

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-2787E  
 )  
THE SCHOOL BOARD OF BROWARD )  
COUNTY, FLORIDA, and CITY OF )  
PEMBROKE PINES, as operator of )  
Pembroke Pines Charter Schools, )  
 )  
Respondents. )  
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THE SCHOOL BOARD OF BROWARD )  
COUNTY, FLORIDA, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-2996E  
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██████, )  
 )  
Respondent. )  
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FINAL ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Lauderdale, Florida, on August 22-24, 2011.

APPEARANCES

For ██████: Jamison Jessup, Qualified Representative  
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For The School Board of Broward County, Florida  
(School Board):

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For City of Pembroke Pines, as operator of  
Pembroke Pines Charter Schools (Charter School):

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STATEMENT OF THE ISSUES

In DOAH Case No. 11-2787E, the issues are whether the School Board has provided a free appropriate public education (FAPE) to the student, including whether the School Board has timely identified the student and [REDACTED] disability so as to determine [REDACTED] eligibility for specialized instruction and related services; whether the student is entitled, at public expense, to an independent education evaluation (IEE) in the form of a functional behavioral assessment (FBA); whether the School Board has provided the student's parents with an opportunity for meaningful participation in the preparation of each of the student's individual education plans (IEPs); whether, during the May 2011 IEP meeting, the IEP team members had predetermined not to prepare an positive behavior

intervention plan (BIP); and whether the student's IEPs were reasonably calculated to provide educational benefit, pursuant generally to Florida Administrative Code Rule 6A-6.03311(9).

In DOAH Case No. 11-2996E, the issue is whether the FBA finalized by the Charter School on March 22, 2011, is appropriate, pursuant to Florida Administrative Code Rule 6A-6.03311(6)(g)2 and (9).

#### PRELIMINARY STATEMENT

On June 1, 2011, the student filed a due process request with the School Board. The due process request names as respondents the School Board and the Charter School. Neither respondent moved to dismiss the Charter School, which remained a party to this case and participated in the final hearing.

The student's due process request alleges that ■ attended ■ in 2007-08 at an elementary school operated by the School Board. In 2008-09, the student attended the Charter School for ■ grade. The student's ■-grade teacher reportedly informed the student's mother that the child was unable to remain on task or follow instructions and lacked self-control. The due process request alleges that respondents failed to evaluate or identify the student as a child eligible for exceptional student education (ESE) services.

The student's due process request alleges that the mother obtained private evaluations of the student during the first

quarter of 2009. After obtaining a psychological evaluation from Maria C. Rodriguez-Downing that diagnosed the student with Attention Deficit Hyperactivity Disorder (ADHD), the mother allegedly provided the Charter School and the School Board with a copy of the evaluation in early April 2009 and, at the same time, expressed her concern that her child had a learning disability. However, the Charter School and School Board allegedly took no action in response to the psychological evaluation, and, in October 2009, the School Board allegedly told the mother that it had lost the report.

The student's due process request alleges that, on December 15, 2009, the School Board obtained a psychological evaluation performed by Robert Roesler, a school psychologist employed by the School Board. Mr. Roesler allegedly concluded that the student lacked the characteristics of a learning disorder. Mr. Roesler allegedly concluded that the student's difficulties in school were the result of ADHD, possible Opposition Defiance Disorder, and below average intelligence.

On December 19, 2009, the mother allegedly took the child to Ivette Gonzalez, a pediatric optometrist, who conducted a visual and perceptual evaluation. Dr. Gonzalez concluded that the child had a number of visual conditions. The mother allegedly provided a copy of Dr. Gonzalez's report to the School Board in February 2010.

The student's due process request alleges that, on January 12, 2010, representatives of the School District and Charter School met and determined that the student met the criteria of Other Health Impaired (OHI), so as to qualify for ESE services. On the same day, the School Board and Charter School allegedly convened an IEP meeting, and the IEP team prepared the student's first IEP (January 2010 IEP).

The student's due process request alleges that, on August 19, 2010, the IEP team met and prepared an interim IEP. (As described below, this is not an interim IEP, so it will be referred to as the August 2010 IEP.) The August 2010 IEP allegedly failed to address the child's behavioral issues.

The student's due process request alleges that, on November 30, 2010, the IEP team met and prepared an interim IEP (November 2010 Interim IEP) that, again, allegedly failed to address the child's behavioral issues.

The student's due process request alleges that, on January 28, 2011, the IEP team met and prepared an interim IEP (January 2011 Interim IEP). The January 2011 Interim IEP allegedly noted that school officials had implemented a behavioral plan, and the January 2011 Interim IEP allegedly included a behavioral goal. At this meeting, the IEP team allegedly decided to conduct a functional behavioral assessment (FBA) by February 28, 2011, and develop a BIP within six weeks.

The due process request alleges that the eight goals contained in the January 2011 Interim IEP were meaningless, immeasurable, and useless.

The student's due process request alleges that, from February 10 through March 22, 2011, the School Board and Charter School conducted a FBA, but they allegedly never developed or implemented a BIP.

The student's due process request alleges that, on February 21, 2011, Harvey F. Mazer, a doctor of optometry, evaluated the student's visual skills and issued a report two days later. Dr. Mazer's report allegedly recommended that the student use eyeglasses and obtain frequent breaks from visual tasks. The mother allegedly provided a copy of the report to the Charter School and School Board by the end of February 2011.

The student's due process request alleges that another IEP meeting took place on April 6, 2011, but that the IEP team allegedly refused to consider Dr. Mazer's report or implement his recommendations. At the same meeting, the mother requested the IEP team to review the FBA and prepare and implement a BIP, but the IEP team allegedly refused to do so.

The student's due process request alleges that another IEP meeting took place on May 9, 2011, and the IEP team agreed to implement Dr. Mazer's recommendations. The IEP team allegedly prepared an interim IEP on this date. (As described below, this

is not an interim IEP, so it will be referred to as the May 2011 IEP.) In this IEP, the IEP team allegedly implemented Dr. Mazer's recommendations, but allegedly refused to prepare a BIP. In response to a demand for a BIP asserted by Mr. Jessup, a School Board employee allegedly replied that "we" had decided that a BIP was unnecessary, thus allegedly revealing that the IEP team had predetermined the issue of the BIP and had deprived the mother of meaningful participation in her child's education planning.

The student's due process request alleges that, at the May 9 IEP meeting, the mother allegedly demanded an IEE in the form of another FBA. The School Board allegedly failed to act on this demand for at least 23 days, which allegedly constitutes an unnecessary delay.

On June 15, 2011, the School Board filed a due process request. The School Board's due process request alleges that the student's mother filed, on May 9, 2011, a request for an IEE in the form of a FBA. The School Board alleges that it completed a FBA on March 22, 2011, that the March 22, 2011, FBA is appropriate, and that it is entitled to an Order to this effect.

At the hearing, the parties announced that they intended to use many of the same witnesses, and they asked to be allowed to fully examine each witness without the necessity of re-calling

the witness at a later point in the hearing. The Administrative Law Judge granted this request. A total of 15 witnesses testified. The student offered into evidence 57 exhibits, and the School Board offered into evidence 79 exhibits. All exhibits were admitted.

During the hearing, the student's qualified representative withdrew several issues stated in the student's due process request, leaving for resolution the issues addressed in this Final Order.

The court reporter filed the transcript on September 9, 2011. Due partly to the fact that the new school year had started shortly before the final hearing, the Administrative Law Judge declined to extend the time for filing proposed final orders. The student's qualified representative waived the filing of a proposed final order. The School Board filed a proposed final order on September 12, 2011.

#### FINDINGS OF FACT

1. The student was born on [REDACTED]. [REDACTED] achieved developmental milestones within normal limits and has enjoyed good health.

2. During the 2007-08 school year, the student attended a kindergarten operated by the School Board. [REDACTED] was placed in a regular classroom setting, where [REDACTED] has been educated continuously thereafter.

