

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM SAMMONS and JANIE SAMMONS,)
as legal guardians of A.S., an incapacitated adult,)

Plaintiffs,)

vs.)

POLK COUNTY SCHOOL BOARD)

Defendant.)
_____)

Case No. 8:06-cv-2240 EAJ
SCB-EAJ
LEAD CASE NUMBER

THE POLK COUNTY SCHOOL BOARD’S DISPOSITIVE MOTION

The District Court conducts an *entirely* de novo review of the ALJ’s findings with the discretion to determine the level of deference it will give the ALJ’s findings (Doc. 98 p. 10). In this case the ALJ’s two orders should be overturned because A.S. (1) received FAPE for the two years in question, (2) the ALJ used a mechanical hour for hour approach that has been discredited to award compensatory education and (3) there is no basis to award an additional three (3) years of compensatory education for failing to change his diploma track to a special diploma. In awarding compensatory education the ALJ erred by applying a mechanical hour for hour formulation that has already been rejected by this court (Doc. 98 & 134). If compensatory education is awarded it must be based on the specific needs of A.S. with supporting evidence from the record and the School District not Lakeland Crossroads is the appropriate provider.

Plaintiffs' Complaint should also be dismissed. The First and Third Counts are identical, except that the first seeks review under federal law and the third seeks review under State Law. The relief sought is either moot or not supported by the record or not appropriate.¹

I. A.S WAS PROVIDED FAPE DURING THE 2002-2004 SCHOOL YEARS

In Draper v. Atlanta Independent School System 518 F.3d 1275 (11th Cir.) 2008 the 11th Circuit restated that to provide FAPE:

“[A]n educational program must be “reasonably calculated to enable the child to receive educational benefits.” “When measuring whether a handicapped child has received adequate educational benefits ... courts must only determine whether the child has received the basic floor of opportunity.”

A. The Basic Floor Of Opportunity Is Narrowly Drawn In This Circuit.

In this Circuit an IEP provides the basic floor of opportunity when an educational plan is provided that is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *M.M. v. School Board of Miami Dade County* 437 F3d. 1085, 1102. It is beyond dispute that A.S.’s IEP’s for the 2002-2003 and the 2003-2004 school years enabled A.S. to receive passing marks, advance from grade to grade and finally earn a standard high school diploma. A.S. earned a cumulative grade point average of 3.09 and he earned 24 credit hours in specified academic areas. When combined with the significant progress on his IEP’s and the significant non-academic benefits that he received, it is simply irrational to hold that A.S. did not receive the “basic floor of opportunity”.

A.S. also received substantial non-academic benefits from his IEPs. For example A.S. mastered his personal grooming goals and meal preparation goals. He also mastered his goals

¹ The Second Count for attorneys fees should also be dismissed as it is premature and a party cannot be an aggrieved party and a prevailing party in the same action *Zipperer v. School Board of Seminole County Florida* 111 F.3d 847 at 852 n2 (11th Cir. 1997)

regarding the use of his Augmentative Communication Device and now demonstrates pragmatic skills utilizing it. A.S. has also made substantial progress in his social skills, managing his physical anger, and organizational skills. The record does not support the ALJ's determination that "there is little evidence that any educational benefit was received by A.S. (#226, Remand Order, #2 Compensatory Ed. Order).

B. A.S.'S Education Meets The Two Part Test Of Rowley For FAPE.

To determine whether a student received FAPE the Supreme Court in *Rowley* established a two-part test. 458 U.S. at 206-07, 102 S.Ct. at 305. In *M.M. v. School Board of Miami Dade County* 437 F3d. 1085, 1097 the 11th Circuit stated:

"Under the *Rowley* test, the ALJ must first determine whether the School Board "complied with the procedures set forth in the [IDEA]." *Id.* at 206; 102 S.Ct. at 3051. If the School Board complied with the procedural requirements of the IDEA (i.e., it properly formed an IEP team and gave the parents sufficient involvement in the IEP formation), then the ALJ must determine whether the IEP was "reasonably calculated to enable the child to receive educational benefits."

1. The School Board Has Met The First Prong Of Rowley.

The evidence shows that the school district has met the first prong of *Rowley*, the School Board properly convened an IEP team for each of the IEPs challenged and the parents had substantial involvement in the process. The Sammons attended each IEP meeting, substantially participated and agreed to the contents of each IEP, with the exception of the February 23, 2004 IEP where they simply objected to A.S. graduating and the removal of several writing goals.² The Sammons did not object to the removal of the organizational goal which the team determined that A.S. had met.³

² Mr. Sammons testified that he disagreed with the February 2004 IEP because it graduated A.S. and because the three writing goals were dropped (Administrative Hearing Transcript ("AHT"). Vol. 3. p. 547).

³ An IEP is required to be held for a student annually, 6A-6.03028(3)(c). In this case the school district held two IEP's a year which indicates a concern and focus by the school district on A.S.'s educational program.

(a) The Sammons Actively Participated In The Formulation Of Every IEP

The Sammons agreed to and actively participated in every IEP at issue in this case, except the February 2004 IEP. These IEPs include those developed by the parents and the school district on 4/17/02, 2/25/03, 10/6/03 and 2/23/04. Mr. Sammons testified that he attended all of the IEPs over the years for his son (AHT. Vol. 2. 365). The Sammons did not challenge the IEPs until after A.S. had graduated and Mr. Sammons explicitly testified that he agreed to the April 17, 2002 IEP, the February 2003 IEP and the October 6, 2003 IEPs. (AHT. Vol. 3. 546-547). The Sammons were active participants in all IEP decisions and consented to every aspect of their son's education with the exception of the February 2004 IEP, where they objected to A.S. exiting the school system and the dropping of three writing goals.

(b) Under Black Letter Law The Sammons Extensive Participation And Approval Of The IEPs Insures That The School District Has Met The First Prong Of Rowley.

The 11th Circuit in *Doe* and *Weiss* described the role of the IDEA's procedural safeguards as set forth in the first prong of *Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982).

"Recognizing," said the *Doe* court, "that *Rowley* holds that the adequacy of an IEP is to be judged by whether it was produced in conformity with the requirements of section 1401(19), the [Supreme] Court's continued emphasis on the procedural safeguards afforded to parents convinces us that the Court was referring to the process by which the IEP is produced, rather than the myriad of technical items that must be included in the written document ... Adequate parental involvement and participation in formulating an IEP, not adherence to the laundry list of items given in section 1401(19), appear to be the Court's primary concern in requiring that procedures be strictly followed." *Id.* at 1190-1191 (emphasis in original). The court concluded by holding that "because appellant's parents were allowed to participate fully in the development of his November 7, 1986 IEP, the procedural requirements of the [IDEA] were met even though two items were omitted from the document." *Id.* at 1191. Thus, as there is no allegation that the parents right to participate in the IEP formulation process was compromised, whether the two goals in question are measurable or not is an issue that at most is a de-minimis-technical violation of the IDEA and as such is not actionable". Cited in *Weiss v. School Board of Hillsborough County* 141 F.3d 990,994.

Under black letter 11th Circuit law, the Sammons participation in and approval of every IEP is incontrovertible evidence that the first prong of the Rowley FAPE standard has been met.

2. A.S.'s IEPs Meet The Test Of The Second Prong Of Rowley

Under the second prong of *Rowley*, the focus of the inquiry is on academic achievement; and, while the IDEA requires the school to provide services to allow the student the requisite basic floor of opportunity, it does not require the school to provide services where the request is not related to helping the student achieve *academic* potential. “If it is undisputed that the disabled child is succeeding academically his or her IEP clearly meets the requirements of FAPE” *White v. Ascension Parish School Board*, 343 F.3d 373; 378-379 (5th Cir. 2003).

