

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

C. J.,)
)
 Petitioner,)
)
 vs.) Case No. 05-2863E
)
 MARION COUNTY SCHOOL BOARD,)
)
 Respondent.)
 _____)

FINAL ORDER

A final hearing was conducted in this case on January 17 through 20, 2006, in Ocala, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

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

For Respondent: Sidney M. Nowell, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent committed procedural errors which resulted in a denial of a free appropriate public education (FAPE) by impeding Petitioner's right to FAPE, significantly impeding the parents' opportunity to participate

in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefits.

PRELIMINARY STATEMENT

On August 8, 2005, Petitioner's father, M.J., filed a Request for Due Process Hearing on behalf of his son, C.J. (Petitioner) with Respondent, the Marion County School Board (School Board). The request alleged that Respondent had violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, et seq., raising the following issues: (a) whether Respondent failed to provide C.J. with a procedural safeguards notice prior to an August 5, 2005, Individualized Education Program (IEP) meeting that meets statutory and regulatory guidelines; (b) whether Respondent's action of changing C.J.'s placement was appropriate; and (c) whether services that Respondent provides subsequent to the date of the request for due process provide FAPE.

Respondent referred Petitioner's request for a hearing to the Division of Administrative Hearings on August 10, 2005. After a telephone conference with the parties on August 1, 2005, the undersigned issued a Notice of Hearing and a Pre-Hearing Order dated August 11, 2005. The notice scheduled the hearing for September 14, 2005, and noted that because of the agreed hearing date, the parties necessarily extended the 45-day timeline.

On September 1, 2005, a Notice of Appearance was filed by Mark S. Kamleiter, Esquire, on behalf of C.J.

On September 9, 2005, the parties filed a Joint Motion for Continuance informing the undersigned that the parties agreed to utilize the scheduled hearing date to conduct a mediation and an IEP meeting. On September 9, 2005, an Order was issued granting the Joint Motion for Continuance and requiring the parties to advise the undersigned no later than September 21, 2005, as to mutually agreeable hearing dates should the matter not be resolved through mediation.

While the date of September 14, 2005, was originally scheduled for mediation, the parties conducted a resolution conference and an IEP meeting on that date. The IEP meeting resulted in one issue being resolved. However, other issues remained.

On September 22, 2005, Petitioner filed a Status Report informing the undersigned that four days would be necessary to conduct the hearing and providing available dates of November 8 through 11, 2006. Unfortunately, the undersigned had previously scheduled hearings on those dates. Consequently, the undersigned's assistant contacted the attorneys by telephone for additional available dates on which to conduct the four-day hearing. After being advised of the parties' available dates, the undersigned issued another Notice of Hearing on

September 26, 2005, scheduling the hearing for December 6 through 9, 2005.

On September 30, 2005, Respondent filed an unopposed Motion for Continuance informing the undersigned that the required witnesses for the hearing would be unavailable during the time period of the scheduled hearing. On October 4, 2005, the undersigned conducted a telephone scheduling conference. As a result of that telephone conference, an Order granting Continuance and Re-Scheduling Hearing was issued on October 4, 2005, scheduling the hearing for November 14 through 16, 2005, three weeks earlier than previously scheduled. November 21, 2005, was also set aside as a fourth hearing day if that became necessary.

On November 1, 2005, Petitioner filed an unopposed Motion for Continuance informing that Petitioner had been delayed in the preparation of his case by the unavailability of an expert witness. On November 4, 2005, an Order Granting Continuance was issued requiring the parties to advise the undersigned no later than November 14, 2005, of mutually available dates.

On November 16, 2005, Petitioner filed a Status Report containing mutually available dates in January 2006. On November 16, 2005, a Notice of Hearing was issued scheduling the hearing for January 17 through 20, 2006.

On December 20, 2005, Petitioner filed a Statement of Issues. On December 21, 2005, Petitioner filed a motion requesting an order allowing a witness to testify via telephone. That motion was granted by Order dated December 22, 2006.

The parties did not file a stipulation of facts as required by the Order of Pre-Hearing Instructions. Instead, Petitioner filed a Statement: Re: Stipulation of Facts and a Witness List on January 13, 2006, and Respondent filed Respondent's Witness List on the same date. Respondent provided an Amended Witness List to the undersigned at the commencement of the hearing.

At hearing, Petitioner offered the testimony of seven witnesses, including C.J.'s mother, S.A.J. Petitioner offered Exhibits numbered 1 through 15 which were admitted into evidence.

Respondent presented the testimony of ten witnesses. Respondent proffered the testimony of an additional witness, Dr. Gary Mesibov. Respondent proffered Exhibit numbered 1. Joint Exhibit numbered 1 was admitted into evidence.

The parties requested 30 days after the filing of the transcript in which to file proposed final orders. Because of the length of the hearing and complexity of the issues, that request was granted. The Transcript consisting of seven volumes was filed on February 6, 2006. On March 6, 2006, the parties filed a Joint Motion for Extension of Time on Proposed Final

Order wherein the parties asserted that it would be in the best interests of their clients to extend the time for filing proposed final orders by two weeks. In consideration of the extensive hearing record, the motion was granted by Order dated March 8, 2006. On March 17, 2006, Respondent filed a Motion for Time Extension on Proposed Final Orders informing the undersigned that, due to counsel for Respondent undergoing daily medical treatment, an extension of time was again being requested and that no further requests were anticipated. Due to the circumstances represented in the Motion, it was granted by Order dated March 20, 2006. The parties timely filed Proposed Final Orders on April 11, 2006.

A post-hearing telephone conference took place on May 4, 2006, during which the parties agreed to a due date of May 24, 2006, for the issuance of the Final Order.

All references to Petitioner found in quoted language have been changed to "C.J." in this Order.

