

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████,)
)
Petitioner,)
)
vs.) Case No. 12-2322E
)
HILLSBOROUGH COUNTY SCHOOL)
BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was conducted on August 23 and 24, 2012, by video teleconference at sites in Tampa and Tallahassee, Florida, before Elizabeth W. McArthur, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Timothy W. Weber, Esquire
Battaglia, Ross, Dicus & Wein, P.A.
Post Office Box 41100
980 Tyrone Boulevard
St. Petersburg, Florida 33743-1100

For Respondent: LaKisha Kinsey-Sallis, Esquire
Thompson, Sizemore, Gonzalez
and Hearing, P.A.
Suite 1600
201 North Franklin Street
Tampa, Florida 33602-5110

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent denied Petitioner "a free appropriate public education" (FAPE) within the meaning of the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. section 1400, et seq., and, if so, whether Petitioner is entitled to reimbursement for the costs expended by the parent in unilaterally placing the student in a private residential boarding school.

PRELIMINARY STATEMENT

A due process complaint and request for hearing pursuant to the IDEA (Complaint) was submitted to the Hillsborough County School Board (School Board, District, or Respondent), on behalf of [REDACTED] ([REDACTED] or Petitioner). The Complaint, completed by counsel, alleged that Respondent failed to provide FAPE to [REDACTED], beginning with the school year 2010-2011 (SY2010-2011), when [REDACTED] was an [REDACTED] student briefly enrolled in the Hillsborough County school system (Hillsborough School System). The Complaint contended that the July 29, 2010, individual educational plan (IEP) developed for [REDACTED] SY2010-2011 provided an inadequate and harmful placement at Alonzo Senior High School (Alonzo). As a result, [REDACTED] father, [REDACTED], enrolled [REDACTED] in The [REDACTED] School ("[REDACTED]"), a private residential boarding school in Polk County, Florida, where [REDACTED] had attended seventh, eighth, ninth, and tenth grades.

The Complaint sought the following relief under the IDEA: reimbursement for private-school tuition costs paid by ██████ for SY2010-2011 and beyond, after ██████ unilateral placement of ██████ back in ██████; compensatory education for educational opportunities allegedly lost since the start of SY2010-2011; and a directive requiring Respondent to develop an IEP for ██████ that provides an appropriate educational environment "such as that offered by a residential facility[.]"

In addition to the IDEA claims, the Complaint sought equitable relief and monetary damages for Respondent's alleged intentional discrimination against ██████ based on disability, in violation of section 504 of the Rehabilitation Act of 1973 (section 504) and the Americans With Disabilities Act (ADA).

The Complaint was received by Respondent on July 6, 2012. The Complaint named both ██████ and ██████ as Petitioners. ██████ was 18 years old at the time the Complaint was filed.

Respondent referred the Complaint to DOAH the day it was received. The case was assigned to the undersigned. A Case Management Order entered on July 10, 2012, set forth procedures and deadlines called for under both state and federal regulations for the conduct of IDEA due process hearings.

Respondent filed an unopposed motion for a one-week extension to respond to the Complaint, which was granted, with a concomitant extension of the final order deadline pursuant to

the Case Management Order. Respondent timely filed its answer and defenses to the Complaint by the extended deadline.

The parties filed a Joint Scheduling Report in which they requested a two-day final hearing on August 23 and 24, 2012, with a hearing site in Tampa, Florida. Petitioner requested that the hearing be open to the public and represented that they both would attend with counsel. The final hearing was scheduled in accordance with the parties' request.

Prior to the final hearing, the parties complied with a Pre-Hearing Order by exchanging witness lists and proposed exhibits and sending their proposed exhibits to DOAH. The parties also filed a Joint Statement of Undisputed Facts; post-hearing, the parties filed a Supplemental Joint Statement of Undisputed Facts to address an issue arising at hearing. The parties' stipulated facts are incorporated in the Findings of Fact below to the extent relevant. Respondent also filed its Evaluation List, disclosing evaluations of ██████ that it intended to rely on at the hearing as required by the Pre-Hearing Order.

At the outset of the final hearing, Respondent raised two threshold matters that were raised as defenses to the Complaint. First, Respondent contended that DOAH lacked jurisdiction over the non-IDEA claims that were included in the IDEA Complaint.

See Response/Defenses at 11, ¶ 33. Respondent moved to dismiss the non-IDEA claims and, thereby, clarify the hearing scope.

Petitioner presented no argument or authority to support DOAH's jurisdiction, in an IDEA due process hearing that culminates in a final order, to adjudicate the discrimination claims under section 504 or under ADA, which were intermingled in the IDEA Complaint. See, e.g., M.R.M. v. Leon Cnty. Sch. Bd., Case No. 10-0396E (Fla. DOAH Aug. 17, 2010), at 61, ¶ 135 ("DOAH does not have jurisdiction to consider alleged violations of Section 504 in the absence of a contractual grant of authority to hear such claims from the School District in question. No evidence was presented that DOAH has such a contract with the Leon County School Board."). DOAH's jurisdiction to conduct a hearing and issue a final order in this case is based on a due process Complaint under the IDEA, in accordance with section 1003.57(1)(b), Florida Statutes (2012),^{1/} and the contractual authority implementing that section. As a result, the discrimination claims under section 504 and ADA were dismissed; that dismissal is without prejudice to Petitioner pursuing available any administrative remedies for such claims.

Respondent also raised as a threshold issue its contention that only ██████ has standing to pursue the Complaint and that ██████ should be dismissed as a Petitioner. See Response/Defenses at 9, ¶ 26. It was undisputed that ██████ was

an 18-year-old adult when the Complaint was filed and had not been adjudicated incompetent or had a guardian appointed. Thus, according to Florida Administrative Code Rule 6A-6.03311(8), all rights afforded to [REDACTED] as [REDACTED] parent, provided in rules 6A-6.03011 through 6A-6.0361, transferred to [REDACTED] when [REDACTED] turned 18. The only exception is for notice rights, which become shared rights.

Counsel for [REDACTED] and [REDACTED] asserted that case authority supports a parent's independent right of action under the IDEA to seek reimbursement of tuition paid for unilateral private school placements. While the right to seek reimbursement is indeed given to parents under the IDEA and corresponding Florida law, that parental right is not excluded from the "rights afforded to parents" that transfer to the student, upon the student reaching the age of majority. See Fla. Admin. Code R. 6A-6.03311(7) (addressing rights to seek reimbursement for parental placement of students with disabilities in private schools); Fla. Admin. Code R. 6A-6.03311(8) (providing for the transfer of parental rights afforded by rules, including rule 6A-6.03311, to the student at the age of majority).

Counsel for [REDACTED] presented no authority at the hearing, or in Petitioner's post-hearing proposed final order (PFO), to support a parent's standing to file IDEA claims after the student reaches majority age. While cases support [REDACTED] right

to have filed a claim under the IDEA for tuition reimbursement, had [REDACTED] done so at any time in the nearly two years after [REDACTED] unilateral private placement of [REDACTED] and before [REDACTED] turned [REDACTED], that right was transferred to [REDACTED] at [REDACTED], before the Complaint was filed. See, e.g., Loch v. Bd. of Ed. of Edwardsville Comm. Sch. Dist. No. 7, 327 Fed.Appx. 647, 2009 U.S.App. LEXIS 13513, *5-*6 (7th Cir. 2009), cert. denied, 130 S. Ct. 1736 (2010) (district court properly dismissed parents' claims under the IDEA for lack of standing; though parents are correct that they have individual enforceable rights under the IDEA, under state law those rights transferred to the student when that student reaches age [REDACTED], and student was [REDACTED] when the parents filed this action). Based on this authority and the absence of any contrary authority, [REDACTED] is not considered a petitioner, and references to Petitioner are to [REDACTED], alone. Nonetheless, as a practical matter, [REDACTED] participated in the final hearing, in [REDACTED] absence. Respondent did not assert that [REDACTED] was not entitled to participate, nor did Respondent assert that the proceedings could not go forward without evidence of [REDACTED] agreement that the proceeding should go forward. Likewise, Respondent did not contend in its PFO that the Complaint must fail due to [REDACTED] non-appearance at the hearing or submission of testimony by other means.

Petitioner presented the testimony of the following witnesses: Fred L. Alberts, Jr., Ph.D. (who was later accepted as an expert for Respondent in the areas of neuropsychology and school psychology); Thomas D. Oakland, Ph.D., Petitioner's expert in school psychology; Christina Benito, Ph.D., the District's supervisor for exceptional student education (ESE) compliance; [REDACTED] ([REDACTED]'s father); Kimberly Phillips, ESE staffing coordinator for the District's Area II at the time [REDACTED] IEP was developed; and Melanie Brockmeier, assistant head of ****. Petitioner's Exhibits 2 through 7, 9, 13, 14, and 38 were received in evidence.^{2/} Petitioner's Exhibits 8, 27, 28, 29, and 40 were offered, but objections to their admission were sustained, and they were not proffered. Petitioner's composite Exhibit 25 was initially offered, but later withdrawn.

Official recognition was provisionally taken, subject to a determination of relevancy, of Petitioner's Exhibit 39, as well as two related documents which were allowed to be filed post-hearing and which have been designated Petitioner's Exhibits 39a and 39b. These three related documents are an Independent Hearing Officer's order, an order on review by the State Review Officer, and the Memorandum and Order of the U.S. District Court for the Southern District of New York in due process proceedings between [REDACTED] and the New York City Department of Education (NYC DOE). Over Respondent's objection (on relevancy grounds),

official recognition of these documents is taken, albeit for a rather limited purpose of providing background. The decisions are not accepted as evidence, or in lieu of evidence, to establish in this case the truth of the facts found in those proceedings, which were based on the records developed in those proceedings and which were between different parties.

Respondent presented the testimony of: Dr. Alberts, accepted as an expert in neuropsychology and school psychology; Kimberly Phillips; Sharon Foster, the District's Area II ESE supervisor; Elizabeth Cabrera, District school social worker; Amanda Prive, Ph.D., District school psychologist; Joseph Albano, ESE teacher and ESE department head at Alonso; Grace Sheffield, ESE teacher at Alonso; and Dr. Benito. For the record, Respondent noted that it had subpoenaed Dr. Cathy Wooley-Brown, head of [REDACTED], but Dr. Wooley-Brown failed to appear; there is no record at DOAH indicating that Dr. Wooley-Brown moved to quash or asked to be excused from the subpoena. Respondent's Exhibits 1 through 46 were admitted in evidence.

Petitioner had included as proposed exhibits, provided to Respondent before hearing, several Technical Assistance Papers (TAPs) issued by the Bureau of Exceptional Education and Student Services, within the K-12 Public Schools Division of the Florida Department of Education (ESE Bureau), for guidance to school districts. The TAPs were not identified or discussed by any

witness and were not admitted as exhibits. Instead, Petitioner was allowed to file a post-hearing motion for official recognition of the TAPs, and Respondent was allowed to file a response. Petitioner's post-hearing motion sought official recognition of TAPs proposed as Exhibits 32, 33, 34, and 36. Respondent opposed the motion. After considering the parties' filings, the motion for official recognition is denied.^{3/}

The four-volume Transcript of the final hearing was filed on September 5, 2012. As agreed at the end of the final hearing, the parties were allowed 20 days after the Transcript was filed in which to submit PFOs and the final order deadline was extended until 20 days thereafter. By joint motion filed on September 24, 2012, the parties requested a six-day extension of the deadlines, which was granted. The parties timely filed PFOs by the extended deadline. The parties' submittals have been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

1. [REDACTED] who is now [REDACTED] old, suffered a traumatic brain injury (TBI) in [REDACTED], at age [REDACTED], when [REDACTED] was hit by a pick-up truck in Bradenton, Florida.

2. For the next 12 years following [REDACTED] accident, [REDACTED] first resided out of state and then was unilaterally placed by [REDACTED] at [REDACTED] in Polk County, adjacent to Hillsborough County. After the 2009-2010 school year began, [REDACTED] presented [REDACTED] as a

continued outpatient care coordinated by [REDACTED]. [REDACTED] an insurance executive, worked for a company with New York offices. [REDACTED] and [REDACTED] mother are divorced; [REDACTED] has custody of [REDACTED]

6. [REDACTED] began school in the state of New York, in the NYC DOE school system. From 1998 through 2005-2006, [REDACTED] went to private day schools for special education, apparently pursuant to IEPs developed by the NYC DOE.^{4/} [REDACTED] commuted daily by bus; at some point, a paraprofessional aide was assigned to assist [REDACTED] with the bus commutes, because [REDACTED] experienced motion sickness.

7. [REDACTED] first attended an early intervention pre-school program at [REDACTED]. For the next four years, [REDACTED] attended [REDACTED] School. [REDACTED] lived in the New York apartment with [REDACTED] and rode a bus to [REDACTED]. [REDACTED] continued outpatient therapy treatments and counseling during this time.

8. [REDACTED] placement changed following the 2004-2005 school year, because [REDACTED] "aged out" of [REDACTED] ([REDACTED]). For 2005-2006, [REDACTED] attended a private day school called [REDACTED] ([REDACTED]). Problems developed with [REDACTED] transition to [REDACTED]. As [REDACTED] explained, [REDACTED] was "further downtown" in New York City than [REDACTED], resulting in "greater bus time, greater transportation time." In addition to the increased time spent on busses, and the time [REDACTED] spent out of school for physical therapy, occupational therapy, and

counseling, [REDACTED] was tutored twice a week to keep up with the sixth-grade classes [REDACTED] was taking at the new school.

9. [REDACTED] did not adjust well to this overly ambitious schedule. [REDACTED] became overwhelmed with the overload, and according to [REDACTED], [REDACTED] began expressing threats to hurt self and others. As a result, as [REDACTED] described it, [REDACTED] psychologist recommended a "residential placement which was centrally based, therefore eliminating transportation and providing [REDACTED] socialization, which [REDACTED] did not have because [REDACTED] was commuting all over New York City." Despite the situation described by [REDACTED] [REDACTED] remained in [REDACTED] for the full 2005-2006 school year, completing the sixth grade. According to information provided by [REDACTED] teachers at Winston [REDACTED], [REDACTED] ultimately adjusted well and made good progress in the classroom.

10. In an IEP dated June 26, 2006, the NYC DOE recommended a private residential placement for [REDACTED]. Apparently, the NYC DOE accepted the recommendation of [REDACTED] psychologist so that [REDACTED] would not have to commute all over New York City and would have time for socialization. However, despite the recommended placement, the NYC DOE did not actually arrange a placement of [REDACTED] in a private residential facility.

11. [REDACTED] was left to unilaterally identify a residential program believed by [REDACTED] to be appropriate for [REDACTED]

Apparently, [REDACTED] had already looked into residential programs and had identified [REDACTED] in [REDACTED], Polk County, Florida, adjacent to Hillsborough County. [REDACTED] still owned a house in Tampa, which had been rented out while [REDACTED] lived in a New York apartment.

