

STATEMENT OF THE ISSUE

Petitioner filed the due process requests that commenced both cases. In DOAH Case No. 11-1334E, the issue is whether, pursuant to Florida Administrative Code Rule 6A-6.03311(6), Petitioner's evaluations of occupational therapy, physical therapy, speech, and behavior are appropriate. In DOAH Case No. 11-1430E, the issue is whether Petitioner can prove that its psychology evaluation is appropriate. For reasons discussed in the Conclusions of Law, these issues are narrower than the issues that Petitioner has identified.

PRELIMINARY STATEMENT

By Request for Due Process Hearing filed March 15, 2011, in DOAH Case No. 11-1334E, Petitioner alleged that Respondent filed a request for IEEs on February 28, 2011, in eight areas. The areas, with the alleged dates of Petitioner's prior evaluations, if any, are: occupational therapy, including sensory integration--January 25, 2010; physical therapy--January 25, 2010; music therapy--none; assistive technology--January 29, 2010; neuropsychology--none; speech evaluation, including oral motor, pragmatic language, articulation, and enunciation--January 27, 2010; sign language--January 26, 2009; and functional behavior analysis--March 3, 2010. In [REDACTED] proposed final order, Respondent states that [REDACTED] is not seeking IEEs for

sign language or assistive technology, so these evaluations are not further addressed.

The Request alleges that Petitioner is denying the IEEs in music therapy and neuropsychology because Petitioner has not conducted evaluations of these two areas. The Request alleges that Petitioner is denying the request for IEEs in the remaining areas because the evaluations that it has conducted in these areas are appropriate and have yielded the information needed for the educational planning necessary to provide Respondent with a free appropriate public education.

For relief, the Request seeks an Order determining that:

- 1) the evaluations performed by Petitioner are appropriate, so Respondent is not entitled to IEEs in these areas at public expense;
- 2) Respondent is not entitled to IEEs at public expense in areas not previously evaluated by Petitioner; and
- 3) Respondent's parents must sign a Release of Information allowing Petitioner's therapists to speak to Respondent's physician, Dr. Lisa Sirota.

By Request for Due Process Hearing filed March 17, 2011, in DOAH Case No. 11-1430E, Petitioner alleged that it received an email from Respondent on March 11, 2011, stating that the student was scheduled for a private psychology evaluation, for which Respondent demanded Petitioner to pay. The Request alleges that Petitioner conducted a psychology evaluation on

January 14, 2010, that was appropriate and yielded the information needed for the educational planning necessary to provide Respondent with a free appropriate public education. For relief, the Request seeks an Order determining that the January 14, 2010, psychology evaluation is appropriate, so Respondent is not entitled to a psychology IEE at public expense.

At the hearing, Petitioner called 13 witnesses and offered into evidence Petitioner Exhibits 1-13 and 15-25. Respondent called one witnesses and offered into evidence Respondent Exhibits 1, 2, 4, 6, and 8. All exhibits were admitted except Respondent Exhibit 8, which was proffered.

The parties did not order a transcript. They filed their proposed final orders on April 28, 2011. The Administrative Law Judge granted no specific extensions, and the Final Order is due, under the 45-day deadline of Florida Administrative Code Rule 6A-6.03311(9)(v)6., on May 2, 2011.

FINDINGS OF FACT

1. The student was born on [REDACTED]. [REDACTED] has been diagnosed with Down syndrome, cyanotic congenital heart disease, hypotonia, developmental delay, feeding disorder, and failure to thrive. Since birth, the student has undergone several, lengthy hospitalizations, usually, if not invariably, to correct congenital cyanotic heart lesions and pulmonary hypertension.

2. The student's most recent major hospitalization, at ■■■, was for an extensive cardiac reconstruction, which was performed on September 17, 2007. Following this procedure, the student remained in the cardiac intensive care unit at the hospital for over six months.

3. Still suffering from serious pulmonary and cardiac conditions, the student requires vigilant observation at all times to monitor ■■■ for loss of oxygen. ■■■ chronic lung disease leaves ■■■ at risk for severe pulmonary compromise with any respiratory infection. The student also takes long-term anticoagulants to prevent clotting within ■■■ coronary vessels or intra-cardiac repair, so even incidental trauma poses a risk of serious bleeding.

4. At all relevant times, the student has attended Petitioner's school system under the following ESE eligibilities: Hospital or Homebound, Intellectual Disability, Language Impaired, Physical Therapy, Occupational Therapy, and Speech Impaired.

5. Petitioner conducted a reevaluation meeting on August 27, 2009, to determine whether the student needed a formal reevaluation at that time. The student's mother attended the meeting and participated. The reevaluation team determined that the student, who had recently resumed homebound instruction

after an interruption for some reason, would be reevaluated again later.

6. The Reevaluation Plan dated August 27, 2009, indicates that a current reevaluation is due September 7, 2009, so, presumably, the last reevaluation plan was September 7, 2006.

7. The Reevaluation Plan dated August 27, 2009, identifies no concerns or vision, hearing, and psychological processing.

8. For speech, the Reevaluation Plan states that the mother reports that the student's voice is "whispery," and [REDACTED] is unable to pronounce some sounds. For expressive and receptive language, the Reevaluation Plan states that the student is currently using "some language and is continuing using signs and gestures." For academic achievement, the Reevaluation Plan states that the student knows all letters, sounds, and basic shapes.

9. For intellectual functioning, the Reevaluation Plan states that a March 6, 2007, psychology evaluation revealed that the student's cognitive functioning was within the moderately mentally handicapped range. For personality/emotional functioning, the Reevaluation Plan states that the mother indicated that the student is "out of control with new teachers."

10. For adaptive behavior/behavior functioning, the Reevaluation Plan states that a March 1, 2007, report indicated

that the student's overall adaptive functioning fell within the mildly mentally handicapped range with significant delays in physical development, self-help, social skills, academic skills, and communication skills. The Reevaluation Plan adds:

Due to a change in behavior at home[,] a reevaluation is requested in the area of behavior. Mom reports that [REDACTED] will not participate in a non-preferred activity[;] [REDACTED] is hitting and spitting. [REDACTED] has an aversion to rubber gloves and demonstrates by hiding, screaming, and/or running away.

11. For physical/motor/medical, the Reevaluation Plan states that the student has Down syndrome, congenital heart conditions, a cyanotic heart lesion, and pulmonary hypertension. Also, the student suffers from hypotonia with associated deficits in strength, lung disease, failure to thrive, and feeding difficulties.

12. The Reevaluation Plan concludes that no formal reevaluation is recommended because the student continues to meet the eligibilities listed above and that a reevaluation is recommended because additional information is needed. If there is an unambiguous recommendation in these statements, the Administrative Law Judge is unable to find it. By checking both boxes, the reevaluation team did not clearly express itself and, specifically, failed to announce unambiguously its decision not to conduct any evaluations at that time. However, the mother evidently understood that the team had so decided.