FINDINGS OF FACT

Background

1. Petitioner, C.J., was born on March 3, 1998. At the time of the hearing, Petitioner was 7 years old.
2. C.J. suffered from cytomegalovirus at a very young age, which left him profoundly deaf. He was in foster care prior to

the time he was adopted by M.J. and S.A.J., which occurred when he was 19 months old.

3. Members of C.J.'s adoptive family have varying abilities at using sign language. His mother, S.A.J., has an A.S. degree in interpreting, a B.S. degree in elementary education, and a Master's degree in deaf education. She is employed by Respondent as an itinerant teacher for the deaf/hard-of-hearing. C.J.'s father worked at the School for the Deaf at the Florida School for the Deaf and the Blind for one year and is a "pretty good" signer. One of C.J.'s sisters, R.J., holds a Florida State Certificate of Sign Language Interpreting and is a senior in college studying to be a deaf education teacher. His other two siblings have some ability to sign.

4. C.J. began his public education in Pinellas County, Florida, in a preschool program for the deaf. C.J. and his family moved to Marion County in the spring 2003. His first Marion County IEP was put in place May 12, 2003. The IEP listed his exceptionalities as "Deaf Hard of Hearing, Speech/Language Impaired, Occupational Therapy, Physical Therapy."^{1/}

5. All of the elementary deaf/hard-of-hearing classes in Marion County are located at South Ocala Elementary (South Ocala). In May 2003, C.J. was placed in a deaf/hard-of-hearing self-contained classroom at South Ocala. He was assigned to a

class comprised of students ranging in age from kindergarten through fifth grades taught by Ms. Chase. Ms. Chase holds a bachelor's degree with a double major in elementary education and deaf education. The 2002-2003 school year was her first year of teaching. C.J.'s mother was disappointed that C.J. was not placed in another classroom at South Ocala that was comprised of preschool-aged children who were deaf.

2003-2004 School Year

6. The following school year (2003-2004), C.J. was again assigned to Ms. Chase's class under the IEP developed in May 2003. Again, S.A.J. was disappointed because the class was comprised of children in second through fifth grades while C.J. was in kindergarten. S.A.J. believed that C.J. should have been in a class with peers of a similar age as C.J.

7. The reason given by the school district for assigning C.J. into Ms. Chase's class for the 2003-2004 school year was that Ms. Chase had had some success with C.J. the short time he has been in her class the previous spring.

8. During the 2003-2004 school year, C.J. was mainstreamed into a math class in which he showed progress. However, C.J. began having behavioral problems that year. During the year, a behavior specialist for the school board, Mr. Crist, provided services for C.J. for about a month, helping Ms. Chase with strategies in an effort to get C.J.'s behavior under control.

After that month, Ms. Chase began implementing the strategies and Mr. Crist was available on a consultative basis. The strategies were helpful but there were still things, such as potty training, that they could not get under control. Ms. Chase also began attending conferences to help her in dealing with C.J. She conducted independent research on the Internet and consulted with other teachers and professionals in an attempt to come up with successful strategies for teaching C.J. At the end of the 2003-2004 school year, the IEP team decided that C.J. would repeat kindergarten the following academic year.

9. Another IEP was developed on March 5, 2004. His exceptionalities were described the same as on the May 2003 IEP. Again, he was assigned to Ms. Chase's class for the 2004-2005 school year.

2004-2005 School Year

10. C.J. exhibited self-injurious behavior during the 2004-2005 school year. He engaged in head-banging, self-biting, and running into the classroom walls. He also, at one point, bit Ms. Chase almost every day and bit the speech therapist. He was much more aggressive than the previous year. Behavior intervention plans were in place for C.J. C.J. had a one-on-one aide during this school year who could sign.

11. In the winter of 2005, C.J. was evaluated at Gallaudet University in Washington, D.C. The school board paid for the evaluation and C.J.'s parents paid all travel and lodging expenses. The evaluation took three days and was conducted by Jennifer Reeseman, Clinical Psychology Trainee and Dr. Patrick Brice, Clinical Supervisor. Ms. Reeseman is a third-year Ph.D. student in clinical psychology. Dr. Brice holds a Ph.D. in clinical and developmental psychology and has been a professor of psychology at Gallaudet for eleven years.

12. While everyone was awaiting the results of the Gallaudet evaluation, it was decided that Ms. Ascierto, another behavior specialist with the school district, would come into the classroom to assist Ms. Chase with C.J.'s increasing behavior problems. Ms. Ascierto holds teaching certificates in New York and Florida. Her New York certificate is for teaching children with severe disabilities, including autism. At the time of the hearing, Ms. Ascierto was in the process of becoming TEACCH certified.^{2/} She has a significant background in dealing with children with autism.

13. Ms. Ascierto began working with C.J. in February 2005 in Ms. Chase's classroom for about three months. In Ms. Ascierto's experience, C.J. was exhibiting behaviors that are typical of a child with autism:

Basically because with all my years of experience with varying degrees of autism, there are some behaviors that are stereotypical that you would expect an autistic child to present with. And C.J. was exhibiting some of those behaviors.

She observed C.J. not interacting with the other students in the class. She helped Ms. Chase with behavior strategies and teaching strategies.

14. In Ms. Ascierto's experience, C.J.'s autism was compromising his overall accessibility to learning and to socialization.

15. In addition to Ms. Ascierto working with C.J. in Ms. Chase's class, the school board added the services of an itinerant deaf-education teacher, Ms. Pearson, to C.J.'s program. Ms. Pearson holds dual bachelor's degrees in elementary and early childhood education, and a master's degree from Gallaudet in deaf education. Ms. Pearson is not a behavior specialist but felt she could manage C.J.'s behavior. Ms. Pearson now works with the Florida Outreach Project-Deaf Blind Services under the Center for Autism and Related Disorders (CARD) at the University of Florida.