12. On May 16, 2006, [REDACTED] completed and signed an application for [REDACTED] 's admission to [REDACTED], in which [REDACTED] provided the following information about [REDACTED] :

[REDACTED] was struck by a vehicle in 1998. [REDACTED] remained in a coma for roughly 5 weeks and has continued with therapies and rehabilitation [sic] thru the present. [REDACTED] recovery has been spectacular. Today [REDACTED] is running, swimming, playing basketball and judo. [REDACTED] was voted two years ago (Most Improved) in running & swimming. [REDACTED] deficits today mirror ADD.

13. In other pre-enrollment forms, [REDACTED] provided the following details about [REDACTED] as of mid-2006: "No indication of any neurological issues; speaks perfectly; used to have difficulties physically in terms of endurance--but no longer." [REDACTED] reported that [REDACTED] responded well to rules and structure, did well socially, was nice, and well-mannered. [REDACTED] did not identify any impediments to [REDACTED] 's full participation in physical education. [REDACTED] did not identify any current health issues for [REDACTED] , noting that [REDACTED] was not taking any medications.

14. An admission screening assessment completed by [REDACTED] staff set forth background information, test results (including [REDACTED]'s below-average intelligence quotient (IQ) according to previous tests), behavioral observation, and interview data. The screening assessment was summarized as follows:

[REDACTED] is a very likable young [person] who has difficulty with auditory processing and working memory. [REDACTED] weaknesses are very much like those of ADD. [REDACTED] had difficulty concentrating during the testing session. [REDACTED] needed to be brought back to the task periodically and on several occasions requested to stop. [REDACTED] is working below grade level in math and reading, but it is important to remember that the testing scores may not be a good indication of what [REDACTED] really knows. [REDACTED] will need strategies to help [REDACTED] stay focused in the classroom

15. [REDACTED] chose to place [REDACTED] at [REDACTED], apparently without involvement of the NYC DOE. More than two years later, in 2009, [REDACTED] filed a due process complaint under the IDEA. According to the decisions, [REDACTED]'s complaint was that the NYC DOE failed in its obligation to provide FAPE to [REDACTED] for the 2006-2007 school year, by not following through on its recommended placement by actually placing [REDACTED] in an appropriate residential facility; and that this failure necessitated [REDACTED]'s unilateral parental placement of [REDACTED] at [REDACTED], for which [REDACTED] should be reimbursed under the IDEA. In the due process hearing that followed, the NYC DOE did not attempt to dispute that it had failed to provide FAPE to [REDACTED]. However, the NYC DOE

asserted that reimbursement relief was barred by the IDEA's two-year statute of limitations.^{5/} Indeed, that was the ultimate outcome of the due process hearing on review by the state review officer by order dated May 11, 2010, upheld by the U.S. District Court for the Southern District of New York in a Memorandum and Order dated September 16, 2011. [REDACTED] was denied reimbursement from the NYC DOE for the costs of [REDACTED] 's unilateral placement of [REDACTED] at [REDACTED] for 2006-2007, because the due process complaint was filed more than two years after the claim arose.

16. Meanwhile, during the pendency of the due process proceedings against the NYC DOE, on September 11, 2009, [REDACTED] filed a due process complaint on [REDACTED] 's behalf against Respondent, claiming that the District was responsible for [REDACTED] 's education as of the 2007-2008 school year, because [REDACTED] had returned to live in Hillsborough County after giving up the New York apartment. The Complaint sought reimbursement from Respondent for the costs of [REDACTED] 's [REDACTED] tuition and related services for school years 2007-2008 and 2008-2009, as well as a determination that Respondent would be obligated to pay for [REDACTED] 's residential placement and related services thereafter.

17. Respondent transmitted the 2009 due process Complaint to DOAH, where it became DOAH Case No. 09-4995E. Respondent moved to dismiss, asserting that [REDACTED] had never been enrolled in the Hillsborough School System, and, thus, the District had

never developed an IEP by which FAPE could be offered to [REDACTED]
The Administrative Law Judge agreed and granted the motion to
dismiss in a Final Order of Dismissal on October 13, 2009.^{6/}

18. On January 11, 2010, [REDACTED] filed a Complaint against
the School Board in the U.S. District Court for the Middle
District of Florida (Case No. 8:10-cv-00056-RAJ-EAJ) for review
of the DOAH Final Order of Dismissal. No decision was rendered
in that case, however, because the parties settled, and the
review Complaint was voluntarily dismissed. The settlement
agreement is not a matter of record, but the parties have
acknowledged that the settlement agreement conclusively resolves
the parties' IDEA disputes regarding school years 2007-2008,
2008-2009, and 2009-2010. The parties stipulated that the
settlement was finalized on May 11, 2011. Thus, as between the
parties, the DOAH Final Order of Dismissal is a binding
adjudication, as it became final beyond review when the federal
review proceeding was dismissed.

19. As noted by Petitioner in the Complaint, however, the
parties' settlement agreement "expressly left open any claims for
subsequent educational entitlements, including the instant
challenge to the July 29, 2010 IEP and reimbursement for the
2010-2011 school year and beyond." Thus, the significance of the
2009 DOAH Final Order of Dismissal and the federal review
complaint, settlement, and dismissal of the review complaint is

that they establish a bright-line temporal limit for this case: those IDEA matters set forth in the Complaint that pertain to SY2010-2011 and thereafter.

Steps Leading to the July 29, 2010, IEP

20. Shortly before issuance of the Final Order of Dismissal in DOAH Case No. 09-4995E, in late September 2009, ██████ telephoned Respondent's attorney to request that the District hold an IEP meeting and do whatever evaluations were necessary to make an offer of FAPE to ██████. At the time, ██████ was already enrolled in ██████ for the 2009-2010 school year; ██████'s annual contracts committed ██████ to pay tuition for the full year.

21. The District's attorney passed ██████'s request on to the appropriate District personnel. Within a week, Kimberly Phillips, an ESE staffing coordinator for the District who coordinated IEP teams and meetings for the geographic area in which ██████'s house was zoned, called ██████ regarding ██████ request. Pursuant to their telephone conversation, the next day (September 30, 2009), Ms. Phillips sent to ██████ a Hillsborough School System registration packet and parental consent forms for the release of ██████ records to the District. The transmittal letter stated that once ██████ completed the enrollment process, he should contact Ms. Phillips to begin the process of identifying available dates for the scheduling of an IEP meeting.

22. On October 15, 2009, [REDACTED] telephoned Ms. Phillips to express concern that the registration packet stated that one of the requirements to register with the Hillsborough School System was the submittal of withdrawal papers from the student's current school placement. [REDACTED] objected to being required to first withdraw [REDACTED] from **** and actually enroll [REDACTED] in the Hillsborough School System in order to have the District develop an IEP for [REDACTED] and make an offer of FAPE.

23. Ms. Phillips consulted with Dr. Christina Benito, District supervisor for ESE compliance. Dr. Benito said that [REDACTED] did not have to withdraw [REDACTED] from [REDACTED]; instead, the District agreed to work with [REDACTED] to develop a "proposed" IEP that would not go into effect unless [REDACTED] decided to complete the enrollment process to register [REDACTED] in the Hillsborough School System. Ms. Phillips conveyed this message to [REDACTED]

24. On October 23, 2009, [REDACTED] wrote to Ms. Phillips regarding whether [REDACTED] should sign the parental consent forms authorizing release of [REDACTED] records to the District. [REDACTED] sought confirmation that if the parental consent forms were signed, the District would proceed to conduct an assessment and develop an IEP without requiring that [REDACTED] first be withdrawn from [REDACTED], where [REDACTED] was currently attending. Ms. Phillips telephoned [REDACTED] and provided that confirmation. Accordingly, [REDACTED] signed the parental consent forms for release of [REDACTED]

records, and on October 28, 2009, █████ sent the forms to Joseph Albano, the ESE department head at Alonso, the zoned high school for the geographic location of █████ Tampa house.

25. The District sent a signed parental consent form authorizing the release of █████ records to █████ in early November 2009. Ms. Phillips contacted █████ to follow up after not receiving the records. Ms. Phillips was told that █████ would not release █████ records, unless █████ first called █████ about the record release. After some delay, █████ sent █████ records to the District, which received them in mid-December 2009. The transmittal letter from Dr. Cathy Wooley-Brown, █████ president/CEO, described the enclosures as "copies of current student records as well as past pertinent information to enable you to develop an IEP [for █████]."

26. █████ records for █████ included some pre-█████ information provided by █████ (█████ sixth-grade school in New York City); enrollment information (including pre-enrollment questionnaires, interview notes, assessment records, admission application, and parental permission forms); █████ 's course schedules; detailed descriptions of █████ █████ course contents; scholastic reports with █████ grades in seventh, eighth, and ninth grades; interim progress reports for █████ current tenth-grade classes, showing █████ grades for assignments and tests; a narrative of academic and social input from █████ current teachers; detailed

progress reports for each course ██████ took in ██████ ██████, showing achievement level in individual course objectives; and some results from Terra Nova standardized achievement tests given in eighth and ninth grades.

27. ██████ records of ██████ classes portrayed the curriculum as geared toward ██████ actual grade level. For example, the detailed descriptions of ██████ ██████ courses specified junior high school/middle school content. ██████ seventh-grade junior school social studies was described as a middle school social studies curriculum focused on world cultures and regions, including such study areas as geography, cultural characteristics, religion, politics, language, family structure, physical characteristics and land use. ██████ also took junior high school math concepts, described as organizing and displaying data, reading and interpreting graphs and charts, and working with fractions, decimals, percentages, probabilities, and measurement ratios. ██████ also took junior high school language arts, described as a middle school English program geared to the developmental and educational needs of sixth, seventh, and eighth-grade students, with literature appreciation and analysis, grammar and writing strategies. ██████ seventh-grade schedule also included two junior high school reading classes, junior high school earth science, and junior high school keyboarding (computer keyboard skills and use of word processing software).

28. In the fall of 2009, █████ took these █████ classes at █████: (1) English II; (2) Art; (3) Pre-Algebra; (4) Biology; (6) Study Skills; (7) Spanish II; and (8) World History. Detailed interim progress reports show the individual class assignments. For example, English II assignments included reading and analyzing "The Outsiders" novel as well as various selections of poetry by Edgar Allen Poe, and working on journals.

29. On the surface of these records, one could reasonably conclude that █████ was used to a regular grade-level academic education because that is what █████ experienced at █████.

30. █████ records also gave the impression that █████ was generally succeeding in grade-level course work at █████. █████ performance reports showed that while █████ got mostly C's and B's in █████ first semester, █████ progressed and was getting mostly A's and B's in eighth and ninth grades. Buttressing the impression given by █████ grades were the detailed progress reports completed by █████ teachers for each █████, which broke down █████ overall performance in the class by individual course objectives. For each course objective, the level of achievement was shown in one of the following categories: mastery, outstanding, satisfactory, or not met. █████ was credited with performing mostly at a satisfactory achievement level, with some outstanding achievement (such as in art), as well as the occasional objective that was "not met."

31. Counterbalancing the detailed records of █████ course work at █████ over more than a three-year period was a summary page from the Terra Nova assessment given to █████ in ninth grade. The summary page showed test results of █████ academic skills expressed as the following norm-based grade equivalents (GE): in reading, GE of 2.6; in language, GE of 2.7; in math, GE of 3.7; in science, GE of 1.8; and in social studies, GE of 1.8.

32. No evidence was presented that █████ implemented an IEP for █████ █████ records provided by █████ did not include an IEP, or any similar document (such as a services plan by the county where █████ is located), describing any special education, related services, or specific accommodations needed by █████ that were being provided at █████. There was no suggestion in the records of the pre-enrollment interview and application process that █████ provided █████ with the 2006 IEP from NYC DOE or that █████ asked █████ to provide special education and related services similar to what was set forth in the 2006 IEP. There was no indication in █████ █████ records that the course curriculum was modified or that course objectives were lowered for █████ While █████ holds itself out as a boarding school geared to students with learning differences, such as ADD and ADHD, █████ also describes its students as having average intelligence quotients (IQs). Thus, it is likely that some ad hoc modification to the curriculum and expectations in █████ classes would have been necessary.

Nonetheless, there was no actual written plan describing how and to what extent modifications were needed by, or were given to,

██████ 7/

33. The 2006 IEP prepared by the NYC DOE apparently made provision for ██████ to receive some physical therapy, occupational therapy, speech therapy, and counseling as related services. At ██████, ██████ received counseling, but no physical therapy, occupational therapy, or speech therapy. No evidence was presented that ██████ received those therapies anywhere since New York City. ██████ testified that he could not afford the therapies. However, in May 2006, ██████ informed ██████, as part of the pre-enrollment process, that ██████ speech was perfect, that there were no neurological issues, no medical issues, and no physical limitations on ██████ participation in physical education. Thereafter, nothing in the ██████ records provided to the District hinted of any concerns or suspicions that ██████ needed services such as physical therapy, occupational therapy, or speech therapy. ██████ itself does not provide physical therapy or occupational therapy, but would take students to appointments with providers, if these services were necessary and arranged by the parent. ██████ does provide speech therapy to its students needing speech therapy, but as ██████ acknowledged, ██████ did not need speech therapy.

34. The District assessed [REDACTED] records provided by [REDACTED]. That review led to the District's reasonable impression that [REDACTED] was taking, and generally succeeding in, courses at [REDACTED] grade level with some supports to assist with [REDACTED] attention deficit issues.

35. Before proceeding to schedule an IEP meeting, the District took steps to verify that [REDACTED] had, in fact, resumed residency in Hillsborough County. [REDACTED] took offense to this, but this was not an inherently unreasonable or antagonistic step as [REDACTED] apparently believed. Proof of residency is a requirement stated in the registration packet for students newly enrolling in the Hillsborough School System. In [REDACTED] case, home ownership was not an indicator of residency, as [REDACTED] had owned his Tampa house during the many years that he and [REDACTED] were residents of New York City. Therefore, it was not unreasonable for Respondent to seek to verify [REDACTED] residency status nor did it cause delay, since [REDACTED] was enrolled at [REDACTED] for the 2009-2010 school year, and thus, Respondent had agreed to develop a proposed IEP that would go into effect, if [REDACTED] decided to enroll [REDACTED] in the Hillsborough School System for SY2010-2011.

36. [REDACTED] also expressed anger to the District when the District did not agree to send someone to the next county to observe [REDACTED] while in class at [REDACTED], as requested by [REDACTED]. While such a limited observation might be helpful in adding to

the information from ██████'s records for ██████ ██████ records contained more detailed information from the teachers who were able to evaluate ██████ over time in their classrooms. Petitioner's expert confirmed the limited utility to the sort of limited one-time classroom observation suggested by ██████

37. In addition to asking the District to send someone to observe ██████ while attending ██████, apparently in December 2009, ██████ also asked the District to pay for a private neuropsychological evaluation of ██████. However, this request was at a point in time when ██████ had not yet decided whether ██████ would complete the registration process in the Hillsborough School System; ██████ had only recently signed the parental consent forms for release of ██████ records to the District; and ██████ delayed releasing ██████ records to the District. The District reasonably undertook an assessment of those records as the first step to the development of a proposed IEP.

