Brevard County School District
No. 08-2774E
Initiated By: District and Parent
Hearing Officer: Lawrence P. Stevenson
Date Of Final Order: August 12, 2009

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-2774E
	)	
BREVARD COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

A formal due process hearing was held in this case before Lawrence P. Stevenson, Administrative Law Judge of the Division of Administrative Hearings, on November 24 and December 1 through 3, 2008, in Viera, Florida.

APPEARANCES

For Petitioner: Mark S. Kamleiter, Esquire
2509 First Avenue South
St. Petersburg, Florida 33712

For Respondent: Melinda Baird Jacobs, Esquire
Qualified Representative
The Law Office of Melinda Baird
P.O. Box 840
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STATEMENT OF THE ISSUE

Whether Petitioner, a student eligible for special education services under the Individuals with Disabilities Education Act ("IDEA"), would be provided a free appropriate public education ("FAPE") in the placement proposed by the Brevard County School Board (referred to herein as the "School District" or the "District," in keeping with the parties' usage at the hearing) in the Individual Education Plan ("IEP") dated June 4, 2008.

PRELIMINARY STATEMENT

This matter commenced upon the filing with the School District of a Request for Due Process Hearing (the "Petition") on June 10, 2008, by counsel for Petitioner At the time of the filing, Petitioner was entering the fourth grade in the School District's "hospital/homebound" program. The Petition stated the following reasons for the request:

> Respondent has failed to provide [Petitioner] with [FAPE] by:
>
> 1. Unilaterally attempting to change Petitioner’s educational placement, without the consent of and over the objection of Petitioner’s parents, essential members of Petitioner’s IEP team. When the IEP team came to an impasse relative to Petitioner’s appropriate placement, the respondent was under a legal obligation to file for due process, if it wished to unilaterally change Petitioner’s placement. Instead of following and respecting Petitioner’s procedural safeguard rights, respondent has insisted that it has the right to unilaterally change a child's placement

> unless the parent files for due process. This action is an illegal attempt to transfer the burden to act and the burden of proof to the petitioner.
>
> 2. The decision of the respondent to change the placement of Petitioner from "hospital/ homebound" in the child's home to a "isolation/safe room" at the neighborhood school violates petitioner's right to a free and appropriate public education, by refusing to respect the child's medical doctors' opinion that such placement would not be safe for Petitioner, thus placing Petitioner at health risk.

The Petition set forth the following detailed basis for alleging that the School District had failed to provide FAPE to Petitioner:

> 1. Petitioner is a child with disabilities who is going to be in the fourth grade in the Brevard County public schools.
>
> 2. Petitioner has been classified as a child with an Autism Spectrum disorder, as well as Language Impairment, Speech Impairment, and Occupational Therapy.
>
> 3. Petitioner is presently being served at home under the hospital/homebound program of Respondent school district.
>
> 4. Petitioner’s medical doctors have consistently stated that it is their belief that, due to a number of very complex and serious medical conditions, including an autoimmune system disorder, it would be dangerous for Petitioner to attend public school.
>
> 5. Respondent has proposed to educate Petitioner in what may be described as an "isolation/safe room," within the neighborhood school. This proposal has been

> presented to Petitioner’s medical doctors, who have continued to insist that even this educational delivery model would be dangerous for Petitioner’s health.
>
> 6. Despite the written opinions of Petitioner’s medical doctors, Respondent has decided to terminate Petitioner’s hospital/homebound placement and require Petitioner to come to the neighborhood school to receive his educational services.
>
> 7. The [individualized education program, or "IEP"] written by Respondent over the objection of Petitioner fails to provide sufficient protections for Petitioner’s educational needs and would result in a loss of educational opportunity for Petitioner.
>
> 8. The IEP, as written, will place Petitioner’s health at significant risk.[1]

The Petition stated that the due process hearing would not be necessary if the School District would implement the following actions:

> A. Conduct a new IEP meeting, wherein Petitioner’s hospital/[homebound] instruction is reinstated in the same intensity and the same format as the present IEP.
>
> B. Restore Petitioner’s Speech/Language minutes.
>
> C. Establish an educational program, which consistently and effectively allows Petitioner to make steady, continual, educational progress.
>
> D. Pay Petitioner's cost of this Due Process action, including Attorney's fees and costs.

The School District forwarded the Petition to the Division of Administrative Hearings (DOAH) on June 12, 2008. On June 16, 2008, the School District filed at DOAH a copy of its June 13, 2008, agreement with Petitioner to extend the 15-day requirement for scheduling a resolution session, pursuant to 20 U.S.C. § 1415(f)(1)(B). The resolution session was held but did not result in full agreement between the parties.

On June 29, 2008, the School District filed its Answer to Due Process Complaint, denying that it had failed to provide FAPE to Petitioner, denying that it proposed to place Petitioner in an "isolation/safe room" rather than in "an ESE classroom specially designed to ensure Petitioner's safety and the appropriate delivery of Petitioner's IEP," and finally denying that the School District had failed to respect the opinions of Petitioner's medical doctors:

> The District's IEP team members have consistently sought input and recommendations from Petitioner's treating physicians. The Board's attempts to gather medical information have been thwarted by Petitioner's refusal to consent to any direct communication between the school and physicians. Nevertheless, the board has reviewed and considered all written statements from Petitioner's medical doctors provided by Petitioner.

On July 1, 2008, the School District filed a Motion for Admission of Qualified Representative, requesting that Melinda Baird Jacobs, an attorney admitted to practice in the state of

Tennessee, be allowed to represent the School District in this matter. Without objection from Petitioner, the Motion was granted by an Order entered on July 3, 2008.

Petitioner and Respondent agreed to extend the 45-day requirement and the case was set for hearing on December 1 through 3, 2008. Petitioner's unopposed motion to allow the testimony of Dr. Richard O'Hern to be taken outside the dates set for hearing was granted by Order dated November 6, 2008, and Dr. O'Hern's testimony was taken on November 24, 2008.

At the outset of the hearing, the parties stipulated to the admission of Joint Exhibit 1, a composite notebook containing Petitioner's medical and educational records; Joint Exhibit 2, Dr. O'Hern's deposition; and Joint Exhibit 3, a supplementary package to Joint Exhibit 1. During the course of the hearing, the parties further stipulated to the admission of Joint Exhibits 4 through 7, which included the depositions of Dr. Ronald G. Davis, Jewel Patterson, and Dr. Floyd Livingston, Jr.

At the hearing, Petitioner presented the testimony of Dr. O'Hern, Petitioner's primary care physician and an expert in the field of pediatrics; Dr. Ronald G. Davis, Petitioner's neurologist and an expert in the field of pediatric neurology; S.H.C., Petitioner's father; M.B.C., Petitioner's mother; and Dr. Floyd Livingston, Jr., Petitioner's pulmonologist and an

expert in the field of pediatric pulmonology. The School District presented the testimony of Karen Palladino, the School District's director of administrative support services in the exceptional student education ("ESE") office; Pamela Treadwell, a staffing specialist in the ESE office; Dr. Olga Emgushov, an expert in the fields of internal medicine and pediatrics; Pamela Cooper Hamilton, assistant nursing director and school health coordinator for the Brevard County Health Department; Andrew Houvouras, a behavior analyst for the School District, accepted as an expert in the field of behavior analysis; Stephanie Weaver, Petitioner's teacher in the hospital/homebound program; Pennie Robinson Wade, principal of [redacted] Elementary, Petitioner's neighborhood school; Nancy Ann Franna, an assistive technology specialist who has worked with Petitioner; and Tina Drummond, Petitioner's speech language pathologist.

The final volume of the four-volume Transcript was filed at the Division of Administrative Hearings on March 5, 2009. Pursuant to the parties' agreement, post-hearing filings were done according to an appellate style briefing schedule, and the statutory deadline for issuance of the Final Order was waived. Petitioner's Proposed Final Order was filed on March 23, 2009. The School District's Proposed Findings of Fact and Conclusions of Law were filed on April 10, 2009. Petitioner's Reply Brief was filed on April 21, 2009.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. Petitioner was [redacted] years old at the time of the hearing. Petitioner has been found eligible for services as a child with a disability under the IDEA, 20 U.S.C. § 1400 et seq. Petitioner's primary exceptionality is autism spectrum disorder, and Petitioner's secondary exceptionalities are occupational therapy and language impairment.

2. Petitioner's current placement, according to the IEP most recently agreed to by Petitioner's mother [redacted] and Petitioner's father [redacted], is in the School District's hospital/homebound program. The School District provides academic instruction, speech language and occupational therapy services in Petitioner's home. Petitioner has remained in this placement during the pendency of this proceeding, pursuant to the "stay put" provision of the IDEA. 20 U.S.C. § 1415(j).

A. Petitioner's major medical issues

3. Dr. Richard O'Hern has practiced in the field of pediatrics for 30 years. Except for a one-year period when Petitioner was about two years old, Dr. O'Hern has been Petitioner's pediatrician since the child was born. He sees Petitioner in his office about every two weeks. Dr. O'Hern

described Petitioner as the most medically complex child he has ever treated.

4. Petitioner diagnoses include autism, celiac disease, epilepsy, Landau-Kleffner Syndrome (acquired epileptic aphasia), asthma, chronic rhinitis, selective immunoglobulin A ("IgA") deficiency, gastroesophageal reflux disease ("GERD"), and Arnold-Chiari Malformation.[2] Dr. O'Hern stated that none of his other patients has had autism or celiac disease as severe as Petitioner's.

5. Petitioner is primarily non-verbal. Petitioner mostly grunts, but is able to say a few words. Petitioner communicates using an assistive technology device called a "Mini Mo," see Finding of Fact 96, infra, and by way of gestures. Dr. O'Hern estimated that Petitioner understands what Petitioner is told about 60 to 75 percent of the time.

6. Petitioner has severe sensory integration problems related to Petitioner's autism. Petitioner is claustrophobic and very sensitive to touch, light, smell, taste and sound. Petitioner's sensitivities manifest themselves through anxiety, often followed by emotional outbursts and, infrequently, violence. Petitioner is not toilet trained.[3]

7. Dr. Ronald Davis, Petitioner's neurologist, testified that Petitioner's autism has caused Petitioner to have

significant deficiencies in socialization skills, information processing, expressive language, and overall learning.

8. Dr. Davis described Landau-Kleffner Syndrome as an epileptic disorder that mimics autism, but has its basis predominantly in electrical abnormalities of the brain. It tends to cause not outward seizures but neurocognitive declines that have the appearance of autism. A person with Landau-Kleffner usually has some degree of autistic disorder. Dr. Davis testified that Petitioner does not have the "pure form" of Landau-Kleffner because Petitioner does not display the EEG abnormality "status epilepticus" during sleep, but that Petitioner does fit the criteria for a variant of Landau-Kleffner.

9. Dr. Davis testified that Petitioner has had epileptic seizures "off and on" for the past six years, despite multiple anti-epileptic medications and "more aggressive therapy" including steroids. [redacted] testified that the seizures are frequent, sometimes occurring daily.

10. Though Petitioner does have "typical," grand mal seizures that involve visible spasms and shaking of the extremities, the majority of Petitioner's seizures are "atypical." Petitioner may simply fall, or flex and remain in the flexed position. Petitioner may have a partial seizure limited to a single extremity or part of Petitioner’s face.

Dr. O'Hern testified that atypical seizures are in a sense more dangerous because they are not always observable without an EEG. Dr. O'Hern prescribes Diastat (diazepam rectal gel) and Valium to be administered when Petitioner has a seizure, but those medications do not always controls the seizures, can cause respiratory arrest, and are subject to overdose. Dr. Davis, the neurologist, testified that it is unlikely Petitioner will outgrow the seizure activity.

11. When Petitioner has a seizure, the family tries to keep Petitioner comfortable and still. Petitioner’s parents bring out Petitioner’s favorite blanket and teddy bear and make every effort to make Petitioner feel safe and secure. They turn out the lights, speak in low voices, and maintain a calm environment until the seizure passes.

12. Dr. Davis testified that epilepsy is always life threatening. Patients are subject to "SUDEP," or "sudden unexplained death in epilepsy." The current theory of the cause of SUDEP is that the electrical discharge from the brain during a seizure travels down the vagus nerve and hits the heart, causing a cardiac dysrhythmia or arrhythmia and death.

13. Dr. Davis testified that he has thousands of school age patients who are diagnosed with epilepsy, and that most of them attend public school because they are able to control their epilepsy with a single medication. Dr. Davis stated that in any

group of epilepsy patients, 30 to 40 percent will be considered relatively intractable, meaning that seizure activity continues despite the use of multiple medications. A subset of that group will be even more medically tenuous and less likely to attend school. Petitioner fits within that subset because of Petitioner’s multiple diagnoses, particularly autism and Petitioner’s neurocognitive and behavioral issues.

14. Dr. Davis testified that Petitioner's medical condition is tenuous enough that Petitioner very easily has "breakthrough" seizures, meaning seizures that occur during a period of relative stability despite treatment with anti-epileptic medications. Dr. Davis testified that the problem of breakthrough seizures is magnified with Petitioner due to the exceptional number of triggers to which Petitioner is subjected by Petitioner’s multiple diagnoses. Gluten ingestion, for example, will not only trigger the toxic reaction of celiac disease, but may also trigger a round of seizures. A change of routine can cause stress in Petitioner because of Petitioner’s autism, and that stress may lead to seizures. Once a round of breakthrough seizure activity commences, it can take months of medication adjustment to return Petitioner to a baseline of "fairly appropriate lack of breakthroughs."

15. Petitioner's seizure problems are complicated by the fact that Petitioner's autism renders Petitioner unable to tell

Petitioner’s parents or doctors when Petitioner feels a breakthrough seizure coming on. Petitioner's outward behavior may be ambiguous. Petitioner will sometimes hold Petitioner’s head and scream, and it is difficult to determine whether Petitioner is having a seizure, a migraine, or is merely engaging in self-stimulating behavior.

16. Petitioner has been relatively stable with regard to seizures since August 2007, though Dr. O'Hern noted that "stable does not mean normal." Dr. O'Hern further explained his understanding of the term:

> When [Petitioner’s] neurologist says [Petitioner] is stable, it means for the moment that Petitioner is not having extreme fluctuations in [Petitioner’s] seizures and that [Petitioner] is neurologically not having paralysis, not having a change in [Petitioner’s] seizure frequency. It doesn't mean that [Petitioner] is not a seizure patient.