3. In kindergarten, the student had problems with listening and hyperactivity. The kindergarten teacher communicated frequently with the student's mother and reported that the child was smart, but not paying attention in class. Supporting the teacher, the mother encouraged her child to pay attention and behave in school, but this effort had little effect.

4. The student's end-of-year report card revealed intermediate grades--i.e., "learning skills with assistance"--not mastery of skills or "areas of concern." A few of the student's marks actually declined from the third grading period to the fourth grading period. ■■■ missed only four days of school and was tardy only seven times for the entire year.

5. For the 2008-09 school year, the mother enrolled the student in ■■■ grade at the Charter School, but his classroom behavior did not improve. The teacher reported to the mother that the student would fiddle around with things in ■■■ desk when ■■■ was supposed to be working or listening. The teacher tried conventional interventions, such as relocating the student's desk, but the student remained distracted in class.

6. The mother took the student to Maria Rodriguez-Dowling, a licensed clinical psychologist, who holds a doctor of psychology degree. Dr. Rodriguez-Dowling saw the student on

January 30, February 7, and March 14, 2009, and she issued a psychological evaluation dated March 27, 2009.

7. Dr. Rodriguez-Dowling administered an intelligence test, reading and math achievement test, behavior assessment for the mother, behavior assessment for the classroom teacher, and test of variable attention.

8. The intelligence test revealed an array of scores, mostly within the 18th-27th percentiles. The student scored in the average range for verbal comprehension and processing speed, but in the low average range for perceptual reasoning, working memory, and full scale intelligence. Consistent with the intelligence scores, the achievement test disclosed low average reading skills and mathematics skills.

9. The assessments by the mother and teacher revealed at-risk behaviors in terms of attention, hyperactivity, and conduct. The test of attention revealed a marked deficit in this skill.

10. Based on her findings, Dr. Rodriguez-Dowling diagnosed the student with ADHD and recommended further diagnostic work to rule out ODD. She recommended that the student receive longer assignments in smaller parts to coincide with [REDACTED] shortened attention span, assignments in isolation to avoid overload, individual tutoring in reading, another psychological evaluation in two or three years to assess cognitive and academic progress,

training in social skills, instructions in writing and orally, a psychiatric evaluation to assess the need for medication, and a multidisciplinary intervention at school to identify accommodations in the least restrictive environment.

11. As soon as the mother received a copy of Dr. Rodriguez-Dowling's report, she gave it to the first-grade teacher and asked that she give it to the Charter School ESE director. By stipulation, the parties agreed that the mother delivered a copy of the report to the teacher in April 2009. The mother waited patiently to be contacted, but first-grade ended without anyone from the Charter School or School Board contacting her.

12. The student's first-grade report card includes "needs improvement" for reading, math, and language arts, as well as completing [REDACTED] classwork on time, behavior, self-control, and following directions. The student was absent 14 days and not tardy during the school year.

13. The student attended [REDACTED] grade at the Charter School for the 2009-10 school year. When school started and the mother still had not heard from the Charter School ESE director about Dr. Rodriguez-Dowling's report, the mother called the director and learned that she had never received a copy of the report. The mother provided a copy of the report to the Charter School ESE director in September or October.

14. Also, on October 26, 2009, the mother took the student to a physician, Dr. Mario Zambrano. Dr. Zambrano confirmed that the student has chronic ADHD, recommended that the child be submitted to behavior modification, and stated that he would consider medication if there was no improvement. Dr. Zambrano incorporated this information into a Medical Evaluation Form for Physically Impaired, which was submitted to the Charter School.

15. Upon receipt of the Medical Evaluation Form for Physically Impaired, the Charter School ESE director promptly initiated the response-to-intervention process. By a Referral Packet Checklist completed probably on November 17, 2009, the Charter School ESE director noted that the student had passed vision and hearing screenings, and the Charter School had conducted two parent conferences during the fall of 2009. Additionally, the Charter School ESE director documented three behavior observations and tiered interventions. After receiving the mother's consent for an evaluation, on November 17, 2009, the Charter School ESE director referred the child for a psychological evaluation.

16. At about this time, the classroom teacher issued an interim report on the student's academic progress through the fourth week of the second quarter of second grade. Two of the student's grades were failing: reading--40% and math--42%. The teacher's note states:

[The student] continues to struggle academically in reading and math. As shown in [REDACTED] daily behavior report, [REDACTED] has the most difficulty calling out in class, waiting [REDACTED] turn and rushing through [REDACTED] work with a lot of careless mistakes. I will continue to monitor [REDACTED] this month as per our phone conversation and let you know if I see an improvement academically and in [REDACTED] behavior.

17. At the end of the second quarter, the student earned "needs improvement" grades in reading and math. [REDACTED] earned the same mark for completing classwork on time, behavior, self-control, following directions, using appropriate behavior, and working cooperatively. [REDACTED] missed only three days of school and had not been tardy through the first half of the 2009-10 school year.

18. On December 15, 2009, the Charter School and School Board issued a parent participation form, which scheduled a meeting at the Charter School on January 12, 2010, to review evaluation information and determine if the student was eligible for ESE.

19. Also on December 15, 2009, school psychologist Robert Roesler saw the student. Mr. Roesler reviewed the work of Dr. Rodriguez-Dowling and administered an academic achievement test, a sentence-completion test, and assessments for the mother and teacher to complete.

20. The student performed better on the academic achievement test than ■■■ had ten months earlier. ■■■ scores in basic reading, math calculation, and written expression were all in the average range, although reading comprehension was below average, suggestive of academic achievement since the first testing in the spring of 2009. In general, Mr. Roesler found that student's academic skills were "fairly consistent" with each other and ■■■ intellectual ability.

21. The child's performance in written language during second grade benefitted from the work of ■■■ mother in particular. During second grade, Wednesday night was "write night." The teacher presented a theme, about which each student was to write a paragraph that night and return the product to school the next morning. If the mother did not help the child with the assignment, the result was invariably that, regardless of ■■■ motivation level, ■■■ could not begin the task. Instead, the mother worked with the child to help ■■■ develop an idea for the theme, which might be a personal hero, and write each sentence that formed the paragraph.

22. Mr. Roesler's sentence-completion test revealed no significant emotional concerns. The teacher scales revealed concerns with ADHD and peer relations, and the mother scales added to this list "learning problems."

23. Mr. Roesler concluded that the student's school difficulties were the result of ADHD, possible ODD, and below-average intelligence. He referred the child to the Charter School's eligibility committee for consideration of a more structured academic program. Mr. Roesler repeated some of the recommendations of Ms. Rodriguez-Dowling and added a few of his own, including adverse consequences for the inappropriate behaviors of lying or tantrums and the recordation of tantrums, so that the student, when later composed, could see and hear what he looked like when throwing a tantrum.

24. On December 16 and 17, 2009, a speech-language pathologist employed by the School Board administered a test of language development, which tests overall receptive and expressive language skills, and an expressive, one-word vocabulary test, which tests the ability to name illustrated objections, actions, and concepts. All of [REDACTED] scores were in the average range.

25. On December 19, 2009, Ivette Gonzalez, a pediatric optometric physician, administered a comprehensive exam to the student, at the request of the mother. Dr. Gonzalez's report, which is undated, notes that the external structures of the eyes revealed no pathology, and intraocular pressures were within normal limits. Uncorrected, the student's visual acuities were 20/20 in both eyes at distance, and 20/40 for the right eye and

20/50 for the left eye at near. Dr. Gonzalez concluded that the student is "slightly myopic (nearsighted) and glasses were not recommended for near tasks."

26. However, Dr. Gonzalez found the student was very weak in [REDACTED] ability to call out numbers and fast eye movements, which can cause reading problems. Dr. Gonzalez found the student's accommodative skills, which refer to [REDACTED] ability to focus clearly and sustain focus on near objects, to be inadequate. This deficit can result in headaches, rapid fatigue, or blurry vision. Dr. Gonzalez found the student's binocularity to be normal, but [REDACTED] ability to focus and coordinate [REDACTED] eyes was inadequate. Lastly, Dr. Gonzalez found the student's overall perceptual functioning, specific perceptual abilities, preferred perceptual modality, and cognitive processing to be weak or very weak, although tests of [REDACTED] visual memory and auditory memory were average.