38. Following the records review, on February 24, 2010, Dr. Benito, Ms. Phillips, and Sharon Foster, the District's ESE supervisor, completed a "review of data" form used for students transferring from out of state, within the meaning of rule 6A-6.0334.^{8/} The completed data review form documented the following from a review of ██████ records: (1) that ██████ would (or might) be transferring into the Hillsborough School System with a New York IEP, dated June 26, 2006; (2) that in that IEP,

█████ was deemed eligible for ESE services in the TBI category, which correlated with the TBI ESE eligibility category in Florida rules; (3) that █████ records provided sufficient evidence that the student was eligible for ESE services; (4) that an IEP had been developed for █████ and implemented upon parental consent for initial ESE placement (i.e., in 1998 when the first New York IEP was apparently developed); and (5) that the parental consent had not been revoked. These are the factors to be considered in determining whether the District needed to conduct its own evaluation in order to make an ESE eligibility determination or whether there was sufficient documentation in the data review that █████ was eligible for ESE services in Florida under the TBI category and that there was still parental consent for █████ to obtain ESE services. In this case, the District reasonably determined that █████ records sufficed. As described in the form, this determination triggered "Option A," which provided that an initial ESE evaluation and eligibility staffing was not necessary, and the next step could be the scheduling of a meeting to develop an IEP, at which the IEP team would discuss re-evaluation needs and whether a three-year re-evaluation is due.

39. Ms. Phillips started the process of coordinating calendars to schedule a meeting. March 3 and 4, 2010, were identified; █████ selected March 4, 2010. █████ asked Ms. Phillips about the purpose of the meeting, and she explained it

was to develop a proposed IEP and discuss possible re-evaluation needs.

40. The District sent notice of the March 4, 2010, meeting to [REDACTED] and [REDACTED], with the date, time and location of the meeting. Consistent with Ms. Phillips' conversation with [REDACTED] the notice provided that the purpose of the meeting was to develop a "proposed IEP for a student currently attending private school in Polk County" and to discuss re-evaluation needs. The notice also identified the individuals who were invited to attend the IEP meeting and who would be invited to attend if parental consent were given. The notice included a request for [REDACTED] consent to invite a representative from the Florida Division of Vocational Rehabilitation (DVR) to discuss transition services for [REDACTED] transition beyond high school, which the District planned to address in the IEP because [REDACTED] would be 16 before SY2010-2011. A form was included for [REDACTED] to sign to indicate whether he consented or not to inviting a DVR representative.

41. Ms. Phillips followed up in a telephone conversation with [REDACTED] to ask about the parental consent form for inviting a DVR representative. According to Ms. Phillips' contemporaneous notes, which were not disputed by [REDACTED], [REDACTED] was disinclined to consent; [REDACTED] told Ms. Phillips that [REDACTED] "[f]eels that he will be able to answer transition questions for [REDACTED]"

42. █████ did not return the consent form asking to invite a DVR representative. █████ did, however, sign another form that was also sent to █████ this form requested parental consent to allow the District to share and exchange transition information with other agencies that might be involved in █████ 's transition beyond secondary school, including the DVR, the Florida Department of Children and Families, and the Agency for Persons with Disabilities. █████ checked the box to indicate that █████ did not consent to the sharing of transition information with other agencies, signed, and returned the form to the District.

43. The March 4, 2010, IEP meeting was held as noticed. The meeting was attended by: █████; Dr. Amanda Prive, school psychologist; Dr. Benito; Ms. Foster; Ms. Phillips; Mr. Albano; Carey DiPompo, regular education teacher; and attorneys on behalf of the School Board and █████ █████ was invited to attend the meeting, but did not attend. A representative from █████ was expected to attend by telephone, but did not. No representative from DVR was invited, because █████ did not give written consent.

44. In advance of the meeting, Dr. Benito and Ms. Phillips prepared a draft IEP, using information gleaned from their review of █████ █████ records. This first draft IEP set forth pieces of information from █████ █████ records, such as narratives by █████ teachers, █████ course descriptions, and █████ grades. That information was used to draft provisions for the types of special

education services and supports, goals and objectives, modifications, and accommodations that seemed to follow from the information in ██████'s records. Based on these draft provisions regarding the type of educational services and supports that might be appropriate for ██████, a provision was drafted to address what the least restrictive environment (LRE) would be where such services and supports could be provided, which was in regular education classes, with accommodations, 80 percent of the time and in a special ESE classroom setting for 20 percent of the time. The draft IEP concluded with an indication that the draft provisions for services and supports could be implemented at ██████ zoned school, ██████.

45. Ms. Phillips and Dr. Benito both explained that draft IEPs in general, including this one in particular, are used to facilitate meetings at which IEPs are developed by putting in preliminary information and concepts, which are discussed and refined as the IEP Team gives input. The IEP draft document is projected on a screen, and each provision is discussed and revised on the spot based on the discussions.

46. The draft IEP was circulated at the March 4, 2010, IEP meeting. However, the meeting did not progress to the point of walking through the draft to discuss and re-work each provision. Instead, ██████ overreacted to the draft IEP. ██████ believed that by giving ██████ the draft IEP, the District was making an offer of

placement, as if the draft IEP were a finalized IEP. However, those words were never spoken; instead, according to [REDACTED], "They came in and handed us the IEP and said 'This is what it is.'" But what was handed to [REDACTED] was an incomplete draft document with a conspicuous "DRAFT" stamp on each page. [REDACTED] testimony does not credibly support a finding that the draft IEP was presented as a final IEP and offer of placement. No witness corroborated [REDACTED] impression that the draft was presented as something more than a draft to be discussed and revised. All other witnesses who were present at the March 4, 2010, meeting testified that the draft IEP was circulated as just that, a draft, to serve as a starting place for discussion and revision; this testimony is credited as more credible than [REDACTED] contrary impression.^{9/}

47. After seeing the draft IEP, [REDACTED] produced a report of a private neuropsychological evaluation of [REDACTED] and presented it to the District. The report, dated December 18, 2009, was on [REDACTED] letterhead and identified the evaluation examiner as NYU intern Jacqueline M. Martone and the supervising psychologist as Dr. David H. Salsberg, Psy.D., clinical neuropsychologist at [REDACTED] (NYU Report). [REDACTED] offered no explanation for not providing the NYU Report to the District before the March 4, 2010, meeting.

48. The District requested that the IEP meeting be suspended at that point, and the decision was made to defer discussion of re-evaluation needs and development of the proposed

IEP until after the District could review the new information provided. The meeting participants agreed to reconvene at a later date with additional school/District personnel as needed.

49. Conference summary notes of the March 4, 2010, IEP meeting were prepared by Dr. Benito accurately summarizing what took place at the meeting. The conference summary notes were signed by the attendees, including [REDACTED]

50. After the March 4, 2010, meeting, the District reviewed the NYU Report. The NYU Report was provided to Dr. Fred Alberts, who serves as a District school psychologist, with expertise in neuropsychology and TBIs. Dr. Alberts was added as an invitee to attend the reconvened meeting, to provide input on the NYU Report and to participate in the discussion of re-evaluation needs for [REDACTED]. Also invited to participate in the reconvened meeting were Elizabeth Cabrera, social worker, and Sheree Glass, District coordinator for orthopedically impaired, other health impaired, TBI, and occupational therapy/physical therapy programs.

51. The process to identify a date to reconvene a meeting began the week after the suspended March 4, 2010, meeting. [REDACTED] was consulted regarding possible dates and times which were acceptable to [REDACTED] and [REDACTED] attorney. Agreement was reached to reconvene a meeting on March 22, 2010.

52. The District gave proper notice of the March 22, 2010, meeting to [REDACTED] and [REDACTED]. The notice provided that the purpose of

the meeting was to discuss re-evaluation needs. The notice identified the individuals invited to attend the meeting and provided the date, time and location of the meeting. Unlike the prior meeting notice, this notice did not include the development of a proposed IEP as one of the purposes of the meeting.

53. The March 22, 2010, meeting was attended by [REDACTED], Dr. Prive, Dr. Benito, Ms. Foster, Ms. Phillips, Dr. Alberts, Ms. Cabrera, Ms. Glass, Mr. Albano, Ms. DiPompo, and attorneys on behalf of the School Board and [REDACTED]. As before, [REDACTED] was invited to attend the meeting, but did not attend.

54. At the March 22, 2010, meeting, the NYU Report was discussed. The NYU Report provided results from an abbreviated intelligence test, an array of other assessments and information provided by [REDACTED]. The report concluded with a recommendation mirroring the 2006 New York IEP: [REDACTED] should in a residential environment ("such as [REDACTED]"), because of significant, global needs requiring 24-hour care; in addition, [REDACTED] should receive the related service therapies in the 2006 New York IEP. It is unclear why these conclusions were reached, except as an adoption of the 2006 IEP; they do not seem to follow from the evaluations.

55. Dr. Alberts had questions about the NYU Report and wanted to review the raw data and/or talk to Ms. Martone about her examination of [REDACTED]. [REDACTED] said that communication with the New York evaluators would be easy to accomplish. [REDACTED] agreed to

make the contact and obtain the raw data or put Dr. Alberts in touch with the individuals involved in the NYU Report.

56. Dr. Alberts also discussed re-evaluation needs. From his perspective, in order to have a full psychological re-evaluation of [REDACTED], it would be necessary to augment the NYU Report. Dr. Alberts noted that the examiner, Ms. Martone, administered an abbreviated measure of intelligence --the Wechsler Abbreviated Intelligence Scale (WASI)--whereas Dr. Alberts believed that a full-scale evaluation of intellectual capacity was more appropriate for District psychological evaluations, in keeping with protocol. Another area of augmentation discussed was the need for current teacher data as part of a psychological evaluation, as the NYU Report did not include any data from [REDACTED] teachers.

57. Dr. Alberts also stated that he would want to explore some issues further, such as anxiety issues and somatic symptoms. [REDACTED] offered information regarding [REDACTED] separation anxiety and the car sickness that [REDACTED] has experienced.

58. The group also discussed the fact that while [REDACTED] New York IEPs provided for speech/language therapy, occupational therapy and physical therapy, [REDACTED] records showed that [REDACTED] had not received those therapies since 2006, with no evidence of any concerns in those areas. It was also pointed out that the 2006

New York IEP provided for ██████ to receive psychological counseling, which had been provided at ██████.

59. The District made the following recommendation for re-evaluations, subject to obtaining ██████ consent: (1) a psychological report to include social/emotional assessment, clinical interview, and intellectual functioning, at a minimum; and (2) a social developmental history. Accordingly, the District requested, and ██████ provided, written consent to conduct a three-year re-evaluation of ██████, and it was agreed that the District would proceed with the recommended re-evaluations.

60. The recommendation for re-evaluations did not include speech/language, physical, or occupational therapy. However, Dr. Alberts agreed that he would consider the areas while conducting his psychological evaluation and would provide input. As Dr. Alberts noted at the final hearing, these therapy areas are not his areas of expertise, but, nonetheless, he could consider whether there were signs of any concerns that would suggest a need to add these areas for evaluation, and, if there were, he could point out the concerns that were evident to him.

61. Conference summary notes of the March 22, 2010, meeting were prepared by Dr. Benito, and they accurately summarize the issues discussed. The notes do not reflect that ██████ asked the District to expand the list of re-evaluations to include physical therapy, occupational therapy, speech therapy, or any other

evaluations besides those outlined in the meeting. [REDACTED] did not contradict the meeting notes in this regard, which he signed.

62. Subsequent to the meeting, the District proceeded with the psychological evaluation and social developmental history of [REDACTED], as outlined at the March 22, 2010, meeting. Dr. Alberts conducted the psychological evaluation and Ms. Cabrera prepared the social developmental history with Dr. Prive's assistance.

63. Dr. Alberts was assigned to perform the psychological evaluation for the same reason he was asked to review the NYU Report--because of his expertise and experience in the area of neuropsychological evaluations and in working with students with TBI.

64. As part of his evaluation, Dr. Alberts reviewed again the NYU Report and considered the information provided from Ms. Martone's examination of [REDACTED], while waiting to obtain the raw data or to have an opportunity to speak with Ms. Martone and/or Dr. Salsberg, the supervising psychologist, to answer questions about the report. Dr. Alberts also conducted a review of all of [REDACTED] records obtained thus far by the District, including prior evaluations and the [REDACTED] records sent to the District in mid-December 2009, which he obtained from Dr. Benito.

65. Dr. Alberts administered the full-scale Wechsler Intelligence Scale for Children--Fourth Edition (WISC-IV), with ten subtests, to [REDACTED] [REDACTED] full-scale intelligence quotient

was 59, in the extremely low range. The subtests revealed that [REDACTED] verbal reasoning abilities were higher, in the low average range, or better than approximately ten percent of others who are [REDACTED] age. In contrast, [REDACTED] non-verbal reasoning and working memory abilities both fell within the extremely low range. [REDACTED] processing speed measured as borderline, better than two percent of those in the norm group. Dr. Alberts' conclusion overall was that these results were generally consistent with previous findings and appeared to be a good estimate of [REDACTED] current intellectual capabilities.

66. Dr. Alberts also administered the Woodcock-Johnson® III tests of academic achievement, when [REDACTED] was [REDACTED] years and nine months old. The test results included [REDACTED] achievement levels expressed in age equivalencies, ranging from a low of eight years for the "applied problems" test (seven and three-quarters' years behind [REDACTED] chronological age), to a high of 13 years, three months for spelling (two and one-half years behind [REDACTED] age). Dr. Alberts concluded that from these results that [REDACTED] academic performance was "at a level far below chronological expectancies, but fairly consistent with intellectual expectancies."

67. Dr. Alberts wanted to follow up on a comment in the NYU Report indicating that [REDACTED] had reported concerns regarding [REDACTED] social/emotional functioning. In particular, [REDACTED] was concerned that [REDACTED] had demonstrated increased anxiety and aggressive

behaviors when angry or frustrated. As described in Dr. Alberts' report, he conducted a social/emotional assessment by administering the Behavior Assessment System for Children, Second Edition (BASC), which measures various categories of behaviors that included the areas of concern: aggression, conduct problems, anxiety, somatization, adaptability, and social skills. This assessment tool requires the selection of respondents, or raters, who know the child well, such as parents or teachers. The rater is given a rating form with different items or questions to respond to by rating the item pursuant to a rating scale. There are different rating forms for different raters--parents, teachers, or self-rating by the child being tested--and they are designed to measure the different categories. The NYU Report indicates that the BASC assessment tool was provided [REDACTED] (parent), and a self-report questionnaire was completed by [REDACTED]. To augment that assessment, Dr. Alberts enlisted two raters from [REDACTED]--one of [REDACTED] teachers, and the director of [REDACTED], Dr. Wooley-Brown--who completed the rating forms. Dr. Alberts found that the [REDACTED] ratings did not reveal deficits in somatization, which was an area he had wanted more information on following the NYU Report. One rater (Dr. Brown, the director), but not the other ([REDACTED] teacher), gave [REDACTED] ratings that were clinically significant in the categories of depression and overall behavior symptoms. Dr. Alberts noted that the results in a majority of

categories were in the borderline range, and he concluded that the results were "indicative of issues of aggression, anxiety, depression, attention problems, and school problems."

