STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

B. E.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-4470E
	)	
MARION COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Diane Cleavinger, held a formal hearing in the above-styled case on April 25, 26 and 27, 2006, in Ocala, Florida.

APPEARANCES

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

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

STATEMENT OF THE ISSUE

Whether Respondent, the Marion County School Board (MCSB), offered Petitioner, B.E., a free appropriate public education (FAPE) in the Least Restrictive Environment since May 2004.

PRELIMINARY STATEMENT

This case has a very long procedural history essentially beginning in the 2002/2003 school year and running up through the present. After the 2002/2003 school year Petitioner was placed in Hospital/Homebound services. On May 13, 2004, a staffing meeting dismissed B.E. from Hospital/Homebound services. On August 17, 2004, an Individual Education Plan (IEP) was developed that placed B.E. in regular, co-taught education classes. On the same day, Petitioner's mother, who disagreed with the placement, hand-delivered a request for Due Process, dated August 16, 2005, to MCSB and the IEP team. The request advised that B.E. would be withdrawn from MCSB schools and placed in a private education setting at public expense.

Considerable negotiations occurred between the parties, resulting in independent psycho-educational and Speech/Language evaluations being completed by April of 2005. Based on the results of the independent evaluations, an IEP meeting was held on May 25, 2005, to resolve the Due Process issues. The parties agreed to an IEP, which provided for a small class Exceptional Student Education (ESE) placement for B.E., as well as various support and summer preparatory services. Based on the May 2005 IEP, the initial Due Process request was dismissed.

The summer preparatory services did not occur. In August 2005, B.E. was assigned to an emotionally handicapped (EH)

classroom. Petitioner disagreed with the placement and had great concern over the impact of MCSB's failure to provide summer preparatory services. Petitioner refused to place B.E. in the EH class.

On December 6, 2005, Petitioner filed for a second Due Process hearing. MCSB appeared to have received the request on December 9, 2005. The case was forwarded to the Division of Administrative Hearings on December 9, 2005, establishing the 45-day time period contained in Florida Administrative Rule 6A-6.03311(5)(k), as January 23, 2006. This second request is the matter presently before the undersigned.

The parties were contacted around December 10, 2005, to obtain some logistical information regarding the amount of time needed for the hearing and dates for scheduling a pre-hearing conference. On December 13, 2005, a Notice of Telephonic Pre-hearing Conference was issued, setting the pre-hearing conference for December 19, 2005. On December 14, 2005, an Notice of Hearing and Order of Pre-hearing Instructions were entered. The case was set for final hearing in Ocala, Florida on January 3, 4, 5 and 6, 2006, pending further input from the parties at the pre-hearing conference.

On December 19, 2005, the pre-hearing conference was held. All parties participated in the hearing. At the conference the undersigned was advised that the parties were going to mediate

this matter. Various scheduling issues were discussed and with the parties' consent and waiver of the 45-day time period contained in Florida Administrative Rule 6A-6.03311(5)(k), a hearing date of February 28 through March 2, 2006, was established. A Notice of hearing for those dates was entered on January 19, 2006. A suspense date for this case was set for April 2, 2006, to allow the parties time to mediate and, if a hearing was necessary, time to write the proposed orders and for the undersigned to issue a final order.

In January 2006, a Resolution Conference was held wherein MCSB agreed to place B.E. in another classroom that was being established. Throughout January and February 2006, the parties participated in several settlement meetings in order to work out the details of any resolution of this case.

On February 16, 2006, the parties filed a Joint Stipulation and Motion For Continuance. The Motion advised that the parties felt they could amicably resolve this matter, but that they needed more time to address the details regarding the structure and make-up of B.E.'s classroom assignment. By order dated February 21, 2006, the Motion was granted and the case was set for final hearing on April 25, 26, 27 and 28, 2006, in Ocala, Florida. The suspense date for concluding the case was likewise extended to June 1, 2006.

In furtherance of settlement, Petitioner's mother observed the proposed classroom for B.E. For a variety of reasons, she felt the class was not appropriate for B.E. As a result the case was not settled.

On April 25, 26, and 27, 2006, the Due Process hearing was held in this matter. The parties stipulated into evidence as Exhibit One, a folder containing B.E.'s student records. At the hearing, Petitioner called six witnesses: Karen E., B.E., Elon Bruner, Kim Johnson, Terri Stewart Kinstle, and Wylene Cayasso. Respondent also called six witnesses: Bonnice Tackett, Mary Anne Starr, Claire Smith, Rebecca Villeda, Dama Abshier, and Karen Flotkoetter.

At the conclusion of the hearing, the parties discussed the amount of time necessary to obtain the transcript, review the extensive transcript and evidence and prepare proposed orders based on that review. The parties requested 30 days after the filing of the transcript to file proposed final orders. Given the length of the hearing and the amount of evidence adduced at the hearing, due process required that the parties' reasonable request be granted. Additionally, the record was held open so that Respondent could take additional testimony from Teresa Pinder by deposition. An estimated suspense date of July 30, 2006, was established.

Ms. Pinder's deposition was taken on May 4, 2006. On May 24, 2006, transcripts of the hearing, including Teresa Pinder's deposition were filed with the Division of Administrative Hearings and provided to counsel for the parties.

After the hearing, Petitioner filed a Proposed Final Order on June 26, 2006. Respondent filed a Proposed Final Order on June 23, 2006. The suspense date for purposes of Due Process remained the same.

FINDINGS OF FACT

1. Petitioner B.E. was born June 18, 1991, and is now 15 years old. By the time she was 1 1/2 years old, her family noticed developmental delays. She was talking very little and did not listen or pay attention to others. According to Petitioner's mother, B.E. was seen by "a lot of doctors" who misdiagnosed her and prescribed the wrong medications.

2. From about the time B.E. was 3 1/2 years old until she was about 10 1/2 years old, Dr. Kytja K.S. Voeller of the Morris Center treated B.E. Dr. Voeller diagnosed B.E. with a Specific Language Impairment or Developmental Language Delay and ADHD.

3. In 1996, around age five, Dr. Voeller placed B.E. in a residential treatment program at the University of Florida's Shands Hospital, in order to take her off medications and to treat her disabilities more intensively. B.E. subsequently

spent eight months receiving inpatient care at the Children's Mental Health Unit at Shands Hospital in Gainesville, Florida.

4. Additionally, around age five, B.E. enrolled in the Marion County public school system. Neither party has disputed that B.E. is a "child with a disability" entitled to services in accordance with IDEA. B.E. was placed into ESE classes in Marion County public schools in the first, second, third, and fourth grades.

5. For most of elementary school, B.E. attended Maplewood Elementary School, where she participated in small, multi-grade classes consisting of students with varying exceptionalities. The classes were relatively small classes, containing about 12 to 14 students. In general, the students in each of these classes were taught as a group. However, B.E. received individual instruction and testing. During those years B.E. performed fairly well in school and made good academic progress with mostly A's and B's. She loved going to school during this time.

6. Prior to B.E.'s entering the fifth grade, Petitioner's mother had B.E. evaluated by Dr. Tanya Mickler at the Morris Center. The evaluation lasted from May 9 to July 26, 2001. Based on the evaluation, Dr. Mickler recommended a proposed treatment plan with continued assessment and curriculum designed

to enhance both written and oral skills, as well as sensory tolerance.

7. During the 2001/2002 school year, B.E. was enrolled in Ms. Burja's ESE class for the fifth grade. Ms. Burja had taught B.E. in some of her prior grades. She was therefore very familiar with B.E. and B.E. was familiar with her.

8. Ms. Burja's class consisted of Ms. Burja and a full-time aide. The class had between eight to fourteen students. B.E. worked well with both Ms. Burja and the aid. She generally had good grades. However, she had some difficulty with her social skills due to her immaturity and did not pass the Math and English portions of the Florida Comprehensive Assessment Test (FCAT) a state-mandated standardized test of academic achievement. Indeed her performance on the FCAT was well below grade level. For these reasons, B.E. was not promoted to sixth grade.

9. During her second fifth grade year in 2002/2003, at Petitioner's mother's request and with the concurrence of the rest of the IEP team, B.E. was placed in a regular education classroom. At the time, while there may have been some reservations, all parties thought B.E. could handle a mainstream classroom environment.

