

Orange County School District
No. 06-4500E
Initiated by: Parent
Hearing Officer: Lawrence P. Stevenson
Date of Final Order: August 7, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
Petitioner,)
vs.)
ORANGE COUNTY SCHOOL BOARD,) Case No. 06-4500E
Respondent.)
_____)
)

FINAL ORDER

A formal due process hearing was held in this case before Lawrence P. Stevenson, Administrative Law Judge of the Division of Administrative Hearings, on March 23, 29, and 30, 2007, in Orlando, Florida.

APPEARANCES

For Petitioner: ██████████ mother of ██████████
(Address of record)

For Respondent: Andrew B. Thomas, Esquire
1625 Lakeside Drive
Deland, Florida 32720-3037

STATEMENT OF THE ISSUE

Whether ██████████ a student eligible for special education services under the Individuals with Disabilities Education Act

("IDEA"), was provided a free appropriate public education during the 2005-2006 and 2006-2007 school years.

PRELIMINARY STATEMENT

This matter commenced upon the filing of a Request for Due Process Hearing on November 8, 2006, by [REDACTED] the mother of the student, [REDACTED], with Respondent, referenced herein as Orange County School Board ("OCSB") in accordance with common usage. At the time of the filing, [REDACTED] was in the fifth grade at [REDACTED] Elementary School (" [REDACTED] ") in Orlando [REDACTED] stated the following as [REDACTED] reasons for requesting the due process hearing:

Child has been denied appropriate accommodations in classroom due to teacher's lack of understanding learning disabilities. Child has been denied behavior intervention plans ["BIPs"] due to "too much trouble" by teacher and principal. Child does not have appropriate ESE representation. IEP lacks clear goals to improve skills necessary to reduce frustrations.

[REDACTED] wrote that the due process hearing would not be necessary if OCSB would implement the following actions:

Provide qualified ESE representative [to] implement skill deficit instruction to child; implement BIP; change classroom teacher; and remove [disciplinary] incidents/referrals of [October 26-27] as manifestation of disability.

In the alternative, ██████ suggested that ██████. be transferred to either ██████, ██████, or ██████ Elementary School, with IEP changes and a BIP in place ██████

requested mediation to resolve the dispute. The mediation was held on December 4, 2006, but did not result in resolution of the complaint. On December 13, 2006, ██████ filed a written request to defer the due process hearing so that she could pursue the State Complaint Procedure, pursuant to Florida Administrative Code Rule 6A-6.303311(6). An Order Granting Extension was entered on December 15, 2006, noting that the parties had agreed to extend the 45-day requirement of Florida Administrative Code 6A-6.03311(11)(i)11. and requiring the parties to advise this tribunal of the status of the case no later than January 29, 2007. On January 21, 2007, ██████ filed a notice that the State Complaint Procedure process was ongoing and that additional time would be required before the hearing in this matter could be scheduled. By order dated February 1, 2007, this case was placed in abeyance and the parties were required to file a written status report no later than February 27, 2007. ██████ filed a status report on February 27, 2007, pursuant to which this matter was set for hearing on March 23 and 30, 2007. By agreement of the parties, March 29, 2007, was later added as a hearing date.

At the hearing [REDACTED] testified on [REDACTED] own behalf and presented the testimony of [REDACTED]; Natalie Jeoffroy, a speech/language pathologist for OCSB; Kristin DeSanctis, a staffing specialist at [REDACTED]; Angie Binder, a behaviorist; Kimba Smith, a behaviorist; Maria Amunategui, a school psychologist for OCSB; and Kelly Pelletier, the principal of [REDACTED]. Petitioner's Exhibits 1 through 20 were admitted into evidence. OCSB presented the testimony of Kathy Peterson, assistant principal of [REDACTED]; Ari Losman, a teacher at [REDACTED]; Jeanann Bradford, a reading coach at [REDACTED]; and Harriet Brown, attorney for OCSB. OCSB's Exhibits 1 and 2 were admitted into evidence. At the outset of the hearing, the parties stipulated to the admission of Joint Exhibits 1 through 25.

A four-volume Transcript was filed with the Division of Administrative Hearings on May 1, 2001. On May 10, 2007, the parties filed a joint motion for extension of time to file proposed final orders, which was granted by an order issued on the same date. The time for issuance of this final order was accordingly extended. The parties timely filed proposed final orders, pursuant to the order granting extension.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the

following findings of fact are made:

1. Petitioner [REDACTED]. is a [REDACTED] child born [REDACTED] [REDACTED], 19[REDACTED], and was eleven years old at the time of the hearing. [REDACTED] is the adopted [REDACTED] of [REDACTED] who acted as [REDACTED] representative at the hearing. At the time of the hearing, [REDACTED] was in the fifth grade at [REDACTED]. With the exception of the first month of the 2002-2003 school year, [REDACTED] has attended [REDACTED] continuously since pre-kindergarten in January 2001.

2. In November 2000, [REDACTED]. was referred for a psycho-educational evaluation by OCSB's Preschool Evaluation Center due to parental concerns about [REDACTED] speech development and overall delays. At the time, [REDACTED] had resided with [REDACTED] for only about two months, after spending two years in foster care.

3. The evaluation, conducted by school psychologist Linda Guest, concluded that [REDACTED] possessed above-average nonverbal intellectual functioning, but that [REDACTED] academic achievement in listening comprehension, oral expression, reading and math were significantly below expectancy for [REDACTED] age and learning ability. Tests of language processing also identified an information processing deficit.

4. An Exceptional Student Education ("ESE") multi-disciplinary team staffing was scheduled to consider [REDACTED]'s eligibility for ESE services. [REDACTED] was found to meet the criteria for the Specific Learning Disabilities ("SLD") program

and for the Speech/Language Impaired program. In January 2001, [REDACTED] was placed as an ESE student in a preschool classroom at [REDACTED].

5. In 2001, [REDACTED] was diagnosed by a physician as having Attention Deficit Hyperactivity Disorder ("ADHD"). ADHD is one of the conditions included in the federal definition of the "Other Health Impairment" ("OHI") disability in 34 C.F.R. 300.8(c)(9).¹ OCSB has been aware of this diagnosis since at least 2003, but has not identified [REDACTED] as OHI for purposes of providing special education under the OHI program for the symptoms and behaviors resulting from ADHD. ...[REDACTED].is currently prescribed Adderall and Risperdal (a trade name for Risperidone) by [REDACTED] treating psychiatrist.

6. In May 2003, while [REDACTED] was in foster care, [REDACTED] was referred for a psychological evaluation by the Department of Children and Family Services. The evaluation was conducted by Deborah J. Smith, a licensed psychologist, who performed a thorough review of the child's clinical and educational records and interviewed both [REDACTED] current foster parent and ...[REDACTED].who was trying to adopt [REDACTED]. Dr. Smith also interviewed [REDACTED] guardian ad litem, the principal of [REDACTED], a behavior analyst who had worked with [REDACTED], and the adoptive mother of [REDACTED] two younger sisters.

7. In the "developmental/medical history" portion of her report, Dr. Smith noted [REDACTED]'s "well documented speech/language delay," and noted physical abuse by [REDACTED] biological parents and alcohol and drug abuse by [REDACTED] biological mother as possible causative factors in [REDACTED]'s developmental delays. In January 2002, when [REDACTED] was six years and three months old, [REDACTED] was reported to be able to articulate words at the level of a child two years and nine months old. Dr. Smith further noted that [REDACTED]'s previous diagnoses included ADHD, Oppositional Defiant Disorder ("ODD"), and Disruptive Behavior Disorder Not Otherwise Specified.

8. Dr. Smith administered the Wechsler Abbreviated Scale of Intelligence ("WASI") to [REDACTED] who obtained a Verbal IQ score of 89, a Performance IQ score of 126, and a Full Scale IQ score of 107. The Full Scale score is based on the Verbal and Performance scores. Dr. Smith noted that the 37-point difference between [REDACTED] Verbal IQ and Performance IQ was significant and indicated that [REDACTED] ability to reason without words was better developed than [REDACTED] ability to reason verbally. Dr. Smith concluded that the large differential between [REDACTED] below average Verbal IQ and superior Performance IQ meant that [REDACTED]'s Full Scale IQ score was not an accurate reflection of [REDACTED] overall intellectual functioning.

9. Dr. Smith further concluded that [REDACTED] "is a very intelligent child, but [REDACTED] language difficulties make it hard for [REDACTED] to express [REDACTED]. [REDACTED] is prone to becoming very frustrated and may often act out [REDACTED] emotions due to [REDACTED] difficulty with verbal expression." Dr. Smith's diagnostic impressions for Axis I of the DSM-IV³ were ADHD and Oppositional Defiant Disorder ("ODD"), but only by history.

10. Dr. Smith believed that [REDACTED]'s behavior problems were likely related to a combination of exposure to domestic violence, abuse and trauma in early childhood and in some foster homes, and [REDACTED] ADHD. She recommended individual therapy to develop [REDACTED] verbal abilities and integrate them with [REDACTED] nonverbal experiences, and that [REDACTED] undergo a neuropsychological evaluation if ** continued to experience academic difficulties.

11. [REDACTED] school placement was not affected by Ms. Smith's psychological evaluation. According to [REDACTED] Ms. Smith's report was placed in [REDACTED]'s cumulative file at [REDACTED], and the school took no action. The report led to no investigation by the IEP team into special education for behavior modification or social skills delays related to ADHD or ODD, or counseling for depression, all of which [REDACTED] requested and believed necessary for [REDACTED]'s educational progress.