68. Although the areas to be re-evaluated by Dr. Alberts as outlined at the March 22, 2012, meeting did not include adaptive behavior, per se, Dr. Alberts administered the Adaptive Behavior Assessment System--II (ABAS), enlisting two [REDACTED] teachers as raters. This augmented the NYU Report for which Ms. Martone administered the ABAS with [REDACTED] as the lone rater.

69. Petitioner's expert, Dr. Oakland, is a co-author of the ABAS, which he described as the only comprehensive assessment of adaptive behavior. Adaptive behavior, as Dr. Oakland explained, is a person's ability to accept responsibility for himself or herself and increasingly to respond to the needs of others. Adaptive behavior has three domains--conceptual, social, and practical--and each domain is broken down into skill areas. For example, falling within the "practical" domain are skill categories called "home living" and "self-care," among others. The ABAS utilizes rating scale forms and respondents or raters who know the person being tested very well, such as parents, teachers, or siblings. There are different rating scales for different types of respondents (e.g., parent, teacher), and each scale has 250 items to be rated. The raw scores are converted to

standard scores designed to measure the child's skill level compared to the norm in the different skill categories.

70. Dr. Alberts evaluated the scores resulting from the two [REDACTED] raters, which both indicated a general adaptive composite in the extremely low range. Dr. Alberts offered his opinion that "this level of adaptive functioning underestimates [REDACTED] current adaptive on the basis of my observations as well as my understanding of [REDACTED] day-to-day capabilities, as documented in the file." As examples, Dr. Alberts pointed specifically to [REDACTED] teacher's narratives in [REDACTED] records, describing [REDACTED] behavior observed in the classroom, as well as detailed progress reports by [REDACTED] [REDACTED] teachers.

71. [REDACTED] ABAS rating scores set forth in the NYU Report showed that [REDACTED] rated [REDACTED] as having clinically significant deficits in two categories: home living and functional academics. However, [REDACTED] ratings for [REDACTED] were average in the categories of self-direction, social behavior, and self-care. It is apparent from a comparison of the ratings that there is quite a bit of variability in the results.

72. The BASC results obtained by Ms. Martone, using [REDACTED] and [REDACTED] as raters, also show contrast and variability. According to the results, [REDACTED] rated [REDACTED] skills in the subcategory of "activities of daily living" as deficient at a

clinically significant level, whereas [REDACTED] rated [REDACTED] as average, with no deficits in the self-care category of the ABAS.

73. Some "real world" testimony was developed at hearing regarding aspects of [REDACTED] adaptive behavior in areas such as self-care, activities of daily living, and home living, adding an interesting perspective. When [REDACTED] was asked whether [REDACTED] had problems caring for [REDACTED] self, such as performing activities of daily living, [REDACTED] said yes. However, when [REDACTED] was asked for examples, the responses did not suggest any real problems in these areas. [REDACTED] said that [REDACTED] was able to pick out clothes and get dressed, although [REDACTED] said that [REDACTED] choice of clothing might not land [REDACTED] on the pages of [a gender-specific fashion magazine]. [REDACTED] described [REDACTED] room as a disaster; [REDACTED] never picks up, leaves dirty dishes around, and [REDACTED] jokes with [REDACTED] that [REDACTED] expects to find a dead animal under the piles of dirty clothes. However, these are hardly uncommon sentiments expressed by parents of teenagers. [REDACTED] last example is that [REDACTED] does not have a good concept of nutrition and does not choose healthy foods to eat. [REDACTED] said that if [REDACTED] were left to [REDACTED] own devices, [REDACTED] would choose chocolate chip cookies for a meal. One thing [REDACTED] appreciated about [REDACTED] is that [REDACTED] would be able to get staff, such as the "Dorm Mom," to control [REDACTED] 's consumption of sweets, and [REDACTED] was able to refuse permission for [REDACTED] to get lattes, which [REDACTED] liked so much. [REDACTED] testimony did

not reveal any basis for [REDACTED] rating of [REDACTED] as having clinically significant deficits in home living on the BASC test, but it would explain why [REDACTED] rated [REDACTED] as average in the self-care category of the ABAS test.

74. The evidence showed that [REDACTED] was able to use the bathroom without assistance; there was no suggestion that [REDACTED] is not toilet-trained, otherwise able to care for [REDACTED] self. [REDACTED] does not have to be bathed or have [REDACTED] teeth brushed by others. Instead, Ms. Brockmeier testified that [REDACTED] is fully capable of performing these self-care activities and does so consistently with the help of simple organizational reminders, such as checklists. [REDACTED] also benefits from written schedules and wake-up reminders by the Dorm Mom.

75. Considering the ABAS assessments, the adaptive behavior measures in the BASC assessments, and other information bearing on adaptive functioning, Dr. Alberts concluded that [REDACTED] adaptive functioning was not in the mental retardation range. While as a general proposition, assessment tools, such as ABAS, provide a reliable basis for measuring adaptive behavior, Dr. Alberts observed that it is not uncommon to see differences between rating scales and "what we see in real life." Dr. Alberts reasonably exercised his professional judgment in reconciling the conflicting information from all sources.^{10/}

76. Dr. Alberts prepared a report of his psychological evaluation. The report listed the evaluation procedures and the specific records he reviewed for information. Dr. Alberts prepared summaries of the prior evaluations and assessments he reviewed, including the December 2009 NYU Report. Dr. Alberts also prepared summaries of the [REDACTED] teacher narratives describing [REDACTED] performance and behavior in the classroom. The report set forth Dr. Alberts' behavioral observations of [REDACTED] made during a clinical interview. The report also detailed the assessments Dr. Alberts administered, along with the results obtained. The report concluded with Dr. Alberts' evaluation summary and recommendations, including the following:

[B]ased upon the current and previous assessments, there are no contraindications to [REDACTED] being able to obtain an accommodated and specialized educational interventions [sic] within the Hillsborough County School District.

To support [REDACTED] educational environment, should the family choose to place [REDACTED] in the District, accommodations should be made available that include but are not limited to providing (a) extended time to complete examinations/assignments; (b) assignments well in advance of a due date; (c) visual cues such as copies of notes, outlines, or classroom presentations as available; (d) permission to tape-record classroom lectures; and (e) flexibility and support in organizing and planning.

Dr. Alberts added a series of recommended strategies, such as removing distractions; providing clear, sequential directions, with repetition by the student; and many other ideas.

77. District Social Worker Ms. Cabrera conducted an evaluation of [REDACTED] social developmental history. Ms. Cabrera began her evaluation by reviewing [REDACTED] [REDACTED] records previously sent to the District. Ms. Cabrera then conducted an interview of [REDACTED], accompanied by school psychologist Dr. Prive. The interview was conducted at the family home in Tampa, while [REDACTED] was home from [REDACTED] for spring break.

78. When Ms. Cabrera and Dr. Prive arrived, [REDACTED] was home alone (except for [REDACTED] dog, Snowflake); [REDACTED] was not there for the first part of the interview, but arrived later and joined them. Ms. Cabrera described the reception from [REDACTED] as "very courteous . . . [REDACTED] was very welcoming and seemed relaxed [with a] calm demeanor." [REDACTED] escorted the social worker and school psychologist to a patio in the back, overlooking a canal running behind the home, where they sat for the interview.

79. During the interview, Snowflake interrupted by barking at ducks in the water. Ms. Cabrera observed that [REDACTED] calmed the dog down so that the barking would not disrupt the interview.

80. [REDACTED] confirmed in the interview that [REDACTED] was still very active in a variety of sports, as previously suggested by [REDACTED] records. [REDACTED] identified continued involvement in swimming

and basketball, as well as a new addition--tennis. Basketball remained the favorite sport.

81. [REDACTED] discussed the area of interest for [REDACTED] future, stating that [REDACTED] would really like to work with animals and possibly become a groomer.

82. [REDACTED] said that [REDACTED] likes living in Florida because there are more amusement parks than in New York City. [REDACTED] misses friends from New York, but is able to reconnect with them via Facebook.

83. [REDACTED] described [REDACTED] weekend activities at [REDACTED] when they go to movies, to the mall, and shopping. [REDACTED] reported that [REDACTED] was living in an all-[gender]' dormitory, but used to live in a coed dorm. [REDACTED] was sharing a dormitory room with one roommate, with their own bathroom.

84. When asked about family, [REDACTED] referred to a strained relationship with [REDACTED] mother and that [REDACTED] has to bite [REDACTED] tongue to avoid saying anything mean to that parent.

85. When asked what [REDACTED] likes the most about self, [REDACTED] referred to liking to "party," being social, and being athletic.

86. When [REDACTED] arrived and joined the interview, [REDACTED] prompted [REDACTED] to talk about [REDACTED] accomplishments of running a race in New York and receiving medals for being most improved in running and swimming.

87. █████ expressed liking █████. █████ described being too nice trying to be everyone's friend at first, but that █████ learned shortly that some others would take advantage of █████. At first, █████ got upset and cried, but █████ was now able to stand up for self and to resolve conflicts through words instead of using physical actions. █████ reported using yoga to calm down when █████ gets in a bad mood.

88. When asked about getting sick, █████ responded that █████ gets homesick sometimes because █████ misses Snowflake; when home, █████ likes to groom him. █████ reported no physical illnesses, other than a cold or headache. █████ added that █████ gets dizzy and experiences motion sickness while in cars or buses. █████ interjected a memory of taxi trip with █████ in New York, when the taxi driver refused to stop when █████ felt about to throw up, and then the taxi driver got mad when █████ did throw up in the car.

89. Following the interview with █████, Ms. Cabrera met █████ at █████ for a separate interview, with Dr. Prive in attendance. When █████ was asked for his thoughts on █████ needs as a student, he reported that █████ has many strengths, including being determined, persistent, sweet, well-mannered, and mature in some ways, but that █████ still faces some challenges with separation anxiety and difficulty with peers.

90. █████ would not provide information about █████ mother. █████ said █████ was not comfortable answering those questions.^{11/}

91. [REDACTED] described [REDACTED] time at home, when [REDACTED] was not residing at [REDACTED], which was from September to May. [REDACTED] stated that [REDACTED] has chores that [REDACTED] should do when at home, but [REDACTED] admitted that whether [REDACTED] completes the chores or not is up to [REDACTED]. [REDACTED] uses time-outs and loss of privileges when [REDACTED] does not do what [REDACTED] is supposed to do; [REDACTED] admitted this technique works "sometimes." [REDACTED] reported that [REDACTED] has some neighborhood friends with whom [REDACTED] spends time when at home.^{12/}

92. After these interviews, Ms. Cabrera sought and obtained updated information from [REDACTED] [REDACTED] teachers. The teachers reported [REDACTED] was working satisfactorily in all subjects, except Spanish and world history; in those classes, the teachers said that [REDACTED] needed to improve writing skills, comprehension, memory, and recall. The teachers described [REDACTED] strengths as being a hard-working, inquisitive, assertive student who was generally well-behaved. [REDACTED] struggled to complete assignments, causing [REDACTED] to sometimes rush to finish work. The teachers reported that [REDACTED] asked for help when needed. They described the strategies used to help [REDACTED] in the classroom: redirection, verbal encouragement, positive reinforcement, extended time, repeating instructions, rephrasing, using different modalities, graphic organizers, visual aids, and color coding for tasks.

93. Ms. Cabrera prepared a social developmental history report, dated May 16, 2010, that summarized the interviews and

teacher reports. Ms. Cabrera's report was provided to [REDACTED] and [REDACTED] shortly after it was finalized, on May 26, 2010.

94. [REDACTED] asked about Dr. Alberts' psychological report. [REDACTED] was reminded that [REDACTED] was supposed to put Dr. Alberts in touch with the persons who prepared the NYU Report, and Dr. Alberts was awaiting that to finalize his report. [REDACTED] then tried to contact the examiner and supervising psychologist, but [REDACTED] calls were not returned; Dr. Alberts tried as well, to no avail. [REDACTED] and Dr. Alberts spoke at the end of May, and they agreed that Dr. Alberts' report would be completed with no more information about the NYU Report. Dr. Alberts finalized his psychological report, and it was faxed to [REDACTED] on June 22, 2010.

95. Ms. Phillips took over then, to coordinate calendars and identify an available date for another IEP meeting. July 29, 2010, was ultimately identified and cleared for the meeting.

July 29, 2010, Proposed IEP

96. The third IEP meeting was properly noticed and held on July 29, 2010. Notice of the meeting, with the date, time, and location, was sent to [REDACTED] and [REDACTED]. The notice identified the purposes of the meeting: to discuss the re-evaluation results; to discuss diploma options and consider post-secondary goals and transition services; and to develop a proposed IEP for a parentally-placed private school student. The notice also identified the individuals who were invited to attend the IEP

meeting. As with the first meeting notice, this notice requested consent to invite a DVR representative to discuss [REDACTED] transition planning, and a parental consent form was provided.

97. The July 29, 2010, IEP meeting was attended by the following: [REDACTED]; Dr. Prive; Dr. Benito; Ms. Foster; Ms. Phillips; Dr. Alberts; Mr. Albano; Jeri Kennedy, ESE teacher and ESE specialist; Larissa McCoy, regular education teacher; Kris Millrose, USF social worker and parent advocate; and attorneys on behalf of the School Board and [REDACTED]. Dr. Cathy Wooley-Brown, director of [REDACTED], participated by telephone. As with the prior IEP meetings, [REDACTED] was invited to attend the meeting, but did not attend. A DVR representative was not invited, because [REDACTED] did not provide written consent.

98. The meeting began with presentation of the two evaluation reports completed since the last meeting. Dr. Alberts presented a summary of his psychological report. Dr. Prive summarized the social development history report. [REDACTED] did not express disagreement with either report or request an independent educational evaluation due to disagreeing with either report.

99. The group then turned its attention to development of a proposed IEP. A second draft IEP had been prepared and provided to [REDACTED] in advance of the IEP meeting. Like the March 4, 2010, first draft IEP, the second draft IEP had been prepared by using the now larger pool of information regarding [REDACTED] to draft

provisions suggested by the information, as starting points for discussion at the meeting and revision as appropriate. Like the first draft IEP, the second draft IEP was clearly marked as a draft, this time with a computer-generated watermark--"DRAFT #2"--appearing diagonally across each page, instead of the "DRAFT" stamp used on each page of the first IEP draft.

100. The second draft IEP was projected onto a screen, and each provision was discussed and revised on the spot to reflect the discussions and agreements. The IEP Team, including [REDACTED] w , and including [REDACTED] Director Dr. Wooley-Brown participating by telephone, provided input as the IEP provisions were discussed and revised, as the group worked towards finalizing the document.

101. The IEP set forth a detailed statement of [REDACTED] present level of academic achievement and functional performance, first addressing the areas of curriculum, learning, and instruction. [REDACTED] tenth grade high-school courses at [REDACTED] were listed, [REDACTED] grades at [REDACTED] were summarized, and [REDACTED] teachers' narrative reports were summarized (with the actual teacher narratives attached to the IEP). The IEP also described the accommodations and techniques reported by [REDACTED] teachers to have worked well in the classroom. [REDACTED] results from the 2009 Terra Nova Assessment administered at [REDACTED] were provided, expressed as norm-referenced grade equivalencies in academic subjects. Results were summarized from Dr. Alberts' and Ms. Martone's assessments of

█████ intellectual functioning and academic achievement, as were the shared conclusions reached.