It has already been determined that A.S. earned his high school diploma. He earned a substantial number of his academic credits during the 2002-2004 school years. The majority of his day was devoted to academic achievement as it should have been. Under these facts, it is impossible to imagine that A.S. did receive academic benefits during the 2002-2004 school years. In this Circuit academic achievement is the primary goal of FAPE. FAPE is provided if the IEP is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *M.M. v. School Board of Miami Dade County* 437 F3d. 1085, 1102. The IEP’s enabled A.S. to access the general education curriculum, by providing a structured environment with sufficient supports and services, especially behavioral support, to achieve passing marks and advance from grade to grade. As previously determined by DOAH and this Court A.S. received passing marks, earned his credits and graduated with a High School Diploma. In this Circuit these facts require a finding that A.S. received FAPE.⁴

⁴ A school satisfies that requirement [to provide FAPE] by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels

As indicated A.S. received much more than academic benefits from his educational program; he received substantial non academic benefits from his IEPs. As this court noted in its February 2006 order (Doc. 134, vacated on other grounds):

“The Court acknowledges that A.S. has mastered some of the goals in his IEP. For example A.S.’s father testified that A.S. has mastered the personal grooming goal and that A.S. demonstrates pragmatic skills utilizing an augmentative communication device. Furthermore, the evidence reveals that A.S. has met the goal that he can prepare simple foods, such as easy macaroni and cheese, instant oatmeal and instant rice. Additionally, it appears that A.S. has met the goal that he read and comprehends literature selections, as Mr. Saenz testified that A.S. was reading a selection out of a twelfth grade literature book and that A.S. understood what he was reading.”

A.S. also mastered his grooming and meal preparation goals within the first six weeks of his return to school indicating his retention of previously mastered skills.

In that same Order (Doc. 134) this Court pointed out that A.S. had made substantial progress on his goals and objectives including writing, organizational skills, managing physical anger and social skills. While A.S. may not have met every goal and objective on his IEP he didn’t have to in order to receive FAPE. The fact that he received some educational benefit from his education and a high school diploma is legally sufficient to mandate a finding that he received FAPE.

3. The IEPs Were Reasonably Calculated To Provide Educational Benefit

The IEPs were reasonably calculated to provide education benefit in that they addressed the domain of curriculum and learning in the areas of writing and reading for academic benefit. They also addressed A.S.’s challenging behavior in the domain of Social Emotional, his pragmatic skills in the Domain of Communication, and his organizational skills, grooming skills

used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and ... should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade Rowley, 458 U.S. at 203-204.

and meal preparation skills in the domain of Daily Living Skills. The IEPs also addressed A.S.'s health care issues in the Domain of Health care and the issues of transition. The ALJ also agreed that the IEPs included measurable annual goals and objectives as required by law (Remand Order 209 p. 58). No witness testified that the Domains addressed were inappropriate or that the IEPs should have had different goals or objectives. The Sammons agreed to all of the goals and in fact their objection to the February 2003 IEP was simply that the writing goals were not being continued and A.S. was graduating.

4. A.S. Received Academic And Non Academic Benefits.

The academic benefits can not be disputed as A.S. earned his High School Diploma, earned 24 credits and a GPA of 3.09. He also made progress on and met some of his academic IEP goals.⁵ The non-academic benefits were also substantial. A.S. mastered his self-grooming goals of teeth and hair brushing. He mastered his meal preparation goal, his goal in the area of pragmatic communication skills and its five objectives, made progress in his organizational skills and mastered his back pack objective. A.S. also clearly mastered the ability to use writing functionally to communicate in a non academic setting. The fact that he used email and his lightwriter to communicate effectively is not disputed. A.S. also made progress on his behavioral goals and was able to access the general curriculum and work on his non academic goals so as to receive educational benefit. A.S.'s behavior plans were successful in that A.S.'s negative behavior was controlled and reduced so that A.S. could receive both academic and non academic benefits from his IEPs. A.S. met the legal standard in the 11th Circuit of having

⁵ A.S. mastered his reading goal and eventually with Mr. Saenz demonstrated his writing ability and mastered his goal to write an essay, and made progress on writing a short story and a poem. A.S. also mastered his language mechanics goal and demonstrated that he could write several paragraphs on one topic and that he could write a composition correctly.

received FAPE for the 2002-2004 school years J.S.K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dept of Educ., 915 F.2d 651 (11th Cir. 1990).

5. The Door Of Public Education Was Thrown Wide Open For A.S.

The Eleventh Circuit has “defined ‘appropriate education’ as making measurable and adequate gains in the classroom.” J.S.K., 941 F.2d at 1573. FAPE does not require that the potential of each student be maximized, or even that the best available educational service be provided. Only a “floor of opportunity,” in the form of an education which is free and “appropriate” is required to be provided. The goal is to open the door to public education, rather than to guarantee any particular level of education once the student has entered the door. Fort Zumwalt School District v. Clynes, 119 F.3d 607, 612 (Eighth Cir. 1997). Cypress-Fairbanks Independent School Dist. v. Michael F. by Barry F., 118 F.3d 245, 248 (Fifth Cir. 1997). A.S. not only earned his high school diploma he received substantial non academic benefits. He earned 24 academic credits, achieved a 3.09 GPA, received substantial non-academic benefits that addressed his unique needs and made measurable and adequate gained in the classroom. If the two prongs of Rowley are met, then the school district has met its obligation to provide FAPE and the courts can require no more.” Rowley at 207.⁶

C. A Denial Of FAPE Is Difficult To Establish, Specific Results Are Not Required, Goals And Objectives Do Not Have To Be Met.

“[A] denial of a FAPE is difficult to establish. The standard for whether an IEP provides a FAPE is whether it is reasonably calculated to confer the basic floor of educational benefits” E.D. v. Enterprise City Bd. of Educ., 273 F. Supp. 2d 1252, 1263 (M.D. Ala. 2003). Also see

⁶ To determining whether FAPE has been offered the courts ask whether: (1) the school complied with the IDEA's procedures; and (2) whether the IEP developed through those procedures is reasonably calculated to enable the student to receive educational benefits. Fisher, v. Atlanta Independent School System 349 F.3d 1309; (11th Cir 2003) A “yes” answer to both questions ends judicial review. White v. Ascension Parish Sch. Bd., 343 F.3d 373, 378 (5th Cir. 2003) (citing Rowley, 458 U.S. at 206-207).

Draper v. Atlanta Independent School System 518 F.3d 1275 (11th Cir. 2008). A student does not need to meet their goals to have received FAPE *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). Specific results are not required, and goals and objectives do not have to be met for a student to have received FAPE, *34 C.F.R. §300.350(b)*.⁷ Furthermore, Dr. Kabot who has extensive experience with autistic spectrum students testified that A.S received FAPE.⁸

II. THE ALJ MISCONSTRUED THE STANDARD FOR FAPE.

In the Final Order Awarding Compensatory Education the ALJ stated that “there is little evidence that any educational benefit was received by A.S. during the 2002-2003-2003-2004 school years.” The record does not support this statement as A.S. clearly received substantial academic and non academic benefits. The ALJ cited what he considered to be the specific evidence that A.S. did not receive educational benefit as follows:⁹

A. Failed To Provide Consistent Instruction In Social Skills Or Sufficient Opportunities To Interact With Peers And Develop Appropriate Social Skills.

The ALJ found that “the evidence established that based on consideration of all factors, a separate classroom location constituted the least restrictive placement available in which A.S. could receive instruction. This establishes that the placement was appropriate for A.S as it was the least restrictive environment in which A.S. could be educated.

⁷ The ALJ found that there was no evidence that the Respondent “neglected the student’s behavioral/social/emotional needs” (Remand Order p. 54, #197).

⁸ Dr. Kabot opined that the April 2002 IEP, and the February 25, 2003 IEPs were appropriate for A.S. and offered him FAPE. (Vol. 4. 792, 829). Dr. Kabot also opined that the October 6, 2003 IEP and the February 23, 2004 IEP were appropriate IEPs for A.S. and offered him FAPE (Vol. 4. 832-833).