12. During the 2003-2004 school year, ██████ was in the second grade. The notes from an IEP team meeting held on February 6, 2004, indicate that ██████'s behavior had been problematic since classes resumed after the winter break. ██████ regular education teacher, Ms. Hermann, reported that ██████ did not complete ██████ work and was engaging in a "power struggle," constantly questioning every request made by Ms. Hermann. Other teachers voiced similar observations. ██████ offered several suggestions on how to work with ██████ including frequent praise for following the prescribed classroom routines and the placement of ██████ seat away from the other students.

13. At the February 6, 2004, IEP team meeting, ██████ also asked for the creation of a BIP. ██████ believed that ██████ problems stemmed from ██████ frustration with Ms. Herman's writing assignments. ██████ had taken ██████ to a play-therapy counselor, who also met with Ms. Hermann and then recommended that ██████ be placed in a different classroom. At spring break, ██████ was placed in Ms. Garrido's second grade class and ██████ behavior improved for the remainder of the school year. Academically, ██████'s report card for the second grade indicated average to above-average grades in science and math courses, and that ██████ was working below grade level in

language arts and reading. ██████ was promoted to the third grade for the 2004-2005 school year.

14. On October 18, 2004, the IEP team met for ██████ annual review and the writing of ██████ new IEP. The team determined that ██████ remained eligible for the SLD program, but that ██████ met the criteria for dismissal from the Speech/Language Impaired program, though *** independent reading skills remained below grade level. The IEP drafted on October 18, 2004, contained a notice of ██████'s change of placement, but did not clearly explain the IEP team's rationale for dismissing the child from the Speech/Language Impaired program ██████ was placed in a regular education classroom with ESE assistance in reading and speech therapy, as well as occupational therapy.

15. ██████ testified that at her request, ██████ was placed in a third grade classroom with a "lenient" teacher, and that the year was relatively uneventful as regards ██████'s behavior.⁴ Notes on ██████'s report card indicated that ██████ teachers were "working on the behavioral issues" and that ██████ needed "to continue working on respecting all adults" at ██████.

16. ██████'s grades were consistently above-average during the first half of the school year, then slipped somewhat during the second half, though ██████ failed no courses. ██████ reading grades were never above a "C", indicating that **

continued to struggle in that area. [REDACTED] was promoted to the fourth grade for the 2005-2006 school year.

17. A psychological evaluation of [REDACTED] was conducted over five days between August 31 and September 28, 2005, by Dr. Mark D. Rapport of the Community Counseling Clinic at the University of Central Florida. [REDACTED] testified that [REDACTED] was evaluated as a participant in an ongoing study of ADHD conducted by Dr. Rapport.

18. Dr. Rapport administered the Wechsler Intelligence Scale for Children, Third Edition ("WISC-III"), a standardized measure of global and specific intellectual functioning. [REDACTED] was given all 13 subtests of the WISC-III. The six subtests in the Verbal area measure abilities such as verbal comprehension and fluency, social judgment, and speed of mental processing. The seven subtests of the Performance area measure abilities such as spatial visualization, concentration, and simultaneous processing.

19. [REDACTED] Full Scale IQ score was 103, which placed [REDACTED] within the average range of intellectual functioning, in the 58th percentile based on age norms. [REDACTED]'s Verbal Scale IQ score of 98 also fell within the average range, in the 45th percentile based on age norms. [REDACTED] Performance Scale IQ score of 108 fell within the upper end of the average range, in the 70th percentile based on age norms. Dr. Rapport found that the

ten-point differential between ██████'s Verbal and Performance Scale IQ scores was not a significant discrepancy and, therefore, that ██████ Full Scale IQ score of 103 was an appropriate estimation of ██████'s current intellectual functioning.

20. The Kaufman Test of Educational Achievement ("K-TEA") was administered to assess ██████'s current level of academic achievement. The K-TEA comprises five subtests that are used to arrive at three composite scores of achievement: Reading Composite, Math Composite, and a "Battery Composite" combining the scores of all five subtests. The scores have a mean of 100 and a standard deviation of 15. ██████ scored 102 on the Reading Composite, 101 on the Math Composite, and 97 on the Battery Composite, all scores that placed ██████ in the average range. No significant differences were found between ██████ composite scores in math, reading, and spelling.

21. Dr. Rapport concluded that the results of ██████ psycho-educational evaluation "reveal a child of average intelligence who is currently functioning at expected levels for ██████ age in the broad areas of reading, comprehension, mathematics, and spelling." Dr. Rapport's diagnostic impressions for Axis I of the DMS-IV included ADHD, Pervasive Developmental Disorder (Not Otherwise Specified) ("PDDNOS"),⁵ and Expressive Language Disorder. Dr. Rapport recommended that ██████'s homework be

divided into manageable parts, because of [REDACTED] difficulty sustaining attention and low frustration tolerance.

22 [REDACTED] testified that [REDACTED] filed Dr. Rapport's evaluation report in [REDACTED]'s cumulative file, and that no steps were taken to review the report with the IEP team to consider special education for behavior modification or social skills delays related to ADHD or PDDNOS.

23. When the 2005-2006 school year began, [REDACTED]. was placed in a regular education fourth grade classroom of about 22 students. The IEP team met on October 11, 2005, to conduct its annual review and draft [REDACTED]'s IEP for the upcoming year [REDACTED]. [REDACTED] priority educational needs were identified as: to increase [REDACTED] reading comprehension skills; to improve [REDACTED] adult and peer interactions; and to improve [REDACTED] visual perceptual skills and, thereby, improve [REDACTED] writing quality.

24. The IEP identified five classroom accommodations to be made for [REDACTED] preferential seating or a study carrel; prompting to redirect [REDACTED] to the task at hand; additional time for assignments; additional time for classroom tests; and the use of a planner. [REDACTED] was to receive occupational therapy once a week for thirty minutes. An ESE resource teacher was assigned to consult with [REDACTED]'s regular education teacher on a monthly basis regarding [REDACTED] reading and behavior problems, though in practice these consultations were more frequent.

25 █████ testified that the school year started well. However, in January 2006, █████ requested that the IEP team design and implement a Behavior Intervention Plan ("BIP") for █████. A BIP is implemented when the child's classroom behavior is impeding █████ learning. █████ was concerned that an inexperienced teacher was not being consistent in disciplining █████ therefore wanted a professional behaviorist to observe █████ in the classroom and suggest strategies to be included in a BIP. Kelton Sweet, a behaviorist working for OCSB, observed █████ in the classroom and completed a written functional assessment and BIP on February 11, 2006.

26. Mr. Sweet noted the following "target behaviors": chronic classroom disruptions, including inappropriate and/or continuous talking to the teacher and other students, and noisemaking; leaving █████ seat and moving at will through the classroom; refusal to work on assignments or follow the teacher's instructions; verbal aggression; and throwing objects, though not at people. Mr. Sweet noted that such behaviors are generally supported by the consequences that follow them. █████ offered detailed strategies by which █████ could "unlearn" these behaviors and have appropriate behaviors reinforced.

27. Mr. Sweet proposed a complex BIP involving a system of modified classroom assignments, and encouraging "replacement behaviors" through the award of tokens that █████ could exchange

for behavioral reinforcers, such as being allowed to play computer games. The BIP included a method of dealing with disruptive behavior that was designed to eliminate the "rewards" [REDACTED] had been obtaining through [REDACTED] misbehavior, such as making [REDACTED] the center of attention and escaping classwork.

28. Mr. Sweet's proposed BIP consumed six single-spaced pages of an eleven-page report. In the report, Mr. Sweet acknowledged the difficulty of addressing [REDACTED] behaviors in this fashion while [REDACTED] remained in a regular public school classroom.

29. Kristen DeSanctis is the special education staffing specialist at [REDACTED]. At the hearing, Ms. DeSanctis testified that Mr. Sweet's BIP could not be implemented, because [REDACTED] was in a regular education classroom with a single teacher. Had [REDACTED] been placed in a self-contained varying exceptionalities classroom [REDACTED] would have had a special education teacher trained in implementing the BIP, as well as a paraprofessional to assist.⁶ The record contains no indication that either [REDACTED] or the IEP team believed that placement in a varying exceptionalities classroom would be in [REDACTED]'s best interests. In fact, [REDACTED] has been persistent in her desire to keep [REDACTED] in a regular classroom with accommodations.

30. ██████ believed that the source of much of ██████ misbehavior was frustration with the increased workload in the fourth grade. At a February 23, 2006, IEP revision meeting, the team agreed to an approach to lessen ██████'s workload by allowing ██████ the option of taking work home if the amount of classwork was making ██████ uncomfortable, and specifying that only certain assignments would be graded and all others would be treated as "extra credit."

31. On or about April 10, 2006, ██████ was placed in a different regular education class for the remainder of the 2005-2006 school year. The reasons for this change were not made clear by the testimony at the hearing. ██████ implied that ██████'s original teacher, Ms. LoPresti, had a breakdown of sorts, caused by ██████'s behavior. Ms. DeSanctis, the staffing specialist, recalled Ms. LoPresti becoming upset and "venting" to her in private regarding ██████ but had no specific recollection that this was the direct cause of ██████'s transfer. The IEP team notes for April 6, 2006, simply stated that ██████ would be moved to another class for the remainder of the year.

