

**Miami-Dade County School District
No. 06-3823E
Initiated by: District
Hearing Officer: Robert E. Meale
Date of Final Order: January 8, 2007**

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 06-3823E
)
)
)
Respondent.)
_____)

FINAL ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Homestead, Florida, on November 13-17, 2006, and by videoconference between Tallahassee and Miami, Florida, on November 21, 2006.

APPEARANCES

For Petitioner: Laura E. Pincus, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Paul E. Liles, Esquire
Alvarez, Sambol, Winthrop & Madson, P.A.
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STATEMENT OF THE ISSUES

The issues are whether Petitioner has properly identified, evaluated, and educationally placed Respondent; whether the May 22, 2006, individual education plan (May 2006 IEP) provides Respondent with a free appropriate public education; whether Petitioner has complied with all applicable procedural requirements in connection with the May 2006 IEP; and whether Petitioner delivered a free appropriate public education in implementing the May 2006 IEP.

PRELIMINARY STATEMENT

By Request for Due Process Hearing filed October 5, 2006, Petitioner requested a due process hearing for a determination whether the May 2006 IEP provides Respondent with a free appropriate public education. The request alleges that Respondent is eligible for exceptional student education services (ESE) in autism, language impaired, speech impaired, and other health impaired.

The request states that the parties participated in IEP meetings on April 24, May 16, and May 22, 2006, at which time they concluded the May 2006 IEP. At that time, Respondent allegedly requested mediation.

The request states that the parties participated in additional IEP meetings on July 13-14, August 3, September 5-6,

September 29, and September 26, 2006, but were unable to complete a new IEP. The request states that the IEP team agreed that Respondent "would require a sort of 'stay put' or 'interim' placement while the IEP was completed," so ██████ began the 2006-07 school year at ██████████ High School, which is ██████ home school and the location proposed by Petitioner for the delivery of instructional services. The request alleges that, on the first day of the 2006-07 school year, Respondent's parents requested certain general education classes, and Petitioner accommodated this request to the best of its ability.

The request states that the "interim" placement lasted only two weeks. Although Respondent appeared to be doing fine at school, the request states that Respondent's parents reported that, at home, ██████ behavior deteriorated, ██████ began vomiting, and ██████ blood pressure rose. The request alleges that Respondent's parents withdrew ██████ from school, and the IEP meetings ended. On September 17, 2006, Respondent's attorney gave Petitioner ten days' notice that Respondent's parents were going to obtain private educational services and seek reimbursement from Petitioner. The request states that Petitioner thus had until September 27 to complete the new IEP or revert to the May 2006 IEP.

The request states that Petitioner provided home services after Respondent's parents refused to send ██████ back to school.

However, the request concedes that these services "do not come close" to providing Respondent with a free appropriate public education. Perceiving an urgent need to return Respondent to school, Petitioner thus filed a due process request for a ruling on whether the May 2006 IEP provides a free appropriate public education.

On October 16, 2006, Respondent filed a Response to Petitioner's Demand for Due Process Hearing and Counter-Petition for Due Process. The demand states that the parties participated in IEP meetings on April 24, May 16, and May 22, 2006, but Petitioner completed the May 2006 IEP and placed Respondent at [REDACTED] High School over the objection of Respondent. The demand alleges that, on May 30, 2006, Respondent made a comprehensive request of "all educational records" pertaining to Respondent, but Petitioner failed to provide all such records. The demand adds that, on July 1, 2006, Respondent reasserted [REDACTED] request for all educational records.

The demand states that the parties participated in additional IEP meetings on July 13-14, August 3, September 5-6, September 19, and September 26, 2006. The demand notes that the parties agreed upon an "interim placement" at [REDACTED] High School, despite the concerns of Respondent's parents that Respondent would again "melt down" if [REDACTED] returned to classes

there. The demand alleges that, shortly after returning to school, Respondent began to suffer headaches, fatigue, vomiting, and stomach aches, as well as significant head tics and new, severe facial tics. The demand states that, after 11 days of school, Respondent had regressed, and [REDACTED] physician, Dr. Carlos Gonzalez, advised the parents that [REDACTED] was suffering harm from attending [REDACTED] High School. The demand alleges that, shortly after withdrawing from school, Respondent's symptoms greatly reduced.

The demand states that, on September 15, 2006, Petitioner offered Respondent instruction at home or in a self-contained class at [REDACTED] High School. The demand notes that, with reluctance, Respondent's parents, by letter dated September 17, 2006, elected to accept home instruction for their [REDACTED], but warned that, if the IEP team failed to identify an appropriate placement prior to October 2, 2006, the parents would provide some of the educational services through private resources.

The demand claims that Petitioner failed to provide Respondent with a free appropriate public education. In particular, Respondent alleges that Petitioner failed to comply with the procedural safeguards by failing to identify and timely produce all educational records, failing to allow Respondent's experts equal access to observe and evaluate Respondent in an

educational setting, and failing to provide written notices to Respondent's parents; failed to design an appropriate IEP for the 2006-07 school year by failing to prepare present levels of performance that relate to Respondent's specific disabilities and are objective and measurable; failed to prepare annual goals that relate to Respondent's specific disabilities, directly relate to Respondent's present levels of performance, and are objective and measurable; failed to prepare short-term objectives, milestones, or benchmarks that relate to Respondent's specific disabilities, directly relate to Respondent's present levels of performance, directly relate to Respondent's annual goals, and are objective and measurable; failed to provide special education and related services that relate to Respondent's specific disabilities; failed to prepare evaluation criteria that relate to Respondent's specific disabilities; failed to identify dates of initiation and duration of services; failed to identify appropriate transitions and services; proposed to change Respondent's setting to a large school that is contrary to [REDACTED] unique needs; implemented an IEP that was inappropriate to Respondent's unique needs; and failed to provide educational and related services necessary for Respondent's unique needs.

At the hearing, Petitioner called 13 witnesses, and Respondent called three witnesses. Exhibits were admitted as shown in the transcripts.

Following the conclusion of the hearing in Homestead, the parties supplemented the record. On November 13, 2006, Petitioner filed the transcript of the deposition of Dr. Carlos Gonzalez; on November 27, 2006, Petitioner filed a copy of the notice of the May 2006 IEP meeting; on December 6, 2006, Petitioner filed the transcript of the deposition of Dr. Peter Gerhardt; on December 13, 2006, Petitioner filed the transcript of the deposition of Sandra Martinez; and, on December 15, 2006, Respondent filed the education records with a cover letter. Prior to the hearing, on November 9, 2006, Petitioner filed the deposition transcripts of Isabel Lara and Dr. Lani Kaskel. Except for any matters arising from official recognition of the Physicians' Desk Reference, as announced by the Administrative Law Judge during the hearing, the filing of December 15 closed the evidentiary record in this case.

After the conclusion of the hearing, on November 27, 2006, Respondent filed a Motion to Determine "Stay Put" During Pendency of Due Process Hearing and Request for Emergency Hearing. On the same day, Petitioner filed a response. The Administrative Law Judge had denied an earlier motion for stay

put, by Order entered October 19, 2006, and deferred ruling on the second stay-put motion until this Final Order.

Based on the filing of the due process request on October 5, 2006, the deadline for issuing the Final Order was December 19, 2006. At the end of the hearing in Homestead, the parties discussed the remaining evidence that needed to be added to the record and the time required for preparing proposed final orders. Petitioner urged the Administrative Law Judge to issue the Final Order before the start of the second semester because Respondent was not attending school and Petitioner contended that [REDACTED] was suffering considerable harm from [REDACTED] failure to attend school. Students return to school on January 8, 2007. At the request of the parties, the Administrative Law Judge granted a specific extension of 15 days, ordered the parties to file their proposed final orders on or before December 22, 2006, and agreed to issue the Final Order on or before January 3, 2007.

On December 18, 2006, Respondent filed a Motion for Extension of Time to File Proposed Final Order. The motion notes that Petitioner received a copy of the transcripts one week in advance of Respondent's receipt of a copy of the transcripts and asks for leave to file proposed final orders on or before January 8, 2007. The next day, Petitioner filed a response restating that it was vital for the Administrative Law

Judge to issue the Final Order as soon as possible because the student was not attending school. However, Respondent showed good cause for a short extension. By Order entered December 19, 2006, the Administrative Law Judge granted an extension, but only through January 3, 2007, which constituted a specific extension of 12 days.

The two specific extensions total 27 days. Due to these extensions, the deadline for issuing the Final Order is January 15, 2007.

The court reporter filed the transcript on December 14, 2006. Petitioner filed its proposed final order on January 3, 2007. By Order entered January 3, 2007, after a brief telephone conference among the Administrative Law Judge and counsel for the parties, Respondent (as well as Petitioner, if it had chosen to take an additional day) received an extension of one day. Respondent duly emailed [REDACTED] proposed final order on January 4, 2007, at 4:58 p.m. and filed it with the Division of Administrative Hearings by 8:00 a.m. on January 5, 2007.

FINDINGS OF FACT

I. Respondent: The Medical/Pharmacological Picture

1. Respondent was born on [REDACTED] [REDACTED] is talented, engaging, sensitive, and determined. [REDACTED] also presents with a combination of neurological, digestive, emotional, and behavioral symptoms.

2. Respondent's mother has a master's degree in architecture, and [REDACTED] father has a master of business administration. Respondent's mother works exclusively within the home, caring for Respondent and [REDACTED] brother, who is one year older than Respondent. Respondent's father works in asset management. Both parents are highly informed, motivated, and involved in their [REDACTED]'s education and development. They have consistently demonstrated professionalism in their dealings with Petitioner. Most importantly, they demonstrate good judgment and outstanding perspective as they discharge their parental responsibilities.

3. Respondent's birth was uncomplicated, and [REDACTED] achieved developmental milestones on time. At three and one-half years, though, Respondent regressed in toilet training. [REDACTED] was diagnosed with attention deficit hyperactivity disorder (ADHD) at this time. Nine months later, [REDACTED] was diagnosed with Asperger's Disorder. A couple of months later, another physician confirmed the broad diagnosis of pervasive developmental disorder.

4. Pervasive development disorder, or autism spectrum disorder, describes the spectrum of disorders, of which Asperger's Disorder is a part. Persons with Asperger's Disorder typically display a qualitative impairment in social interaction, patterns of restricted behaviors, interests and

activities, and communication difficulties. Social impairments typically manifest themselves in problems with eye contact, gesture, and facial expression, peer relations, and social and emotional reciprocity. Restrictive behaviors, interests and activities manifest themselves by preoccupation with parts of objects, stereotyped motor mechanics, unusual preoccupations, and restricted and nonfunctional rituals.

5. Adolescents with Asperger's Disorder may display separate disorders, most frequently anxiety and depression. They may suffer from obsessive-compulsive disorder, but it is ordinarily a form of anxiety disorder. It is not possible to diagnose differentially ADHD in persons with autism, but adolescents with Asperger's Disorder are treated for ADHD symptoms.

6. Many adolescents with autism undergo sensory challenges in managing aspects of their physical environment. These sensory challenges may arise from visual, auditory, olfactory, gustatory, or physical stimulation. When these sensory challenges are complicated by communication deficits, the adolescent patient's response to overstimulation may range from shutting down to physical aggression. The adolescent patient's reaction to sensory overload may be immediate or delayed, such as after leaving the stressful school environment and returning to the relative safety of the home environment.

7. Overload behaviors typically feature the exacerbation of behavior already in the child's repertoire. For instance, the overstimulated child may engage in heightened restrictions or motor mechanisms, like rocking, slapping, or picking at cuticles or scabs. Sensory overload or anxiety may produce fatigue, as well as headaches. Stomach aches are more typically associated with anxiety than with overload, and vomiting is less frequently observed, but also may be associated with anxiety.

8. Respondent's medication history is extensive, silent evidence of the extent to which the technique of trial-and-error necessarily informs the treatment of someone with the complicated symptomatology of Respondent. For the most part, physicians have prescribed medications to stabilize Respondent's mood, reduce [REDACTED] anxiety, treat [REDACTED] ADHD, and, later, treat [REDACTED] digestive disorders.

9. In addition to presenting with a complex of symptoms, Respondent challenges the treating physician because [REDACTED] neurological status may exacerbate [REDACTED] complex of symptoms, the intended effects of one medication (such as that treating ADHD) may worsen another condition (such as anxiety), and the side effects of several of the medications may worsen one or more conditions, especially the digestive disorder.

10. Just prior to turning four years old, Respondent was prescribed Ritalin, [REDACTED] first psychotropic medication. The

dosage was subsequently increased several times, but Respondent suffered anxiety, and Ritalin was discontinued. Without much success, Respondent's physicians then prescribed Cylert, Tofranil, Clonidine, Dexedrine, and Prozac, which is an antidepressant. In 1997, a physician prescribed Risperdal, which is an anti-psychotic that is effective in controlling behavior and mood. The next year, Respondent began taking Prozac, as Risperdal was slowly decreased, but, when Risperdal was stopped, Respondent regressed quickly. The physician restarted Risperdal, and Respondent's behavior quickly improved. In October 1998, when Respondent was nearly seven years old, [REDACTED] briefly restarted Ritalin, but it was again discontinued due to excessive anxiety. In December 1999, when Respondent was eight years old, [REDACTED] was taken off Risperdal and placed on Prozac, but the results were less than optimal. [REDACTED] then took Risperdal and Prozac, which [REDACTED] continued to take through the summer of 2002.

11. During this period, Dr. Roberto Tuchman, a neurologist, was in charge of treating Respondent's neurological symptoms and prescribing psychotropic medications. By 2003, the efficacy of Respondent's medications was losing ground to undesirable side effects. In early 2003, Dr. Tuchman was not having much success targeting problems with attention and anxiety. [REDACTED] had prescribed Strattera, which controls ADHD,

but may produce side effects of upset stomach, nausea, vomiting, and decreased appetite.

12. Dr. Tuchman eliminated the Strattera in March 2003 and tried different combinations of Risperdal, Ritalin, and Prozac. Risperdal may produce tics as a side effect, but not the type from which Respondent suffers. Trying to stabilize Respondent's mood, Dr. Tuchman prescribed Trileptal, which is an anti-seizure medication that also stabilizes mood.

13. In the summer of 2003, Respondent's mother asked Dr. Tuchman to restart Prozac. Respondent had been experiencing headaches three times weekly since the recent increase in the dosage of Risperdal. In October 2003, Dr. Tuchman tried Luvox in place of Prozac. Luvox is an antidepressant useful for treating obsessive-compulsive disorder. Among the side effects of Luvox, though, are anxiety and a worsening of behavior. Dr. Tuchman quickly discontinued Luvox after an unsuccessful trial.

14. In mid-December 2003, which was the mid-point of sixth grade, Respondent's mother reported to Dr. Tuchman a sudden deterioration in Respondent's behavior over the preceding couple of weeks. At this time, Dr. Tuchman acknowledged that [REDACTED] had not found an effective mix of medications and suggested that Respondent see another health care provider. Dr. Tuchman has continued to see Respondent as needed.

15. In April 2004, Respondent saw Dr. William Munoz, a pediatric gastroenterologist, due to a history of easy vomiting with a cyclic component. Dr. Munoz diagnosed gastroesophageal reflux disease (GERD), which could have been caused or worsened by Respondent's medications. For example, Ritalin can increase the production of stomach acid, and Risperdal can cause intestinal side effects. Also, patients with neurological issues, such as Respondent's, suffer more reflux symptomatology, as do patients under stress, such as those attending school.

16. Dr. Munoz found that Respondent was not the classic GERD patient and considered the possibility of classic cyclic vomiting syndrome, which is a neurological/digestive disorder also known as abdominal epilepsy. However, Dr. Munoz did not pursue this possible diagnosis because the initial treatment approach for both disorders would be the same, and GERD is much more common than classic cyclic vomiting syndrome.

17. Dr. Munoz prescribed Protonix, a proton pump inhibitor that controls GERD. Dr. Munoz also directed Respondent to avoid foods that worsen GERD, such as tomato sauce, caffeine, candy, carbonated drinks, and gum. Dr. Munoz explained that Respondent is not a simple patient to treat and would be in treatment for GERD for a long time, given the intermittent nature of [REDACTED] digestive symptoms.

18. Dr. Munoz saw Respondent three times in 2004, the last visit taking place in October, and then did not see [REDACTED] again until June 2006. [REDACTED] impression of Respondent was that [REDACTED] was very stressed and not at peace. Dr. Munoz found Respondent fearful and unstable and determined that the child was over-stimulated. Dr. Munoz concluded that stress exacerbates Respondent's GERD.

19. In the fall of 2004, when Respondent was in the fifth week of seventh grade, [REDACTED] began to suffer what [REDACTED] mother described as a series of "crises." On the way to school or after school, Respondent would turn on [REDACTED] mother with a stream of profanity and verbal aggressiveness.