⁹ It should be kept in mind that the burden of proof is on the Sammons to affirmatively prove that A.S. did not receive FAPE. The ALJ’s statement that there is little evidence that any educational benefit was received by A.S. places the burden of proof incorrectly on the school district to prove that educational benefit was received by A.S.

1. Peers

As evidence of this failure to offer sufficient opportunities to interact with peers the ALJ cites paragraph 11 of his final remand order. However in that paragraph the ALJ makes clear that “there were discussions..., regarding methods of initiating interaction between A.S. and other students but for reasons primarily related to A.S.’s behavioral issues, such interaction with other students was essentially non-existent during the course of A.S.’s high school career.” The determination that A.S.’s behavioral issues made his placement the least restrictive environment and was therefore appropriate coupled with the ALJ’s own finding that A.S.’s interaction with other students was essentially non-existent due to A.S.’s dangerous behavior supports the school districts position that it provided FAPE in the least restrictive environment. Furthermore, the April 17, 2002 IEP identified in the domain of social emotional behavior A.S.’s “Priority Educational Need” (Remand Order 28, p. 13)

“The Student is currently able to interact with peers and needs to be able to respond appropriately to the directives of adult/authority figures. This remained a Priority Educational Need on the February 25, 2003 IEP and it was determined at the IEP meeting that A.S. had made progress on managing his physical anger and the level of compliance was raised” (Remand Order 68, 69 and 70)

In April 17, 2002 and continued in several subsequent IEPs the IEP team including the Sammons thought that A.S. priority educational need was responding appropriately to adult figures not interacting with peers. This was an IEP team decision that cannot be revisited as a matter of law by the ALJ after the fact. A.S.’s lack of interaction with other high school students, years after the fact, cannot legally support a finding that FAPE was not provided.

The ALJ cites paragraph 149 of the Remand Order with is simple statement that while A.S. had friendly relationships with adults with whom he interacted on a regular basis, he had essentially no interaction with his peer group at school. The IEPs specifically do not make interacting with peers an educational priority and do not require that A.S. interact with other

high school students. The term peer is misleading as A.S. turned 18 in July of 2003. A.S. had lots of interaction with adults and as the ALJ makes clear they were positive interactions for the most part. The IEPs recognized that interactions with peers were not a priority educational need, but interactions with adults were.¹⁰

2. Social Skills

Mr. Thornhill worked with A.S. on Social Stories to develop his social skills.¹¹ This constituted a formal curriculum that pertained to A.S.'s daily living skills. They would discuss a situation and how best to handle it (Vol. 1. 86.). The curriculum was called Autism and PDD Adolescent Social Skills and it had chapters such as getting along, community skills and social behaviors (Vol. 1. 87, 89). They would model looking people in the eye when communicating with them and shaking people's hands saying please and thank you receiving compliments. Some of the social stories also pertained to vocational social stories. (Vol. 1. 153-154).

Ms. Allore provided training to Mr. Thornhill on the social stories that were used with A.S. and how to use them effectively in the classroom.¹² She gave Mr. Thornhill the Autism &

¹⁰ The ALJ also basis his finding on paragraph 200 of his Remand Order which simply notes that the IEP team attempted to have students from the High School visit A.S., but for reasons that are unclear the visits stopped after a few times. Rather than indicating a deficiency, this shows that while not required by the IEP steps were taken to have peers come and interact with A.S. The fact that the high school students didn't continue to visit, including A.S.'s brother, should not be held against the school district as the IEP didn't even require such visits and the district clearly tried to go beyond the requirements of the IEP.

¹¹ The ALJ for some reason believed that this was Mr. Thornhill's first teaching Job. The record does not reflect that and it wasn't (see p. 7, #5 Remand Order).

¹² A.S. also received training in the area of leisure skills. Mr. Thornhill played games like Uno and Milborn with A.S. (Vol. 1. 155). Ms. Bronson played games with A.S. during the 2002-2003, 2003-2004 and the 2005-2006 school years (Vol. 4. 718). Mr. Saenz also played games with A.S.

PDD Adolescent Social skills curriculum that Mr. Thornhill used. She provided the books to Mr. Thornhill and trained him on how to use them (Vol. 4. 643).¹³

A.S. maintained his own personal area appropriately with Mr. Saenz. He performed chores. He took out the garbage twice a week, would help clean the dishes and would help sweep the portable. A.S. also helped clean the bathroom (Vol. 4. 687). These activities including the extensive CBI visits that A.S. made with Mr. Saenz completely undercuts the ALJ's finding that "Respondents could have offered appropriate services and did not do so, opting instead to meet the bare minimum requirements if the stay-put order"¹⁴

The ALJ cites paragraph 186 of his Remand Order as evidence that A.S. didn't develop appropriate social skills. The ALJ admits that A.S. used the Augmentative Communication device with fluency, but finds that A.S. didn't meet Annual Goal 5 or its objectives (Remand order 180-186). The evidence is overwhelming that A.S. did meet this goal and its short term objectives. This court has already acknowledged that A.S. demonstrated pragmatic skills utilizing an augmentative communication device meeting Annual Goal 5, (Doc. 134. P. 13).

B. Reinforced Rather Than Reduced Inappropriate Behaviors.

The ALJ based his finding that FAPE was not provided on the dubious premise that A.S.'s Teacher Bruce Thornhill reinforced, rather than reduced, inappropriate behaviors. This finding is not supported by the record or by the ALJ's own findings of fact.

¹³ The ALJ discounted this because he felt it was unclear whether this instruction resulted in improvement in A.S. social skills or in meeting any of his IEP goals. Again the ALJ has confused the burden of proof. The burden of proof is on the Sammons to show that such instruction didn't result in improvement in A.S. social skills. There is no evidence that Mr. Thornhill didn't use the social skills curriculum. He was clearly trained to use it with A.S. by Leslie Allore and he testified that he did it. Clearly, this cannot form a basis for finding that A.S. did not receive FAPE.

¹⁴ (Order on Compensatory Ed. #52)

The ALJ cites paragraphs 197 and 223 of his order to support this finding. In paragraph 197 the ALJ states that “Mr. Thornhill’s practice of allowing A.S. to reject and thereby escape from various tasks likely reinforced the propensity of the student to refuse the tasks.”¹⁵ In paragraph 198 the ALJ explains his finding in 197 and 223 that “the evidence establishes that Mr. Thornhill was attempting to educate A.S. without provoking an aggressive incident that he viewed as detrimental to the student’s progress. Given, as the ALJ himself noted “[A.S.] has a history of aggression and was of sufficient size, strength and temperament to cause injury to himself and to others during an aggressive incident” such a concern was not unreasonable and clearly cannot lead to a finding that A.S. was not provided FAPE.

C. Made No Reasonable Attempt To Respond To A.S.’s Behavioral Deficits.

In support of this assertion the ALJ cites paragraph 223 of the remand order. In that paragraph the ALJ makes two allegations (1) The School District failed to implement a consistent behavioral plan to address A.S.’s deficits and (2) no behavioral cognitive therapy was provided and no program of desensitization was offered. The ALJ is correct no program of cognitive therapy was offered and no program of desensitization was offered, nor where they required under the IDEA. This is the crux of the ALJ’s misunderstanding. It is well established that “The remedy of compensatory education remedy is limited to challenges to the implementation of the IEP--such as when the school system fails to provide the services set forth therein”. It does not apply to a second category of claims challenging the content of past IEPs. *See Rome Sch.Comm v. Mrs. B* 2000 WL 762027, at *13, No. 99-CV-20-B, 2000 U.S. Dist. LEXIS 2949, at *39 (D.Me. Mar. 8, 2000). The ALJ felt strongly that the school district should have offered cognitive therapy and a program of desensitization. Neither was ever

¹⁵ In paragraph 223 the ALJ states that “Mr. Thornhill generally allowed A.S. to dictate what occurred in the classroom and likely reinforced the student’s non-compliance with the demand.”

discussed at an IEP meeting or requested by the Sammons prior to filing their due process request post A.S.'s graduation. As a matter of law a service neither offered nor discussed at an IEP cannot form the basis for awarding compensatory education after a student has graduated. This is also true for the ALJ's decision that the School Board should have offered the additional service of cognitive therapy to A.S. It should be noted that nowhere in the ALJ's order does he define cognitive therapy or indicate why he believes it should have been offered to A.S.