16. Ms. Pearson worked with C.J. for one-on-one instruction in a separate classroom for approximately two hours daily. At the beginning of the time she worked with C.J., he engaged in severe head-banging, head-slapping, and picking at

his nose and face. If he did not want to do something, he would push it away, push it to the floor, or throw it. When C.J. transitioned in and out of his deaf education classroom, Ms. Pearson observed C.J. more easily agitated when in Ms. Chase's classroom.

17. As time went on, Ms. Pearson observed C.J. making progress with his behavior including his head-banging reduced to lightly slapping his hand on his head when upset, and in his toileting. Instead of pushing away or throwing something he did not want to work on, he would indicate to her that he did not want to finish. She further observed his behavioral problems dwindled as time went on.

18. In addition to making progress on his behaviors, Ms. Pearson noted that C.J. made progress in his work including memorizing sight words, and in particular, in math. Despite his progress, she described C.J. as still struggling, noting that he was not able to pass everything on the kindergarten checklist.

19. Ms. Chase's description of C.J.'s progress was more reserved. She also noted his progress in math. However, Ms. Chase described his self-injurious behaviors as minimally improved: "I mean, we went from, I think, the average was about sixty-five head bangs a day to maybe fifty-two . . . but they were slowly starting to decrease." However, she noted that there were other areas that he still "had a lot of delays in

. . . like potty training, expressing his wants and needs, being able to identify all pictures in a book, even being able to identify things on campus."

20. At some point in the spring of 2005, the Gallaudet report was received. The Gallaudet evaluation resulted in a 14-page Psychoeducational Assessment Report. The diagnoses and recommendations contained in the report are as follows:

Diagnoses

Given the information and test results discussed above, the following DSM-IV-TR five axis diagnosis is suggested:

Axis I 299.00 Autistic Disorder, Mild to Moderate

Axis II No diagnosis

Axis III Bilateral deafness

Axis IV Educational problems (lack of progress in significant areas)

Axis V GAF = 25 (current)

Recommendations:

1. The most appropriate placement for C.J. is a classroom that can both regularly expose C.J. to fluent sign language models and also address his behavioral and social needs. Professionals familiar with educating deaf children and implementing behavioral modifications programs consistently with C.J. would be able to begin to address his needs in a fashion so that he would be able to make improvements in areas of concern (i.e., adaptive behavior, use of communication, and daily living skills). The implementation of

intensive behavioral modification techniques would require much one-on-one time from a skilled professional at the beginning of such a placement. Thus, the following options must be evaluated in terms of which would be best able to meet C.J.'s needs.

One option is placement in a classroom prepared to work with deaf children and provide a fluent signed communication model for C.J.. This classroom would satisfy C.J.'s need for language models, but would need adaptation in order to deal with his behavioral needs. An advantage of the deaf classroom is that it provides C.J. the opportunity to practice his social skills with other deaf peers. A disadvantage of this type of classroom placement is that it is not appropriately equipped to address daily living skills, toileting needs, and other adaptive behaviors without supplementation and adaptive to the existing program.

Another option is placement in a self-contained classroom prepared to work with children with pervasive developmental disabilities. This classroom would be able to address C.J.'s needs in the areas of adaptive behavior and daily living skills. Improving C.J.'s ability to toilet independently and perform other daily living skills will also improve his ability to function within the classroom. However, this type of a classroom placement would be unable to appropriately meet C.J.'s need for fluent sign communication models. If an interpreter was placed in the classroom, C.J. would not presently be able to benefit from the interpreter. The presence of an interpreter would only give him limited access to a language model, which would be insufficient for improving his language at this point in time. Additionally, because his language use at this point is limited, it highlights the importance for sign language models to be present at all times.

Without fluent language models present in this type of classroom situation, C.J. would not be able to make progress in terms of language and communication development.

The option of residential treatment/ placement would be inappropriate as C.J. has clearly developed a positive emotional attachment and relationship with his parents. Given his early history of removal from the home and placement in foster care, residential treatment/ placement would not be a viable option for C.J.. His present stage of receptive language development would make it impossible to explain to him the reasons or the duration of the placement. The risks of such a placement far outweigh the benefits in his situation.

If such a choice between classroom placements is to be made it would be the deaf classroom placement that would be able to address some of his behavioral difficulties, it would be extremely difficult to have that placement also satisfy his needs for formal fluent language exposure. In order for the deaf classroom placement to have a greater likelihood of success in working with C.J., the following changes are suggested:

A. C.J. needs one-on-one assistance in the classroom from an adult in order to achieve the primary goal of self-regulation (i.e., toileting and activities of daily living). Increased self-regulation should lead to a decrease in self-injurious behaviors and increase his tolerance for frustration so that he is better prepared to learn in the classroom environment. Once he has achieved greater self-regulation he will be better prepared to work on social skills and other goals.

B. All communicative efforts from C.J. (i.e., pointing, grabbing, etc) should be reinforced and followed by comments and elaboration in sign language to clarify and teach formal sign language. While C.J.'s formal expressive language use is limited at the present, his efforts at any communication must be reinforced in order to lead to formal language acquisition.

C. Consultation and assistance from individuals skilled in working with children with autism in the classroom setting should be implemented. While these individuals may not be skilled in working with deaf children, they should be able to assist in designing and implementing behavioral modification programs for C.J.. This individual should consult with C.J.'s classroom teacher and other members of the team that work with him. The development of a comprehensive behavioral modification plan should begin immediately. Specific goals need to be outlined and a plan of reinforcement begun. This individual will need to continue to consult with the team in order to accommodate C.J.'s changing needs and accomplishments. Behavioral modification for children with autism has shown to be extremely effective in symptom amelioration and increases in cognitive and language functioning. Many different approaches to working with children with autism have been developed, standardized and show varying effectiveness rates through research. Examples of research supported interventions included Applied Behavioral Analysis (O. Ivar Loovas), Floortime (Stanley Greenspan), Relationship Development Intervention (RDI, Steve Gutstein).