17. Dr. Davis attributed Petitioner's current relative stability to Petitioner’s controlled environment, which eliminates the triggers that cause breakthrough seizures. Petitioner’s parents provide Petitioner with an unvarying and therefore stressless routine, prevent Petitioner’s exposure to gluten, and limit Petitioner’s exposure to illnesses and germs.

18. Celiac disease is an inherited condition in which gluten acts as a gastrointestinal toxin. Gluten ingestion can cause failure to thrive in a child with celiac disease, because

the child's intestinal flora are damaged and they will have chronic diarrhea. Because the gluten also acts as a neurotoxin, it can increase the autistic state in a child such as Petitioner. Celiac disease may also increase Petitioner's chances of developing cancer of the colon and small intestine.

19. Petitioner's reaction to gluten is severe. Petitioner suffers from severe diarrhea, vomiting, and consequent weight loss. Dr. O'Hern testified that Petitioner once lost 30 pounds over a period of months after gluten ingestion. Dr. O'Hern believes that celiac disease is a major complication preventing Petitioner's attending school, because exposure to gluten triggers "a cascade of events" from which it takes Petitioner months, if not years, to return to a condition of relative stability.

20. Petitioner's autism makes it impossible for Petitioner to cooperate in the effort to shield Petitioner from gluten exposure. [redacted] testified as to Petitioner's propensity for putting things in Petitioner’s mouth, which, coupled with the severity of Petitioner's gluten response, means that Petitioner must inhabit an environment that is entirely gluten-free. Not merely foodstuffs but any item that will come into contact with Petitioner must be researched in order to ensure that it does not contain gluten.

21. [redacted] has become a self-taught expert in researching the presence of gluten in foods, medications, and other items which Petitioner may encounter, such as school supplies. [redacted] testified that it is not enough to examine product labels, because some products advertised as gluten-free may actually contain gluten. The gluten content of products may vary over time; items that were formerly gluten-free may not remain so. [redacted] makes a practice of contacting manufacturers to obtain assurance of gluten-free products.

22. The majority of medications use gluten as filler, a complicating factor for Petitioner's treatment because Petitioner takes as many as seven prescription medications daily,[4] and Petitioner's physicians very frequently change Petitioner's medications. Constant vigilance and research is required to stay abreast of medications' gluten content. Dr. O'Hern testified that he relies on [redacted] to contact the pharmaceutical companies and to tell Petitioner whether the medications he prescribes to Petitioner are gluten-free.

23. Petitioner has moderately severe GERD. Certain foods provoke GERD, which causes the stomach to distend and acid to come up into the esophagus. The indications of GERD in Petitioner are poor appetite, bloating, and asthma, making this condition another factor in Petitioner's periodic struggles with weight loss.

24. Dr. Floyd Livingston, Petitioner's pulmonologist, testified that Petitioner has moderate asthma. Petitioner requires daily breathing treatments, and is very susceptible to colds and viruses. Petitioner's other medical conditions, particularly GERD, can trigger asthma attacks. Petitioner also has allergic rhinitis, a common affliction but one that combines with Petitioner’s asthma to further complicate Petitioner's respiratory tract problems.

25. Petitioner has selective IgA deficiency. IgA is a protein antibody that protects against bacterial and viral infections of the mucous membranes of the mouth, airways, and the digestive tract. Dr. O'Hern testified that, while selective IgA deficiency is probably the mildest form of gamma globulin deficiency, Petitioner's is relatively severe. Petitioner has been tested and failed to make an immune response to hepatitis B and pneumococcal disease.

26. Petitioner has not had the full set of immunizations Petitioner would need to enter school. Dr. O'Hern testified that there is some question whether immunizations such as the MMR vaccine would be effective in Petitioner, given Petitioner’s lack of immune response to pneumococcus.

B. Petitioner's educational history

27. Between Petitioner’s second and third birthdays, Petitioner was diagnosed with pervasive developmental disorder

not otherwise specified ("PDD-NOS"), which is one of the autism spectrum disorders. Petitioner was first referred for evaluation with the School District in August 2001. In October 2001, [redacted] met with School District representatives to discuss service options for Petitioner as Petitioner's third birthday approached. Since that time, Petitioner has received services from the School District.

28. When Petitioner was two years old, Petitioner began attending the Hope Center, a private pre-school in Rockledge. The School District had a collaborative agreement with the Hope Center to provide services to eligible children with disabilities who were enrolled at the Hope Center. Under this agreement, the School District provided occupational therapy and speech/language therapy to Petitioner while Petitioner attended the Hope Center, beginning in the latter half of 2001.

29. Petitioner attended the Hope Center for approximately two years, until the fall of 2003. The record of an ESE conference report dated September 2, 2003, indicates that [redacted] was pressing the School District for a teacher assistant dedicated to Petitioner at the Hope Center, and for a home-based program in addition to the services Petitioner was receiving at the Hope Center.

30. In September 2003, the Hope Center announced that it would be closing at the end of the year. The ESE personnel

working with Petitioner began drafting a new IEP in mid-September, with the intention of placing Petitioner at Mila Elementary School in Merritt Island. At an ESE conference on September 25, 2003, [redacted] expressed "grave concerns" regarding the number of students to which Petitioner would be exposed, and whether Petitioner would be watched closely enough to keep Petitioner from eating paper or other materials with gluten. Petitioner remained at the Hope Center while the new IEP was being developed.

31. The ESE team, including [redacted], met again on October 14, 2003, to continue working on the draft IEP. [redacted] presented the team with a letter from Dr. Joel Andres, a pediatric gastroenterologist at Nemours Children's Clinic who was caring for Petitioner. Dr. Andres wrote as follows, in relevant part:

> Due to diagnosis of celiac disease it is medically necessary for [Petitioner] to be on strict gluten free diet. Since [Petitioner] frequently puts edible and non-edible items in [Petitioner's] mouth, it is essential for [Petitioner] to have continual one on one supervision at school. This is to insure good handwashing and that [Petitioner] does not eat any edible or non-edible items which contain gluten. Due to [Petitioner] frequently putting non-edible objects in [Petitioner's] mouth, gluten free toys and art supplies are also needed. In addition, any school personnel handling food or non-food items for [Petitioner] need to wash their hands and utensils used well, prior to touching items given to

> [Petitioner] to prevent possible gluten contamination.

32. The conference report of the October 14, 2003, meeting indicates that the ESE team agreed to request a personal care assistant for Petitioner at the Hope Center.

33. In November 2003, Petitioner began to experience severe asthma and intestinal problems. Petitioner's parents were convinced that Petitioner had ingested gluten at the Hope Center. [redacted] recalled that a teacher at the Hope Center told her that Petitioner had pulled a pretzel off an art project that was hanging on a classroom wall.

34. At an ESE team meeting on November 18, 2003, Dr. Palladino expressly rejected [redacted]'s proposal that Petitioner receive homebound instruction. The School District proposed moving Petitioner to the preschool program at [redacted] Elementary. [redacted] reluctantly agreed to the placement, insisting that the IEP conference report note her disagreement that the [redacted] Elementary program could meet Petitioner's needs.

35. On November 21, 2003, [redacted] called the ESE office's director of administrative support, Karen Palladino, to say that Petitioner's medical condition necessitated Petitioner's immediate withdrawal from the Hope Center. [redacted] testified that she and her husband decided to "keep Petitioner home and get Petitioner better."

36. On November 25, 2003, the School District agreed to provide a one on one personal care assistant for Petitioner after Petitioner transitioned to [redacted] Elementary in January 2004. The School District provided hospital/homebound instruction for Petitioner during the month of December 2003.

37. Petitioner was placed in a pre-K varying exceptionalities classroom at [redacted] Elementary in January 2004, with a health care plan drafted by the Brevard County Health Department to provide a gluten-free environment. After two weeks, Petitioner's parents decided to withdraw Petitioner from [redacted] Elementary. Petitioner had become ill, and Dr. Andres suggested to [redacted] that Petitioner's symptoms were consistent with gluten ingestion.

38. At the hearing, [redacted] conceded there was no definitive proof that Petitioner had been exposed to gluten while at [redacted] Elementary. However, [redacted]'s visits to the school and conversations with Petitioner's personal care assistant led her to conclude that Petitioner was not being properly supervised, and that the gluten ingestion had most likely occurred at the school.

39. On February 3, 2004, Dr. Andres certified in writing to the School District that Petitioner was unable to attend school "because it cannot be guaranteed that Petitioner will NOT INGEST ANY GLUTEN. This will regularly make Petitioner

extremely ill!!" Petitioner's parents provided the School District with a letter from Dr. O'Hern, dated February 9, 2004, stating that Petitioner "has severe autistic spectrum disorder. Ten hours of home bound instruction is insufficient." Petitioner's parents also provided the School District with a letter from Dr. Davis recommending that Petitioner receive 25 hours per week of home instruction, and three days per week of occupational, physical and speech therapies.[5]

40. An IEP was developed on February 24, 2004, that provided Petitioner with a total of 12 hours of services per week at home, including ten hours of academic instruction, one hour of occupational therapy and one hour of speech/language therapy. The IEP was to remain in effect through August 31, 2004.

41. The IEP team met on August 31, 2004. Petitioner was now in kindergarten, and the team reviewed a new IEP and discussed a re-evaluation of Petitioner for placement in the most appropriate program. [redacted] pressed for additional hours of academic instruction. Dr. Palladino declined to recommend additional hours as of that date, but the team agreed to reconvene when Petitioner's evaluations were complete and then to address whether the current services were adequate to meet Petitioner's needs.

42. Petitioner was referred for evaluation on January 18, 2005. On or about January 25, 2005, Dr. Davis completed a hospital/homebound authorization form certifying that Petitioner was unable to attend school.

43. The IEP team met on February 1, 2005. Though there were disagreements between the parents and School District personnel as to details, there was agreement that Petitioner would remain in a hospital/homebound placement, receiving academic instruction, occupational therapy, and speech/language therapy. The School District continued to provide hospital/homebound instruction and related services for the remainder of the 2004-2005 school year and during the summer of 2005.

44. In early June 2005, the School District received a "Certificate to Return to Work or School" form from Children's Hospital of Philadelphia indicating that Petitioner was seen by Dr. Kathleen Sullivan at Children's Hospital on June 2, 2005. The form also appeared to indicate that Petitioner "is able to return to school."

45. Pamela Treadwell, a School District ESE staffing specialist, saw the form signed by Dr. Sullivan and took it to mean that Petitioner had been medically cleared to return to school. However, when she telephoned Dr. Sullivan, the physician told her that the intent of the form was to indicate

that she had seen Petitioner on June 2, 2005, not to remove the child from the hospital/homebound program.

46. [redacted] became "very upset" when she learned that Ms. Treadwell had contacted Dr. Sullivan without her prior consent. Since this incident, [redacted] has consistently refused the School District's requests to directly contact Petitioner's physicians.

47. Dr. Sullivan was the director of the immunology clinic at Children's Hospital in Philadelphia, and had first seen Petitioner on a referral from Dr. O'Hern in 2003. Dr. O'Hern sent Petitioner to Dr. Sullivan in June 2005 due to the frequent infections the child had been experiencing over the past year. These were mostly sinus infections resulting from Petitioner's asthma.

48. Dr. Sullivan wrote a letter to Dr. O'Hern, dated June 3, 2005, describing Petitioner's visit and providing her treatment recommendations. After describing Petitioner's recent experience, Dr. Sullivan outlined a strategy for antibiotic treatment, including prophylactic antibiotics once Petitioner was clear of infection for a sustained period, and recommended that Petitioner go to an allergist upon Petitioner’s return to Florida to determine whether allergies were a co-factor in the infections. Regarding Petitioner's school placement, Dr. Sullivan wrote the following:

> Finally, there was some concern about [Petitioner's] home schooling. I would definitely endorse [Petitioner] going back to school. However, the last time [Petitioner] was in school [Petitioner's] aide was not able to prevent accidental gluten exposure and [Petitioner's] celiac disease flared dramatically. When [Petitioner's] celiac disease flares, there is sort of a cascade of effects, all of which are undesirable. I think it would be worthwhile for [Petitioner] to try school in a limited fashion one more time; hopefully, in such a controlled way that [Petitioner] would be completely unable to have gluten exposure.

49. Dr. Sullivan provided this letter to Petitioner's parents, who did not provide it to the School District. The School District first learned of this letter through the litigation process, at least two years after it was written.[6]

50. [redacted] testified that the letter was a medical record, and that she was not in the practice of forwarding to the School District every letter she received from a specialist to Dr. O'Hern. She had discussed the question of Petitioner's return to school with Dr. Sullivan at the time of Petitioner's examination. Dr. Sullivan had told [redacted] to discuss the matter with Dr. O'Hern, Petitioner's primary care physician.

51. [redacted] disagreed with Dr. Sullivan's recommendation that Petitioner should try returning to school. [redacted] believed that Dr. Sullivan had only a partial understanding of Petitioner's condition because she only saw Petitioner once a year. [redacted]

believed that Dr. O'Hern's opinion on Petitioner's ability to return to school was the most reliable because of Dr. O'Hern's superior, first-hand knowledge of Petitioner's complicated conditions.

52. On August 24, 2005, Dr. O'Hern completed a physician's medical statement for Petitioner. In the statement, Dr. O'Hern attested that Petitioner should be confined to Petitioner's home on a full-time basis. Dr. O'Hern stated the following "medical implications" as the basis for his recommendation: strict dietary issues; unable to be out of home without parent; periodic uncontrollable activity/behavior; limited communication; decreased immunity. In response to a question on the form regarding the physician's plan for the student's reentry to school, Dr. O'Hern stated: "unknown/based on dietary, behavior, immune issues."

53. The physician's medical statement contains the following release, to be signed by the parent: "As the parent/guardian for the student named above, I give my permission for the physician and Brevard Count School District personnel to exchange information regarding the student's medical condition and needs." On the signature line, [redacted] wrote: "I will be happy to request the physician to provide written answers to any questions you have. The District may not contact the doctor directly."

54. At an IEP team meeting on September 12, 2005, the IEP team determined that Dr. O'Hern's physician medical statement was adequate to authorize hospital/homebound education for Petitioner for the 2005-2006 school year, and for extended services through July 2006.