13. On November 18, 2009, the mother sent an email to Marjorie DiVeronica, the ESE Specialist at the school to which the student was assigned. The email demands an "independent evaluation" for physical therapy because the mother did not agree that the student had met [REDACTED] goals and believed that [REDACTED] needed more physical therapy than Petitioner had provided. In the same email, the mother asked for an "independent evaluation" for

sensory integration occupational therapy to determine [REDACTED] [unclear] issues so therapy can be better targeted. I am not satisfied with support only. I believe [REDACTED] may benefit from a sensory diet, organization skills and more fine motor therapy. I would like an independent auditory integration evaluation to best determine what the exact issues are and the most effective way to overcome them in [the student's] specific situation.

I want [REDACTED] to have a music and art therapy evaluation so [REDACTED] can have those included in [REDACTED] education. At this time [REDACTED] has nothing for music and/or art in [REDACTED] school week like children that are able to attend school.

I want an independent assistive technology evaluation.

I want [REDACTED] evaluated for a touch typing program and a computer that can have a program to teach [REDACTED] touch typing.

I am requesting a neuropsychological evaluation as I do not have clear and accurate data regarding [REDACTED] IQ and function level. I have been told since [REDACTED] is non-verbal[,] school staff did an inadequate evaluation.

I am requesting independent speech evaluations to include oral motor, pragmatic language, articulation and enunciation, and sign language. I feel that behaviors have developed due to [REDACTED] lack of communication skills and school staff inability to communicate with [the student].

[The student] has developed behaviors due to [REDACTED] frustration with school staff[']s lack of ability to communicate with [REDACTED]. I want an independent behavior evaluation.

I want an independent evaluation for water therapy and adaptive physical education.

I will expect a reply as my [REDACTED] at this time is receiving little to no education and therapy.

14. By letter dated December 2, 2009, Respondent's Due Process Coordinator Lida Yocum acknowledged receipt of the November 19 email requesting several IEEs. Ms. Yocum stated that the student had been evaluated on October 27, 2008, for Hearing, Speech, Language, Adaptive Behavior, Occupational Therapy, and Physical Therapy, and the results had been discussed at the February 6, 2009 IEP meeting. The letter notes:

At this time, your request does not meet the criteria for an IEE. Florida Statutes and State Board of Education Rules (2009) 6A-6.03311(6) (a) states, "A parent of a student with a disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district." The evaluations that you have requested were not evaluations that were

previously conducted by Broward County Public Schools.

The District is denying your request for an IEE. . . . As you will note in the attached Notice, the School Board is proposed to conduct a comprehensive re-evaluation expeditiously, as a remedy to your request for an IEE. The Re-evaluation Plan will be discussed at the December 9, 2009 Interim IEP meeting.

15. The enclosed Notice of Proposal/Refusal, which is dated December 2, 2009, states that the parent's request for an IEE is denied because the areas had not previously been evaluated by Petitioner, but Petitioner will conduct a reevaluation plan meeting to determine the areas where further evaluation information is needed and evaluate the student accordingly.

16. Ms. Yocum's letter is puzzling. Her denial of IEEs because the areas had not been previously evaluated by Petitioner contradicts her acknowledgement in the same letter that Petitioner had already performed evaluations of physical therapy, occupational therapy (which presumably includes sensory integration because the mother specifically included this in her November 18 letter), speech, language and behavior.

Ms. DiVeronica testified similarly: Petitioner had already performed evaluations of physical therapy, occupational therapy, assistive technology, speech, and language, but not music therapy. Ms. DiVeronica was unsure if, as of November 18, 2009,

Petitioner had conducted a functional behavior evaluation. The record contains copies of two evaluations previously conducted by Petitioner: a psychology evaluation performed on March 6, 2007, and a physical therapy evaluation performed on two dates in November 2008.

17. After receiving the mother's November 18 letter demanding several IEEs, Petitioner did not immediately ensure that IEEs were conducted at public expense or request a due process hearing to show that the areas that it had evaluated had been evaluated appropriately. Petitioner erroneously concluded that all that was required of it was action on the demand, which, as noted above, is an unambiguous denial, although the reasons are muddled, coupled with a commitment to perform, itself, the evaluations in some of the areas covered in the mother's November 18 letter.

18. At the same time, Ms. Yocum spoke to the mother's advocate, Selena O'Shannon, and said that Petitioner had already performed evaluations of physical therapy, occupational therapy (including sensory integration), language, and speech--omitting behavior, perhaps inadvertently. Ms. Yocum suggested a comprehensive, rather than piecemeal, reevaluation prior to the February 2010 IEP meeting, and Ms. O'Shannon replied that she would discuss this possibility with the mother. In the meantime, Petitioner scheduled another reevaluation meeting.

19. The proper characterization of these conversations is disputed between the parties. However, it is clear that Ms. Yocum and the mother's advocate were not negotiating IEEs, but were instead discussing the evaluations that Petitioner would perform.

20. A Parent Participation form dated December 9, 2009, identifies the purpose of a meeting on that date as a review of the current IEP, discussion of hospital/homebound services, and development of a reevaluation plan that will include a determination of the child's need for an individualized evaluation. Ms. O'Shannon and another advocate for the mother, Ms. Solomon, attended the December 9 reevaluation meeting--one in person and one by telephone. The mother also attended. During the meeting, everyone discussed, area by area, the scope of the needed reevaluation, but no one discussed the IEEs that the mother had requested three weeks earlier.

21. There is no basis in the record to infer the mother's thinking at this point. She may have decided to wait to see how Petitioner's evaluations turned out, or she may have decided that she wanted Petitioner's updated evaluations and the IEEs she had demanded. Maybe she did not know how to prosecute her demand for IEEs, or could not afford the time and effort--or the cost, if she had to hire an attorney--to file a due process request to get Petitioner to act on her IEE demands. She

testified that she lacked the funds to pay for IEEs. All of these inferences are as likely as Petitioner's proffered inference that she withdrew her IEE demands.

22. Following winter break, Petitioner obtained hearing, speech/language, psychological, occupational/physical therapy, and psychosocial evaluations in January 2010, as well as a functional behavioral assessment on March 3, 2010.

23. The audiology evaluation took place on January 13, 2010. Although it is not among the evaluations at issue in these cases, it is relevant to the extent that the audiologist found nothing remarkable about the student's hearing. This allowed the ensuing evaluations to take place.

