an accommodation for large print font and preferential seating in the classroom due to the student's vision.

66. The August 29, 2013, IEP contains a clerical error concerning the number of hours that [redacted] spent in general education. On September 4, 2013, [redacted] e-mailed [redacted] about the error, and contacted [redacted] about setting up another IEP meeting in order to correct the mistake. [redacted] told [redacted] that [redacted] would not agree, and that the IEP was already complete. Apparently, [redacted] had not been informed that [redacted] had filed [redacted] due process request the day before. [redacted] stated at the final hearing that [redacted] did not agree to correct the error because it was not [redacted] fault.

Retaliation Claim

67. [redacted] ([redacted]) is the [redacted] for Early Steps of Southwest Florida, and [redacted]. Early Steps is a service coordinator that contracts with the School Board to perform transitional service for children entering the school district.

68. On October 22, 2013, [redacted] sent an e-mail to [redacted] stating that the School Board was experiencing difficulty in receiving necessary information from [redacted] in order to complete its transition schedules for students. [redacted] had

previously sent some information, but the schedule was incomplete because it was missing the students' names.

69. On October 23, 2013, two School Board employees, [redacted] and [redacted], reported to [redacted] that [redacted] had acted strangely during a transitional meeting between Early Steps and the school district. According to [redacted] and [redacted], [redacted] was the Early Steps representative at the meeting. They observed [redacted] taking photographs with, her cell phone, of unidentified papers and asking parents, who were present at the meeting, to sign the unidentified papers. [redacted] and [redacted] reported [redacted] behavior to [redacted] because they found [redacted] actions secretive. Neither [redacted] nor [redacted] asked [redacted] what documents [redacted] was photographing or having the parents to sign.

70. [redacted] testified that at the transitional meeting, [redacted] was substituting for another employee and had taken photographs of the documents for work. The undersigned finds explanation credible.

71. On October 23, 2013, [redacted] contacted [redacted] and reported the school employees' observations. [redacted] credibly explained that in the transitional meetings confidential student information is shared, and she did not know what documents [redacted] had photographed. During a subsequent telephone conversation between [redacted] and [redacted], [redacted]

inquired about Early Steps using a different employee, rather than [redacted], when working with the School District.

72. [redacted] asked [redacted] about the incident, and [redacted] produced the documents that had been photographed and asked the parents to sign. [redacted] explanation satisfied [redacted] that [redacted] had behaved properly during the meeting.

73. There was no evidence that [redacted] acted with a retaliatory or improper purpose by contacting [redacted] about obtaining missing information for the transitional meetings or contacting [redacted] about [redacted] behavior at the October 23, 2013, meeting.

CONCLUSIONS OF LAW

74. DOAH has jurisdiction over the parties and [redacted] claims brought under the IDEA, pursuant to section 1003.57(1)(b), Florida Statutes (2013); Florida Administrative Code Rule 6A-6.03311(9); and 20 U.S.C. section 1402 et seq. The parties consented to the hearing of the Section 504 claims to the extent that those claims overlapped with the IDEA claims.

75. [redacted] has the burden of proving by a preponderance of the evidence the claim that the School Board violated the IDEA. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005); Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1313 (11th Cir. 2003).

IDEA claims

76. Under the IDEA, the federal government provides funding for states to create special educational plans for disabled persons. The IDEA requires states receiving the federal funds to provide children with disabilities with a "free and appropriate education," commonly referred to as FAPE. 20 U.S.C. § 1412(a)(1)(A).

77. FAPE is defined as "special education and related services" that:

> a. have been provided at public expense, under public supervision and direction, and without charge;
>
> b. meet the standards of the State educational agency;
>
> c. include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> d. are provided in conformity with the individualized education program required under section 614(d) [20 U.S.C.S. § 1414 (d)]. Title 20 U.S.C. § 1401(9).

78. IDEA provides procedural safeguards to ensure that students with disabilities receive FAPE. 20 U.S.C. § 1415(a). Specifically, IDEA requires that states provide parents with the opportunity to present complaints with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a FAPE to such child. 20 U.S.C. § 1415(b)(6)(A).

79. A parent's request for a due process hearing shall be made within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(c); 34 C.F.R. § 300.507(a)(2); and Fla. Admin. Code R. 6A-6.03311(9)(b). Two exceptions to this two-year period are:

> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent. 20 U.S.C. § 1415(f)(3)(D).

80. In Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley, 454 U.S. 1175 (1982), the Court established the following two-prong test for determining whether or not a school has violated IDEA: 1) whether there has been compliance with the procedural requirements of the IDEA, including the creation of the IEP; and 2) whether the IEP developed through the IDEA's procedures is reasonably calculated to enable the child to receive an educational benefit. Rowley, 458 U.S. at 306-207.