20. After each crisis, Respondent would cry extensively and say that [REDACTED] could not stop [REDACTED], [REDACTED] was very bad, and [REDACTED] was sorry for all that [REDACTED] had done. Respondent's parents discussed these incidents with Dr. Tuchman, who, after trying various behavior management techniques, determined that the crisis behaviors were not under Respondent's control.

21. In a note documenting a visit on October 1, 2004, Dr. Tuchman found that Respondent's obsessive-compulsive disorder and tics had worsened, and [REDACTED] was experiencing headaches and vomiting. [REDACTED] noted that Respondent's mother had stopped the Ritalin, and the tics had lessened. [REDACTED] also reported that Respondent did well at school, but "really poorly"

at home. For a plan, Dr. Tuchman recommended that a psychiatrist evaluate Respondent, as Dr. Tuchman had tried in "on every single medication that I can come up with and at this point I'm suggesting that we refer █████ over to the Miami Children's Hospital to the Department of Child Psychiatry."

22. In October 2004, Respondent began seeing Dr. Carlos Gonzalez, a Board-certified psychiatrist. Dr. Gonzalez assumed the responsibility from Dr. Tuchman for managing Respondent's medication, but did not serve as Respondent's primary therapist.

23. One night, Respondent's crisis behaviors escalated to a new, more frightening level. Immediately after tutoring at home, Respondent asked █████ mother to take █████ to Home Depot to buy a lock, one of Respondent's favorite things. She declined, saying it was too late. Respondent started screaming and yelling. █████ engaged in █████ typical obsessive-compulsive behavior--hitting █████ ears, grunting three times, and tapping █████ mother's arm three times, but the taps became hits, and Respondent became very violent. When Respondent's father tried to restrain █████, Respondent began to bite, thrash about, and scream. █████ parents finally maneuvered █████ into a guest room, which had the fewest amount of objects that █████ could throw. The crisis, which lasted an hour, ended when Respondent's parents gave █████ some medications they had on hand for emergency use, but they also called Dr. Gonzalez for advice.

24. After learning of these incidents, Dr. Gonzalez changed Respondent's medications by prescribing smaller doses, to be taken daily, until the crises ended. However, subsequent crises required Respondent's parents to administer the emergency medicine 5-10 times that fall.

25. On October 25, 2004, Dr. Munoz admitted Respondent to Miami Children's Hospital for a three-day diagnostic visit. Respondent's chief complaints were vomiting twice daily for six months, headaches of increasing frequency, increasing sleepiness, and ringing in the ears. The discharge record states that Respondent had developed obsessive-compulsive disorder behaviors about 18 months earlier when [REDACTED] had started hitting [REDACTED] ears and grunting. Tests in the hospital ruled out any hearing loss or head abnormalities that an MRI would reveal. No organic cause of the headaches, ear ringing, or vomiting was found.

26. After [REDACTED] discharge from the hospital, Respondent returned to school for awhile, but [REDACTED] behaviors and illnesses worsened until [REDACTED] parents removed [REDACTED] from school in December 2004, a year after the previous sudden deterioration of behavior.

27. At the time of the due process hearing, Respondent was taking Zoloft (50 mg), Tenex (4 mg), Abilify (30 mg), and Protonix (20 mg). Respondent's mother gave [REDACTED] some leftover

Ritalin on the days that [REDACTED] was taking tests administered by a District test administrator early in the 2006-07 school year, but she stated that Respondent has not been on Ritalin since the end of eighth grade, which was June 2006.

28. Dr. Gonzalez prescribed Zoloft, which is an antidepressant, to control anxiety, obsessive traits, and possibly sensory overstimulation. Dr. Gonzalez has maintained Respondent on Zoloft for the two years that [REDACTED] has been treating [REDACTED]. At this dosage, there are rarely any side effects.

29. Dr. Gonzalez prescribed Tenex for tics and aggression. [REDACTED] has maintained Respondent on Tenex for one year. The main side effects are lowered blood pressure and, thus, sedation, but Tenex can also cause headaches.

30. Dr. Gonzalez prescribed Abilify, which is an anti-psychotic, to regulate mood, control agitation, and treat a thinking disorder. The main side effect is sedation. Although Dr. Gonzalez has not seen Abilify's side effects extend to digestive disturbances, the drug manufacturer lists this as a possible side effect.

31. On July 11, 2006, Dr. Gonzalez completed an evaluation and treatment plan for Respondent. [REDACTED] diagnosed Respondent with an Axis I disorder of autism, an Axis II disorder of obsessive-compulsive personality features, and an

Axis III disorder of GERD, tic disorder, and multiple soft neurological impairments. This report notes that Respondent has a hard time processing and integrating sensory input and can easily be overwhelmed by [REDACTED] environment. Past failures in school and social interaction have left Respondent's self-esteem damaged, but [REDACTED] continues to want and seek peer relationships, despite the difficulties in maintaining appropriate social interaction. Dr. Gonzalez opined that, for psychological reasons, segregation from peers further reinforces Respondent's self-image as "damaged."

32. The difficulty in structuring an appropriate educational environment for Respondent, according to Dr. Gonzalez, is that Respondent's sensitivity to stimulation demands a "setting that is [not] physically and emotionally overwhelming, because [such a setting] will lead to illness and emotional breakdown." Dr. Gonzalez found that the "relationship between environmentally induced stress and physical (e.g., vomiting, insomnia, exacerbation of motor and vocal tics) symptoms and emotional decompensation have been clearly and repeatedly demonstrated."

33. By letter dated September 1, 2006, Dr. Gonzalez described Respondent, in the summer preceding [REDACTED] entering high school, as "clinically stable and happy" and cooperative. Dr. Gonzalez found that Respondent, during the summer of 2006,

was enjoying the company of others and experiencing social success in relating to peers. Respondent had expressed concern about fitting in at [REDACTED] new school and had begun to show anxiety, but not excessively.

34. Dr. Gonzalez treated Respondent as [REDACTED] entered [REDACTED] High School at the start of the 2006-07 school year. Within a couple of weeks of starting classes, Respondent's tics became more pronounced, and [REDACTED] tolerance of office visits went down. Respondent began to do compulsive rituals, which Dr. Gonzalez had not seen in a long time, as [REDACTED] tapped [REDACTED] mother compulsively. Also, Respondent engaged in outbursts when someone set limits on [REDACTED] behavior--something that Dr. Gonzalez had never seen before. After Respondent withdrew from school, these behaviors began to moderate.

35. Dr. Gonzalez was unsurprised by the discrepancy between Respondent's behavior and symptoms at school versus [REDACTED] behavior and symptoms at home. Dr. Gonzalez described a phenomenon in which persons could control tics while in an environment in which they must perform, but then suffer an overflow of tics once they have removed themselves to a more secure environment, such as home.

36. Isabel Lara is a licensed physical therapist who first saw Respondent in October 2004. Her treatment center works with children ages two to seven years, so Ms. Lara limited

her initial work with Respondent to an evaluation and home assessment.

37. Ms. Lara conducted a reevaluation in 2006 when she saw Respondent in her office. She issued a report dated May 14, 2006. The report describes Respondent's proprioceptive stimulatory needs as including jumping, tumbling, and crashing into bean bags and air mattresses for long periods of time, suggestive of an under-aroused proprioceptive system. Respondent also seeks out deep pressure activities, such as being sandwiched and body massage. During the deep pressure activities, Respondent's neck tics cease, [REDACTED] body relaxes, and [REDACTED] becomes cooperative and easy-going.

38. Ms. Lara's report discusses Respondent's tactile system, noting that shows signs of decreased tactile defensiveness because [REDACTED] can manipulate smooth and slimy substances. But continues to exhibit signs of tactile defensiveness in severe apprehension to manipulating sand, tissues, or paper or unexpected touch.

39. Ms. Lara's report addresses Respondent's auditory system. The report states that Respondent continues to experience difficulty with auditory processing, as evidenced by [REDACTED] need for verbal cueing to assist [REDACTED] with recalling the details of three-step directions in proper sequence. Ms. Lara stated that Respondent continues to show auditory defensiveness

by being extremely apprehensive with loud or unexpected noises. Respondent also continues to be distracted by background noises and often requires verbal cueing to get [REDACTED] attention back to the subject task.

40. Ms. Lara's report describes Respondent's visual motor skills as deficient. The report adds that Respondent is better at controlling [REDACTED] impulsivity and asks for specific sensory motor activities to help [REDACTED] self-organize. Respondent also expresses [REDACTED] emotions verbally.

41. Ms. Lara's report recommends that Respondent receive sensory integration therapy three times per week for 30 minute sessions to address [REDACTED] auditory defensiveness, tactile defensiveness, and visual motor and perceptual skills. Ms. Lara determined that Respondent requires sensory integration therapy to help [REDACTED] modulate efficiently the information derived from [REDACTED] sensory-motor processing system, so as to allow [REDACTED] to access [REDACTED] education.

II. Respondent--The Educational/Psychological Picture

42. Invariably, Respondent's teachers describe [REDACTED] as very nice and sweet and extremely engaging. Respondent varies from the typical child with Asperger's Disorder in [REDACTED] sense of humor, nonverbal communication with eye movement and body language, and ability to advance beyond obsessive interests to active learning. Respondent is not entirely characteristic

either in [REDACTED] eagerness to please and [REDACTED] flexibility, at least at school.

43. Respondent has not presented behavioral management issues to teachers or administrators. When [REDACTED] has acted out at school, [REDACTED] has limited [REDACTED] to verbal aggression, and it is directed at [REDACTED] mother. The record amply supports findings that Respondent has worked hard to attend to instruction, to understand what [REDACTED] reads and hears, to express [REDACTED], to regulate unwanted stimulation, to decode the myriad of social relationships that surround [REDACTED], and to fit in.

44. For kindergarten, during the 1997-98 school year, Respondent attended an autism class at an elementary school of Petitioner. [REDACTED] began first grade in the same educational placement, but, three months into the school year, Petitioner placed [REDACTED] in an inclusion class with eight high-functioning children with autism and 22 neurotypical children. Respondent progressed in this placement in math, but had considerable difficulty in reading, staying on task, and interacting socially. Aided by a fulltime paraprofessional, Respondent continued with this placement in second grade.

45. In third and fourth grade, Respondent attended [REDACTED] Elementary in a mainstream classroom, aided by a paraprofessional. [REDACTED] received resource services for language arts and reading. Inattentiveness was [REDACTED] greatest problem.

In general education classes, Respondent received instruction with 35 students in fourth grade; the next year, [REDACTED] received general-education instruction with 41 students. Both years, [REDACTED] received resource-room instruction in classes of 12-17 students. By this time, Respondent's parents were supplementing [REDACTED] instruction, at their expense, with reading programs tailored to Respondent's learning style.

46. On four days in July 2002, which was the summer after Respondent had finished fourth grade, the University of Miami, Psychological Services Center, administered a psychoeducational evaluation. The report, which is dated November 4, 2002, states that Respondent made significant improvements academically in the preceding year, especially in reading.

47. The November 4 report states that Respondent scored an 89 in verbal IQ on the Wechsler Intelligence Scale for Children, Third Edition. The other scores on the test lacked significant confidence levels, although the unusual score discrepancy revealed that Respondent is much better processing information verbally than visually. The report contains Respondent's scores on the Wechsler Individual Achievement Test. [REDACTED] highest scores (with percentiles in parentheses) were numerical operations (39th), pseudoword decoding (37th), mathematics reasoning (25th), word reading (18th) and spelling (16th). [REDACTED] lowest scores were written expression (1st),

reading comprehension (3rd), and oral expression (4th). [REDACTED] overall scores were math (27th), writing (16th), reading (12th). The grade equivalents for both math scores were fourth, but the grade equivalents for reading scores ranged from 2.2-3.2. Although the spelling grade equivalent was 3.2, the grade equivalents for written expression and oral expression were both 1.8. Other scores contained in the November 4 report were visual perception (34th), story recall (28th), understanding directions (8th), spatial relations (4th), and motor coordination (1st).

48. The November 4 report cites three main factors significantly affecting Respondent's school performance. First, [REDACTED] had significant difficulties in the areas of attention and impulsivity/hyperactivity. [REDACTED] showed a tendency to focus on "background noise" and tended to listen superficially, possibly due to [REDACTED] auditory processing problems. Respondent also self-monitored poorly. Second, Respondent had significant problems in visual and motor processing. Respondent's academic performance was affected, as the complexity of spatial relationships increased and words and columns became larger. Third, Respondent's clinical diagnosis affected [REDACTED] academic performance. During the previous neuroeducational evaluation at the University of Miami in July 2000, Respondent met the eligibility criteria for autism in terms of communications and

social impairments, but did not display the restricted, repetitive, and stereotyped pattern of behavior, interests, and activities that characterize this disorder. Two years later, █████ met these criteria, as █████ "extreme preoccupation" with insects and reptiles interfered with testing. However, the November 4 report stresses that the most important factor is the progress that Respondent had made over the past several years.

49. The November 4 report contains five recommendations. The first four are: continued speech and language therapy with an emphasis on language pragmatics; continued occupational therapy to address sensory integration, handwriting, and, most importantly, visual processing; continued neurological consultations, and Respondent "seem[ed] to need" medications for inattention and impulsivity; and continued involvement in social skills groups with peers █████ age.

50. The fifth recommendation is a series of suggestions to be implemented at home and school. The report acknowledges the importance of maximizing Respondent's in-school educational programming, so that █████ could have some "down time" after school and participate in age-appropriate activities. The first recommendation is priming, so that Respondent is exposed to a learning activity a day before it is taught. The second recommendation is self-management to increase independence. The third recommendation is a clear reward system to reinforce

attentiveness. The fourth recommendation is a reward system to reinforce the timely completion of tasks. The fifth recommendation is for Respondent to proofread [REDACTED] work. The sixth recommendation is to seat Respondent near the teacher and away from disruptive students. The seventh recommendation is to use clear and specific language when talking to Respondent, as [REDACTED] cannot be expected to infer anything. The eighth recommendation is to explain everything. The ninth recommendation is to continue multisensory instruction with the step-by-step, systematic presentation of material in a slow, repetitive, redundant manner. The tenth recommendation is to arrange breaks to allow Respondent to pursue whatever is distracting [REDACTED]. The eleventh recommendation is to schedule regular sensory integration breaks. The twelfth recommendation is for the teacher and paraprofessional to maintain consultation with Respondent's professionals. The thirteenth recommendation is multisensory instruction; although Respondent has trouble filtering out background noise, [REDACTED] remains an auditory learner, perhaps due to [REDACTED] visual processing deficits. The fourteenth recommendation is to allow Respondent more time to complete tasks and allow Respondent to dictate [REDACTED] responses.

51. The November 4 report concludes with the warning that the nature of children's learning problems changes as they age because they require different functions to perform effectively

at different ages and evolving subject matters call for different capacity at different grades. The report strongly recommends new neuroeducational evaluations every three years.

52. Respondent's social interactions were limited in fourth and fifth grade. █████ picked █████ nose in plain view, passed gas inappropriately for █████ peer group, interrupted conversations, wiped █████ hands on █████ shirt (possibly due to a tactile aversion to paper, such as Kleenex, or to a habit formed when █████ still had such a tactile aversion), and sometimes vomited.

53. The vomiting became frequent in fifth grade, but it subsided later in the school year. Fifth grade marked the start of intensive homework: in order to finish schoolwork that █████ had been unable to complete in school, Respondent had to work at home for one or two hours nightly. In fifth grade, Respondent also began exhibiting anxiety about school.

54. Between fifth and sixth grades, verbal aggressiveness began to emerge as a problem, and it continued to increase during sixth grade. With the start of middle school, Respondent's slow processing speed caused █████ to slip behind during the school day and have to spend more time at night trying to catch up. In sixth grade, the vomiting increased in frequency and was now accompanied by headaches, fatigue, and stomach aches. Respondent would put █████ head down on a table

and fall asleep at school, and, when [REDACTED] got home, [REDACTED] often slept for several more hours. At this time, [REDACTED] began developing atypical sleep patterns, [REDACTED] became less compliant and redirectable at home, and [REDACTED] reverted more frequently and persistently to [REDACTED] obsessive-compulsive rituals. In sixth grade, Respondent had 16 absences and 17 early pickups due to [REDACTED] illnesses.

55. As noted above, Respondent's health deteriorated early in seventh grade, culminating in [REDACTED] withdrawal from school in December 2004. By this point, Respondent already had 24 absences. Shortly after Respondent withdrew from school, Petitioner began to provide homebound instruction.