24. The psychology evaluation took place on January 13, 2010--presumably, after the audiology evaluation. Based on the administration of the Stanford-Binet Intelligence Scales, Fifth Edition, the student earned a nonverbal intelligence quotient of 50, placing █████ nonverbal cognitive skills within the moderately impaired range and below the first tenth of the first percentile. The psychologist found that the student demonstrated knowledge of common tasks, such as waving, drinking from a cup, cutting paper with scissors, drinking with a straw, eating with a spoon, blowing a whistle, sweeping with a broom, and watering plants with a watering can, but demonstrated difficulty with quantitative reasoning and visual-spatial tasks

involving basic number concepts, counting, position, and direction. The student's math skills were "very poor." As to activities of daily living, the student moved independently within [REDACTED] school environment, which probably means the portion of [REDACTED] home in which [REDACTED] receives instruction. [REDACTED] also participated enthusiastically in class activities, displayed ample energy for activities, and took turns, but had difficulty accepting the consequences of [REDACTED] behavior.

25. In terms of the Basic School Skills Inventory, Third Edition, the student displayed an overall skill level below the first percentile with similar scores for spoken language, reading, writing, math, and daily living skills.

26. In terms of adaptive functioning, the student listened closely for at least five minutes when a teacher talked, but did not consistently work on one task for at least fifteen minutes. [REDACTED] looked at others' faces when they are talking. [REDACTED] was able to greet and say goodbye to others. The student was cooperative on preferred tasks and uncooperative on nonpreferred tasks, often refusing to engage in them or throwing items. The student did not engage much with the occupational therapist on fine-motor or visual-motor activity.

27. In the Developmental Profile, Third Edition, the student demonstrated scores below the first tenth of the first

percentile in general development, physical, adaptive behavior, social/emotional, cognitive, and communication.

28. In terms of academic skills, the student lacked a sight vocabulary of at least five words and had "very limited" writing skills. In general, as to basic concepts, the student performed "significantly below" age level in all areas assessed. In spoken language, the student could answer most "wh" questions, follow verbal instructions, and initiate and maintain conversations with others. ■ was also consistently able to talk about ■ needs and feelings.

29. In terms of social skills, the student routinely participated in fun activities, sometimes needing a reminder to wait ■ turn. ■ had difficulty controlling ■ feelings when ■ does not get ■ way. ■ would say "thank you" when given a gift and sometimes say "please" when asking for something. The student laughed when ■ found something humorous. ■ could express feelings of happiness, sadness, fear, and anger and sometimes recognize these feelings in others, occasionally feeling sympathy for others who were upset or sad.

30. The psychologist concluded the report by observing that the student "continues to demonstrate the characteristics of an intellectually disabled child," and ■ "should continue to benefit from ESE services that address ■ academic, social, behavioral, and developmental needs." The psychologist thus

recommended that the student's teachers continue to provide repetition and stress overlearning of material; use concrete materials and hands-on experiences; provide constant feedback and reinforcement; emphasize the development of functional living skills, personal responsibility, and functional academics; allow for short breaks and teach the student cues that alert ■■■ that it is time to resume work; and incorporate the recommendations from previous psychological reports, as relevant and appropriate.

31. The psychological report appears comprehensive and suitably detailed relative to its findings. In all regards, the psychological report is appropriate.

32. The occupational/physical therapy evaluation is a combined evaluation resulting from a combined observation on January 25, 2010. The evaluation summary covers six areas. For curriculum and learning, the summary states that the student had a designated classroom area and sat at an age-appropriate table with appropriate chair with appropriate sitting balance and postural control for academic tasks. ■■■ walked independently in ■■■ classroom area. For self-help, the summary states that the student had strong food preferences. ■■■ could finger feed and use a fork independently, but had difficulty using a spoon with thin liquids. ■■■ needed assistance setting up ■■■ meal. The student could sip from a straw, but had difficulty drinking from

an open cup. ■ was being toilet-trained. ■ had some trouble pulling up ■ clothing, but was able to push down ■ clothing. ■ could wash and dry ■ hands.

33. For mobility, the summary notes that the student could access ■ educational environment with physical independence, but required supervision for safety. ■ could ascend and descend two steps with physical assistance. For gross motor, the summary reports that the student demonstrated appropriate functional gross motor skills in ■ home classroom environment. ■ could transition from standing to sitting on the floor with a controlled technique and from lying on the ground to standing without loss of balance. ■ could throw a ball forward and swing a bat or hockey stick. Outdoor physical activity was a preferred task.

34. For fine motor/visual motor, the summary notes that the student used ■ left hand for most fine/visual motor tasks, but switched to ■ right hand at times. ■ used a pincer grasp when picking up small objects from a table. ■ held chalk with a static tripod grasp. ■ could copy vertical and horizontal lines and imitate circular strokes. ■ could cut along a sheet of paper with physical assist to hold the paper. For sensory processing, the summary states that the student tolerated the closeness of others in ■ home. ■ accommodated to the everyday noises and tolerated wet and dry tactile media without problems.

█ tolerated hand-over-hand assistance. █ did not like to be dirty.

35. The recommendations of the occupational/physical therapy evaluation are two: use a two-step wooden step stool at home for access to functional activities (e.g., washing hands at sink) and train the caregiver and family in the appropriate technique for stair/step climbing, given the mother's concern about the student's exposure to steps in the community. The evaluation explains that the student's performance in the educational environment is impaired by █ delayed fine/visual motor skills and poor functional attending skills toward nonpreferred tasks.

36. The occupational/physical therapy evaluation does not inspire the same confidence as the psychology evaluation and is plainly deficient. It lacks evidence of the kind of data collection found in the psychology evaluation, even if that data, given the areas involved, must be limited to observations, rather than the administration of assessment instruments. By the admission of the occupational therapist who performed █ portion of the evaluation, █ did not address sensory integration, even though this is part of occupational therapy, at least for a child with Respondent's conditions.

37. The superficiality that haunts the entire, two-page document emerges most dramatically in two respects. First, the

student has limited fine/visual motor skills, which the report terms, "delayed." These deficits appear to be exacerbated by ■■■ "poor functional attending skills toward non-preferred tasks, which is affecting ■■■ ability to manipulate classroom tools and objects successfully." But, second, the two recommendations are plainly superficial: use a two-step stool at home and train the caregiver/family for step climbing.

38. From the perspective of occupational therapy, this report does a poor job of identifying the student's numerous, significant deficits, as they impede ■■■ progress in an educational setting; assessing possible means of addressing these deficits in a meaningful sequence; and recommending specific means of addressing these deficits. From the perspective of occupational therapy, this evaluation is not appropriate.

39. From the perspective of physical therapy, this report is also insufficient and inappropriate. Although sitting balance and postural control are critical in the educational setting, and the report mentions these strengths, the report works as a snapshot, not a movie--suggestive, perhaps, of the limited amount of time available for the "evaluation" and the fact that the student's longstanding physical therapist did not perform the "evaluation." Obviously, given the student's hypotonic condition, which is characteristic of persons with

Down syndrome, ■■■ endurance is an important issue to ■■■ ability to function in an educational setting. If ■■■ lacks the muscle tone, for instance, to maintain ■■■ sitting balance and postural control for more than, say, ten minutes, this will contribute to ■■■ above-noted "poor functional attending skills." Again, as with the occupational-therapy perspective, so the physical-therapy perspective: this evaluation fails to address these basic elements of the student's needs in the educational setting--in terms of data collection, data analysis, and informed recommendations.