32. ██████ spent the fourth quarter of the 2005-2006 school year in Ms. Diodonet's fourth grade classroom. Aside from a "C" in social studies for the second quarter of the year, ██████'s grades for the fourth grade consisted of "A"s and

"B"s in all academic subjects, and "satisfactory" grades in Art, Music, and Physical Education. [REDACTED] was promoted to the fifth grade for the 2006-2007 school year.

33. In Spring 2006, [REDACTED] took the Florida Comprehensive Assessment Test ("FCAT"). In reading, [REDACTED]'s score of 1630 placed [REDACTED] at Level 3 on a scale of 5, indicating that [REDACTED] was comfortably at grade level. In mathematics, [REDACTED]'s score of 1661 placed [REDACTED] at Level 4 on a scale of 5, indicating that [REDACTED] was above grade level.

34. [REDACTED] requested that [REDACTED] be assigned to Ari Losman's fifth grade class, after she met Mr. Losman and noted that [REDACTED] seemed to have a good relationship with [REDACTED] Ms. DeSanctis took over as [REDACTED]'s ESE case manager in August 2006. The first day of school was August 7, 2006. IEP team notes, dated August 18, 2006, state that [REDACTED] contacted the IEP team with a request that [REDACTED] be provided with the "FM system," a portable transponder with ear buds that would help [REDACTED] hear and focus on the teacher. The team agreed to provide the FM system.⁷

35. During the summer of 2006, [REDACTED] employed two behaviorists to develop a BIP that Mr. Losman could employ in [REDACTED] regular education classroom. Angie Binder, one of the two behaviorists, testified at the final hearing.⁸ The BIP developed

by Ms. Binder and her colleague, dated August 24, 2006, was entered into evidence.

36. The BIP identified "The Big 3," i.e., three positive behaviors that ██████ should concentrate on to earn computer time during class breaks. "The Big 3" were:

1. Stay QUIETLY in your seat so you don't disturb your classmates.
2. Follow along/pay attention (but it is OK to ask for help if you need to).
3. If a teacher asks you to do something, you need to do it IMMEDIATELY, without talking back.

37. The BIP set forth ██████'s schedule as follows:

8:45 - 9:40	Math
9:40 - 10:20	Specials
10:20 - 11:30	Follow the Big 3 rules to earn CCC [an educational computer program with reading and math components]
11:30 - 11:38	Snack
11:40 - 12:00	CCC in room 25 (BRING FOLDER and PENCIL)
12:05 - 12:25	Follow the Big 3 rules to earn CCC
12:25 - 12:55	CCC in media center (BRING FOLDER and PENCIL)
12:55	Clinic for meds
1:00 - 1:30	Lunch
1:30 - 2:00	Kindergarten class ^[9]

2:00 - 2:45	Follow the Big 3 rules to earn tokens for computer time (1 penny = 1 minute) ^[10]
2:45 - 2:55	Earned computer time
2:55	Pack up to leave
3:00	Dismissal

38. The behaviorists drafted written guidelines for implementing ██████'s BIP:

Since most of [█████] problem behaviors occur throughout the day, beginning after specials, we have broken ██████ day down into manageable "chunks" of time in which ██████ can earn the opportunity to work on the computer doing CCC. Doing CCC on the computer was chosen as the reinforcer because it is something ██████ enjoys doing, it gives ██████ the opportunity to leave the classroom, and whenever students score over 80% (as ██████ usually does) they get a lollipop. A natural consequence of spending so much time doing CCC is academic improvement, and the students with significant improvement get called on stage for a special award at the end of the year.

In order for ██████ to earn CCC computer time, ██████ needs to follow the three basic behavior rules: 1. Stay quietly in ██████ seat; 2. Follow along/paying attention; and 3. Respond immediately to an adult's request, without arguing. Mr. Losman will employ the "3 strikes and you're out" rule, where ██████ will give 2 warnings and if ██████ has to issue a 3rd, then ██████ has not earned the reinforcer. The reinforcement is based solely on behavior, not on academic performance. ██████ has two opportunities to earn CCC sessions in the morning, and in the afternoon ██████ can go to the kindergarten class and be the teacher's assistant. This

is not a reinforcer that can be earned or lost, but more of a given opportunity for ██████ to feel successful and to boost ██████ self-esteem. The kindergarten teacher reports that ██████ is a wonderful leader in ██████ class and that in helping the students with phonics ** is also working to improve ██████ speech. Upon returning to class, a token economy will be available for ██████ to earn time on the computer doing ██████ activity of choice (academic website, game, etc.). Tokens are added to the Velcro strip on a variable time schedule of about every 8 minutes. As of this time, ██████ will not lose any tokens for inappropriate behavior, but Mr. Losman will prompt ██████ to remain on task by presenting the token and altering the delivery based on ██████ compliance to the rules. For example, ██████ will be reinforced frequently for complying with requests and staying on task, but if Mr. Losman notices ██████ not following along, ██████ can begin to deliver the token, then pause and point to where ██████ should be focusing, and then deliver the token as soon as ██████ gets back on task. At 2:45 these tokens are redeemable for computer time, with each token equaling 1 minute. At this time Mr. Losman will spend a minute with ██████ reviewing the day and teaching ██████ to self-monitor by filling out the simple data sheet to indicate the reinforcement earned that day. It is recommended that ██████ reinforcement be carried over to home, with ██████ earning privileges or treats for a good day at school, as well as a response cost for bad days.

This new plan for [████████] school days will start on Monday, August 28, 2006. It is recommended that communication between school and home takes place on a daily basis via the data sheet/notes, and with behavioral staff twice a week via phone or email.

39. The referenced data sheet was a simple graphic depiction of computers and pennies that would indicate, for each day of a given week, whether [REDACTED] had earned [REDACTED] morning and afternoon CCC computer sessions, and how many minutes of "free" computer time [REDACTED] had earned via the token system.

40. Ms. Binder observed Mr. Losman's classroom six times during August and September 2006. She was concerned about Mr. Losman's attitude toward [REDACTED]. Ms. Binder observed [REDACTED] doing what she termed "basic everyday behaviors" for [REDACTED], such as refusing to do [REDACTED] work, distracting other students, and not following directions. Mr. Losman commented aloud, in front of [REDACTED] that he would ask for [REDACTED].. to be removed from [REDACTED] class if [REDACTED] behavior did not improve.

41. During her August 29 observation, Ms. Binder noted that she did not see the BIP being implemented. She observed [REDACTED] mumbling, raising [REDACTED] hand while the teacher was talking, making statements out of turn, and playing with objects at [REDACTED] chair. What Ms. Binder termed "more severe" behaviors included [REDACTED]'s getting out of [REDACTED] chair, standing at the window, and throwing an eraser off [REDACTED] desk. In Ms. Binder's estimation, [REDACTED] was never "totally out of control" during any of her observations. Ms. Binder observed that [REDACTED] seemed very

focused during math class. ■ was praised for completing a problem at the board, and was eager to do it again.

42. Over the course of her observations, Ms. Binder saw no improvement in the relationship between ■ and Mr. Losman. The teacher would roll his eyes at ■, and state in front of the class that ■ did not follow the rules. ■ would come to Ms. Binder and tell her that Mr. Losman was being mean to ■. Ms. Binder advised ■ that ■ needed to change teachers.

43. Mr. Losman testified that at the outset of the 2006-2007 school year, he worked to help ■ reach the benchmarks set forth in ■ carryover IEP from October 2005. One of ■'s IEP benchmarks was to remain silent when ■ is upset/angry rather than make inappropriate comments. At the beginning of the year, Mr. Losman conducted role playing activities to help the students learn ■ expectations of them. When he saw a student modeling the proper behavior, Mr. Losman would stop the class and make a note of it. When he saw negative behavior, he would stop the class and discuss what was right and wrong about that behavior. When role playing, ■ would respond with the correct answer as to how ■ should behave. However, Mr. Losman noted that actually practicing the correct behavior was "another story at times" for ■. By way of example, Mr. Losman testified that if ■ got up and wandered to the window, Mr.

Losman would model with words, asking █████ what █ should be doing right now. █████ would ultimately realize █ should be in █████ seat. Mr. Losman did not mind if █████ left █████ seat, or sat on the floor, so long as █ did not disrupt the classroom.

45. When █████ was distracted, Mr. Losman's "usual routine" was get █████ back on task, and subtly try to re-engage █████. If that failed to work, Mr. Losman would offer █████ an alternative assignment. If █████ refused the alternate assignment, █████ behavior would usually escalate into a "situation." If █████'s behavior was not too disruptive, Mr. Losman would attempt to ignore it. If █████'s behavior disrupted the flow of instruction for the rest of the class, Mr. Losman would call to the main office for assistance.

46. Though the testimony that Mr. Losman was "picking on" or "being mean" to █████ is not credited, the evidence on the whole does support Ms. Binder's contention that the BIP was not consistently implemented. █████ was given the computer breaks whether or not █ had earned them, because █████ teachers found it easier to give in than to deal with the escalating misbehavior that would ensue if █████ were denied █████ breaks.

47. The IEP team met on September 19, 2006, in a planning session prior to developing █████'s new IEP in October. █████ testified that, prior to this meeting, Mr. Losman and Ms. DeSanctis had consistently complained to her about

██████'s behavior. At the September 19 planning session, the team discussed accommodations regarding...██████'s workload, though the testimony of the participants varied as to the outcome of the discussion.