55. Despite the dispute regarding physician contacts, and some continuing disagreements over Petitioner's services, [redacted] and School District personnel had a mostly positive day-to-day working relationship. In the fall of 2005, [redacted] undertook to assist the School District in understanding the number of products on the market containing gluten. Dr. Palladino, on behalf of the School District, was happy to accept [redacted]'s assistance. The School District agreed to ensure that all instructional and therapeutic materials used with Petitioner would be gluten-free. The School District further implemented a formal procedure to ensure that all personnel working with Petitioner were fully aware of Petitioner's condition, and requiring that they agree in writing to use only materials provided or approved by [redacted] when working with Petitioner.

56. In an e-mail to [redacted] dated November 28, 2005, Dr. Palladino inquired as to Petitioner's long-term prognosis and plans to return to a school setting. On the same date, [redacted] replied as follows:

> [Petitioner] has recent [sic] lost 10 pounds in 2 months. [Petitioner] is currently undergoing further medical tests to determine the cause of such a significant weight loss for a 6 year old child. So, to answer your question, nobody knows what [Petitioner's] long term prognosis is and plans to eventually return to a school setting can not be determined at this time.

57. On December 1, 2005, [redacted] provided the School District with a handwritten note from Dr. O'Hern, dated November 29, 2005, stating that Petitioner presented with "complex medical issues" including immune deficiency, autism, seizures, and celiac disease and was unable to attend school at the present time. Dr. O'Hern also wrote that the timing of Petitioner's return to school "is unknown at this time because of dietary, safety and medical issues."

58. The record indicates that Petitioner's health was precarious during the first half of 2006, mainly due to seizure activity. The School District required a doctor's note for scheduled instructional hours that Petitioner missed due to illness or appointments with Petitioner’s physicians, so that those hours could be rescheduled at a later date. Petitioner missed school hours on January 5 and 6, 2006, for a 48-hour EEG scheduled by Dr. Davis in relation to Petitioner's seizures. Petitioner missed school on February 6, 2006, for an appointment at the pulmonology/cystic fibrosis clinc at Nemours Children's Clinic in Orlando. Petitioner was treated in the endocrinology

clinic of Nemours Children's Clinic on February 7, 2006. Petitioner missed school on February 8, 2006, for an appointment with a nurse practitioner in Dr. O'Hern's office to deal with a fever and infections in both ears. According to a note from Dr. O'Hern, Petitioner missed school on March 1, 2006, for medical reasons. Petitioner missed school on March 29, 2006, for an appointment with Dr. Davis. Notes from Dr. O'Hern stated that Petitioner had medical reasons for missing school on April 27 and 28, May 10 through 12, and May 15, 2006. Petitioner missed school for an evaluation by Dr. Davis on June 22, 2006, and for an appointment with Dr. O'Hern on June 23, 2006. Dr. O'Hern's office sent the School District a note, dated June 23, 2006, stating that it would be medically necessary for Petitioner to start school at 10 a.m. rather than 9 a.m., due to Petitioner's recent illness. Petitioner was admitted to Florida Children's Hospital from June 28 to June 29, 2006, for neurological testing.

59. On June 30, 2006, Petitioner's academic instructor Deborah Brannigan wrote the following e-mail to Dr. Palladino regarding Petitioner's condition:

> [Petitioner] really is having a terrible time. [Petitioner] works so well, then [Petitioner] will start getting agitated. As soon as this happens, we know an episode is coming. [Petitioner will] grab [Petitioner's] head in pain, sometimes cry and then bang [Petitioner's] head on the

> floor. When [Petitioner] is told not to hit [Petitioner's] head, I can see that [Petitioner is] really trying not to, but for some reason has to do it. [Petitioner's] eyes glaze over, [Petitioner] lays on [Petitioner's] back and arches it and then it passes. [Petitioner] is left exhausted. [Petitioner] is such a good child and really shows an interest in learning, it's just so sad.

60. On August 10, 2006, Dr. O'Hern signed another physician's medical statement. Dr. O'Hern again attested that Petitioner should be confined to Petitioner's home on a full-time basis. Dr. O'Hern stated the following "medical implications" as the basis for his recommendation: "medical condition requiring constant parental supervision; periodic uncontrollable behavior; limited communication; frequent seizures; custom designed diet." In response to the question on the form regarding the physician's plan for the student's reentry to school, Dr. O'Hern again stated: "unknown/based on dietary, behavior, immune issues."

61. On the parental release portion of the form, [redacted] again indicated that she did not give her permission for the physician and the School District to exchange information. She wrote: "I will request information from the doctors. The district may not contact [Petitioner's] doctors. If the district needs information, I will get the doctor to put it in writing."

62. [redacted] provided the School District with a handwritten note, on a prescription blank, from Dr. O'Hern dated August 21, 2006. The note stated that Petitioner should have a one-hour break for every two hours of instruction.

63. On September 5, 2006, the School District authorized the continuance of hospital/homebound instruction and related services to Petitioner through the 2006-2007 school year, with extended services through the following summer.

64. In a May 21, 2007, e-mail to Dr. Palladino explaining why the day's academic instruction had been cancelled, teacher Dayle Ramsey[7] wrote that she had witnessed "several large seizures last week with Petitioner and some small behavioral/laughing seizures." On August 21, 2007, Ms. Ramsey reported to Dr. Palladino that [redacted] told her "[Petitioner] had a violent seizure last night where Petitioner went after both her and dad. Petitioner supposedly bit her very badly."

65. On August 21, 2007, Dr. O'Hern completed another physician's medical statement. Dr. O'Hern attested that Petitioner's medical condition warranted constant parental supervision and a custom diet, and that Petitioner had periodic severe behavioral outbursts, seizures, and limited communication. As to the physician's plan for the student's reentry to school, Dr. O'Hern wrote, "indeterminate," based on Petitioner's developmental progress and medical condition,

including dietary, behavioral and medical concerns. [redacted] again amended the parental release to forbid direct contact between the School District and Petitioner's physicians.

66. At an IEP team meeting on September 10, 2007, [redacted] was given a letter from Dr. Palladino that provided as follows, in relevant part:

> I am writing to express my concern regarding the medical homebound placement for [Petitioner]. I am requesting your permission to speak directly with [Petitioner's] physician regarding [Petitioner's] medical condition as it relates to [Petitioner's] educational setting. Currently, [Petitioner] is on medical homebound instructional placement based on a physician's statement that [Petitioner] is unable to attend school at a public school building. The initial decision to place Petitioner on hospital/homebound arose from the fear that [Petitioner] would ingest gluten at school and we could not keep [Petitioner] safe. [Petitioner] was very young at the time. At present, [Petitioner] does continue to have medical issues not unlike many other students who are able to attend school. In reviewing [Petitioner's] records, we believe that [Petitioner] is not confined to [Petitioner's] home for medical reasons and therefore, it may be possible for Petitioner to begin attending school at Lewis Carroll Elementary in short segments, possible beginning with [Petitioner's] therapies and expanding from there.
>
> I have explored the options available at [redacted] and have found a resource-size classroom that can be dedicated solely as [Petitioner's] educational setting. The classroom will be cleaned and completely free of all gluten. All materials,

furniture and equipment will be safe for [Petitioner's] medical condition. No other students will use the classroom. Only [Petitioner], [Petitioner's] one-on-one instructor, [Petitioner's] speech-language pathologist and [Petitioner's] occupational therapist will use this room. There is a full-time registered nurse assigned to the school. A health care plan would be developed, with your input, prior to [Petitioner] attending [redacted]. I invite you to visit the designated classroom, which I have described. I will also invite [Petitioner's] physician to visit the classroom if you agree.

My concern is that [Petitioner] has not attended school on a public school campus for three years. As a result, [Petitioner] is limited in [Petitioner's] potential to eventually be integrated with regular peers for social and educational experiences. I see this transition of providing [Petitioner's] instructional therapies from your home to a classroom at [redacted], as the first step in transitioning [Petitioner] to an environment where [Petitioner] can eventually be included with [Petitioner's] peers. I believe this is [Petitioner's] least restrictive educational environment. I request your permission to talk directly with [Petitioner's] physician as soon as possible. In fact, the physician should be part of the IEP team so we can discuss all issues and he can hear our educational offer to [Petitioner]. I have included a release of information for your signature for this purpose. We believe we can provide a safe environment for [Petitioner] at [redacted]. I will ask [Petitioner's] physician if [Petitioner's] medical condition would permit [Petitioner] to attend [redacted] Elementary for several hours daily for academic instruction and therapies in the safe room as I have described. I will also ask [Petitioner's] physician what restrictions and/or limitations would apply while

> [Petitioner] is at [redacted]. [Petitioner] is not confined to [Petitioner's] home as [Petitioner] participates in numerous activities in the community including trips to Disney World, the mall, the bookstore, activities involving other children and to private therapy. These are all environments that have not been altered unlike what we are willing to do at [redacted]. . . .

67. [redacted] declined to discuss the matter until she could consult with her attorney. On September 11, 2007, [redacted] returned the release of information form referenced in Dr. Palladino's letter. [redacted] declined to allow School District personnel to communicate directly with Petitioner's physicians.

68. [redacted] provided Dr. O'Hern with a copy of Dr. Palladino's letter. Before giving the letter to Dr. O'Hern, [redacted] added her own handwritten comments in the margins, essentially disputing Dr. Palladino's assurances that the School District could ensure a gluten-free classroom: "[Petitioner's] teacher has repeatedly brought gluten into my home! I must supervise her constantly! Can't be trusted in my home without me watching."

69. In a letter to the School District dated September 13, 2007, Dr. O'Hern wrote as follows, in pertinent part:

> As [Petitioner's] pediatrician, I am responding to a Brevard County School Board request to have the above patient begin to re-enter the classroom setting.
>
> Unfortunately, [Petitioner's] medical status continues to be fragile and not stable.

> [Petitioner's] multiple medical conditions are documented on the hospital/homebound form. [Petitioner] experiences multiple seizures which are only partially controlled. Under supervision from a pediatric neurologist, [redacted] has to administer seizure medication on an emergent basis to supplement [Petitioner's] regular seizure medication. If [Petitioner] was in the classroom, this process would require a 911 call to the emergency room.
>
> [Petitioner] is on a strict gluten free diet and requires constant supervision of food ingestion. By history, [Petitioner] has experienced medical complications from accidental ingestion of gluten. There is no assurance that [Petitioner] can be maintained on a gluten free environment while at school.
>
> [Petitioner's] reactions to people/ situations are not predictable. [Petitioner] can experience sudden outbursts of violent behavior without provocation. Furthermore, [Petitioner's] stamina and fitness are compromised resulting in unexpected falls.
>
> In summary, [Petitioner] remains severely compromised and any shred of normalcy in [Petitioner's] life is due to the heroic efforts by [Petitioner's] parents on a nearly 24/7 basis. I cannot, in good conscience, approve [Petitioner's] placement in a classroom setting. . . .

70. Also on September 13, 2007, Ms. Ramsey wrote an e-mail to Dr. Palladino that read, in relevant part:

> Mom began to ask questions yesterday about how I would handle a situation with a student having a seizure in my classroom when I was alone. I simply said there have been times where students do have seizures and there will be plans put in place if the

> possibility exists. I also said that is where it is good to have the doctor present at the IEP meeting so that he can ensure all needs are met. . . .

71. Dr. Palladino responded as follows:

> Student would have a health plan at school. Our schools have many students who have seizures. The nurse [is] right around the corner from the classroom at [redacted].

72. On October 15, 2007, Dr. O'Hern wrote a note on a prescription pad that was provided to the School District by [redacted]. The note provided: "I have reviewed the school board proposal for a modified special classroom for [Petitioner]. My recommendation for homebound stands as the most appropriate for this patient. I also recommend for school not to begin before 10 a.m. and every 2 hrs to have a one hour break."

73. In a letter to Petitioner's lawyer, Mark Kamleiter, dated October 15, 2007, Ms. Treadwell addressed the concerns raised in Dr. O'Hern's September 13, 2007, letter. Ms. Treadwell wrote that she believed Dr. O'Hern wrote his letter without full knowledge of the services and protections the School District could provide Petitioner on a school campus, and she requested that Mr. Kamleiter provide a copy of her letter to Dr. O'Hern "in order that he can make recommendations regarding [Petitioner's] educational program based on all relevant information." Ms. Treadwell described the School District's proposal as follows, in relevant part:

At the IEP meeting on October 15, 2007, we would like to consider a plan in which [Petitioner] would attend school on the campus of [redacted] Elementary for a partial day of instruction. [Petitioner] would arrive at school later in the morning when all other students are in their classrooms thereby eliminating or minimizing [Petitioner's] contact with other students. The principal has designed a classroom to be set-aside for [Petitioner's] instruction in the event that the IEP team makes a recommendation for [Petitioner] to attend school at [Petitioner's] neighborhood school site. [Petitioner] would be in that classroom with [Petitioner's] teacher and the only other person entering that classroom on [a] regular basis would be [Petitioner's] occupational therapist and speech-language pathologist. Other adults may occasionally enter [Petitioner's] classroom such as the principal, assistant principal, or certified behavioral analyst. No other students would be present in this classroom that has been designed for [Petitioner]. The classroom has a sink and a changing table. We have provided for the purchase of gluten-free wipes, paper towels, soap, rubber gloves, art/craft materials, paper, writing instruments, glue, books, etc. When [Petitioner] leaves the school to return home, [Petitioner] would leave before the end of the school day during a time that all the other students are in class. This reserved classroom is designated for [Petitioner's] instruction alone. The classroom will be cleaned daily with gluten-free products. All materials and equipment in the classroom will be gluten-free and cleaned with products that are acceptable for [Petitioner's] medical concerns. We invite you and Dr. O'Hern to visit the school and tour the building including the bus loop area, hallways, and classroom that is reserved for [Petitioner].

Dr. O'Hern's letter states that the school cannot assure that [Petitioner] will have no contact with gluten at school. The Brevard Public School District has many students attending school at a school site who are gluten intolerant and several of these students have severe reactions when exposed to gluten. The Brevard Public Schools have experience in creating gluten-free classrooms for other students and we can do so for [Petitioner]. We have taken into account the materials in the classroom including food and drinks. [Petitioner] may bring [Petitioner's] food with [Petitioner] to school for [Petitioner's] snacks and lunch. We have a clean refrigerator in the classroom that can keep [Petitioner's] food fresh until eaten. There will be no opportunity for Petitioner to ingest food other than [Petitioner's] own (as supplied by the parent) as the teacher will not keep her food in the classroom. The teacher will eat her lunch after [Petitioner] leaves her classroom for the day. We can provide for either a microwave oven and/or a toaster oven depending upon what type of cooking method [[redacted]] would prefer for [Petitioner's] food.