40. The two therapists who did the occupation/physical therapy evaluation had not previously worked with Respondent. Although a fresh perspective may be valuable, it also means more work in getting up to speed. Unfortunately, the two therapists saw the student on only one occasion. They scheduled a joint evaluation partly due to scheduling reasons. Scheduling difficulties arose due to the limited time available between the mother's IEE demands in mid November 2009 and the IEP meeting set for early February 2010. The limited time seems also to have limited the scope and detail of the therapists' evaluations.

41. The psychosocial evaluation took place on January 27, 2010. This area is not at issue in these cases and the two-page report overlaps small sections of the psychology evaluation

dated January 13, 2010. Thus, the psychosocial report will not be addressed.

42. Also on January 27, 2010, Petitioner issued a speech and language program evaluation. The therapist who did this evaluation had worked with the student extensively in the past and was preferred by the mother. Aware of the student's limited attending skills, the therapist scheduled evaluation sessions in manageable intervals over three days.

43. The purpose of the speech evaluation, according to the report, was to evaluate articulation, voice, and language. The first page of the two-page form lists four "evaluation instruments": observations during assessment, Oral and Written Language Scales, Goldman Fristoe Test of Articulation II, and oral motor exam. The Oral and Written Language Scales was administered on January 22, 2010; the Goldman Fristoe Test of Articulation II was administered on January 20, 2010; and the oral motor exam was administered on January 26, 2010.

44. The results of the Oral Written Language Scales are:

. . . [The student] received a standard score of 40 on both the Listening Comprehension scale and the Oral Expression scale. The oral Composite score had a standard score of 40. This is the lowest standard score possible for this evaluation. [The student] demonstrated an understanding of quantitative concepts and simple descriptive concepts such as big/small. ■ had difficulty making inferences and understanding directional prepositions such

as: on top, behind, under. During the oral expression portion of the exam, allowances were made for [the student] to be able to respond either verbally or with sign language.

45. The results of the Goldman Fristoe Test are:

. . . [The student] received a standard score of □40. ■ vocalizations consist mostly of vowel and consonant-vowel productions. ■ presents with deletions, consonant cluster reductions, and substitutions using the phonemes /t, n, b/. During the evaluation, ■ was able to produce the following phonemes in initial word position /m, b/. In the medial word position, ■ was able [to] produce the /n/ phoneme. In the final word position, [the student] produced the phonemes /n, b, l/.

46. The results of the oral motor exam are:

[The student] presents with good lingual protrusion and lateralization, but slow and uncoordinated movement. ■ has weak labial musculature with uncoordinated movement.

* * *

. . . [The student] has a paralyzed vocal fold. ■ vocalizations are hoarse and harsh. ■ vocalizations are intermittently loud.

47. The speech-language pathologist concluded:

Overall, [the student's] communication consists of vowel and consonant-vowel vocalizations, modified sign language, pantomime, and infrequent use of a Dyn[a]vox. It is difficult for unfamiliar communication partners to understand ■. ■ has shown signs of frustration and avoidance behaviors.

48. The speech evaluation is informed by the results obtained from multiple assessment instruments and presents detailed findings supported by the data. The report could offer more analysis of its specific findings and some bridging of these findings to recommendations that might be useful to the IEP team in identifying speech strategies for the student and preparing specific goals for ■■■ speech/language teachers or therapists to help ■■■ pursue and achieve. However, these shortfalls are insignificant, given the ongoing role of the therapist in Respondent's educational program, as reflected, in part, by the adequacy of the February 2010 IEP in handling speech issues.

49. In ■■■ proposed final order, Respondent treats language--including pragmatic language--as a separate area. Respondent did not do so in the mother's November 2009 letter, nor in the February 2011 letter from counsel that again demanded IEEs. Given the understandable failure of Petitioner to address pragmatic language at the hearing and the compressed timeframe of a due process hearing, the Administrative Law Judge declines to address this issue, except as a subissue of speech, which is how it is treated in the two IEE demands. Under this approach, the weight given to the speech therapist's work extends to pragmatics, as included with the area of speech. For a different result on this subissue, even though the burden of

proof remains on Petitioner, Respondent had the burden of going forward with some evidence about speech/language pragmatics, as applied to Respondent, but Respondent produced no evidence on this matter.

50. Although assistive technology is not an issue as an evaluation, the assistive technology evaluation explains the reference to "Dynavox" above. The assistive technology evaluation states that the student tried a Dynavox MiniMo®, which is an augmentative communication device for persons with disabilities. This evaluation encourages the use of the MiniMo® "as a communication repair strategy when [the student] is not understood by the listener" and the occasional, feigned lack of understanding, on the part of the student's well-established communication partners, to stimulate the student's use of the device.

51. Petitioner issued a Functional Behavioral Assessment on March 3, 2010. This assessment was produced by a team that included an area program specialist for behavior, a hospital homebound ESE specialist, a hospital homebound teacher, and other professionals familiar with the student. However, the behavior specialist who did the observation had no prior experience with Respondent. Although there was a prior behavior plan, no one used it, and likely did not know its location, so there was no opportunity to review this plan and see what was

working and what was not working. However, all parties were aware that the targeted behavior, which has been ongoing since April 2008, is work refusal, which is defined as saying "no," turning away, crawling under a table, or hiding in curtains. And all parties were probably aware that the management of Respondent's behavior had become decidedly ad hoc.

52. In a reversal of the usual roles, the Functional Behavior Assessment obtained data from the February 2010 IEP, which is described below. The two-and-one-half-page assessment notes that the student could stay on task for 10 minutes for preferred activities and five minutes for nonpreferred activities. ■ became frustrated when the listener did not understand what ■ was trying to communicate. ■ sometimes made ■ body go rigid, and ■ made a guttural sound or removed ■ from a situation.

53. Obtaining information from the mother, the Functional Behavior Assessment reports that the student did not like doctor appointments due to hospitalizations and post-traumatic stress. ■ also did not like going to bed at night or getting up in the morning and getting dressed. ■ did not like others to help ■ handwriting or being helped by others. The student did not like speech. ■ more aggressive behaviors occurred at home and include hitting, kicking, and biting ■ father, if ■ tried to stop playing with the student. The mother reported that the

motivation of the student's behavior was ■■■ "wanting ■■■ own way and that ■■■ is spoiled due to ■■■ illness." Due to the student's serious conditions, the mother found it hard to discipline ■■■, and she was gravely concerned about risks to ■■■ fragile health.