56. Respondent's parents were stunned and frightened by their [REDACTED]'s rapid deterioration in the fall of 2004. They had long been accustomed to three steps forward, one step back, but, this time, even when compared to the breakdown of December 2003, their [REDACTED] had fallen off a cliff, as Respondent's mother described it. Respondent's parents considered the possibility of a psychiatric hospitalization to manage behavior that was essentially uncontrollable and verging on psychotic. After this crisis, they attempted to relieve their [REDACTED]'s stress anyway they could, such as by not insisting that [REDACTED] clean [REDACTED] room or clean up the kitchen after cooking a meal.

57. With a couple of hours of homebound instruction daily, Respondent progressed in science and social studies, possibly made some progress in language arts, but made no progress in reading. [REDACTED] parents thus added a tutor for three hours each afternoon. They discontinued subject-matter tutoring after the third grading period, although they retained tutoring for study and organizational skills.

58. Respondent ceased vomiting within three months of [REDACTED] withdrawal from school. Respondent returned to school, but only part-time. [REDACTED] attended school four periods a day and went home for two periods of homebound instruction. During the summer after seventh grade, Respondent again relaxed. The headaches that [REDACTED] had had for many years almost vanished.

59. In a report dated April 2, 2005, based on three evaluations in the preceding month, Dr. Kaskel noted that Respondent had just returned to middle school following an extended leave of absence. She stated: "There is well substantiated reason to believe that [Respondent's] illness was in part attributed to the stress caused by [REDACTED] previous academic situation."

60. Describing Respondent's recent education as a "full" school day followed by individual, multi-sensory instruction at home, Dr. Kaskel concluded: "The stress of a demanding school day for a sensory-impaired child followed by intensive

individualized tutoring precipitated [Respondent's] recent physical illness." Dr. Kaskel pointed out that Respondent's twin processing deficits--auditory and visual--impeded [REDACTED] learning. Exacerbated by [REDACTED] inability to attend and focus, these processing deficits, according to Dr. Kaskel, prevented Respondent from accessing [REDACTED] education while the teacher was teaching from a chalkboard and interacting with her students. Given Respondent's extremely slow processing speed, [REDACTED] required, in Dr. Kaskel's opinion, one-on-one instruction by a teacher trained in multi-sensory instructional techniques to identify and overcome these deficits in auditory processing, visual processing, attentiveness, and processing speed.

61. Noting these issues plus the "overwhelming anxiety [that Respondent] experiences when [REDACTED] is unable to retain instruction," Dr. Kaskel recommended "some individualized instruction in the course of the school day." [REDACTED] "severe" processing speed deficit demanded that [REDACTED] receive a teacher's outline or a note-taker because [REDACTED] could not possibly take notes for [REDACTED]. For the same reason, Respondent needed multiple-choice tests because [REDACTED] slow processing speed hindered [REDACTED] ability to organize a written response. All teachers and paraprofessionals must use multi-sensory instruction with Respondent. Lastly, Dr. Kaskel recommended that, due to Respondent's "auditory defensiveness," [REDACTED] class

size should not exceed 28 students. Dr. Kaskel ended her report by stating that all previous recommendations in psycho-educational evaluations by the University of Miami remained valid and should continue to be implemented.

62. During the summer between seventh and eighth grades, Respondent's family and five other families took a trip to Idaho where Respondent's father participated in a triathlon. Lots of teenagers were present, and Respondent did fine. [REDACTED] went to lunch with others. [REDACTED] became independent, fishing on [REDACTED] own, but returning, as instructed, every two hours to check in with [REDACTED] mother or father.

63. Based on Dr. Gonzalez's advice, Respondent returned to school for eighth grade, taking four periods at school and two periods at home. After the first nine weeks, Petitioner and Respondent's parents agreed to add a fifth subject at school and reduce homebound instruction to one period. Immediately, Respondent became more anxious and irritable and could not fall asleep.

64. Due to a reading score of less than three on the FCAT, Petitioner and Respondent's parents agreed to add a mandatory reading class at school to Respondent's schedule, giving [REDACTED] six academic subjects. Respondent had individual instruction from a one-to-one teacher for one period, in which [REDACTED] primarily worked on math. At the same time, Respondent's

parents had obtained for [REDACTED] two hours' instruction daily at home. This was an arduous program for a child with Respondent's deficits, but, at least in reading, did not produce any gains.

65. Respondent's eighth-grade reading and language art teacher testified. She used multisensory instruction in reading, but admitted that Respondent made "very little" progress during a five-month period within eighth grade. She admitted that she had not collected or retained certain reading data. She stated that Respondent's head tics interfered only with [REDACTED] reading fluency, not [REDACTED] reading comprehension. She stated that Respondent had arrived in her class "not writing," but soon had demonstrated that [REDACTED] as only "a little below grade level" in written expression.

66. Respondent's eighth grade teacher attributed Respondent's failure to improve [REDACTED] reading comprehension to [REDACTED] frequent absences and late arrivals. Although she found Respondent easy to motivate, the teacher added that Respondent needed to be motivated and "needed to start listening." [REDACTED] often came to class disheveled. Respondent was alert in her language arts class, which took place in the middle of the day, but [REDACTED] was tired and often put [REDACTED] head down while in her reading class, which took place second period. The teacher reported that Respondent appeared in class more often and on

time, and thus performed better, when, in February, [REDACTED] was transferred to the third-period reading class.

67. Doubtlessly, the absences, tardiness, inattentiveness, and sleepiness of the neurotypical eighth grader are products of numerous factors--most or all of them quickly correctable. Respondent's eighth grade teacher concluded that Respondent's absences, tardiness, inattentiveness, and sleepiness were correctable and that, due to the failure of Respondent and [REDACTED] parents to correct these problems, [REDACTED] failure in reading was not the responsibility of the school.

68. Respondent's performance in eighth grade reading is a microcosm--in [REDACTED] most important subject--of the macrocosm of [REDACTED] overall educational experience, at school and at home. Respondent's failure in reading was largely the responsibility of the school, because inattentiveness and sleepiness are symptoms of Respondent's disabilities, and absences, tardiness, and sleepiness are common byproducts of symptoms of Respondent's disabilities. These facts are clearly established by the numerous professionals who have evaluated and treated Respondent for several years. If [REDACTED] is missing, late, or dozing off at school, comprehensive analysis must include the parenting efforts of Respondent's parents, but must also consider what is stressing Respondent, so as to disturb [REDACTED] sleep and cause [REDACTED]

to break down. Obvious factors include [REDACTED] academic load--both at school and at home, as Dr. Kaskel observed. More accommodation of, and less resistance to, these disabilities would have resulted in an earlier switch of class periods for reading, Respondent's most important class--a simple solution to a problem that Petitioner never should have allowed to persist as long as it did in eighth grade.

69. Early in 2006, Respondent's parents and Petitioner added a seventh period for the remainder of eighth grade. They chose a high-interest elective, home economics. Respondent's parents wanted this class to motivate Petitioner at school, given [REDACTED] interest in cooking. Petitioner agreed to provide the class, although Respondent was the only child at school with a seventh period. Concerns about overworking Respondent were probably allayed, at least in part, by Dr. Gonzalez, who, by letter dated April 18, 2006, endorsed adding a seventh period to include a high-interest elective that would allow [REDACTED] educational program to address [REDACTED] academic and social needs.

70. However, not all of Respondent's professionals shared the sanguine view of Respondent's parents and Dr. Gonzalez regarding the workload that the child could safely carry. Dr. Lani Kaskel, a licensed school psychologist with seven years' experience teaching, has seen Respondent for ten years and had successfully used behavior modification previously to

address [REDACTED] obsessive-compulsive behaviors, attention issues, and language issues.

71. By letter dated December 1, 2005, Dr. Kaskel advocated a lighter academic load due to the re-emergence of the symptoms that, a year earlier, had been a precursor to Respondent's breakdown. In her letter, Dr. Kaskel suggested the removal of Respondent's second period class at school, and she carefully noted that she was not recommending homebound instruction for this class. As she explained, "[REDACTED] problem is related to the number of academic courses [REDACTED] is subjected to on a daily basis rather than the number of hours [REDACTED] is physically attending school." She also recommended that one of Respondent's academic subjects be replaced with an elective "to reduce [REDACTED] escalated stress level."

72. In her letter, Dr. Kaskel characterized the episode of a year earlier as a "major psychological break-down," which necessitated the hospitalization of Respondent. She attributed the breakdown to the demands placed on Respondent by school.

73. Also attributing the December 2004 breakdown to overwork, Respondent's parents discontinued the home instruction in eighth grade. However, Respondent's head tics worsened again at the start of eighth grade and, due to their severity, impeded [REDACTED] ability to read and socialize. The head tics in eighth grade eased and intensified, even in the course

of a day, depending on the level of stress produced by whatever Respondent was doing at school. In particular, the tics intensified during the week of FCAT testing, and the week preceding and week following testing.

74. During eighth grade, Respondent again became explosive after school, although, as always, never at school, at least toward teachers, administrators, or peers. Respondent's parents found that they could de-escalate [REDACTED] behaviors at home by giving [REDACTED] more release time, such as to fish on [REDACTED] own or, presumably, to allow [REDACTED] to watch videos at night when [REDACTED] could not sleep. By the end of eighth grade, however, Respondent's home behaviors had improved.

75. In a report dated April 5, 2006, which Dr. Kaskel shared at an IEP meeting the next month, Dr. Kaskel stated that Respondent has a "significant" deficiency in reading comprehension, as reflected by a decline in standardized reading scores from 2004 to 2006. The report describes Respondent's reading as exclusive engagement in decoding with no assignment of meaning to the written material. Dr. Kaskel stated: "It is unquestionable . . . that the delivery of [reading] instruction must be made in an individual pupil-teacher setting." She added, due to Respondent's "documented history of physical breakdown resulting from an extended school day," it is

"mandatory" that Respondent receive [REDACTED] individualized reading instruction during the course of the regular school day.

76. Dr. Kaskel's report also notes that Respondent presents with a "severe neurological deficiency in [REDACTED] speed of processing that is exacerbated by moderate to severe auditory-vocal processing deficiencies as well as problems with ability to initiate and sustain attention."

77. In an undated report, probably from mid-2006, Dr. Kaskel reviewed the psycho-educational data. For academic achievement, she reported that Respondent had undergone another comprehensive academic skills assessment in December 2005--the first since the University of Miami assessment in 2002. Dr. Kaskel noted that Respondent scored "*significantly*" lower scores in math achievement than [REDACTED] had three years earlier. She noted that Respondent was in the lowest 5th percentile in oral reading and scored a grade equivalent of 3.7 in reading comprehension.

78. Addressing reading tests administered by one of Respondent's teachers, Dr. Kaskel noted a decline from September 14, 2005, of a grade equivalent of 3.4 to a grade equivalent of 2.1 on January 24, 2006. Citing another reading achievement test administered by one of Respondent's school psychologists, Dr. Kaskel traced a decline from March 15, 2004, of a grade

equivalent of 5.6 to a grade equivalent of 3.9 on January 30, 2006.

79. Referring again to the breakdown of December 2004, Dr. Kaskel stated that she, Dr. Gonzalez, Ms. Lara, and Respondent's audiologist all agreed that the illness had "resulted to a significant degree from the sensory overload [REDACTED] was exposed to in the large middle school environment." She added: "The fact that [Respondent] in addition to an intensive academic schedule was receiving after-school instruction on a daily basis to facilitate [REDACTED] ability to absorb [REDACTED] schoolwork was also a major contributor to [REDACTED] illness."

80. Dr. Kaskel concluded by advocating for a school with 700 or fewer students "in a low density setting." She added that [REDACTED] "hypersensitivity and difficulty with sensory regulation" drive the acceptable class size, which is no more than 20 students in a "well-structured classroom setting." She recommended individual instruction in math and reading, but stated that Respondent could participate in "traditional" classes for social studies, science, and electives. She recommended a seven-period day.

81. During the summer between eighth and ninth grades, Respondent was more compliant at home, as long as [REDACTED] could fish. [REDACTED] was less oppositional and required less redirection. [REDACTED] head tics almost vanished, as did [REDACTED] obsessive-compulsive

behaviors, such as tapping [REDACTED] mother's arm three times and then tapping another object three times.

82. Based largely on an observation of Respondent on July 29, 2006, as well as parent interviews and medical and educational records, Dr. Peter Gerhardt of the Gerhardt Autism/Aspergers Consultation Group in Baltimore, Maryland, prepared a consultative report on September 1, 2006. The report is an "educational evaluation" using "evidence-based practices" following a test of adaptive and maladaptive behaviors. At the time of the test, Respondent was 14 years, nine months old.

83. The first area tested was Broad Independence, which averages four areas of adaptive functioning: motor skills, social interaction and communication skills, personal living skills, and community living skills. For motor skills, Respondent scored at an average age of eight years, eight months. [REDACTED] gross- and fine-motor skills are "limited."

84. The second area tested was Social Interaction and Communication Skills, which comprises Respondent's interactions with others in various social settings and [REDACTED] use of signs, oral expression, and written symbols. For this area, Respondent scored at an average age of seven years, two months. [REDACTED] social interaction skills and language comprehension skills are "limited to very limited," but [REDACTED] language expression skills are "limited to age-appropriate."

85. The third area tested was Personal Living Skills, which includes adaptive behaviors related to eating and preparing meals, personal hygiene, and housekeeping. For this area, Respondent scored at an average age of six years, six months. [REDACTED] personal self-care and domestic (i.e., housekeeping) skills are "very limited." [REDACTED] toileting skills are "very limited" to "negligible," and [REDACTED] dressing skills are "limited." However, [REDACTED] eating and meal-preparation skills are "age-appropriate."

86. The fourth area tested was Community Living Skills, which measures the subject's ability to assume social and economic responsibilities. For this area, Respondent scored an average age of twelve years, one month. [REDACTED] time and punctuality skills and work skills are "limited," [REDACTED] home and community orientation skills are "limited to age-appropriate," and [REDACTED] money and value skills are "age appropriate."

87. Overall, in terms of broad independence, Respondent scored an average of eight years, six months, so [REDACTED] functional independence is "limited." Overall, Respondent displayed "moderately serious problem behaviors"; "marginally serious internalized maladaptive behaviors, including unusual or repetitive habits"; "serious asocial maladaptive behaviors, including socially offensive and uncooperative behavior"; and "marginally serious externalized maladaptive behaviors,

including disruptive behavior, destructiveness to property, and hurting others."

88. The report makes five recommendations. The first recommendation is a "school/classroom environment designed to reduce school-related anxiety and its concomitant physical presentation." Citing Respondent's history of school-related anxiety and stress, the report states that it is of critical importance to specifically tailor [REDACTED] educational environment to: "1) reduce [REDACTED] anxiety/stress, 2) promote the development of self monitoring/self management competencies relevant to stressful environmental conditions, and 3) provide consistently positive interactions with peers, teachers and related school personnel."

89. The recommendation concerning the design of the school/classroom environment includes three items: limit the regular education class size to 20-25 students and limit the "overall size of the school," as a "smaller school size [would be] a necessary component of an appropriate education"; reduce to a minimum unnecessary auditory, visual or tactile stimulation; and institute a "system of data collection to directly and accurately assess the impact of different environmental stressors on [Respondent's] physical well-being."

90. The second recommendation is a "[d]irect and intensive intervention in the area of communication and social

competence." The recommendation is that "direct and intensive instruction in both expressive and receptive social and communicative competence [is] necessary and appropriate." This instruction should include "direct, one on one instruction provided by competently trained school personnel, group instruction inclusive of neurotypical peers, and generalization strategies to support the mastery of new acquired skills across school environments, personnel and peers." This recommendation warns that social competence instruction "in isolation and absent regular opportunities to generalize newly learned skills is . . . ineffective and educationally inappropriate."

91. The third recommendation is "[d]irect and intensive reading intervention with emphasis of [sic] reading fluency." Reading is Dr. Gerhardt's "primary academic concern." The fourth recommendation is "[a]dequate training of classroom personnel."

92. The fifth recommendation is "[a]n emphasis on individualized instruction within an inclusive setting." This recommendation suggests the following supports or modifications: pull-out or resource room instruction to support academic instruction and promote grade level competencies, regular-education personnel competent to implement the recommendations and promote a socially inclusive classroom, and an awareness of

the potential for learners such as Respondent to become the victim of verbal, physical and even sexual abuse.

93. Dr. Gerhardt added several observations concerning Respondent. First, any functional assessment of behavior needs to take place in the setting in which the assessor is seeking to regulate the behavior. Second, even though mere exposure to typical peers, without instruction, is not sufficient to help Respondent remediate [REDACTED] deficit in social skills, exposure to such peers and practicing appropriate social behaviors are crucial for Respondent's development. Third, Dr. Gerhardt did not form a specific opinion concerning any auditory sensitivities that Respondent might have.