27. Based on her findings, Dr. Gonzalez recommended individual visual therapy to improve the student's perceptual and visual skills. The purpose of this therapy would be to help the student process and organize information more rapidly and efficiently in a learning environment. Dr. Gonzalez recommended that the student be allowed to use a finger or straight edge as a guide when reading, take frequent breaks when reading or studying, have extra time for tests and written assignments, and

be forgiven poor handwriting. Dr. Gonzalez also recommended that the student have a psycho-educational evaluation to evaluate ■■■ strengths and weaknesses, an auditory processing evaluation, and occupational therapy.

28. According to a handwritten note dated January 19, 2010, the mother provided a copy of Dr. Gonzalez's report to a Charter School ESE teacher on that date and, this time, asked for a call to confirm receipt of the report. At some point, the mother made another copy of Dr. Gonzalez's report, gave it to the classroom teacher, and told her to give it to the IEP team.

29. One week earlier, on January 12, 2010, the IEP team met and determined that the student met eligibility criteria for OHI. The eligibility form states that the student has a medical diagnosis of ADHD, "which is affecting ■■■ educational performance."

30. The January 12 IEP meeting was unremarkable. The Charter School ESE director explained the planning process to the mother, who was happy that something was being done for her child and did not object to anything contained in the draft IEP that was presented at the meeting.

31. As are all of the IEPs in these cases, the January 2010 IEP is divided into four domains: Curriculum and Instruction, Social/Emotional Behavior, Independent Functioning, and Communication. Because the student has never displayed any

difficulty in communication, the Communication domain of all of the IEPs in these cases is appropriately empty.

32. For each domain, the IEPs in these cases provide present levels of performance, the impact of the disability on the student's progress in the general curriculum, the resulting priority educational need, and one or more goals. All of the IEPs in these cases contain goals, not objectives, because the student is still on Sunshine State standards and is on track for a regular diploma. All of the IEPs also contain specialized instruction, and some contain consultative or collaborative services. Consultative services usually involve other persons assisting the general education teacher directly, and collaborative services are largely the same, but typically more intense.

33. Under the domain of Curriculum and Instruction, the January 2010 IEP, noting the student's modest performance, reports that the student's "academic skills are consistent with [his] intellectual ability." The student's weakest area is reading comprehension, but [REDACTED] has problems generally in reading and math. Under this domain, the January 2010 IEP describes the impact of the student's disability: "[a]s a result of . . . ADHD, [the student] is performing below grade level in academic areas within the general curriculum." As a result, the student will receive "intervention" in reading and math.

34. The Curriculum and Instruction domain identifies two goals:

1. By January 201[1], [the student] will read a grade level passage and answer corresponding comprehension questions with 80% accuracy within a small group setting.

2. By January 201[1], [the student] will independently answer a variety of grade level math problems involving computation and application with 80% accuracy within a small group setting.

35. The evaluation procedures for the attainment of these goals are documented teacher observations and informal assessments. As with all domains bearing goals, the Curriculum and Instruction domain states that report cards will be accompanied by reports on the student's progress in mastering the IEP goals.

36. Under the domain of Social/Emotional Behavior, the January 2010 IEP states that the student is respectful, pleasant, and friendly. ■■■ tries to follow school rules, and the classroom teacher describes the student as "one of her most responsible students." However, due to the ADHD, the student is "often impulsive and very excitable." This domain explains that the student has "trouble demonstrating self-control, and often appears anxious." ■■■ often requires redirection, although ■■■ does not display "major behavioral issues." This domain states

that the student will receive "intervention" to improve [REDACTED] ability to comply with school rules.

37. The lone goal under Social/Emotional Behavior--and the third goal of the January 2010 IEP--is: "By January 2011, [the student] will demonstrate compliance with school rules 90% of the time." The evaluation procedure is documented teacher observation.

38. Under the domain of Independent Functioning, the January 2010 IEP states that the student regularly turns in [REDACTED] homework. [REDACTED] benefits from structured environments with routines and requires prompting and redirection from [REDACTED] teacher. The student works best in small groups. As a result of the ADHD, this domain states that the student has trouble maintaining attention and often makes careless mistakes and rushes through assignments.

39. The Independent Functioning domain identifies two goals:

4. By January 2011, [the student] will maintain attention to task for a period of 30 minutes with 0-1 prompts with 80% success.

5. By January 2011, [the student] will use strategies to independently complete assignments with passing accuracy 80% of the time.

40. For accommodations, the January 2010 IEP provides a small group and the repetition and clarification of directions

during FCAT testing, but not additional time. The January 2010 IEP provides classroom accommodations of repetition and clarification of directions, preferential seating, and small-group testing.

41. In terms of services, the January 2010 IEP provides 120 minutes weekly of specialized instruction in reading, 40 minutes weekly of consultation in social skills, 40 minutes weekly of collaboration in math, and 80 minutes weekly of collaboration in independent functioning. Although there is a math goal, there is no specialized instruction in math. The January 2010 IEP finds no need for health care, assistive technology, or behavior provisions. As to this last determination, the IEP team considered Dr. Zambrano's October 26, 2009, recommendation for behavior modification, but rejected it.

42. The Charter School sent home a progress report on March 25, 2010. The progress report states that the student is making some progress on each of the five goals in the January 2010 IEP, and ■ is expected to master each goal within the stated time. This prediction was not borne out over time, as discussed below.

43. The student's second-grade report card portrayed a student in academic difficulty. On the minus side, the student's language arts grades deteriorated from B and C,

respectively, in the first and second quarters to "needs improvement" in the third and fourth quarters. The lone change in study skills--specifically, applying information in making decisions and solving problems--reflected deterioration from "satisfactory" to "needs improvement" in the first and second semesters, respectively. On the plus side, the student's reading grades improved from "needs improvement" in the first and second quarters to B and C, respectively, in the third and fourth quarters--perhaps reflective of the introduction of specialized instruction in reading mid-year. In math, the student received "needs improvement" for the first three quarters before earning a C in the fourth quarter. For the second semester, the student was absent six days and never tardy.

44. Suggesting that the student's academic difficulties were substantial, at the end of second grade, the classroom teacher recommended that the student be retained to allow ██████████ another year to mature and master second-grade reading, math, and language arts. The mother rejected this advice. It is difficult to quarrel with the reasoning of either party. The Charter School had determined that a student performing below grade level would hardly do better by advancing a grade. The mother had determined that her child's classroom problems, especially inattentiveness, were persistent and, unless and

until addressed, would militate in favor of retention year after year. Yielding to the mother's demand, the Charter School promoted the student to third grade for the 2010-11 school year.

45. On August 19, 2010, at the mother's request, the IEP team met to prepare a new IEP. The IEP team closed out the goals of the January 2010 IEP, finding that the student had mastered the goal of complying with school rules 90% of the time, but had not mastered the remaining goals. The close-out document reports that the IEP team continued these goals with revisions, but, except for the already-mastered rule-compliance goal, the August 2010 IEP actually continues the other four goals from the January 2010 IEP without revision.

46. The mother explained to the IEP team in August 2010 that she and the child were spending five hours nightly on homework, which had become a source of aggravation and frustration. She told the IEP team that the child was having trouble retaining the information ■ was taught each day in class. The mother also raised the issue of Dr. Gonzalez's report. The only relevant comments on the August 2010 IEP are that the mother presented a report from an "optomitist," and the child could use a finger or straight edge to assist in reading, as Dr. Gonzalez had recommended.