D. The initiation of group play therapy experiences for C.J., led by a professional skilled in working with play therapy groups. Given C.J.'s current age and ability to attend, he should engage in play therapy for

approximately 15-20 minutes at a time, 2-3 times per week. The play therapy group has been shown to be one effective way of working with children with autism, and will also serve to give him the opportunity to practice social skills with his peers. This group will serve a dual-purpose goal by giving him the opportunity to practice social skills, as well as a model to follow from his peers within the group.

E. Weekly physical therapy is recommended in order to address the motor deficits C.J. is currently experiencing. Particularly, gross-motor coordination skills needs to be addressed in order for C.J. to be able to play appropriately with other children without risk of harming himself during play.

F. The continuation of his current occupational and speech-language therapy is also recommended.

G. Re-evaluation of C.J.'s placement should occur yearly, as his needs will change once the appropriate interventions have been implemented. His progress should be monitored and a formal evaluation of his cognitive functioning, language, and adaptive behavior should be performed by an individual skilled in the assessment of deaf children in order to measure the effectiveness of the placement and the intervention.

21. An IEP meeting was held on April 7, 2005, to consider the Gallaudet evaluation in educational planning for C.J. It was determined that C.J. was eligible for placement in the autistic program. The IEP developed on that day identifies C.J.'s exceptionalities as follows: "Autistic, Deaf/Hard of Hearing, Language Impaired." C.J.'s parents objected, and

continue to object, to his primary exceptionality being listed as "autistic" as opposed to "deaf/hard-of-hearing." His placement did not change at this time.

22. At the time of this IEP meeting, he was still wearing pull-ups in school because he was still having toileting accidents. When he would have toileting accidents at school, S.A.J., who was and is a staffing specialist for Respondent, was called into the classroom to change C.J.'s diaper. This became a problem during the second semester when S.A.J. was moved from being a staffing specialist at South Ocala to another location. C.J. was also still wearing a protective helmet at school.

23. In addition to the Gallaudet evaluation and report, C.J.'s parents requested that Dr. Donna Gilles observe C.J. and make recommendations relative to his educational needs. Dr. Gilles holds a doctorate from Johns Hopkins University with a major in severe disabilities and is Associate Director of CARD at the University of Florida. Both Dr. Gilles' master's and doctoral degrees focused on behavior technology. She is also director of the statewide Deaf Blind Project.^{3/}

24. Dr. Gilles observed C.J. in May 2005, both in Ms. Chase's class as well as when he was with Ms. Pearson. Dr. Gilles also observed C.J. at home. As a result of these observations, Dr. Gilles wrote a report which included the following recommendations:

Visually Supported Language

The underlying theme of my suggestions is to provide C.J. more visual support for following directions and performing tasks. Visual supports in the form of pictures, written words, or other symbols assist in anchoring the message to which C.J. must attend. It appears that C.J. needs more time to process receptive language, and when directions are given in sign language alone, C.J. has difficulty processing the direction quickly enough to get the whole message. I observed two things happen when he had difficulty processing the directions -- he either became frustrated (whining, crying, head slapping), or he only picked up on the last part of the message. Sign language and spoken language are fleeting, there is nothing that stays behind to remind the person of what to do, especially in the context of having many things to attend to at the time the message is provided. When using visual messages, not only will it be easier to remember the language, but it will facilitate more independence in following through to task completion. I am not advocating that pictures or other symbols replace sign language as C.J.'s primary receptive and expressive mode. I am, however, strongly suggesting using visual aids to support his sign language so that he can be a more efficient consumer of sign language. Evidence shows that when other symbolic means of receptive and expressive communication are used in conjunction with verbal and sign language, the primary mode is enhanced. With that context, here are some suggestions.

- 1) Create an "agenda" of activities. This can be made up of representations of each activity that is to be completed. He can check off each item (or pull a symbol off a schedule) to signal completion. Making him a participant in using the schedule or agenda, will encourage his independent use

of it more quickly. Use this concept also to signal to him how much work will be required of him, as the word "finished" is abstract. For example, when doing math problems, have the problems written on a page so that he can see the amount of work. Summarily, when he is eventually asked to do spelling words, to have spaces numbered 1, 2, 3, etc. to designate how many before "finished" is a reality. Surprises don't work, knowing what is expected does work.

2) When stating contingencies, "first you do this, then you can do that", he appears to have a recency effect and often catches only the latter half of the contingency. So when he is presented with "do this task and then you can have the computer", he appears to catch "computer" and may not understand when he has to do work instead of having the computer. This may be one source of frustration. To facilitate his understanding of a contingency, use a "T-chart" that has two columns labeled "First - Then", with a picture, or written word, or the picture of the sign, under each so that he can process and remember the contingency.

3) Use a variety of materials within the same instructional period to teach concepts. For example to teach addition, use different materials for each problem: unifix cubes for one, cars for another, regular blocks for another, etc. This will prevent him from associating and then potentially insisting on one set of materials being used for addition, etc.

4) Continue to use visually represented language as a prompting method to reduce the amount of time the adult has to continuously remind him or explain to him what to do. Using the baskets to signal amount of work as well as sequence is a great example of what is in use already. Other examples could include a model of a completed task, a task analysis in pictures or words, again an

agenda, etc. Another example from the observation, when he was asked to create a chain of 5 links, he did it. When asked then to make a chain of 10 links, he tried to add 5 to the existing chain. Theoretically, he was correct to add 5 to the chain. The breakdown in communication and subsequent frustration came when he lost the message that he was to produce two chains, not one. Placing a card with the numeral 5 on it with the completed chain of 5 next to it, and then a numeral 10 with a space next to him may have signaled him without much additional coaching.