The teacher has agreed to be responsible for preparing and serving [Petitioner's] snacks and lunch under these parameters. This will eliminate the need for [Petitioner] to visit the cafeteria or have any contamination from food or drinks in the school's cafeteria. We respectfully submit that this level of gluten-free precautionary procedures is more rigorous then [sic] are the precautions taken for [Petitioner] in a hotel room, bookstore, or at the mall.

In his letter of September 13, 2007, Dr. O'Hern stated that if [Petitioner] has a seizure requiring medication on an emergency basis, the school would need to call 911. Dr. O'Hern is probably not aware that there is a Registered Nurse at [redacted] Elementary who

is at the school every school day. Her clinic is located down the hallway from [Petitioner's] room. We believe that the Registered Nurse at [redacted] Elementary could administer emergency medication after consulting with the parents and developing a Health Care Plan to address how medication is to be administered. We offer Dr. O'Hern the opportunity to speak with the Registered Nurse at [redacted] Elementary if he has any concerns regarding the administration of emergency medication to [Petitioner]. The nurse can also address additional medical concerns/procedures through the Health Care Plan. The Health Care Plan is developed in collaboration with the parents and the student's physician as available. All persons interacting with [Petitioner] at the school site and bus would be trained in all aspects of the Health Care Plan.

There is a trained crisis prevention team at the school who are immediately available when called for assistance. The teacher has a phone in the classroom that is equipped to contact the front office for assistance with the touch of a single button. In addition, the teacher is trained in crisis prevention techniques and has knowledge of all [Petitioner's] medical conditions and needs that have been shared by the parent. If the IEP team determines it necessary, a walkie-talkie or other type of wireless notification system can be provided to [Petitioner's] teacher for emergency purposes.

Dr. O'Hern's letter states that [Petitioner] needs rest periods. In planning for [Petitioner's] eventual return to a school campus, the district has considered [Petitioner's] needs for breaks and rest periods. We have a gluten-free mat and wedge available in [Petitioner's] designated classroom where [Petitioner] can sit or lie to rest. There are games and materials in the room that [Petitioner] can access during

> these times. [Petitioner] would continue to be supervised by an adult on at least a one-to-one ratio during these periods by the teacher, speech-language pathologist, and/or occupational therapist.
>
> Our purpose in considering an option of providing [Petitioner's] education on a school site is to gradually have Petitioner re-enter the educational system in as normal a manner as possible, including eventual instruction in small group settings with peers. I'm certain you agree that [Petitioner] deserves to be educated in the least restrictive environment possible. Brevard Public Schools can provide [a] setting for Petitioner on a school site that is safe. . . .

74. The IEP team met on October 15, 2007. The School District proposed returning Petitioner to a public school setting on a trial basis, with a partial day schedule and homebound instruction on days when Petitioner was too ill to attend school. [redacted] refused to agree to any instruction on a public school campus.

75. On October 19, 2007, counsel for Petitioner filed a request for Due Process Hearing to contest the School District's proposal to transition Petitioner into the public school setting. The reasons for requesting the due process hearing and detailed basis for the complaint were identical to those set forth in the instant proceeding, as quoted in the Preliminary Statement above. On November 14, 2007, the matter was forwarded

to DOAH for the conduct of a formal hearing. The matter was assigned DOAH Case No. 07-5223E.

76. Counsel for Petitioner filed a Notice of Dismissal with DOAH on December 3, 2007. A Final Order of Dismissal was entered on December 5, 2007.

77. The precise written terms of the parties' settlement agreement in DOAH Case No. 07-5223E were not entered into the record of this proceeding. In general, Petitioner's parents agreed to allow Dr. Olga Emgushov, a pediatrician with the Brevard County Health Department, to review Petitioner's medical records and to communicate directly with Dr. O'Hern and Dr. Davis. In exchange, the School District agreed to continue Petitioner's hospital/homebound placement services pending the results of Dr. Emgushov's review of the record, and to commence Petitioner's academic instruction at a later hour.

78. Petitioner's IEP team met on December 12, 2007. The team agreed to conduct a functional behavioral assessment. The team also discussed the issue of how to deal with Petitioner when Petitioner is having a seizure. The issue first arose in November 2007, when Ms. Ramsey restrained Petitioner during a seizure in an effort to prevent Petitioner from being hurt. [redacted] gave the School District a note from Dr. Davis, dated November 9, 2007, advising school personnel not to restrain Petitioner during seizures, to avoid injury and escalation of the seizure.

The School District agreed to follow the seizure plan submitted by [redacted], in which the teacher or therapist would leave the room during a seizure, leaving Petitioner's medical care to the parent or caregiver.[8]

79. It took until February 14, 2008, for the School District to coordinate with [redacted] in obtaining the formal authorizations for Dr. Emgushov to review Petitioner's medical records and talk with the doctors. Dr. Emgushov then began the process of obtaining the records from the physicians. She reviewed Dr. Davis' records on February 20, 2008. The process of coordinating with Dr. O'Hern's office extended into March 2008 due to scheduling conflicts.

80. Dr. Emgushov requested permission to observe Petitioner during instruction in his hospital/homebound setting, but [redacted] refused.

81. Dr. Emgushov was finally able to meet with Dr. O'Hern on April 1, 2008. She fully explained the School District's capabilities to Dr. O'Hern, outlining the measures it intended to put in place to ensure Petitioner's safety in the more traditional educational setting. Shortly after the meeting, Dr. Emgushov sent the following e-mail to Dr. Palladino:

> I just met with Dr. O'Hern and told him all I had done [and] reviewed. I explained what the school board and [redacted] had to offer. I also let him know about my meetings with [Petitioner's] teacher, [Petitioner's]

> future principal, and my tour of the facility. He agreed that this might be the next best step for our student. He said that he would let the mother know his intentions at the next visit, and suggested that she would probably feel betrayed by him, but that in terms of our student's best interest, starting into a school setting would be best for [Petitioner]. I am not sure where you want me to go from here, and continue to be available if needed. Thank you.

82. At the final hearing, Dr. Emgushov testified as follows regarding her meeting with Dr. O'Hern:

> He wasn't aware of all those things that the school was offering at the time, and he was actually very impressed. And stated that -- he stated that he was very impressed that the school board was willing to do this for [Petitioner]. And he shared with me that maybe he -- maybe he had been manipulated by the mother. And that he was going to change his mind and suggest that [Petitioner] go ahead and attend school in what the school board was offering [Petitioner] at the time.

83. On April 3, 2008, Dr. Emgushov sent the following e-mail to Dr. O'Hern:

> I just wanted to thank you for taking the time out to meet with me. I know that you have a very busy schedule, and I appreciate your time. I also just wanted to let you know that I shared your decision to talk with our student's mother and recommend that [Petitioner] attend school with Dr. Palladino at the school board. As I stated at our meeting, they have reassured me that they will take every precaution that you feel is medically necessary to ensure [Petitioner's] safety, such as arriving at a different time, through a different door, in [Petitioner's] own dedicated classroom and

> bathroom. I did neglect to tell you that [Petitioner's] teacher will have a walkie-talkie to stay directly contacted with the school nurse who can come running at a moment's notice. She is an RN who is comfortable handling seizures and demonstrated a willingness to really step up to assist if needed. Thank you again for your time, and I remain available for any further assistance.

84. Dr. O'Hern responded to Dr. Emgushov's e-mail on the same date, writing as follows:

> Thank you for your kind note. It was a pleasure meeting you and assisting with the well-being of [Petitioner] and [Petitioner's] family. The school system is obviously going above and beyond to meet the needs of this special child. Looking forward to working with you in the future.

85. On May 8, 2008, Dr. Davis issued his written recommendation that Petitioner remain in his hospital/homebound placement. Dr. Davis also recommended that Petitioner continue to receive services through the summer, in the interest of keeping Petitioner's routine "continuous and stable."

86. On May 21, 2008, Dr. Livingston wrote the following recommendation:

> [Petitioner] has been followed by the Pediatric Pulmonary Division [of Nemours Children's Clinic] with the history of Asthma -- mild-persistent. Pt has IgA deficiency, Esophageal Reflux, Allergic Rhinitis, Intermittent Tachypnea due [to] ventilation perfusion mismatching. [Petitioner] needs to remain hospital homebound to prevent future morbidity and recurrent hospitalizations.

87. On May 28, 2008, Dr. O'Hern wrote the following letter "To Whom It May Concern," which was provided to the School District by [redacted]:

> After careful review of [Petitioner's] medical history over the past year and review of records from [Petitioner's] neurologist and pulmonologist, it is my sincere opinion that [Petitioner] cannot attend school outside of [Petitioner's] home for the year 2008-2009. [Petitioner] is a medically fragile child with complex diagnoses including autism, celiac disease, immune deficiency, seizure disorder and asthma. [Petitioner] continues to have intermittent random severe sleep disturbances and chronic GI problems, especially if [Petitioner] is subjected to gluten products. [Petitioner] has severe sensory integration issues, is claustrophobic, and has problems with light and noise.
>
> It is my professional recommendation that [Petitioner] remain in [Petitioner's] current school placement of Hospital Homebound and that services will continue throughout the summer, including the July break in 2008. [Petitioner's] routine must have a stable and continuous characteristic, which I believe will not be achieved in a classroom setting as proposed by the Brevard County School Board. Previous attempts have caused Petitioner to regress with health problems that have lasted over one years [sic] duration. I do believe that ultimately [Petitioner's] overall needs will be benefited from further social integration and I would recommend that the school placement issue be reviewed on a yearly basis.

88. An IEP team meeting was held on June 4, 2008. The team reviewed the statements received from Petitioner's physicians in May 2008. The team discussed transitioning Petitioner from Petitioner’s hospital/homebound placement to a public school placement. The School District members of the IEP team agreed that Petitioner should be educated at school with the implementation of a transition plan beginning on June 11, 2008, concluding that "being educated in as normal an instructional environment as possible is FAPE for [Petitioner]." Petitioner's parents disagreed with a return to school on the basis that Petitioner's medical needs prevented Petitioner from attending a public school campus.

89. The placement recommendation of the IEP team was as follows:

> Homebound Placement to continue through June 10, 2008.
>
> A Transition Plan for return to school classroom setting will be implemented beginning June 11, 2008, [and] will go through July 10, 2008.
>
> A Special (separate) class setting at a public school will be [Petitioner's] placement beginning June 11, 2008. The Special Class on school campus will be provided for [Petitioner] and will begin as a classroom (resource size classroom) that will be used only by [Petitioner]. The ESE teacher, speech-language pathologist, and occupational therapist will instruct Petitioner in this classroom. A teacher assistant will be available to provide

> breaks to the ESE teacher on occasion. A school nurse will be on campus at all times that [Petitioner] is at the school site. All adults working with [Petitioner] will be trained in [Petitioner's] health needs, dietary needs, and behavioral plan. The classroom will be prepared with all environmental considerations provided for [Petitioner's] health and behavioral needs including constant supervision. Special considerations include gluten-free materials in classroom; gluten-free cleaning products for classroom; refrigerator in classroom to keep [Petitioner's] food and drinks separate from any other food/drinks; walkie-talkie for teacher; sleeping mat for rest periods; sensory materials for emotional regulation; visual schedule in the classroom; temperature controlled classroom. If [Petitioner] rides the district school bus, an assistant or the ESE teacher will ride the bus with [Petitioner] and walk [Petitioner] to the classroom. [Petitioner] will arrive at school after the other students have all gone to their classroom. If [Petitioner's] parent brings [Petitioner] to school, the ESE teacher, SLP, OT, or teacher assistant will meet [Petitioner] at the car loop and will walk with [Petitioner] to the classroom. The Transition Plan provides for novel adults to meet [Petitioner] prior to the start of the school year on August 18, 2008.

90. In a letter dated June 6, 2008, and titled "Prior Written Notice Regarding IEP for [Petitioner]," Dr. Palladino informed Petitioner's parents that the School District refused to agree to continue hospital/homebound instruction for Petitioner for the extended 2008 school year and for the 2008-2009 academic year. Dr. Palladino wrote that the School District members of the IEP team refused to recommend continued

instruction in the home setting because that is not Petitioner's least restrictive environment.

91. In her letter, Dr. Palladino described the proposed placement as follows, in relevant part:

> This transition plan requires your family's support in order that [Petitioner] will accept and look forward to coming to [Petitioner's] classroom at school. The school has taken numerous steps to assure that [Petitioner's] classroom will be safe for [Petitioner] in light of [Petitioner's] medical needs. To address [Petitioner's] physicians' concerns, the IEP team has made the provision for [Petitioner] to begin at [redacted] in a resource-sized classroom specially cleaned with gluten-free products. I told you at the IEP meeting that the District had purchased gluten-free products for [Petitioner] such as art materials, paper, books, soap, paper towels, etc. based on a gluten-free products list you provided to us earlier. You stated that this list is no longer accurate. We asked you to either provide us a current list or we offered to reimburse you for the cost of these items if you could purchase those items. If you decide to do neither, the District will purchase these materials for [Petitioner's] classroom based on our review of the ingredients for each item. In addition to the clean classroom (no carpet) and gluten-free materials, the classroom will be set up initially for only [Petitioner] and [Petitioner's] teacher and therapists. Eventually, the plan is to introduce age-peers into the classroom and to introduce [Petitioner] to other parts of the school including the playground. This gradual introduction of age-peers and other environments in the school will be carefully monitored and will be discussed with you prior to implementation. All adults working with [Petitioner] at school will be trained

> in [Petitioner's] medical needs, dietary restrictions, and behavioral needs. [Petitioner] will have constant 1:1 supervision by a trained adult. [Petitioner's] drinks and snacks will be sent from home and will be kept in a refrigerator in the classroom that is designated only for [Petitioner's] food/drinks. Not even the teacher will use this refrigerator for her/his food or drinks. Provisions will be made for [Petitioner] to have rest breaks as needed, a visual schedule will be available, a walkie-talkie will be in the classroom for emergency calls, a registered nurse is at the school at all times, the classroom is temperature controlled, and [Petitioner] will arrive and leave school at times that other children are not passing in the hallways. Any other concerns you or [Petitioner's] physicians [have] in regard to [redacted] Elementary, can be presented to me and I will address them. . . .