10. Ms. Tannous was her regular education teacher. One aide was present in the classroom. The class consisted of about

thirty or more regular education students who were at the same age and grade level as B.E. However, B.E. did not do well socially.

11. B.E.'s mother described B.E.'s behavior. She stated that B.E., "kind of stumbles and has a hard time finding words to say." If she doesn't know how to do something, it may have to be repeated to her a few times before she catches on." She also stated that "[w]hen she gets nervous or anxious she'll start picking or scratching, or something like that." In fact, B.E. often picks at sores and eats the skin. She pulls on her hair, eyelashes, and eyebrows to the extent that she pulls out the hair. B.E. can also be argumentative. She sees things as black and white. Additionally, B.E may get up without permission: "Like if she had to go to the bathroom and the teacher said no, she went anyway, or something like that." Indeed, the second fifth-grade year was particularly difficult because of B.E.'s concerns over hygiene related to the onset of puberty. B.E was also subjected to some bullying.

12. As the year progressed B.E. became very stressed and depressed. Her compulsive behaviors increased. Petitioner's mother described the situation as follows:

> [J]ust nervous, crying. There's too many students. And getting in trouble with the teacher. And throughout the that whole year I told her, I said, B.E. tell me what the problem is and I will go to the teacher. . . . [S]he couldn't keep up. Like when the

> teacher is up in front of the classroom giving the assignment, or telling what they were learning for the day or whatever, B.E. just - she could not keep up with what was going on.

13. Petitioner's mother also complained to the ESE Executive Director that the accommodations provided in B.E.'s IEP were not being provided. Due to these complaints a co-teacher was added to the class.

14. Petitioner's mother attempted to intervene to help Ms. Tannous understand B.E. and her educational needs. However, Ms. Tannous refused her help, and the friction grew between Ms. Tannous and B.E. Eventually, Petitioner's mother was refused permission to come to the classroom. Ms. Tannous also stopped communicating with Petitioner's mother.

15. Unfortunately, the problems between B.E. and Ms. Tannous continued. At one point the speech teacher tried to intervene by attempting to help B.E. communicate with Ms. Tannous. At her prompting, B.E. wrote an "I'm sorry note."

16. Ms. Tannous told B.E. that the note was "a smart-alecky note." The speech teacher then helped B.E. write another note. Ms. Tannous acknowledged the note by signing it without comment.

17. In December, 2002, due to her concern for B.E.'s educational and emotional welfare, Petitioner's mother requested the Morris Center complete an updated evaluation of B.E. The

evaluation, including an observation at school, was done between December 11, 2002 and March 28, 2003. The evaluation report is several pages long and consists of a narrative summary with an appendix containing test scores. Through inadvertence, only the test scores were initially given to MCSB. The entire report was not provided to MCSB until 2005.

18. The Morris Center report details the problems that B.E. was having in Ms. Tannous' fifth-grade classroom. The classroom observation was done on January 24, 2003. That day the "student-to-teacher ratio was 29:1, with one teacher's assistant in the classroom and one aide to assist Brooke." The report noted that: "Brooke's affect was noted to be sad and serious . . . The examiner indicated that Brooke's relationship with Ms. Tannous seemed 'strained' as there was minimal interaction between them and the teacher stayed on the other side of the room (Brooke's desk was at the furthest place from the teacher's desk). It was noted that the teacher's aide had the most interactions with Brooke and would walk over and pull Brooke's hands away from her eyes when she was pulling on her eyelashes. This intervention appeared very obvious to others in the classroom."

19. The report concluded that:

> . . . Brooke's behavioral difficulties appear significantly related to a poor fit with her environment. Test results indicate that Brooke's academic functioning is appropriate for her age,

suggesting she is able to handle the academic demands of a regular classroom. However, her difficulties with social skills and attentional functioning (i.e. impulsive and distractible behavior, poor self-monitoring of what annoys other people, a tendency to be a concrete black-and-white thinker) coupled with the fact that she has spent much of her time in a small special education classroom with atypical peers and has never had a supervised transition into a mainstream setting, make her success in a large classroom with mainstream peers highly problematic. Her behavior problems and difficulty in the area of "social skills" do not involve any aggressive behaviors or any antisocial behaviors directed at peers. Rather, she is isolated and has become the target of teasing by peers. In the regular classroom, earlier this year, she drew attention to herself by picking at her face and pulling eyelashes (a behavior which received undue emphasis because the aide assigned to her would forcibly hold her hands).

In addition, Brooke's worries about leaks at the time of her period resulted in bolting from the room without the teacher's permission. There is a strong suggestion that the mainstream classroom teacher did not like Brooke, felt that she personally did not have the skills to manage a "learning disabled student," and in her behavior communicated to both Brooke and other students that Brooke was "different."

In short, Brooke's first experience with a regular classroom placement was set up so that it was almost certain to be unsuccessful. It is important to note that in her other classes Brooke is not demonstrating significant behavioral problems and behavioral/personality assessment indicated that Brooke's behavioral difficulties are likely to be greatly reduced when she is in a classroom which better fits her needs (smaller, consistent structure and routine, a positive student-teacher relationship, flexibility to offer cues for appropriate behavior as necessary).

20. When B.E. was interviewed during the evaluation, she reported that "school is 'fine'" and "she makes good grades," although she also felt that she had too much homework, that a full day of school was too long, and that other kids picked on her for blowing her nose and scratching her head. These responses were not unusual for B.E. given her level of social functioning and peer interaction. An IQ test administered to B.E. for the evaluation yielded a full-scale IQ of 82, which placed her in the low-average range of intellectual functioning.

21. The report acknowledges that B.E. "has improved her ability to tolerate frustrations [and] complete more challenging work." However, the report does not attribute those advances to MCSB.

22. At the time of the report, the Morris Center recommended that B.E. be placed in small classes with social skills and behavior training. The report also emphasized the need for pre-planning and preparation for B.E.'s attendance at school for her "development of a positive relationship with school staff." The report also stated, "It is important for B. to have exposure to peers who are not as impaired as children in Varying Exceptionalities classrooms and to become more outgoing and confident in her social relationships with peers."

23. As with the first fifth grade year, at the end of the second fifth grade year, B.E. made A's and B's in all her subject areas. She passed the FCAT, performing at grade level. Such success was likely attributable to familiarity with the fifth-grade material and greater maturity. The FCAT results were likely due to the special testing accommodations she received for the test. Such accommodations were not provided in her first fifth-grade year. In any event, in spite of her relationship with Ms. Tannous and difficulties in a large regular class, B.E. made meaningful educational progress during her second fifth-grade year. At this point, the evidence did not demonstrate that B.E. was not provided with FAPE during her second fifth grade year.

24. As indicated, despite B.E.'s accomplishments during her second fifth-grade year and her acknowledgement to the Morris Center staff that school was "fine," the year was emotionally devastating for her. Petitioner's mother saw how unhappy and depressed her daughter was. She was developing ritualistic or compulsive behaviors her mother had not seen before. B.E. developed a real fear about public school. To a large degree her mother felt guilty for requesting and placing her daughter in a large regular education classroom.

25. Indeed the 2003/2004 school year was so traumatic for B.E. that Petitioner's mother sought psychiatric and behavioral

help over the summer. B.E. returned to the Morris Center for help. Petitioner's mother also felt she could not send her back to a classroom in the MCSB schools. Petitioner's mother requested that B.E. be placed in Hospital/Homebound services.

26. Importantly, only two forms were needed to place B.E. in Hospital Homebound. The first form was a physician referral form titled "Referral for Hospital Homebound Program." The physician's referral was dated August 8, 2003, and signed by Petitioner' doctor, Dr. Kytja K.S. Voeller, M.D. Dr. Voeller described B.E.'s condition as "central nervous system dysfunction, impairing attention, behavior, language and sensory motor function."

27. The second form necessary for enrollment in Hospital/Homebound was a combined student information and consent for placement form. The form grants consent for district personnel to speak with the relevant physicians. The consent form was dated July 28, 2003, and signed by Petitioner's mother.