81. In determining what "reasonably calculated to enable the child to receive an educational benefit" means, the federal courts have provided clarification. Educational benefits provided under IDEA must be more than trivial or de minimis.

J.S.K. v. Hendry Cnty Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although educational benefits must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997)(citations omitted). If a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. Sch. Bd. of Martin Cnty. v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999). In Devine v. Indian River Cnty Sch. Bd., 249 F.3d 1289, 1291-92 (11th Cir. 2001), cert. denied, 537 U.S. 815, 123 S. Ct. 82, 154 L. Ed, 19 (2002), the Eleventh Circuit summed up the Supreme Court's decision in Rowley as "a student is only entitled to some educational benefit; the benefit need not be maximized to be adequate." Finally, pertinent to this case, the IDEA provides a preference that disabled children be educated in the least restrictive environment capable of meeting their needs. Walcyzak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 (2nd Cir. 1998).

82. The undersigned finds that the only two IEPs at issue are: 1) the September 22, 2011, IEP; and 2) the August 29, 2013. [redacted] attempts to show that IEPs developed prior to September 22, 2011, result in a denial of FAPE. [redacted], however, did not argue or bring forward facts showing that either exception to the two-year statute of limitations found in 20 U.S.C. 1415(f)(3)(D) is applicable.

83. Next, turning to an examination of the September 22, 2011, IEP, there was no evidence that the IEP was procedurally deficient. The School Board provided [redacted] with the required notices, rights, and opportunity to participate in preparing the IEP. Moreover, it is undisputed that all of the required school personnel participated in the drafting of the IEP.

84. The record shows by competent, substantial evidence that the September 22, 2011, IEP was reasonably calculated to enable [redacted] to receive an educational benefit. In fact, the testimony established that [redacted] did receive an educational benefit. [redacted] testimony and note entered as an exhibit show that [redacted] received an educational benefit in following the IEP. Specifically, [redacted] testimony showed the educational benefit that [redacted] received from the use of the iPad and communication application used on the iPad. Although some of the IEP goals for the September 22, 2011, IEP overlapped with prior IEP goals, the undersigned does not find that fact supports a

lack of educational progress. As [redacted] noted, [redacted] did not retain some of the skills that had been previously mastered, such as identifying colors. Consequently, it is not improper to re-address and re-set those goals to re-learn those skills. Further, the School Board's purchase of the iPad and communication application and integrating that technology into the classroom shows that the School Board was providing [redacted] with a FAPE.

85. Next, the record shows that the August 29, 2013, IEP was prepared in conformity with the IDEA procedural safeguards. [redacted] claim that the School Board violated the IDEA by preparing the draft IEP is not supported by the facts. The facts showed that the IEP team, including [redacted] with legal counsel present, understood that the initial document presented at the August 14, 2013, meeting was a draft. Furthermore, the IEP team decided to continue its discussion and development of the IEP until August 29, 2013, in order to have information from the private school. The IEP team incorporated information gathered from the private school into the IEP, and completed the IEP on August 29, 2013. Therefore, it is clear that preparing the draft IEP does not constitute a procedural violation. Clearly, [redacted] had an opportunity to participate and develop a final IEP.

86. The August 29, 2013, IEP is reasonably calculated to provide [redacted] with an educational benefit. [redacted] testimony

ably demonstrates how the School Board is providing [redacted] a FAPE through the educational goals, and by integrating speech, physical, and occupational therapy throughout [redacted] everyday classroom experience.

87. Examples of integrating the different therapies into [redacted] classroom experience are plentiful. For example, even though the IEP states that [redacted] receives only 30 minutes a week of occupational therapy, the record shows that the occupational therapy is built into the classroom experience. Therefore, [redacted] occupational therapy is not limited to just one 30-minute segment.

88. Furthermore, the IEP and the classroom instruction are specifically addressing skills which [redacted] identified that [redacted] struggled to either retain or generalize from the private school. Although [redacted] demonstrated mastery of some skills at the private school, such as identifying 15 objects from an array of three or correctly using the hand signal meaning "more," [redacted] credibly testified on re-testing that [redacted] was unable to demonstrate those skills. As [redacted] explained, and the record supported, [redacted] has difficulty generalizing tasks. As a result, one may obtain inconsistent results when testing [redacted]

89. The current IEP addresses this issue of teaching the student how to generalize the skills into different settings. For example, [redacted] offered the example of [redacted] becoming very

excited when the student learned that the picture of a pig also meant an actual pig that her class is raising for a 4-H project; thus, generalizing the student's knowledge of specific words from pictures to actual objects.