C. Petitioner's current hospital/homebound placement

92. Petitioner's current academic instructor in the hospital/homebound placement is Stephanie Weaver, who teaches Petitioner in the home Monday through Friday. On Monday, she teaches Petitioner from 12:30 p.m. until 3:45 p.m.[9] On Tuesday through Friday, she teaches Petitioner from 11:45 a.m. until 3:00 p.m.[10] Petitioner takes language therapy from 10:15 a.m. to 11:00 a.m. on Tuesday and Wednesday, and occupational therapy from 10:00 a.m. to 11:15 a.m. on Friday.[11]

93. Ms. Weaver arrives at the home and is met at the front door by either [redacted] or Jewel Patterson, the caretaker (see endnote

8, supra). On a typical day, [redacted] will fill in Ms. Weaver on Petitioner's condition: whether Petitioner is feeling well, whether Petitioner had a seizure during the night, and whether [redacted] believes Petitioner will be able to do academic work that day. If Petitioner has had a particularly rough night, due to illness or lack of sleep, Petitioner will wear pajamas during instruction.[12]

94. The family has dedicated the largest room in their house, a screened-in patio that was enclosed and converted to a playroom, to Petitioner's homebound classroom. The room is large enough to hold a desk and chairs for instruction, and, in a separate area, a computer desk with chairs. There are windows or glass doors on all sides of the room, allowing [redacted] to observe Petitioner's instruction from anywhere in the house.

95. Ms. Weaver enters the playroom, pulls down the shades (Petitioner is very light-sensitive), then begins teaching. As of the date of the hearing, Petitioner was performing academic work at the fourth grade level, though Petitioner was not taking the full fourth grade curriculum. When health permits, Petitioner is able to focus consistently on school work, though Petitioner requires frequent breaks. Petitioner’s instruction is broken into 15 or 20 minute segments, with breaks between every change in activity.

96. Petitioner communicates by means of a "Mini Mo," a handheld, touch-screen device manufactured by DynaVox Systems and provided at no cost to Petitioner by the School District. The Mini Mo is programmed with pictures, symbols, numbers and the alphabet on the touch screen. When Petitioner touches something on the screen, the Mini Mo verbalizes the symbol that Petitioner touched. For example, if Petitioner touches the numeral "5," the Mini Mo will "speak" the word "five." Among other things, Petitioner's Mini Mo is programmed with books, pages for math, for art activities, symbols for the teacher, and a symbol that represents "seizure coming."

97. [redacted] testified that there are days when Petitioner receives instruction at home when she would not send Petitioner out to school, such as when Petitioner has had only two hours of sleep, has had clusters of seizures during the night or has severe diarrhea. At home, Petitioner can be changed or given a bath right away by [redacted] or Ms. Patterson after an incident of diarrhea. [redacted] also expressed the concern that school personnel would not notice some of Petitioner's seizure activity, and could not deal with Petitioner's emergency asthma treatments.

98. Ms. Weaver testified that [redacted] is often overly pessimistic about Petitioner's ability to perform on a given day. [redacted] will frequently tell Ms. Weaver about Petitioner's rough night and express her belief that Petitioner will not be

able to do the school work. Ms. Weaver stated that, contrary to [redacted]'s warnings, she has never had a problem with Petitioner's performing the school work.[13]

99. On one occasion, Ms. Weaver was in the playroom alone with Petitioner when the child had a seizure:

> [Petitioner] was blinking [Petitioner's] eyes very fast and then [Petitioner], all of a sudden, just stared off. And then [Petitioner] tried to close, like, [Petitioner] was focusing. [Petitioner] stood up and fell. And I said, "Do you want your mommy? Are you okay?" And [Petitioner] got up and went towards the door and fell again right by where the computer was and [Petitioner] -- I was afraid, because [Petitioner] was right close to it. I thought [Petitioner] hit [Petitioner's] head or something, but [Petitioner] didn't. So, I opened the door and said, "[redacted]," and she came right then. She was right there . . .
>
> She comforted [Petitioner]. She said, "[Petitioner], are you okay, honey?" And then she told me that was a seizure. And she sat on the floor with [Petitioner] and pretty much comforted [Petitioner], held [Petitioner]. That's about it. And we waited about -- I want to say about 20 minutes and then [Petitioner] seemed to be okay. [Petiitoner] was not as rambunctious as [Petitioner] is. [Petitioner] was a lot of -- subdued, but [Petitioner] came back to the table and worked the rest of the afternoon.

100. Petitioner's father, [redacted], testified that Petitioner has made "tremendous progress" in the homebound program. [redacted] testified that she is "absolutely" happy with Petitioner's

educational progress in the homebound placement, and that Ms. Weaver is an outstanding teacher, very professional and very prepared. Ms. Weaver likewise spoke highly of Petitioner's parents, calling them "very supportive, very helpful," and expressed the opinion that Petitioner is "wonderful . . . like sunshine every day. Petitioner is great."

D. Least restrictive environment: hospital/homebound, or special classroom?

101. Petitioner's regular physicians, Dr. O'Hern and Dr. Davis, testified at length and were of the opinion that, due to Petitioner's precarious health, the hospital/homebound placement represented the least restrictive environment in which Petitioner could make educational progress. Dr. Emgushov could see no reason why Petitioner could not receive instruction in the special classroom at [redacted] Elementary. Several witnesses from the School District, including Dr. Palladino and Ms. Treadwell, concurred that the school setting constitutes Petitioner's least restrictive educational environment.

102. Dr. O'Hern is the physician most intimately familiar with Petitioner, having seen Petitioner on an average of every two weeks for most of the child's life. He acknowledged that Petitioner is not completely "homebound" as that term is generally used. Petitioner has been to Disney World, and Petitioner’s father sometimes takes Petitioner to the beach.

Petitioner accompanies Petitioner’s parents to church and to the grocery store.

103. Dr. O'Hern testified that it has never been his opinion that Petitioner cannot be out in public, only that Petitioner’s exposure should be limited when Petitioner is sick or having frequent seizures. When Petitioner is away from home, Petitioner "needs to be free from gluten, Petitioner needs to be handled with good hand washing and not direct exposure to somebody who's sick." Dr. O'Hern also specified that Petitioner must be in a "guarded environment," with people who know how Petitioner normally behaves and who can assess whether Petitioner is having a seizure or problems with asthma.

104. Dr. O'Hern sees a "tremendous difference" between Petitioner going to Disney World for one weekend with Petitioner’s parents and going back to a classroom situation on a full time basis. Going back to school creates a chronic situation in which Petitioner is wrenched out of familiar surroundings without the safety net provided by Petitioner’s mother. At Disney World, [redacted] could observe Petitioner and judge for herself whether Petitioner was able to continue or needed to go home. When Petitioner is in school, [redacted] will have to rely on the assessments of others, "on a day-to-day-to-day basis."

105. Dr. O'Hern testified that [redacted]'s knowledge of Petitioner and her ability to respond to Petitioner’s needs

exceeds that of the RNs who work in his office. He could name no other parent in his experience who knows her child's needs and supplies them better than [redacted]. Dr. O'Hern believed that [redacted]'s presence is vital to Petitioner's medical welfare:

> She knows Petitioner intimately. She knows the medications, she guards those medicines, she reassesses them all the time.[14] She's had experience with [Petitioner's] atypical seizures . . . she's able to recognize them. She knows when [Petitioner] has lack of sleep. She knows when [Petitioner] is having feeding issues. She knows when [Petitioner] is having light issues. She knows when [Petitioner] is claustrophobic. And the list keeps on going. . . . I have no other parent that knows their child's needs and supplies them better than [redacted].

106. Dr. O'Hern did not visit [redacted] Elementary to inspect the classroom, but is familiar with the school by virtue of his own children having attended it. Dr. O'Hern could see no reason for trading the "optimal environment" provided by Petitioner's home for a situation that would give Petitioner none of the benefits of going to school, such as "interpersonal association, to be around other kids and lead a relatively normal life." Dr. O'Hern did not believe that "a sanitized classroom with a single teacher in an isolated room is any different from home where Petitioner is being educated."

107. Dr. O'Hern stated that his ultimate goal was to see Petitioner go to school, but that his prognosis on that score was guarded. Petitioner's medical stability is fragile, and

could fall apart at any time. He likened each day with Petitioner to sending fragile glassware through the mail: "You can't predict that [Petitioner's] day is not going to be broken." Dr. O'Hern testified that he would not state that Petitioner can be in a public school, regardless of the setting provided by the School District, "[u]ntil I have assurance that Petitioner is progressing, meaning in Petitioner's medical condition. . . ." He held open the possibility that as Petitioner matures, Petitioner may learn more socially acceptable behaviors, Petitioner's seizures might lessen, and Petitioner might be able to attend school.

108. As more fully set forth in Findings of Fact 81 through 84, supra, Dr. Emgushov testified and wrote in contemporaneous correspondence that Dr. O'Hern had changed his mind about Petitioner's attending school after his meeting with Dr. Emgushov on April 1, 2008. At the hearing, Dr. O'Hern denied having told Dr. Emgushov that he had changed his mind. Dr. O'Hern testified that Dr. Emgushov's version of their conversation was "an incomplete statement," and that he actually told her that "the goal is for Petitioner to attend school, but not necessarily at this time."

109. On this point, Dr. O'Hern's testimony cannot be credited. Two days after their meeting, on April 3, 2008, Dr. Emgushov sent Dr. O'Hern an e-mail that plainly presumed

their agreement that Petitioner will begin attending [redacted] Elementary. See Finding of Fact 83, supra. Far from correcting what Dr. O'Hern now claims was Dr. Emgushov's misapprehension of his position, Dr. O'Hern responded that the School District was "obviously going above and beyond to meet the needs of this special child," and anticipated working with Dr. Emgushov in the future. See Finding of Fact 84.[15]

110. Dr. O'Hern somewhat softened and qualified his denial of Dr. Emgushov's statements with the following:

> I was looking at it from the standpoint, yes, [Petitioner] is going to be, quote, "in a gluten free environment," [Petitioner] is going to be in a room that's totally isolated. And then after review, I said, what difference has that given [Petitioner] in terms of [Petitioner's] educational benefit? And I, after review, I said, no. It hasn't changed the goal. So why increase the risk without the benefit?
>
> I always look at -- good doctors, any doctor should be looking at risk/benefit. When we give immunizations, there's risks [sic] that it may hurt the child, but the benefit overwhelms the risk. When I give medicine to a child, there's risk, but the benefit is there. When I see . . . the change that has been offered, I don't see any increased benefit. I just see increased risk.

111. This quotation provides a fairer and more complete understanding of Dr. O'Hern's position. It is clear that, despite his denial, he was persuaded by Dr. Emgushov that Petitioner should be placed in the program offered by the School

District at [redacted] Elementary.[16] Then Dr. O'Hern discussed the matter with [redacted] and had second thoughts, eventually arriving at the conclusion that the School District was offering no additional educational benefit to offset the increased medical risk that Dr. O'Hern found inherent in removing Petitioner from the homebound environment.

112. In his "risk/benefit" analysis, Dr. O'Hern employed the analogy of a physician giving immunizations, in which there is a clear risk to the patient's health that are "overwhelmed" by the benefits of immunization to the patient's health.

113. At this point, Dr. O'Hern's explanation becomes problematic: in the case of Petitioner's proposed placement in school, Dr. O'Hern is explicitly weighing the health risk against the educational benefit. Dr. O'Hern's opinion regarding the health risk is that of an expert pediatrician, trained at the highest levels of his profession and possessed of more than 30 years' experience. Dr. O'Hern's opinion regarding the educational benefit of Petitioner's placement is that of a layman with no particular experience or expertise in the IDEA or ESE,[17] rendered less reliable by the fact that Petitioner's parents have gone to some pains to keep Dr. O'Hern separated from School District personnel. Dr. O'Hern freely conceded that, aside from his meeting with Dr. Emgushov, he has had no contacts with anyone from the School District regarding

Petitioner, and that all of his knowledge regarding Petitioner's education has been filtered to Petitioner by [redacted].

114. Dr. O'Hern's opinion regarding the increased health risk that Petitioner would encounter by returning to school is entitled to credit. Petitioner presents a complex combination of diagnoses. His various maladies can interact in various ways that cause a cascade of symptoms and a downward spiral of poor health. In the year immediately preceding the hearing in this matter, Petitioner's condition was comparatively stable, though Dr. O'Hern cautioned that this was a fragile stability.

115. Dr. O'Hern did not flatly state that he believed the School District incapable of taking the precautions necessary to minimize risks to Petitioner's health. Some of the precautions Dr. O'Hern noted were relatively simple, such as good hand washing and keeping Petitioner away from sick people. Dr. O'Hern testified that he did not accept the School District's statements that it is capable of maintaining a sanitized, gluten-free classroom. However, he conceded that his only basis for that opinion, aside from the ubiquity of gluten in the world at large, is [redacted]'s statements on the issue.[18] Similarly, Dr. O'Hern's opinion that the School District could not respond effectively to Petitioner's seizures was based mainly on the statements of [redacted].

116. Dr. O'Hern believed that [redacted]'s presence was an important reason for keeping Petitioner in the homebound placement. Dr. O'Hern's preference for keeping Petitioner in the home had to do with [redacted]'s ability to improvise in the home setting, depending on Petitioner's condition at any given moment, as opposed to the presumably more rigid "structured classroom setting" petitioner would encounter in the school. Dr. O'Hern found it "obvious that a school setting is not as adaptable as a home setting," though his prime example of this adaptability was the fact that [redacted] can easily cancel Petitioner's home instruction if he has had a bad night. Under cross-examination, Dr. O'Hern conceded that [redacted] would be able to keep Petitioner at home from school if the child were ill, and that his office would write a note to the school to excuse Petitioner's absence, just as it does when [redacted] cancels home instruction due to Petitioner's illness or physician's appointments.[19]

117. Dr. Palladino's letter provided to [redacted] at the September 10, 2007, IEP meeting, specifically stated: "There is a full time registered nurse assigned to the school." Ms. Treadwell's October 15, 2007, letter to Mr. Kamleiter stated: "Dr. O'Hern is probably not aware that there is a Registered Nurse at [redacted] Elementary who is at the school every

day." Dr. Palladino's letter of June 6, 2008, stated that "a registered nurse is at the school at all times."