5) Use a visual schedule of the day. Again, ask him to participate in checking activities off or putting the symbol in a container (envelope, bin, etc.).

Behavior

I am sure that all who are involved with C.J. would agree that head banging and head slapping have to stop working for C.J. Without conducting a comprehensive behavior assessment or reviewing a report of one, my sense from interviews and a couple of observations at home and school is that these behaviors serve a variety of functions. Most obvious are: 'I am angry and frustrated at you or at what is not going right in this situation,' 'I needed your attention, fast,' and 'I really want to get out of this activity, now.' The helmet is stigmatizing and interferes with the use of his hearing aids, and the goal should be to eliminate his need to wear it. Chris has the ability to sign 'angry.' He has signed it at home, and I observed an approximation (which looked like the sign for 'want' only it was up by his face) to it right before he started crying out of what appeared to be frustration, which I am assuming, given that context, could have meant 'angry.' It certainly could have been reinforced as such. He can learn pretty quickly how to

come and get someone, or raise his hand to get attention. He also could easily learn to sign that he needs a break.

My suggestion to start with (unless this contradicts a behavior support plan already in place) is to follow a simple protocol that when he bangs his head or slaps his head.

1) Do not react to him in a way that conveys to him that you are panicked, horrified, frightened, or even concerned. The helmet is there to protect his head, use it to your short-term advantage.

2) Wait a few seconds after he stops and indicate to him that you understand that he is angry/wants attention/needs a break, etc.

3) Model the behavior that you want him to do instead of banging/slapping his head (raising hand, coming to get you, signing angry, etc.).

4) Assist him to practice the desired sign/behavior.

To decrease the amount of his skin picking (face, etc.), try keeping his fingers and face moisturized so that it keeps scabs softened, and fingers smooth.

Dr. Gilles also gave detailed suggestions regarding C.J.'s toileting.

25. Dr. Gilles discussed her recommendations with both Ms. Chase and Ms. Pearson who were receptive to her suggestions.

26. C.J. finished out the 2004-2005 school year in Ms. Chase's classroom.

27. During the summer of 2005, S.A.J. worked extensively with C.J. on reading, math, toileting, and other skills. He made significant progress in reading. He did not wear a helmet at home because he did not engage in head-banging during the summer. He did not engage in face-picking during the summer. He was completely out of diapers by the end of the summer.

2005-2006 School Year

28. Approximately a week before the 2005-2006 school year was scheduled to begin, C.J.'s parents requested a meeting with school personnel. The purpose of the request for a meeting was to discuss C.J.'s progress during the summer and to specifically address their desire that C.J. begin the school year without wearing diapers or a helmet.

29. S.A.J. insists that neither she nor her husband requested an IEP meeting. S.A.J. assumed that the meeting they requested would be with the classroom teacher and the school principal to discuss their desires regarding the helmet and diapers. S.A.J. did not learn that it might be an IEP meeting until a day-and-a half before the meeting.

30. Indeed, the August 5, 2005, meeting was an IEP meeting. C.J.'s parents did not receive any prior written notice of the IEP meeting. The parents did not receive prior written notice that the school board was proposing a change of placement.

31. Respondent insists that the parents requested an IEP meeting. Kathy Ruiz, lead staffing specialist for Respondent, acknowledged, however, that she had not spoken to C.J.'s parents but had received an e-mail from the guidance counselor that M.J. called and requested an IEP meeting.

32. The Notice of Conference form, referred to as the parent invitation, contains blanks for checkmarks with several choices as to the purpose of the IEP meeting. The purpose of the August 5, 2005, IEP meeting was described as "Parent Request." The blank beside the choice "Change in Placement" was left blank. The parent invitation form was given to S.A.J. at the conclusion of the August 5, 2005, IEP meeting.

33. Respondent invited Sarah Rockwell, a teacher of autistic students at Maplewood School, to the August 5, 2005, IEP meeting. C.J.'s parents were not aware that anyone from Maplewood would be in attendance at the IEP meeting. During the IEP meeting, Ms. Rockwell explained her classroom and the teaching methods she used.

34. C.J.'s parents objected to C.J. being removed from the deaf education classroom to the autistic classroom. Despite their objections, the IEP team recommended that C.J. be placed in the autistic classroom at Maplewood. C.J.'s parents refused to sign the IEP form.

35. Ms. Ruiz, as part of the IEP team, agreed with C.J.'s recommended change of placement from the deaf education classroom to the autistic classroom:

Because, in my opinion, C.J. had been at South Ocala for three years with limited progress and an escalation in behaviors, self-injurious behaviors. He needed something different in order to make progress. . . . Because I think it would be a fresh start for C.J. It would implement a different type of classroom that was more geared towards addressing his--the stumbling blocks that were prohibiting him from learning. We needed to address the behaviors. That's what was getting in his way, in my opinion, from learning

36. Respondent asserts that the parents were made aware at the April 7, 2005, IEP meeting, when C.J. became eligible for the autistic program, that placement was going to be addressed later and that the discussion of placement for C.J. should not have been a surprise to C.J.'s parents. According to Ms. Ruiz, she does not send notices of IEP meetings to parents who request IEP meetings.

37. Ms. Ruiz acknowledged that Respondent failed to notify the parents that persons from Maplewood were being invited and failed to notify them that a change of placement was going to be discussed.

38. C.J.'s parents filed their request for due process hearing with Respondent on August 8, 2005. The request included the following:

We requested that he be allowed to remain at South Ocala with the same program he had received at the end of the school year since he was now making progress. . . . We were denied.

39. The August 5, 2005, IEP meeting was held on a Friday. On August 8, 2005, the first day of school, C.J. was placed in a self-contained autistic classroom at Maplewood taught by Ms. Rockwell. The students in the class ranged from first through fifth grade.