28. On August 15, 2003, an IEP was drafted for B.E.'s sixth-eighth grade year (2003/2004). B.E. was placed into Hospital/Homebound with only four hours of one-on-one, homebound, academic instruction per week. Despite the fact that the IEP indicated that Speech/Language and Occupational Therapy (OT) were areas of disability, the IEP did not provide any

Speech/Language or OT services. The evidence showed that such services were not provided because B.E. received Speech/Language and OT services at the Morris Center.

29. B.E.'s program at the Morris Center was intensive. B.E. attended the program five days a week, from 9:00 am to about 2:00 pm. To attend the program B.E.'s parents drove her to and from Gainesville, where the Morris Center is located. The drive time was about 45 minutes each way.

30. B.E.'s treatment at the Morris Center was performed by a multidisciplinary team, including a psychologist and medical doctor. As noted, OT and Speech/Language therapy were part of her treatment program.

31. The IEP homebound instruction was provided in the afternoon, two days a week, 2 hours a day. The evidence was clear that B.E. could handle more instruction time. However, the lack of such instruction was not shown to be a denial of FAPE.

32. Petitioner's mother did not believe that two hours of academic instruction was sufficient for B.E. since academic achievement was her strength. In order to provide more academic instruction B.E.'s parents paid for private tutoring with Kim Johnson, a certified Florida teacher. Ms. Johnson has worked with B.E. since this time.

33. Over the summer of 2003, Ms. Johnson instructed B.E. for about two hours a week. Ms. Johnson slowly increased B.E.'s time and requirements so that she and B.E. could become comfortable with each other. Later, at the beginning of the 2003/2004 school year she increased the number of hours of instruction she gave to B.E. B.E. also continued at the Morris Center and in the Hospital/Homebound program.

34. Ms Johnson's class varies in size, but generally contains about 8 students. She uses a curriculum with B.E. that is broken into small segments or "paces." Her instruction is generally one-on-one with B.E. Ms. Johnson does conduct some group instruction. B.E. is given time in class to work individually on assignments in her own space while Ms. Johnson instructs other students in the class.

35. On November 26, 2003, Dr. Voeller provided a Hospital/Homebound Medical Update. Dr. Voeller stated, "B.E. continues to receive treatment through the Morris Center. Plans for future treatment in the spring semester are currently under development." Notably, MCSB did not need to obtain another Parental Consent form in order to obtain this update from Dr. Voeller.

36. Again on January 20, 2004, Dr. Voeller provided another Hospital/Homebound Medical Update. This document was accompanied by a letter from Dr. Voeller to the ESE Executive

Director recommending a continuation of Hospital/Homebound services. The letter stated:

> Consequently, we do not feel that she is ready for a mainstream classroom situation although she is academically strong enough to handle a regular educational curriculum. . . . We would like to request that she remain on the Homebound program for the remainder of the school year while she continues to work on these skill areas.

Again, it is noted that MCSB did not need to obtain another Parental Consent form in order to obtain this update from Dr. Voeller.

37. The evidence was not clear when B.E. was discharged from the Morris Center program. She was discharged sometime during the 2003-2004 school year.

38. On May 13, 2004 a staffing and IEP meeting was held. At this meeting B.E. was dismissed from Hospital/Homebound services on the grounds that she "meets the dismissal criteria." The notation was documented on a "Staffing Committee Report" and an "Informed Notice/Consent for Educational Placement." However, the evidence showed that there were no such criteria, but only a policy that a student is automatically dismissed from the Hospital/Homebound program at the end of the academic year.

39. Claire Smith, an MCSB ESE Coordinator, described MCSB's policy to automatically dismiss students from Hospital Homebound. "So basically we dismiss them and then we - they

have to reapply. So basically they have to reapply with new Homebound information, and we, you know, do the process all over again." The evidence was contradictory as to whether a new consent form was requested by MCSB. No credible reason or rationale was provided as to why MCSB could not use the same consent form they had been using since July, 2003, especially since Petitioner's mother had recently requested continuation of such services and especially in light of the fact that termination of such services would constitute a substantial change in placement for B.E.

40. Thus, based on the policy and even though Petitioner's mother had already consented to school contact with B.E.'s physicians and had clearly requested continuation of Hospital/Homebound services, MCSB staff took no affirmative step to obtain the opinion of or further information from B.E.'s treating physicians. MCSB staff took no affirmative steps even though B.E.'s treating physicians had already indicated a need for continuation of Hospital/Homebound services.

41. In this case, such an automatic dismissal policy elevates paperwork over substance and violates the affirmative duties of MCSB under the Individual with Disabilities Education Act (IDEA) to develop an IEP based on individualized information. At this time, there was no authoritative evidence before the IEP team to indicate a change of placement was

warranted. Petitioner's mother had not revoked her earlier consent.

42. Eventually, an interim IEP was drafted for the summer of 2004. Hospital/Homebound services were extended until May 20, 2004. The IEP team also provided that B.E. receive Extended School Year (ESY) services. The interim IEP expired on August 15, 2004.

43. Prior to expiration, another IEP was drafted on June 8, 2004. This IEP provided for ESY Speech/Language services.

44. B.E.'s ESY program was set to begin on June 8, 2004. However, the Speech/Language program did not begin until June 28, 2004. For reasons that are not clear, the teacher was not present at the school. This lack of planning and coordination between Petitioner and school personnel would, unfortunately, be repeated in the future.

45. On August 10, 2004, near the beginning of the 2004/2005 school year, an IEP team meeting was held to address B.E.'s educational program for her seventh grade year.

46. B.E.'s mother attended and participated in the August 10 meeting.

47. At the meeting, goals were developed for B.E.'s IEP. Petitioner's mother expressed her desire that B.E. be allowed to continue in the Hospital/Homebound placement. Petitioner's

mother also requested that the intensity of the Hospital/Homebound services be increased from 4 hours of instruction per week to 12 hours per week.

48. MCSB staff proposed a different educational program for B.E. Since, educationally, B.E. had done well in an inclusion class her last year at Maplewood, the IEP team proposed a Varying Exceptionalities class supplemented by a Read 180 program. The recommendation seemed to ignore the disastrous emotional and behavioral effect such a placement had on B.E. during her second fifth grade year. The proposal was also a fait accompli since B.E. had already been dismissed from the Hospital/Homebound program.

49. The Read 180 class was proposed for B.E. because reading was one of B.E.'s academic strengths at which she could be successful. The MCSB staff wanted B.E.'s initial experience upon returning to a school campus after a year's absence to be positive.

50. Although the August 10 IEP Team meeting was adjourned after about two hours, the understanding of the participants was that Petitioner's mother would visit a Read 180 class at Ft. King Middle School to see if she found it suitable for B.E. They agreed to meet again on August 13, 2004.

51. In a spirit of cooperation, Petitioner's mother visited the Read 180 class. The class was composed of

approximately 15 nondisabled, regular education students taught by a regular education teacher assisted by an ESE teacher. The class was similar to, but much smaller than, the regular class B.E. had attended for her second 5th grade year. It was, however, considerably larger than the class B.E. had attended at Ms. Johnsons' home.

52. Due to a hurricane, the resumption of the August 10 IEP meeting was postponed from August 13 to August 17, 2004.

53. At the August 17 meeting, Petitioner's mother voiced her objection to both classes on the basis that she felt they were inappropriate for B.E., due to her perception that the level of the classes was below B.E.'s academic level. Petitioner needed smaller classes and more structure than either class provided, with students on her grade level. The Morris Center report, completed the year before, supported Petitioner's mother in her position. Petitioner's mother wanted increased Hospital/Homebound services since, at the time, alternative placements were not offered to her that would allow B.E. to begin school slowly with some services being provided at home and some at school. There was no discussion or offer of a home program other than Hospital/Homebound. Such hybrid services exist in the Marion County schools and should have been considered by the IEP team.

54. There is some dispute over whether MCSB requested Petitioner's mother to sign another consent form to begin the process of investigating Hospital/Homebound placement. However, Petitioner's earlier consents were still in place and had not been withdrawn. Petitioner's mother reasonably did not understand or consider it necessary that a new consent form be signed or that the Homebound placement process started over every year, especially since, to her, the process had never stopped.