48. ██████ testified that she asked Mr. Losman and Ms. Pelletier to allow...██████ to opt out of some classwork in the manner that had been allowed during the latter part of the 2005-2006 school year. ██████ testified that this request was denied, and that Mr. Losman instead offered to drop some low grades. According to ██████ did hours of homework every night in the struggle to keep up with the class, because ██████ was unable to complete all of ██████ classwork during school hours ██████ testified that Mr. Losman's offer would not have helped ██████, because the child would still be required to do all the work.

49. Mr. Losman testified that, at the beginning of the school year, the IEP team decided that ██████ would be required to complete all the work that the other students were doing. After about two weeks ██████ complained that the workload was excessive, and Mr. Losman conceded that it was "slightly cumbersome." Mr. Losman testified that he determined which papers were most important, gave ██████ only those assignments that he planned to grade, and cut down the amount of classwork. It was also agreed that ██████ would not have to participate in the accelerated reader

program at school, and would instead read every night to [REDACTED] who would report [REDACTED] progress to Mr. Losman.

50. Based upon a review of all the evidence and testimony, Mr. Losman's version of events regarding [REDACTED] workload is credited. [REDACTED] correctly states the situation prior to September 19, but the evidence does not support her contention that the IEP team flatly refused to modify [REDACTED]'s workload at that meeting. The team notes for September 19 indicate that homework and test expectations were discussed, and that accommodations for math and reading tests would be implemented. The evidence established that the modifications were a work in progress through the conclusion of the first quarter of the 2006-2007 school year, but the team did work with [REDACTED] and [REDACTED] to arrive at a comfortable arrangement for [REDACTED]'s classwork.

51. The IEP team met on October 10, 2006, to conduct its annual review and draft [REDACTED]'s IEP for the upcoming year. The team notes for the meeting indicate that [REDACTED] met the dismissal criteria for the occupational therapy program. The notes further stated that [REDACTED] would receive an assistive technology referral and continue to use AlphaSmart as needed in the classroom.¹¹ [REDACTED] was noted to be at grade level academically, but below grade level in [REDACTED] social/emotional skills.

52. ██████'s priority educational needs were identified as: to improve adult interactions and increase ██████ ability to complete work independently in the classroom; and to provide classroom accommodations to assist with improving ██████ work performance in class.

53. The IEP identified six classroom accommodations to be made for ██████ consultation in social skills and behavior; prompting to redirect ██████ to ██████ task; additional time for assignments; additional time for tests; reduce the number of practice items; and testing conducted in an alternative setting. As in the previous year, an ESE resource teacher was assigned to consult with ██████'s regular education teacher on a monthly basis, though in practice these consultations were more frequent.

54. At the October 10, 2006, IEP team meeting, it was agreed that ██████ would be referred for a new psycho-educational evaluation. ██████ expressed special concern regarding what she termed ██████'s continued academic difficulties and processing delays.

55. The written referral for ██████'s evaluation was completed on October 11, 2006. The referral states that the reason for the referral is "Behavioral/Emotional," not "Achievement/Learning." The specific behaviors of concern are that ██████'s behavior is "unmanageable in a regular

classroom . . . ■ does not follow adult directions, is verbally aggressive towards adults, peers . . . does not complete assignments in class, is out of ■ seat, threatens to leave the room." In short, ■'s academic progress was on grade level, but ■ behavior issues continued to interfere with ■ participation in the regular education classroom. The referral lists ■'s grades for the first quarter of the 2006-2007 school year: C in reading; D in language; D in math; A in science; and A in social studies.¹²

56. The referral lists the attempted interventions during the current school year and their results. First, the FM listening system was initiated on September 22, 2006, and was ongoing at the time of the referral. The listed result was that the FM system was offered to ■ every day, but that ** refused to wear it.¹³ Second, the token system was initiated on September 19, 2006, and ended on October 11, 2006.¹⁴ The listed result was that ■ "earns computer time, but still does not do any class work."

57. For reasons unexplained at the hearing, ■'s vision and hearing screenings did not occur until October 27, 2006, and the evaluation by the school psychologist did not commence until November 2, 2006 ■ complained that the school would not remove ■ from Mr. Losman's classroom. ■ held ■ out of school on October 30 through

November 2, 2006. An IEP team meeting was held on November 2, 2006, to review and modify a revised functional behavioral assessment summary and BIP created by [REDACTED]'s behaviorists.

58. Though [REDACTED] agreed with the revised BIP, she continued to complain that the school was not adequately administering the accommodations already in place. [REDACTED] continued to hold [REDACTED] out of school until after the winter break concluded in January 2007, except for activities relating to [REDACTED] psycho-educational evaluation.

59. At the hearing, [REDACTED] testified that her reason for holding [REDACTED] out of school was her fear for [REDACTED]'s physical safety due to inappropriate discipline. The evidence presented at the hearing established that on at least one occasion, Mr. Losman called to the office for assistance with [REDACTED], and that assistant principal Kathy Peterson came to the classroom and lightly restrained [REDACTED] in the manner prescribed by her Crisis Prevention Intervention training, which involves techniques for de-escalating volatile classroom situations. The evidence did not demonstrate that

[REDACTED] was ever physically abused or subjected to inappropriate discipline at [REDACTED].

60. The psycho-educational evaluation of [REDACTED] began on November 2, 2006, by Maria Amunategui, a school psychologist for OCSB. Ms. Amunategui did not observe [REDACTED] in the classroom,

because ■ had removed ■ from school. Ms. Amunategui did observe ■'s behavior over multiple testing sessions. She noted a wide variation in ■'s mood and demeanor at each testing session, despite similar environmental variables in each. At some sessions, ■ would appear to lack energy and speak in a low voice. ■ would become avoidant when confronted with a challenging task, attempting to divert the examiner, asking for ■ would appear agitated and overactive. ■ would walk around the testing room, look out the windows, and attempt to negotiate the rules of the testing session with the examiner. During these sessions ■ required frequent and repeated redirection to remain on task.

61. Ms. Amunategui administered the Wechsler Intelligence Scale for Children, Fourth Edition ("WISC-IV"). The WISC-IV is a test of cognitive ability that yields a Full Scale IQ score and four index scores: Verbal Comprehension, Perceptual Reasoning, Working Memory, and Processing Speed ■ Full Scale IQ was measured at 90, where 100 is the mean score and the standard deviation is 15. Thus ■ overall cognitive score was in the average range.

62. ■'s index scores were 89 in Verbal Comprehension, 102 in Perceptual Reasoning, 86 in Working Memory, and 94 in Processing Speed, all scores ranging from low average to average. Ms. Amunategui noted a "significant and rare"

discrepancy between ██████'s Perceptual Reasoning and Working Memory scores, indicating that ██████ perceptual and fluid reasoning, spatial processing, and visual-motor integration are better developed than ██████ "working memory" abilities involving attention, concentration, mental control, and reasoning.

63. To test ██████'s academic achievement levels, Ms. Amunategui administered the Woodcock-Johnson III Tests of Achievement ("WJ-III ACH"). The subtests of the WJ-III ACH measure academic skills in reading, mathematics, and written and oral language ██████'s scores were generally in the average range and commensurate with ██████ measured ability. ██████ performance was above average to superior in the math subtests, while ██████ basic reading skills and reading comprehension were average compared to same-age peers. ██████'s overall score in written expression was in the average range, but ██████ score on a subtest measuring writing fluency was well below average.

64. Ms. Amunategui administered portions of the Woodcock-Johnson III Tests of Cognitive Abilities ("WJ-III COG") to evaluate ██████'s ability to process information. To provide a comprehensive analysis of ██████'s cognitive processing, Ms. Amunategui administered seven subtests: crystallized intelligence (intelligence based on stored knowledge and experience); fluid reasoning (intelligence based on raw learning

ability); long-term retrieval; visual-spatial thinking; auditory processing; processing speed; and short-term memory.

65. The WJ-III COG indicated that [REDACTED] cognitive processing ranges from low average to average in most areas, which was the range predicted by [REDACTED] measured ability. However, [REDACTED]'s performance in the short-term memory subtest was in the extremely low range. Ms. Amunategui's report, citing the WJ-III COG Examiner's Manual, noted that the short-term memory subtest measures the ability to attend to information, hold this information in immediate awareness, and then use it within a few seconds.

66. To assess [REDACTED]'s personality and attitudes, Ms. Amunategui employed the Behavior Assessment System for Children, Second Edition ("BASC-2"), which evaluates a child's behavior as rated by the child [REDACTED], [REDACTED] parents, and teachers. The BASC-2 measures numerous aspects of behavior and personality, including positive ("adaptive") and negative ("clinical") dimensions. The BASC-2 teacher and parent behavior ratings showed common concerns in the emotional/behavioral characteristics of: pervasive unhappiness or depression; inappropriate behavior or feelings; and difficulty in interpersonal relationships.¹⁵ [REDACTED]'s self-report included those three characteristics, along with physical symptoms or fears.

67. In her summary and conclusions, Ms. Amunategui restated the results of the intellectual and academic testing, then stated the following:

Additionally, [REDACTED] behavioral and emotional functioning may be impacting [REDACTED] performance in the classroom. [REDACTED] is exhibiting serious emotional problems, and current evaluation results indicate that [REDACTED] demonstrates the following characteristics:

- * An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- * Inappropriate types of behavior or feelings under normal circumstances.
- * A general pervasive mood of unhappiness or depression.
- * Physical symptoms or fears.