90. [redacted] testimony demonstrated that [redacted] is receiving an educational benefit from the IEP through the continued development of functional communication in different settings. Two examples are [redacted] progress in using the Smartboard during an academic portion and using the iPad to communicate with students of what the student wants to do and at lunch.

91. Finally, [redacted] argues that the current IEP is deficient because it does not list that [redacted] has had seizures, or list a visual impairment, and contains an error about the amount of time spent in general education. None of these criticisms is valid. First, the IEP addresses the fact that [redacted] had a seizure several years before and the need to be vigilant concerning flashing lights that might trigger a seizure. Moreover, [redacted] indicated that [redacted] had discussed this issue at the IEP meeting and that the team was aware of this issue. [redacted] recollection is supported by the Conference Notes from the IEP meeting. Similarly, the IEP specifically makes an accommodation for [redacted] vision with large print font. Again, [redacted] testimony showed that she was aware of [redacted] vision difficulties and took the fact into consideration when teaching [redacted]. Finally,

even though the IEP contains a mistake about the amount of time that [redacted] spends with general education students, it is difficult to credit this complaint as a denial of FAPE. The record shows that [redacted] learned of the mistake on September 4, 2013, but refused to allow the correction because the parent did not create the error.

92. Based on the foregoing, the undersigned finds that the School Board is currently providing [redacted] with a FAPE.

Section 504 claims

93. [redacted] argues the School Board is violating both the IDEA and Section 504 based on its failure to fully re-evaluate [redacted] when the student re-enrolled. [redacted] contends the failure to conduct a re-evaluation results in the IEP lacking a proper baseline on which to implement measureable and appropriate goals. Therefore, [redacted] concludes that the August 29, 2013, IEP does not provide FAPE, and results in [redacted] having a failed placement in the School District.

94. Section 504 prohibits discrimination on the basis of disability in any program or activity receiving Federal financial assistance. Under section 504, a complaining party must show that he or she: (a) is an individual with a disability; (b) otherwise qualified for participation in the program receiving federal funds; and (c) being excluded from participation in, being denied benefits from, or being subjected

to discrimination because of his or her disability. See 29 U.S.C. § 794(a); and Timothy H. v. Cedar Rapids Cnty. Sch. Dist., 178 F.3d 968 (8th Cir. 1999).

95. The federal regulations implementing Section 504, 34 C.F.R. sections 104.33(a) and (b) and 104.35(a) through (c), require public schools to provide a student with disabilities an education designed to meet the student's individual needs as adequately as the needs of students without disabilities. This includes using tests and other evaluation materials that have been validated for the specific purpose in which they are used and are tailored to assess the specific areas of the student's educational needs. In addition to interpreting the evaluation data, a recipient must draw upon information from a variety of sources, including aptitude and achievement test, teacher recommendations, and social and cultural background information. This initial placement decision must be made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options.

96. Further, under Section 504, students must be re-evaluated prior to any significant change in placement. 34 C.F.R. 104.35(a). Public schools are required to establish procedures for periodic re-evaluation of students who have been provided special education and related services. A re-evaluation procedure that is consistent with the requirements of the IDEA is

one way of meeting this requirement. 34 C.F.R. 104.35(d). Under the federal regulations implementing the IDEA, a public school must re-evaluate a child once every three years, unless the parent and school agree that a re-evaluation is unnecessary. 34 C.F.R. 300.303(a).

97. Under the 2006 IDEA Part B regulations at 34 C.F.R. 300.303 (a), a district must re-evaluate the child if:

> 1. It determines that the child's educational or related services, needs, including improved academic achievement and functional performance, warrant a re-evaluation; or
>
> 2. If the child's parent or teacher requests a re-evaluation.

98. Turning to facts here, it is questionable whether [redacted] re-enrollment in the School District from the private school constitutes a change of placement. There was no dispute that [redacted] disabilities or need for ESE services remained. This is not an example of conducting an evaluation in order to determine if ESE services are appropriate.

99. The facts showed that [redacted] received an initial evaluation that determined the student's placement in 2008. On January 25, 2011, the IEP team and parent determined that a new evaluation was not necessary. This determination not to re-evaluate [redacted] in 2011 complied with 34 C.F.R. 300.303(a). The failure to conduct an evaluation immediately upon re-enrollment,

however, must be put in the factual context here. Before seeking parental consent to re-evaluate [redacted], school officials wanted to re-establish a level of trust and working together with [redacted], after the difficulties concerning the decision not to continue transporting [redacted] to The private school. In contrast, [redacted] had pre-determined to file a due process complaint before the IEP was completed because the parent wanted [redacted] to attend the private school, not the public school. The unfortunate result of these actions is that the issue of re-evaluation was not addressed at the IEP meeting.