55. During her short attendance at the August 17 meeting, Petitioner's mother delivered to the other members of the IEP team letters from three health care professionals recommending that B.E. be allowed to continue in a Hospital/Homebound program. Because of her level of frustration with MCSB and the lack of consideration given her request for Hospital/Homebound services, Petitioner's mother also submitted a request for a due process hearing to challenge the School Board's proposed August placement of B.E. and its refusal to offer Hospital/Homebound services to B.E. The Due Process letter indicated that B.E. would continue her education at Ms. Johnson's school at public expense.

56. After Petitioner's mother left the IEP meeting, the remaining IEP team drafted an IEP for B.E. The August 17, 2004 IEP provides for educational services to be provided "daily" in

"regular ed. class," with "co-teach/support facilitation." Although the class that MCSB personnel had in mind for placement had less than 25 students, MCSB generally tries to keep the number of students in such a class around 25.

57. Under the IEP, it was the intent of MCSB to offer only 55 minutes of the Read 180 class at first, and then gradually transition B.E. into more regular education classes as she was able to handle public school. B.E. would only attend school during that 55-minute period. No provision was made to offer B.E. instruction beyond this 55-minute period. This limited instructional time was too little and did not meet B.E.'s academic needs or provide her with FAPE.

58. On October 1, 2004, Ms. Johnson wrote to the ESE Executive Director. She stated, "I do not feel that B.E. would be successful in a mainstream classroom setting. At this time, however, she is very capable of academically thriving in an environment that is conducive to her style of learning, which I have outlined in this letter". Ms. Johnson also stated in her letter that four hours of Homebound instruction were insufficient.

59. Eventually, B.E.'s parents retained the services of her present attorney, Mark S. Kamleiter. After several meetings, the parties agreed to obtain several independent educational evaluations of B.E. They agreed that, after the new

evaluation information was received, they would meet again to develop an IEP for B.E.'s return to school.

60. The process of obtaining independent evaluations was a long and difficult process, with MCSB rejecting the first Speech/Language evaluator proposed by Petitioner. Eventually MCSB did agree to an independent Speech/Language evaluation being done by Therakids. MCSB also approved Dr. Kinstle, a psychologist, to perform an independent psycho-educational evaluation.

61. Ms. Elon Bruner of Therakids is a Speech/Language Pathologist, with her Masters in Communicative Disorders. Ms. Bruner performed a language evaluation on B.E. on April 8 and 12, 2005.

62. The purpose of Ms. Bruner's evaluation was to test B.E.'s overall language skills in order to determine her level of functioning and limitations in the Speech/Language area. The purpose of the evaluation was also to provide recommendations on improving B.E.'s language skills.

63. The CELF evaluation revealed an overall language score of 78, with 85 to 115 being average. In looking at language processing Ms. Bruner found that "definitely there are some language processing deficits there. The child may know a lot of language but has difficulty using it." Relative to language pragmatics Ms. Bruner noted that "she does have difficulty

determining what should be appropriate and what should be said in certain social situations." "She does have that difficulty interacting socially and being able to problem solve and critically think out what would be the most appropriate thing to do or the most appropriate thing to say."

64. Ms. Bruner found that given B.E.'s language issues she would have difficulty interacting with her peers. She would be "standoffish" and have difficulty problem-solving with other students or carrying on lengthy conversations with others.

65. For this reason, she found that it would be important for B.E. to be with competent language and cognitively on-level peers. She stated that "for any children with language delays it's important for them to be around other children and see other children who interact, and carry on conversations, use their language skills in appropriate - - in an age-appropriate manner because children tend to learn the best from their peers and they learn by example." In regard to modeling, she stated, "Even typically language-delayed children, you know, when they see bad behaviors, do those behaviors. They experiment with language."

66. Based on her evaluation, Ms. Bruner stated, "it would seem that B.'s return to a regular classroom setting would not be the most appropriate placement at this time." Ms. Bruner was concerned about the difficulties emotionally and behaviorally

that B.E. would experience. She felt that the rapid pace of a regular class would be to stressful.

67. Ms. Bruner also did not recommend a typical varying exceptionalities class for B.E. She stated both in her report and in testimony that "although the student-to-teacher ratio is more optimal in a varying exceptionalities classroom, this placement also does not seem to give B.E. the most optimal learning environment." The problem with a typical varying exceptionalities class is that it is a mix of students with relatively low cognitive function or other severe disabilities with both high and low levels of language-functioning, who would not generally provide B.E. with the opportunity to interact with and model students who demonstrate appropriate Speech/Language skills and social behaviors.

68. Ms. Bruner did recommend that a varying exceptionalities class comprising students who were cognitively intact, with average intelligence, but who may have learning disabilities or other processing problems would be the appropriate placement for B.E. Such a class would provide B.E. with good models for language peers, but would be small enough that B.E. wouldn't feel overwhelmed by the number of people in the room. In general, Ms. Bruner's recommendations were the same as the recommendations contained in the earlier Morris

Center report and the many professionals who had either treated or taught B.E.

69. Dr. Terri Steward Kinstle performed the independent psycho-educational evaluation in February and March, 2005. Dr. Kinstle holds a Ph.D. in clinical psychology and assessment. She specializes in the assessment of children with learning disabilities, ADHD, giftedness, PDD, anxiety, depression, etc.

70. Dr. Kinstle conducted a review of records and extensive interviews with Petitioner's mother and Dr. Tanya Mickler, one of B.E.'s treating specialists. Although B.E. was resistant to being interviewed, Dr. Kinstle spent a number of hours with her during the evaluations, which took place over three days. Several psychological test were administered to B.E.

71. B.E.'s scored a full-scale IQ of 92. The score placed her in the average range of intellectual functioning.

72. The Wechsler Intelligence Scale for Children, 4th Ed. (WISC-IV) showed that B.E.'s cognitive abilities ranged from a Verbal Comprehension Score of 79 percent to a Perceptual Reasoning (nonverbal) score of 104 percent. Her Working Memory Index was at 107 percent.

73. Dr. Kinstle found that "the Verbal Comprehension is a clear weakness for her relative to her other abilities. And the differences between her scores in some cases are pretty unusual.

. . . the twenty-five point difference between her Verbal Comprehension Index and Perceptual Reasoning Index is obtained by less than four percent of other children, so that's -- that magnitude of discrepancy is pretty unusual."

74. Dr. Kinstle concluded that B.E lacks an understanding of the social conventions of behavior and what might be expected to occur in certain situations. She cannot reason through everyday problems because she does not understand other people's behavior and does not, in turn, respond appropriately to those behaviors. An important component of B.E.'s education would be direct instruction about social norms and opportunities to model students with higher developed social skills.

75. Based upon the above, Dr. Kinstle concluded that it was educationally important for B.E. to be in a class where she received direct instruction on appropriate social norms and was around students who have higher developed social skills and behaviors.

76. The Woodcock Johnson-3 test was also administered by Dr. Kinstle. This test looks at a persons achievement in four areas: Broad Reading, Written Language, Math, and Oral Language. B.E.'s scores were average in each of these areas. Such scores indicate that B.E would be able to do age and grade level work. In fact, all of B.E.'s academic history demonstrates that she is capable of age and grade level work.

77. Dr. Kinstle administered the Behavioral Rating Inventory of Executive Functioning (partially related to social and emotional functioning). She found that two of B.E.'s scores were clinically significant. The scores related to the Inhibit score and the Shift score.

78. The Inhibit score reflects a person's ability to not act on impulse and to refrain from certain behaviors when it's appropriate to do so. The Shift score reflects a person's ability to transition or change his or her behavior, as appropriate. B.E.'s scores reflected significant difficulty in those areas.

79. The Conner's evaluation in the area of "Anxious and Shy" indicated that B.E. is anxious in unfamiliar situations and new environments. B.E.'s score in the area of Hyperactivity indicates that B.E. has trouble sitting for long periods of time and is impulsive and restless.

80. Based on her evaluation, Dr. Kinstle, for the first time, diagnosed B.E. with autism. Autism is a pervasive developmental disorder that involves impairment essentially in three broad domains of communication and language, poor social skills, and restrictive interests.