47. Under the domain of Curriculum and Instruction, the August 2010 IEP details the student's lack of academic progress,

which the IEP describes as "minimal" during the just-concluded school year. Somewhat contradicting the improved reading scores for the second semester of second grade, the STAR reading test administered in the ninth month of second grade revealed that the student was performing one year below grade level--at 1.8 grade equivalent. This domain of the August 2010 IEP adds that the student's written expression and math skills remain below grade level.

48. The domain of Curriculum and Instruction states that the student needs frequent one-on-one support from the teacher to complete ■■■ work. The student does not like to read aloud in class. This domain reports that the teacher has made unspecified modifications in the curriculum to address the student's needs in reading, math, and language arts.

49. The Curriculum and Instruction domain of the IEP concludes: "As a result of [the student's] ADHD, ■■■ is performing below grade level in academic areas within the general curriculum." This IEP determines that the student will receive "interventions" in reading and math to improve proficiencies in these subjects.

50. Changing only the IEP timeframe for mastery, the August 2010 IEP restates the first two goals from the January 2010 IEP:

1. By August 2011, [the student] will read a grade level passage and answer corresponding comprehension questions with 80% accuracy within a setting.

2. By August 2011, [the student] will independently answer a variety of grade level math problems involving computation and application with 80% accuracy within a setting.

51. The August 2010 IEP notes that the student's disability does not impact [redacted] involvement and progress in the general curriculum, from the perspective of the Social/Emotional Behavior domain. The August 2010 IEP contains no goals under this domain.

52. Under the Independent Functioning domain, the August 2010 IEP reviews largely the same data contained in the January 2010 IEP, as supplemented by some information from the second-grade report card. Again changing only the IEP timeframe for mastery, the August 2010 IEP restates the fourth and fifth goals from the January 2010 IEP:

3. By August 2011, [the student] will maintain attention to task for a period of 30 minutes with 0-1 prompts with 80% success.

4. By August 2011, [the student] will use strategies to independently complete assignments with passing accuracy 80% of the time.

53. The August 2010 IEP increases the specialized instruction by adding 120 minutes weekly in math to the 120

minutes weekly in reading, but eliminates all collaboration and consultation, except for 25 minutes weekly collaboration in independent functioning.

54. In another change from the January 2010 IEP, the August 2010 IEP drops the FCAT accommodations, although this was not discussed at the August 2010 IEP meeting. The August 2010 IEP continues the classroom accommodations, although it substitutes highlighting keywords in directions and tests for small-group testing.

55. Until sometime toward the end of the school year, the student's behavior in third grade was largely unchanged from ■■■ behavior in first and second grades. ■■■ fidgeted at ■■■ desk, rushed to ■■■ place in line, blurted out answers without raising ■■■ hand, and turned around in ■■■ seat to talk to a neighbor.

56. During third grade, the ESE reading teacher worked with the student in a small group of typically five students. The classroom teacher used the Treasure reading program, and the ESE reading teacher supplemented this program with iStation, which, each session, identifies a student's weaknesses and prepares computer-based instruction so as to remediate these weaknesses. The student's most prominent weaknesses in reading were fluency, which measures the pace of reading aloud with accuracy, and spelling, and these have been persistent weaknesses.

57. Early in the 2010-11 school year, the student did not participate enthusiastically in ■■■ ESE reading class; it appeared to the ESE teacher that ■■■ was uncomfortable reading aloud. But the student was always polite and would ask the ESE teacher questions about an assignment.

57. At all times, including third grade, the student tended to behave well. If ■■■ began to fidget with a toy, rather than focus on his work, the ESE teacher would redirect ■■■, and ■■■ would refocus. It was generally necessary to redirect the student once per session. After a redirection, ■■■ would avoid the behavior the rest of the session, but ■■■ would probably repeat it the next session, until redirected.

58. The ESE math teacher had a similar experience with the student at the start of the 2010-11 school year. Although her class size varied from 2 to 8 students, the ESE math teacher reported that the student's behavior was not especially affected by this range in class size.

59. The ESE math teacher found the student to be very sweet and quick to greet her with a hug. This became a problem when, although directed not to, the student would impulsively rush out of ■■■ seat to hug the ESE math teacher when ■■■ first saw her each day. As with other behaviors of the student, the ESE math teacher carefully redirected the child. The redirections held for the duration of class on that day, but

were required again the next day. When asked if the student was manipulative, the ESE math teacher testified that she recognized that some third graders were manipulative, but the student clearly was not.

60. Typical of the problematic and redeeming behavior that the child could manifest in a single transaction, especially early in third grade, was a pattern reported by one of the ESE teachers. Early in the 2010-11 school year, the student would talk to a peer in the small ESE math group. Eventually, after repeated redirections, the student got the message, although ■■■ friend did not. When the friend later would try to strike up a conversation at an inappropriate time, the student would tell ■■■ to be quiet because the student did not want to displease the teacher. Other redirections, such as to stop fidgeting at the student's desk, took much longer to take, though.

61. The pattern of repeated redirections for the same behaviors was less marked in third grade than during second grade. At all times, the teachers testified that the student accepted the redirection and was never defiant, although, even in third grade, ■■■ would repeat the behavior a day or two later.

62. On November 2, 2010, the Charter School sent home a progress report. The progress report states that the student is making progress on the second goal of the August 2010 IEP and is expected to master it by the end of the term of the IEP, but,

although making progress on the other three goals, ■ is not expected to master them by the end of the term of the IEP. When compared to the optimistic progress report of March 25, 2010, concerning the student's progress on the same goals, one may infer either deterioration in the student's skills or improvement in the predictive abilities or candor of the Charter School employees preparing the progress reports. However, even the November 2 report proved overly optimistic as to the student's progress on goal 2 of the August 2, 2010, IEP.

63. On November 12, 2010, the classroom teacher completed a survey concerning the student. In the comments section, she stated: "Math classwork is of great concern. Can't remember lessons taught previously." This is the same complaint that the mother reported to the IEP team in August 2010. The classroom teacher added that she had to remind the student daily to turn in ■ classwork and homework and even to put ■ name on the assignment. Also, the student failed to check ■ work.

64. By the end of the first semester of third grade, the student earned two Ds in reading, a C and D respectively in math, and a C and a D respectively in language arts. ■ had a "needs improvement" in applying information in making decisions and solving problems. ■ had a "satisfactory" followed by a "needs improvement" in completing classwork and homework. ■

academic difficulties seemed to be growing during the first semester of third grade.

65. During parent-teacher conferences, the mother heard exactly the same description of her child that she had heard for two years--namely, fidgeting at ■■■ desk, not paying attention, and failing to work independently. For the first semester of third grade, the student was absent six days and never tardy.

66. On November 30, 2010, the IEP team--this time, including the Charter School principal--conducted another meeting. The IEP team prepared the third IEP of 2010 for the student. At the meeting, the mother expressed her worry that the student was not making progress, although she testified that the student's behavior had improved a little since the start of the 2010-11 school year. The mother reported to the IEP team that she was taking the student to a doctor for headaches. She stated that a firm hand in Sunday school had produced good results, and maybe the student needed a challenge. The IEP team advised the mother of the availability of early-morning tutoring three times weekly, but the mother is a single parent with a full-time job and cannot get the student to these sessions very often.

67. During the November 30 IEP meeting, the IEP team acknowledged that the student was in danger of not passing third grade. ■■■ standardized testing showed variable results.

District benchmark achievement tests in September 2010 placed the student in the third percentile in reading and fourteenth percentile in math. Somewhat surprisingly, STAR reading tests revealed that the student improved ■■■ reading skills from a 1.7 grade equivalent in September 2010, which was a drop of one month from the May 2010 STAR test result of 1.8, to 2.7 in November 2010, two months later. Most surprisingly, according to the iStation, the student's overall reading score is 3.5 grade equivalent with lower scores in fluency, spelling, and comprehension. It is difficult to reconcile all of this information.

68. The November 2010 interim IEP notes that, due to the student's ADHD, he is performing below grade level in academic areas and will receive "intervention" in reading and math. The November 2010 interim IEP does not change any of the goals of the August 2010 IEP, including the timeframes for mastery.