102. The "present level" narrative next addressed █████ social/emotional/community experience issues. The IEP summarized the █████ teacher reports: █████ had problems interacting with opposite gender peers, with whom █████ "tends to hit and have physical contact"; █████ needed to learned to stop using profanity and to accept teacher corrections; █████ had been physically aggressive in the past when faced with a frustrating situation; and in some classes, █████ tended to not interact with peers. On the positive side, █████ had participated in field trips to places of interest to Orlando. █████ gave his input to this narrative, by adding that █████ has difficulty in new settings, █████ is not independent going to stores or other community settings, and █████ has difficulty transitioning from one setting to another.

103. The IEP next described █████ independent functioning/ daily living skills/post-school adult living skills. The summary stated that █████ was independent in self-care skills and was progressing appropriately to acquire the knowledge base and skills needed to live independently as an adult. █████ was living with a roommate in a dorm-like room with their own bathroom.

104. As to health care needs, the IEP set forth █████ report, which was that █████ gets motion sickness easily, but is taking no medications.

105. Regarding employment and training, the IEP reported that ■■■ future goal is to work in the field of animal grooming or care.

106. The IEP identified ■■■ priority educational needs:

- Increase language arts (reading and writing) skills and strategies
- Increase skills and strategies in mathematics
- Instructional accommodations (additional time and repetition of instructions)

107. The IEP next addressed the course of study and diploma option agreed to by the IEP Team, including ■■■, as appropriate for ■■■. A parental notification form detailing the diploma options was reviewed and discussed. A scoring guideline on the notice form indicated that ■■■ was not projected to pass the Florida Comprehensive Assessment Test (FCAT) in reading, math, written language, or science, but that ■■■ had age-appropriate social skills and age-appropriate independent skills (punctuality, task completion, and preparedness) and was performing well enough in ■■■ current school to earn enough credits for grade-level promotion with at least a 2.0 grade point average. ■■■ earned seven points under these scoring guidelines, at the top of the range for a special diploma with a modified curriculum. Accordingly, the District recommended Special Diploma 1A, with a modified curriculum. ■■■ signed the

notification form indicating he agreed with that recommendation.
The selected diploma option was added to the IEP.

108. The IEP next provided measurable post-secondary goals:

Postsecondary goal for Education/training:
Within 6 months of graduating from high school, ■ will attend technical school and pursue training in the field of animal grooming or vet assisting.

Postsecondary goal for Employment: Within 6 months of completing a technical program, A. will obtain employment in the field of animal grooming or vet assisting.

Postsecondary goal for Independent Living Skills, when needed: Within 1 year of graduating from high school, ■ will live independently with the assistance of supervision and supports, especially when traveling to or visiting unfamiliar places.

The IEP confirmed that no agency representative participated in transition planning, because parental consent was not given.

109. The IEP next addressed measurable annual goal(s) and short-term objectives, providing in pertinent part:

Annual Goal #1: Given specially designed instruction, ■ will increase [■] language arts skills and will complete class work and homework assignments with at least 75% accuracy, each 9-week grading period.

Short Term Objectives:

- a. ■ will answer comprehension questions accurately.
- b. ■ will accurately identify key elements of a written passage (author's purpose, main idea, supporting details, etc.).
- c. ■ will write a multi-paragraph essay, remaining on topic and following correct rules of grammar.

* * *

Annual Goal #2: When provided specially designed instruction, ■ will increase [■] mathematics skills and complete class work and homework assignments will with at least 75% accuracy, each 9-week grading period.

Short Term Objectives:

- a. ■ will add, subtract, multiply and divide decimals
- b. ■ will add, subtract, multiply and divide fractions
- c. ■ will complete real world mathematical problems using the applications of addition, subtraction, multiplication and division, as appropriate.

* * *

Annual Goal #3: With the provision of adult/teacher support and guidance, A. will interact appropriately with peers at school, in 8 of 10 social and classroom interaction situations, each 9-week grading period.

Short Term Objectives:

- a. ■ will greet peers at school
- b. ■ will interact appropriately with peers at school while refraining from the use of profane language and inappropriate physical contact.
- c. ■ will communicate with peers at school and contribute to group classroom projects.

* * *

Annual Goal #4: Given specially designed instruction and adult/teacher/peer support and guidance, ■ will transition from one setting to another in the school environment with fading prompts and increased independence 3 out of 5 opportunities each 9-week grading period.

Short Term Objectives:

- a. [REDACTED] will become familiar with [REDACTED] school's physical environment.
- b. [REDACTED] will follow [REDACTED] class schedule and demonstrate [REDACTED] knowledge of class location.
- c. [REDACTED] will verbally express any frustrations or need for assistance to [REDACTED] teacher or another adult.
- d. [REDACTED] will apply previously learned strategies when faced with changes to schedule and unstructured situations.

110. The IEP included an impact statement for each goal:

Considering the student's present level of educational performance and disability, participation in the general curriculum (or activities) is impacted by:

(for goal #1): below level skills in language arts (reading and writing)

(for goal #2): below level skills in mathematics

(for goal #3): need to improve social interactions with peers

(for goal #4): difficulty transitioning from one setting to another

111. The annual goals and short-term objectives each provided an evaluation plan. For the first two academic goals, the evaluation plan provides for collection of teacher/therapist data and work samples to evaluate progress quarterly; work samples are omitted from the evaluation plan for goals three and four. In all four evaluation plans, reports to [REDACTED] of progress towards the annual goals was required at least every nine weeks.

The ESE teacher was designated as the responsible person for planning and implementing the services and documenting progress.

112. The IEP included an extensive list of accommodations for [REDACTED] instructional delivery and program modifications:

- More time for completing assignments
- More instructional time
- Use of manipulatives
- Assistance with note taking
- Shortened assignments
- Adjust pacing
- Provide notes/outline/study guide
- Reduce written work
- Advanced organizers (to prepare A. for any pending changes to schedule or routine)
- Graphic organizers
- Organization system
- Proximity control
- Reminders of rules
- Cueing and prompting
- Repetition of directions and rephrasing of directions by student
- Additional Adult Assistance to assist with academic and nonacademic activities and assist with transitioning from one setting to another

Each one of these accommodations was called for on a daily basis in both the regular education classroom and the ESE classroom.

The "cueing and prompting" accommodation was broadened to apply not only in all classrooms, but also, in social situations and during group participation activities. The last accommodation, for extra adult assistance with activities and transitions, was

broadened to apply not only in all classrooms, but, also, throughout the school campus.

113. The IEP next addressed behavioral supports. The two draft IEPs had no supports; the final IEP provided as follows:

Functional Behavioral Assessment/Positive
Behavior Intervention Plan (FBA/PBIP)
required and will be initiated.

Dr. Benito testified that as a matter of appropriate practice, the process for FBA/PBIPs is initiated after the first few weeks of school for a new student, when behaviors begin to settle into regular patterns, less skewed by the newness of the setting.

114. The IEP, as crafted on July 29, 2010, identified the following areas as requiring special education daily in the ESE classroom, with specially designed instruction and services:

- Reading skills & strategies
- Written language skills & strategies
- Mathematics skills & strategies
- Functional academics
- Behavior management strategies
- Self determination/self advocacy skills and strategies
- Organizational skills & strategies
- Monitoring of skills maintenance and progress
- Communication skills
- Daily living skills for transitioning
- Social skills

115. Another change from the IEP drafts was the final IEP provision recommending ESE extended school year (ESY) services:

ESY services are recommended, and the goals to be addressed and the frequency/duration

will be specified at a later IEP team meeting when data is available.

116. The IEP next addressed related services. Provision was made for daily specialized transportation to and from school:

Specialized ESE Transportation-3 (Aide or monitor required due to disability and specific needs of the student.) This service will address student's need for adult supervision and safety. Universal bus run is not recommended for this student, as [REDACTED] requires a smaller number of students on the bus and close supervision by adults.

[REDACTED] requested a provision requiring transportation by minibus. The rest of the IEP Team did not agree, and a Notice of Refusal was provided. Dr. Benito explained that the rest of the IEP Team felt that a minibus was not necessary, because the information they had was that [REDACTED] unpredictable motion sickness episodes were unrelated to the size of the vehicle. Therefore, the IEP Team chose instead to provide an aide/monitor as had been done in the New York IEPs, to assist [REDACTED] on the bus and keep [REDACTED] safe in case [REDACTED] experienced motion sickness. The rest of the IEP Team did, however, agree with [REDACTED] that a regular universal bus route was inappropriate because of the number of student riders and that [REDACTED] needed to be transported with a smaller group of students. Ms. Foster agreed to get more information from the District's transportation department about what could be expected with the specialized ESE bus and provide the information to [REDACTED]

117. The IEP added counseling for [REDACTED] as a related service "[t]o address self-esteem, aggression, and social skills." The counseling service would be provided at least weekly, plus as a "counselor/adult/teacher deems necessary as situations arise."

118. The IEP did not provide for physical, occupational, or speech/language therapy as related services. [REDACTED] did not request the addition of these services, so no notice of refusal was provided regarding these services. [REDACTED] acknowledged at hearing that [REDACTED] probably does not need speech/language therapy.

119. The IEP made provision for accommodations that [REDACTED] needed for testing, for all classroom, statewide, and district assessments. The testing accommodations provided for flexible setting (either small group or individual), flexible scheduling to provide frequent breaks, and flexible (extended) timing.

120. The IEP provided that regular physical education was appropriate for [REDACTED] with accommodations and support.

121. Next, the IEP addressed the LRE requirement to ensure that the plan for [REDACTED] provided for [REDACTED] education with non-disabled students to the maximum extent appropriate. Upon consideration of the special education services and locations described in the IEP, the determination was made that [REDACTED] IEP goals would be achieved appropriately in settings that included non-disabled students 40 percent or less of the time.

122. As required because of the determination that [REDACTED] would be removed from the regular education classroom setting part of the time, the IEP set forth the factors considered by the IEP Team in selecting [REDACTED] placement, listed [REDACTED] prior placements, and listed the accommodations and modifications previously attempted.

123. At the end of the IEP, the IEP Team, with the exception of [REDACTED], recommended the following ESE placement for [REDACTED]: "Separate class (special education services provided outside regular class more than 60% of the time)."

124. [REDACTED] requested that the IEP Team determine that a residential facility was the appropriate placement for [REDACTED]. The IEP Team did not agree, and a written notice of refusal was issued to [REDACTED] on this issue.

125. The District determined that the resources were available at [REDACTED] to implement the provisions of the IEP. Therefore, as the zoned neighborhood school where [REDACTED] would be assigned if [REDACTED] were not disabled, the IEP provided that [REDACTED] would be assigned to [REDACTED].

126. [REDACTED] asked about tutoring for [REDACTED]. Ms. McCoy, the regular education teacher in attendance, told [REDACTED] about tutoring opportunities through the extended learning program (ELP). The "additional comment" section of the IEP noted that [REDACTED] expressed an interest in pursuing tutoring through the ELP for [REDACTED].

127. [REDACTED] signed the finalized IEP at the end of the meeting, as did the rest of the IEP Team participating in the July 29, 2010, IEP meeting, with two exceptions. ESE teacher Jeri Kennedy, participated from 2:30 p.m. to 4:30 p.m., but had to leave with the consent of the District and [REDACTED], before the meeting ended and did not sign the IEP. [REDACTED] director Dr. Wooley-Brown participated by telephone and was not present to sign.

128. [REDACTED] Left blank on the signature page of the July 29, 2010, IEP were spaces for the current IEP date, IEP review date, reevaluation due date, and date of anticipated initiation of IEP services. That is because the IEP was a proposed IEP, pending completion of [REDACTED] enrollment in the Hillsborough School System. It was understood that if [REDACTED] enrolled [REDACTED] before the start of SY2010-2011, the IEP would go into effect and services would be initiated on the first day of school.

129. Conference summary notes of the July 29, 2010, IEP meeting were prepared by Dr. Benito. The notes accurately reflect the issues addressed at the meeting and bear the signatures of the attendees, including [REDACTED]

130. On Monday, August 16, 2010, the week before school was to begin, [REDACTED] submitted the completed registration material to enroll [REDACTED] in the Hillsborough School System for the first time.

131. News of [REDACTED] enrollment was immediately communicated to IEP Team members needing to take action to ensure proper implementation of the IEP starting on day one.

132. Ms. Foster sent an email to Mr. Diaz, the [REDACTED] principal, that same evening. Ms. Foster proposed a meeting on Thursday, August 19, 2010, with all of [REDACTED] teachers, both ESE and regular education, prior to [REDACTED] arrival on the following Tuesday morning for the first day of school.

133. On Tuesday, August 17, 2010, arrangements were made to secure an emergency assignment to [REDACTED] of a substitute position for the start of the school year to serve as [REDACTED] special-needs aide, while [REDACTED] began the process to hire one permanently.

134. Ms. Foster followed up with the transportation department to get more information for [REDACTED] about the bus, as she agreed to do at the July 29, 2010, IEP meeting. Ms. Foster sent an email to [REDACTED] at 7:45 a.m. on Thursday, August 19, 2010, informing [REDACTED] that there were 15 other students assigned to [REDACTED] bus. Ms. Foster told [REDACTED] to expect a call from the bus driver regarding what time [REDACTED] should be ready. Ms. Foster also gave [REDACTED] two different phone numbers for the District's Area II transportation office, to call if [REDACTED] had any other questions about [REDACTED] bus transportation. While [REDACTED] testified at hearing that [REDACTED] thought Ms. Foster was going to get information about the bus size, Ms. Foster apparently thought [REDACTED] wanted to know the size

of the crowd riding the bus. [REDACTED] did not take Ms. Foster up on her suggestion that [REDACTED] contact the area transportation office if [REDACTED] had any other questions.

135. Also on Thursday, August 19, 2010, Ms. Foster was able to conduct the meeting she requested with all of [REDACTED] teachers at Alonso. By that time, Ms. Foster had developed an accommodations tracking sheets to document the provision of each accommodation listed in the IEP, as well as data sheets to document and track progress towards each annual goal and short-term objective in [REDACTED] IEP. Ms. Foster reviewed the IEP with [REDACTED] teachers, the accommodations tracking sheets, and the goals/objectives data sheets. They went over [REDACTED] schedule and reviewed the planned use of a unique needs aide to assist [REDACTED]. They also went over the specialized bus transportation provision in the IEP.

[REDACTED] Eight Days at [REDACTED]

136. The first day of SY2010-2011 at [REDACTED] was Tuesday, August 24, 2010. On Monday, the bus driver who would be driving the specialized ESE bus to pick up [REDACTED] telephoned to let [REDACTED] and [REDACTED] know what time to expect the bus the next morning.

137. [REDACTED] got ready for school, and [REDACTED] waited with [REDACTED] for the bus. Unfortunately, but not surprising, the bus was late on that first day of school. Understandably, [REDACTED] was anxious about getting to school late. [REDACTED] drove [REDACTED] to school. [REDACTED] took [REDACTED] to [REDACTED] first class, then contacted Mr.

Albano, the ESE department head. [REDACTED] said he wanted to attend school with [REDACTED] the next day. Mr. Albano agreed, and arrangements were made.