81. Dr. Kinstle outlined the essential elements of an appropriate education for B.E. Importantly, these

recommendations were generally the same as the recommendations made by the Morris Center in 2003.

82. Dr. Kinstle recommended that B.E. should be placed in a small class with a lot of individual attention and instruction. Direct instruction on understanding, interpreting and reading the verbal and nonverbal behavior of others should be provided. A large class would overwhelm B.E and she would not get the level of attention she needs. Students in the class should be competent, and age and grade-level peer models.

83. The classroom should be located in a very quiet, calm setting so that B.E. can focus and manage her anxiety when she is in a noisier setting. The classroom setting should also be protective, since B.E.'s behavior is likely to result in teasing or bullying by other students.

84. Dr. Kinstle also thought it was essential that B.E.'s teachers and other educational personnel should have some pre-training and familiarity with autism, so that they would understand B.E.'s disability and behaviors. Her IEP should contain an individualized behavior modification plan that focuses on rewards for appropriate and positive behaviors.

85. In her report Dr. Kinstle suggested that Petitioner's parents, "may wish to explore education options outside of the public school district," because:

> B.E. is an unusual and complex child. . . . I feel she very clearly meets criteria for autistic disorder, but she's atypical in many ways. And the biggest way is that she is not cognitively impaired. It's very common for children who are diagnosed with autistic disorder to also have a co-morbid mental retardation. But because she's so complex I thought it worthwhile to pursue what other - you know, see what other programs are available.

86. After the evaluations, the parties met on May 26, 2005, with their attorneys present, and jointly developed an IEP for B.E. to which everyone agreed. In the May 2005 IEP, MCSB agreed to provide an unspecified amount of "preplanning and training" to "appropriate staff" before B.E. attends class and, in addition, over the summer would complete a "behavior observation" and a "sensory profile."

87. The parties agreed to add Autism to B.E.'s labeled disabilities. The parties also agreed to placement in an ESE class, which would provide direct, specialized instruction for B.E. The notes attached to the IEP stressed B.E.'s need to be in a "small group with appropriate age peers to develop pragmatic communication and social interactions. The last paragraph of the notes state that:

> After much consideration committee recommends self-contained classroom with low student/teacher ratio, working on grade level curriculum. Pre-planning and training will be provided with appropriate staff before B.E. attends. Mom will visit classroom option. A behavior observation

will be done over the summer and a sensory profile will be completed.

88. Ms. Bonnie Tackett, Staffing Specialist, testified that the IEP committee wanted "to meet her needs in an ESE setting with lower numbers, with peers, that were working on social skills, language pragmatic skills, but also opportunities to get her academic level of instruction."

89. Petitioner's mother approved and signed this IEP, because she felt that B.E. requires an ESE class. "She can handle grade level material, but she does need specialized instruction, one-on-one practically." She approved the provision of Language Therapy, O.T. consultation, and other necessary accommodations. Petitioner's mother's approval was contingent upon the items outlined in the last paragraph to the notes being accomplished over the summer. In fact these items were the most important part of Petitioner's IEP since the failure to prepare for B.E.'s unique disability had over the years created the emotional devastation caused by B.E.'s second fifth-grade year and miscommunication, as well as mistrust of MCSB personnel. The lack of planning and preparation had contributed to B.E.'s genuine fear of public school and continued education in private school. Based on the IEP, Petitioner's request for a due process hearing was voluntarily withdrawn.

90. However, over the summer, the District failed to perform the tasks it had agreed to in the IEP. MCSB failed to make any behavioral observations or to complete any meaningful pre-planning or training with the educational staff that would be working with B.E. when she began school in August. During this time Petitioner's mother made herself and B.E. available for the behavior observations and any pre-planning such as B.E.'s teachers' meeting with her prior to the start of school. No classroom environment was prepared to meet B.E.'s requirements for her own space in which to work.

91. After inquiries by Petitioner's mother, MCSB did send two behavior specialists to observe B.E. in her home. However, this perfunctory observation did not meet the requirements of the IEP.

92. MSCB's reason for its failure during the summer to implement B.E.'s IEP was that it had no control over its teachers during the summer months since the teacher's are not under contract through the summer months. However, MCSB knew about its contract arrangements with its teachers and it knew the promises it had made were required to be performed during the summer months. Such contractual arrangements do not excuse MCSB's failure to perform important and material parts of B.E.'s IEP. At a minimum MCSB should have ensured that the required school personnel were on hand at some point during the summer to

implement the requirements contained in B.E.'s IEP. Under the facts of this case, MCSB's failure to follow through with those requirements constituted a failure to provide FAPE to B.E.

93. At some point, just days before the beginning of school, MCSB unilaterally decided to place B.E. into a small class of eight or less students. The class was classified as "Emotionally Handicapped." Ms. Robinson was B.E.'s assigned teacher. At some point, Petitioner's mother was notified of the placement.

94. When Petitioner's mother called Ms. Robinson, Ms. Robinson did not want to give her any information about the class. Ms. Robinson told her that she had only very recently been notified that B.E. would be in her class. She had not seen or reviewed B.E.'s IEP. When Petitioner's mother asked Ms. Robinson if she had taught autistic children or if she had received training in autism, Ms. Robinson stopped answering questions.

95. MCSB's excuse for the failure to prepare Ms. Robinson in advance of the start of school and Ms. Robinson's lack of knowledge that B.E. would be in her class was to blame Petitioner's mother for not formally enrolling B.E. in school. Therefore, B.E. had not appeared on the class list. Clearly performing the pre-planning requirements of B.E.'s IEP would have prevented the situation from occurring. Some proactive

effort was required on MCSB's part to provide appropriate and agreed-to training to Ms. Robinson, along with clearly needed advance pre-planning in order to provide an appropriate education for B.E. Belated efforts by MCSB personnel to provide Ms. Robinson with a copy of B.E.'s IEP during the first week the students were in school do not meet the obligation of training and pre-planning as agreed to in the IEP.

96. Petitioner's mother visited Ms. Robinson's class. She felt that the children looked like they were sixth graders who would be considerably younger than B.E., there were approximately six to eight kids in the class. Ms. Robinson told her that the class consisted of students at different grade levels of performance. However, the principal of the school testified that "The students in Mrs. Robinson's class were working on grade-level materials. And they would be expected to pass the FCAT. And they were getting regular curriculum instruction." She indicated these students were cognitively normal, but because of emotional difficulties needed a protected environment. There was no evidence regarding what grade level the students were on or whether that level was close to B.E.'s academic level. At the time, Petitioner's mother could not get any information as to the cognitive level of the other students, or whether the class was on grade level. The evidence was unclear whether this class would have been appropriate for B.E.

However, the evidence was clear that the class was not appropriate for B.E., since no pre-planning or preparation had been done by MCSB.

97. When asked why she would not just send B.E. to school and trust MCSB to put the proper educational services in place, Petitioner's mother answered, "They did that in the second fifth grade and it tore her to pieces."

98. Petitioner's mother through her attorney, informed MCSB that the district had failed to keep its promises to prepare for B.E.'s return to MCSB schools through pre-planning or training and that the classroom was not prepared or appropriate for B.E. She, therefore, declined to send B.E. to a classroom she considered ill-prepared to receive her daughter and inappropriate to B.E.'s very unique and specific needs.

99. Not having heard from MCSB relative to the parents' complaints about the initial class offered, B.E.'s parents requested that their attorney file for Due Process. Said request was formally made on December 6, 2005.

100. In the course of this proceeding an autism class was created at Ft. King Middle School, with Ms. Mary Ann Starr as its teacher. MCSB proposed Ms. Starr's class as meeting the requirements of B.E.'s IEP.

101. Petitioner's mother observed this class. She and B.E first visited on a Thursday to show B.E. the class and orient

her to the school. They went back on Friday and B.E. stayed for some testing. Petitioner's mother ate lunch with B.E.

102. The students in Ms. Starr's class were younger than B.E., ranging from 11 to 13. B.E. is now 15. The two-year age disparity is significant and does not provide B.E. with age-appropriate role models.