54. From the ESE teachers, the Functional Behavior Assessment determined that the student received academic services five days per week, but was below grade level in math and reading. ■■■ left ■■■ work table when ■■■ became frustrated, most often with occupational therapy, physical therapy, and speech therapy. The student responded well to a routine schedule and enthusiastic caregivers, but resisted activities that required independent functioning. When angry, ■■■ gestured or pushed the appropriate buttons on ■■■ MiniMo®.

55. During the direct assessments, which were pursuant to two methodologies of data collection, the behavior specialist detected the target behaviors most during sessions of speech, occupational, and physical therapy. The function of the behavior was to avoid nonpreferred tasks and gain adult attention.

56. The Functional Behavior Assessment identifies setting events as fatigue from poor sleeping and waking routines and problems eating and taking medications. The summary repeats this information and promises that a positive behavior

intervention plan "will be developed or revised," suggesting that the behavior specialist was unsure if there already was such a plan.

57. True to her word, the behavior specialist attached a two-and-one-half-page Positive Behavior Intervention Plan to the Functional Behavior Assessment. The goals of the interventions are to increase the student's participation in inclusive settings, develop friendships, and improve academic performance. Among the proactive strategies are teaching the replacement behavior prior to each session using a social story, using a multi-sensory approach when teaching nonpreferred skills, observing signs from the student, removing toys from the student during lesson time, presenting lessons in an enthusiastic and upbeat manner, sequencing tasks with the nonpreferred followed by the preferred, cueing the student to request a break, and encouraging the parents to allow the staff to implement these strategies without interference and to implement them themselves. For all of these proactive strategies, there are only two replacement skills: asking for a break and following staff directions.

58. The consequence strategies are more numerous and include giving praise when the student asks for a break, using an auditory timer for three-minute breaks, removing all attention for 30 seconds when the student exhibits the targeted

behavior, inducing the student to return from a break by engaging in a preferred activity while ignoring the student, and obtaining parental support, which, if necessary, includes the parents' leaving the room during instruction.

59. As a behavior evaluation, the Functional Behavioral Assessment is an unambitious, even superficial document that reveals little effort in the collection of data, either directly or from third parties. The recommendations largely track what experienced educational professionals would implement themselves when educating a student presenting with the kinds of behavioral challenges that characterize the student in these cases. Although not as deficient as the occupational/physical therapy evaluation, the behavior evaluation has a decided off-the-shelf quality to it and probably could have been prepared by a capable professional who had not observed the student at all.

60. One of the cases cited by Petitioner for another purpose, as discussed below, J. P. v. Ripon Unified Sch. Dist., 2009 U.S. Dist. LEXIS 32035 (E.D. Cal. 2009), illustrates the level of effort that ensures a determination of appropriateness for a behavior evaluation. In Ripon, the functional behavior assessment is nine pages--not two-and-one-half pages--and includes an in-depth compilation of observations of the student on 11 occasions spanning seven days--not a single observation. The observations took place during different

educational activities during different parts of the day. The assessment concluded with analysis of four behavior functions with evidence obtained from the observations and histories and several specific areas of concern.

61. About five weeks before the behavior evaluation, Petitioner conducted an IEP meeting on February 4, 2010. Given the mother's demand in mid November 2009, the intervening school holidays at Thanksgiving and winter break, and the IEP meeting in early February, it is obvious that Petitioner left its evaluators with little time to collect and analyze data as part, and their efforts were rushed. The effect of the rushed performance of evaluations is heightened when they are performed by therapists who have not previously worked with Respondent.

62. The pressure placed on the evaluators was shared by the IEP team members, who had little time to absorb the work of the evaluators, much of which was reported one week to ten days before the IEP meeting. Obviously, where capable work was performed, as in the psychology, speech, and assistive technology evaluations, for example, these IEP team members could take over and ensure that the IEP incorporates the necessary material--somewhat at the expense of the collegiality intended by the requirement of a multidisciplinary IEP team. Where the work is deficient--specifically, the critical areas of occupational and physical therapy--or nonexistent at the time of

the IEP meeting--the critical area of behavior--the output of the IEP team is necessarily wanting. The significance of these deficiencies are in proportion to the complexity of Respondent, who presents with a complex array of interdependent conditions. As might be expected, the IEP is stronger in the areas where the groundwork is stronger and weaker in the areas where the groundwork is weaker or nonexistent.

63. Under the domain of Curriculum and Instruction, the IEP dated February 4, 2010, identifies the student's present level of performance, in part:

As reported in the Psychological Report dated 1/13/10 in the area of reading[, the student] is able to hold a book in its proper position. ■ understands the concepts of letters and ■ produces the sounds associated with consonant letters. ■ is mostly able to recognize lower case and capital letters when names are provided. ■ cannot consistently name letters when they are presented out of sequence. [The student] is unable to recite or sign the letters of the alphabet in the correct sequence, match a written word with the same word within a group of words, or attempt to read words in the proper left-right sequence. [The student] has limited writing skills. In math[, the student] can, with assistance, count most numbers of objects in a set fewer than ten. ■ usually demonstrates understanding of the concepts of "first," "second," and "third."

64. The first goal is, by February 2011, given a list of six lower case consonants, the student will identify the letter through a variety of modalities with 80% accuracy. (All goals

are for February 2011.) The second goal is, given five safety word cards and five picture cards, the student will correctly match the word to the picture with 80% accuracy. The third goal is, given manipulatives, the student will solve simple addition problems to the sum of five with 80% accuracy.

65. Under the domain of Social/Emotional Behavior, the IEP describes the present level of performance as follows: the student is a "happy █" who is interested in animals, computers, music, and books. The IEP states that the student wants everyone involved in █ lessons, and █ "is very happy when █ is understood by the listener and when █ completes preferred activities." However, as to nonpreferred activities, the student "will refuse to participate, crawl under the table, hide behind the curtain, go into a room and slam the door."

66. The fourth goal is, given a nonpreferred activity and visual, gestural, and verbal prompting, the student will attend to the task for five minutes in four out of five opportunities. Strictly speaking, this is not a goal, or else the student made quick progress in mastering it, as the Functional Behavior Assessment on March 3, 2010, states, as noted above, that █ attended to nonpreferred tasks for five minutes.

67. Under the domain of Independent Functioning, the IEP describes the present level of performance from the occupational therapy evaluation performed on January 25, 2010. The IEP

mentions the pincer grasp and static tripod grasp, difficulty using a spoon for thin liquids or drinking from an open cup, and ongoing toilet training. The IEP notes that the student tolerates the closeness of others, common noises in the environment, and wet and dry tactile media, but ■ displays poor attending skills toward nonpreferred tasks and requires continual redirection and encouragement.