94. Dr. Gerhardt testified that some persons with autism manifest no sensory challenges. When pressed during [REDACTED] deposition to identify any such challenges manifested by Respondent--auditory, visual, or tactile--Dr. Gerhardt mentioned a situation that displayed the lack of such sensitivity: Respondent snagged a fish hook while fishing and, so desirous of returning to fishing, [REDACTED] jumped into the water, retrieved [REDACTED] hook, and resumed fishing, without apparent discomfort from [REDACTED] soaked shoes and pants. However, Dr. Gerhardt's direct contact with Respondent was during the middle of the summer, 2006, and [REDACTED] observed Respondent at home, at play, and in the community, not in school and not particularly under any stress. Also,

Dr. Gerhardt testified to the "critical importance" of tailoring Respondent's educational environment to: 1) reduce [REDACTED] anxiety and stress and 2) promote [REDACTED] ability to self-monitor and self-manage regarding stressful environmental conditions.

95. Respondent's mother reports that Respondent is not so auditorily challenged that [REDACTED] cannot manage the sound levels of grocery stores, restaurants, and theme parks. As she explained, at home, knowing that [REDACTED] does not have to perform math or reading, Respondent can tolerate higher noise levels. Clearly, Respondent can tolerate higher levels of auditory stimulation and other sensory challenges when [REDACTED] is not stressed or fatigued or when [REDACTED] is pursuing a keen interest, such as fishing. The educational challenge is to structure a program that calibrates the stressors carefully, ensuring that each stressor, such as reading instruction or group science teaching, carries greater benefits than it imposes costs. When not opting for homebound instruction, Respondent's parents prefer a smaller school and a full academic load. When not opting for hospital-bound instruction, Petitioner prefers a regular school, smaller classes, and, at least at first, a lightened academic load that is progressively built up until it is a regular load or Respondent demonstrates that [REDACTED] is at [REDACTED] maximum capacity.

III. Procedural Issues, Including IEP Planning Process

96. The IEP team conducted three meetings. The meetings took place on April 24, May 16, and May 22, 2006. Each meeting started at 9:00 a.m. and ended at 3:30 p.m.

97. The April 24 IEP meeting went well, as the parties worked collaboratively. As described by a child advocate who attended all three IEP meetings to assist Respondent, this meeting was structured, and Petitioner's staff elicited information from Respondent's parents, who were prepared to present a lot of information. The IEP team listened to some of their information and deferred consideration of the remainder. Necessarily, the IEP team limited discussion.

98. Respondent bases [REDACTED] procedural challenge in part on two comments by Twila Grandchamp, who was an ESE Director for Petitioner. First, Ms. Grandchamp stated that the IEP team would not discuss the setting of [REDACTED] Academy, a magnet school operated by Petitioner on Key Biscayne and sought by Respondent's parents. The record fails to support a finding that [REDACTED] Academy would be a better setting than [REDACTED] High School for the education of Respondent. Moreover, there is some indication in the record that Petitioner has discontinued a small ESE program that it had started at [REDACTED] Academy.

99. Although a brief discussion of [REDACTED] Academy might have resulted in the identification of additional features to

incorporate into Respondent's educational program, nothing required Petitioner to structure the discussion of Respondent's unfolding IEP by focusing on the setting of ██████ Academy. Such an approach probably would have been less efficient than directly discussing specific features of Respondent's IEP. Thus, the refusal to discuss ██████ Academy was not a failure to permit Respondent's parents to participate meaningfully in the IEP-preparation process.

100. Second, Ms. Grandchamp stated that the documents produced by Respondent's parents were in the record and thus required no discussion, so she permitted none. This is immaterial if members of the IEP team examined the documents, and at least one prominent IEP team member did so. An instructional supervisor in autism, Dr. Annmarie Sasseville read at least five professional evaluations provided by Respondent's parents. It is not unreasonable to assume that she would discuss relevant portions of these materials with the IEP team. Under these circumstances, it is impossible to find that this decision by Ms. Grandchamp deprived Respondent's parents of the right to participate meaningfully in the IEP-preparation process.

101. On May 12, 2006, Respondent's parents sent a letter to Rae Burnham, who had taught Respondent in seventh grade and the first half of eighth grade before transferring to

██████████ High School, where she monitors eleventh and twelfth grade ESE students' work. Ms. Burnham has taught for 29 years with Respondent and holds a master's degree in special education.

102. In their letter to Ms. Burnham, Respondent's parents expressed concern that their ██████████ would not be able to function at a school with 3600 students, which is the student population of ██████████ High School. They expressed a preference for ██████████ Academy, which is operated by Respondent. They asked Ms. Burnham for a written response that they could present at the May 16 IEP meeting.

103. Ms. Burnham complied. By letter dated May 15, 2006, she stated: "it became obvious that [Respondent's] sensitivity to noise and other stimuli's [sic] increased dramatically in the 7th grade. . . . Due to the set up and arrangement of the classroom, there was a tremendous amount of noise and stimulation." Ms. Burnham reported that she watched as Respondent became "increasingly less tolerant," until ██████████ was unable to participate at all. In eighth grade, by contrast, Ms. Burnham stated that Respondent was in a "smaller class setting with less students and more structure." Each student had ██████████ own desk, not a group table as was used in seventh grade. Students were not allowed to roam around the room.

104. Ms. Burnham memorably added:

it was overwhelming for me to enter the 'city' they call [REDACTED] High School]. The school is huge and the halls are overcrowded with people. I cannot predict how a similar change [from Respondent's middle school to [REDACTED] High School] will affect [Respondent], but I believe it would be fair to say that the situation would be difficult for [Respondent] to tolerate and [REDACTED] functional performance would once again regress as it did in the 7th grade.

105. Although the "'city' they call [REDACTED] High" is burnished in the mind of the Administrative Law Judge, both as a phrase and an image, the force of Ms. Burnham's letter is undermined by its non sequitur. In seventh grade, Ms. Burnham found, convincingly, that overstimulation within the classroom produced Respondent's breakdown, and, in eighth grade, she found, again convincingly, that a classroom with more structure, fewer students, and, thus, less stimulation, worked for Respondent. For high school, Ms. Burnham based her analysis, not on classroom characteristics, but on school characteristics.

106. Obviously, a noisy, disruptive classroom may exist within a small school, just as a peaceful, structured classroom may exist within a large school. A student spends more time in a classroom than does in the halls and lunchroom. Also, Petitioner can mitigate the stimulation of extra-classroom time by allowing Respondent to change classes three minutes early or eat in a quiet area, as the May 2006 IEP provides.

Ms. Burnham's argument therefore lacks any force, and it is irrelevant whether the IEP team saw her letter. It is unclear why the letter did not reach the IEP team, although it may have something to do with Ms. Burnham's salutation, "To Whom It May Concern."

107. The omission of Ms. Burnham's letter involves another procedural issue raised by Respondent: the failure of Petitioner to produce educational records. The failure occurs at two points: at the 2006 IEP meetings and subsequently. The only other potentially significant document that appears to have been omitted from the IEP meetings was the results of a Woodcock Johnson reading comprehension test administered shortly before the IEP meetings. This omission is immaterial. The IEP team already had ample evidence that Respondent's reading comprehension had not improved for several years.

108. The failure to produce records after the IEP meetings pertains to a demand by Respondent dated May 30, 2006. Although the IEP meetings were over and the May 2006 IEP had been finished, the production of these documents was important to Respondent's decision whether to file a due process request and, if filed, Respondent's need to prepare for the hearing. It was obvious at the hearing that Petitioner failed to produce all of the records, despite several waves of production.

109. However, no evidence suggests that Petitioner intentionally or recklessly failed to produce documents. Few records among the thousands of documents were tardily produced or lost. Most importantly, Respondent has identified no omitted records that would have been material to the issues presented in this case, including the responsibility of Petitioner to provide Respondent with a free appropriate public education. Respondent's mother is understandably concerned about tardily produced records arguably reflecting adversely on the safety of her [REDACTED] in [REDACTED] educational setting a few years ago, but this matter is outside of the scope of the present case.

110. As for the remaining IEP meetings, the record suggests that the participants became more stressed. Toward the end of the meetings, some participants may even have become antagonistic. The child advocate described Ms. Grandchamp at the May 16 at IEP meeting as "curt" and "less congenial" than she had been at the previous meeting, but the record supports a finding that Respondent's parents meaningfully participated in the meetings.

111. For instance, Ms. Lara attended the May 16 meeting and spoke extensively to the IEP team. She discussed such matters as sensory overload and tactile stimulation. Respondent's occupational therapist, who is responsible for designing sensory integration therapy, discussed with Ms. Lara

the fact that Respondent had developed some effective compensatory strategies to modulate stimulation and allow [REDACTED] to focus on the task at hand. Ms. Lara agreed. The IEP team, including Ms. Lara, determined that Respondent was accessing [REDACTED] education without sensory integration therapy, so [REDACTED] compensatory skills were adequate. Without regard to whether the May 2006 IEP adequately addresses sensory overload, the underlying process was adequate.

112. The IEP team did not finish the IEP at the May 16 meeting, but they did decide upon the setting, [REDACTED] High School. Ms. Grandchamp stated that no other site would be considered, but this does not mean that no other site had been considered. Ms. Grandchamp allowed someone from [REDACTED] Academy to make a presentation, but she allowed no discussion following the presentation. The setting is typically selected at the end of the planning process, but selecting it earlier does not mean that the IEP team failed to consider other potentially appropriate settings.

113. The mood at the May 22 IEP meeting was, according to the child advocate, "okay, let's get this done." The IEP team addressed the educational program to be implemented at [REDACTED] High School. Respondent's parents tried to bring up issues, but Ms. Grandchamp ran the meeting firmly, disallowing them to insert issues that she did not want to

address. The IEP team discussed more limited matters with Respondent's parents.

114. The substantive deficiencies in the May 2006 IEP do not mean that the planning process was necessarily flawed. As noted above, sensory issues--one of the areas of substantive deficiency--were adequately addressed, as was reading, which is the other area of substantive deficiency. The IEP team discussed Respondent's decline in reading comprehension and the use of a one-to-one reading teacher for Respondent, but elected not to provide this service.

115. One particularly noteworthy element of the IEP planning process was that Respondent made a presentation to the large IEP team. [REDACTED] made an effective presentation to the group and, by doing so, [REDACTED] and the IEP team gained a better understanding of the investment that the other party is making in Respondent's education.

IV. IEP

116. The IEP dated May 22, 2006, assigns Respondent to [REDACTED] High School for the 2006-07 school year with a placement from 0-40 percent of the time in a separate class. The May 2006 IEP identifies Respondent's ESE eligibilities as autism, language impaired, speech impaired, and hospital/homebound (until May 26, 2006).

117. The present levels of performance in the May 2006 IEP reflect input from the parents, the general education teacher, the ESE teacher, the speech-language pathologist, the ESE chair, District personnel, and the hospital/homebound teacher. The Diagnostic Assessment of Reading, which was administered in January 2006, shows that Respondent's word recognition is at a fourth grade level, silent reading is at a fifth grade level, and word meaning is at a third grade level. The Oral Reading for Fluency, which was administered in November 2005, reveals that Respondent is at "high risk."

118. The May 2006 IEP describes Respondent's present level of performance as:

[Respondent] likes to participate in class. [REDACTED] is able to summarize, compare and contrast using graphic organizers. [REDACTED] is able to answer "right there" type of questions of 1 step. Responds to questions asked by a peer. According to diagnostic reading evaluation: [REDACTED] has phonemic awareness skills. [REDACTED] can read 36 basic sight words. [REDACTED] has phonics skills and is able to identify: consonant sounds, blends, digraphs, vowels and vowel combinations (in context and isolation). [REDACTED] has structural strengths: analysis skills and is able [sic] to identify word parts, inflectional endings, prefixes, suffixes, compound words. [REDACTED] was able to read words in isolation on an independent level from a 3rd-4th grade list, with no more than 2 errors. Independent reading comprehension level was from PP-1st. Instructional reading comprehension level was 2nd grade level. Frustration level was on 3rd grade.

According to Woodcock Reading Mastery Test-R
[Respondent] scored:

Word Identification 4.2 G[rade]E[quivalent]
Word Attack 10.0 GE
Word Comprehension 5.6 GE
Passage Comprehension 3.6 GE

[Respondent] seems to comprehend better when [redacted] reads aloud. [Respondent] can transition in hallway from one class to another. [redacted] can follow directions without redirection for up to 10 min, with accommodation or leaving early, depending on the task, on a known/non-preferred task. can use a computer without assistance, open programs, and navigate a mouse. [redacted] adapts to change of teacher in room. interacts with peers in a small group setting, and adults. [redacted] can paraphrase 1-2 step directions. [redacted] can write a 5 paragraph essay using a graphic organizer and dictation, and/or keyboarding. [redacted] understands figurative language, similes in context at [redacted] instructional level, in the language arts class. [Respondent] is able to perform math calculations to solve a word problem with prompting and breaking down of steps and visual cues. [redacted] has established reciprocal/true friendships outside of school with children who share similar interests. [redacted] is aware of things that cause [redacted] stress.

Weaknesses: with social communication, idioms, and articulation of the "r" sound. According to parent, [redacted] has an auditory processing disorder. [redacted] rate of learning is slow. [redacted] feels anxious at times. [redacted] has a deficit in processing.

Meeting ended at 3:00 pm. Team will reconvene on 5/16/06 to complete IEP.

5/16/06 strengths (con't). [Respondent] is beginning to respond to 1 step directions.

5/22/06. Para[professional]

responsibilities:

- para will meet [Respondent] prior to school starting in a designated spot and accompany to lunch & fire drills
- redirection
- reteaching
- social interpreter
- supervision/safety
- breaks
- communication log
- monitor caffeine intake

For L. Arts (English), Reading, Math and Learning Strategies--there will be no more than 3 students including [Respondent] in those classes.

5/16/06

Weaknesses (con't)

In home setting, demonstrates obsessive/compulsive behavior during hospital/homebound instruction.

██████ has difficulty with multi-step word problems. ██████ needs repetition to learn a new math skill (avg. 2-3 class periods).

Use of FM system will be reviewed and assessed during first 9 wks of school. District audiologist and parent will be consulted.

For Language Arts (English) and Reading elective class [Respondent] will initially be assigned to the teacher's class for Autism Unit. After master schedule is developed at ██████████ Sr. consideration will be given to place [Respondent] in a general ed. Lang. Arts (English)/Reading class with a smaller teacher/pupil ratio. A[ssistant] P[rincipal] at ██████████ Sr. will contact parent to discuss options once the master schedule is completed.

Parents assure that they will monitor [Respondent's] level of stress and alert the school staff (ESE AP or chairperson)

immediately so that the IEP team can reconvene to address [REDACTED] scheduling needs.

Parents will be contacted prior to any field trip/travel outside of school to discuss accommodations.

ISP (Individual Student Planning) meeting will be done on an early release day during 1st nine weeks of school.

Be aware of parent concerns about [Respondent's] leaving campus if [REDACTED] gets distracted.

Training: Counselor will receive training on working with [Respondent on] stress reduction and working with others.

119. The IEP states that Respondent's disabilities affect [REDACTED] involvement in the general curriculum as follows:

Progress and involvement in the general curriculum is affected by difficulty with reading vocabulary, fluency and comprehension. [REDACTED] has difficulty with task analysis, and staying on task without redirection. [REDACTED] has difficulty with conventions, punctuation, capitalization and proofreading. [REDACTED] has difficulty with topic maintenance, maintaining a conversation, transitioning in a conversation. [REDACTED] has difficulty [sic].

120. The May 2006 IEP identifies Respondent's priority educational needs as reading skills, written communication skills, on task/organizational skills, social skills, articulation skills, language usage skills, math applications, self-advocacy, and stress reduction.

121. The May 2006 IEP states that Respondent is interested in cooking, fishing, reptiles, animals, and running a business.

█ also has expressed an interest in science. The May 2006 IEP indicates that Respondent is working on a standard diploma.

122. For supplementary aids and services, the May 2006 IEP identifies paraprofessional assistance in all classes on a daily basis, autism support at the school site monthly, science class daily, and home economics class monthly.

123. For related services, the May 2006 IEP identifies counseling twice weekly, a computerized reading program in the classroom daily, occupational therapy 30 minutes weekly, and an FM unit in the classroom on a daily basis when Respondent chooses to use it.

124. For support needed for IEP implementation, the May 2006 IEP identifies the general education teacher, who needs training in Respondent's learning needs and IEP implementation on a one-time basis with follow up as needed; and the autism teacher, speech-language pathologist, paraprofessional, and autism support teacher, who need training in learning styles and techniques in reading and math on a one-time basis.