118. In fact, the evidence at the hearing demonstrated that the school nurse at [redacted] Elementary is not a registered nurse (RN) but a licensed practical nurse (LPN). Dr. O'Hern succinctly explained the difference between the two:

> A registered nurse has a great deal of difference in education. They are taught to not just follow orders; they are taught to make assessments and are taught to make medical decisions on a nursing level that LPNs are not. LPNs are technicians. They are taught to do a blood pressure, but they don't know what an elevated blood pressure means, whereas a registered nurse knows when to call a doctor and why.

119. Dr. O'Hern believed that even an RN could not assess Petitioner's medical needs and provide appropriate treatment as well as [redacted], for the reasons set forth in Finding of Fact 104, supra. He believed that an LPN would be totally inadequate for anything other than administering prescribed medications.

120. Dr. Davis testified that an LPN should be able to administer the medications that Petitioner needs, but also stated that there is an element of assessment in providing seizure medications to Petitioner that could be beyond the LPN's skills and necessitate a call to 911. However, at another point in his testimony, Dr. Davis stated that he would trust [redacted] to

train a layperson to administer Petitioner's seizure medications.

121. Pamela Cooper Hamilton, the assistant nursing director for the Brevard County Health Department, agreed with Dr. O'Hern that an RN is taught the theory behind the procedures she performs, and is therefore more capable than an LPN of training others to perform procedures. However, Ms. Hamilton stated that an LPN can perform the same procedures that an RN can perform, and that the LPN at [redacted] would be capable of responding to Petitioner's seizure activity. In the event of a situation beyond her capability, the LPN could phone Petitioner's physician or, following Health Department protocols, could call 911.

122. Ms. Hamilton was aware of Dr. O'Hern's concerns, but was firmly convinced that her LPNs are capable of assessing Petitioner in order to administer PRN ("as needed") medications. Other students at the school require nursing services, including the administration of rectal Diastat. About 20 other students in the School District have frequent seizures, and three or four other students have celiac disease. The LPNs carry out whatever orders they receive from the physician, and Petitioner's medical needs are not extremely unusual.

123. Dr. O'Hern is persuasive that [redacted] knows the subtleties of Petitioner's behavior and the manner in which Petitioner's

symptoms present themselves better than any RN or LPN could when first working with Petitioner. Dr. O'Hern is also persuasive that an RN would be preferable to an LPN in the school setting. However, it is found, based on all the evidence, that an LPN would be capable of learning to assess Petitioner and of taking appropriate steps to treat Petitioner in the school environment.

124. Accepting that the School District is able to keep Petitioner free from exposure to gluten, the chief medical concern for Petitioner at school would be seizure activity. There are two elements to this concern. First, whether placing Petitioner in a school setting will cause more seizures and, second, whether the school can adequately care for Petitioner when the inevitable seizures occur.

125. As to the first element, Dr. Davis, Petitioner's neurologist, wrote a letter to the School District, dated July 3, 2008, setting forth his expert view as follows, in relevant part:

> [Petitioner] has been a patient of my practice for the past 7 years. During that time, I have seen the effects of the multiple health issues that [Petitioner] deals with on a day to day basis. My decision to keep [Petitioner] on hospital homebound is not based on one exam; it is on the complexity of [Petitioner's] various diagnoses and what has happened over time. [Petitioner] is a medically fragile child who presents with increased seizure activity when under physical or emotional stress. [Petitioner] needs monitoring of

> [Petitioner's] parents so they can be the ones to make regular medical decisions.
>
> My recommendation that [Petitioner] remain with [Petitioner's] current hospital homebound placement remains firm. My hope is that the district will stop with their efforts to force this child into an inappropriate environment that would ultimately place Petitioner at medical risk. It is very important to keep [Petitioner's] routine continuous and stable. I feel that stopping services could cause Petitioner to regress. . . .

126. When asked in his deposition what prompted Petitioner to write this letter, Dr. Davis answered:

> I've dealt with [Petitioner] now for a long time and, you know, again, I feel like with [Petitioner's] triggers, [Petitioner] does best, I'll be honest with you, [Petitioner] does best at home. And you know, if [Petitioner] has lots of breakthrough seizures, I'll also be frank with you, it makes my job harder. So, if I am able to minimize [Petitioner's] breakthrough seizures and improve [Petitioner's] quality of life, and with the relationship I may have with the parents in terms of the day-to-day activities and what they believe also leads to [Petitioner] being relatively stable, you know, if I think it's reasonable then I'm going to recommend it.

127. Dr. Davis concluded that Petitioner is "too medically tenuous" to attend school even under the conditions proposed by the School District:

> [T]o spend all that time and money on your hypothetical situation, to me, makes absolutely no sense in a child who otherwise has done well from a medical standpoint.

> [Petitioner] is not going to grow up and be a rocket scientist . . .
>
> [W]hen I have an opportunity to have [Petitioner] in an environment that's well controlled, that minimizes his breakthrough seizures and incorporates an opportunity of allowing my job to care for [Petitioner] to be better, why would I want to put [Petitioner] through that risk?

128. As to the school's ability to care for Petitioner when Petitioner has a seizure, Dr. Davis, like Dr. O'Hern, believed that Petitioner's parents are uniquely qualified to respond to Petitioner's distress signals. However, he conceded that a school nurse, even an LPN, could be instructed to care for Petitioner in the event of a seizure. As stated in Finding of Fact 122, supra, Ms. Hamilton was convinced that the school nurse at [redacted] could care for Petitioner during Petitioner's seizures.

129. Dr. Livingston, Petitioner's pulmonologist, testified that from his perspective, "it's probably worth a try" to place Petitioner in school with the protections offered by the School District, especially those designed to limit Petitioner's exposure to viral and bacterial infections.[20] Dr. Livingston specified that his opinion dealt only with Petitioner's asthma, not with the interplay of Petitioner's various other diagnoses. He stated that he would defer to the opinions of Dr. O'Hern and Dr. Davis regarding Petitioner's non-respiratory conditions.

130. It is noted that none of Petitioner's physicians visited the classroom at [redacted] or met with any school personnel (aside from Dr. O'Hern's meeting with Dr. Emgushov) to discuss the School District's proposed placement. They were entirely dependent on information provided by [redacted], who naturally took an adversarial position toward the School District that colored her reports to the physicians. It is also noted that the School District's proposed placement was described to the physicians during the course of their testimony, and that the physicians maintained their opposition to the proposed placement.

131. There is also in the physicians' opinions a clear element of acceding to the strongly held desires of Petitioner's parents. Dr. O'Hern was persuaded by Dr. Emgushov that Petitioner should be placed in school, but was apparently moved to change his mind again by [redacted]. These shifts cannot help but lessen the weight to be given to his expert opinion. Dr. O'Hern also conceded that he was relying on the parents' opinion that the School District would not be able to keep Petitioner away from gluten or respond effectively to his seizures. Dr. Davis emphasized the importance of stability to minimizing Petitioner's breakthrough seizures, but conceded that he was relying on Petitioner's parents to tell Petitioner what makes Petitioner "stable" on a day-to-day basis. Dr. Davis also

stated that [redacted]'s "level of comfort" with school personnel would influence his judgment as to the classroom placement.

132. On the School District's side, Dr. Emgushov testified that she could find no reason for Petitioner not to attend school in the setting offered by the School District. Her opinion was based on her discussions with School District personnel, her review of Petitioner's educational records, her review of the medical records provided by Petitioner's physicians, her examination of the classroom and other facilities at [redacted] Elementary, and a medical examination of Petitioner that she was allowed to conduct in preparation for the hearing in this case.

133. Dr. Emgushov's explanation for the opinions of Petitioner's physicians was that all their information came from [redacted], and they were therefore unaware of the lengths to which the School District was going to ensure Petitioner's safety at [redacted]. She had no answer for the fact that Petitioner's physicians continued to recommend home placement even after learning the details of the School District's proposal.

134. When presented with Dr. Davis' opinion that Petitioner's seizure activity would almost certainly increase at school, Dr. Emgushov stated as follows:

> I don't think he has all the facts that I have. In his deposition he stated he thought that stress -- increased stress,

> increased illnesses, things like that could trigger more seizures. The routine that they would set up for [Petitioner], in my opinion -- you know, any change in routine causes some stress, but the routine would be set up such that it would not try to increase [Petitioner's] stress. And [Petitioner] would have a routine every single day of learning. . . .

135. As to the need for Petitioner to maintain an unvarying routine, Dr. Emgushov noted that Petitioner was able to break out of Petitioner's routine and visit her office for Petitioner's examination. She again emphasized that the School District would do everything it could to maintain a constant routine for Petitioner at school.

136. Dr. Palladino[21] is the School District employee in charge of the hospital/homebound program. She has attended several of Petitioner's IEP meetings, and has visited the home several times over the years to observe Petitioner's instruction.

137. Dr. Palladino testified that when Petitioner was first approved for hospital/homebound placement, the School District accepted the physicians' medical statements at face value, not realizing that Petitioner would still be in the hospital/homebound placement six years later. Over the years, it became obvious that Petitioner was not confined to the home in the sense contemplated by the homebound program, as Petitioner traveled with [redacted] family on vacation trips and

occasionally accompanied Petitioner’s parents to the store, to church, and to the beach.

138. Dr. Palladino stated that the School District began questioning the physicians' recommendations because homebound is the most restrictive, isolated placement available. The School District began trying to establish communications with Petitioner's physicians, but learned that Petitioner's parents forbade such direct communications, on advice of counsel.

139. Dr. Palladino testified that it is very unusual for the School District to be denied contact with a student's physicians when the child is in a hospital/homebound placement. The physician's medical statement itself includes a form to be signed by the parent giving permission for the physician and the School District to exchange information regarding the student's medical condition and needs. Most parents are required to sign the statement in order to obtain the homebound service but, for reasons unexplained by Dr. Palladino, Petitioner received hospital/homebound services despite Petitioner’s mother's modification of the form to deny the School District direct contact with Petitioner's physicians.

140. Dr. Palladino explained that the physician's medical statement alone does not determine a student's placement on the hospital/homebound program. The decision is made by the entire IEP team. Dr. Palladino stated that, if the child is not

confined to the home and is not contagious, the team must determine whether the School District is able to make an appropriate environment available at a public school.

141. Dr. Palladino stated that the School District is nearly always able to persuade physicians that hospital/ homebound placement is not necessary. She attributed this common reversal of opinion to her ability to fully inform the physicians of the programs the School District offer. Dr. Palladino believed that most physicians who recommend hospital/homebound placement do so because they are not aware of the requirements that the IDEA places on school districts to accommodate the needs of eligible students, and therefore are not aware of the options available from the School District, such as the presence of school nurses and the availability of personal care assistants.

142. Dr. Palladino has supervised the hospital/homebound program for 17 years, and stated that Petitioner's homebound placement is by far the longest she has seen. In the previous school year, the School District had 254 students who had some condition on the autism spectrum but who attended school, including one child who also had an immune deficiency and seizure disorder.

143. Children with potentially fatal allergies to bee stings and peanuts attend school, and their teachers are trained

to administer medications in the event of allergic reactions. School nurses and assistants trained by the Brevard County Health Department administer rectal Diastat to students with seizure disorders. Dr. Palladino believed that the school nurse and other school personnel would be fully capable of responding to Petitioner's seizures.

144. Dr. Palladino testified that there are several autistic children in Brevard County schools who also have celiac disease. The School District has procedures in place to ensure that these children have a gluten-free environment. The School District has never had a child with celiac disease hospitalized from encountering gluten in the school, nor has it had to call 911 because of a child's reaction to gluten in the school. Dr. Palladino repeated the School District's offer to allow [redacted] to purchase all the products with which Petitioner would come into contact, and to reimburse [redacted] for those purchases.

145. Dr. Palladino rejected [redacted]'s argument that there are days when Petitioner is able to receive some instruction at home when he would be too sick or tired to attend school. Dr. Palladino pointed out that the School District deals with diarrhea every day.[22] She further observed that the school day can be fashioned to fit the needs of children who are autistic or have sleep disorders. The children are given time to rest between activities, and are allowed to take naps and long

lunches. Dr. Palladino testified that if Petitioner is able to take instruction in the home, then he can be accommodated in a way that would allow Petitioner to receive instruction in the classroom. She also held out the possibility of intermittent homebound placement if Petitioner is too sick to come to school.

146. After hearing all of the testimony from Petitioner's parents and physicians, Dr. Palladino concluded that the School District could provide all of the services, products, devices and interventions that Petitioner needs to function in a classroom setting. She stated that none of the interventions or therapies recommended for Petitioner is unusual for the ESE office. Dr. Palladino testified that there are students in the Brevard County schools who require much more medical intervention than Petitioner, and that the School District was prepared to commence transitioning Petitioner into a classroom placement immediately.

147. Dr. Palladino testified that she has an ethical obligation to provide Petitioner with an appropriate education in the least restrictive environment. Petitioner's physicians questioned the safety of the classroom; Dr. Palladino responded that the School District "can make that room as safe as Petitioner’s home, if not safer." She acknowledged that there is a "fear factor" and a lack of trust between the School District and Petitioner's parents, and she acknowledged the

complexity of Petitioner's medical condition, but she finally expressed an absolute conviction that the School District can provide Petitioner with a safe classroom setting.

148. The evidence taken as whole establishes that placing Petitioner in the classroom as proposed by the School District might entail some level of medical risk to Petitioner. Dr. O'Hern and Dr. Davis stressed Petitioner's medical fragility, the interplay of his disabilities, the constant changing of Petitioner's medications, and Petitioner's need for a precisely controlled environment, all of which the School District concedes are real concerns.

149. No witness was able to quantify the risk involved in placing Petitioner in the classroom proposed by the School District. The procedures proposed by the School District to prevent exposure to gluten are sufficient, if they are strictly followed. Two of Petitioner's physicians and Petitioner's mother are skeptical as to the school's ability to maintain a gluten-free environment, based on Petitioner's prior experience at [redacted] Elementary and on instances in which [redacted] believed that School District personnel inadvertently brought products containing gluten into Petitioner's home.