69. Under the domain of Social/Emotional Behavior, the November 2010 interim IEP reports that the student's disability has no impact, although ■■■ teachers report that ■■■ is socially immature and engages in horseplay. There are thus no goals under the domain of Social/Emotional Behavior.

70. The November 2010 interim IEP does not change the specialized instruction or collaboration contained in the August 2010 IEP. As does the August 2010 IEP, the November 2010

interim IEP provides for no FCAT accommodations and maintains the three classroom accommodations of repeating and clarifying directions, highlighting key words in directions and tests, and preferential seating. And, as in the August 2010 IEP, the November 2010 interim IEP reports no behavioral needs.

71. On January 21, 2011, the Charter School sent home a progress report. The progress report states that the student has made no progress on the first, second, and fourth goals of the August 2010 IEP and some progress on the third goal, but is not expected to master any of these goals by the end of the term of the IEP. Given its proximity to the November 2010 IEP meeting, this progress report, which proved accurate, undermines the more favorable reports of the student's reading levels, as set forth in the November 30 interim IEP.

72. Two months after the November 2010 IEP meeting--one month, if winter break is excluded--the IEP team, again including the Charter School principal--reconvened on January 28, 2011. Reviewing largely the same standardized achievement scores that it had reviewed two months earlier, the January 2011 interim IEP expresses concerns that the student may not pass third grade or upcoming the FCATs in reading and math.

73. The January 2011 interim IEP notes that, about half the time, the student attends early-morning tutoring, which is offered three days per week. The IEP notes a number of absences

from school. In fact, the student's rate of absence nearly doubled during the second semester--to 11--when compared to the first semester--at 6--but this was due to doctors' appointments. He was tardy once all school year.

74. At the January 2011 IEP meeting, the mother asked the IEP team to review Dr. Gonzalez's report; Mr. Roesler's psychological evaluation of December 2009; and Dr. Rodriguez-Dowling's psychological evaluation of March 2009. The January 2011 interim IEP notes this request, but does not address explicitly these three sources of information.

75. The IEP team did, however, discuss with the mother her decision not to allow the student to repeat second grade, notwithstanding the fact that this was a done deed. The mother reprised her arguments from May 2010. The Charter School principal then opined that, if students come out of second grade with 50% knowledge, that is better than coming out of second grade with 25% knowledge. The mother replied that the student is not supposed to leave any grade with less than 100% knowledge; the child goes to school to learn, and the teacher is there to teach ■■■; and, if there is something wrong, the school should fix it. The principal told the mother that the problem was that the student was immature and, until ■■■ matured, the services included in ■■■ current IEP were all the services that ■■■ needed. These are the statements that, if short of textbook

education planning for the disabled, are exemplars of the foundation of intensive due process litigation.

76. On a more positive note, the principal or Charter School ESE director mentioned that they were starting Saturday tutoring, in addition to tutoring before school three days per week. The mother replied that, alternating weekends, the student stayed with [REDACTED] father, who lived in another county. The mother added that her own medical issues were interfering with her ability to take the child to morning tutoring.

77. The January 2011 interim IEP adds important information as to the student's achievement levels from the fall of 2010. [REDACTED] September 2010 benchmark assessment tests in reading and math were, respectively, in the third and fourteenth percentiles. Two months later, the benchmark assessment tests in reading and math were, respectively, in the fourteenth and sixth percentiles.

78. The January 2011 interim IEP restates the four goals of the August 2010 IEP (and November 2010 interim IEP) without revision, although it renumbers goals 3 and 4 as goals 5 and 6. The new goals in the January 2011 interim IEP are:

3. Given a grade level passage, [the student] will orally read 80 words correct per minute on 4/5 trial[s] by August 2011.

4. Given a specific topic, [the student] will write a 5-sentence paragraph with

correct punctuation on 4 out of 5 opportunities by August 2011.

7. By August 2011, [the student] will take home the appropriate materials given to [redacted] by teachers in all subject areas 100% of the time.

8. By August 2011, [the student] will demonstrate self control (distracting others, poor proximity, inappropriate touching) with 1-2 prompts 90% of the time.

79. Under the domain of Independent Functioning, the January 2011 interim IEP notes that, since last November, the Charter School had implemented a behavior plan, but communication between school and home had been inconsistent. This behavior plan was a more informal arrangement than a BIP and did not proceed from a FBA. Essentially, the behavior plan consisted of daily behavioral reports from the teacher to the mother. The mother testified that the child's behavior improved somewhat after the implementation of this informal behavior plan, but there were still bad days.

80. The January 2011 interim IEP leaves unchanged the amount and type of the student's specialized instruction in reading and math and consultation in independent functioning. Likewise, the January 2011 interim IEP makes no changes in FCAT accommodations and classroom accommodations, except to add a classroom accommodation of having the student repeat or paraphrase directions.

81. The January 2011 interim IEP acknowledges behavior needs. Specifically, the interim IEP states that a FBA will be conducted by February 18, 2011, and a BIP will be developed, if appropriate. The student argues that an alternative statement of this undertaking, which states merely that a BIP will be developed in six weeks, is evidence of the need of a BIP for the student to access [REDACTED] curriculum; this alternative statement is evidence--cumulative, at this point--of nothing more than a need for the Charter School to proofread its IEPs.

82. On February 21, 2011, the mother took the child to another optometrist, Dr. Harvey F. Mazer. In his report dated February 23, Dr. Mazer reviews the relevant history, including Dr. Gonzalez's report of December 2009 or January 2010 and four months of vision therapy, which the student never completed. Dr. Mazer's report states that his assessment is to determine if any further refractive or functional visual intervention is indicated.

83. Dr. Mazer's report states that distance visual acuity was 20/60, but near visual acuity was 20/20. The distance acuity was correctable to 20/20. Eye movement control testing revealed "highly significant" findings for a child of the student's age. This testing revealed continued difficulties with both tracking and fixation skills. Ocular coordination revealed an inward posture of the eyes that would be consistent

with a visual system that fatigues quickly when doing close activities. Likewise consistent with a visual system that fatigues quickly was the student's unequal ability to focus. However, the student's ocular health was normal.

84. Dr. Mazer recommended corrective lenses for use at distance. The eyeglasses should be used at school for board work but not near work. Dr. Mazer "highly recommend[ed]" the continuation of a vision therapy program to improve the student's eye movement skills, focusing ability, and binocular skills. Dr. Mazer recommended a program of six to eight months. He also suggested that the student required extra time to complete assignments and should take visual breaks of three minutes every 20 minutes or so to allow for visual fatigue.

85. The mother sent Dr. Mazer's report into school by stapling it to the student's notebook used for transporting work between school and home. The Charter School received Dr. Mazer's report by early March 2011.

86. From February 10 to March 22, 2011, the Charter School conducted a FBA. Charter School employees assuming this task were the Charter School ESE director, the student's classroom teacher, and two ESE teachers. They determined that the rationale for the FBA was: "The student is engaging in behavior that places them [sic] or others at risk of harm."

87. The rationale is problematic. Clearly, the student had engaged in horseplay for a long time, but never to the extent that a teacher ever felt the need to send [REDACTED] to the office. Prior reports of cutting into line and invading classmates' space pepper the student's records. But nothing whatsoever in the record supports the bald assertion that the student's horseplay poses a risk of injury to [REDACTED] or others.

88. Consistent with the stated rationale, the target behavior in the FBA is:

According to school reports, [the student] engages in horseplay, [REDACTED] runs and talks loudly in the halls. [REDACTED] is impulsive (blurts out, interrupts others, answers without thinking). [REDACTED] gets too close to the students in line and invades their personal space. [REDACTED] plays inappropriately (pushing) and yells in the student['] face.

When [REDACTED] is confronted by [REDACTED] teacher for [REDACTED] behavior, [the student] will not accept responsibility for [REDACTED] actions. [The student] will often blame others for [REDACTED] inappropriate behavior.