68. The IEP describes the present levels of performance from the physical therapy evaluation performed on January 25, 2010. This is pretty much covered by notations that the student is able to access ■ educational environment with physical independence, but requires supervision for safety, and ■ can ascent and descend two steps with physical assistance.

69. The fifth goal is for the student, when given a visual model, to trace ■ name with the proper formation and minimal prompts in four out of five opportunities. The sixth goal is for the student to demonstrate good dynamic balance skills to enable ■ to safely negotiate ■ environment with no more than one verbal prompt 90% of the time. Again, it appears from the occupational/physical therapy evaluation that ■ had mastered this goal prior to the preparation of this IEP. The seventh goal is for the student, when given a toileting routine, to manipulate simple fasteners on ■ clothing bottoms with minimal verbal and physical prompts in four out of five opportunities.

70. Under the domain of Communication, the IEP describes the present level of performance based on the speech evaluation. The tenth goal is for the student, when given a preferred activity, to use a preferred means of communication (e.g., MiniMo®, signing, or verbalization) to comment or ask using a two- or three-word utterance two to three times during a 15-minute activity in four out of five opportunities. The eleventh goal is for the student, when given a visual cue, to produce bilabials (/b/, /p/, and /m/) in the final position with 80% accuracy. The twelfth goal is for the student, when given a list of one- to two-syllable words, to produce the initial consonant in four out of five attempts with minimal cues. The thirteenth goal is for the student, when read a grade-level passage by ■■■ teacher, with picture prompts, to answer literal questions with 80% accuracy in four out of five opportunities.

71. The February 2010 IEP provides 120 minutes weekly of direct language therapy, 60 minutes weekly of direct speech therapy, 300 minutes weekly of intensive instruction in all academic areas, 60 minutes weekly of occupational therapy, and 60 minutes weekly of physical therapy. The February 2010 IEP states that the student will be educated 100% of the time in hospital/homebound through the end of the 2009-10 school year, but 100% in regular class starting the beginning of the 2010-11 school year.

72. Every year, the student's physician files a letter with Petitioner that updates [REDACTED] medical situation and, among other things, qualifies [REDACTED] for hospital/homebound instruction. On January 21, 2011, Dr. Lisa Sirota, sent such a letter to Petitioner.

73. The letter states that the student "continues to recover from a major cardiac reconstruction [on] 9/17/07[,]" and [REDACTED] "continues to have pulmonary hypertension and multiple defects within [REDACTED] heart, which place [REDACTED] at risk for loss of oxygen and requires vigilant observation and care." The letter adds: "[REDACTED] chronic lung disease makes [REDACTED] at-risk for severe pulmonary compromise with any respiratory infection." Also, the student "requires long-term anti-coagulation to insure that no clotting occurs . . ., a situation which places [REDACTED] at risk for bleeding with even incidental trauma."

74. After the grave cautions in the first paragraph, Dr. Sirota's letter defines the task at hand in educating the student as follows:

[The student's educational services] need to be expanded to be commensurate with the needs of a 9 year-old child with Down's Syndrome, specifically, increasing [the student's] school schedule to 3 hours/day (ideally noon-3 pm) with an ESE-teacher skilled in the education of a child with complex medical and development needs. [REDACTED] must continue to receive aggressive speech and oromotor therapy for significant speech, language and feeding deficits, and

occupational and physical therapy for hypotonia with associated deficits in strength, balance, gross and fine motor coordination, postural control, ambulation, visual-spatial skills, eye-hand coordination, and basic functions involved with self-care. The handicapped-accommodations in place in the . . . residence are appropriate for [REDACTED] safety within the home, yet [REDACTED] must be pushed to attain more complex skills to allow [REDACTED] to safely navigate in the world at large. [The student] would benefit from the addition of art and music, to support not only [REDACTED] cultural educational, but to support [REDACTED] neuro-biological development as well.

75. Dr. Sirota's letter advises that educational activities be coordinated with the student's sleep schedule, morning feeding, medication schedule, and myriad appointments with physicians and other health-care providers. She warns that the student's vulnerability to infection and risk of bleeding preclude education in a traditional school setting. [REDACTED] acquisition of a respiratory infection could be "fatal," bleeding from even minor trauma could be a "potential disaster," and head trauma could proceed to a "fatal" intracranial hemorrhage.

76. Although this letter is not unlike other annual letters from Dr. Sirota, at least since the 2007 major cardiac reconstruction, the student's physical therapist became concerned at the warnings contained in the letter. It is possible that her motivation was prompted partly by what seemed

to be a tapering off of physical therapy at the time and a deterioration of relations between the parents and Petitioner.

77. Whatever her motivations, the physical therapist voiced well-founded concerns. Dr. Sirota's January 21 letter simultaneously exhorts Petitioner to intensify its educational efforts and warns Petitioner of the life-threatening fragility of its student. Exacerbating the situation, Dr. Sirota supplemented her January 21 letter with a letter dated March 31, 2011. No longer satisfied with an epistolary style drawn from the tired formulary of self-protective prose, Dr. Sirota achieved an accusatory tone more befitting talk radio than an effort by professionals to exchange useful information. After summarizing, but not adding to, the material contained in her earlier letter, Dr. Sirota concluded:

The failure of the school board to defend [the student's] right to [educational] services, and the inaction on the part of all those involved that have deferred/delayed the provision of necessary services, is an affront to every person in this county that cares for children. . . . The only thing standing in the way of [the student's reaching █████ highest potential now] is a political battle, which is disgraceful. Please re-address the needs of this delightful █████, and become a partner in █████ growth, development, and continued healing.

78. Dr. Sirota's evident unwillingness, herself, to partner with Petitioner and its representatives in safely

educating the student suggests strongly that Petitioner is correct--correspondence with her will not produce detailed recommendations of how physical therapy, occupational therapy, and education in general may be undertaken safely at this time. What Petitioner requires is the information necessary to construct a risk-reward ratio to which it, Dr. Sirota, and, most importantly, Respondent's parents can agree. Should Petitioner's representatives wear masks? Should Respondent wear a helmet? There are obvious tradeoffs in each available safeguard. Informed decisionmaking about these matters requires a candid exchange of information between professionals--not obfuscation, hyperbole, and substantially groundless accusations.

79. Between the two letters of Dr. Sirota, an IEP meeting took place on January 26, 2011, but the IEP, if any, is not in the record. Also, between the two letters of Dr. Sirota, Respondent advised Petitioner of [REDACTED] intent to obtain IEEs. By letter dated February 13, 2011, Respondent's counsel, who is not the counsel listed above, informed Ms. Yocum that the mother had demanded IEEs in her letter of November 18, 2009, but Petitioner failed to discharge its duty either to file a due process request or provide the IEEs. The letter demands that Petitioner grant permission for all of the previously requested IEEs.