125. Under other pertinent information, the May 2006 IEP notes that Respondent is taking Abilify (20 mg), Zoloft (50 mg), Ritalin LA (20 mg), and Tenex (20 mg). The IEP allows staff to use physical restraints on Respondent if presents a danger

to [REDACTED] or others, or to property. The IEP notes that Respondent suffers from bladder spasms that are aggravated by caffeine, so [REDACTED] must use restrooms as needed. The IEP states that Respondent is not to have a shortened school day.

126. With respect to the least restrictive environment, the May 2006 IEP selects a "separate class" for Respondent. The most inclusive educational placement is "general education class," which means that the ESE student is placed with general education students from 80-100 percent of the time. The next "resource room" means that the ESE student is placed with general education students from 41-79 percent of the time. The "separate class" means that the ESE student is placed with general education students from 0-40 percent of the time. The two least inclusive educational placements are "separate day school" and "hospital/homebound."

127. To support its educational placement decision, the IEP team cited Respondent's frustration and stress, self-esteem, distractibility, need for lower pupil-to-teacher ratio, time needed to master educational objectives, need for instructional technology, social skills causing increased isolation, and difficulty completing tasks.

128. For educational services, the May 2006 IEP states that Respondent is to receive general education and ESE instruction in science and home economics. In English, math,

reading, and learning strategies, the instruction is exclusively ESE. Speech and language are both types of therapy.

129. The IEP explains that Respondent cannot be educated to a greater extent in general education classes because needs "specialized instruction in reading, writing, on task/organizational, social, articulation, language usage, math applications, self-advocacy, stress reduction skills." The IEP states that Respondent will receive specialized instruction in reading skills/written communication skills in English class daily, on task/organizational skills in all classes daily, social skills in counseling, articulation/language usage in therapy 80 minutes per week, math applications in math class daily, and self-advocacy/stress reduction in all classes daily.

130. The May 2006 IEP identifies the persons responsible for implementing the IEP as the general education teachers, ESE teachers, speech-language pathologist, occupational therapist, and counselor.

131. The May 2006 IEP contains annual goals and benchmarks. They are organized by the nine priority educational needs. The IEP assigns varying numbers of goals to each priority educational need: reading skills--four goals; written communication skills--one goal; on task/organizational skills--three goals; social skills--two goals (one shared); articulation skills--one goal; language usage skills--three goals (one

shared); math applications--three goals; self-advocacy--one goal; and stress reduction--one goal.

132. The first goal under the first priority educational need of reading skills is: "[Respondent] will be able to read/listen to a selection at instructional level and above and determine higher order information from text." The reading teacher is to measure Respondent's progress weekly. Mastery criteria are 80 percent accuracy on teacher-made tests and curriculum-based assessment. The benchmarks are: "1) identify pattern and story organization, 2) identify the question type, and 3) analyze and paraphrase higher order question types."

133. Instructional level is the level at which the class is taught, which is grade level for Respondent. Independent level is the level at which a student functions on [REDACTED] own. The May 2006 IEP is not entirely consistent in the use of these terms, at least once treating "instructional" level as "independent" level. Respondent's ninth grade ESE teacher made the same mistake, as discussed in more detail below. Also, as she explained, the mastery criteria in the May 2006 IEP apply to the goals, not the benchmarks.

134. The second goal under the first priority educational need of reading skills is: "[Respondent] will be able to identify the correct meaning of a multiple meaning word in the context of a sentence." The language arts teacher is to measure

Respondent's progress weekly. Mastery criteria are 80 percent accuracy on teacher-made tests and curriculum-based assessment. The benchmarks are: "1) given several choices, identify the correct meaning of the word, 2) read the word in context to check correctness, and 3) apply knowledge of prefixes, suffixes and roots to help determine meaning."

135. The third goal under the first priority educational need of reading skills is: "[Respondent] will be able to determine the meaning of vocabulary words using context from various text clues in a reading selection, from a grade level text." The language arts teacher is to measure Respondent's progress weekly. Mastery criteria are 80 percent accuracy on teacher-made tests and curriculum-based assessment. The benchmarks are: "1) identify vocabulary words in the selection (grade level text), 2) use context clues to grasp meaning, and 3) identify base word, prefixes, suffixes."

136. The fourth goal under the first priority educational need of reading skills is: "[Respondent] will be able to read an unfamiliar selection with fluency at [REDACTED] independent reading level." The reading teacher is to measure Respondent's progress weekly. The mastery criterion is a score of "medium risk" on the Oral Reading Fluency test. The benchmarks are "1) re-read a selection with a model and prompting with fluency, 2) re-read a

selection with a model and no prompting, and 3) re-read a selection without a model."

137. The only goal under the second priority educational need of written communication skills is: "[Respondent] will be able to write a 5 paragraph cohesive essay using correct conventions." The language arts teacher is to measure Respondent's progress weekly. The mastery criteria are three out of five opportunities on a rubric to be developed. The benchmarks are "1) will identify type of essay after reading the prompt, 2) use correct graphic organizer to plan [REDACTED] writing, with prompting, and 3) edit [REDACTED] own work (monitor & self-identify)."

138. The first goal under the third priority educational need of on task/organizational skills is: "[Respondent] will begin and complete a given assignment during time frame allotted." The teachers and occupational therapist are to measure Respondent's progress weekly. There are no mastery criteria. The benchmarks are "1) start work promptly with minimal redirection, 2) listen attentively with eye contact toward instruction & repeat 1-2 step directions in sequence, and 3) ask for assistance by raising hand & place completed assignment in designated area."

139. The second goal under the third priority educational need of on task/organizational skills is: "[Respondent] will

save, organize, & retrieve files and folders for classroom activities on a computer." The teachers are to measure Respondent's progress weekly. The mastery criteria are four out of five opportunities on student work product. The benchmarks are "1) use organized folders to save & retrieve files with prompting, 2) will create folders, save & retrieve files with prompting, 3) save new files to appropriate folder & retrieve with minimum prompting, and 4) create a new folder, save & retrieve files independently with visual cue/reminder card."

140. The third goal under the third priority educational need of on task/organizational skills is: "[Respondent] will demonstrate organizational skills to complete a task." The teachers and occupational therapist are to measure Respondent's progress weekly. The mastery criteria are four out of five opportunities on student work product and agenda. The benchmarks are "1) take out materials after teacher prompting, 2) carry materials/assignments to and from class, and 3) write homework assignment in agenda book."

141. The first goal under the fourth priority educational need of social skills and the first goal under the sixth priority educational need of language usage skills is: "[Respondent] will use communication strategies to initiate and participate in conversations including verbal and nonverbal communication in the school setting." The teachers and speech-

language pathologist are to measure Respondent's progress weekly. The mastery criteria are 85 percent accuracy in teacher observations and as shown in therapy. The benchmarks are "1) . . . will continue to identify nonverbal communication, i.e., eye contact, facial expressions, gestures, body posture, 2) . . . will match socially acceptable body language and speaking style to appropriate situations, . . . 4) . . . will initiate and maintain a fluent, mutual conversation and [REDACTED] will recognize and initial topic shifts, [and] 5) . . . will role-play and critique conversations, interviews, and phone calls."

142. The second goal under the fourth priority educational need of social skills is: "[Respondent] will interact and work cooperatively in class with peers on a given task." The teachers are to measure Respondent's progress weekly. Mastery criteria are four out of five teacher observations. The benchmarks are "1) select a partner independently with minimal prompting, 2) participate actively in discussions in a small group of 3-5 students, [and] 3) participate actively in class projects that require working cooperatively in a small group of 2-5 students."

143. The only goal of the fifth priority educational need of articulation skills is: "[Respondent] will produce the /r/ phoneme in clear, intelligible speech in an unstructured

conversational speech therapy setting." The speech-language pathologist is to measure Respondent's progress weekly. Mastery criteria are 85 percent accuracy in therapy. The benchmarks are "1) . . . will use a slower speech pattern to increase clear speech in spontaneous conversation in therapy [and] 2) . . . will monitor and self-correct the production of the /r/ and vocalic /r/ phonemes in the therapy setting with visual cues and/or verbal prompts from the Speech-Language Pathologist when necessary."

144. The second goal of the sixth priority educational need of language usage skills is: "[Respondent] will demonstrate comprehension of analogies, metaphors, and idioms in the therapy session." The speech-language pathologist is to measure Respondent's progress weekly. Mastery criteria are 85 percent accuracy in therapy. The benchmarks are "1) [u]sing ██████ auditory memory skills, . . . will demonstrate recall of the target analogy, metaphor or idiom in structured language intervention activities [and] 2) . . . will interpret the idiom and explain the metaphor and analogy as presented by the Speech-Language Pathologist using verbal cues and visual materials in the therapy setting."

145. The third goal of the sixth priority educational need of language usage skills is: "[Respondent] will demonstrate the ability to recall a series of events and to verbally sequence

the events accurately in the therapy setting." The speech-language pathologist is to measure Respondent's progress weekly. The mastery criteria are 85 percent accuracy shown in therapeutic data. The benchmarks are "1) . . . will comprehend and recall the target sequence and indicate what . . . does not understand, 2) . . . will verbally sequence events of everyday life, the events in a story, and the progression of a story line in a movie, [and] 3) . . . will sequence material from classroom reading material with visual cues and verbal prompts by the Speech-Language Pathologist."

146. The first goal under the seventh priority educational need of math applications is: "[Respondent] will solve two-step word problems that include decimals, fractions and/or integers." The math teacher will measure Respondent's progress weekly. The mastery criteria are 80 percent accuracy in tests, student work project, and graded work samples. The benchmarks are "1) read word problems, 2) re-tell questions, 3) identify steps necessary to solve problem, 4) translate words into mathematical expressions, 4) [sic] calculate, [and] 5) check answer for accuracy."

147. The second goal under the seventh priority educational need of math applications is: "[Respondent] will solve math problems that include rational & irrational numbers." The math teacher will measure Respondent's progress weekly. The

mastery criteria are 80 percent accuracy in tests, student work product, and graded work samples. The benchmarks are "1) . . . will identify & orally tell steps to solve problems [and] 2) . . . will use visual cues to check steps for accuracy."

148. The third goal under the seventh priority educational need of math applications is: "[Respondent] will read information on a given chart/graph." The math teacher will measure █████ progress weekly. The mastery criteria are 80 percent accuracy in tests, student work product, and graded work samples. The benchmarks are "1) . . . will identify title [obscure word] on graph/chart, 2) . . . will locate information, 3) . . . will mark/highlight information on graph/chart, [and] 4) . . . [will] interpret information on graph/chart."

149. The only goal under the eighth priority educational need of self-advocacy is: "[Respondent] will express █████ desires, preferences and needs to adults and peers." Teachers and the counselor will measure Respondent's progress weekly. Mastery criteria are four out of five opportunities on teacher and counselor data. Benchmarks are "1) answer questions regarding desires, preferences & needs posed by adult, 2) express desires, needs & preferences with practice & prompting, 3) [express desires, needs & preferences] with prompting, [and]

4) [express desires, needs & preferences] independently with minimum visual cues."

150. The only goal under the ninth priority educational need of stress reduction is: "[Respondent] will identify and learn 3 techniques for coping with stress and anxiety." The counselor will measure Respondent's progress weekly. Mastery criteria are four out of five opportunities on counselor data. Benchmarks are "1) . . . will choose 3 strategies to learn from a menu of 4-5 strategies, 2) learn steps for specific techniques & model in 1:1 setting, 3) identify situations & match techniques for situation, [and] 4) demonstrate use of 3 techniques."

151. The May 2006 IEP contains numerous adaptations, including allowing Respondent to chew gum or candy when [REDACTED] tics appear, giving Respondent more time on tests and tasks, reviewing test format and concept formation, allowing Respondent to dictate to [REDACTED] paraprofessional [REDACTED] written responses to tests that are not multiple choice, designating one staffperson to whom Respondent can go for support, shortening Respondent's homework assignments without excluding any content, using a daily communications log, sending home pages for unit review about one week prior to the test, breaking longer tasks into smaller steps, pairing visual with verbal information, using a multisensory teaching approach, providing wait time for

Respondent to respond to a question, repeating and highlighting key words in assignments and tests, reducing the number of items per page on handouts and tests, providing the parents with information one week in advance on new skills that will be covered in class and on homework, granting the teacher discretion to offer Respondent open-book tests, providing Respondent a visual/written schedule, dismissing Respondent three minutes early, giving Respondent a pass to use the restroom without disrupting class, identifying and encouraging peer relationships for academics and social interactions, ensuring the paraprofessional writes all assignments in an agenda book, assigning preferential seating near the teacher, allowing Respondent to read aloud or whisper while reads, allowing or encouraging Respondent to read daily on preferred topics, using colored highlighting tape to assist with sequencing, giving Respondent breaks while working, and allowing Respondent to walk outside with the paraprofessional to get a snack when [REDACTED] is not feeling well.

152. The May 2006 IEP provides that Respondent is entitled to extended school year services. The IEP provides for five days weekly at one hour per session of extended school year services in reading, writing and math, on task/organizational skills, and self-advocacy and stress reduction. The IEP provides for one day weekly at one hour per session of extended

school year services in articulation/language skills, and one day weekly at 30 minutes per session of extended school year services in social skills.

V. Respondent--In School at Start of 2006-07 School Year

153. The implementation of the May 2006 IEP started in the 2006-07 school year. The IEP team finished this IEP just a few days prior to the start of final exams at the end of the 2005-06 school year, so Petitioner had no chance to implement it at that time.

154. With considerable misgivings, Respondent's parents allowed their [REDACTED] to attend [REDACTED] High School at the start of the 2006-07 school year. They liked the school, where Respondent's older brother attends, but did not believe the setting was suitable for Respondent, whom they feared would suffer another breakdown similar to that of December 2004.

155. But Petitioner did not have much more of a chance to implement the May 2006 IEP during the 2006-07 school year than it had at the end of the preceding school year. Respondent attended [REDACTED] High School for 11 days. [REDACTED] started school on August 17, 2006, and [REDACTED] last day was September 1, 2006--the day after Labor Day--at which time [REDACTED] parents withdrew [REDACTED] from school. (School was closed for hurricane days during this period.)

156. Prior to the start of school, Karen Uhle, who was the ESE teacher assigned to Respondent, Suzanne Murray, who was an autism support teacher assigned to Respondent and [REDACTED] teachers, and Dr. Sasseville met to discuss Respondent and the implementation of [REDACTED] IEP. They discussed such matters as Respondent's educational needs and sensory integration process. Ms. Uhle is Board-certified in ESE and has taught for 30 years, and Ms. Murray has taught for 18 years.

157. Ms. Murray met Respondent at [REDACTED] High School on the morning of [REDACTED] first day to try to help with the transition. Ms. Murray watched as Respondent separated willingly from [REDACTED] parents, who separated willingly from [REDACTED]. Ms. Murray introduced herself and immediately found Respondent to be very animated and engaging. [REDACTED] spoke eagerly about [REDACTED] interests, such as fishing, and asked questions about the class, lunch, and the rules at [REDACTED] new school. Ms. Murray and Respondent's paraprofessional responded to [REDACTED] questions, explaining that, among other things, [REDACTED] would eat outside where it was quieter and where other students ate.

158. Ms. Murray saw Respondent's head tics on the first day, but said they were not too noticeable. Ms. Uhle described Respondent's head tics as pronounced on the first day, although the paraprofessional, who had worked with Respondent the prior year, said that they were not as bad as they had been at times

in eighth grade. Ms. Murray testified that Respondent's head tics were never particularly frequent, except for one day when they tapered off by the end of the day. Dr. Sasseville, who only saw Respondent four times at ██████████ High School, but had seen ██████ during the previous summer, noticed that ██████ head tics increased on the second Monday of school.

Dr. Sasseville was "alarmed" by the tics, which exceeded anything that she had seen previously in Respondent, but she stated that they decreased by the end of the day to the levels of the first week. Respondent liked to have ██████ head massaged, so the paraprofessional brought a head massager to school and , sometimes as the suggestion of Ms. Uhle, used it to massage Respondent's head, which reduced the tics.

159. Ms. Uhle's classroom was at one end of the school, near an entrance. It is not in a particularly busy hallway, nor do relatively large numbers of students pass by it. Ms. Uhle's classroom itself is small, containing three student tables, a teacher desk, a computer, and a fish tank. Respondent received instruction in study skills, math, and reading in Ms. Uhle's class.

160. Ms. Uhle testified that she had no problem implementing the May 2006 IEP, and she did so enthusiastically and effectively, with one exception. Ms. Uhle testified several times that instructional level was independent level, which, in

reading, would mean that the instructional level was about third grade. As noted above, Respondent's instructional level in reading was ninth grade. Ms. Uhle confused [REDACTED] reading instructional level with independent level, which is about third grade. Although Ms. Uhle was obviously nervous when she testified, her testimony on this point was not a product of her nervousness, as she repeated this misstatement several times. When asked by Respondent's counsel if she would administer a reading achievement test at the third grade level at the end of the ninth grade school year, Ms. Uhle replied that she would, even though this test would only indicate how well Respondent was reading at the third grade level.