138. [REDACTED] gave one detail regarding [REDACTED] first day at school. [REDACTED] testified that he had given [REDACTED] five dollars to buy lunch in the school cafeteria that first day. After school, [REDACTED] asked [REDACTED] what [REDACTED] bought for lunch, and [REDACTED] reported that lunch was three chocolate chip cookies and a coke. [REDACTED] did not offer any other information about [REDACTED] first day of school, except to report that [REDACTED] experience at [REDACTED] was "okay."

139. On the second day of school, [REDACTED] went with [REDACTED] [REDACTED] brought [REDACTED] camera with him.

140. [REDACTED] did not describe the classroom activities [REDACTED] observed in the classes [REDACTED] attended with [REDACTED] [REDACTED] described the approximate class sizes: [REDACTED] ESE classes in English, math, and reading had "approximately eight students" with what [REDACTED] described as varying exceptionalities; [REDACTED] believed that [REDACTED] social studies class had 17 students; and [REDACTED] believed that [REDACTED] veterinary assistant class had 25 to 27 students.

141. [REDACTED] said that [REDACTED] did not like one of [REDACTED] ESE teachers, Ms. Sheffield, who taught [REDACTED] four different ESE classes: English, reading, math, and science. [REDACTED] described Ms. Sheffield as a strict disciplinarian, who managed her classes with rigid application of too many rules. According to [REDACTED], she

had to handle her small classes in a dictatorial fashion, because there were "behaviorally maladjusted" and "learning-disabled" children in the class. While ██████ has described ██████ as responding well to structure and clear rules, ██████ clarified at the hearing that ██████ needed structure and clear rules, but in a "warm and wooly" environment.

142. ██████ said that ██████ believed that ██████ got a referral for discipline for a "bird-flipping" incident in Ms. Sheffield's class. ██████ said that when ██████ asked a question, Ms. Sheffield "set off" ██████ by telling ██████ to go to the blackboard at the front of the class. When ██████ went back to be seated, ██████ "flipped a bird" in the teacher's direction and the other students applauded. It was not clear whether ██████ observed this or whether ██████ told ██████ about it.

143. Ms. Sheffield credibly testified that she recalls no bird-flipping incident; perhaps ██████ was not facing Ms. Sheffield at the time. From Ms. Sheffield's perspective, ██████ was doing well in class. Ms. Sheffield described how the curriculum would be modified and how she worked one-on-one with ██████. In addition, ██████ had an aide who also helped ██████ one-on-one. Ms. Sheffield described the techniques she would use with ██████ when ██████ got off-task, such as redirection, repeating directions, and other strategies described in ██████ IEP and used by ██████ teachers. Ms. Sheffield thought ██████ was being successful in the classroom.

144. When asked if [REDACTED] exhibited any behavioral problems in her classroom, Ms. Sheffield said that the only behavioral problem with [REDACTED] was that [REDACTED] would do things to get attention, such as yelling when coming into class after lunch and saying [REDACTED] was thirsty and needed a soda, which was against the rules.

145. [REDACTED] did not describe any other specific problems that [REDACTED] had in any classes, besides not liking Ms. Sheffield.

146. [REDACTED] expressed [REDACTED] concerns with [REDACTED] having lunch in the regular cafeteria. [REDACTED] described the cafeteria as large, crowded, very noisy, and chaotic, and [REDACTED] was concerned that [REDACTED] would find the setting overwhelming.

147. [REDACTED] went to the cafeteria with [REDACTED] for lunch on [REDACTED] second day at [REDACTED]. [REDACTED] brought his camera with [REDACTED]. [REDACTED] testified that [REDACTED] does not recall observing [REDACTED] eat lunch that day; instead, [REDACTED] had [REDACTED] camera out to photograph the cafeteria. A picture of the cafeteria was admitted in evidence.

148. Ms. Brockmeier, the [REDACTED] assistant head, testified that from the appearance of the cafeteria in the picture, [REDACTED] would find the setting overwhelming, and [REDACTED] might react inappropriately. So too, Dr. Oakland expressed concern about the cafeteria picture. However, Dr. Oakland's testimony was generic as to persons with TBI, because Dr. Oakland never evaluated [REDACTED]

149. No evidence was presented that [REDACTED] actually had any problems at [REDACTED], whether in the cafeteria or elsewhere, beyond

the common adjustment phase that any high school student would have starting a new school and perhaps not liking one teacher. There may have been problems, but none were established in the record. The only evidence regarding how █████ did in the cafeteria is that █████ successfully negotiated to the cafeteria on the first day of school (presumably with help of the aide assigned to assist with transitioning from place to place), and █████ was able to successfully purchase an unhealthy lunch of █████ choosing, just like many other teenagers might do when freed from a parent's watchful eye.

150. Mr. Albano testified that if █████ had been having any problems or difficulty in classes or on campus or if █████ teachers thought more or different supports were needed, those matters would have been brought to his attention, and he would have taken action.

151. Mr. Albano described █████ as "[v]ery, very sweet [and] [v]ery, very likeable[.]" He thought █████ was adjusting fine. He described two occasions on which he had a talk with █████ about classroom rules. At one point, █████ spoke out in the classroom, and Mr. Albano spoke with █████ about the fact that in a smaller setting, speaking out may be appropriate, but in a larger setting, there are different rules and regulations. He said that █████ understood and was fine with that. The other time, he spoke with █████ about students not being allowed to bring soda

into the classroom, but he told [REDACTED] that water was permitted in the classroom. Again, Mr. Albano said that [REDACTED] understood and accepted what he said and was very polite about it. It may well be that these discussions were related to Ms. Sheffield's classroom, but they were not disciplinary in nature. [REDACTED] school records showed no disciplinary matters while at [REDACTED].

152. Mr. Albano described a conversation with [REDACTED] in which [REDACTED] asked him how to go about requesting a schedule change. This testimony gives some credence to the notion that [REDACTED] did not like Ms. Sheffield. Mr. Albano's credible account of his meeting with [REDACTED] suggests that [REDACTED] was handling things rather well by identifying an issue that [REDACTED] wanted to address and then going about it in an appropriate way. However, [REDACTED] did not take the next step to request a schedule change; instead, [REDACTED] stopped going to [REDACTED].

153. [REDACTED] was asked whether [REDACTED] had any discussions with Mr. Albano about [REDACTED] during [REDACTED] time at [REDACTED]. [REDACTED] said that [REDACTED] spoke with Mr. Albano to "discuss specific issues" (not described) and that [REDACTED] request to Mr. Albano was to get a breakdown of the makeup (by disability) of the students in [REDACTED]'s ESE classes. Mr. Albano told [REDACTED] he would get that for [REDACTED], but Mr. Albano did not (perhaps because of confidentiality issues). Mr. Albano testified that he made himself available to [REDACTED] to discuss any concerns [REDACTED] might have about [REDACTED] Mr.

Albano said that [REDACTED] spoke with [REDACTED] once about classroom rules being too rigid, but that was all.

154. It is not entirely clear what happened on the days following August 25, 2010, when [REDACTED] went with [REDACTED] to [REDACTED]. [REDACTED] gave no details, stating only that things were okay for [REDACTED] at first at [REDACTED], but got worse as the days went by.

155. The only specific detail [REDACTED] gave was that [REDACTED] had apparently told [REDACTED] that [REDACTED] was experiencing motion sickness on the bus and that [REDACTED] had begun inducing [REDACTED] self to throw up in the morning before getting on the bus to avoid throwing up on the bus, which would be embarrassing.

156. The specialized ESE bus used to transport [REDACTED] was not a minibus, but a school bus specially designed with wheelchair lifts and space to accommodate riders with their wheelchairs. [REDACTED] took a picture of the special bus that transported [REDACTED], which was admitted in evidence. While [REDACTED] expressed [REDACTED] belief that the bus was larger than a regular school bus, that is not apparent from the single picture at very close range.

157. Ms. Brockmeier testified that the motion sickness issue with [REDACTED] on buses could be addressed by ensuring that [REDACTED] had a seat up front with good visibility. In addition, it would help to have an adult available to monitor [REDACTED] behavior. [REDACTED] had a lot of experience on the [REDACTED] minibus, on which [REDACTED]

rode frequently to basketball games, to movies, to the mall, and on occasional field trips to amusement parks like Sea World. Ms. Brockmeier said that █████ would often ride the bus with about 14 other students and that sometimes an adult had to intervene when █████ acted aggressively toward another student.

158. The IEP plan should have been sufficient to manage █████'s motion sickness and behavior issues in the manner suggested by Ms. Brockmeier. The IEP plan provided for an adult monitor; while there was no specific mention of up-front seating, the monitor could have arranged that, if it had been requested, or an adjustment to the IEP could have been made, if necessary, to specify seating. █████ did not say that █████ brought this matter to the attention of anyone at █████ or at the District offices.

159. Without ever specifying what problems, if any, █████ was having at Alonso besides not liking Ms. Sheffield and having motion sickness, █████ said that at some point, █████ starting making threats to hurt self and others. █████ said that █████ picked up a kitchen knife and "challenged █████] authority." At that point, █████ stopped sending █████ to █████; according to school records, █████ last day was Thursday, September 2, 2010.

160. In contrast to █████ reports that at home, █████ started expressing threats to hurt self and others, by all accounts, █████ seemed to be doing well at █████ during █████

eight days there. No problems or concerns were brought to the attention of the ESE department at [REDACTED] or to the District ESE personnel regarding [REDACTED]. These [REDACTED] and District witnesses testified credibly that had [REDACTED] or others brought concerns about [REDACTED] to their attention, they would have addressed those matters.

161. On September 1, 2010, the day before [REDACTED] last day attending [REDACTED], [REDACTED] had a regular counseling session with Dr. Prive, as provided for in the IEP. Dr. Prive testified in a general way that [REDACTED] appearance was good, and [REDACTED] did not seem troubled or upset, just undergoing the adjustment to a new school that one would expect of any new student. Dr. Prive's record of the meeting is in evidence, but Dr. Prive's notes were redacted, subject to Petitioner waiving the right to keep the notes confidential; Petitioner did not indicate such a waiver.

162. Dr. Prive attempted to find [REDACTED] on September 8, 2010, for another counseling session, but [REDACTED] was not in school.

163. The parties stipulated that [REDACTED] withdrew [REDACTED] from [REDACTED] on September 10, 2010. However, on September 4, 2010, [REDACTED] signed a contract with [REDACTED] to enroll [REDACTED] for SY2010-2011. [REDACTED]'s classes began on Tuesday, September 7, 2010.

164. Thus, [REDACTED] was already enrolled in [REDACTED] when [REDACTED] sent an email to Mr. Diaz on September 10, 2010, stating:

Please accept this communication as notification that I have withdrawn [REDACTED] from your school. This action has been taken as a result of two issues having negative impact on [REDACTED] health and well being. 1) [REDACTED] has made threats to kill and do bodily harm to [REDACTED]self, me, and other people during the period [REDACTED] has attended your school. 2) [REDACTED] caused [REDACTED]self to vomit mornings prior to [REDACTED] being picked up by the districts [sic] school bus to avoid being sick on the bus and consequently embarrassed in front of other children.

[REDACTED] inappropriate behavior and my subsequent actions of withdrawing [REDACTED] could have been avoided if the district's ESE department (in issuing [REDACTED] IEP had acknowledged and followed the recommendations outlined in [REDACTED] recently completed independent Neuro psyche evaluation and agreed to an appropriate placement. Thankfully, neither [REDACTED], myself, nor any other person was injured.

165. Although [REDACTED] had requested at the final IEP meeting that [REDACTED] be placed in a residential facility, [REDACTED] later said that [REDACTED] agreed to give [REDACTED] a try. Neither at the IEP meeting, nor in [REDACTED] 's notice of withdrawing [REDACTED] from [REDACTED], did [REDACTED] inform the District that [REDACTED] was going to re-enroll [REDACTED] in [REDACTED] and seek public reimbursement for the private placement.

166. No credible evidence was presented to prove that [REDACTED] was likely to suffer physical harm or serious emotional harm at [REDACTED], had [REDACTED] remained there longer than [REDACTED] did. [REDACTED] 's descriptions of [REDACTED] threats to self and others were the same as those [REDACTED] described [REDACTED] making in 2005 when [REDACTED] transitioned to [REDACTED] and had to ride a bus "all over New York

City." [REDACTED] did not withdraw [REDACTED] from [REDACTED]; instead, [REDACTED] remained there for the entire school year and reportedly adjusted and made good progress. Ms. Brockmeier explained that [REDACTED] would make statements that sounded like threats, but that [REDACTED] did not really mean it:

I mean, [REDACTED] will sometimes say things out of pure impulsive. [sic] [REDACTED] can't sometimes regulate the words to go with the feelings. So, you know, [REDACTED] will say things like, you know, "I just want to punch them in the face." [REDACTED] doesn't mean that [REDACTED] wants to punch them in the face, but [REDACTED] can't formulate the words for how [REDACTED] is feeling.

Had [REDACTED] stayed at [REDACTED], [REDACTED] may have been helped in this regard with the FBA/PBIP provision in the IEP, a process that would have begun after the first few weeks of school.

167. The credible evidence shows that the District developed an IEP for [REDACTED] that was crafted with appropriate input by all IEP Team members, including [REDACTED], and that was reasonably calculated to provide educational benefits to [REDACTED]. However, the July 29, 2010, IEP was never given a real chance to succeed. [REDACTED] made no effort to address the problems [REDACTED] perceived with the program in the few days that [REDACTED] attended [REDACTED]. [REDACTED] actions and inaction suggests that [REDACTED] may have never truly intended to give [REDACTED] a try. It is not completely clear that there were any concrete problems, but if there were, there is no evidence that anyone at [REDACTED] or the District knew of such problems so as to have a chance to address them.

168. By [REDACTED] account, [REDACTED] subsequent two years at [REDACTED] were not free from the same kind of "inappropriate behavior" that caused [REDACTED] to withdraw [REDACTED] from [REDACTED]. In the summer after [REDACTED] completed 11th grade, [REDACTED] made threats to a doctor, and [REDACTED] was sent to a hospital pursuant to the Baker Act for psychological evaluation. [REDACTED] explained that [REDACTED] had difficulty transitioning back home for the summer after being in residence at [REDACTED] from September through May. [REDACTED] does not offer extended year services, as [REDACTED] had been designated for under the July 29, 2010, IEP.

Critique of the IEP

169. Dr. Oakland, Petitioner's expert, criticized the fact that the IEP has any academic goals, which he contended should be an afterthought because [REDACTED] could not make progress in these areas. Dr. Oakland suggested that [REDACTED] needed training in a normalized setting to prepare [REDACTED] to work in that setting. Thus, instead of trying to improve [REDACTED] English and math, he opined that [REDACTED] needed training in a non-school setting, such as by putting [REDACTED] in a work training program at Home Depot.