103. Ms. Starr's students were of average intelligence, but with scattered abilities. She did not know if her students were functioning at their cognitive levels. She felt they were functioning between second and sixth grade levels in most areas. B.E. is currently performing at the eighth-grade level, which is the level she should be on.

104. The lowest reading levels in Ms. Starr's class were "second or third grade." She has some students who can read on their own grade level and one boy in the sixth grade who reads above-grade level. At least two students have difficulty speaking in complete sentences. Some of her students are severely language impaired due to major deficits in their expressive language.

105. The class is primarily instructed on a sixth grade level.

106. In presenting a lesson to the whole class the lesson is aimed at the sixth-grade level. She stated, "You have to find --you have to find the middle ground . . . and so you have

to find a middle ground so that everybody is going to get something from the lesson." Her presentation is accessible to those functioning on a second or third grade level. Those on higher or lower levels supplement class lessons with independent work at their level.

107. Ms. Starr testified that she could meet B.E.'s academic needs by providing her with direct, individual instruction. From her estimation she would provide B.E. with the following daily independent, direct instruction:

a. Social Studies- 15-20 minutes
b. Science - 15-20 minutes
c. Writing - 30-45 minutes
d. Reading - 30-45 minutes

108. Ms. Starr is a very competent, experienced teacher of children with autism. However, the class does not provide B.E. with age appropriate role models and Petitioner's mother declined to send B.E. to Ms. Starr's class.

109. Petitioner insists that MCSB can assemble a class that meets B.E.'s needs for age appropriate cognitively intact role models. Petitioner bases this claim on the size of the Marion County School District. However, no evidence that such a class could reasonably be created was introduced at the hearing. Indeed the evidence demonstrates that MCSB has attempted to assemble a class that would meet B.E.'s educational needs. The class Petitioner seeks is simply not available in the District.

The reason is that most cognitively intact students can be mainstreamed or included in regular education classes.

110. Petitioner's mother testified about B.E.'s educational needs:

> her social skills, her self-esteem, she needs good role models. B.E. has come a long way since she was little. She needs to be around kids that - with appropriate mannerisms and - because we've been through all the rolling under the desk and that kind of thing. She needs a lot of cueing. She needs a lot of direction. It's hard to say. She's autistic and she just - she can do the work, but she can't follow a teacher in front of the class discussing something. She can't follow it.
>
> She needs direction, like the teachers used to do, to come sit down by her, help her learn what the math thing is, let her figure it out, make sure she knows what she's doing, and then - but the teachers don't have time to do that any more.

111. From the August 2004 IEP to the present, B.E. was home schooled under the paid tutelage of Ms. Johnson for nine hours of direct instruction per week at eight hundred dollars ($800.00) a month.

112. Currently, B.E. is receiving her education privately, in a small setting at the home of Ms. Johnson. She has been with a mix of up to eight typically developing students, although some have exceptionalities such as dyslexia and ADD. None of the students have cognitive deficits. The students

range from sixth grade to high school in age. The students are good role or social models for B.E..

113. The classroom is set up so that B.E. has her own space. She keeps the space organized and knows where her things are, and she can work quietly in that space. Such accommodations are important for her.

114. B.E. is working at the eighth-grade level and making good academic progress. She has an A average in every subject and will finish the eighth grade in May, 2006.

115. In reviewing the MCSB IEP from May 26, 2005, it is clear that B.E. has been able to master the goals and objectives during this year. She can identify a topic sentence and three supporting ideas related to a story prompt. Using graphic organizers she can write a five-sentence paragraph and can identify the various types of paragraphs.

116. She will be ready for high school level, ninth-grade material by the start of the next school year in August 2006. Importantly, the high school environment is even more noisy and disruptive than the middle school environment. Essentially, the gap between B.E.'s academic requirements and her social requirements is growing. The evidence did not demonstrate that MCSB can meet the educational needs of B.E. without sacrificing either her academic requirements or her socialization requirements. Indeed, the evidence indicates the only

appropriate placement for B.E in the future may be in a private school setting similar to Ms. Johnson's school. In any event, even with the belated attempts at settlement with Ms. Starr's class, B.E.'s educational needs have not been met and MCSB has not provided FAPE to B.E. To the extent that this failure has caused Petitioner to incur expenses for private education, those expenses should be reimbursed to Petitioner. Private placement in the future should also be at public expense.

CONCLUSIONS OF LAW

117. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 1003.57(5), Fla. Stat. (2005), and Fla. Admin. Code R. 6A-6.03311(5)(e).

118. The Individuals with Disabilities Act (IDEA) entitles disabled students to a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE).

119. The legal standard to be applied in determining whether a disabled student has received FAPE is a two-pronged test described by the United States Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

120. The first prong of the Rowley standard is whether the State complied with the procedures set forth in IDEA. The

second prong is whether the IEP developed through IDEA's procedures is reasonably calculated to enable the disabled child to receive educational benefits. 458 U.S. at 206. In other words, there is a procedural test and an educational benefits test.

121. In evaluating whether a procedural defect has deprived a student of FAPE, the court must consider the impact of the procedural defect, and not merely the defect per se. Weiss v. School Board of Hillsborough County, 141 F.3d 990 (11th Cir. 1998). To prove that B.E. was denied FAPE due to any procedural shortcomings, a person challenging an IEP must show actual or likely harm as a result of the alleged procedural violations. Id. In other words, "[v]iolation of any of the procedures of the IDEA is not a per se violation of the Act." Id.

122. Petitioner has raised one procedural issue, related to the way MCSB dismissed B.E. from Hospital/Homebound services on May 13, 2004, based on its policy to automatically dismiss students from Hospital/Homebound services at the end of a school year and requiring a new application process for such services.

123. Florida Administrative Rule 6A-6-03020 provides for the placement of students in Hospital/Homebound services. The Rule states in part:

(1) Homebound or hospitalized. A homebound

or hospitalized student is a student who has a medically diagnosed physical or mental condition which confines the student to home or hospital and whose activities are restricted for an extended period of time. The medical diagnosis shall be made by a licensed physician.

(2) The term licensed physician, as used in Rule 6A-6.03020, FAC., is one who is qualified to assess the students physical or mental condition.

(3) Criteria for eligibility. A student is eligible for special programs for homebound or hospitalized if the following criteria are met:

(a) Certification by a licensed physician(s) as specified in Rule 6A-6.03020(2), FAC., that the student is expected to be absent from school due to a physical or mental condition for at least fifteen (15) consecutive school days, or due to a chronic condition, for at least fifteen (15) school days which need not run consecutively, and will be able to participate in and benefit from an instructional program; and

(b) Student is under medical care for illness or injury which is acute or catastrophic in nature; and

(c) Certification by a licensed physician as specified in Rule 6A-6.03020 (2), FAC., that the student can receive an instructional program without endangering the health of the instructor or other students with whom the instructor may come in contact; and

(d) Student is enrolled in a public school prior to the referral for the homebound or hospitalized program, unless

the student meets criteria for eligibility under Rules 6A-6.03011, 6A-6.03012, 6A-6.03013. 6A-6.03014, 6A-6.03014, 6A-6.03016, 6A-6.03018, 6A-6.03019, 6A6.03021, 6A-6.03022, 6A-6.03023, 6A-6.03024, and 6A-6.03025, FAC.

(e) A parent, guardian or primary caregiver signs parental agreement concerning homebound or hospitalized policies and parental cooperation.

(4) Procedures for student evaluation.

(a) The minimum evaluation for a student to determine eligibility shall be a medical statement from a licensed physician(s) as specified in Rule 6A-6.03020(2), FAC., including a description of the handicapping condition with any medical implications for instruction. This report shall state the student is unable to attend school and give an estimated duration of condition.

(b) A physical reexamination and a medical report by a licensed physician(s) as specified in Rule 6A-6.03020(2), FAC., may be requested by the administrator or exceptional student education or the administrators designee on a more frequent basis than required in Rule 6A-6.0331(1)(c), FAC., and shall be required if the student is scheduled to attend school part of a day during a recuperative period of readjustment to a full school schedule.

(5) Procedures for determining eligibility.