161. Ms. Uhle found that Respondent was the hardest worker in her class, although [REDACTED] left school before she had finished with orientation and review of the past year's work. At the time of [REDACTED] departure, Ms. Uhle was starting to administer placement tests.

162. Ms. Murray saw Respondent at school seven or eight times in the first two weeks. On the first day, she spent the entire day with [REDACTED]; subsequently, she spent one to several hours with [REDACTED]. In the first two weeks, Ms. Murray spent 10-20 hours with Respondent at school. Ms. Murray observed Respondent several times in Ms. Uhle's class and only saw [REDACTED] lower [REDACTED] head to [REDACTED] desk in fatigue one time, at which point [REDACTED] also

complained of a headache. Respondent went home early that day, which is the only time that Ms. Murray saw Respondent ill or leave school early.

163. For language arts, which Respondent took in Ms. Uhle's ESE classroom, there were 12 students present. Ms. Murray observed Respondent briefly in that class and found that █████ tolerated well the tardy arrival of the teacher. The class was very structured, so it was easier for Respondent to concentrate. Respondent displayed no anxiety during the class, and █████ interacted appropriately with the other students.

164. Ms. Murray accompanied Respondent as █████ changed classes to attend █████ inclusion science and social studies classes. As always, Respondent was attracted to the locks on the rows of lockers, but, after █████ touched each of them down a hallway, █████ complied with Ms. Murray's request not to touch them.

165. Ms. Murray attended science with Respondent one day. She found that █████ participated appropriately in class. █████ raised █████ hand and answered questions. █████ was eager to participate. Although the classroom was set up in three long rows and was very crowded, the density had no apparent effect on Respondent.

166. Ms. Murray attended home economics with Respondent one day. In this class, students sat 2-4 persons per table,

from which they would walk to the kitchen areas to cook. There were about 18-20 students seated at six tables. Two students sat at Respondent's table, and they interacted with [REDACTED]. Although Respondent displayed some anxiety while in class, [REDACTED] did not bother any students.

167. One of the components that Petitioner was starting to implement during the short time that Respondent attended [REDACTED] High School was observations by the counselor, who was to observe Respondent in class once or twice weekly for 25-45 minutes each session. The counselor assigned to observe Respondent was a mental-health counselor, not a school guidance counselor. Also, this counselor is assigned less than 100 students as compared to the typical workload of 900 students for each guidance counselor.

168. At home during the first two weeks of school, Respondent presented a starkly different picture. By the third day of school, [REDACTED] vomited and displayed a moderate head tic, which had been minimal the preceding summer. [REDACTED] parents initially attributed the vomiting to chance, but Respondent started to express anxiety. After the fifth day of school, Respondent developed a "complete facial contortion" that [REDACTED] mother described as "inhumane."

169. Respondent's parents took [REDACTED] to Dr. Gonzalez. Although they wanted to remove Respondent from school,

Dr. Gonzalez suggested that they hold off, instead increasing Respondent's medications. They did so, and Respondent's tics and elevated blood pressure went down, but [REDACTED] continued to throw up, so they returned to Dr. Gonzalez, who said [REDACTED] could not adjust the medications further and advised Respondent's parents to remove [REDACTED] from school.

170. By this time, Respondent's anxiety was very high. [REDACTED] had a hard time falling asleep due to [REDACTED] rapid heart rate. [REDACTED] was no longer redirectable. The preceding summer, Respondent had accepted that [REDACTED] could not go fishing during lightning storms, but, in the fall, [REDACTED] could no longer accept this limitation. [REDACTED] restarted [REDACTED] obsessive-compulsive behaviors, hitting [REDACTED] ears, grunting, and tapping [REDACTED] mother's arm three times. [REDACTED] was throwing [REDACTED] on the floor, screaming, and breaking doors again.

171. Respondent told [REDACTED] parents that [REDACTED] was happy attending [REDACTED] High School. [REDACTED] wanted to attend the school attended by [REDACTED] friends from elementary school and [REDACTED] older brother, but [REDACTED] complained of the crowding and noise in the auditorium and cafeteria. Unfortunately, Respondent has not developed sufficient self-reporting skills, so that, if [REDACTED] parent asks [REDACTED] if [REDACTED] is okay, [REDACTED] will say yes, even if [REDACTED] is not. In seventh grade before the breakdown, Respondent was never unhappy and never reported

dissatisfaction with [REDACTED] school setting. Respondent's parents legitimately feared a repeat of the seventh grade breakdown, so they withdrew [REDACTED] from school.

172. Since leaving [REDACTED] High School, Respondent fishes nearly every day. Respondent's mother describes this activity as no longer manageable; it has become an "obsession." According to [REDACTED] mother, Respondent attributes [REDACTED] illness to attending [REDACTED] High School, but [REDACTED] expresses concern that [REDACTED] will be assigned to a school with all ESE students.

173. After withdrawing their [REDACTED], Respondent's parents and Petitioner's representatives discussed educational options for Respondent. In a settlement that each side outraces the other to describe as failing to provide Respondent with a free appropriate public education, the parties agreed on a program of homebound education two hours daily, although some disagreement remains as to the subjects. Within two weeks after the conclusion of the hearing, Petitioner discontinued these services, and Respondent filed a motion seeking a stay-put order, which is discussed below.

VI. Ultimate Findings

174. There is no evidence of a material violation of any procedural requirements in this case.

175. Substantively, the May 2006 IEP deprives Respondent of a free appropriate public education in two areas. First, the May 2006 IEP fails to address adequately Respondent's educational needs arising from [REDACTED] illnesses and disorders. In particular, the IEP fails to describe Respondent adequately in terms of [REDACTED] susceptibility to stress and sensory overload; the IEP fails to identify measurable goals and benchmarks to monitor [REDACTED] progress and the effectiveness of the IEP in managing stress and sensory overload; and the IEP fails to identify the services necessary so that Respondent can manage [REDACTED] stress and overload and access [REDACTED] education.

176. On the one hand, Respondent's professionals portray Respondent as overloaded by stimulation and in need of sensory integration or at least self-monitoring and self-managing techniques to offset these stresses. In July 2006, Dr. Gonzalez found Respondent was easily overwhelmed by [REDACTED] environment. At the same time, Dr. Kaskel found Respondent to be suffering from sensory overload. In early 2006, Ms. Lara found that Respondent still needed sensory integration. Although observing less auditory sensitivity in non-school settings during the relatively restful summer, Dr. Gephardt, in September 2006, recommended that Respondent undergo sensory integration and training to self-monitor and self-report, and he suggested the collection and analysis of data and the development of

stimulation-reduction programs. All of these findings are based on careful data collection and analysis.

177. On the other hand, Petitioner's conceptualization of this aspect of the educational problem is uninformed by the available data and, thus, any analysis of such data. Instead, Petitioner presents a combination of implied doubts as to the reliability of parental reports of Respondent's symptoms and an attribution of these symptoms, at least in significant part, to the parents' failures, such as in managing Respondent's diet and bedtimes.

178. The May 2006 IEP does not classify Respondent as physically impaired or, as it was formerly known, other health impaired. The surprising nature of this omission is perhaps inadvertently revealed by Petitioner's claim in its proposed final order that [REDACTED] is so classified. However, the omission is immaterial because ESE classifications are mere labels; the point is the specialized services. The omission is consistent, though, with the failure of the May 2006 IEP to address Respondent's physical disabilities and the symptoms they produce and the failure of the IEP to state an educational plan that will provide Respondent with a free appropriate public education.

179. The present levels of performance do not undertake any meaningful description of Respondent in terms of stress

levels or [REDACTED] ability to overcome stress or overstimulation. Nothing in the IEP provides any methodology or structure for describing Respondent's present tolerance for stress and overstimulation or provides any basis for measuring these characteristics in the future, as part of an effort to monitor the effectiveness of this IEP.

180. Exacerbating these omissions from the present levels of performance are poorly conceived goals and benchmarks that fail to set useful, enforceable objectives for the management of Respondent's stress levels in order to allow [REDACTED] to access [REDACTED] education. Only two goals address this important subject.

181. Priority educational need eight is self-advocacy, and it generates one goal: for Respondent to express [REDACTED] desires, needs, and preferences to adults and peers four out of five times. Respondent is the ultimate trooper, who will steadfastly deny stress until facial tics consume [REDACTED]. No one can know how many times Respondent will have needs, desires, and preferences and not express them, so the mastery criteria are useless. Nor do the benchmarks help. Respondent will generally answer the questions of adults so as to please them. This goal and its benchmark cluster are so grossly inadequate that it is likely that, long before Respondent fails to measure up under these vague criteria, [REDACTED] will be consumed by tics, vomiting,

and the rest of [REDACTED] symptomatology and will be, again, fishing by [REDACTED] at home.

182. Priority educational need nine is stress reduction. Like the goal under self-advocacy, the lone stress-reduction goal imposes the burden of attainment solely on Respondent. [REDACTED] must find and learn stress-reduction techniques, as [REDACTED] must self-advocate; Petitioner shoulders none of the burden, except, in the first benchmark under stress reduction, to provide Respondent a menu of four or five stress-reduction strategies from which [REDACTED] is to select three. The goal is for Respondent to identify and learn three techniques for dealing with stress and anxiety four out of five times. Finding and learning three stress-reduction techniques may have been adequate in third grade, but now, to deliver a free appropriate public education, Petitioner must set more ambitious objectives that deliver substantial and measurable reductions in stress.

183. By contrast to the present levels of performance and goals and benchmarks, the adaptations do a reasonably good job of meeting Respondent's needs. They allow Respondent to chew gum to relieve tics, to take more time on tests and assignments, to go to a designated person for support, and to break longer tasks into smaller tasks. Perhaps most importantly, the adaptations also allow Respondent to leave class three minutes early to avoid the hallway crush, to eat in a quiet place in the

cafeteria, to have a permanent pass to go to the restroom, to take breaks while working, to leave class when not feeling well to get a snack, and to find refuge in a quiet, safe place to relieve sensory overload.

184. But the services themselves fail to provide a free appropriate public education. One obscure provision in the IEP prohibits a shortened school day, which is precisely what Respondent requires, at least initially. Another provision assigns Respondent only 30 minutes weekly of occupational therapy, and the IEP does not further describe the services. This provision is inadequate.

185. Respondent may, or may not, be aging out of sensory integration techniques, but █████ tics respond to the head massager that the paraprofessional brought to school on her own. At minimum, Respondent requires careful and timely counseling to help █████ self-monitor when sensory overload is taking place-- before it overwhelms █████. Ms. Lara recommended 90 minutes weekly of occupational therapy. Even if this time were spent entirely in counseling Respondent to find better ways of modulating sensory overloads, without active sensory integration techniques such as physical pressure, it is a 90-minute investment in the service that most directly impacts Respondent's ability to continue to attend school and, thus, access the remainder of █████ education.

186. The May 2006 IEP requires the parents to "assure that they will monitor [Respondent's] level of stress and alert the school staff immediately so that the IEP team can reconvene to address [REDACTED] scheduling needs." In one sense, this provision is good because it reinforces the cooperative effort required of Petitioner and Respondent's parents in the education of Respondent. Absent effective provisions in the IEP regarding stress and overstimulation, though, this provision seems to try to transfer the responsibility for this matter to the parents, as the two, above-described goals transfer responsibility for their achievement to Respondent.

187. Second, the May 2006 IEP fails to provide Respondent a free appropriate public education because it fails to address adequately Respondent's needs in reading--specifically, reading comprehension. This was Dr. Gerhardt's primary academic concern in September 2006. In April 2006, sharing this concern, Dr. Kaskel recommended one-to-one instruction in reading.

188. The present levels of performance adequately reveal Respondent's deficiencies in reading comprehension, showing this important skill to be at the third grade level. What the present levels fail to reveal, though, is that Respondent's reading comprehension has remained unchanged for four years or, taking a view of the evidence most favorable to Petitioner, has improved perhaps one grade level in that time. Four years ago,

when tested by the University of Miami, Respondent was a little over two years behind in reading, having just shown real gains in reading comprehension. Now, [REDACTED] is five years behind, so, taking the most generous view of the evidence, [REDACTED] has slipped further behind. If present levels of performance are to inform the setting of goals and benchmarks and the provision of services, aids, and adaptations, the present levels of performance need to inform the IEP team clearly that Petitioner's reading instruction for the past four years has failed to produce any educational benefit. This way, the IEP team understands that it must exercise its educational expertise to find better means of instructing reading to Respondent in the limited time that it has to educate [REDACTED].

189. Written and oral expression receive even less attention in the present levels of performance in the May 2006 IEP, which fails to state Respondent's present levels of performance in these two important subjects. Four years ago, Respondent was below second grade level in written expression and oral expression. At that time, [REDACTED] was, respectively, in the first and fourth percentiles in written and oral expression, respectively (which sandwiched [REDACTED] third percentile in reading comprehension).

190. Respondent's eighth grade language arts teacher testified that Respondent was nearly at grade level in written

expression by the end of the school year, and [REDACTED] has performed satisfactorily on the Florida Writes test. Although the IEP needs to define Petitioner's present level of performance in both of these subjects, evidence of recent achievement in written expression--and an assumption that similar progress has taken place in oral expression--precludes a finding that these omissions from the May 2006 IEP deprive Respondent of a free appropriate public education.

191. The May 2006 IEP contains four goals on reading. The second goal suffers from a failure to provide that the reading assignment will be at instructional level, but that may be assumed. (The implementation of all four reading goals would have been undermined by Ms. Uhle's failure to differentiate between independent level and instructional level, but Respondent did not remain in school long enough for this misunderstanding to affect [REDACTED] education, and the confusion has been eliminated.) Otherwise, the goals and benchmarks are adequate, but for one omission. Four years ago, Respondent scored nearly as low as one could score in reading comprehension. Four years later, [REDACTED] has made negligible progress. A free appropriate public education requires Petitioner finally to set clear, enforceable reading comprehension goals in terms of grade equivalents.

192. The services in the IEP concerning reading also fail to provide a free appropriate public education. The May 2006 IEP promises that reading instruction will be from a teacher with no more than three students. Respondent's parents and Dr. Kaskel believe that Respondent requires reading instruction from a teacher with Respondent as her only student. A class of three is small, but a class of one is three times smaller. Also, the additional two students may impact Respondent's instruction even more because they will be ESE students, who may also require intensive reading instruction. Thus, the service promising no more than three students in Respondent's reading class deprives █████ of a free appropriate public education. Although Respondent's parents prefer a particular reading program, the specific teaching methodology is left entirely to Petitioner, by law.

193. Betraying the failure of the present levels of performance in describing Respondent's reading comprehension, the May 2006 IEP states that someone will consider assigning Respondent to general education language arts (English) and reading. Such a placement would generate frustration and social humiliation, as Respondent, with a third grade reading level, tackled, with █████ ninth grade classmates, such freshman English fixtures as "Romeo and Juliet" or To Kill a Mockingbird. This would be a nice place for Respondent to be, if had made

reasonable gains in reading comprehension over the past four years, but [REDACTED] has not. Due to Petitioner's failure to instruct Respondent effectively in reading for the past four years, this provision is wholly inappropriate as a service or even a goal for the one-year term of the May 2006 IEP.

194. The remainder of the May 2006 IEP provides Respondent with a free appropriate public education. Several concerns legitimately exist, including the subjects of language arts and math, the process of data collection (the assignment of a mental health counselor sufficiently offsets concerns about the failure to specify collection topics, such as the frequency/intensity of tics during or after different activities), the omission of mastery criteria for an on task/organizational goal, and the processes of reporting on mastery and the documentation of these reports. But, on its face, the May 2006 IEP adequately addresses these areas.

195. Respondent's main contention in this case is that a free appropriate public education requires the setting of [REDACTED] Academy. Neither the law nor the facts support this contention. Most, if not all, of Respondent's professionals expressed an opinion as to the maximum number of students in any school that Respondent would attend. Most, if not all, of these opinions, as distinguished from their other opinions, are unsupported by data and seem to have been the result of the professional

yielding to the specific request of a concerned parent preparing for due process litigation in the futile hope of winning a particular educational setting.

196. The Administrative Law Judge has assigned little weight to the shared opinion of Respondent's professionals that [REDACTED] requires a small high school so as to control environmental stimulation and allow [REDACTED] to access [REDACTED] education. For most of these witnesses, this testimony required educational expertise that they did not have. For all of these witnesses, this testimony suffered from, among other things, the failure to differentiate between schools of several hundred students and schools with a few hundred more students. No witness attempted an analysis of student density at a school, which would be a function of, among other things, the number of students and the effective area of the school. Each witness instead made a simplistic assumption about the relationship of the size of the school and the intensity of environmental stimuli.