A Desensitization Program would have been ineffective in any event. Dr. Reeve who is far more qualified than Dr. Oakland who this court acknowledged had problems with his testimony opined that a Desensitization Program would not be an effective strategy to use with A.S. because his response to the things you would want to desensitize him to, the scrunchies, the open-toed shoes, etc. are not things that A.S. has a reaction to every time. Presenting these items in a systematic way and increasing A.S.'s anxiety as a part of the function of the intervention, is not going to be effective in addressing those behaviors (Vol. 5. 952-953).

Ms. Gina Estridge Zwanzig is the vocational evaluator with Abilities of Florida and performed a vocational evaluation as part of A.S.'s transition plan (Vol. 2 213-214). She testified that part of A.S.'s disability is that he would need a desensitization program on a continual regimented basis. That starting and stopping such a program simply wouldn't work. She also stated that desensitization training in the school environment would not carry over to the work environment. That such desensitization training would have to occur in the workplace environment for it to be successful and it is very uncertain whether it would be successful (p. 243). To even start such a training regime, A.S. would have to be employed, which would require that he modify his behaviors (Vol. 2. 234, 239). As it would be impractical to implement such a program in the workplace and as training in the school environment would

not carry over to the work place, such a program would be irrelevant and ineffective in making A.S. employable.

D. Failed To Develop Or Implement A Consistent Approach To A.S.'s Behavior.

The ALJ failed to explain what he means by this and only gives the example of A.S. refusal to write for Mr. Thornhill on any consistent basis. The evidence is overwhelming that A.S. had a behavior plan and that it was implemented and that while A.S. had several academic writing goals, he could write. A.S.'s IEP team, his father and the ALJ all acknowledge that A.S. could write, but refused to do so.¹⁶ The disconnect between the ALJ and the team is that the ALJ views the writing goals as behavior goal, yet the IEP team viewed them as academic goals and placed them in the academic domain. A.S.'s ability to write, but his persistent refusal to do so was not treated on the IEP or by the team as a behavioral goal, with a behavioral plan to address the issue. In hindsight it probably should have, but such "Monday Morning Quarterbacking" is simply not allowed in determining whether compensatory education should be offered See *Roland M.*, 910 F.2d at 992 ("For one thing, actions of the school systems cannot, as appellants would have it, be judged in hindsight.").

If the Sammons had filed for due process prior to graduation and raised the issue that A.S.'s refusal to write should be treated as a behavior issue not an academic issue this would be have been resolved prior to graduation. However, as the writing goals are in the domain of curriculum and learning and not in the domain of behavior as a matter of law the ALJ cannot find that the IEP did not offer FAPE and award compensatory education by finding that the

¹⁶ See Remand Order 136 "The transcript of the meeting indicates that the IEP team, as well as the parents, believed the student to be capable of writing and agreed that the failure to meet the IEP writing goals was a function of the student's noncompliance.

writing goals should be treated as behavioral goals not academic goals. If A.S. did not meet his academic goals in writing in the domain of curriculum and learning it is simply irrelevant to FAPE as A.S. obtained his high school diploma. The law is clear that “the relevant [IDEA] regulation 34 C.F.R. § 300.350 limits challenges to the implementation of past IEPs. The content of past IEPs may not form the basis for an award of compensatory education.” *Bell v. Education in the Unorganized Territories*, No. 00-CV-160-B, slip op. at 10 (D.Me. Mar. 27, 2001) (citing 34 C.F.R. § 300.350); *Rome Sch.Comm v. Mrs. B* 2000 WL 762027, at *13, 2000 U.S. Dist. LEXIS 2949, at *39 (Mar. 8, 2000), *Houston Independent School Dist. v. Bobby R.*, 200 F.3d 341, 346 (5 Cir.2000).

1. A.S. Made Substantial Progress On His Behavior Goals.

The evidence is overwhelming that A.S. made progress on his behavior and that his behavior plan worked. Everyone agrees that ending A.S. violent outbursts would be the preferred solution. However, there is no evidence that this could have been done or that five years of further education will do it at the cost to tax payers of almost \$1,000,000.

A.S.’s behavior goal on the April 17, 2002 IEP was “During activity that may cause conflict; the student will manage physical anger, biting, kicking, throwing, while respecting the rights of others in three out of five trials.” At the February 2003 IEP this was increased to 7/10 trial and at the February 23, 2004 IEP meeting this was further increased to “by exhibiting no more than one physical aggression per month” (R. Ex. 2, 6, 10 and 15). As the ALJ makes clear this indicates progress was made.

From the time Mr. Thornhill started working with A.S. in September 2002 to the February 2003 IEP Mr. Thornhill characterized A.S.’s progress on this goal as a dramatic improvement (Vol. 1. 128). This is borne out by Mr. Sammons statements to that effect at the February 23, 2003 IEP (R. Exhibit 7 p. 54, 65, 114). Mr. Sammons also testified under cross

examination that A.S.'s behavior had improved by the February 2003 IEP (Vol. 3. 518). Mr. Thornhill testified and the IEP transcript shows that there was general agreement among IEP team members that A.S.'s behavior had improved and that A.S. had made progress (Vol. 1 129).

Mr. Thornhill also testified that at the time A.S. graduated he had met this goal (Vol. 1. 100). Dr Kim Spence-Cochran, the Sammons expert, testified that A.S. made progress on his behavior during the 2002-2004 school years (Vol. 2. 318). Ms. Bronson also observed positive changes in A.S.'s behavior since he started with Mr. Thornhill in September of 2002 until the time he graduated. The frequency of A.S.'s challenging behaviors decreased (Vol. 4. 714). Ms. Bronson also testified that she observed substantial progress in A.S.'s ability to talk about his behavior and use coping strategies to avoid violent outbursts (Vol. 4. 717).

At the February 2003 IEP the team raised the criteria from three out of five to seven of ten (60% to 70%) because A.S. had shown improvement in his behavior and mastered the three out of five criteria (Vol. 1. 130). A year later at the February 2004 IEP the team including Mr. Sammons again raised the criteria because A.S. had made a lot of improvement in his behavior and had mastered the seven out of 10 trials criteria (Vol. 1. 131). The criterion for mastery was raised from 7 out of 10 trials to no more than one physical aggression a month. Mr. Thornhill testified that A.S. had made a "very big improvement in his behavior between the February 2003 IEP and the February 2004 IEP (Vol. 1. 131).

The first objective for this behavior goal is that "[A.S.] will recognize when he feels angry and use cues to prevent losing self control." Mr. Thornhill testified that he worked with A.S. on this objective (Vol. 1. 131). Mr. Thornhill implemented this objective by talking to Drew about what he should do when he started to get angry. That A.S. could remove himself from the room and sit back for a few minutes to calm down. Mr. Thornhill testified that he would push A.S. to the point before he would go over the edge and taught him a replacement

behavior of recognizing when he was angry so that A.S. would say “I’m getting angry, I need to calm down, and I need to talk or go in my room for a few minutes” (Vol. 1. 133). Mr. Thornhill testified that A.S. would successfully do this and that it was a successful strategy (Vol. 1 133).¹⁷

The fact that A.S. was taught this replacement behavior is further evidenced by the events reported in the Abilities of Florida Community based evaluation p.6 when he was escalating and was able to sign that he needed to take a time out which he did. After about 20 minutes he had calmed down and was able to transition from that behavior to another and was compliant following the previous outburst.