(a) For a student who is medically diagnosed as chronically ill or who has repeated intermittent illness due to a persisting medical problem, staffing as required in Rule 6A-6.0331(2) and (4)(b), (c), (d), and (e), FAC., shall be held annually to establish continuing eligibility for homebound or hospitalized services.

(b) A student may be alternately assigned to the homebound or hospitalized program and to a school-based program due to a severe, chronic or intermittent condition as certified by a licensed physician, as specified in Rule 6A-6.03020(2) FAC.

(6) Procedures for providing and individual educational plan.

(a) For the homebound or hospitalized student who meets the eligibility criteria for programs as listed in Rule 6A-6.03020(3)(d), FAC., whose physician expects the placement in the homebound or hospitalized program to exceed thirty (30) consecutive school days, the individual educational plan shall be developed prior to assignment but may be developed with out a formal meeting, as required in Rule 6A-6.0331, FAC.

(b) For the homebound or hospitalized student who does not meet the eligibility criteria for programs as listed in Rule 6A-6.03020(3)(d), FAC., whose physician expects the placement in the homebound or hospitalized program not to exceed thirty (30) consecutive school days, the individual educational plan may be developed after assignment and without the formal meeting required in Rule 6A-6.0331, FAC . . . .

124. This rule does not authorize automatic dismissal of a child with disabilities from Hospital/Homebound services, but provides only for a formal determination of the child's continuing need for the services once a medical diagnosis by a licensed physician of a "physical or mental condition, which confines the student to home or hospital and whose activities are restricted for an extended period of time," is made.

125. The evidence was clear that B.E. was found eligible under the diagnosis of Dr. Voeller in August 2003, and received Hospital/Homebound services under an IEP for providing for such services.

126. Under the rules, it is clear that MCSB may require a "physical reexamination and a medical report" on a more frequent basis than annually. In fact, such reports were provided by Dr. Voeller on November 26, 2003 and on January 20, 2004.

127. MCSB personnel admitted that Dr. Voeller's letters indicated that B.E. continued to need homebound services, but insisted that a "diagnosis" was needed. However, once a student has been found eligible the rules provide for an annual staffing to determine "continuing eligibility," not a new diagnosis.

128. Admittedly MCSB had the right to require that Dr. Voeller provide an update to her diagnosis and reports. There is no evidence that MCSB made any effort to obtain another updated report from Dr. Voeller or request any further information from her. Petitioner's mother's consent was never withdrawn. MCSB had all the authority required under the Rule to exercise its duty to determine B.E.'s eligibility for continued Hospital/Homebound services.

129. There was nothing to prevent MCSB from communicating its informational needs to Dr. Voeller and, in fact, MCSB had

already done that effectively in August and November 2003 and in January 2004.

130. To automatically dismiss B.E. from Hospital/Homebound services, without serious consideration of Dr. Voeller's letters and updates was a violation of B.E.'s procedural due process safeguards. Moreover, to automatically dismiss B.E. from Hospital/Homebound services without obtaining any updates from B.E.'s treating physicians similarly violated B.E.'s procedural due process rights. The effect of such violation was compounded when it resulted in B.E. being offered an inappropriate and insufficient educational placement in the August 2004 IEP, resulting in B.E.'s continued placement in a private school.

131. Although technical procedural safe guard violations will not automatically invalidate an IEP, the Rowley standard requires administrative law judges to strictly review an IEP for procedural compliance. Dong v. Board of Educ., 197 F.3d 793, 800 (Fla. 6th Cir. 1999). As indicated above, the procedural violations against the rights and interests of B.E. were significant. They have caused B.E. to suffer significant emotional loss and forced Petitioner to seek alternative private education. Due to the significance of the procedural violations, MCSB violated the legal requirements of FAPE in this matter. Daniel R.R. v. State Board of Educ., 874 F.2d 1036, 1041 at 1049 (Fla. 5th Cir. 1989).

132. As indicated FAPE also requires a substantive educational component. IDEA's educational requirement for FAPE has been interpreted by the Supreme Court in Rowley to be satisfied when the school system offers the disabled student a "basic floor of opportunity consist[ing] of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201-203. A corollary to the above is that such offer must also be implemented by the School.

133. In School Board of Martin County v. A.S., 737 So. 2d 1071 (Fla. 4th DCA 1999), the court discussed the nature and extent of the educational benefits which Florida school districts must make available to exceptional, or disabled, students, stating:

> Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County School District, 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198, 102 S. Ct. 3034. Id. at 1074.

134. The court in Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247-248 (Fla. 5th Cir. 1997) found that the educational benefit, to meet the IDEA standard must be

"likely to produce progress, not regression or trivial educational advancement." The Eleventh Circuit held that the determination of adequate educational benefit should be "based on surrounding and supporting facts that EAHCA requirements have been satisfied." J.S.K. v. Hendry at 1573.

135. In this case, Petitioner does not challenge the goals and objectives of either the May 2005 or the August 2004 IEPs. Her objection in both cases is to the proposed educational placement and the implementation of the May 2005 IEP.

136. Petitioner alleges that the IEP of August 2004 and May 2005 placed B.E. in classes that were inappropriate for her. Petitioner also alleges that MCSB continued to deny B.E. a FAPE, after agreeing to the IEP of May 2005. While Petitioner's accepted this IEP in principle, Petitioner's allege that MCSB failed to properly implement the agreed preparations for B.E.'s return to school.

137. In IDEA, Congress strongly expressed its preference for educating disabled students in the LRE, stating:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §

1412(a)(5)(A).

138. This statutory language contemplates a flexible approach, requiring mainstreaming to the maximum extent "appropriate," when education can be achieved "satisfactorily." In Daniel R.R., 874 F.2d 1036 (Fla. 5th Cir. 1989), the court stated that "[s]chools must retain significant flexibility in educational planning if they truly are to address each child's needs." Id. at 1044. The court in Daniel R.R. suggested a policy of deference to the mainstreaming choices of educators:

> Ultimately, our task is to balance competing requirements of the EHA's dual mandate: a free appropriate public education that is provided, to the maximum extent appropriate, in the regular education classroom. As we begin our task we must keep in mind that Congress left the choice of educational policies and methods where it properly belongs--in the hands of state and local school officials. Our task is not to second-guess state and local policy decisions; rather, it is the narrow one of determining whether state and local school officials have complied with the Act. Id. at 1048.

139. Federal regulations under IDEA require that B.E.'s "specially designed instruction" be adapted, "as appropriate to the needs of the eligible child . . . in the content, methodology, or delivery of instruction." The instruction should "address the unique needs of the child . . ." and "ensure access of the child to the general curriculum. . . ." 34 C.F.R. § 300.26(b)(3)

140. The standard for assessing a District's failure to implement portions of an IEP is set forth in Houston ISD v. Bobby R., 200 F.3d 341 (Fla. 5th Cir. 2000). Adopting an analysis from Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989), rev'd on other grounds, 932 F.2d 551 (6th Cir. 1991), where the court held that a District's failure to provide services and modifications on an IEP did not constitute a per se violation of IDEA, the Fifth Circuit stated:

> [W]e conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Bobby R., 200 F.3d at 349.

141. Several Federal Regulations are relevant to the provision of FAPE. Those rules state, in relevant part:

> 34 C.F.R. §300.26 Special Education
> (b)(3) Specially-designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction -
>
> (i) To address the unique needs of the child that result from the child's disability; and
>
> (ii) To ensure access of the child to the general curriculum, so that he or she can

meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.551 Continuum of Alternative Placements:

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must -

(1) Include the alternative placements listed in the definition of special education under Sec. 300.26 (instruction in regular classes, special classes, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. (Authority 20 U.S.C. 1412(a)(5)

142. In this case, there are two IEPs, which are at issue here. The IEP offered on August 17, 2004, to replace the previously improperly dismissed Hospital/Homebound placement and the May 26, 2005 IEP. During this time B.E. was being privately educated due to the alleged inadequacies of the August 17, 2004, IEP.

143. The adequacy of the goals and placement of the May 2005 IEP is not being challenged itself, but rather the implementation of the IEP placement. It is the failure of MCSB

to implement promised pre-planning and training that is alleged to have caused a substantive violation of IDEA, as well as the failure of the classroom demographics to meet B.E.'s unique educational and socialization requirements.