150. The School District responds that Petitioner has been exposed to gluten in the home, despite the best efforts of Petitioner's parents, and that there is no reason beyond [redacted]'s

inchoate suspicions to believe that the School District is incapable of maintaining a gluten-free environment for Petitioner in the narrow confines of the classroom. The School District maintains such an environment for other students. There would be more potential for gluten to be introduced into the classroom than into the home because there are more people in the school setting[23] and because [redacted] would not be present to act as a gatekeeper in the classroom. Nonetheless, the undersigned is unwilling to presume that the School District will not follow the entirely adequate protocols it proposes in the June 4, 2008, IEP.[24]

151. The most serious medical concern is whether the change to a classroom setting would cause increased stress to Petitioner, thereby causing breakthrough seizures. Dr. Davis was virtually certain that changing Petitioner's homebound routine would cause seizures, because of Petitioner's need to avoid triggers such as stress. Dr. Davis repeatedly noted that Petitioner was currently in a period of relative stability in Petitioner's homebound placement, and that he could therefore see no reason to change that situation. However, Petitioner's medical history shows that the homebound placement has been no guarantee of stability. Most of Dr. Davis' struggle to control Petitioner's breakthrough seizures has taken place while Petitioner has been in Petitioner's current homebound placement.

152. Dr. O'Hern testified that Petitioner is affected by the seizure disorder virtually every day, despite medications, even in the current homebound setting. Dr. Davis agreed that medication cannot prevent epileptic seizures. Dr. Davis testified that Petitioner can have breakthrough seizures caused by triggers such as stress, or can have breakthroughs "for no apparent reason," and that such fluctuations between apparent control and breakthrough seizures are "the nature of the beast with epilepsy." Petitioner will have weeks with no significant seizures occurrences, then months of dealing with breakthrough seizures and medication adjustments.

153. [redacted] expressed the concern that a teacher will miss things that she would notice, such as an impending seizure. However, [redacted] also testified that she was able to train Ms. Patterson, a high school graduate with no medical training aside from a CPR certification, to recognize an imminent seizure in Petitioner and that she is comfortable leaving Petitioner in the care of Ms. Patterson for short periods of time. Dr. Davis expressed his trust in [redacted] to train a person to administer oral Valium or rectal Diastat to Petitioner. Ms. Hamilton, the assistant nursing director, testified that a teacher could be trained to respond correctly to a seizure in the absence of the school nurse. There is no reason to suppose that Petitioner's

classroom teacher cannot be trained to observe Petitioner and to act accordingly.[25]

154. The School District would provide Petitioner with a structure and routine similar to his homebound program, including breaks and rest periods. The evidence established that Petitioner is able to deal with novel settings outside the home, at least for short periods. This evidence gives credence to the School District's belief that Petitioner can handle the transition into the classroom setting if Petitioner's family cooperates to ease Petitioner into the new routine with as little stress as possible. Of course, the School District will have to prepare a plan for intermittent homebound placement in the event that Petitioner is medically unable to function in the classroom environment.

155. Petitioner is not "homebound" in the usual meaning of the term. Petitioner is physically capable of leaving home, and none of Petitioner's physicians has ever recommended that he be confined to the house. Two of Petitioner's physicians, Dr. O'Hern and Dr. Davis, have opined that Petitioner should remain in the homebound placement, though they concede that Petitioner's complex of medical complaints render Petitioner's condition mercurial in any environment. Two other physicians with more limited exposure to Petitioner, Dr. Livingston and

Dr. Sullivan, have opined that Petitioner should try public school again.

156. Petitioner has been in the hospital/homebound program since February 2004, a five-year span that includes months-long periods of illness as well as the current period of relative stability. One cannot attribute the medically stable period to the homebound placement while disregarding the fact that Petitioner has also been very sick in the homebound placement. Petitioner is medically fragile, regardless of the location. It makes sense, as Dr. Emgushov stated that a period of relative medical stability would be the ideal time to attempt the transition to a classroom placement.

157. The evidence, taken as a whole, does not establish that Petitioner will be appreciably more at risk in the isolated classroom setting proposed by the School District than in Petitioner’s current homebound placement, provided that all parties -- parents, physicians, school personnel -- work together to ensure the success of Petitioner's transition.

158. The final issue is whether the proposed IEP offers educational benefit to Petitioner. Dr. O'Hern asked why a sanitized, isolated classroom with a single teacher is any different from Petitioner's current homebound placement. If Petitioner's educational situation is going to be virtually the same in school as in the homebound placement, what is the point

of subjecting Petitioner to any potential health risk by forcing Petitioner to make the transition into a strange setting?

159. The evidence indicated that Petitioner will receive the same academic instruction, occupational therapy, and speech/language therapy as Petitioner would receive in the homebound program. However, the School District points to educational values beyond the programmatic aspects of Petitioner's IEP in support of the classroom placement.

160. Ms. Weaver, Petitioner's current homebound teacher, testified on this point as follows:

> I think, knowing how [Petitioner] is, I think that [Petitioner] would actually become more independent, because [Petitioner] would have a schedule. [Petitioner] would be able to come to school and have a purpose; whereas, when I go to the home, [Petitioner] has so much there and [Petitioner is] like all different directions and everything.
>
> And at least, I think if [Petitioner] has a purpose, gets up in the morning, gets dressed, goes to school and comes to school and that's [Petitioner's] world right there, it gives Petitioner, like, a little bit of independence. And I think it would help Petitioner as far as to maybe where [Petitioner] can see other children and -- even if they don't [have] contact with [Petitioner], [Petitioner] will see other children and be around the world, you know, open the world up a little bit. I think [Petitioner] is maybe like in a little bubble right there and it's not letting [Petitioner] experience what's out there . . .

> And I think [Petitioner] would blossom. I think [Petitioner] really would if [Petitioner] had an opportunity to maybe experience the world outside of that room. . . .

161. Dr. Palladino expressed similar sentiments regarding the value of opening up the world to Petitioner, and of providing Petitioner with a routine outside of the home that could lead Petitioner to greater independence. Further, the June 4, 2008, IEP views the isolated classroom setting as a transition period that the School District hopes will lead to some meaningful form of communication and contact with Petitioner's peers in the future.

162. As more fully explained in the Conclusions of Law below, the School District's burden is not to demonstrate that the proposed IEP offers maximum educational benefit, or to demonstrate the educational superiority of the classroom placement over and above Petitioner's current homebound placement. Rather, the School District is required to provide FAPE to Petitioner by developing an IEP that is reasonably calculated to confer educational benefit on Petitioner. The classroom placement is the least restrictive environment in which Petitioner can be expected to make educational progress. The proposed June 4, 2008, IEP is reasonably calculated to provide Petitioner with meaningful educational benefit while

accommodating Petitioner's disabilities within the meaning of the IDEA.

CONCLUSIONS OF LAW

163. DOAH has jurisdiction over the subject matter and the parties of this proceeding pursuant to Subsection 1003.57(1)(e), Florida Statutes (2008)[26], and Florida Administrative Code Rule 6A-6.03311(11).

164. Petitioner has the burden of proof to establish, by a preponderance of the evidence that the IEP developed by the School District does not comport with the IDEA and does not provide for FAPE. See Schaffer v. Weast, 546 U.S. 49 (2005).

165. Petitioner has strenuously urged that Schaffer dictates the School District has the burden of proof in this proceeding. The express holding of Schaffer is as follows:

> If parents believe their child's IEP is inappropriate, they may request an "impartial due process hearing." § 1415(f). The [IDEA] is silent, however, as to which party bears the burden of persuasion at such a hearing. We hold that the burden lies, as it typically does, on the party seeking relief.

Schaffer, 546 U.S. at 51 (Emphasis added).

166. The Court's holding is less than pellucid, as it fails to state in plain words who is the "party seeking relief" in a typical due process hearing. In other words, who is the party "asserting the affirmative of an issue" before this

administrative tribunal? See Young v. Department of Community Affairs, 625 So. 2d 831, 833-834 (Fla. 1993).

167. Petitioner argues, with some logical force, that Schaffer places the burden on the School District because it is the party seeking to disturb the status quo. The most recent mutually agreed upon IEP provided for a hospital/homebound placement for Petitioner. The June 4, 2008, IEP was not agreed to by Petitioner's parents. Petitioner points to the Schaffer court's favorable citation to McCormick for the proposition that the burden of proof should be assigned to the party "who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." Schaffer, 546 U.S. at 56, quoting J. Strong, McCormick on Evidence (5th ed. 1999), § 337 (Emphasis added).

168. Petitioner contends that it is the School District that seeks to "change the present state of affairs" by unilaterally imposing a classroom placement on Petitioner. In this view, the most recent agreed-upon IEP enjoys a presumption of validity, and it is the School District that is mounting a challenge to this presumptively valid IEP by attempting to force Petitioner into the new placement set forth in the arbitrarily adopted June 4, 2008, IEP.

169. In Petitioner's view, Schaffer required the School District to file for a due process hearing in order to impose the June 4, 2008, IEP on Petitioner. Because the School District attempted to force acceptance of the new IEP without benefit of a due process hearing, Petitioner was forced to defensively file for Petitioner's own due process hearing in order to protect Petitioner's rights under the IDEA. Petitioner argues that such a defensive filing should not deprive Petitioner of the benefit of the burden of persuasion, which is rightly placed on the School District as the party seeking to change the present state of affairs.

170. Petitioner's position is not without appeal. The Schaffer case itself acknowledges a strong minority position in which several states have overridden the default rule and placed the burden of persuasion in IDEA due process cases always on the school districts. Schaffer, 546 U.S. at 61-62.[27] Even in the absence of state intervention, the district court in Schaffer placed the burden of persuasion on the school district. 546 U.S. at 55.

171. However, the facts of Schaffer make it clear that the Supreme Court intended for the Petitioner to bear the burden of persuasion in the typical IDEA due process proceeding. The court briefly set forth the facts of the case as follows:

> This case concerns the educational services that were due, under IDEA, to petitioner Brian Schaffer. Brian suffers from learning disabilities and speech-language impairments. From prekindergarten through seventh grade he attended a private school and struggled academically. In 1997, school officials informed Brian's mother that he needed a school that could better accommodate his needs. Brian's parents contacted respondent Montgomery County Public Schools System (MCPS) seeking a placement for Petitioner for the following school year.
>
> MCPS evaluated Brian and convened an IEP team. The committee generated an initial IEP offering Brian a place in either of two MCPS middle schools. Brian's parents were not satisfied with the arrangement, believing that Brian needed smaller classes and more intensive services. The Schaffers thus enrolled Brian in another private school, and initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education.

Schaffer, 546 U.S. at 54-55.

172. Based on those facts, and its holding that the burden in IDEA due process hearings should fall on the "party seeking relief," the Supreme Court affirmed the Fourth Circuit Court of Appeals ruling that the Schaffers had the burden of persuasion. 546 U.S. at 62. The burden of persuasion was placed on the Schaffers despite the facts that this was the first IEP developed by the school district for the child and the parents never agreed to the IEP. It is clear that the Supreme Court considered the Schaffers to be the "party seeking relief," and

this consideration leads to the conclusion that Petitioner is the party seeking relief in the instant case.

173. The IDEA requires the School District to develop an IEP once a year for each child with a disability. 20 U.S.C. § 1414(d)(2)(A) & (d)(4)(A)(i). The June 4, 2008, IEP was not an "amendment" to an existing IEP as contemplated by 20 U.S.C. Subsection 1414(d)(3)(F), but was the new annual IEP for Petitioner. For purposes of this proceeding, the June 4, 2008, IEP is the existing IEP, and is to be considered on its own merits rather than in comparison to previous IEPs. See M.C. v. Voluntown Board of Education, 226 F.3d 60, 66-67 (2d Cir. 2000)(because the IDEA requires the child's IEP team to formulate a new IEP at least once every year, the adequacy of an IEP is to be judged on its own terms, not in terms of previous IEPs). See also A.E. v. Westport Board of Education, 463 F.Supp. 2d 208, 216 (D. Conn. 2006), aff'd 251 Fed. App. 685 (2d Cir. 2007) ("Nothing in the IDEA requires the parents' consent to finalize an IEP. Instead, the IDEA only requires that parents have an opportunity to participate in the drafting process.")

174. Subsection 1003.57(1), Florida Statutes, requires each school district to provide "an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education. . . ."

175. Subsection 1003.01(3)(a), Florida Statutes, defines an "exceptional student" as any student determined to be eligible for a special program pursuant to rules of the State Board of Education, including a student with an autism spectrum disorder. No party to this proceeding disputed Petitioner's status as an exceptional student.

176. Subsection 1003.57(1)(f), Florida Statutes, states as follows:

> In providing for the education of exceptional students, the district school superintendent, principals, and teachers shall utilize the regular school facilities and adapt them to the needs of exceptional students to the maximum extent appropriate. Segregation of exceptional students shall occur only if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

177. The IDEA, 20 U.S.C. Section 1400, provides that the local education agency must provide children with disabilities with a free, appropriate public education, which must be tailored to the unique needs of the handicapped child by means of an IEP program. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

178. The determination of whether a school district has provided FAPE to an exceptional student involves a twofold

inquiry as directed by the United States Supreme Court in Rowley:

> First, has the State [or school district] complied with the procedures set forth in the Act [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State [or school district] has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 206-207. See also School Board of Collier County Florida v. K.C., 285 F.3d 977 (11th Cir. 2002)(restating and applying the Rowley test).

179. The nature and extent of "educational benefits" required by Rowley to be provided by Florida school districts was discussed in School Board of Martin County v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999):

> Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County School District, 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 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)(citing Board of Education of Community Consol. School District 21 v. Illinois State Board of Education, 938 F.2d 712 at 715, and Lachman v. Illinois State Board of Education, 852 F.2d 290, 297 (7th Cir. 1988). Thus, if a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208; O'Toole v. Olathe District Schs. Unified School District No. 233, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

180. Petitioner has raised no claims of significant procedural errors on the part of the School District, and therefore the first part of the Rowley test is not implicated in the instant case.

181. The second part of the test inquires whether the IEP developed through the IDEA's procedures is "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 206-207. In this regard, an appropriate education does not mean a "potential-maximizing education." Rowley, at 198, n. 21. The issue in reviewing an IEP is whether the student has received "the basic floor of opportunity" to receive an educational benefit. J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1572-1573 (11th Cir. 1991); Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991). FAPE does, however, require "more than a trivial educational benefit." See

Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3rd Cir. 1999).

182. An IEP must provide "significant learning" and "meaningful benefit" when considered in light of a student's potential and individual abilities. Ridgewood Board of Education v. N.E., supra at 248. The IDEA creates a presumption in favor of a school system's educational plan, placing the burden of proof on the party challenging it. See White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003); Teague Independent School District v. Todd L., 999 F.2d 127, 132 (5th Cir. 1993).