The second objective was that “[A.S.] will comply with directives of authority figures”. When A.S. started with Mr. Thornhill he had not mastered that goal. At the February 2003 IEP the criteria for mastery was increased from 3/5 trials to 7/10. At the October IEP the criteria was changed to make it more measurable “[A.S.] will achieve a minimum of 50% success on his daily reinforcement program for 7 out of 10 days. At the February 2004 IEP the criteria was again increased to a minimum of 80% success because A.S. had met the criteria for mastery of this goal. Mr. Thornhill testified that A.S. had “shown great improvement in this area” (Vol. 1. 134).

2. A.S. Had An Appropriate Behavior Plan That Was Developed By A Board Certified Behavior Analyst.

The school district had a functional behavioral assessment done for A.S. by a certified behavior analyst Cheryl Borden Jordan (Vol. 5. 940). Ms. Jorden worked closely with A.S. on his behavior prior to and during the 2002-2004 school years as well as when he was with Mr.

¹⁷ A.S. also improved his behavior with Mr. Saenz. With Mr. Saenz A.S. would ask before eating lunch if anybody was going to be wearing a scrunchie and he would choose to remove himself from a situation that he knew would be stressful for him (Vol. 4. 718).

Saenz. Mr. Sammons had Ms. Jorden come to his house to give him tips on how to manage A.S.'s behaviors. She came to the house approximately 10 times. Mr. Sammons expressed that Ms. Jorden was very helpful and the strategies she suggested worked for their family, but that given the severity of A.S.'s problems more training is always helpful (Vol. 2. 392).

Dr. Reeve opined that the behavioral plans developed for A.S. by Ms. Jordon a certified behavior analyst who the district contracted with for the 2002-2003 school year and the 2003-2004 school year were appropriate for A.S. They were appropriate because they were based on the functional assessment that she had done, as well as the ongoing data that was collected by the individuals working with A.S.

The behavioral plans included preventive strategies to modify the environment, and strategies to prevent the aggressive or challenging behavior from occurring. They also contained strategies to teach A.S. replacement behaviors for the functions that his behaviors served. A.S.'s behavior analyst Ms. Jorden used reinforcement as a technique for appropriate behavior. She also used planned ignoring to try to extinguish some of the attention-seeking behavior that A.S. engaged in. Ms. Jorden also had strategies to de-escalate A.S. when his behaviors began. Dr. Reeve opined that these are the components of an appropriate behavior plan. A.S.'s behaviors decreased which shows that the behavior plans were effective (Vol. 5. 953-954).

Dr. Reeve also opined that A.S. made progress on his behavior during both the 2002-2003 and the 2003-2004 school years. The frequency of his behavior decreased, even though the severity of the behaviors did not. Dr. Reeve also opined that the school district could not have extinguished Drew's violent behaviors. A.S. had a high staff ratio and a modified environment. He had teaching strategies to address the replacement behavior with the challenging behavior. There were times when the behavior went to zero. However when the

behavior occurs, it's very severe and it's very dangerous. Dr. Reeve opined that she does not believe that these instances of dangerous behavior could be eliminated. In her experience these are behavioral issues that last throughout the individual's lifetime (Vol. 5, 954-956).

Sometimes as the ALJ found there are clear precursors to a violent episode and at other times there are not (Remand Order # 16.). Mr. Saenz observed violent outbursts in his classroom, but often could not tell what caused them (Vol. 4, 692). A.S.'s behavior is very complex because there isn't a perfect correlation between the antecedent and the behavior. This makes his behavior unpredictable. You often cannot tell in a situation whether something will set him off. With A.S. there is also more than one function or purpose to his behavior. So sometimes when you're with him, you don't know whether the behavior is to get you to go away or get you to come to him. When there are multiple functions, it's a complex problem to deal with. If it's just an escape function, there are three or four skills that can be taught to replace those behaviors, but when there are multiple functions, as with A.S. the behavior is unpredictable. Both Mr. Sammons and Dr. Reeve discussed that A.S.'s antecedents to his behaviors are often internally generated and may only be determined days later (Vol. 2, 392).

E. Made No Meaningful Progress On Most, If Not All Of A.S.'s IEP Goals And Objectives Particularly With Reference To Writing.

This statement is clearly not supported by the evidence. A.S. mastered some of his goals and made substantial progress on others. The ALJ cites paragraphs 21, 47, 92, 170, 174, 178, 186 and 211 of the Remand order to support this position. Paragraph 21 simply states a conclusion with no supportive facts. In Paragraph 47 and paragraph 211 the ALJ states that some IEP goals show that the benchmarks were increased from prior IEPs indicating progress and that other benchmarks were unaltered indicating no progress. Leaving a benchmark unaltered doesn't mean that no progress was made it just means that benchmark wasn't met.

Also, the fact that a benchmark wasn't changed from one IEP to the next doesn't even indicate a slow rate of progress. What the ALJ failed to take into account is that the team met more than once a year and that you would actually expect IEP goals to remain unchanged for a full year. When looked at over a full year, A.S. made progress on each goal. The ALJ's methodology was faulty as he measured progress from IEP to IEP rather than year by year.

F. Failed To Collect Or Maintain Data Concerning Progress And Thus Failed To Implement The IEPs.

In paragraphs 92, 6 and 209 the ALJ simply reiterates his concern that Mr. Thornhill did not keep appropriate written data and that discussions of progress were based on Mr. Thornhill's recollection. A.S. was Mr. Thornhill's only student. It is not surprising that he knew A.S. very well and felt comfortable determining progress based on his one on one work with A.S. With hindsight Mr. Thornhill should have had impeccable data to support his conclusions, but A.S. was his only student. Mr. Thornhill did testify that he kept tally sheets on a day to day basis. To the extent that failing to review the tally sheets with the IEP team is a violation of the IDEA it is a procedural violation that does not amount to a denial of FAPE or a blanket determination that A.S. made no progress on his goals and therefore received no educational benefit. Paragraphs 174, 178, and 186 reiterate the ALJ's contention that without data sheets no progress was made. This contention is not legally or factually supportable from the record. The ALJ's assumption that without written documentation that no progress was made is legally incorrect. Technical flaws, including a lack of specificity in goals and objectives and assessment of progress, do not, of themselves, render an IEP invalid so as to require a compensatory education award. *Hampton School District v. Dobrowski*, 976 F.2d 48, 54 (1st Cir. 1992).¹⁸

¹⁸ A procedurally defective IEP does not entitle a party to relief. "In evaluating whether a procedural defect has deprived a student of a FAPE, the court must consider the impact of the procedural defect, and not merely the

G. Failed To Apply Indicated And Appropriate Research Based Methodologies To Address A.S.'s Needs (E.G. Systematic Desensitization And Cognitive Therapy).

In paragraph 14 of the remand order the ALJ discusses the issue of behavioral causality. The ALJ notes that while there are at times clear behavioral triggers that they are not consistent. For example at times A.S. will be able to see a scrunchies without being compelled to remove it. The AJL does find that some out bursts are a reaction to demands, a reaction overstimulation by noise or crowds, or seem to be generated randomly without consistency as to time or place (Remand Order 15). The ALJ in this context specifically finds that there is no credible evidence that all of A.S.'s behavioral antecedents can be identified (Remand Order. 17.)

However, almost inexplicably the ALJ still finds that a program of systematic desensitization could have reduced some of A.S.'s behavioral deficits. The evidence does not support this finding and it is unclear how reducing the behavioral deficits will make a difference if as the ALJ notes such behavior will continue to appear randomly without regard to time or place. This is the crux of Dr. Reeve's testimony that the number of incidents has been continually reduced, but the severity of an incident has not and some of these incidents will be randomly generated and will continue to occur without regard to time or place.