144. In determining the appropriate educational placement for a child with disabilities, it is essential to look first at that child's specific and unique educational needs. 34 C.F.R. § 300.26(b)(3)(i). Considerable evidence has been presented in this cause relative to B.E.'s educational needs.

145. The IEP of August 17, 2004, placed B.E. in a varying exceptionalities classroom with a regular education Read 180 class. Initially, B.E. would only attend school in the Read 180 class for 55 minutes a day since she had already been dismissed from Hospital/Homebound services. MCSB hoped that B.E.'s instructional time could be increased as she gained comfort in her surroundings. Given B.E.'s academic abilities, the short amount of time in school was clearly inappropriate and did not provide FAPE to B.E.

146. Although MCSB testimony established that "home instruction" was an alternative to returning B.E. to a regular education classroom, such instruction was not offered to her. See 34 C.F.R § 300.551 Continuum of Alternative Placements (b)(1).

147. In 34 C.F.R. Section 300.552(d) there is a specific requirement that consideration be given to any potential harmful effect on the child or on the quality of services that he or she needs in determining the least restrictive environment.

148. The evidence showed that the August 2004 IEP did not provide for all of B.E.'s educational and academic needs. Even if one were to accept that placement in a regular educational, co-taught reading class was an appropriate placement, this IEP fails entirely to provide for the rest of B.E.'s educational needs during the time she would not receive a full day's instruction in school. The evidence was clear that B.E. would benefit from and could handle a full day of academic instruction. Because of B.E.'s unique socialization requirements and fear of school, all parties agree that a full day of instruction could not be given at school. Apparently, MCSB staff was willing to let Petitioner's academics fall behind in order to not provide services at B.E.'s home and in the hope that she could eventually attend school full time. This lack of instruction did not provide FAPE to B.E.

149. The August 2004 IEP also does not meet B.E.'s need for a very small class with a low teacher-pupil ratio with appropriate peer models functioning at her cognitive level. All experts agreed that B.E. needs such a class placement. The

students in the proposed placement were significantly younger than B.E. and were not performing at her grade level.

150. Faced with an inappropriate educational plan for their daughter, B.E.'s parents were left with no choice but to seek appropriate education for B.E. from private sources. Petitioner's mother provided appropriate notice to MCSB that she did not accept this IEP and that she was going to place B.E., "in a private educational setting at Public Expense." From that point until the date of the Due Process hearing, B.E. was home schooled under the paid tutelage of Ms. Johnson for nine hours of direct instruction per week at eight hundred dollars ($800.00) a month.

151. The inappropriate August 17, 2004, IEP continued to be in force until the parties were able to agree to a new IEP on May 26, 2005. The previous Due Process hearing was dismissed once this IEP was developed.

152. The May 2005 IEP provided that Autism would be added to B.E.'s eligibility and that she would be served in ESE classes, with a small teacher-pupil ratio. The parties agreed that B.E. would receive direct, specialized instruction. The parties agreed upon appropriate goals and objectives.

153. Finally, the parties agreed on the necessary preparations for B.E.'s successful return to the MCSB schools and documented these terms in the ESE Staffing Committee notes,

attached to the May 2005 IEP. According to these notes, B.E. was to be in a "small group with appropriate age peers to develop pragmatic communication and social interactions. The notes further required MCSB to pre-plan and train appropriate staff during the summer before B.E. attended school. MCSB was also requires to complete a behavior observation and a sensory profile during the summer.

154. The evidence showed that these preparations and conditions were essential to B.E.'s successful integration into any public school classroom environment.

155. MCSB failed to implement the preparations, which had been agreed to between the parties, and as a consequence the school was not appropriately prepared to receive B.E. as a student.

156. When Petitioner's mother realized that most of the agreed to preparations had not been done, she refused to allow B.E. to go into a situation which she reasonably considered harmful to B.E. Given her past experiences with the District's schools, Petitioner's mother testified that she could not leave B.E. with the school until staff figured out what she needed. "They did that in the second fifth grade and it tore her to pieces." By not preparing for B.E., MCSB failed to provide an appropriately prepared and suitable classroom environment for B.E. in the fall of 2005.

157. On December 6, 2005, Petitioner again filed for due process.

158. In an effort to resolve this dispute, the parties agreed to try another classroom placement for B.E. The class proposed by MCSB was a multi-level class with autistic students taught by Ms. Starr.

159. The evidence showed that the students in this class were again significantly younger than B.E., ranging between 11 to 13 years old. The students have very scattered abilities, functioning between second and sixth-grade levels in most areas. Even a sixth-grade level is well below Petitioner's eighth-grade level, and the class is generally instructed on a sixth-grade level. Due to the fact that most of the class is working on a much lower academic level, Ms. Starr testified that she would meet B.E.'s academic needs by providing direct, individual instruction. She estimates that she may have to spend between 1.5 hours and 2.25 hours daily in direct, individual instruction of B.E. Given these age and academic differences, Ms. Starr's class does not provide B.E. with FAPE since the students do not fulfill the requirement that B.E. be educated with appropriate peer models functioning on her cognitive level.

160. Finally, MCSB has made minimal effort to prepare for B.E.. B.E. is a very complex and unique young lady. As demonstrated by Ms Johnson, she can be taught successfully, but

she needs special handling and understanding. She cannot be slotted into an ESE classroom, without careful planning and preparation.

161. There can be no question that B.E. suffered, at least socially and emotionally, from her experiences in the fifth grade (2002/2003). Even MCSB recognized her fragile condition after that year, when it allowed her to enter their Hospital/Homebound program. MCSB summarily dismissed B.E. from Hospital/Homebound and placed her back into a regular education class with the August 2004 IEP. The August 2004 IEP did not provide FAPE to B.E., and Petitioner's parents were forced to further B.E.'s education in a private setting. The May 2005, IEP and subsequent implementation or failure of such implementation, likewise, did not provide FAPE to B.E.

162. In 20 U.S.C. and 34 C.F.R. Section 300.403 reimbursement is authorized of parents of an ESE child who have withdrawn their child from public school and enrolled the child in a private educational placement without the consent of the district school board for the cost of such private school enrollment.

163. Parents who unilaterally change their child's placement without the consent of state or local school officials, generally do so at their own financial risk. School Comm. Of Burlington, Mass. v. Department of Education, 471 U.S.

359 (1985); see also Knable v. Bexley City School District, 238 F.3d 755, 763 (6th Cir. 2001); Wise v. Ohio Department of Education, 80 F.3d 177, 184 (6th Cir. 1996).

164. In this case, the Petitioner has established that MCSB has failed to provide FAPE, both under the August 17, 2004, IEP and under the May 26, 2005, IEP. Petitioner's mother acted in good faith toward MCSB. Even when MCSB improperly dismissed B.E. from Hospital/Homebound services, Petitioner's mother visited and considered the model Read 180 class MCSB was offering. Petitioner's mother went to the August 10, 2004 IEP meeting and discussed B.E.'s educational, social, and emotional needs. Only when it became obvious that MCSB was determined to return B.E. to a regular education class did she request due process and provide notice of her intent to place B.E. in private education at public expense. In doing so, she met the notice requirements of 20 U.S.C. Section 1412(a) (10) (C) (iii) (I) (aa)-(bb). Unquestionably, B.E.'s private placement with Ms. Johnson was appropriate. See Florence County Sch. Dist. v. Shannon Carter, 950 F.2d. at 164. See also Malkentzos v. New York State Department of Health, 923 F. Supp. 505 (N.Y. S.D., 1996). Given these facts, Petitioner is entitled to reimbursement for the expenses of B.E.'s private school placement.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ORDERED:

That the Marion County School Board failed to provide FAPE to B.E. and is responsible to pay the parents for private tutoring of B.E. since August 17, 2004, and shall continue to pay for private tutoring until such time as an appropriate educational program is offered to her.

DONE AND ORDERED this 28th day of July, 2006, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
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Filed with the Clerk of the
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this 28th day of July, 2006.

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NOTICE OF RIGHT TO SEEK JUDICIAL RELIEF

The decision and its findings are final, unless an adversely affected party:

a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 230.23(4)(m)5, Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.