[The student's] classroom teacher reports that the yelling, running and horseplay are often exhibited in the halls early in the morning. This behavior is displayed 1-2 times per day for about 30 seconds or less.

89. The exclusive focus on horseplay, of course, informs the hypothesis statements. For the circumstances, the FBA states:

The circumstances in which [the student's] yelling, screaming and horse playing

behaviors are most likely to occur outside the classroom setting.

90. For the behavior, the FBA states:

When [the student] demonstrates [redacted] inappropriate behavior it usually occur[s] when [redacted] is given opportunities to interact with [redacted] peers. [The student] will often resort to running, hitting and yelling in other student[']s face. [redacted] also engages in horse play which may have the potential of hurting himself or others.

91. For the consequences, the FBA states:

[The student] wants the attention of [redacted] peers. However, he seems to struggle with how to get their attention in a positive manner. As a result, what [the student] might deem as appropriate interactions with [redacted] is peers often appears to be horseplay. [redacted] does not seem to comprehend that [redacted] actions will lead to poor social interactions with [redacted] peers. The consequences for [the student's] behavior have been notes home. An improvement has been evident by the teacher documentation.

92. The FBA concludes that, based on the findings of the FBA, the student's IEP will be "reviewed and revised as needed."

93. As relevant to the present cases, according to the School Board's Functional Behavioral Assessment: A Resource Manual (FBA Manual), an FBA is necessary only "[w]hen a student demonstrates behaviors that are persistent and disruptive to the degree that they impede a student's learning and have not responded to typical classroom intervention." FBA Manual, p. 7. (The other circumstances under which an FBA is necessary are for

certain students suspected of having an emotional/behavioral disorder or students whose disciplinary suspensions have accumulated to effect a change in placement.)

94. The FBA Manual suggests that the education professionals identify the target behavior and explain the rationale for changing it. The FBA Manual recommends that the education professionals prioritize the behavioral concerns:

Does the behavior threaten the life or physical well being of the individual or others? Does the behavior interfere with the student's learning or the learning of others? Does the behavior place the child at-risk for academic failure?

FBA Manual, p. 9.

95. For collecting data, the FBA Manual suggests environmental observations "that assess all the relevant environmental variables that might affect the target behavior"; recording of the antecedents, the behavior, and the consequences, which recordkeeping is "most valuable for providing information needed for a functional assessment"; making scatter plots of the occurrence and nonoccurrence of behaviors; recording the frequency, duration, and time intervals of the target behavior; and producing permanent products, such as work samples. FBA Manual, pp. 10-11.

96. After collecting the data, the FBA Manual requires analysis "to determine the function the behavior(s) is serving

and, ultimately, generate a hypothesis." FBA Manual, p. 11. Setting events are the environment, events, or conditions in which the behavior is likely to occur. Antecedents are factors preceding the behavior that are likely to cause or exacerbate the behavior. Antecedents might include task demands, types of required responses (verbal or nonverbal), amounts and types of attention from peers or adults, levels of available assistance, and clarity of expectations. The FBA Manual warns that the identification of the function of the behavior requires consideration of whether the assigned task relates to a deficit in skills or performance. Consequences are what occurs after the student demonstrates the behavior, such as whether the demands imposed on ■■■ are reduced or eliminated, but do not include punishments. This element requires consideration of why a student continues to engage in the inappropriate behavior.

97. After identifying the antecedents, behavior, and consequences, the education professionals can develop a hypothesis. This is difficult work requiring the possession and exercise of considerable educational expertise. Appendix B of the FBA Manual provides a format for making hypothesis statements of when a student's behavior is more likely to occur and when it is less likely to occur and likely consequences, which may be positive (e.g., social attention) or negative (e.g., avoidance of nonpreferred tasks or situations).

98. The next step is to develop interventions, according to the FBA Manual. The purpose of this critical step is to make the target behavior irrelevant, inefficient, or ineffective. This step probably marks the transition to a BIP, but its framework should inform the FBA, which precedes a BIP, if a BIP is required, after analysis of what is learned from the FBA.

99. Given the lack of justification, on the present record, for a BIP for the student, as discussed below, interventions are amply illustrated by the example in Appendix B of the FBA Manual. The setting event in this example is a child who has not had breakfast before school. One intervention--a setting event strategy--is simply to feed the child a morning snack. Another set of interventions--known as predictor strategies--is to mix easy and more difficult tasks, provide assistance before the student gets upset, and allow the student to make choices among tasks. Another set of interventions--known as teaching strategies--is to teach the student to ask for adult assistance and teach the student to tolerate delays in getting help. And the final set of interventions--known as consequence strategies--is to redirect the student to ■■■ work when ■■■ yells or throws things and provide help on completing tasks, if the student asks for help.

100. Judged against these sensible criteria, the FBA prepared by the Charter School is both inapt and inept.

101. The FBA is inapt because it addresses the wrong behavior. The January 2010 IEP and August 2010 IEP omit any mention of horseplay; they describe the student as "respectful," "pleasant," "friendly," "sweet," "kind," "caring," and "sensitive." Nothing in the record suggests any violent or aggressive behavior on the part of the student. The November 2010 interim IEP adds that the student is "immature" and "engages in horseplay in the classroom," but does not add a goal under the Social/Emotional Behavior domain because the student's ADHD does not impact [REDACTED] in this domain so as to require a goal.

102. The January 2011 interim IEP adds only the following to the Social/Emotional Behavior domain: "[The student] handles reprimand from the teacher appropriately. [REDACTED] does not talk back to authority figures. [REDACTED] continues to engage in horseplay." Understandably, the January 2011 interim IEP provides no goals for this domain because, again, none is required.

103. Undoubtedly, horseplay is as annoying as it is visible, but the education planning for this disabled child does not pivot on [REDACTED] yelling or running in the halls twice a day for a total of 60 seconds. The recurring behaviors that impede the student's progress in the general curriculum involve [REDACTED] hyperactivity and inability to control [REDACTED] impulses and, in terms of adaptive behaviors, as discussed below, [REDACTED] poor

organization skills and difficulty applying lessons over time and to other situations. The duration and frequency of these recurring behaviors are greater than once or twice a day for 30 seconds each--the reported frequency and duration of the horseplay. And the critical setting for these recurring, persistent behaviors is the classroom, not the hallway. These recurring behaviors imperil the student's learning and the learning of [REDACTED] peers, whom the student distracts or who lose learning while the teacher must deal with the student. In this context, 60 seconds daily of horseplay in the halls is, if a problem at all, a problem for another day.

104. At one point, even the FBA authors seem to lack much conviction that the student's horseplay poses a safety threat. Consider the double qualifier in the following description of the behavior: "[The student] also engages in horse play which may have the potential of hurting [REDACTED] or others." (Emphasis added).

105. The ineptitude of the FBA is almost as evident as its inaptness. Reduced to their essentials, the Charter School's hypothesis statements are as follows.

106. First, the antecedent is that the student is outside the classroom. That is all.

107. Second, the behavior is horseplay, including running, hitting, and yelling in students' faces. These behaviors

"usually occur when [the student] is given opportunities to interact with [REDACTED] peers." Tacked onto the behavior is the editorial comment, quoted above, that horseplay "may" have the "potential" to hurt the student or others. Reduced to its essentials, the behavior is horseplay, usually with others--and not, unsurprisingly, when the student is alone.

108. Third, the consequence initially is noted as a desire to obtain the attention of [REDACTED] peers. This is a consequence, and, if the target behavior were relevant, this step would possibly have some value.

109. But the consequence section falls apart when the FBA authors displace the analytic process with baseless speculation and, worse, reveal a misunderstanding of the meaning of consequence in the FBA process. The FBA authors warn: "[The student] does not seem to comprehend that [REDACTED] actions will lead to poor social interactions with [REDACTED] peers." Absent any support in the Social/Emotional Behavior domains of the IEPs, the speculative nature of this statement properly uses the future tense. Even the Charter School ESE director described the student as liked by [REDACTED] peers.