The characteristics listed by Ms. Amunategui are among those found in the definition of "emotional handicap" in the then-current version of Florida Administrative Code Rule 6A-6.03016(1).¹⁶

68. At the conclusion of her report, Ms. Amunategui included the following suggestions for future interventions:

- * In relation to [REDACTED] behavioral difficulties in the classroom, it is suggested that a structured behavioral management program be put in place to address [REDACTED] difficulties. This program should focus on positive reinforcement for increasing desired behaviors. Home privileges could be made contingent on [REDACTED] achieving a specified level of performance in the classroom.

* Rules and consequences should be clear to all students, such as by posting them in writing or with pictures. Rules should be reviewed and discussed regularly. Rewards and consequences should be meaningful and quickly delivered.

* Teach [] self-monitoring skills. If [] feels ready to cry, begins to become quickly frustrated, or feels [] "losing control," teach [] how to monitor [] and independently take appropriate action. [] may benefit from instruction in the use of specific mnemonic strategies to register and retrieve important information. Teach [] to use rehearsal techniques with information [] must remember. Material can be rehearsed by repeating it verbally or visualizing it.

* Close communication between the home and school is strongly encouraged to further reinforce any strategies used in the classroom setting.

69. On or about November 9, 2006, Natalie Jeoffroy, a licensed speech/language pathologist working for OCSB, administered a speech/language assessment to [] determine [] eligibility for speech and language services. She administered the Clinical Evaluation of Language Fundamentals, Fourth Edition ("CELF-4"), the standard evaluation employed to determine initial eligibility.¹⁷ Under OCSB's standards, the score on a standardized language test must be more than 1.5 standard deviations below the mean for the student's chronological age in order to establish the student's eligibility for services.

70 [REDACTED]'s score of 90 in the qualifying criterion of Core Language was well above the qualifying score of 77.

Ms. Jeoffroy conducted no further tests because she found no significant discrepancies between [REDACTED]'s scores in the CELF-4 Core Language subtests of expressive and receptive expression, or between [REDACTED] language scores and nonverbal measures. Ms. Jeoffroy found [REDACTED] to be a very bright, cooperative student with a tendency to interrupt her questions during the testing.

71. As noted above [REDACTED] was held out of school from early November 2006 until the spring semester commenced in January 2007. [REDACTED] filed the Request for Due Process Hearing on [REDACTED] behalf on November 8, 2006. Mediation was conducted on December 4, 2006. On January 8, 2007, the IEP team met to discuss the recently completed testing for [REDACTED]¹⁸ and to follow up on issues raised at the mediation.

72. The result of this IEP team meeting was a determination that [REDACTED] met the criteria for placement as Emotionally Handicapped ("EH"). The grounds for this determination were set forth on an "Emotionally Handicapped (EH) Assessment Report" signed by a multi-disciplinary team, including: Ms. Amunategui as school psychologist; Ms. Pelletier as principal; Ms. DeSanctis as staffing coordinator; a regular

classroom teacher (not Mr. Losman); an ESE teacher; and a school social worker.

73. The assessment report set forth the "characteristics of an emotional handicap" and the "criteria for eligibility," with "yes" and "no" checkboxes after each. The characteristics and criteria read as follows:

A. CHARACTERISTICS OF AN EMOTIONAL HANDICAP

1. The student demonstrates an inability to achieve academic progress that cannot be explained by intellectual, sensory or health factors.
2. The student demonstrates an inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
3. The student displays inappropriate types of behavior or feelings under normal circumstances.
4. The student exhibits a general pervasive mood of unhappiness or depression.
5. The student displays a tendency to develop physical symptoms or fears associated with personal or school problems.

B. CRITERIA FOR ELIGIBILITY (to be completed only if the student exhibits one or more characteristics of an emotional handicap)

1. The student has received supportive educational assistance and counseling services available to all students and still exhibits an emotional disability.

2. The emotional disability has existed over an extended period of time and in more than one situation.

3. The emotional disability interferes with the student's own learning, reading, arithmetic or writing skills, social-personal development, language development or behavioral progress and control.

4. If intellectual, sensory or physical deficits exist, they are being addressed by other appropriate interventions or special programs.

74. The multi-disciplinary team checked "yes" as the response to each of the quoted statements, which tracked the language of the then-current version of Florida Administrative Code Rule 6A-6.03016(1) and (3). The proposed placement option for ██████ remained the regular classroom with support services. ██████ was placed in Ms. Klein's fifth grade classroom for the remainder of the school year.

75. ██████ strenuously disagreed with the finding that ██████ met the criteria for EH. She contended that ██████ discriminated against ██████ by not providing the accommodations and evaluations ██████ needed during ██████ time at the school, thereby causing ██████ behavior difficulties ██████ believed that the school set up the psycho-educational evaluation in order to eventually push ██████ into an EH classroom, thus ridding the regular education program of a problem student. The facts recited above indicate, at the very least, that by the 2006-2007 school year,

██████████ personnel were wearying of the effort to rein in -
██████████'s behavior in a regular education classroom by way of
BIPs.

76. ██████ disagreed with the speech/language evaluation
conducted by OCSB's employee, Ms. Jeoffroy, and contacted the
Center for Speech and Language, Inc. in Orlando to conduct an
independent evaluation. The evaluation was performed by Nancy
Colantino, a speech/language pathologist, on January 12, 2007.
Several tests were administered, including a mini-language
sample of ...██████████ expressive language. Ms. Colantino's comments
and recommendations included the following:

Results of testing indicate receptive and
expressive language deficits. ██████
displays a severe deficit in auditory short-
term memory for repeating unrelated words
and a moderate deficit for repeating numbers
and sentences. Memory for repeating digits
in reverse order is within the low average
range. ██████ displays deficits in the ability
to follow verbal directions of increasing
length and complexity, as well as for
listening comprehension for story
information. [██████████ displays semantic
deficits in structured and unstructured
tasks, such as conversation. Critical
thinking and verbal reasoning skills are
also mildly depressed. Verbal organization
is reduced as evidenced by the excessive use
of verbal mazes.^[19] ██████] speech is
characterized by /r/ and vocalic /r/
distortion.^[20]

It is recommended that [██████████ receive
speech/language treatment on a twice a week
basis with emphasis on the following long
term goals:

1. Increase auditory memory skills.
2. Increase the ability to follow verbal directions of increasing length and complexity.
3. Increase auditory comprehension skills to grade level.
4. Increase semantic skills for specific word knowledge and use.
5. Increase critical thinking/verbal reasoning skills.
6. Improve verbal organization to reduce the use of verbal mazes.
7. Assess oral motor skills, with direct intervention as needed.
8. Remediate articulation errors.
9. Increase pragmatic skills.

It is, also, recommended that [REDACTED] participate in a social skills group.

77. In her testimony, Ms. Jeoffroy stated that the mini-language sample is used by OCSB to determine eligibility for speech/language services, but only where there are discrepancies in the student's responses on the CELF-4. She had found no such discrepancies in [REDACTED]'s responses to the CELF-4.

Ms. Jeoffroy stated that Ms. Colantino appeared to have administered the mini-language sample in a fashion consistent with OCSB practice, but that she could not agree that the test

established ...[REDACTED]'s eligibility without seeing the test protocols, which were not produced at the hearing.

78. On January 18, 2007, Tami Folks, an occupational therapist and assistive technology practitioner for OCSB, conducted a consultation regarding [REDACTED]'s handwriting and typing skills. Ms. Folks noted that [REDACTED] resisted writing a sample sentence and [REDACTED] name on a piece of paper, and was more willing to type, which [REDACTED] did using a two-handed, single-finger approach [REDACTED] was able to locate the letters and use basic function keys such as "space," "backspace," and "enter."

79. Ms. Folks noted that [REDACTED] handwriting was inconsistent. Sometimes, [REDACTED] was able to stay between the lines and size the letters appropriately, so that tall letters such as "t" and "d" took up the whole space on the line and short letters such as "o" and "a" came up halfway between the lines. On other samples, all the letters were the same size, which decreased their legibility. At times, [REDACTED] put spaces between the words and at other times ** ran the words together.

80. Ms. Folks recommended the following strategies to increase [REDACTED]'s ability to produce written assignments:

Handwriting:

* Encourage [REDACTED] to skip lines when writing.

- * Explore the use of graph paper and have [REDACTED] skip a box between words for spacing.
. . .

Technology:

* Complete a formal typing program to reinforce keyboarding skills and increase accuracy in typing frequently occurring letter combinations. Completion of a formal program will teach [REDACTED] key placement and relationship of the keys to each other. These skills will speed up [REDACTED] typing regardless of finger placement used.

* Encourage student to use classroom computer/AlphaSmart to complete classroom assignments.

* Clearly define with [REDACTED] which written tasks will be completed on the classroom computer/AlphaSmart and, which tasks will be completed using paper and pencil. For example writing sentences using [REDACTED] spelling words will be done on the classroom computer/AlphaSmart, where fill in the blank worksheets will be done by handwriting in the answers.

* Review attached AlphaSmart skills check list with student to ensure [REDACTED] is maximizing the use of the AlphaSmart.