80. By letter dated February 28, 2011, from the author of the February 13 letter, Respondent makes a "final demand" for IEEs in occupational therapy (and sensory integration), physical therapy, music therapy, assistive technology, neuropsychology, speech, and behavior. The letter states that the mother had demanded these IEEs in her November 18, 2009, letter, and Petitioner failed to select one of its options--file a due process request or provide an IEE--without unnecessary delay. The letter threatens Ms. Yocum with a claim for damages personally for intentional discrimination, but, in closing, the author "sincerely hopes it doesn't come to that."

81. The March 11, 2011, email from Respondent's representative to Petitioner demanding an IEE for psychology is not among the exhibits, nor is it attached to Petitioner's due process request. But the parties do not dispute the fact of this demand or its contents, so its omission is inconsequential. Given the mother's failure to demand a psychology evaluation in her November 2009 letter, counsel's email presumably did not characterize this demand as a restatement of the mother's earlier demand.

CONCLUSIONS OF LAW

82. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1),

and 1003.57(1)(b), Fla. Stat., and Florida Administrative Code Rule 6A-6.03311(6)(g)2. and (9).

83. Florida Administrative Code Rule 6A-6.03311(6) provides:

Independent educational evaluations.

(a) A parent of a student with a disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

* * *

(c) For purposes of this section, independent educational evaluation is defined to mean an evaluation conducted by a qualified evaluation specialist who is not an employee of the school district responsible for the education of the student in question.

* * *

(g) If a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay either:

1. Ensure that an independent educational evaluation is provided at public expense; or

2. Initiate a due process hearing under this rule to show that its evaluation is appropriate or that the evaluation obtained by the parent did not meet the school district's criteria. If the school district initiates a hearing and the final decision from the hearing is that the district's evaluation is appropriate, then the parent still has a right to an independent educational evaluation, but not at public expense.

* * *

(i) A parent is entitled to only one (1) independent educational evaluation at public expense each time the school district conducts an evaluation with which the parent disagrees.

* * *

(k) If an administrative law judge requests an independent educational evaluation as part of a due process hearing, the cost of the evaluation must be at public expense.

84. Florida Administrative Code Rule 6A-6.03311(9)

provides:

Due process Hearings and Resolution Sessions.

(a) A due process hearing request may be initiated by a parent or a school district as to matters related to the identification, evaluation, or educational placement of a student or the provision of FAPE to the student.

(b) A due process hearing request must allege a violation that occurred not more than two (2) years before the date the parent or school district knew or should have known about the alleged action that forms the basis of the due process hearing request.

* * *

(v) An ALJ shall use the provisions of Rules 6A-6.03011 through 6A-6.0361, F.A.C., for conducting due process hearings and shall conduct such hearings in accordance with the Uniform Rules for Administrative Proceedings, Chapter 28-106, F.A.C. Minimum procedures for due process hearings shall include the following:

* * *

4. Hearing decisions. An ALJ's determination of whether a student received FAPE must be based on substantive grounds. In matters alleging a procedural violation, an ALJ may find that a student did not receive FAPE only if the procedural inadequacies impeded the student's right to FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or caused a deprivation of educational benefit. This shall not be

construed to preclude an ALJ from ordering a school district to comply with the procedural safeguards set forth in Rules 6A-6.03011 through 6A-6.0361, F.A.C. In addition, nothing in Rules 6A-6.03011 through 6A-6.0361, F.A.C., shall be construed to preclude a parent from filing a separate request for due process on an issue separate from a request for due process already filed.

85. Petitioner bears the burden of proof. Rule 6A-6.03311(6)(g)2. Petitioner must prove the material allegations by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

86. The relief sought by Petitioner is overbroad, given its implicit reliance on rule 6A-6.03311(6)(g). The due process requests were prepared by Ms. Yocum, not counsel, and do not mention any rule. But, based on the contents of the requests, arguments of counsel at the hearing, and the scope of these cases, which did not involve the broader issue of the role of one or more IEEs in providing Respondent a free appropriate public education, it is evident that Petitioner has relied on rule 6A-6.03311(6).

87. Rule 6A-6.003311(6) provides for a due process hearing, not on the parent's request for IEEs, but on the sole issue of whether the school district's existing evaluations are appropriate. Consequences from a determination of the appropriateness or inappropriateness of an existing evaluation

may be far-reaching, but the sole issue in the due process hearing is whether the existing evaluation is appropriate.

88. Thus, the February and March 2011 letters from Respondent's counsel, advising of Respondent's intent to obtain IEEs, do not define the scope of these cases or the available relief. If Respondent wishes to litigate evaluations, ■ could file a due process request under rule 6A-6.03311(9), claiming that, in the evaluations performed and not performed by Petitioner, it has failed to discharge its obligations to identify, evaluate, and educationally place Respondent or provide Respondent a free appropriate public education, both as required by rule 6A-6.03311(9) (a).

89. The scope of these cases is defined instead by Petitioner's due process requests--to the extent that they seek relief available under rule 6A-6.03311(6). As outlined in the Preliminary Statement, in DOAH Case No. 11-1334E, Petitioner seeks an Order determining that: 1) its evaluations in January and March 2010 in physical therapy, occupational therapy, speech, and behavior are appropriate, so that Respondent is not entitled to IEEs in these four areas at public expense; 2) Respondent is not entitled to an IEE at public expense in the areas of music therapy and neuropsychology because Petitioner has not performed these evaluations; and 3) Respondent's parents must sign a Release of Information consenting to a discussion of

Respondent's medical conditions between Petitioner's therapist and Dr. Sirota. In DOAH Case No. 11-1430E, Petitioner seeks an Order determining that its psychology evaluation is appropriate, so that Respondent is not entitled to a psychology IEE at public expense.

90. The relief sought in the second and third issues above is unavailable. For the two areas in which Petitioner has not previously evaluated the student--music therapy and neuropsychology--Petitioner essentially wants an Order denying Respondent's requests for IEEs at public expenses. As noted above, Respondent's requests are not before the Administrative Law Judge in this proceeding, which can address only Petitioner's request for an Order that its evaluations are appropriate.

91. A threshold requirement to any relief available to a parent under rule 6A-6.03311(6)(g)2. is that the parent disagree with a school district's evaluation, as required by rule 6A-6.03311(6)(a). This requirement means that the relief of an IEE at public expense is available to a parent only in an area that has already been evaluated by the school district.

92. Also unavailable in this proceeding is an Order requiring the parents to sign a consent allowing Petitioner's therapist to speak to Respondent's physician. The Administrative Law Judge has provided some factual findings on

this issue, in case the parties are exhausting administrative remedies prior to litigating in state or federal court, but nothing in rule 6A-6.03311(6) authorizes an Administrative Law Judge to enter such an Order. Rule 6A-6.0331(4) (e) and (7) (d) gives a school district the right to file a due process request to pursue an initial evaluation or reevaluation, respectively, when a parent refuses to give consent. But Petitioner is not seeking consent to evaluate or reevaluate; it is seeking consent to implement portions of the IEP. If not raised in the context of injunctive relief in a judicial action, this issue may arise in an administrative proceeding, but only in an IEP-implementation case and never with the result of an injunctive order to parents to sign a release form.