Neither cognitive therapy nor desensitization training was offered on the IEP or required to be offered.¹⁹ Dr. Reeve testified that these services would not have been effective. The failure to offer these services or any particular service on the IEP or any failure to have a particular goal or objectives or the determination that the goals or services were not appropriate

defect per se." Weiss, 141 F.3d at 994; see also Doe v. Ala. State Dep't of Educ., 915 F.2d 651, 661-63 (11th Cir.1990) (holding deficiencies failing to impact parental involvement were not sufficient to warrant relief). K.C. v. Collier County (11th Cir.) 285 F3d 277.

¹⁹ There is little or no evidence as to what these services are, their efficacy, whether they are supported by research, their effectiveness or their appropriateness for A.S.

cannot form the basis for a compensatory education award post graduation. The ALJ's belief that systematic desensitization training would further reduce the number of incidents when the school district was already successful in reducing the number of incidents has no implications for FAPE. *Bell v. Education in the Unorganized Territories*, No. 00-CV-160-B, slip op. at 10 (D.Me. Mar. 27, 2001) (citing 34 C.F.R. § 300.350); *See Rome Sch. Comm v. Mrs. B* 2000 WL 762027, at *13, (D.Me. Mar. 8, 2000),²⁰

Neither an IEP nor the IDEA can promise perfect solutions to the problems inherent in educating disabled children. *Lynn v. Portland School Committee*, 20 IDELR 342 at 343, 998 F.2d 1083 (1st Cir. 1993). A.S. will continue to have violent episodes. The school district successfully reduced the frequency of the outbursts, but as the ALJ found they will unfortunately continue to occur most likely for the rest of A.S. life barring some new medication.

I. Transition: (1) Failed To Designate Appropriate Transition Services In The IEP Documents; (2) Failed To Provide The Transition Services To Which A.S. Was Entitled; And (3) Offered Minimal Transition Services That Failed To Identify Deficits.

In this case A.S. received appropriate transition services. Transition was extensively discussed at both the February 2003 and February 2004 IEPs. Career and interest inventories

²⁰ In *Bd. of Educ. v. Brett Y.* the Fourth Circuit Court of Appeals confirmed the District Court's decision overturning an ALJ's conclusions that deficiencies in an IEP caused the student to lose educational opportunity. The ALJ had found that the school system's failure to include appropriate objective criteria and evaluation procedures for measuring goals, internal inconsistencies in the IEP, and failure to update the IEP to reflect the extent of the student's disability and most recent educational performance were procedurally deficient under the IDEA. The District Court reversed and the Fourth Circuit Court of Appeals agreed stating that "Even assuming that these deficiencies in the IEP existed, we agree with the district court that none of the alleged deficiencies relied upon by the ALJ constituted a denial of FAPE *Id.* 1998 U.S. App. LEXIS 13702, at 465-466.20 .

were done by the transition specialists that attended each IEP. Online classes were explored with A.S. A.S. was successfully linked with Vocational Rehabilitation which did a vocational assessment on A.S. Independent Living options were explored. The parents determined that A.S. would live with them. Daily living skills were developed and incorporated into the IEP. Mr. Thornhill worked with Drew on social stories. When A.S. was with Mr. Saenz he completed the Daily living Skills text book which focuses on transition skills and Mr. Saenz took A.S. on community based instruction trips to Polk County community college, book stores, restaurants and other places. A.S. received adequate transition services. Furthermore, as a matter of law, the adequacy of the transition services on the IEP cannot be an issue post graduation. The only issue is were the transition services on the IEP implemented *Bell v. Education in the Unorganized Territories*, No. 00-CV-160-B, slip op. at 10 (2001)

J. Inappropriately Eliminated Unmet Goals And Objectives.

“The remedy of compensatory education remedy is limited to challenges to the implementation of the IEP--such as when the school system fails to provide the services set forth therein”. It does not apply to a second category of claims challenging the content of past IEPs. *See Rome Sch.Comm v. Mrs. B 2000 WL 762027, at *13*, No. 99-CV-20-B, 2000 U.S. Dist. LEXIS 2949, at *39 (D.Me. Mar. 8, 2000). The major difference between the two IEP’s is the elimination of goals/objectives in the Curriculum and Learning domain (writing goals). That occurred because A.S. had met all graduation requirements and only needed two ½ credit courses in English and Science to graduate. The IEP Team including the parents agreed he could write, but refused to do so. These academic goals made no sense in that context and were therefore eliminated. The goal/objectives related to organizational skills were eliminated because the team including the Sammons felt that they had been met.

II. At The Due Process Hearing The Burden To Establish That The Student Has Not Received FAPE Is On The Student.

The IDEA creates a presumption in favor of a school system's educational plan, placing the burden of proof on the party challenging it. *Schaeffer v. Weast*, 126 S. Ct. 528, 537, 163 L. Ed.2d 387 (2005). A.S. is the party challenging the IEPs and has the burden of proof to demonstrate that the school district did not provide FAPE *Devine v. Indian River County* 249 F.3d 1289,1291-1292 (11th Cir.). The Sammons have not met this burden of proof. The ALJ acknowledges that the Sammons had the burden of proof in the Administrative Hearing (Remand Order 208), however, the ALJ placed the burden of proof inappropriately on the school district. This is evident in the ALJ's finding that no program of desensitization was offered and no behavioral cognitive therapy was offered. Neither desensitization nor cognitive therapy was an IEP service. The School Board's experts testified that neither of these approaches were appropriate for A.S. There were never any discussions at the IEPs regarding such services and it is well established that challenges to past IEPs in an effort to obtain compensatory education are limited to whether the existing services on the IEPs were provided.

III. THE ALJ ERRED IN GRANTING AN ADDITIONAL THREE YEARS OF COMPENSATORY EDUCATION BASED ON HIS FINDING THAT THE DIPLOMA OPTION WAS PREDETERMINED AT THE FEBRUARY 2004 IEP MEETING .

The ALJ correctly found that the first time the Sammons requested that the IEP team change A.S.'s diploma track from a Standard Diploma to a Special Diploma was at the February 2004 IEP which was a little less than 3 months before A.S. graduated with a standard diploma.²¹

21 (ALJ Compensatory Ed. Order #4, p. 6)

A. A Special Diploma Is Only An Appropriate Option If The Student Is Not Able To Meet The Requirements For A Standard Diploma.

In a Technical Assistance Paper (“TAP”) “Sunshine State Standards for Special Diploma” attached hereto as Exhibit A the Florida Department of Education clearly states that “*The Special Diploma is a viable option for students with disabilities who are not able to meet the requirements for a standard diploma.*” It should also be noted that only students who were classified as “EMH, TMH, HI, SLD, or physically or language impaired or emotionally handicapped (EH) could receive were eligible for a special diploma in 2004 (Fl. Stat 1003.438.). The statute has since been revised to include Other Health Impaired under which A.S. was qualified. In effect under the statute in 2004 it does not seem that A.S. would have been eligible for a special diploma as he was qualified as Other Health Impaired which was not a recognized category for a Special Diploma at that time.

B. The IEP Team Does Not Have The Authority To “Game The System” By Taking A Student Off A Regular Diploma Track To Thwart A Loss Of IDEA Eligibility.

Congress has consistently expressed its desire to end IDEA eligibility upon graduation from high school. The goal for all students is to graduate with a regular high diploma. It would circumvent the intent of Congress and be bad public policy if parents could insist that their child be taken off a standard diploma and placed on a special diploma not because they couldn’t do the work, but because the parents wanted them in school until they aged out.