40. Ms. Rockwell holds a bachelor's degree in special education from the University of Florida. She received that degree in 2004 and is currently working on her master's degree in special education. She is somewhat proficient in sign language. Since she was the only teacher of autistic children who signed, C.J. was assigned to her class.

41. At the beginning of the school year, C.J.'s older sister, R.J. was hired temporarily to assist in C.J.'s classroom. There is conflicting evidence as to whether she was hired in the role of interpreter or in the role of aide/interpreter. R.J. had previously worked for Respondent in the role of interpreter. In any event, she worked with C.J. interpreting for him and assisting with his instruction.

42. After R.J. left, other interpreters were hired. At the time of the hearing, C.J. had had four different

interpreters, including his sister, R.J., since being assigned to Ms. Rockwell's class.

43. On September 13, 2005, Dr. Gilles returned to conduct another observation of C.J., this time in his autistic classroom. She reported the following in an e-mail to M.J.:

These are my initial reactions and should not be construed as anything other than a draft:

- 1) C.J.'s behavior has improved dramatically since last year. He is not wearing a helmet, nor is he picking his face. He occasionally gets upset, but resolves quickly. He is engaged when doing table-top tasks, and group activities. He continues to isolate during down time.
- 2) Sarah Rockwell has a lot of experience with individuals who are on the Autism Spectrum, but understands her limitations when it comes to teaching concepts from a deaf-ed perspective.
- 3) The work presented to C.J. yesterday was mostly practice as opposed to instruction.
- 4) The interpreter was new, and only his 2nd day there. He and the teacher are still coordinating which signs to use as per C.J.'s repertoire. C.J. attended more to the teacher/therapist than to the interpreter. His teacher is the only signer among his staff. Others who don't sign, had difficulty communicating with him through an interpreter. Staff could use a refresher on the role of and interactions with an interpreter. My initial thoughts are these:

1) C.J. has a combination of language-based challenges that will drive a unique, and truly individualized educational program for him. Regardless of his "autism" label, if his loss of information-gathering ability through the auditory channel is not addressed and accommodated, he will never meet his academic, social, and communicative potential.

2) C.J. needs direct instruction from a teacher trained and experienced in teaching concepts to a deaf child for language arts, reading, and math. For the time being, this might be accomplished on an itinerant basis for a couple of hours a day. That same person could provide consultation to Ms. Rockwell and to the Speech/Language Pathologist, who is new to him and not experienced with deaf children, so that they could oversee his academic skill practice, and communication building throughout the rest of the day. For other pieces of his curriculum, the combination of Ms. Rockwell's signing and the interpreter MAY suffice for now. Once his teachers (Ms. Rockwell and the itinerant deaf-ed teacher) have successfully addressed the combination of the autism and the deafness, as evidenced by his success on his goals and his academic work, the issue of securing same-age signing communication partners to facilitate an improvement in his communication and social skills (the defining features of autism) should be addressed. (Emphasis in original)

44. In addition to Dr. Gilles, C.J. was observed by Dr. Lynn Woolsey on September 15, 2005. Dr. Woolsey is an assistant professor at the University of North Florida in the deaf-education program. She holds a bachelor's degree in deaf education, a master's degree in early intervention and deafness,

and a Ph.D. in education with a focus on behavioral analysis in working with deaf students who have additional behavior disorders. She is also a board certified behavior analyst.^{4/}

45. Dr. Woolsey explained the difference between interpretation and teaching language to a deaf student:

A: . . . let me tell you that watching an interpreter is like watching a classroom through a funnel. So everything goes on around me, or the child, but my funnel is on one person. And I see the responses of one person . . . [a deaf student] needs a direct connection with the person who is providing the language. It would be very difficult to learn Spanish through an interpreter . . . something gets lost.

Q: So is it fair to say that in a deaf ed. class there is a significant amount of direct instruction in how to receive and understand language?

A: Yes, yes.

Q: And how to use sign language in communicating with others?

A: Right. Because as adults we would naturally correct the child. Or if you show me the wrong sign for orange, I am going to say, oh, you mean orange...and I am going to repeat it back to you, just like you would do in a normal conversation with a six-year-old. But that does not happen typically with an interpreter because the hearing teacher doesn't really understand that the deaf child has missed something. And the interpreter may, but they may be moving on so that gets dropped, because really math is what they're talking about and not the sign for orange. So the deaf ed. teacher matches the pace of the children and brings them along.

46. Dr. Woolsey observed virtually no communication between any of the students to each other or to C.J., that C.J. spent a lot of time in self-stimulation, or "stimming."

47. On September 14, 2005, the parties in this case met for a resolution session as required by law. As a result of this resolution session, the school board agreed to provide a deaf/hard-of-hearing teacher to work with C.J. in the autistic classroom. This was memorialized in an IEP meeting which immediately followed the resolution session and in writing with a notation on C.J.'s April 7, 2005, IEP.

48. In early October 2005, the school board hired Janeen Wilson to work with C.J. in Ms. Rockwell's class at Maplewood. Ms. Wilson, who is deaf, holds a bachelor's degree in elementary education and a master's degree in deaf education from Gallaudet. She is a teacher of the deaf/hard of hearing.

49. Ms. Wilson's role in the classroom with C.J. is to work with him on academics, as well as intervention with inappropriate behavior. Ms. Wilson works with C.J. one-on-one all day, for academics and otherwise. She communicates with C.J. by signing. She describes C.J.'s level of competency in signing as low, as he does not sign in sentences or carry on conversations. C.J. does not attempt to sign to the other children in the class. One of his classmates signs "a little bit sometimes" and another is picking up signs every day. She

encourages C.J. to play with other students and while he has shown improvement in that regard, he often chooses not to play with others.