197. Each witness advocating for a school under 700 students failed to address the myriad of variables that would need to be considered carefully to assess the stimulatory potential of a school setting. No witness identified the visual, auditory, or tactile variables that would contribute to the stimulatory potential of a particular school. Any reliance on Respondent's success, years earlier, in modulating sensory

input in smaller elementary schools fails to account for the nature of elementary school, which is more emotionally supportive and less intellectually and socially demanding than middle or high school.

198. As unpersuasive as the testimony of Respondent's professionals in advocating a school smaller than 700 students was one aspect of the testimony of Dr. Sasseville. She warned that, if the record substantiates Respondent's claim of illness, Petitioner will need to provide instructional services in a hospital/educational setting, where ██████ can receive ██████ education in a controlled environment. She explained that health-care providers are trained to observe and pick up subtle changes and needs. The record offers no support for this departure from the requirements of the least restrictive alternative. Perhaps motivated by the same concern that motivated Respondent's professionals to opine as to school size, Dr. Sasseville otherwise was a source of much valuable information, so the Administrative Law Judge, as ██████ did with Respondent's professionals, did not discredit her other opinions.

199. If the ultimate goal were to prepare Respondent to live in a hospital, Dr. Sasseville's alternative proposal would make perfect sense, but, of course, the goal shared by both parties is to equip Petitioner to live independently and

productively. The strange mix of medical, neurological, and psychological symptoms with which Respondent presents requires empirical, evidence-based functional analysis. As noted by Dr. Gerhardt and Dr. Durocher, the assistant director of the Center for Autism Related Disabilities at the University of Miami, to manage Respondent and [REDACTED] constellation of symptoms requires functional analysis of [REDACTED] in the targeted setting, which remains a school, not a hospital. Trained professionals themselves, educators are at least as well-equipped as health-care providers to collect and analyze the data necessary to determine how to help Respondent access [REDACTED] education.

200. Thus, the setting of the [REDACTED] High School in the May 2006 IEP does not deprive Respondent of a free appropriate public education.

201. Dr. Sasseville has earned the last word on the proper plan to educate Respondent because she has proposed the plan that is most responsive to [REDACTED] needs. She is properly very concerned that Respondent has regressed while out of school. It is one thing to treat home as a refuge, where Respondent can safely relieve [REDACTED] from the burdens of regulating [REDACTED] behavior after a difficult day at school. It is quite another thing to eliminate the challenge of school. Now, Respondent lives at home, relatively unchallenged, and persists in acting out, resisting redirection, and engaging in solitary pursuits.

It is no longer a matter of Respondent's unburdening [REDACTED] from the rigors of holding [REDACTED] together. Freed of these stresses of academic and social demands, Respondent is using the home setting to perfect petulance and perpetuate social isolation. Petitioner's action in eliminating homebound instruction reflects the urgency of Respondent's return to school.

202. Dr. Sasseville would design an IEP that transitions Respondent back to school by, first, determining where [REDACTED] is presently. Prior to [REDACTED] return to school, she would offer whatever support she could to the parents' effort to re-establish regular sleep and awakening times. Most importantly, she would re-introduce Respondent slowly into the school by starting with no more courses than [REDACTED] clearly can handle and very gradually, after carefully assessing how [REDACTED] is handling the stress, building up from there.

203. With the additional modifications set forth above in stress and stimulation management and reading, Dr. Sasseville's plan would provide a free appropriate public education to Respondent. To avoid the breakdown of December 2004 or imminent breakdown of September 2006, the parties must cooperate. Once Petitioner delivers appropriate reading instruction, the parents must discontinue all instruction or tutoring at home, so Petitioner will know the level of academic stimulation that

Respondent is absorbing and Respondent can enjoy home as a place where ■■■■ is free of academic stress, at least initially, and can rest before the next day of school. Perhaps the parents can then enforce dietary and rest restrictions. For its part, when the parents report at-home signs of overstimulation, Petitioner must credit this information and immediately rearrange Respondent's academic environment to reduce stress, at least until such time that Respondent is able to handle more stress.

CONCLUSIONS OF LAW

204. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1003.57(1)(e), Fla. Stat. (2006).

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

206. Section 1003.57(1)(e) prohibits the delivery of special instruction or services until the student has been properly placed. Section 1003.57(1)(f) requires that school districts providing special instruction or services use the regular schools "to the maximum extent appropriate" and segregate ESE students only if education in regular classes,

with supplemental aids and services, "cannot be satisfactorily achieved."

207. Section 1003.01(3)(a), Florida Statutes, defines an "exceptional student" as any student determined to be eligible for a special program pursuant to rules of the State Board of Education. Section 1003.01(3)(b), Florida Statutes, defines "special education services" as:

specially designed instruction and such related services as are necessary for an exceptional student to benefit from education. Such services may include: transportation; diagnostic and evaluation services; social services; physical and occupational therapy; speech and language pathology services; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board.

208. Besides federal and state case law, the main source of authority--both substantive and procedural--governing this case is Florida Administrative Code Rule 6A-6.03011 et seq. These rules and the above-cited Florida statutes constitute Florida's response to 20 U.S.C. Section 1412(a), which predicates federal assistance on Florida's "submi[ssion] of a plan that provides assurances to the Secretary (of the U.S.

Department of Education) that the State has in effect policies and procedures to ensure that the State meets each of the following conditions[.] Among the conditions to be contained in the state plan are the provision of a "free appropriate public education to all children with disabilities residing in the State . . . , including children who have been suspended or expelled from school," 20 U.S.C. Section 1412(a)(1)(A); the development, review, and revision of an individualized education program," 20 U.S.C. Section 1412(a)(4); to the "maximum extent appropriate," the education of disabled children with children who are not disabled, 20 U.S.C. Section 1412(a)(5)(A); the affording of the procedural safeguards set forth in 20 U.S.C. Section 1415, 20 U.S.C. Section 1412(a)(6)(A); and the evaluation of children with disabilities in accordance with 20 U.S.C. Section 1414(a)-(c), 20 U.S.C. Section 1412(a)(7). Likewise, 20 U.S.C. Section 1415, which contains the procedural safeguards, clearly provides that states are to "establish and maintain procedures in accordance with this section" and does not directly impose these provisions on states.

209. In recognition that state plans do not modify automatically to adopt the 2004 Individuals with Disabilities Education Improvement Act, 20 U.S.C. Section 1412(c) provides that federal assistance will continue to states with plans that were compliant with the federal law as it existed before such

amendments. If Congress amends the federal statutes or the U.S. Department of Education amends the federal regulations, a federal court or the state's highest court makes a "new interpretation" of these federal statutes, or the U.S. Department of Education makes an "official finding" of noncompliance with the federal statutes or regulations, then the U.S. Department of Education "may require a State to modify its application [i.e., state plan] only to the extent necessary to ensure the State's compliance with this subchapter."

210. In Town of Burlington v. Department of Education, 736 F.2d 773 (1st Cir. 1984), aff'd 471 U.S. 359 (1985), the Circuit Court described the relationship of state and federal statutory and regulatory law:

We believe that under the "cooperative federalism" approach the proper construction of [20 U.S.C.] § 1415 is that state substantive law supplements the federal Act in prescribing the determinations to be made at the due process hearing. It seems plain that the Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states. States are responsible for filling in the numerous interstices within the federal Act through their own statutes and regulations. Congress provided for federal executive oversight through states' annual plans to assure basic compliance with the federal minimum standards but the states supply the machinery necessary to effectuate the guarantees provided by the federal Act on a daily basis.ⁿ⁸ [n8 See, e.g., 20 U.S.C. §§ 1412-1415; 34 C.F.R. §§ 300.126, 300.220-

227, 300.300, 300.304, 300.402, 300.501. Congressional authorization for state law to supply the interstitial detail of federal statutes and regulations is not novel. Such authorization has been granted by express declaration, see, e.g., 28 U.S.C. § 1346(b) (Federal Tort Claims Act specifically makes situs state law applicable to determine the government's liability) and implicitly, as by silence, see, e.g., *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 152, 88 L. Ed. 635, 64 S. Ct. 474 (1944); *Seaboard Air Line Ry. v. Kenney*, 240 U.S. 489, 493-94, 60 L. Ed. 762, 36 S. Ct. 458 (1916). See generally Friendly, *In Praise of Erie -- And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 412-21 (1964); Comment, *Rules of Decision in Nondiversity Suits*, 69 Yale L.J. 1428 (1960).]

736 F.2d at 785.

211. Florida Administrative Code Rule 6A-6.03015 provides in relevant part:

6A-6.03015 Special Programs for Students who are Physically Impaired.

(1) The term physically impaired as used in this rule includes students who are orthopedially impaired, students who are other health impaired, and students with traumatic brain injury.

* * *

(3) Students who are other health impaired. Other health impaired means having limited strength, vitality or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that

adversely affect a child's educational performance.

(a) Criteria for eligibility. A student is eligible for a special program for the physically impaired if the student has a health impairment which results in reduced efficiency in school work because of temporary or chronic lack of strength, vitality or alertness.

(b) Procedures for student evaluation. The procedures for student evaluation are the same as in paragraph (2)(b) of this rule.

* * *

(5) Instructional program. A student who meets the criteria specified in this rule shall be served in any program or combination of programs for students with or without disabilities as determined by the student's strengths and goals recorded on the individual educational plan (IEP).

212. Florida Administrative Code Rule 6A-6.03028 provides in relevant part:

An Individual Educational Plan (IEP) or Individual Family Support Plan (IFSP) must be developed, reviewed, and revised for each eligible child with a disability served by a school district, or other state agency that provides special education and related services either directly, by contract, or through other arrangements, in accordance with this rule. . . . Procedures for the development of the individual educational plan, including procedures for parental involvement, and the required contents for the IEP shall be . . . consistent with the following requirements:

(1) Role of parents. The role of parents in developing IEPs includes, but is not limited to:

- (a) Providing critical information regarding the strengths of their child;
- (b) Expressing their concerns for enhancing the education of their child so that their child can receive a free appropriate public education;
- (c) Participating in discussions about the child's need for specially designed instruction and related services;
- (d) Participating in the determination of how the child will be involved and progress in the general curriculum, including participation in the statewide assessment program and in district-wide assessments;
- (e) Participating in the determination of what services the school district will provide to the child and in what setting; and
- (f) Participating in the determination of whether the child is pursuing a course of study leading towards a standard diploma, consistent with Section 1003.43, Florida Statutes, or a special diploma, consistent with Section 1003.438, Florida Statutes.

(2) Definitions.

(a) General curriculum. The general curriculum is a curriculum or course of study that addresses the Florida Sunshine State Standards and state and district requirements for a standard diploma.

* * *

(e) Accommodations. Accommodations are changes that are made in how the student accesses information and demonstrates performance.

(f) Modifications. Modifications are changes in what a student is expected to learn and may include changes to content, requirements, and expected level of mastery.

* * *

(6) Considerations in IEP development, review, and revision for students with disabilities. The IEP team shall consider the following in IEP development, review, and revision:

(a) The strengths of the student and the concerns of the parents for enhancing the education of their child;

(b) The results of the initial or most recent evaluation of the student;

(c) As appropriate, the results of the student's performance on any general state or district assessment;

(d) In the case of a student whose behavior impedes learning or the learning of others, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

* * *

(7) Contents of the IEP for students with disabilities. Each district, in collaboration with the student's parents, shall develop an IEP for each student with a disability. . . . The IEP for each student with a disability must include:

(a) A statement of the student's present levels of educational performance, including how the student's disability affects the student's involvement and progress in the general curriculum. For students with disabilities who participate in the general statewide assessment program, consistent with the provisions of Rule 6A-1.0943, F.A.C., a statement of the remediation needed for the student to achieve a passing score on the statewide assessment, or for prekindergarten children, as appropriate, how the disability affects the student's participation in appropriate activities;

(b) A statement of measurable annual goals, including benchmarks or short term objectives related to meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum or for preschool children, as appropriate, to participate in appropriate activities and meeting each of the student's other educational needs that result from the student's disability;

(c) A statement of the specially designed instruction and related services and supplementary aids and services to be provided to the student, or on behalf of the student, and a statement of the classroom accommodations, modifications or supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals; to be involved and progress in the general curriculum in accordance with paragraph (7)(a) of this rule; to participate in extracurricular and other nonacademic activities; and to be educated and participate with other students with disabilities and nondisabled students in the Activities described in this paragraph;

(d) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in the activities described in paragraph (7)(c);

(e) A statement of any individual accommodations in the administration of the state or district assessments of student achievement that are needed in order for the student to participate in state or district assessments. A parent must provide signed consent for a student to receive instructional accommodations that would not be permitted on the statewide assessments and must acknowledge in writing that he or she understands the implications of such accommodations. Accommodations that negate the validity of a statewide assessment are not allowable in accordance with Section 1008.22(3)(c)6., Florida Statutes. If the IEP team determines that the student will not participate in the Florida Comprehensive Assessment Test (FCAT) or district assessment of student achievement or part of an assessment, a statement of why that assessment is not appropriate for the student and how the student will be assessed. If a student does not participate in the FCAT, the district must notify the student's parent and provide the

parent with information regarding the implications of such nonparticipation in accordance with Section 1008.22(3)(c)6., Florida Statutes.

(f) The projected date for the beginning of the specially designed instruction, services, accommodations and modifications described in paragraph (7)(c) of this rule and the anticipated frequency, location, and duration of those services;

(g) A statement of how the student's progress toward the annual goals will be measured and how the student's parents will be regularly informed (at least as often as parents are informed of their nondisabled children's progress) of the student's progress toward the annual goals and the extent to which that progress is sufficient to enable the student to achieve the goals by the end of the year;

(h) During the student's eighth grade year or during the school year of the student's fourteenth birthday, whichever comes first, a statement of whether the student is pursuing a course of study leading to a standard diploma or a special diploma.

(i) Beginning by the student's fourteenth birthday (or younger, if determined appropriate by the IEP team), including the student and the student's parents, and updated annually:

1. A statement of the student's desired post-school outcome which shall be developed through a student-centered process;

2. A statement of the student's transition service needs under the applicable components of the student's IEP that focuses on the student's courses of study, such as participation in advanced-placement courses or a vocational education program; and

3. Consideration of instruction or the provision of information in the area of self-determination to assist the student to be able to actively and effectively

participate in IEP meetings and self-advocate, if appropriate.

(j) Beginning by the student's sixteenth birthday (or younger, if determined appropriate by the IEP team), including the student and the student's parents and updated annually and thereafter, a statement of needed transition services for the student including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

(k) Beginning at least one (1) year before the student's eighteenth birthday, a statement that the student has been informed of his or her rights under Part B of the Individuals with Disabilities Education Act (IDEA) that will transfer from the parent to the student on reaching the age of majority, which is eighteen years of age. The transfer of these rights is described in subsection (10) of Rule 6A-6.03311, F.A.C.

(8) Transition services for students beginning at age sixteen (16) (or younger, if determined appropriate by the IEP team).

(a) The coordinated set of activities described in paragraphs (7)(i) and (j) of this rule must be based on the student's needs, take into account the student's preferences and interests, and focus on the student's desired post-school outcome and shall include:

1. Activities in the areas of instruction, related services, community experiences, the development of employment, and other post-school adult living objectives; and

2. Acquisition of daily living skills and functional vocational evaluation, if appropriate.

(b) If an agency responsible for transition services, other than the school district, fails to provide the transition services described in the IEP, the school district shall reconvene the IEP team to identify alternative strategies to meet the

transition objectives for the student set out in the IEP.

(c) Nothing in this part relieves any participating agency, including Vocational Rehabilitation Services, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency. When a student is provided services by Vocational Rehabilitation Services or another agency, the Individual Plan for Employment or other agency plan should be coordinated with the development of the IEP as appropriate.

(d) The district shall identify an IEP team member or designee who will follow-up with agencies, as needed, and verify the provision of services by other agencies to the student and/or the student's parents as provided for in the IEP.

(e) If the IEP team determines that transition service is not needed as described in subparagraph (8)(a)1. of this rule, the IEP shall include a statement to that effect.

* * *

(10) Review and revision of the IEP. The school district shall ensure that the IEP team:

(a) Reviews the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved; and

(b) Revises the IEP as appropriate to address:

1. Any lack of expected progress toward the annual goals and in the general curriculum, if appropriate,

2. The results of any reevaluation conducted,

3. Information about the student provided to, or by, the parents,

4. The student's anticipated needs or other matters,

5. Consideration of the factors described in subsection (6) of this rule, and

6. The remediation of skills needed to obtain a passing score on the statewide assessment.

(c) Responds to parent's right to ask for revision of the student's IEP or to invoke due process procedures in accordance with subsection 6A-6.03311(11), F.A.C., if the parent feels that the efforts required to provide specially designed instruction related services are not being made.