C. Refusing To Discuss Diploma Options At The February IEP Was At Worst A Harmless Procedural Error.

The ALJ held that whether A.S. should be transferred from a Standard Diploma to a Special Diploma was an IEP team determination that had been predetermined by the team. As set forth above the IEP team had no authority to change A.S.’s diploma track from a Standard

Diploma to a Special Diploma. A Special Diploma is only an option for students with disabilities who are not able to meet the requirements of a Standard Diploma (see TAP Sunshine State Standards for Special Diploma, Exhibit A attached hereto). The IEP team is empowered to decide whether a student has the ability to achieve a standard diploma, not whether a student would benefit from additional time in school, by refusing a standard diploma.

In late February of 2004, A.S. was two half credits from meeting the Florida Sunshine State standards for a Standard Diploma.²² By May of 2004, A.S. did indeed earn his high school diploma; he obtained the necessary 24 credits with accumulative grade point average of 3.09. Furthermore, this court affirmed the ALJ's decision which found that A.S.'s teacher taught the school prescribed academic curriculum to A.S. in an acceptable manner and that A.S. was taught from the required textbooks and the texts were completed as required.

By the time of the IEP team meeting of February 2004 it was obvious that A.S. had the capability to meet the Sunshine State Standards for a Standard Diploma. At that point there was no serious question as to whether A.S. had the capability to earn a Standard High School Diploma and both the District and the Sammons were in agreement that A.S. had the capability to obtain a Standard Diploma. Instead the Sammons wished to turn the discussion on its head. Their argument was that A.S. would graduate and that this was a bad thing, because it would end his entitlement to special education. In short, the Sammons complaint is not with A.S.

²² A.S. passed the FCAT with a score of 329 for the math portion (a score of 295 was required in order to pass) and a score of 296 on the reading portion (a score of 287 was required to pass). Additionally A.S. had passed the writing portion of the FCAT which he was not required to pass to obtain a standard diploma. As this court noted in Doc. 98, A.S. passed the FCAT on his first attempt when 36% of Polk county students did not successfully pass the required portions of the FCAT on their first try.

receiving a Standard High School Diploma, but with Congresses policy determination that earning a high school diploma ends entitlement to special education.

As a matter of law this cannot be a factor in the IEP team decision making process. Congress in authorizing and reauthorizing the IDEA has clearly stated that graduation terminates entitlement to special education. Congress could have decided otherwise, but it didn't. A policy decision was made. If IEP teams are allowed to decide to stop a child from graduating solely so that child can continue to receive special education services until he ages out, if the team thinks that is in his best interests, then congressional policy has been subverted.²³ Such a ruling would allow any parent to challenge their child's diploma track at the last moment, with the issue being not whether the student could graduate with a standard diploma, but would the student benefit from more years of special education. When phrased whether the child would benefit from more years of special education rather than less, the invariable answer is yes. Such a ruling would be a major departure from the obligations of the school district, Congresses clear intent and the intent of No Child Left Behind. As the Sunshine Standards for Special Diploma Technical Assistance paper makes clear a *Special Diploma is only for those children with disabilities who cannot meet the standards for a Standard Diploma*.

If the IEP team had discussed this issue fully with the parents, the outcome would have been the same. The IEP team was not in a position to change A.S.'s diploma track because no rational person could have concluded that A.S. did not have the ability in February 2004 to obtain a Standard Diploma. The ALJ's premise without any citation to any authority is that the IEP team was free to change A.S.'s diploma track to a special diploma not because he wasn't able to meet the requirements for a special diploma, but rather because he would benefit from

²³ The ALJ's decision goes further by mandating that a student be taken off a standard diploma track, if the student would benefit from further special education. This is dangerous public policy that subverts congressional intent

more time in school. This is simply wrong and the ALJ provides no authority for this assumption. In the ALJ's Remand Order Par. 159 the ALJ states:

The Student's father then asserted that the IEP Team should change the diploma track option so that the student would be pursuing a special diploma rather than the standard diploma, **with the apparent intent being to keep A.S. in the school system beyond the proposed graduation date.**

Clearly attempting to "game the system" in this manner cannot be a goal of the IDEA.

The IEP team responded appropriately to this improper suggestion as follows:

"The team denied the request, asserting that the student had demonstrated the capability of earning a standard diploma and was two and a half credits short of completing all requirements for a regular diploma." (Remand Order 159)

The IEP team made the correct decision and yet based on this series of events the ALJ granted an additional three years of compensatory education because he believed that if the team felt free to keep A.S. in school by using the subterfuge of changing his diploma to a special diploma they would have.²⁴ This leads to the absurd result that the IEP team becomes tasked with insuring that the student does not obtain the final few credits to graduate so that he does not lose his IDEA eligibility. In this case the IEP team would have to actively insure that over the next three years that A.S. did not receive the final two half credits he needed.²⁵

²⁴ The ALJ misunderstands the IEP process. IEP teams don't vote, the Administrator in charge listens to the discussion and makes a decision, which the parents are then free to challenge in a due process hearing. If every team member thought, A.S. should have remained in school, the Administrator in charge would still be correct in not changing A.S. diploma to a special diploma when he has the proven capability to earn a standard diploma.

²⁵ Congress specifically ended IDEA eligibility upon graduation with a standard high school diploma. In this case the team would have to insure that A.S. did not earn any credits, in case he inadvertently graduated. Clearly the ALJ's holding would undermine Congress intent. No rational policymaker would set up such a system. If students such as A.S. are to be permitted to stay in school until they age out, Congress needs to change the law, IEP teams should not be permitted and clearly they shouldn't be mandated to do an end run around the law and congress.

D. The ALJ Exceeded His Authority By Considering The Parents Challenge To The IEP Teams Refusal To Change A.S.'s Diploma Track From A Standard Diploma To A Special Diploma.

The IDEA provides parents an opportunity to present complaints with respect to any matter relating to the identification, evaluation or educational placement of their child, or the provision of a free appropriate public education to their child see 20 U.S.C. §1415(b)(6). The Sammons request that the IEP team change A.S. diploma from a standard diploma to a special diploma so that he can avoid graduating with a regular diploma because of its consequences for continued IDEA eligibility is not a matter relating to the identification, evaluation or educational placement of a child, or the provision of a free appropriate public education to a child and therefore is not a matter that can be the subject of a due process hearing.²⁶ Furthermore, the remand order from this court did not encompass this challenge and nor did the original request for due process. In short this issue was not before the ALJ and he exceeded his authority.

E The Record Demonstrates That the Sammons Were Very Involved In A.S.'s Education and Diploma Options.

The Polk County School district did not rush A.S. through high school. He took five years to complete high school and graduate (Vol. 5, 911-912).²⁷ At all times material to this

²⁶ If an IEP team placed a child on a Special Diploma track and the parents thought the child could meet the requirements of a Standard Diploma this would impact the provision of a free appropriate public education. However, the fact that Congress through statute decided that IDEA eligibility ends upon graduation, makes the decision to graduate a student not an IEP team decision. There is no practical difference in making a decision to graduate a student an IEP team decision and the decision not take a child off a standard Diploma track simply so that he will not graduate. Neither is sanctioned by statute or the courts.

²⁷ In the first hearing, the Division of Administrative Hearings determined that A.S. had earned his high school diploma and graduated with a standard High School Diploma. A.S. appealed to the Federal District Court for the Middle District of Florida which upheld A.S.'s graduation and issued a judgment to that effect.

case, the educational goal established for A.S. was to graduate from high school with a Standard High School Diploma (Finding of Fact 2, ALJ Order dated November 10, 2004). This goal was developed with input from both his parents and school staff. Dr Kim Spence-Cochran who testified as the Sammons expert opined that she thought it was appropriate for the school district to press for a high school diploma for A.S. (Vol.2. 328). Only in the last three months of A.S.'s education did the Sammons object to A.S. obtaining a standard diploma.