50. There is no longer an interpreter in the class. During instruction time, Ms. Rockwell signs and Ms. Wilson sees that. Ms. Wilson also lip reads well.

51. Ms. Wilson does not consider Ms. Rockwell as her co-teacher for C.J. Ms. Wilson works with C.J. for all academic areas, while Ms. Rockwell does morning activities such as reading the calendar and identifying days of the week.

52. Regarding academics, Ms. Wilson describes C.J. as improving in math. He can read single words but cannot make a sentence. His language is delayed. He cannot keep his attention while stories are being read during circle time. Regarding reading, he can follow along and read the words, but she believes that he is frustrated because he receives reading instruction at home, already knows what is being covered, and is bored.

53. According to Ms. Wilson, she observes C.J. engaging in inappropriate behavior such as tantrums, every day.

54. Ms. Wilson describes C.J. as not a typical deaf child regarding communication. She believes that he is showing improvement in communication skills because of the visual

support system, Picture Exchange Communication System, that the autism program uses, that most deaf children do not use.

55. Stephanie Ames is a behavioral specialist at Maplewood. She works with C.J. a couple of times a week and has been since he began school at Maplewood. From August until the time of the hearing, she observed that his behavior of biting himself has decreased, the behaviors of head banging and hitting others have decreased slightly. However, his other behaviors have plateaued.

56. C.J. receives occupational therapy and services from a speech-pathologist. His occupational therapist has basic sign language skills. His speech/language pathologist knows minimal sign language. Both rely on Ms. Wilson to assist in communicating with C.J. Both believe that visual supports, as recommended by the behavior specialist, Ms. Ames, are beneficial to C.J.

57. Both Drs. Gilles and Woolsey observed C.J. on December 15, 2005. This was the first observation done by them after Ms. Wilson had been assigned to work with C.J. in the autism classroom.

58. As a result of her observations, Dr. Woolsey recommended as follows:

In summary of my observations there are several recommendations I would like to make. It is clear C.J. is affected by both by his deafness and his autistic-like behaviors. C.J. is currently educated in a classroom for autistic students. He has one teacher who signs fluently. The teacher of autistic students signs clearly but does not sign all the time. The assistant signs a bit but it cannot serve as any model for the acquisition of language. Thus, C.J. is in a classroom with one person who is fluent in ASL. On the day I observed there was no interpreter for the Deaf teacher. In this setting C.J. receives information about what happens during class from his Deaf teacher who must guess at what is happening around her. This situation minimizes C.J.'s direct involvement significantly.

During my observation C.J. spent a great deal of time either on a break, a transition with nothing to do, or a transition when he was walking from place to place. There were numerous opportunities to engage C.J. in conversation and provide incidental language that were missed. If I described C.J. in this setting it would be as an island in an island. He is surrounded by students who are not his age, and not communicative. He can only communicate fully with his teacher who was also at a disadvantage that day. His peers in the classroom do not communicate with each other, much less C.J. C.J. is unable to communicate directly with his P.E. teacher or his Occupational Therapist. C.J. is so very isolated.

In my mind the challenge of determining services and placement lie in how we view the effects of C.J.'s disabilities on his classroom activities. In this setting C.J. has no communicative or social peers. He cannot communicate with the support services staff. He may not do as well with an interpreter due to the effects of his disability on communication.

When professionals look at children with dual disabilities we often ask ourselves which is the primary handicapping condition. In C.J.'s case I submit it is language delay. In working with students who have autism the first goal is language. In working with students who are deaf or hard of hearing the first goal is language. In C.J.'s case the first goal should be language. Language models should surround him. He should have access to social peers who sign. His classroom peers have that. They all hear the teacher, the assistants, and the service providers. C.J. does not.

The consistent input of language will benefit C.J. the most. Access to signing peers whose age range matches his will provide C.J. with a less restrictive environment. Currently C.J. is in one of the most restrictive environments because his access to communicative adults and peers is severely limited.

It is my recommendation that language input should be considered first. C.J. will always be deaf but his autistic-like behaviors can be ameliorated with support.

59. As a result of her observations, Dr. Gilles made the following recommendations:

C.J. is a child whose needs are complex in that he has a hearing loss that significantly impacts on his ability to gather information through auditory means. In addition he exhibits traits of, and has been diagnosed with autism, which impacts on his ability to process information effectively and efficiently when presented in a transient, abstract manner. Despite these disabilities and his present level of language performance, he has been assessed to function within the low average range of intelligence. This provides reasons to expect that he can learn academic skills

close to grade level. In order to carry this out, he will benefit from daily intensive instruction (promoting acquisition in balance with fluency) using multiple methods of language input and communication output to learn new academic and non-academic concepts. Intensive academic and language instruction will best be provided by a teacher of students who are Deaf/Hard of Hearing for at least two to three hours a day, which is the range of what most children receive in intensive academic instruction (acquisition) during the day. Instruction in other areas, such as fine motor, social skills, self-care skills, as well as fluency building on already acquired academic concepts and skills can be taught and supervised by a teacher who understands students with autism. Social skills and communication skills are best learned in the present [sic] of socially and communicatively competent peers.

60. Both Drs. Gilles and Woolsey were concerned with the amount of "down time" C.J. has in his autistic classroom because that was when C.J.'s behaviors were worse and when he engaged in self-stimulation. Both Drs. Gilles and Woolsey were concerned that C.J. was isolated within the autistic classroom and did not have any opportunity to develop social interactions. Both Drs. Gilles and Woolsey are of the opinion that C.J. needs a language rich environment where both teacher and students are able to sign and communicate with him.

CONCLUSIONS OF LAW

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

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

63. In Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed. 2d 690 (1982), the United States Supreme Court set the legal standard for determining whether a state has violated IDEA. "[A] court's inquiry . . . is twofold. First, has the state complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Rowley, 458 U.S. at 206-207. Accord, School Board of Collier County, Fla. v. K.C., 285 F. 3d 977 (11th Cir. 2002).