110. Worse, though, the prediction of poor peer relations is not a consequence, as described in the FBA Manual. Further betraying their misunderstanding of what is meant by consequence

in the FBA process, the FBA authors add: "The consequences for [the student's behavior--i.e., horseplay] have been notes home."

111. The treatment of consequence as unintended adverse results--the loss of friends, punishment, or notes home to mother--serves the colloquial meaning of "consequences," not the meaning of the term, as used in the preparation of FBAs or the FBA Manual. Horseplay may alienate the perpetrator's peers and generate notes home to the perpetrator's mother; colloquially, these are consequences. But the alienation of peers and irritation of mothers are not consequences, under the FBA process--unless the perpetrator is engaging in the targeted behavior to gain some advantage by alienating ■■■ peers and irritating ■■■ mother. Nothing so complex exists in this case.

112. The evidence fails to explain why the Charter School employees did not focus on pertinent behaviors in the design and implementation of an FBA, except that the complexity of this task is far more daunting than addressing 60 seconds daily of horseplay in the halls. The child is uniformly described as respectful, sweet, and eager to please. According to the Charter School ESE director, the student enjoys learning. Afflicted with ADHD and visual-processing difficulties, this sweet, respectful, eager-to-learn child long suffered from pronounced impulsivity, as well as distractibility and inattentiveness. ■■■ has long displayed failures in adaptive

behaviors, such as failing to retain and transfer information that has already been taught to [REDACTED] and failing to self-organize.

113. After the January 2011 IEP meeting, the student's performance in school improved, but only marginally. On March 29, 2011, the Charter School sent home a progress report. The progress report states that the student is making progress on all eight goals, but is only expected to master, by August 2011, Goals 3, 5, and 8 which are to orally read 80 words correct per minute, maintain attention for 30 minutes, and demonstrate self-control. Again, the progress report proved groundless; as noted below, six weeks later, the IEP team closed out the January 2011 interim IEP goals and determined that these goals had to be continued with revisions.

114. On March 1, 2011, the Charter School sent the mother a parent participation form, advising her of a meeting on March 22, 2011, to create a FBA/BIP and to develop a reevaluation plan, so that the IEP team could determine the student's need for an individualized evaluation. Unfortunately, the IEP team missed the report by Dr. Mazer. The March 22 meeting was devoted largely to a discussion of the FBA and whether the Charter School would proceed to prepare a BIP. To her credit, the Charter School ESE director admitted that Dr. Mazer's report was behind a packet of information from Nova

University, and the IEP team failed to notice it. Because the IEP team was able to remedy this omission with another meeting in short order, this omission had no material effect on the student.

115. On March 29, 2011, the Charter School sent the mother another parent participation form, advising her of another reevaluation meeting for April 6, 2011. FCAT testing was to take place from April 11-14, and the IEP team, relying largely on Dr. Mazer's report, needed to restore FCAT accommodations for the student. The April 2011 interim IEP provides the following FCAT accommodations: brief testing with frequent breaks, doubling the allotted time for taking the test, and small-group testing.

116. The April 2011 interim IEP also notes the student's most recent grades for the third quarter: D in math and Cs in reading and language arts. Under the domain of Social/Emotional Behavior, the IEP reports "some progress" on unspecified problem behaviors since the implementation of the FBA. Under the domain of Independent Functioning, the IEP states that, based on Dr. Mazer's report, the student needs extra time to complete assignments.

117. Based on Dr. Mazer's report, the April 2011 interim IEP adds two important classroom accommodations. In addition to those contained in the January 2011 interim IEP--preferential

seating, repeating and clarifying directions, repeating and paraphrasing directions by the student, and highlighting key words in directions and tests--the April 2011 interim IEP adds doubling the time for tasks and allowing extra time for assignments. The April 2011 interim IEP also restores the classroom accommodation of small-group testing.

118. Most of the April 6, 2011, meeting involved a discussion of the FCAT accommodations, but the mother and her advocate, Mr. Jessup, in his first appearance for the mother, also wanted a BIP based on the FBA and more of the material in Dr. Mazer's report incorporated into the student's educational plan.

119. The IEP team reconvened on May 9, 2011, to prepare a new IEP. At the meeting were the Charter School principal, who assumed an active role, and a School Board ESE specialist, who had recently been assisting the Charter School in this educational planning exercise.

120. The mother and Mr. Jessup demanded a BIP. The School Board ESE specialist replied that "we" had determined that a BIP was inappropriate. The mother and Mr. Jessup complained that this was a predetermination violative of the rights of the mother to participate in the education planning process for her son.

121. The School Board ESE specialist was entirely correct, even if the "we" referred to the IEP team excluding the mother and her advocate. There was no basis for a BIP. As noted above, the targeted behavior covered by the FBA was inappropriate, so a BIP directed toward horseplay would have been entirely unwarranted. And, at this stage, prior to the completion of a relevant, competent FBA, it is premature to determine to what extent, if any, a BIP may be appropriate or necessary.

122. The IEP team closed out the pending goals. Four of the goals--most recently numbered 1, 2, 5, and 6--were first identified in the August 2010 IEP. The student mastered none of these goals, which were all continued with revisions. Three of the goals--most recently numbered 3, 4, and 7--were first identified in the January 2011 interim IEP. The student mastered goal 4, which was to write a five-sentence paragraph with correct punctuation four out of five times, but did not master the other two goals. The IEP team continued goal 3 with revisions, but discontinued goal 7, at least partly because the Charter School had been collecting data on how often teachers put materials into the student's backpack, not how often the material were received at home, which was what the goal was supposed to measure. Goal 8 was first identified in the April

2011 interim IEP, and the IEP continued this goal with revisions too.

123. The School Board ESE specialist participated in the discussion of the close-out of goals during the May 9 IEP meeting. At the IEP meeting and at the hearing, the ESE specialist candidly admitted the obvious shortcomings of existing goals and the Charter School's efforts at collecting data pertinent to some of the goals. Goal 3 is specific and measurable. But goals 1, 2, 4, 5, 6, and 8 fail to specify a setting--a particularly notable omission as to goal 8, which requires the student to maintain self-control. Goal 8 also should have specified a timeframe, such as during transitions.

124. The student's final report card for third grade showed a D in reading and Cs in math and language arts, although ■■■ fourth-quarter grade in the latter was a D. ■■■ earned "satisfactory" in all study skills, behavior, and social growth for the third and fourth quarters. During the second semester, the student was absent 11 days and tardy once. ■■■ was promoted to fourth grade.

125. On May 12, 2011, the student took a STAR reading diagnostic test, which reported that ■■■ was reading at the grade equivalent of 3.4, which placed ■■■ about one-half year behind the average third grader, but documented one and one-half year's growth in one school year or about ten months. However, the

STAR grade equivalents do not seem consistent, as reflected by the decline of one month grade equivalency over four months in 2010 followed by the increase of one year in the next two months. The May 2011 IEP reports that a reading diagnostic test had found that the child read at the rate of 58 words per minute, which was at the second grade level.

126. By the end of May 2011, the student's work on the iStation suggested that ■ was reading at the appropriate level, 3.11 grade equivalent. However, ■ text fluency was only 2.4 grade equivalent, which, according to iStation, means that ■ is "seriously below grade level and in need of intensive intervention." ■ spelling was also below grade level by about an equal amount, but ■ comprehension reportedly was at grade level and ■ vocabulary was substantially in excess of grade level.

127. The student also passed the reading and math portions of the FCAT, which ■ took with the accommodations added to ■ IEP in April 2011. In each subject, the student scored a Level 2. The test scores are divided into five levels, and Level 1 is failing. The student's scores in both subjects were in the middle of Level 2.

128. The language arts assessment in the May 2011 IEP is incomplete. It states only: "[the student] is able to write simple sentences with appropriate punctuation." There is no

mention of grade level performance or any other skills in written expression. As noted below, the classroom teacher stated that [REDACTED] written expression skills were below grade level at year's end.