IV. THE SCHOOL DISTRICT SHOULD GET A CREDIT TOWARDS ANY COMPENSATORY EDUCATION AWARD FOR THE YEAR THAT WAS SPENT WITH MR. SAENZ.

Mr. Saenz worked with A.S. in the portable during the 2005-2006 school year pursuant to a stay-put order from this Court. During that year, Mr. Saenz implemented the October 6, 2003 IEP (Vol. 4. 679) A.S. was in school through almost the end of the school year (Through, April 4, 2006) when the 11th Circuit Court of Appeals overturned the Stay-Put Order from the Federal District Court ruling that the District court erred in sending A.S. back to school. A.S. had no legal entitlement to the services that he received with Mr. Saenz.

A.S. has already received almost a year of compensatory education to which he was not entitled. Dr. Kabot testified that A.S. had already received an additional year of compensatory education. The intense focus by Mr. Saenz on A.S.'s goals, objectives and transition skills more than made up for any deficits in Mr. Thornhill's class (Vol. 4, 824).

Dr. Oakland, Dr. Kabot, and Dr. Reeve all opined that A.S. made progress with Mr. Saenz during the 2005-2006 school year (Vol. 3, 626) and the evidence in the federal court

proceeding and this proceeding supports the fact that A.S. met or made progress on his IEP goals and short-term objectives and received significant transition services.²⁸

V COMPENSATORY EDUCATION BEYOND AGE 21 IS ONLY ALLOWED FOR BAD FAITH VIOLATIONS OF THE IDEA.

In *Scott v. Carlisle Area School District* 62 F.3d 520, 536-537 the court said “We have held that compensatory education is available to respond to situations where a school district flagrantly fails to comply with the requirements of IDEA”. The Second Circuit has explicitly made a “gross” violation of IDEA a prerequisite to an award of compensatory education. See *Garro v. State of Conn.*, 23 F.3d 734 (2d Cir.1994); *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir.1990) (requiring a gross violation and defining such as instances of undue delay in holding hearings or taking advantage of mental infirmity to deny a placement). The cases from other circuits implicitly recognize that compensatory education beyond age 21 or after a student has graduated require a degree of intent involving culpable conduct or bad faith²⁹.

VI. THE CROSSROADS PLACEMENT IS NOT APPROPRIATE FOR A.S.

The ALJ placed A.S. at the Crossroads School on the basis that A.S. (1) would not be arrested at the Lakelands Crossroads School, (2) similarity in cost and (3) his assertion that their

²⁸ As set forth above the student spent almost a year working on his goals and objectives with Mr. Saenz who by all accounts is an excellent dedicated teacher. Mr. Saenz collected appropriate data in the form of a Tally Sheet (Exhibit 15), student work samples (Exhibit 32), anecdotes (Exhibit 14) and student progress reports (Exhibits 16-19). A.S. also filled out his self monitoring sheets (Exhibit 20).

²⁹ *Burr v. Ambach*, 863 F.2d 1071, 1073 (2d Cir.1988) (awarding compensatory education where state institution disqualified a student because of its purported inability to accommodate his multiple handicaps without mentioning or considering placement in an extant special program for multiple handicapped students); *Miener v. State of Mo.*, 800 F.2d 749 (8th Cir.1986) (reversing denial of compensatory education for a child who spent three years in mental health ward of a state hospital after district failed to provide any educational services notwithstanding its own evaluation recommending such services) and *Lester H.*, 916 F.2d at 865, 870, 873 (award of compensatory education where a district took *thirty* months after *admitting* that the in-district placement was inappropriate to locate an appropriate placement despite the availability of at least six suitable schools).

is no evidence that the school district is able or willing to provide the services. The ALJ without citation to any evidence found that the Lakeland Crossroads School is an appropriate placement for A.S.

A. Arrest

The ALJ incorrectly stated that A.S. was arrested on the second day of returning to the Polk County schools pursuant to this court's stay put order.³⁰ A.S. was not arrested at any time with Mr. Saenz or Mr. Thornton. Prior to A.S. being placed in a self contained classroom with Mr. Thornhill charges were filed against A.S due to his violent behavior. The school district did not initiate these charges and had no control over them being filed. A.S. was never arrested while he was with Mr. Thornhill or Mr. Saenz and no charges were ever filed against A.S. during that period contrary to the ALJ's assertion (Vol. 4, 716).³¹

B. Capability Of Providing Services.

The evidence is overwhelming that the school district is capable of providing the appropriate services to A.S. The evidence is not disputed that A.S. made progress with Mr. Saenz and was provided FAPE during that year. Clearly as the school district can provide FAPE to A.S. and as there is a preference for the public schools in the IDEA, A.S. should be returned to Polk County, if compensatory education is ultimately ordered.

³⁰ At the beginning of the school year with Mr. Saenz there was an incident in which a police officer tried to arrest A.S. Ms. Bronson stopped the police officers from arresting A.S. and was almost arrested herself in the process. (715-716). The ALJ based on this incident stated that "The evidence shows that A.S. was arrested on the second day of returning to school under the Court's stay-put order..." A.S. was never arrested with Mr. Saenz. The ALJ is factually incorrect.

³¹ In fact at no time during any of the time periods at issue was A.S. ever arrested while attending the authority of the Polk County School Board. The ALJ's finding that fear of arrest is a primary motivating factor that A.S. not be returned to the Polk County School district militates in favor of sending A.S. back to the Polk County school district.

C. The Lakelands Crossroads School Is Inappropriate For A.S.

The Crossroads School is inappropriate for A.S. The evidence established that neither the Traditions Program nor the F.A.C.E. Program would be appropriate for A.S. The only option would be for Lakelands Crossroads to create their own program for A.S. in a self contained classroom with an aide. This is how the staff of Educational Services of America testified that they could serve A.S.; in a self contained setting similar to that in which the Polk County School District served him.

However, no teacher or program was identified and there was no evidence provided as to what services A.S. would receive or what staff would be available to serve him. To obtain a private educational placement, the Sammons have the burden of proof and must prove that the school district cannot meet A.S.'s needs and that the proposed private placement can *Florence County School District Four v. Carter*, 510 U.S. 7 (1993). This showing has not been made.

VII THE SAMMONS COMPLAINT SHOULD BE DISMISSED

The Sammons filed a complaint seeking review of the administrative decision under both federal and state law (Counts 1 and III). This Complaint alleges two categories of claims. The first category alleges that the ALJ failed to consider claims for compensatory education, award compensatory education or find that the IEP team predetermined the decision to graduate A.S. (Plf.'s Compl. Par. 44 a-c). The A.LJ did consider these issues in his subsequent order and ruled in Plaintiffs favor. These issues are therefore moot and should be dismissed. The remaining issues are the assertion that A.S. was not educated in the least restrictive environment and the finding by the ALJ that residential placement was more restrictive and less suitable for A.S. than the district's placement. The ALJ's findings of fact are supported by the record. Plaintiffs own contention that A.S. should be placed at the Crossroads School in a setting

similar to his former placement and the Sammons failure to suggest a residential placement rather than the Crossroads School supports this determination.

Plaintiffs' second cause of action for Attorneys fees incurred in the Administrative Hearing should be dismissed as in the 11th Circuit a party cannot be both a prevailing party and an aggrieved party at the same time. As the 11th Circuit noted in *Zipperer v. School Board of Seminole County Florida* 111 F.3d 847 at 852 n2 (11th Cir. 1997) a party cannot appeal a due process hearing and seek attorneys fees for that hearing.

CONCLUSION

For the reasons stated above it is respectfully requested that this court dismiss Plaintiff's complaint, find that A.S. was provided FAPE and that he is not entitled to any compensatory education.

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CERTIFICATE OF SERVICE

I certify that on August 10, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to Timothy W. Weber, Esquire, Battaglia, Ross, Dicus & Wein.

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