100. The record shows by competent, substantial evidence that the School Board brought together an IEP team, with the appropriate members, and addressed [redacted] skills and how to help the student develop functional communication, receive an educational benefit, and the student's placement in the school. The IEP team members had information concerning The private school's IEP, testing data from The private school, and the School District, as well as interviews with [redacted] prior teacher and paraprofessional. Further, the IEP team had the benefit of [redacted] comparative assessment of [redacted] skills based on the reporting by The private school. Finally, because [redacted] had been in the School District from 2008 through May 2012, the School Board was familiar with [redacted] social and cultural background.

Therefore, [redacted] failed to show that the School Board violated Section 504 by discriminating against the student.

101. The record does not show that the School Board discriminated against [redacted] based on the student's disabilities.

Retaliation Claim

102. [redacted] alleges that the School Board retaliated against [redacted] for withdrawing the parental consent for using [redacted] confidential information in order to bill Medicaid for reimbursement, and for filing the due process complaint in this case.

103. In the absence of direct evidence of retaliation, [redacted] may rely on the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), in order to establish [redacted] retaliation claim. Under this framework, [redacted] establishes a prima facie claim of retaliation by showing: (1) that the parent engaged in protected activity; (2) that the parent suffered a materially adverse action by the school board either after or contemporaneous with the parent protected activity; and (3) a causal connection between the protected activity and the adverse action. If [redacted] establishes such a prima facie case, the burden shifts to the School Board to produce evidence of a legitimate, non-retaliatory reason for the adverse action. If the School Board meets its burden, then the burden of production shifts back to [redacted] to show

that the School Board's proffered reason is a pretext for its actions. See Duvall v. Putnam City Sch. Dist., 530 Fed. Appx. 804, 810 (10th Cir. Okla. 2013).

104. Applying the rules of law to the facts here, the undersigned finds that [redacted] failed to establish [redacted] claim of retaliation. At the onset, the undersigned finds that [redacted] met the prima facie case by showing that the parent engaged in a protected activity; suffered a materially adverse action when [redacted] contacted [redacted] work supervisor, [redacted]; and the causal connection based on the temporal proximity of [redacted] actions and the due process hearing. Consequently, the burden of production shifted to the School Board to bring forward a legitimate, non-discriminatory reason for [redacted] actions.

105. The School Board brought forward a legitimate, non-discriminatory explanation for [redacted] actions. The record established by competent, substantial evidence that [redacted] contacted [redacted] based on [redacted] work performance and behavior at a meeting between school officials and Early Steps. The burden of production then shifted back to [redacted] to show that the offered reason was a pretext for the retaliatory action.

106. [redacted] failed to bring forward competent, substantial evidence showing the School Board's offered explanation was pretextual or that [redacted] acted with an improper purpose. In fact, [redacted] did not dispute the behaviors reported by [redacted]

to [redacted]. Consequently, there was a factual basis for [redacted] contact with [redacted] about [redacted] behavior. There was no showing, however, that [redacted] acted with any improper motive or intent to retaliate against [redacted].

CONCLUSION

Based on the preceding Findings of Fact and Conclusions of Law, [redacted] did not prove by the preponderance of the evidence that the School Board violated the IDEA, violated the Section 504 anti-discrimination provisions or engaged in a retaliatory action against [redacted] for engaging in a protected activity.

DONE AND ORDERED this 12th day of February, 2014, in Tallahassee, Leon County, Florida.

S

THOMAS P. CRAPPS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 2014.

ENDNOTE

[1/] [redacted] educational experience in the Hendry County School District that includes inclusion with general education students contrasts with the student's time at The private school where there were no general education students.

COPIES FURNISHED:

Matthew Brandon Trail, Esquire
Trail and Sommer Legal Services, P.A.
Post Office Box 62279
Fort Myers, Florida 33906

John Stewart Sommer, Esquire
Trail and Sommer Legal Services, P.A.
Post Office Box 62279
Fort Myers, Florida 33906

Richard B. Akin, Esquire
Henderson, Franklin, Starnes
and Holt, P.A.
1715 Monroe Street
Fort Myers, Florida 33902-0280

Robert C. Shearman, Esquire
Henderson, Franklin, Starnes
and Holt, P.A.
1715 Monroe Street
Fort Myers, Florida 33902-0280

Catherine A. Bishop
Bureau of Exceptional Education
and Student Services
Turlington Building, Suite 614
325 West Gaines Street
Tallahassee, Florida 32399-0400

Paul K. Puletti, Superintendent
Hendry County School Board
25 East Hickpochee Avenue
Post Office Box 1980
LaBelle, Florida 33975-1980

Matthew Carson, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes (2011), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).