183. Petitioner's parents seek to continue a hospital/ homebound placement for Petitioner because they believe such is the only medically safe placement. The School District has developed an IEP that purports to provide for Petitioner's medical needs in the setting of an isolated classroom at [redacted] Elementary. Both parties contend that their proposed placement constitutes the "least restrictive environment" (LRE) for Petitioner. 34 C.F.R. Section 300.114 requires the state to have in effect policies and procedures that meet the following LRE requirements:

> (2) Each public agency must ensure that --
>
> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions

> or other care facilities, are educated with children who are nondisabled; and
>
> (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[28]

184. In Greer v. Rome City School District, 950 F.2d 688, 695-696 (11th Cir. 1991), the Eleventh Circuit Court of Appeals examined the LRE or "mainstreaming" requirement and concluded that the two-part test set forth in Rowley was not intended to decide mainstreaming issues. In agreement with Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989), the Greer court adopted a separate two-part test for determining compliance with the mainstreaming requirement: first, the tribunal asks whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; if not, the second question is whether the school has mainstreamed the child to the maximum extent appropriate. Greer, 950 F.2d at 696.

185. The evidence in the instant case clearly established that Petitioner cannot be educated in the regular classroom even with the use of supplemental aids and services. The decisive question, then, is whether the proposed IEP will mainstream Petitioner to the "maximum extent appropriate." In the context

of this case, the question of "appropriateness" had almost entirely to do with whether Petitioner's medical conditions would allow Petitioner to attend school at all.

186. The School District did not dispute Petitioner's medical diagnoses. The School District did dispute Petitioner's current eligibility for hospital/homebound placement. The criteria for hospital homebound eligibility are found in Florida Administrative Code Rule 6A-6.03020:

> (1) Homebound or hospitalized. A homebound or hospitalized student is a student who has a medically diagnosed physical or psychiatric condition which is acute or catastrophic in nature, or a chronic illness, or a repeated intermittent illness due to a persisting medical problem and which confines the student to home or hospital, and restricts activities for an extended period of time. The medical diagnosis shall be made by a licensed physician.
>
> * * *
>
> (3) Criteria for eligibility. A student, who is homebound or hospitalized, is eligible for specially designed instruction if the following criteria are met:
>
> (a) A licensed physician must certify that the student:
>
> 1. Is expected to be absent from school due to a physical or psychiatric condition for at least fifteen (15) consecutive school days, or the equivalent on the block schedule, or due to a chronic condition, for at least fifteen (15) school days, or the equivalent on a block schedule, which need not run consecutively;

2. Is confined to home or hospital;

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

4. Is under medical care for illness or injury which is acute, catastrophic, or chronic in nature; and[29]

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

187. The evidence adduced at the hearing established that Petitioner was not confined to the home. With the consent of Petitioner's physicians, Petitioner's parents take Petitioner on trips to Disney World, the beach, to stores and to church. Dr. O'Hern opined that these trips were safe provided certain minimal precautions were taken, such as frequent handwashing and keeping Petitioner away from obviously sick people. Aside from distinguishing these "short" trips from "long" days at school, Dr. O'Hern failed to offer a convincing rationale as to why these precautions work in one context but would not work in the other.

188. The evidence presented at hearing indicated that the School District intends to provide a safe environment for Petitioner in the isolated classroom. Dr. O'Hern and Dr. Davis voiced initial skepticism as to the School District's ability to follow through on its safety plans, but conceded that all of

their information regarding the proposed classroom placement or anything else involving Petitioner's education was filtered through Petitioner's parents. After having the School District's plan explained to them, the physicians also conceded, with certain exceptions, that Petitioner would be safe if the plan is carried out as proposed.

189. Dr. O'Hern did not believe that the proposed LPN would be adequate to attend to Petitioner's medical needs, or that his teacher could recognize the onset of a seizure. The undersigned agreed that an RN would be preferable, but also took into consideration that Petitioner's urgent needs are at present met by three laypeople: his parents and Ms. Patterson. It is undisputed that [redacted] understands the nuances of Petitioner's conditions better than anyone else could, but no evidence was presented to demonstrate that an LPN and Petitioner's teacher could not be trained sufficiently to respond to a seizure. See Morton Community School District No. 709 v. J.M., 152 F.3d 583, 586 (7th Cir. 1998) (if the child's parents, who are not medical professionals, can be trained to attend to the child's needs, "so can the school nurse").

190. The chief issue raised by Dr. Davis was whether the stress of the transition into the classroom would actually cause Petitioner to have more seizures. While the undersigned credited Dr. Davis' concerns, there was also evidence that

Petitioner has responded well to novel situations in the recent past. The evidence also established that Petitioner is prone to breakthrough seizures even under what Dr. Davis would consider ideal conditions.

191. Petitioner's physicians are not experts on education generally or ESE in particular. Given the nature of their pediatric practices, their counsel on Petitioner's physical capacity to attend public school should be taken into consideration, but only in light of their very limited understanding of what the public school was offering in this instance. The evidence at hearing indicated that the School District did consider the physicians' medical opinions as best it could, given the limitations imposed by Petitioner's parents. However, the physcians do not have the authority under the IDEA to dictate Petitioner's educational placement. See Winkelman v. Parma City School District, 411 F. Supp. 2d 722, 732-733 (N.D. Ohio 2005) (rejecting pediatric neurologist's "firm medical recommendation" that child required one-on-one instruction; physician was not an educator, had only limited personal interaction with the child, had never observed child in a classroom setting and, more importantly, relied on the child's parents for most of his information). It is ultimately the IEP team's responsibility to determine the appropriate educational program for Petitioner's particular needs.

192. In summary, the Petitioner did not establish by a preponderance of the evidence that the June 4, 2008, IEP poses such a medical risk that the hospital/homebound placement should be reinstated. The School District is required to provide all of the health services that Petitioner requires in order to attend school, short of those medical services required to be provided by a physician. Cedar Rapids Community School District v. Garrett F., 526 U.S. 66 (1999). The evidence at hearing demonstrated that the School District is prepared to provide the services required for Petitioner's safety in the school setting.

193. The evidence at hearing demonstrated that the June 4, 2008, IEP will provide a free appropriate public education in the least restrictive environment.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

ORDERED that

1. The School District has provided a free appropriate public education to Petitioner at all times relevant to this proceeding;

2. The June 4, 2008, IEP was adequate to provide a free appropriate public education to Petitioner in the least restrictive environment; and

3. The Request for Due Process Hearing filed on June 10, 2008, is DISMISSED.

DONE AND ORDERED this 12th day of August, 2009, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of August, 2009.

ENDNOTES

[1/] Two additional paragraphs have been omitted because the allegations therein were settled between the parties prior to the hearing.

[2/] Arnold-Chiari is an inherited malformation that causes a portion of the brain to be seated below the base of the skull. A person with Arnold-Chiari is more prone to brain trauma and headaches. Dr. O'Hern testified that Arnold-Chiari is a mild concern with Petitioner, because Petitioner's other diagnoses keep Petitioner in a very controlled environment and prevent Petitioner from playing competitive sports. Because Petitioner is unable to communicate effectively, it is difficult to determine whether Petitioner has an unusual number of headaches. Dr. O'Hern stated that Petitioner's mannerisms such as head holding lead Petitioner to conclude that Petitioner has head pain at times.

[3/] Dr. O'Hern testified that it is an "obvious concern" that a [redacted]-year-old child is not toilet trained. He found no medical contraindication to toilet training Petitioner, and agreed that Petitioner's lack of toilet training was a parental decision.

[4/] At the time of the hearing, Petitioner was taking the following medications, according to Dr. O'Hern: Zonegran (an antiseizure drug), 250 mg once a day; Valium, 1 mg as needed; Prevacid, 30 mg twice a day; Pulmicort, .50 twice a day; Bromfed (an antihistamine/decongestant combination), ¾ tsp as needed; Singulair, 5 mg once a day; Xopenex, .63-1.25 as needed.

[5/] Dr. Davis testified that he believes "the more the better" when it comes to obtaining services for a child in Petitioner's position. He could recall employing no particular formula in recommending 25 hours per week, other than "trying to get the maximum at the time."

[6/] The evidence was unclear whether the School District became aware of the letter during the discovery process in the instant proceeding, or during the resolution process of a previous due process case involving the same parties, Petitioner v. Brevard County School Board, DOAH Case No. 07-5223E, which was closed pursuant to Petitioner's notice of voluntary dismissal on December 5, 2007.

[7/] Deborah Brannigan resigned from the School District on September 15, 2006. Dayle Ramsey took over as Petitioner's academic instructor on October 16, 2006.

[8/] Commencing in January 2007, Jewel Patterson has worked as a caregiver in Petitioner's home from 7:30 a.m. to 5:30 p.m., Mondays through Fridays. Most of the time, [redacted] is also in the house, though Ms. Patterson's presence frees [redacted] to run errands or care for Petitioner's younger sister, who is also an ESE student but who attends school.

[9/] Petitioner has a standing appointment on Monday mornings with a private occupational therapist in Melbourne.

[10/] Petitioner will sometimes receive make-up instruction from 3:00 to 3:30 p.m. for class time that Petitioner has missed due to illness or doctor's appointments.

[11/] [redacted] testified that the occupational therapy times are "kind of iffy" from week to week, depending on the therapist's schedule.

[12/] During the 2007-2008 school year, Petitioner missed instruction 13 percent of the time because of illness or appointments with physicians. Petitioner missed 8 percent of the time due to cancellations by teachers or therapists.

[13/] Tina Drummond, Petitioner's speech language pathologist, likewise testified that she saw no correlation between [redacted]'s pessimistic reports and the amount of work Petitioner is able to perform. She sees Petitioner three days per week and finds that Petitioner is nearly always able to concentrate for the full hour.

[14/] The "reassessment" is in reference to the medications' gluten content. See Findings of Fact 21 and 22, supra.

[15/] Further, the undersigned is not prepared to believe that Dr. Emgushov was simply making up such details as Dr. O'Hern's telling her that [redacted] "would probably feel betrayed" by Petitioner, or Dr. O'Hern's concession that [redacted] had perhaps "manipulated" Petitioner by keeping Petitioner unaware of the details of the School District's proposal.

[16/] In his deposition, by way of explaining his correspondence with Dr. Emgushov, Dr. O'Hern stated his opinion that the IDEA is unreasonable in the demands its places on school systems to accommodate children such as Petitioner He testified that in his opinion the School District's offer was "above and beyond" anything he would consider reasonable, but that it still would not meet Petitioner's needs and that he therefore continued to believe that Petitioner should remain in his homebound placement. This is an intellectually defensible position, but does not fully explain the tone of Dr. O'Hern's response to and conversations with Dr. Emgushov, which clearly anticipated Petitioner's imminent placement in the school.

[17/] Dr. Emgushov employed a similar balancing of health risks against educational benefits to conclude that Petitioner should go to school. Dr. Emgushov's opinion testimony regarding the educational benefits of Petitioner's attending school is given no more credit than Dr. O'Hern's. Both are the opinions of very intelligent, highly educated laypersons familiar with Petitioner and Petitioner’s medical and educational situation. The undersigned did not entirely ignore the testimony, but also did not grant it the weight afforded to expert opinion.

[18/] Dr. O'Hern testified that he was unaware that the School District has asked [redacted] to share her information regarding gluten-free products, or that the School District had offered to allow [redacted] to purchase all of the equipment and supplies for Petitioner's classroom and then to reimburse her for the purchases.

[19/] Nonetheless, there would likely be times when Petitioner would be kept at home from school due to illness and miss class work that might have been completed had the teacher come to Petitioner's home. During Petitioner's homebound career, there have been many instances when Petitioner has had a bad night and is still wearing pajamas when the teacher arrives, when [redacted] and the teacher have decided it's worth a try to accomplish an hour or two of instruction despite Petitioner's not feeling well, and when significant work has been completed.

[20/] At the time of his May 8, 2008, letter recommending that Petitioner remain in the hospital/homebound placement, see Finding of Fact 86, supra, Dr. Livingston was unaware of the details of the School District's proposal.

[21/] Dr. Palladino is not a physician. She has a doctorate in early childhood education.

[22/] Ms. Hamilton testified that Petitioner would have a private bathroom, just around the corner from the classroom. There is also a washing area in the classroom where Petitioner could be changed in an emergency. The LPN at [redacted] would be the person designated to change Petitioner.

[23/] It is understood that the School District's proposal calls for Petitioner to be exposed to no more school personnel than is seen in the homebound setting. However, at the school there is much more opportunity for unauthorized persons to inadvertently come into contact with Petitioner, despite the best efforts of the school's administrators. Strict protocols for entry into Petitioner's classroom will have to be enforced.

[24/] The isolation protocols for gluten exposure should also suffice to protect Petitioner from exposure to infection.

[25/] When Petitioner has a seizure, the appropriate response is to provide a safe environment for Petitioner, making Petitioner comfortable and keeping the room quiet and dark. See Findings of Fact 11 and 99. [redacted]'s main complaint about teachers in the homebound program has been their overreaction to Petitioner's

seizures, attempting to restrain Petitioner in an effort to keep Petitioner from being hurt. If the teacher is properly trained, perhaps by [redacted] herself, such overreaction should not be a problem in the classroom setting.

[26/] Statutory references are to the 2008 edition of the Florida Statutes, unless otherwise noted. Subsection 1003.57(1)(e), Florida Statutes, was amended in 2009 and renumbered as Subsection 1003.57(1)(b), Florida Statutes. See Section 1, Chapter 2009-238, Laws of Florida. The 2009 amendment would have no bearing on the substance of this proceeding even if it were applicable.

[27/] The court left open the question whether such state laws or regulations are permissible, because the case before the court involved no such law or regulation. 546 U.S. at 61-62.

[28/] The rule implements virtually identical language found at 20 U.S.C. Subsection 1412(a)(5)(A).

[29/] The underscoring is in answer to Petitioner's argument that "[t]he law does not require [Petitioner] to be absolutely and totally confined to Petitioner's home in order to receive homebound services. Petitioner need only be sufficiently ill that Petitioner cannot be continually and regularly educated at school for an extended period of time." Petitioner essentially argues that subparagraphs (3)(a)1 and (3)(a)2 of the quoted rule are alternative eligibility criteria. The presence of the word "and" indicates that a child must meet both criteria, and that the child must indeed be "confined to home or hospital" to be eligible for hospital/homebound placement.

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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 90 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 90 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(b), Florida Statutes; or
c) only if the student is identified as “gifted”, files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(b) and 120.68, Florida Statutes.