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

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

65. The parties do not agree on where the burden of proof resides. Each party cites the recent United States Supreme Court case of Schaeffer v. Weast, 126 S. Ct. 528, 105 LRP 55797 (2005), as authority for its position that the other party bears the burden of proof (burden of persuasion). After careful review of Schaeffer, the undersigned is persuaded that, despite the unusual procedural posture of this case, the burden of proof resides with Petitioner. Id.

66. Petitioner alleges the following procedural errors:

--That Respondent failed to provide any written notice of MCSB's intention to invite an autistic teacher to the August 5, 2005, IEP and that it was their intent to change C.J.'s placement from his deaf education class to an autism class at the IEP meeting;

--That Respondent failed after the August 5, 2005, IEP to provide Petitioner with prior written notice of their intent to unilaterally change C.J.'s placement; and

--That Respondent refused and denied Petitioner's right to be maintained in his "stay put" placement and unilaterally moved him to the autistic class at Maplewood.

67. IDEA specifies the parameters of this Order as it relates to procedural violations. 20 U.S.C. § 1415(f)(E), provides as follows:

(E) Decision of hearing officer.

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

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

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

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

(III) caused a deprivation of educational benefits.

68. 20 U.S.C. § 1415 further reads in pertinent part as follows:

(b) Types of procedures. The procedures required by this section shall include the following:

* * *

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency-

(A) proposes to initiate a change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

* * *

(c) Notification requirements.

(1) Content of prior written notice. The notice required by subsection (b)(3) shall include--

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part (citation omitted) and, if this notice is not an initial referral for evaluation, the means by which a copy of the description of the procedural safeguards can be obtained;

* * *

(d) Procedural safeguards notice.--

(1) In General.--

(A) Copy to parents.--A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parent-

(i) upon initial referral or parental request for evaluation;

(ii) upon first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by the parent.

* * *

(j) Maintenance of current educational placement. Except as provided in (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . . .

69. State regulations also require that the school district provide parents with prior written notice a reasonable time before any proposal to change the placement of the child. Florida Administrative Code Rule 6A6-03311(1). Written notice to the parents must indicate, among other things, the purpose of the meeting and who, by title and position, will be attending. Florida Administrative Code Rule 6A-6.03028(7)(b).

70. The preponderance of the evidence establishes that the school board committed procedural violations.

71. First, the school board violated stay put. The parent expressly invoked stay put in the letter requesting this due process hearing. Instead, the child remained in the new placement, in violation of the stay put provision.

72. Second, the school board violated the requirement of giving the parents sufficient prior written notice of the August IEP meeting. In particular, the school board failed to give the parents prior written notice in violation of 20 U.S.C. s. 1415(b)(3) and (c)(3) that it intended to change the child's placement to a class for autistic children. Whatever assumptions C.J.'s parents had or did not have as to what would be discussed at the August 5, 2005 meeting, and whether or not they indeed requested an IEP meeting, Respondent failed to give prior written notice that it was proposing to initiate a change, a description of the action proposed, and an explanation of why their intended action was to change C.J.'s placement from deaf education to an autistic classroom. Respondent also failed to inform C.J.'s parents who would be in attendance at the IEP meeting.

73. Having found that that procedural violations did occur, the undersigned now must determine the impact of the procedural inadequacies as outlined in 20 U.S.C. s. 1415(f)(E), quoted above.

74. Clearly, the school district's failure to give proper notice regarding its intention to change C.J.'s placement from a deaf education classroom to an autistic classroom significantly impeded the parents' opportunity to meaningfully participate in the decision-making process at the August 5, 2005, IEP meeting.

75. The preponderance of the evidence establishes that unilaterally moving C.J. to the autistic classroom caused a deprivation of educational benefits to C.J., in particular before the services of the deaf education teacher was provided as a result of the resolution conference and subsequent IEP meeting held on September 14, 2005.

76. Finally, the preponderance of the evidence establishes that, even after Ms. Wilson was assigned to work with C.J. in the autistic class in October 2005, there is still insufficient language access for C.J. to receive meaningful educational benefits and, therefore, FAPE.

ORDER

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

ORDERED:

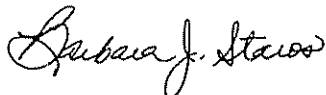
1. Respondent violated IDEA by failing to give full and meaningful notice of the purpose of the August 5, 2005, IEP meeting.

2. Respondent violated IDEA by not allowing C.J. to remain in his then current educational placement when C.J.'s parents invoked the stay put provision.

3. As a result of these procedural violations, C.J. did not receive FAPE in his placement in the autistic classroom at Maplewood.

4. Respondent shall promptly convene an IEP meeting and write an IEP consistent with the findings and conclusions of this Order, that provides C.J. with FAPE.^{5/}

DONE AND ORDERED this 18th day of May, 2006, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of May, 2006.

ENDNOTES

1/ Petitioner asserts that C.J. has been inappropriately placed since he arrived in Marion County. However, anything that occurred prior to the two-year statute of limitations of IDEA, which goes back to August 2003, is discussed for background information purposes only. 20 U.S.C. § 1415 (f) (C).

2/ TEACCH was not specifically defined in the record. From the evidence presented, TEACCH is apparently a program concerning the education and treatment of children on the Autism Spectrum.

3/ Dr. Gilles testified under subpoena from Petitioner and was not compensated for her testimony by either party.

4/ Dr. Woolsey appeared as an expert on behalf of C.J. without compensation of a fee. C.J.'s parents did pay for her lodging expenses to attend the due process hearing.

5/ The parents did not request compensatory education for C.J.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(I)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.