170. When asked whether [REDACTED] needed to be educated in a mainstream setting with non-disabled peers or whether [REDACTED] should be educated with only disabled peers, Dr. Oakland opined that [REDACTED] needed to be in a "setting that represents a more

normalized environment." That opinion supports the District's decision that it was appropriate to place ██████ in a restrictive setting (ESE classroom) the majority of the time, while introducing some mainstreaming, such as at lunch and in the non-core academic courses, where ██████ interest would not be hampered by the difficulties concentrating on academic subjects. For example, ██████ veterinary assistant class and art class would seem good places to start getting ██████ used to "more normalized" environments. Throwing ██████ into Home Depot for training, or into a veterinarian's office where ██████ would have to deal with not only the animal-patients, but also, their owners, seems a bit abrupt. In any event, Dr. Oakland's comments tend to underscore that of all options, the one that seems most inappropriate for ██████, as an 11th grader whose time had come to move into a "more normalized environment," would be a return to the cloistered, "warm and wooly" environment of ██████.

171. Petitioner criticized the IEP provisions aimed at helping ██████ adjust to the new school setting to transition from place to place during the school day and to adjust to changes in schedules and new settings. According to Dr. Oakland, these provisions were inappropriate because there was no evidence that ██████ had any problems finding ██████ way around the ██████ campus or meeting class schedules there. Inconsistently, Dr. Oakland expressed concern about ██████ transition from ██████ to a large

public school because of these very issues. The IEP reasonably provided for the supports to allow ██████ to adjust to the new setting of ██████, to learn ██████ 's way around this new campus, and to adjust to buying lunch in the cafeteria.

172. Dr. Oakland conceded that it was possible for ██████ to receive the type of educational program ██████ needed, with all necessary supports and accommodations, within the Hillsborough School System; Dr. Oakland acknowledged that the District has all of the resources necessary. This is a concession that a more restrictive placement is not necessary. Nonetheless, Dr. Oakland endorsed the NYU Report's conclusion that ██████ would be best placed in a residential private school "such as ██████" because of ██████ significant, global needs requiring 24-hour care. The NYU Report authors did not testify at hearing, nor were they available to Dr. Alberts to explain their conclusion, which did not seem to follow from the recommended components of an educational program for ██████. Those program components were similar to those developed in the IEP, with the exception of the steps taken by the District to begin mainstreaming ██████

██████ Costs Paid By Parent

173. Petitioner seeks reimbursement in the full amount of the tuition charges, \$42,500 for two years, totaling \$85,000. However, the evidence of ██████'s statements of charges and credits

shows that the tuition "charges" were reduced by a \$10,000 scholarship credit in 2010-2011, and by a \$12,500 scholarship credit in 2011-2012. If Petitioner were entitled to reimbursement for the amounts paid by ██████ for the costs paid to ██████ for school years 2010-2011 and 2011-2012, that amount would be \$63,000, not the \$85,000 claimed.

CONCLUSIONS OF LAW

174. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding, as limited to the IDEA claims. §§ 120.65 and 1003.57(1), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

175. It is undisputed that ██████ meets the ESE eligibility standards in the TBI category, as the School Board acknowledged in February 2010. TBI is defined in Florida Administrative Code Rule 6A-6.030153(1), as follows:

A traumatic brain injury means an acquired injury to the brain caused by an external physical force resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects educational performance. The term applies to mild, moderate, or severe, open or closed head injuries resulting in impairments in one (1) or more areas such as cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem-solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, or speech.

176. Thus, the School Board was obligated to make FAPE available to █████ as of the start of SY2010-2011. Prior IDEA litigation between the parties, and resolution of that litigation, establish the temporal limit of this inquiry by conclusively resolving disputes between the parties as to their IDEA rights and obligations for school years prior to 2010-2011.

177. As set forth in the Complaint, Petitioner has challenged the appropriateness of the July 29, 2010, IEP to make FAPE available to █████ Petitioner bears the burden of proof, by a preponderance of the evidence. Schaffer v. Weast, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001); M.M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1096, n.8 (11th Cir. 2006).

178. In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 175, 206-207 (1982), the Supreme Court established the following two-part test to determine the appropriateness of an IEP:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through that Act's procedure reasonably calculated to enable the child to receive educational benefits?

179. In considering an IEP, the IDEA's LRE mandate requires that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and that removing a child from the regular educational

environment to any extent occurs only when the nature or severity of the child's disability is such that education in regular classes with the use of aids and supports cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A)-(B).

180. Where, as here, a parent removes a student from the school district and unilaterally enrolls the student in private school, the law allows reimbursement for the costs incurred for the private placement, under certain circumstances. 20 U.S.C. § 1414(d)(1)(A)-(B); Fla. Admin. Code R. 6A-6.03311(7); Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2496 (2009). The threshold inquiry is whether the school district has provided FAPE. If the answer is "no," then consideration must be given to whether the private school placement is appropriate and whether the equities warrant reimbursement in whole or in part. Id. If the answer is yes, that ends the inquiry. Loren F. ex. rel. Fischer v. Atlanta Indus. Sch. Sys., 349 F.3d 1309, 1312 (11th Cir. 2003).

181. Turning to the specific challenges to FAPE raised by Petitioner, Petitioner first contends that the School Board violated IDEA procedures by predetermining that [REDACTED] would be placed at [REDACTED], because that was the placement stated in the first draft IEP. However, use of draft IEPs does not violate the IDEA. Instead, the relevant inquiry is whether the provisions in a draft IEP were subject to full discussion with the

parent(s) before the student's IEP is finalized. See, e.g., Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 193 (2d Cir. 2005) ("[W]hen a school district brings drafts of some or all of the IEP content to the IEP meeting, the relevant inquiry is whether there was a full discussion with the child's parents, before the child's IEP [wa]s finalized, regarding drafted content" (internal quotation marks omitted)).

182. The credible evidence does not support a conclusion that the School Board predetermined █████ placement. Instead, the School Board utilized draft IEPs as just that--drafts, whose provisions were subject to discussion and revision. The initial draft IEP provisions, including the parameters of the placement itself, changed as the IEP draft evolved from March 4, 2010, to July 29, 2010. No part of the IEP was finalized until the July 29, 2010, IEP meeting at which the draft provisions were fully discussed, with █████ full participation.

183. Besides the mere use of the draft IEP, Petitioner offered no credible evidence proving a predetermined placement. Instead, the evidence established that the only IEP Team member apparently having predetermined █████ 's placement was █████ Of course, █████ is not bound by the IDEA procedures, and it is understandable that as █████ 's parent, █████ would want the IEP Team to agree with █████ view of what is best for █████ and what is best for the █████ family. █████ may have disagreed with the

ultimate placement decision incorporated in the July 29, 2010, IEP, but there was no procedural violation, as alleged, by reason of a predetermination of placement.

184. Petitioner also challenged the sufficiency of the contents of the July 29, 2010, IEP. Petitioner contends that the IEP did not contain a sufficient statement of [REDACTED] present level of performance and that the goals were too general and not sufficiently measurable. However, the evidence established that the July 29, 2010, IEP was sufficient, in form, and met the content requirements of the IDEA and the corresponding rule 6A-6.03028(3)(h).

185. Petitioner's critique of the IEP's statement of present performance was revealed at hearing to be predicated on Dr. Oakland's mistaken belief that there was no statement of present level of performance at all in the IEP. The fallback argument that the statement was insufficient for lack of baseline data was also shown to be inaccurate; the IEP set forth baseline data regarding [REDACTED] academic performance and standardized test results. Petitioner failed to demonstrate that the statement of present performance was insufficient.

186. Petitioner's challenge to the sufficiency of the IEP goals as too vague and not measurable was likewise not established. The IEP goals were sufficiently clear and elaborated on via the short-term objectives (which are not

required in an IEP anymore). The goals and objectives were sufficiently measurable, with quantitative standards by which ██████'s progress could be evaluated and reported. While better, more precisely tailored goals could, no doubt, have followed in IEP adjustments for a student new to the Hillsborough School System, the contents were sufficient to comply procedurally.

187. Petitioner's remaining challenges were more substantive in nature, arguing that the July 29, 2010, IEP was inappropriate, and, thus, failed to make FAPE available to ██████. Under the Rowley standard, the inquiry is whether the IEP was reasonably calculated to enable ██████ to receive educational benefits. In considering this question, the question is whether the IEP was designed to allow ██████ to receive "the basic floor of opportunity"; the IEP "need not maximize the child's education." J.S.K. v. Hendry Cnty. Sch. Dist., 941 F.2d 1563, 1573 (11th Cir. 1991). With regard to placement, the issue is whether the "[p]lacement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997) (citations omitted). Thus, if a student progresses in a school district's program, the courts should not

examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208.

188. Determinations of educational benefit must take into account the individual circumstances of the student. Thus, educational benefit is assessed relative to cognition. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 (1st Cir. 2010) (per curiam).

189. Petitioner failed to prove that the July 29, 2010, IEP did not meet the foregoing standards. Instead, the evidence established that the IEP comprehensively addressed [REDACTED] unique educational needs and circumstances, and was reasonably calculated to provide educational benefits to [REDACTED]. The extent to which those benefits would have accrued cannot be judged, because Petitioner never gave the IEP a chance to succeed. See John Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990) ("In short, the IEP was never given a chance to succeed.").

190. Petitioner argued that the IEP's goals were inappropriate, because [REDACTED] academic goals should be secondary to transition goals; and Petitioner argued that the IEP's transition goals and plans for [REDACTED] postsecondary transition were inappropriate. However, Respondent reasonably conducted the transition planning that it was able to, with its hands tied, when [REDACTED] withheld consent to inviting a DVR representative to assist in that transition planning. [REDACTED]

participated in the development of the IEP's transition goals. While ██████ declined the invitations to attend and participate, ██████ told the District social worker about ██████ areas of interest and employment goals. Respondent was able to enroll ██████ in a veterinary assistant class--██████ field of interest. The IEP also provided for special education services in areas such as daily living skills; and the IEP specifically focused extra support for ██████ in the areas of transitioning from place to place, and orienting ██████ to changes.

191. The inconsistencies in Petitioner's challenges must be noted: On the one hand, Petitioner argued that ██████ required a residential facility placement because of global deficits and 24-hour needs and that ██████ could not transition to a large public high school or deal with a noisy cafeteria or any regular education classes. Conversely, Petitioner challenged the IEP goals by contending that ██████ needed to learn in a "more normalized environment" and should go into a work training program in a real work setting such as Home Depot.

192. Dr. Oakland acknowledged that it was time to prepare ██████ for post-secondary school life in the real world. That is precisely what the IEP provided for. It was, indeed, time for ██████ to evolve from the cloistered, "warm and wooly" environment of ██████ and start adjusting to a more mainstream, real-world environment with settings such as a noisy cafeteria,

while having the assistance of aides and the support of the ESE program to help with this adjustment. The IEP represented a reasonable balance of protected, structured, small settings most of [REDACTED] time at school, with regular education settings for non-core academic classes, including the class selected to advance [REDACTED] career goal as a veterinary assistant or groomer.

193. Petitioner failed to prove that a residential placement was necessary to provide FAPE to [REDACTED]. Instead, the evidence suggested not only that a residential facility was not necessary, but that keeping [REDACTED] in the cloistered environment of [REDACTED] was inappropriate and was unduly restrictive in violation of the LRE mandate of the IDEA. As Dr. Oakland conceded, the time had come for [REDACTED] to start adjusting to a "more normalized environment" with a mixture of disabled and non-disabled peers with whom to learn and socialize.

194. Petitioner points to a case in which it was determined that a residential placement was necessary for a student with TBI, as if that supports residential placements for all students with TBI. Brown v. Wilson Cnty. Sch. Bd., 747 F. Supp. 436 (M.D. Tenn. 1990). However, as that case plainly demonstrates, TBI is not a one-size-fits-all classification. In Brown, the court described the student as follows:

Her condition is aggravated by a severe behavioral disorder which causes bizarre, frightening and uncontrollable outbursts endangering both herself and others. These

outburst are unpredictable and can last for hours. The plaintiff's behavior includes ingestion of foreign objects, such as hairspray, thumbtacks and articles of clothing; head banging; public masturbation, assault, feces smearing; object throwing and window breaking.

Id. at 438. Needless to say, that description bears no resemblance to the "very sweet," "well-mannered," and polite █████ who might say things on impulse that █████ did not mean, who might get angry or frustrated, and who might even be physically aggressive on occasion. In short, IDEA decisions involving TBI students run the full gamut, reflecting that conclusions cannot be drawn merely by invoking the category. If it were that simple, placement decisions would be codified in the eligibility rules. Instead, as the Florida eligibility rule makes clear, TBI ranges from mild, to moderate, to severe.

195. Petitioner contends that the District should have followed the NYU Report's recommendation of a residential placement "to meet █████ need for structure, safety, consistency, carryover and generalization." (PFO ¶ 76). However, the IDEA does not require carryover and generalization to all settings. L.G. v. Sch. Bd. of Palm Bch. Cnty., 225 Fed.Appx. 360, 2007 U.S.App. LEXIS 24349, *16 (11th Cir. 2007) ("[T]he IDEA does not require that the student be able to generalize behaviors from the classroom to the home setting.");

accord J.S.K., 941 F.2d at 1573; Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1293 (11th Cir. 2001).

196. Petitioner failed to prove that the IEP did not provide all related services necessary to enable [REDACTED] to attain educational benefits. As to the omission of physical therapy, occupational therapy, and speech/language therapy, the School Board reasonably determined that [REDACTED] records did not show the need for re-evaluation in these areas or that these services were necessary to allow [REDACTED] to attain educational benefits. [REDACTED] did not request that these areas be added to the list of re-evaluations delineated at the March 22, 2010, IEP meeting, nor did [REDACTED] request that these related services be added to the July 29, 2010, IEP. The fact that these therapies were found needed in New York IEPs when [REDACTED] was in pre-school through sixth grade, in the years immediately following [REDACTED] TBI accident, does not establish that those therapies continued to be necessary for [REDACTED] to attain educational benefits in 11th grade, when the evidence showed that [REDACTED] had thrived without those services for four full years while at [REDACTED].

197. Petitioner failed to prove that the IEP's transportation provision was inappropriate by not adopting [REDACTED] request for minibus transportation. Respondent reasonably addressed the problem shown by [REDACTED] records, including information provided by [REDACTED] [REDACTED] had motion sickness at

times, whether traveling by car, taxi, minibus, or regular bus. The IEP reasonably provided support by way of an aide or adult to monitor [REDACTED] on the bus, just as had been done in New York IEPs when [REDACTED] was traveling by bus "all over New York City." Respondent addressed [REDACTED] concern about a regular bus with a large crowd of students, by providing the special ESE bus transportation with a small number of students.

198. Petitioner's failure to prove that the District did not make FAPE available to [REDACTED] means that when [REDACTED] re-enrolled [REDACTED] in [REDACTED] and then withdrew [REDACTED] from [REDACTED], [REDACTED] did so at [REDACTED] own peril and is responsible for the cost of doing so. Loren F., supra; John Doe v. Bd. of Ed. of Tullahoma, 9 F.3d 455, 461 (6th Cir. 1993) ("Appellants' parents assumed the risk of responsibility for the cost of appellant's private education by removing appellants from the Tullahoma schools without ever giving the proposed IEP a chance.").