93. The relief available in these cases is whether Petitioner's evaluations of physical therapy, occupational therapy, speech, behavior, and psychology are appropriate. All but one of these areas are simple to resolve. Petitioner's psychology evaluation is appropriate for the reasons stated in the Findings of Fact. The mother's November 2009 letter did not demand a psychology IEE, so this is a straightforward matter of determining the appropriateness of the evaluation that preceded the IEE demand in the March 2011 email from Respondent's counsel.

94. Because they are inappropriate, for the reasons stated in the Findings of Fact, Petitioner's physical therapy, occupational therapy, and behavior evaluations performed in January and March 2010 are easy to resolve. If Petitioner waived its right to file due process in response to the mother's November 2009 IEE demands in these three areas, Petitioner fails to prevail, and, if Petitioner did not waive its right, Petitioner fails to prevail.

95. Alone among the evaluations at issue in these cases is the speech evaluation. For the reasons stated in the Findings of Fact, the speech evaluation of January 2010 is appropriate. If Respondent's sole request for a speech IEE were in February 2011, Petitioner would prevail. But difficult questions of waiver and materiality apply to this determination: 1) whether Petitioner waived its right to file a due process request; 2) whether the parties agreed that Respondent would not persist in ■■■ November 2009 IEE demands--or, stated a little differently, whether Respondent waived Petitioner's waiver; and 3) if Petitioner waived, whether a condition of materiality attaches to the waiver, so that, on these facts, the performance, two months later, of an appropriate speech evaluation by Petitioner and the preparation, two and one-half months later, of an IEP that adequately addresses speech eliminate the effect of Petitioner's waiver.

96. The waiver question is not overly difficult to resolve, based on the pair of cases, thoughtfully discussed in Petitioner's proposed final order. In Ripon, supra, the school district did not file its due process request for more than two months after receiving the parent's demand for IEEs at public expense. The court declined to find that the school district had waived its option to file a due process request for a determination that its evaluations were appropriate. The court noted that, after the initial IEE demand, the parties had discussed an "IEE" through a series of letters. The school district filed its due process request less than three weeks after the parties reached an impasse. On these facts, the court declined to find an "unnecessary delay" between school district's receipt of the IEE demand from the parent and its filing of the due process request.

97. The Ripon court distinguished its facts from the facts in Pajaro Valley Unified Sch. Dist. v. J. S., 2006 U.S. Dist. LEXIS 90840 (N.D. Cal. 2006). In Pajaro, the school district filed its due process request over three months after receiving the parent's IEE demand. Three weeks after receiving the IEE demand, the school district wrote the student's attorney and explained why it believed its evaluation was appropriate, that it was prepared to file a due process request, and that the student's attorney must inform the school district within nine

days if the student intended to continue to pursue the proposed IEE, in which case the school district would then file a due process request. The student's attorney timely advised of the student's intent to pursue the IEE, and the school district eventually filed its due process request. In view of the school district's "unexplained and unnecessary delay" in filing its due process request, the court held that it waived its right to contest the student's right to an IEE.

98. The situation involving the speech evaluation is governed by Pajaro, not Ripon. In November 2009, Petitioner had a choice when it received the mother's letter: "without unnecessary delay," file a due process request or grant the IEE demands. Ensuing discussions never touched on IEEs; they involved exclusively evaluations to be performed by Petitioner.

99. Instead of taking one of its options, Petitioner denied the mother's request, partly deflecting it in favor of an accelerated schedule of school district evaluations. This transitions to the second of the above-stated issues--did the mother agree to this deflection or, stated differently, did she waive Petitioner's waiver? If Petitioner selects one of its options under the rule, these issues do not emerge. If Petitioner had filed a due process request without unnecessary delay--not, as here, 16 months later--any settlement reflected by the mother's withdrawal of her November 2009 IEE demands

would have been determined by a disinterested adjudicator--i.e., an Administrative Law Judge--not a representative of one of the parties--i.e., Ms. Yocum. As reflected by the process of these cases, the resolution of the mother's demand would have consumed only 45 days from the filing of the due process request and not an inordinate amount of resources.

100. The Administrative Law Judge does not conclude that, inferentially, as a matter of fact, the mother agreed to withdraw her IEE demands. Nor did she waive Petitioner's waiver. Undoubtedly, the mother was unaware of this technical area of ESE law, which, the Administrative Law Judge doubts, even permits of such a waiver of a waiver. Nor does the Administrative Law Judge conclude that, somehow, the mother's IEE demands somehow expired over time. If an IEE demand expires at some point, a good candidate for a limitations period would be two years--borrowed from rule 6A-6.03311(9)(b), which governs the filing of due process requests generally.

101. But Petitioner may escape the consequences of its failure to file timely a due process request, if it shows that, under the circumstances, its failure was immaterial. Rule 6A-6.03311(9)(v)4. provides, in detail, how a procedural violation must essentially be substantive for a determination that a student has been denied a free appropriate public education: the procedural inadequacies impeded the student's

right to FAPE, significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of FAPE to the student, or caused a deprivation of educational benefit. In another case provided by Petitioner's counsel, Taylor v. D. C., 2011 U.S. Dist. LEXIS 26961 (D.D.C. 2011), the court so ruled, remanding the case to the administrative law judge for consideration of new evidence as to materiality of the timeliness of the school district's filing of its due process request relative to when it received the IEE demand from the parent.

102. As previously noted, Petitioner's waiver of its right to file a due process on the mother's speech IEE demand in November 2009 is immaterial because: 1) two months after the IEE demand, Petitioner performed an appropriate speech evaluation and 2) the results of Petitioner's speech evaluation were incorporated into Respondent's IEP two and one-half months after the IEE demand.

ORDER

For the reasons set forth above, it is

ORDERED that, pursuant to Rule 6A-6.03311(6), Petitioner's request for an Order determining that its speech and psychology evaluations of January 2010 are appropriate is granted; Petitioner's request for an Order determining that its occupational/physical therapy evaluation, including sensory

integration, and behavior evaluation of January 2010 are appropriate is denied; Petitioner's request for an Order denying an IEE for a music therapy and neuropsychology evaluation and compelling Respondent's parents to consent to a discussion between Petitioner's therapist and Dr. Sirota is denied as beyond the scope of this proceeding.

DONE AND ORDERED this 2nd day of May, 2011, in Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

- a) brings a civil action in the appropriate state circuit court pursuant to § 1003.57(1)(b), Fla. Stat. (2009), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), and Florida Administrative Code Rule 6A-6.03311(9)(w).