* * *

213. Florida Administrative Code Rule 6A-6.03311 provides in relevant part:

(4) Parents' opportunity to examine records and participate in meetings.

(a) The parents of a child with a disability shall be afforded an opportunity to inspect and review their child's educational records including all records related to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child in accordance with Rule 6A-1.0955, F.A.C., Section 1002.22, Florida Statutes, 34 CFR 300.569, 300.571, and 300.572 and this rule.

(b) The right to inspect and review education records under this rule includes the right to have a representative of the parent inspect and review the records.

* * *

(11) Due process hearings. While use of mediation and the state complaint procedure may be preferable and less litigious, due process hearings are required to be available to parents of students with disabilities and to school districts to

resolve matters related to the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education.

(a) Such hearings may be initiated by a parent or a school district on the proposal or refusal to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education to the student.

(b) A hearing shall be conducted by an administrative law judge (ALJ), appointed as required by Section 120.65, Florida Statutes, from the Division of Administrative Hearings, Department of Management Services, on behalf of the Department of Education.

(c) An administrative law judge (ALJ) shall use subsection (11) of this rule for any such hearings and shall conduct such hearings in accordance with the Uniform Rules for Administrative Proceedings, Chapter 28-106, F.A.C. The procedures for these hearings shall include:

1. Prehearing summary of facts. Prior to the prehearing conference set forth below, the moving party or petitioner shall submit to the ALJ assigned to the case, a brief summary of facts setting forth the facts which the petitioner believes are related to the ALJ's determination of the petitioner's entitlement to the relief sought. The summary shall also include a description of the relief sought by the petitioner and the reasons petitioner is entitled to the relief sought.

2. Prehearing Conference. A prehearing conference shall be scheduled within ten (10) days of the Division of Administrative Hearings' (DOAH's) receipt of the request for a due process hearing. The purpose of the prehearing conference shall be to consider any of the following, as deemed appropriate by the ALJ:

a. Specifying and simplifying the issues;

- b. Proposing resolutions;
 - c. Admitting facts to which both parties agree. A joint written statement specifying the facts to which both parties agree shall be provided to the ALJ within two (2) weeks of the prehearing conference;
 - d. Preparation of documents that will be submitted by both parties. An authenticated set of these documents shall be exchanged by each party and one combined set shall be filed with the ALJ within two (2) weeks of the prehearing conference;
 - e. Preparation of the list of the witnesses to be used during the hearing. The list of witnesses shall be filed with the ALJ within two (2) weeks of the prehearing conference;
 - f. Establishing reasonable limitations and/or guidelines on discovery between the parties. In setting the parameters for discovery, the ALJ should consider the expedited nature of the hearing process, the relative burden on the parties, and whether the discovery sought is necessary or whether it could be obtained by other, less burdensome means;
 - g. Determining whether unusual circumstances exist that would require the use of expedited discovery prior to the hearing such as depositions, document production, or interrogatories;
 - h. Determining whether unusual circumstances exist that would require the filing of any motions or pleadings prior to or during the hearing;
 - i. Determining the date, time, and place of the hearing and how many days the parties may require to present their case;
 - j. Discussing other matters which may aid in simplifying the proceeding or disposing of matters in dispute, including settling matters in dispute.
3. Upon conclusion of the prehearing conference, the ALJ shall issue a prehearing order setting forth the following:
- a. The date, time and location of the hearing,

b. The issues to be resolved at the hearing,

c. The relief being sought,

d. The deadline, no later than five (5) days before the hearing, for the parties to disclose their witness lists and evidence to be used at the hearing,

e. Any reasonable limits on the amount of time for the hearing,

f. Limitations or parameters for discovery,

g. The filing and dispositions of any requests or motions, and

h. Other matters or relevant information as determined by the ALJ.

4. No pleadings, other than the request for hearing, are mandatory unless ordered by the ALJ.

5. The ALJ has the authority to issue subpoenas to compel the attendance of witnesses and the production of records, to issue summary rulings in absence of a disputed issue of material fact.

6. If there is conflict between the due process provisions set forth in subsection (11) of this rule and Chapter 28-106, F.A.C., the provisions of subsection (11) shall govern.

* * *

(e) Hearing rights for all parties.

1. Any party to a hearing conducted pursuant to subsection (11) of this rule has the right:

a. To be represented by counsel or to be represented by a qualified representative under the qualifications and standards set forth in Rules 28-106.106 and 28-106.107, F.A.C., or to be accompanied and advised by individuals with special knowledge or training with respect to the problems of students with disabilities, or any combination of the above;

b. To present evidence, and to confront, cross-examine, and compel the attendance of witnesses;

c. To prohibit the introduction of any evidence at the hearing that has not

been disclosed to that party at least five (5) business days before the hearing;

d. To obtain written, or at the option of the parents, electronic verbatim record of the hearing at no cost to the parents; and

e. To obtain written, or at the option of the parents, electronic findings of fact and decisions at no cost to the parents.

2. Additional disclosure of information.

a. At least five (5) business days prior to a hearing conducted pursuant to subsection (11) of this rule, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

b. An administrative law judge may bar any party that fails to comply with subparagraph (11)(e)2.a. of this rule from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(f) Parental rights at hearings. In addition to the rights identified in paragraph (11)(e) of this rule, parents involved in hearings must be given the right to:

1. Have their child who is the subject of the hearing present.

2. Open the hearing to the public.

(g) Duties and responsibilities of the superintendent or designee shall include:

1. Implementing procedures that require the parent of a child with a disability or the attorney representing the child, to provide notice. The notice, must remain confidential and must include: the name of the child; the address of the residence of the child; the name of the school that the child is attending; a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including

facts relating to the problem; and, a proposed resolution of the problem to the extent known and available to the parents at the time. However, the school district may not deny or delay a parent's right to a due process hearing for failure to provide this notice.

2. Immediately forwarding the Division of Administrative Hearings by facsimile transmission of the parents' request for a hearing upon its receipt.

3. Notifying all parties regarding their rights and responsibilities before, during, and after the hearing. This notice should include information to the parent of any free or low cost legal and other relevant services, including mediation services, which are available, if the parent requests this information or if the parent or school district initiates a hearing.

4. Complying with the administrative law judge's rulings regarding requests for and exchanges of evidence; discovery; the filing of motions; and, scheduling, so as to meet the requirements of subsection (11) of this rule, and the deadlines established herein.

5. Arranging for the provision and payment of clerical assistance, the hearing, use of facilities, and a verbatim transcript of the hearing.

6. Completing other responsibilities specified by the school board.

7. To determine whether an interpreter is needed and arranging for the interpreter as required;

(h) Duties and responsibilities of the Department of Education shall include:

1. Maintaining a list of persons who serve as administrative law judges, including a statement of the qualifications of each of these persons;

2. Maintaining an index of the final orders of such hearings and providing this information to the public upon request; and

3. Transmitting the findings and decisions, after deleting any personally

identifiable information, of any such hearings to the Commissioner of Education for review by the State Advisory Committee for the Education of Exceptional Students.

4. Developing a model notice to assist parents in filing a request for a due process hearing that includes the information required in subparagraph (11)(g)1. of this rule.

(i) Duties and responsibilities of an administrative law judge shall be:

1. To establish the date, time, and location of the hearing and any pre-hearing conference calls and motion hearings. Each hearing involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and their child;

2. To conduct the hearing in a fair and impartial manner;

3. To ensure that all discovery, motion practice, and pre-trial procedures are conducted in an expedited manner, consistent with the deadlines established by this rule concerning the exchange of evidence and the issuance of the final decision established by this rule.

4. To determine if the parent wants an electronic or written copy of the final decision and the administrative record of the hearing;

5. To determine whether the parent wants the hearing open to the public and whether the parent wants their child to attend the hearing;

6. To determine whether the parent's advisor or counsel is sufficiently knowledgeable about or trained with respect to the problems of students with disabilities;

7. To determine how evidence may be exchanged prior to and during the hearing;

8. To determine how witnesses may be compelled to attend, be cross-examined, and confronted during discovery and at the hearing;

9. To determine how evaluations and recommendations may be disclosed prior to and during a hearing;

10. To summarize the facts and findings of the case and to arrive at an impartial decision based solely on information presented during the hearing;

11. To reach a final decision and mail to all parties copies of the facts, findings, and decision regarding the hearing within forty-five (45) days of the district's receipt of the parent's request or the filing of the district's request for a hearing, whichever is sooner;

12. To be accountable for all deadlines and procedures established by the statutes and rules for such hearings;

13. To maintain the confidentiality of all information; and

14. To rule on requests for specific extensions of time beyond the periods set forth in paragraph (11)(i) of this rule, at the request of either party.

(j) Civil Action. A decision made in a hearing conducted under subsection (11) of this rule shall be final; unless, within thirty (30) days, a party aggrieved by the decision brings a civil action in federal district or state circuit court without regard to the amount in controversy, as provided in Section 1003.57(5), Florida Statutes. The state circuit or federal district court shall: receive the records of the administrative proceedings; hear, as appropriate, additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, shall grant the relief it determines appropriate. In the alternative, any party aggrieved by the administrative law judge's decision shall have the right to request an impartial review by the appropriate state district court of appeal as provided by Sections 120.68 and 1003.57(5), Florida Statutes. Nothing in this rule restricts or limits the rights, procedures, and remedies available under the U.S. Constitution, the Americans

with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under the procedures safeguards available under the IDEA, the procedures under impartial hearing or appeal must be exhausted to the same extent as would be required had the action been brought under the remedies available under the IDEA.

214. The burden of proof in this case is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005). Both sides have sought relief, but the allocation of the burden of proof in this case is unimportant. The results would be identical regardless which party bore the burden of proof.

215. The substantive standard in determining whether an IEP provides a free appropriate public education is to determine whether it is reasonably calculated to provide Respondent with educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982). In J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1573 (11th Cir. 1991), the court stated: "We . . . define 'appropriate education' as making measurable and adequate gains in the classroom."

216. Respondent's arguments that Florida has recently adopted a more ambitious standard for the education of the

disabled are unpersuasive. The authorities cited for this proposition do not clearly so provide.

217. For the reasons set forth above, the May 2006 IEP fails to provide Respondent with a free appropriate public education in its treatment of stress and stimulation and reading. The failings of the IEP in these areas are such that the IEP is not reasonably calculated to provide Respondent with educational benefit.

218. An Administrative Law Judge lacks the authority to order an educational placement or specify an educational setting. The parties requested at the hearing that the Administrative Law Judge address these matters, in the hope of resolving their overall dispute more expeditiously. For that reason, the Administrative Law Judge has made certain recommendations, pursuant to the recognition in Florida case law that █████ may do so. Hendry County School Board v. Kujawski, 498 So. 2d 566 (Fla. 2d DCA 1986). These recommendations include recommended rejections of the settings of █████ Academy and a hospital, the latter because, among other things, it violates the requirement that Petitioner educate Respondent in the least restrictive environment.

219. Respondent's claims of procedural violations fail to rise to the level of depriving the child of educational benefit or deprive the parents of the ability to participate fully in

their child's education. See, e.g., K. C. v. Fulton County School District, __ F. Supp. __, 2006 U.S. Dist. Lexis 47652 (N.D. Ga. 2006). In terms of a failure to provide copies of educational records, the kind of failure that triggers a finding of a denial of a free appropriate public education is found in Amanda J. v. Clark County School District, 267 F.3d 877 (9th Cir. 2001), in which the school district failed to provide the parents documents suggesting that their child might be autistic.

220. Respondent's stay-put argument is similarly unpersuasive. Florida Administrative Code Rule 6A-6.03311(11)(d) provides:

Status of student during proceedings. Except as provided in subsection (9) of Rule 6A-6.03312, F.A.C., during the time that an administrative or subsequent judicial proceeding regarding a due process hearing is pending, unless the parent of the student and the district agree otherwise, the student involved in the proceeding must remain in the present educational placement. If the proceeding involves an application for an initial admission to public school, the student, with the consent of the parent, must be placed in a public school program until the completion of all proceedings. If the administrative law judge agrees with the parent and finds that a change of placement is appropriate, that placement becomes the agreed-upon placement during the pendency of the appeal.

221. Relying on the clause, "unless the parent of the student and the district agree otherwise," Respondent attempts to apply stay put to an agreed-upon placement and setting during

which Petitioner provided two hours daily of homebound instruction after Respondent left ██████████ High School. This clause is ambiguous because it supports this interpretation and the interpretation that the clause permits the parties to waive the stay-put placement. If the latter construction applies, the clause merely allows the parties to operate without regard to stay put; it does not then apply the force of stay put to any agreement, outside of an IEP, that the parties have devised for the education of an ESE student, at least if ██████ has already been the subject of an implemented IEP, as Respondent has.

222. Respondent's construction is unsupported by the relevant Florida statute. Section 1003.57(1)(e), Florida Statutes, provides in part:

Notwithstanding any law to the contrary, during the pendency of any proceeding conducted pursuant to this section, unless the district school board and the parents otherwise agree, the student shall remain in his or her then-current educational assignment or, if applying for initial admission to a public school, shall be assigned, with the consent of the parents, in the public school program until all such proceedings have been completed.

223. Federal courts have interpreted identical language in federal law. In Drinker v. Colonial School District, 78 F.3d 859, 867 (3d Cir. 1996), the court quoted with approval, Thomas v. Cincinnati Board of Education, 918 F.2d 618, 625-26 (6th Cir.

1990), which stated that the "then-current educational placement" ("assignment" and "placement" in this context are synonymous) to which stay put applies is:

the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then that program's placement will be the one subject to the stayput provision. And where . . . the dispute arises before any IEP has been implemented, the 'current educational placement' will be the operative placement under which the child is actually receiving instruction at the time the dispute arises.

224. Therefore, in this case, any stay-put placement would necessarily refer to an IEP, not the placement and setting upon which Respondent claims the parties agreed, following Respondent's departure from ██████████ High School. Respondent's motion filed November 27, 2006, seeks stay put for a post-IEP placement and is thus denied.

225. In this case, Respondent's request for stay put raises another problem. Section 1003.57(1)(e) prohibits the delivery of specialized instruction and services until the school district has appropriately placed the ESE student. The parties have agreed that the homebound placement of the fall of 2006 did not constitute a free appropriate public education, and the Administrative Law Judge agrees with them. That means that, by law, Petitioner was prohibited from providing specialized

instruction in that educational placement, so it was right to terminate these services after the hearing.

226. Lastly, stay put is injunctive relief that only a court may order. An Administrative Law Judge may address stay put only to assist a court in the exercise of its judicial discretion as to stay put or possibly to assist the parties in negotiating a placement/setting agreement pending litigation. The absence of administrative stay-put relief is mitigated by the 45- or 75-day timeframe (under the reauthorized federal act, to which Florida has yet to respond with rules) imposed on the Administrative Law Judge for issuing a final order.

227. On a related note, Respondent seeks a wide array of other relief that the Administrative Law Judge is without authority to provide. Pursuant to Florida Administrative Code Rule 6A-6.03311(11), which authorizes the Administrative Law Judge to "resolve matters related to the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education," the Administrative Law Judge is authorized to consider only the issues set forth in the Statement of the Issues.

228. The broad relief awarded in court cases is not available administratively. Florida Administrative Code Rule 6A-6.03311(11)(j) authorizes courts to award such relief, as does 20 U.S.C. Section 1415(i)(2)(C)(iii), just as Florida

Administrative Code Rule 6A-6.03311(12) authorizes courts to aware attorney's fees and costs to prevailing parties. The only exception is 20 U.S.C. Section 1412(a)(10)(C)(ii), which authorizes the court "or hearing officer" to order reimbursement of certain private school expenses, but Florida law has not apparently adopted this provision, which has no applicability to the facts of this case.

229. The only other exception would derive from a contractual arrangement between the Division of Administrative Hearings and Petitioner to hear claims against it, at least arising out of the provision of educational services, under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794. Although Petitioner's counsel believed that such an arrangement exists, neither party produced a copy of the contract, so the jurisdictional basis is absent from the record. If the Administrative Law Judge had jurisdiction over this claim, would deny relief because of the absence from the record of evidence of intentional discrimination or bad faith on the part of Petitioner or any of its employees or representatives. Wood v. Spring Hill College, 978 F.2d 1214, 1219 (11th Cir. 1992).

ORDER

Based on the foregoing, it is

ORDERED that:

1. The May 2006 IEP does not provide Respondent with a free appropriate public education for the reasons set forth above.

2. Respondent's request for a stay-put order is denied.

3. Respondent's request for additional relief is denied.

4. The administrative assistant has emailed copies of this Final Order to the parties by 9:00 a.m. on the date set forth below.

DONE AND ORDERED this 8th day of January, 2007, in
Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of January, 2007.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

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