* Review basic word processing skills, for example:

- Name and saving files
- Change font type/size/bold/underline
- How many spaces between words or after punctuation
- How to spell check/grammar check
- Use of numbering/bullets
- Page set up/margins
- Creating/using a table

81. The IEP team met on January 23, 2007, to complete a new IEP for ██████ in light of the recent evaluations. Ms. Klein reported that ██████ was adjusting well to her classroom. Ms. Pelletier discussed the accommodation of a "peer buddy" for ██████ a fellow student who assists ██████ with note taking and organization in the classroom. The group agreed that ██████ would not be pressured to participate in a public speaking contest. ██████ would be allowed to use the AlphaSmart and would be required to write only three sentences in response to essay questions on tests given by Ms. Klein.

82. Ms. Pelletier proposed that ██████ participate in counseling with the guidance counselor during ██████ lunch hour, one day per week. The sessions would be aimed at improving ██████'s self-esteem, and ██████ ability to make friends and interact appropriately with ██████ peers. The guidance counselor would also bring in some of ██████'s peers to participate in group sessions, further assisting ██████ in learning proper interaction with fellow students. ██████ did not agree to the counseling sessions, and continued to decline consent for ██████ to participate in the EH program.

83. ██████ also questioned the reward system being put in place as part of ██████'s revised BIP. Ms. Pelletier explained that ██████ would be going to the media center and working as an assistant, shelving books and performing other tasks at the

direction of the media specialist, as part of [REDACTED] reward system. This would allow [REDACTED] a break from the classroom setting and inculcate a sense of responsibility, similar to [REDACTED] assisting the kindergarten teacher during the first quarter of the school year.

84. Ms. Pelletier told [REDACTED] that [REDACTED] would participate in a small-group session to improve [REDACTED] written expression two days per week [REDACTED] requested that [REDACTED] also receive pull-out reading support, but the consensus of the IEP team was that [REDACTED] was not having problems in reading sufficient to merit such treatment. Ms. Klein explained that an ESE teacher was already in the classroom to work with small groups during reading, and that [REDACTED] received the benefit of these sessions along with the non-ESE students.

85. [REDACTED] inquired about the proposed IEP's finding that [REDACTED] had a need for assistive technology devices and services. Ms. Pelletier assured [REDACTED] that this statement referenced only the AlphaSmart device and the audio books that [REDACTED] was already using in the school library.²¹

86. The January 23, 2007, IEP identified [REDACTED] as eligible for services under the SLD and EH programs, though it also noted [REDACTED]'s objection to the EH label as "capricious" and [REDACTED]'s belief that [REDACTED]'s reading deficits were not being addressed.

87. The IEP identified [REDACTED]'s priority educational needs as: to improve adult and peer interactions; improve [REDACTED] compliance to adult requests; provide classroom accommodations to assist with improving [REDACTED] work performance in class; and to improve [REDACTED] written expression skills to grade level.

88. The IEP identified ten classroom accommodations to be made for [REDACTED] the use of AlphaSmart; prompting to redirect [REDACTED] to [REDACTED] task; additional time for assignments; additional time for tests; reduce the number of practice items; testing conducted in an alternative setting; the peer buddy system discussed by Ms. Pelletier; advance organizers and/or study guides; guides and/or visuals for assignments; and the teachers to check with [REDACTED] to ensure [REDACTED] understands instructions. The IEP identified small group instruction as ESE services to be provided to [REDACTED]. Under "supplementary aids and services," the IEP provided for a BIP and weekly counseling, the latter of which was declined by [REDACTED]. 89. At the hearing, [REDACTED] testified that [REDACTED] was doing fine now that the school was "actually doing what they should have been doing all along" in terms of BIP implementation and classroom accommodations.

90. In summary, the historical evidence demonstrated that [REDACTED] has been identified as meeting the criteria for SLD since preschool. [REDACTED] was first diagnosed with ADHD while in preschool, but has apparently never been evaluated for

eligibility under the OHI classification. ██████ experienced speech/language delays from a very early age, possibly related to abuse prior to ██████'s taking custody of ██████. ██████ began to exhibit classroom behavior problems in the second grade, but nonetheless progressed academically in the regular classroom setting with accommodations. In the second and third grades, ██████'s overall performance tended to be above grade level in science and math, and somewhat below grade level in language arts and reading. A psychological evaluation conducted early in ██████'s fourth grade year indicated that ██████ Full Scale IQ, Verbal Scale IQ, and Performance Scale IQ were all in the normal range, and that ██████ academic performance was consistent with ██████ IQ levels.

91. As to the 2005-2006 school year, the evidence demonstrated that ██████'s behavior in the classroom became more consistently problematic. ██████ worked with behaviorists, both OCSB employees and independent consultants, to arrive at a BIP that would be effective for ██████ and workable in the regular classroom setting. The initial BIP developed by Mr. Sweet in February 2006 was deemed unworkably complex by Ms. DeSanctis. However, the IEP team in February 2006 did adopt ██████'s suggestion that ██████ workload be reduced, in keeping with ██████'s belief that ██████'s misbehavior was triggered by frustration at the amount of work given the students in the

fourth grade. ██████'s grades in academic subjects for the fourth grade were almost entirely "A"s and "B"s. On the fourth grade FCAT, ██████ scored at Level 3 in reading (at grade level) and at Level 4 in mathematics (above grade level). ██████ was promoted to the fifth grade for the 2006-2007 school year.

92. The 2006-2007 school year began with ██████ being placed in Mr. Losman's class, at ██████'s request, and with a new BIP in place, developed by two private behaviorists hired by ██████ the evidence established that ██████..... and Mr. Losman did not have a good relationship and that the BIP was not consistently implemented ██████ requested workload adjustments similar to those granted ██████.in the fourth grade, and Mr. Losman worked conscientiously to make realistic modifications to ██████'s workload through the first quarter of the school year.

93. In October 2006, ██████ was referred for a new round of psychological testing, premised not upon any academic shortcomings, but on ██████ classroom behavior. ██████ cognitive and academic scores were in the average range, but the testing demonstrated below average scores in writing fluency, a deficit in ██████ "working memory" abilities consistent with ██████ ADHD diagnosis, and an extremely low score in the short-term memory subtest.

94. Most significantly, the BASC-2 test provided the impetus for the IEP team's finding that █████ met the criteria for EH. Florida Administrative Code Rule 6A-6.03016, as written prior to July 1, 2007, provides as follows, in relevant part:

(1) An emotional handicap is defined as a condition resulting in persistent and consistent maladaptive behavior, which exists to a marked degree, which interferes with the student's learning process, and which may include but is not limited to any of the following characteristics:

(a) An inability to achieve adequate academic progress which cannot be explained by intellectual, sensory, or health factors;

(b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(c) Inappropriate types of behavior or feelings under normal circumstances;

(d) A general pervasive mood of unhappiness or depression; or

(e) A tendency to develop physical symptoms or fears associated with personal or school problems.

(2) Criteria for eligibility. Students with disruptive behavior shall not be eligible unless they are also determined to be emotionally handicapped. A severe emotional disturbance is defined as an emotional handicap, the severity of which results in the need for a program for the full school week and extensive support services.

(3) A student is eligible for a special program for emotionally handicapped if there is evidence that:

(a) The student, after receiving supportive educational assistance and counseling services available to all students, still exhibits an emotional handicap;

(b) An emotional handicap exists over an extended period of time, and in more than one situation;

(c) The emotional handicap interferes with the student's own learning, reading, arithmetic or writing skills, social-personal development, language development or behavioral progress and control; and

(d) When intellectual, sensory or physical deficits exist, they are addressed by other appropriate interventions or special programs.

(4) Criteria for eligibility for programs for severely emotionally disturbed. A student is eligible for a special program for severely emotionally disturbed if the student meets the criteria in subsection 6A-6.03016(2), F.A.C., above and there is evidence that the student requires a program which:

(a) Serves the student for the full school week in a special class;

(b) Provides a highly structured academic and affective curriculum, including but not limited to art, music and recreation services which are specifically designed for severely emotionally disturbed students;

(c) Provides for a lower adult to pupil ratio than programs for emotionally handicapped are designed to accommodate;

(d) Provides extensive support services specifically designed for severely emotionally disturbed students. These services include but are not limited to:

1. Individual or group counseling,
2. Parent counseling or education, and
3. Consultation from mental health, medical or other professionals; and

(e) Cannot be provided in a less restrictive environment.

(5) Procedures for referral. Prior to the referral for student evaluation, the following procedures are required for students enrolled in public school programs. If a student is transferring from an agency which provides services to emotionally handicapped students, the requirements in paragraphs 6A-6.03016(4)(a), (b), (c), (d), and (e), F.A.C., shall be waived.

(a) Conferences concerning the student's specific problem. These conferences shall include the parents or guardian, administrative personnel, teaching personnel and student services personnel, as appropriate;

(b) Anecdotal records or behavioral observations made by more than one (1) person and in more than one (1) situation which cite the specific behaviors indicating the need for the referral;

(c) A minimum of two (2) interventions and adjustments that have been tried with the student. These interventions shall include, but not be limited to, change in student's class schedule or teacher; change in student's curriculum; change in techniques of instruction; interventions provided by student services personnel; community agency intervention; or health and rehabilitative services agency intervention;

(d) Review of social, psychological, medical and achievement data in the student's educational records;

(e) Review of attendance records, and where appropriate, investigation of reasons for excessive absenteeism; and

(f) Screening for vision, hearing, speech and language functioning.