199. If the District had failed to provide FAPE, the next inquiry would be whether Petitioner proved that [REDACTED] was an appropriate private school placement for [REDACTED] in 2010. Petitioner's testimony regarding the summer of 2011 tends to suggest that it was inappropriate to return [REDACTED] to [REDACTED], because [REDACTED] behavior upon returning home after a school year being cared for by a Dorm Mom was apparently worse than ever.

200. There is little information about [REDACTED] 's educational program on return to [REDACTED], save for one year's half-page listing of educational accommodations, which seemed rather paltry compared to the IEP. While a private school placement need not meet the same standards as are imposed by the IDEA, nonetheless there was virtually no evidence from which to conclude that [REDACTED] was an appropriate placement for [REDACTED] in 2010. Petitioner failed to prove this criterion.

201. Lastly, even if Petitioner met the other criteria, reimbursement may be denied in whole or in part, upon consideration of factors described in the IDEA and state rule. 20 U.S.C. § 1412(a)(10)(C)(iii); Fla. Admin. Code R. 6A-6.03311(7)(d). The IDEA provides that reimbursement may be reduced or denied if:

- (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa)[.]

202. Petitioner failed to provide the requisite notice. The written notice dated September 10, 2010, was not given until

eight days after [REDACTED] stopped going to [REDACTED] and six days after [REDACTED] signed the contract with [REDACTED], placing [REDACTED] back in the private school [REDACTED] previously attended. Moreover, the notice only said that [REDACTED] was withdrawing [REDACTED] from [REDACTED], not that [REDACTED] would place [REDACTED] back at [REDACTED] "at public expense."

203. [REDACTED]'s claim that [REDACTED] made [REDACTED] intentions clear at the July 29, 2010, IEP meeting was not established by the credible evidence. There was no credible evidence that [REDACTED] made clear at the IEP meeting not only that [REDACTED] was "rejecting" the proposed placement (while agreeing to give [REDACTED] a try), but, also, that [REDACTED] intended to enroll [REDACTED] in [REDACTED], and seek reimbursement from the District for the private school tuition.

204. An exception to the notice requirement is recognized if complying with the notice provision "is likely to result in physical harm to the student"; and an exception to the notice requirement may be recognized if complying with the notice provision "is likely to result in serious emotional harm to the student." Fla. Admin. Code R. 6A-6.03311(7)(d)4.c., 5.b. Petitioner asserts that the unilateral placement without notice was necessary to protect [REDACTED] health and safety. However, as found above, Petitioner did not prove that [REDACTED] was likely to suffer physical harm or likely to suffer serious emotional harm.

205. Certainly the short period of time in which [REDACTED] attended [REDACTED] (eight days) meant that it would have been

impossible to give ten-business-days' advance notice while still giving the appearance of following through on the agreement to "give it a try" under the July 29, 2010, IEP. However, the question is whether the consequences of giving it a try were dangerous to [REDACTED] health and safety such that emergency, immediate action without notice was necessary. More importantly, even if [REDACTED] experience had been shown to be so bad that [REDACTED] had to remove [REDACTED] right away, that would not explain why, when [REDACTED] 's last day at [REDACTED] was September 2, 2010 (a Thursday), notice could not have been given on that day or the next day. Instead, [REDACTED] waited until after [REDACTED] was signed up and in classes at [REDACTED] before sending notice to [REDACTED] that [REDACTED] was withdrawn.

206. The notice provision serves the purpose of allowing school districts to respond by addressing the problems that are causing the parent to contemplate unilateral private placement. [REDACTED] failed to give this chance to the District. [REDACTED] never gave the IEP a chance to succeed. Cf. John Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990) ("In short, the IEP was never given a chance to succeed.") Thus, even if [REDACTED] had shown a denial of FAPE and that [REDACTED] was an appropriate placement for [REDACTED] in 2010, [REDACTED] would not be entitled to reimbursement.^{13/}

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's due process complaint is DENIED in all respects.

DONE AND ORDERED this 22nd day of October, 2012, in Tallahassee, Leon County, Florida.

S

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

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of October, 2012.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2012 codification.

^{2/} A number of errors were noted in the Transcript of the final hearing; most of the errors appear to be minor and fairly obvious by context. However, one error worth noting relates to the Transcript's reference to an exhibit as Petitioner's Exhibit 24, when, in fact, the referenced exhibit was Respondent's Exhibit 24. See Tr. vol. 3, p. 265 (index of Petitioner's Exhibits, listing Petitioner's Exhibit 24 as having been identified but not admitted at page 348); compare Tr. vol. 3, p. 348 (testimony regarding Respondent's Exhibit 24, not Petitioner's Exhibit 24). The testimony at page 348 described the exhibit as an informed notice of refusal to take specific action (residential placement requested by parent). That description fits Respondent's Exhibit 24, which had already been admitted in evidence as part of the agreed wholesale admission of Respondent's exhibits. Therefore, the exhibit index in Transcript volume 3, page 265, listing Petitioner's Exhibit 24, is wrong. Petitioner may have been led astray by the Transcript error, because Petitioner's PFO states that Petitioner's Exhibit 24 was admitted in evidence. In fact, Petitioner's proposed Exhibit 24 was neither offered nor admitted in evidence.

^{3/} Petitioner has not demonstrated that the TAPs are appropriate for official recognition. The TAPs are not statutes, rules, or agency decisions; they are guidance papers issued by a bureau of a division of an agency. Petitioner argues that TAPs are considered binding rules pursuant to The Renaissance Charter School, Inc. v. Department of Education, Case No. 08-1309RU (Fla. DOAH 2008). To the contrary, in that unadopted rule challenge, pursuant to section 120.56(4), Florida Statutes, DOAH determined that the Department of Education could not rely on certain TAPs as binding interpretations, because they had not been promulgated as rules. As determined in that proceeding, a TAP cannot have binding effect as an interpretation that adds meaning to an existing statute or rule; such a TAP would have to be promulgated as a rule to have force and effect.

The motion for official recognition also argues that the District has acknowledged or adopted the TAPs in some fashion, but Petitioner cannot support that argument with any evidence in this record. Instead, the motion for official recognition offers internet addresses at which material apparently could be obtained on various websites. The undersigned declines Petitioner's invitation to print material from websites to belatedly supplement the record. The time to identify evidence or more documents for official recognition is long past.

Finally, even if Petitioner had established a legal basis for official recognition of TAPs, Petitioner would still have to show relevance. In that regard, the only TAPs even mentioned in Petitioner's PFO were the TAPs identified as proposed Exhibits 33 and 34. Petitioner has not shown relevancy with respect to the other two TAPs (identified as proposed Exhibits 32 and 36) for which official recognition was sought.

^{4/} ██████ 's background in New York was generally described by ██████ ; no IEPs developed by the NYC DOE were offered in evidence. According to School Board witnesses, ██████ provided Respondent with ██████ 's 1998-2005 IEPs, and ██████ 's June 26, 2006, IEP, which was the last IEP developed for ██████ prior to the July 29, 2010, IEP at issue in this case. Therefore, the description of ██████ 's New York past, through 2006, is general and primarily based on ██████ 's testimony.

^{5/} The NYC DOE also asserted that ██████ was not an appropriate choice for ██████ 's unilateral placement. Based on the evidence presented in that case, ██████ was found to be appropriate for ██████ for the 2006-2007 school year. That finding--made in a different case, addressing a different time period, based on a record of unknown dimensions developed in litigation between different parties--is not considered as evidence, or in lieu of evidence, in this case.

^{6/} The gist of this first DOAH proceeding, DOAH Case No. 09-4995E, was acknowledged by the parties throughout the record, including in the Complaint and Response/Affirmative Defenses. The Final Order of Dismissal is included in the record of this case as authority for the legal conclusion established therein, which became final as between the parties.

^{7/} ██████ 's assistant head, Ms. Brockmeier, confirmed that there was no written educational plan for ██████ for the 2006-2007, 2007-2008, and 2009-2010 school years. She testified that ██████ recently instituted the practice of developing written educational plans for its students; that practice was not in

effect before SY2010-2011. ██████'s Learning/Accommodations plan for 2011-2012 in evidence is a half-page list of accommodations.

^{8/} Rule 6A-6.0334 addresses a Florida school district's obligations with respect to an ESE student who transfers into the Hillsborough School System with an IEP that was developed for the student by an out-of-state school district. The rule draws a distinction between students who transfer to Hillsborough County in the middle of a school year, with an out-of-state IEP that is current and being implemented that same school year, versus those students who transfer to Hillsborough County with an out-of state IEP that is not current and is not being implemented in the same school year in which the student enrolls in the Hillsborough School System. As to "same school year" transfers, the rule provides that the school district is to provide services comparable to those in the out-of-state IEP until the district is able to develop its own IEP. However, the district can develop its own IEP for ESE students who do not transfer into the Hillsborough School System in the middle of the same school year in which the out-of-state IEP was being implemented. In this case, Petitioner invoked this transfer rule to argue that the District was required to provide services comparable to those in the June 2006 New York IEP, but the rule does not support Petitioner's argument. ██████'s transfer into the Hillsborough School System was not within the same school year in which ██████'s New York IEP was being implemented. When the proposed IEP was developed, consideration was being given to enrolling ██████ in the Hillsborough School System for SY2010-2011. ██████'s 2006 New York IEP was neither current nor being implemented in the same school year in which ██████ was considering enrolling in the Hillsborough School System. In fact, there was no evidence that the 2006 New York IEP was ever implemented, because immediately after that IEP was developed, ██████ left the New York school system to enroll at ██████. But even if Petitioner had proven that ██████'s 2006 IEP had been implemented or followed to any extent at ██████ through the 2009-2010 school year, that would still not entitle Petitioner to an IEP with comparable services, because the Hillsborough IEP was being developed for the next school year, not the same school year. In this regard, it must be noted that Petitioner's PFO strays from the bright-line temporal limit on the scope of this proceeding by arguing that Respondent should have provided services to ██████ that were comparable to those in the 2006 New York IEP for the 2009-2010 school year, including funding the residential program provided for in the New York IEP. This argument cannot stand. Petitioner's rights with regard to services and funding for the 2009-2010 school year and years prior were conclusively resolved by the DOAH Final Order of Dismissal and by the subsequent settlement and release and

voluntary dismissal of the federal court action to review the DOAH Final Order of Dismissal, as the parties have acknowledged. The issue here is limited to whether Respondent failed to offer FAPE to ██████ beginning in SY2010-2011, via the July 29, 2010, IEP, and, if so, whether Petitioner is entitled to the IDEA remedies set forth in the Complaint.

^{9/} Petitioner attempts to suggest something nefarious regarding the draft IEP by eliciting testimony from Dr. Benito that shortly before the March 4, 2010, meeting, counsel for the District reviewed the draft IEP, as shown by billing records. The billing records themselves were not admitted in evidence, but the entry to which the testimony was directed was a charge for three-tenths of an hour spent by counsel for a telephone conference with Dr. Benito and to review the draft IEP. No credence can be given to Petitioner's suggestion that it was somehow inappropriate for the District's lawyer to be involved in this matter by giving what could not have been more than a cursory glance at the nine-page draft IEP document. Indeed, ██████ was the first one to involve the District's lawyer by calling the lawyer to request that the District develop an IEP for ██████

^{10/} In Petitioner's PFO, Petitioner makes the argument that Dr. Alberts was precluded from questioning the results of the administration of the ABAS or considering any other information in reaching judgments about ██████ 's adaptive behavior. According to Petitioner, the IDEA requires school districts to only use assessment measures that are valid and reliable for the purpose being used, a requirement codified in Florida Administrative Code Rule 6A-6.0331(5)(b) ("Each school district must ensure that assessments and other evaluation materials used to assess a student are . . . [u]sed for the purposes for which the assessments or measures are valid and reliable."). Petitioner contends that "teacher reports" are neither valid nor reliable, and, as such, Dr. Alberts could not consider the ██████ records with teachers' progress reports and a wealth of other information generated over a three-year time span. While it is understood that ABAS is an assessment tool that has been recognized as valid and reliable by its design, the tool utilizes responses by teachers and parents, and neither the teachers nor the parents have been validated. In other words, the rating scales may be well-designed, but the assessment tool still relies on the responses of human beings whose responses to questions might just not make sense when compared to other information. Dr. Alberts' professional judgments in this regard are reasonable; nothing in the IDEA or in the cited rule preclude Dr. Alberts' use of professional judgment in considering the results of assessments along with the

information revealed by other sources (such as from the same teachers who respond to the assessment rating scales).

Petitioner also apparently contends that Dr. Alberts was not allowed to consider the BASC results for adaptive skills as bearing on the assessment of ██████'s adaptive behavior, because the BASC tool, according to Petitioner is not shown as "recognized" in State guidance communications or in a document dated October 2011 (well after the relevant time period) apparently available on the District website. The law relied on by Petitioner does not require school districts to adopt or "recognize" all assessment tools before they may be used. Petitioner's own selected private evaluator used the BASC tool just as Dr. Alberts did. Indeed, as Dr. Alberts' report suggests, the BASC tool was used by Dr. Alberts primarily to carry out the directive to perform a social/emotional assessment to address ██████'s expressed concerns about aggressive behavior and anxiety. And as Dr. Oakland conceded, there is nothing inappropriate about considering the BASC results that are relevant to adaptive behavior to supplement the ABAS results with regard to adaptive behavior. Indeed, the IDEA and corresponding Florida regulations plainly encourage, if not mandate, use of a variety of assessments, strategies, materials, and sources of information to determine the appropriate educational program for an individual student. Fla. Admin. Code R. 6A-6.0331(5)(a)1. (in conducting an evaluation, school districts must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student"); Fla. Admin. Code R. 6A-6.0331(5)(a)2. (school district must "not use any single measure or assessment as the sole criterion . . . for determining an appropriate educational program for the student[.]").

^{11/} In contrast to ██████'s reticence to provide any information to the District's social worker about ██████'s mother, when ██████ was asked by ██████ staff, during the pre-enrollment process in 2006, for family history information that could be helpful in planning ██████'s education, ██████ volunteered that ██████'s mother was an alcoholic with an eating disorder.

^{12/} At hearing, ██████ acknowledged that ██████ is comfortable leaving ██████ home alone sometimes (such as when ██████ was interviewed by the District social worker). ██████ also goes out in the neighborhood alone, such as to walk Snowflake or visit with neighborhood friends.

^{13/} Petitioner apparently has abandoned the claim for compensatory education for lost opportunities, as no mention is made of this in Petitioner's PFO. The conclusion that the District offered FAPE to [REDACTED] means that no compensatory education is warranted; but in any event, there is no evidentiary basis in the record that would support such relief.

COPIES FURNISHED:

Maryellen Elia, Superintendent
Hillsborough County Schools
901 East Kennedy Boulevard
Tampa, Florida 33602-3408

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Lindsey Granger, Program Director
Bureau of Exceptional Education
and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Timothy W. Weber, Esquire
Battaglia, Ross, Dicus & Wein, P.A.
Post Office Box 41100
980 Tyrone Boulevard
St. Petersburg, Florida 33743-1100

LaKisha Kinsey-Sallis, Esquire
Thompson, Sizemore, Gonzalez
and Hearing, P.A.
Suite 1600
201 North Franklin Street
Tampa, Florida 33602-5110

NOTICE OF RIGHT TO JUDICIAL REVIEW

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

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

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