(6) Procedures for student evaluation.

(a) The minimum evaluation for determining eligibility for emotionally handicapped or severely emotionally disturbed shall include all information collected in subsection 6A-6.03016(4), F.A.C., and the following:

1. A medical evaluation when determined by the administrator of the exceptional student program or designee that the behavioral problem may be precipitated by a physical problem;

2. A comprehensive psychological evaluation conducted in accordance with subsection 6A-6.071(5), F.A.C.,^[22] or by a psychiatrist which shall include the following information: an individual evaluation of intellectual ability and potential, an evaluation of the student's personality and attitudes, and behavioral observations and interview data relative to the problems described in the referral;

3. An educational evaluation which includes information on the student's academic strengths and weaknesses; and

4. A social or developmental history which has been compiled directly from the parent or guardian.

(b) For students enrolled in programs for emotionally handicapped, the minimum evaluation for determining eligibility for

special programs for severely emotionally disturbed shall include evidence of the following procedures:

1. Conferences concerning the student's specific problem in the program for emotionally handicapped;
2. Anecdotal records or behavioral observations made by more than one (1) person in more than one (1) situation which cite the specific problems causing the need for a program for severely emotionally disturbed;
3. Interventions and adjustments that have been tried with the student while enrolled in the program for emotionally handicapped;
4. An update of the social history required by subparagraph 6A-6.03016(5)(a)4., F.A.C.; and
5. Additional psychological, psychiatric or other evaluations deemed appropriate by the administrator of the exceptional student education programs.

(7) Parent education. Each district shall make provisions for a parent education program for all parents of students placed in full-time special classes for emotionally handicapped and severely emotionally disturbed. (Emphasis added)

95. In light of the facts found above, the underscored portions of the quoted rule raise questions whether the IEP team followed prescribed procedures in placing the EH label on [REDACTED] and whether [REDACTED] meets the definition of EH at all [REDACTED] has not shown an inability to achieve adequate academic progress. To the extent that [REDACTED]'s academic progress has,

at times, not been commensurate with *** native abilities, the language of the rule requires the school to rule out physical causes such as ADHD and/or ██████'s established processing deficiencies (working memory and short-term memory) before concluding that ██████ is emotionally handicapped.

96. The rule also requires that any intellectual, sensory, or physical deficits must have been "addressed by other appropriate interventions or special programs" without affecting the presence of the "emotional handicap." The evidence established that the school's implementation of ██████'s BIPs has been so sporadic that it cannot be fairly stated that ██████ ADHD and memory problems have been "addressed" sufficiently to rule them out as the causative factors in ██████ classroom behavior.

97. The underscored portions of subsection (5) imply that the parent has received notice that the school suspects EH and is working consultatively with the parent and student in exploring that potential diagnosis. In this case, ██████ credibly testified that the process was not collaborative. While there was no direct evidence that the psychological evaluation process itself was skewed to arrive at the EH classification, the IEP team was quick to seize upon the EH label when ██████'s BASC-2 test results raised that possibility ██████ suspicions regarding the process were not wholly unfounded.

98. Based on the evidence presented at the hearing, it is found that the process by which the IEP team arrived at the EH finding for ██████ was so perfunctory and flawed as to be unreliable and invalid. This finding does not preclude the IEP team from conducting a new EH evaluation, pursuant to the current version of Florida Administrative Code Rule 6A-6.03016. The record also establishes that, out of deference to ██████'s objections, OCSB had not acted on the EH designation as of the time of the final hearing. ██████ remained in a regular classroom with accommodations similar to those ██████ had received under previous IEPs.

99. ██████ demonstrated that the IEP team has never formally addressed whether ██████'s ADHD and mental processing deficits make ██████ eligible for services under the OHI program. However, it is clear that ██████'s IEPs have consistently addressed ██████ attention deficit and processing problems through accommodations such as prompting to redirect ██████ to ██████ tasks, additional time for assignments and tests, reduced classroom workload, and testing in alternative settings. It is certainly within the discretion of the IEP team to consider whether ██████ qualifies for OHI services, but it cannot be found that the IEP team has neglected to consider ██████'s ADHD and processing difficulties in developing ██████ IEPs and providing ██████ accommodations and services pursuant to those IEPs.

100. It is found that the staff of [REDACTED] generally and the IEP team in particular have worked conscientiously to provide [REDACTED] with FAPE. It is noted that the EH finding was made in conjunction with an IEP written after [REDACTED] filed the Request for Due Process Hearing that initiated this matter and that, despite her disagreement with the determination [REDACTED] pronounced herself more or less pleased with [REDACTED]'s current classroom situation.

101. [REDACTED] demonstrated that [REDACTED]'s BIPs could have been more consistently implemented, that [REDACTED]'s teachers could have been more patient with [REDACTED], and that the school's administration could have been more responsive and sensitive to [REDACTED]'s accommodation needs regarding items such as the FM system and audio books. The question, however, is not whether the school could have done more. In every situation, for every child, the answer to that question will always be "yes." The correct question is whether the school did enough to provide [REDACTED] with a free appropriate public education.

102. Despite [REDACTED] behavior problems, [REDACTED] made meaningful educational progress during the 2005-2006 and 2006-2007 school years. Testing has consistently shown [REDACTED] to be a child of average intelligence whose academic achievement is generally consistent with [REDACTED] intellect. [REDACTED] grades were adequate to pass from one grade to the next. [REDACTED] fourth grade FCAT scores were

on grade level for reading and above grade level for mathematics. With the notable exception of the EH designation on the January 23, 2007, IEP, ██████ had accepted the IEPs at the time they were written, and those IEPs provided sufficient accommodations to enable ██████ to progress academically in the regular education classroom ██████. has received FAPE.

103. The IEP team should address the questions of ██████'s eligibility under the EH and OHI designations on a prospective basis during the development of ██████'s next IEP. Given the finding that ██████ received FAPE during the period relevant to this hearing, there is no retrospective or compensatory relief to be granted aside from the finding that ██████ was not properly labeled EH.

CONCLUSIONS OF LAW

104. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties of this proceeding pursuant to Subsection 1003.57(1)(e), Florida Statutes (2006), and Florida Administrative Code Rule 6A-6.03311(11).

105. Subsection 1003.57(1), 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. . . ."

106. Subsection 1003.57(1)(a), requires each school district to "provide the necessary professional services for diagnosis and evaluation of exceptional students."

107. Subsection 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. Subsection 1003.57(1)(e) provides that a student may not be given special instruction or services as an exceptional student until the student has been properly evaluated, classified, and placed. Subsection 1003.57(1)(f) requires that school districts providing special instruction or services use the regular school facilities and adapt them to the needs of exceptional students "to the maximum extent appropriate" and segregate ESE students only if education in regular classes, with supplemental aids and services, "cannot be achieved satisfactorily."

108. In this case, it was undisputed that [REDACTED] was eligible for services as an ESE student, under the category of Specific Learning Disabilities. Further, the parent did not contest [REDACTED]'s placement in a regular education classroom with accommodations. The controversies over eligibility related to [REDACTED]'s belated classification as Emotionally Handicapped, and the IEP team's failure to consider whether [REDACTED]'s ADHD made [REDACTED] eligible for services under the Other Health Impaired program.

The controversy over placement related to the nature of the accommodations provided to ██████ in the regular education classroom, not whether ██████ should be in that classroom.

109. The IDEA, 20 U.S.C. Section 1400, provides that the local education agency must provide children with disabilities with a free, appropriate public education, which must be tailored to the unique needs of the handicapped child by means of an IEP program. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

110. The determination of whether a school district has provided FAPE to an exceptional student involves a twofold inquiry as directed by the United States Supreme Court in Rowley:

First, has the State [or school district] complied with the procedures set forth in the Act [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State [or school district] has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 206-207. See also School Board of Collier County Florida v. K.C., 285 F.3d 977 (11th Cir. 2002)(restating and applying the Rowley test).

111. The nature and extent of "educational benefits" required by Rowley to be provided by Florida school districts was discussed in School Board of Martin County v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999):

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry County School District, 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997)(citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Board of Education, 938 F.2d 712 at 715, and Lachman v. Illinois State Board of Education, 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

112. Petitioner has the burden of proof to establish, by a preponderance of the evidence, that the IEPs developed by OCSB

do not comport with the IDEA and do not provide for FAPE.

See Schaffer v. Weast, 546 U.S. 49 (2005).

113. Under the IDEA, Petitioner has the right to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, with the limitation that the alleged violation must have occurred not more than two years before the date the parent or school board knew or should have known about the alleged action forming the basis of the complaint. 20 U.S.C. § 1415(b)(6). In this case, the parent's complaint is limited to the 2005-2006 and 2006-2007 school years, although evidence was admitted concerning prior years in order to provide context regarding ██████'s current educational status.

114. The only allegation that may be termed procedural involves ██████ contention that ██████ as improperly designated as EH. The evidence supported ██████'s substantive claim that OCSB had not ruled out that ██████'s behavioral problems were manifestations of ██████ ADHD and mental processing problems before concluding that ██████ fell into the EH category. However, the evidence at the hearing further showed that OCSB failed to comply with the procedures set forth in the then-current version of Florida Administrative Code Rule 6A-6.03016, quoted in full

in the findings of fact above, for the determination of EH eligibility.

115. Concerning the legal effect of procedural violations, the IDEA provides as follows, at 20 U.S.C. Section 1415(f)(3)(E):

(E) Decision of hearing officer.

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

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

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

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

(III) caused a deprivation of educational benefits.

116. As of the time of the hearing in this case, OCSB had done nothing more than designate [REDACTED] as eligible for services under the EH program. The mere designation did not impede [REDACTED]'s right to FAPE or cause a deprivation of educational benefits, so long as [REDACTED] continued to receive the proper accommodations in the regular classroom and the school

took no action to place ██████ in the EH program. The process by which the IEP team arrived at the EH eligibility designation did significantly impede ██████'s ability to participate in the decision-making process regarding the provision of FAPE to ██████ in that there appeared to be a rush to judgment without adequate consultation with ██████²³ and without sufficiently documented observance of the procedural eligibility determination requirements set forth in then-current Florida Administrative Code Rule 6A-6.03016. However, given that no placement action has occurred, the procedural violation also can be cured by the substantive remedy, i.e., withdrawal of the EH designation pending a re-evaluation of ██████ pursuant to the current version of Florida Administrative Code Rule 6A-6.03016.

117. Having resolved the first part of the Rowley test in Petitioner's favor, it remains to be determined whether there was compliance with the second portion of the Rowley test.

118. In this regard, an appropriate education does not mean a "potential-maximizing education." Rowley, at 198, n. 21. The issue in reviewing an IEP is whether the student has received "the basic floor of opportunity" to receive an educational benefit. J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1572-1573 (11th Cir. 1991); Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991). FAPE does, however, require "more than a trivial educational benefit." See

Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3rd Cir. 1999).

119. An IEP must provide "significant learning" and "meaningful benefit" when considered in light of a student's potential and individual abilities. Ridgewood Board of Education v. N.E., supra at 248. The IDEA creates a presumption in favor of a school system's educational plan, placing the burden of proof on the party challenging it. See White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir. 2003); Teague Independent School District v. Todd L., 999 F.2d 127, 132 (5th Cir. 1993).

120. The IEPs developed for the 2005-2006 school year on October 11, 2005, and for the 2006-2007 school year on October 10, 2006, and, after ██████'s re-evaluation, on January 23, 2007, with the single exception of the EH designation discussed above, were entirely adequate expressions of the informed, good faith consensus of the IEP team. The preponderant, persuasive evidence established that, despite ██████ behavioral difficulties, ██████ made consistent academic progress in the regular education classroom with the accommodations provided by these IEP's. It must be concluded that a "basic floor of opportunity" has been provided such that meaningful educational benefit has been accorded ██████ by

OCSB, the IEPs enacted and their implementation. [REDACTED] has received FAPE during the 2005-2006 and 2006-2007 school years.

ORDER

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

ORDERED that:

Respondent withdraw the designation of [REDACTED] as eligible for services under the Emotionally Handicapped ("EH") program as set forth in the EH Assessment Report, dated January 8, 2007, and in the IEP, dated January 23, 2007, pending a re-evaluation of [REDACTED] pursuant to the current version of Florida Administrative Code Rule 6A-6.03016. In all other respects, the Request for Due Process Hearing, filed on November 8, 2006, is DISMISSED.

DONE AND ORDERED this 7th day of August, 2007, in Tallahassee, Leon County, Florida.

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LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings

this 7th day of August, 2007.

ENDNOTES

1/ 34 C.F.R. 300.8(c)(9), as amended effective October 13, 2006, provides:

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

2/ ██████ testified that, due to unspecified "problems" with the Department of Children and Family Services, ██████ was removed from ██████ home and placed in a foster home for a period of seven weeks during this period. ██████ adoption of ██████ was completed later in 2003. Hearsay documents admitted at the hearing indicated that ██████ requested that ██████ be removed from her home for a period of time. ██████'s temporary removal is relevant only to establish why the Department of Children and Family Services had the authority to refer ██████ for a psychological examination.

3/ The Diagnostic and Statistical Manual of Mental Disorders ("DSM") is a handbook published by the American Psychiatric Association that categorizes mental disorders and the criteria for their diagnosis. The most recent major revision of the DSM is the DSM-IV, published in 1994, with a text revision in 2000. The DSM-IV organizes each psychiatric diagnosis into five levels, or axes, relating to different aspects of disorder or disability. Axis I sets forth clinical disorders, as well as developmental and learning disorders.

4/ The notes from an IEP team meeting held on April 26, 2005, indicate that ... [REDACTED] told the team that [REDACTED] had been diagnosed with bipolar disorder. No evidence was presented at the hearing to support this claimed diagnosis. Dr. Mark D. Rapport's psychological evaluation, conducted in August and September 2005, stated: "No evidence was presented to suggest that [REDACTED] is exhibiting Bipolar Disorder symptoms."

5/ PDDNOS is one of five disorders identified in the DSM-IV under the category of Pervasive Developmental Disorders. This class of disorders has in common the following characteristics: impairments in social interaction, imaginative activity, verbal and nonverbal communication skills, and a limited number of interests and activities that tend to be repetitive. The other PDDs are Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, and Asperger's Disorder. Children with PDDNOS either do not fully meet the criteria of symptoms clinicians use to diagnose any of the other four specific types of PDD, or do not have the degree of impairment found in the four specific types of PDD.

6/ Ms. DeSanctis also testified that [REDACTED] herself undercut Mr. Sweet's work by providing the IEP team with a BIP of her own devising at a February 23, 2006, IEP revision meeting. However, [REDACTED] credibly testified that she was not given a copy of Mr. Sweet's report in February, and out of desperation came up with her own plan to address [REDACTED] behavior problems. [REDACTED]'s testimony is supported by an "IEP team notes" document indicating that she was not provided a copy of Mr. Sweet's report until April 16, 2006.

7/ A test period of the FM system was commenced in September 2006. Documents entered into the record indicate that [REDACTED] would not make use of the system. [REDACTED] testified that the teachers made [REDACTED] feel so self-conscious about it in front of the class that [REDACTED] refused to use it. OCSB offered no testimony to contradict [REDACTED] contention, which is therefore credited.

8/ At the hearing, the second behaviorist was identified only as "Emily" from First Choice Behavior Solutions, Inc.

9/ To improve [REDACTED] social skills and self-esteem [REDACTED] assisted the kindergarten teacher in [REDACTED] classroom.

10/ This reward was for "fun" computer time, as opposed to the academically oriented CCC computer time.

11/ AlphaSmart is a portable word-processing keyboard that [REDACTED] had been allowed to use in the fourth grade, because of continuing problems with legible penmanship.

12/ Mr. Losman testified that these grades reflected the ongoing process of working out which and how much work [REDACTED] would be required to complete in class. These grades were based on the test results and homework that Mr. Losman had in hand at the time of grading. Mr. Losman testified that [REDACTED] made academic progress during the first quarter, and that [REDACTED]'s low grades were at least partially due to [REDACTED] not turning in homework.

13/ See endnote 7, supra.

14/ This statement in the referral is the only indication of the duration of the BIP's token system. It appears that the system was employed for less than one month, a further indication that the school was less than enthusiastic about consistent application of the BIP over time.

15/ It should be noted that in every category of the clinical and adaptive scales, [REDACTED]'s teachers rated [REDACTED] as clinical or at risk. Ms. Amunategui noted that the teachers' ratings triggered a test index calling for "caution," meaning that [REDACTED] teachers may have a tendency to exaggerate the severity of [REDACTED] problems.

16/ A revised Florida Administrative Code Rule 6A-6.03016 became effective on July 1, 2007.

17/ Because [REDACTED] had been dismissed from the Speech/Language Impaired program by the October 18, 2004, IEP, this evaluation was treated as an initial assessment. Ms. Jeoffroy had no prior experience with [REDACTED], and testified that the IEP team made it clear that it wanted her to perform a "cold" evaluation of [REDACTED]. She was given no background information that might skew her testing of [REDACTED].

18/ The lengthy time between the start and completion of [REDACTED] evaluations was not fully explained at the hearing, although it is noted that the semester break occurred during this period.

19/ Ms. Colantino defined "verbal mazes" as "hesitations, revisions or repetitions of words or groups of words," indicative of difficulty in planning and organizing one's thought prior to speaking.

20/ ██████ testified briefly at the hearing. The undersigned noted a slight speech impediment, but had no difficulty understanding ██████.

21/ One of ██████'s continuing complaints was the paucity of audio books at ██████'s reading level in the ██████ school library. ██████ believed that ██████'s reading was greatly helped when ██████ could follow along with an audio book, but she testified that ██████ quickly went through all of the appropriate books in the library and that Ms. Pelletier was resistant to ordering more. Ms. Pelletier testified that she attempted to help ██████ find more audio books and provided ██████ with a list of the local public library's holdings. Ms. Pelletier did not explain why the school's library was unable to expand its holdings of audio books.

22/ Florida Administrative Code Rule 6A-6.071 was repealed on October 18, 1994. This reference was never corrected in the version of Florida Administrative Code Rule 6A-6.03016 that was in effect prior to July 1, 2007. The version of the rule currently in effect differs significantly from the prior version, and does not contain the outdated reference.

23/ There were no allegations and no evidence of the sort of procedural violations more typical of due process hearings, such as failure to provide adequate notice to the parent of IEP team meetings. ██████ conscientiously notified ██████ at each step of the process, and ██████ was diligent in ██████ participation.

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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.