129. The math information is based on a single source, the GoMath Chapter tests. On these, the student scored a 24% at the start of the year and a 40% at mid-year; as noted below, [REDACTED] raised this to a 66% by year-end. This is clear progress in mastering the skills tested by GoMath Chapter tests, about which nothing appears in the record. However, these test results do not harmonize well with the benchmark assessment test that placed the student in the sixth percentile in math in November 2010. Lacking is information about the GoMath Chapter tests in terms of the scope of these chapter tests or the meaning of these percentage scores, including whether the end-of-year test is cumulative or merely a reflection of how well, or poorly, the child mastered the final chapter in the material that [REDACTED] managed to cover during the school year. The May 2011 IEP thus provides little reliable information about the child's math performance level.

130. None of the child's IEPs has provided much of a statement as to the impact of the student's disability on [REDACTED] progress in the general curriculum. The January 2010 IEP uses this space merely to continue the description of the child's

present level of performance, although this information is richly detailed and useful for other purposes. The August 2010 IEP, November 2010 interim IEP, January 2011 interim IEP (although this IEP contains much detailed information about the child's present levels of performance), and April 2011 interim IEP do about the same thing as the January 2010 IEP, but with less detail, all merely concluding, as noted above: "As a result of [the student's] ADHD, ■■■ is performing below grade level in academic areas within the general curriculum."

131. For a different reason, the May 2011 IEP does not improve much on these earlier efforts to describe the impact of the child's disability on ■■■ progress in the general curriculum: "As a result of [the student's] ADHD, ■■■ requires prompting to maintain focus." Although formally this is an improvement on earlier efforts, the specific impediment--lack of attention during class--has faded somewhat as an issue. As noted in the classroom teacher's end-of-year survey, the child's more pressing problems--all of which have persisted over time--are recalling instructional material, transferring information from one situation to another, impulsivity in the classroom (as in blurting out answers, not horseplay in the halls), classroom organizational skills, and turning in homework and classwork.

132. Driven by a misleadingly incomplete statement of the impact of the disability, the May 2011 IEP misstates the

priority educational need of the child: "[t]o improve his attention to task." Although the teacher's end-of-year ratings, discussed below, are not a comprehensive survey of the child's attentiveness in various settings and for various tasks-- something that a relevant, competent FBA should have provided months earlier--other priority needs, as noted in the preceding paragraph, have emerged.

133. The three goals under the domain of Curriculum and Instruction are:

1. Given no more than 3 prompts to remain on task, [the student] will correctly answer inferential questions (orally and/or written) in 4/5 trials by May 2012.
2. Given a timed reading passage, [the student] will orally read 80 words correctly per minute on 4/5 trials by May 2012.
3. Given no more than 3 prompts of the steps required to solve math word problems, [the student] will correctly solve the problems on 4/5 trials by May 2012.

134. The record provides no explanation as to why these goals omit any criterion of skill level, such as grade level. This is a material omission for a student who has demonstrated below grade-level performance in reading, math, and language arts for most of [REDACTED] short academic career.

135. The May 2011 IEP omits any goals under the domains of Social/Emotional Behavior because the student has no issues in

this area, at least pending the completion of a relevant, competent FBA.

136. Under the domain of Independent Functioning, the present levels of performance describe the student as follows:

Based on teacher observations, [the student] is able to independently complete workbook pages, spelling assignments, grammar, and limited group work. ■ can read independently during center time. ■ recognizes when it is ■ turn and can log on independently to the computer and take an Accelerated Reader quiz. [The student] can independently copy ■ homework from the board into ■ agenda. ■ enjoys participating in classroom job opportunities. [The student] volunteers to assist the teacher. [The student] follows the cafeteria routine by choosing ■ lunch, entering ■ lunch number into the computer and sitting down at the appropriate table.

According to ■ Spanish teacher, [the student] listens to and follows directions. ■ Science teacher reports, [the student] works cooperatively with other students and likes to be in charge. After school, ■ goes to the science room to check out space books. According to the Media Specialist, [the student] can use ■ library card to independently check out a book in the media center. ■ Art teacher reports that [the student] can begin and work on ■ art project in class. All teachers report ■ requires prompting to maintain focus.

137. According to the Independent Functioning domain, the impact of the child's disability on ■ progress in the general curriculum is that "he has difficulty transitioning during unstructured periods of the day." This statement omits the more

crucial behaviors discussed above that present serious impediments to his ability to function independently, as contrasted to 60 seconds daily of horseplay in the halls.

138. The priority educational needs under the Independent Functioning domain are interesting. One is to improve the student's self-control. As noted below, the classroom teacher rates this in the second highest category, meaning that the student often displays self-control, although she reports that ■ continues to have impulsivity problems, as in blurting out answers in class. This suggests that aspects of self-control remain a problem for the student and are, among other things, a priority educational need.

139. The other priority educational need is to raise the child's self-awareness. It is difficult to find fault with this concept, which is, some would say, an overarching objective of education. It is equally difficult to find this to be a priority educational need for a nine-year-old child who is continued to be plagued by behaviors that impede ■ education.

140. Driven by the flaws in identifying the impact of the student's disability upon ■ progress in the general curriculum and ■ ensuing priority needs, as well as the irrelevant and incompetent FBA, the Independent Functioning domain states two goals that, if not utterly pointless, are misguided given the more pressing independent-functioning needs of the child:

4. During transitional periods of the day, given no more than 2 prompts, [the student] will keep [REDACTED] hands to [REDACTED] in 4/5 trials by May 2012.

5. During transitional periods of the day, given no more than 2 prompts, [the student] will maintain an appropriate space between [REDACTED] and others in 4/5 trials by May 2012.

141. The May 2011 IEP maintains the FCAT accommodations and adds verbal encouragement. It maintains the levels of specialized instruction in math and reading and collaboration in independent functioning. The May 2011 IEP maintains the previous classroom accommodations and adds frequent breaks, the use of a straight edge or finger during reading, verbal encouragement, and a daily note home concerning whether the student is using [REDACTED] eyeglasses. The May 2011 IEP notes the student's behavior problems, but states that they have been addressed by the FBA, and the student does not require a BIP.

142. On May 16, 2011, the classroom teacher prepared a rating form. The teacher mentioned horseplay, although she testified that the child was easily redirected from horseplay and the redirection lasted. The teacher also dutifully mentioned the student's 11 absences and seven early releases. Although not particularly developed in the record, the mother has consistently obtained outside diagnoses and treatment for the child during the period covered by these cases, and this

outside work necessitated more frequent absences from school during the 2010-11 school year.

143. Of greater relevance, though, the classroom teacher recorded the student's clear progress in reading, which has been noted above. The math comments are less detailed, indicating that ■ achieved only a 66% on the end-of-year GoMath Chapter test. And she reports that the student remains below grade level in written expression.

144. And of greatest relevance, the classroom teacher's rated the student's end-of-year behaviors. The importance of these ratings is highlighted by the failure of the mother to provide updated behavioral information when testifying; unfortunately, as often is the case, the mother's testimony of events, starting in the spring of 2011, focused more on the relatively unimportant, but dramatic, exchanges during IEP meetings and less on the relevant behaviors and performance of the child.

145. According to the classroom teacher, the lone problem behavior under attention/activity level is impulsivity in the form of blurting out answers and interrupting others, and this combined category occurs often, probably, given the child's history, in the form of blurting out answers. Notably, the classroom teacher reports that only sometimes does the student fidget or appear easily distracted or inattentive. The

classroom teacher testified that self-distraction decreased during the school year.

146. As to social skills/interpersonal relationships, the classroom teacher assigned the student the highest ratings for complying with directions from adults and handling redirection or reprimand without overreacting. ■ received the second highest rating, which means ■ often demonstrates the skill, in maintaining self-control, making friends easily, working cooperatively with others, and following rules. ■ worst ranking, which is that ■ sometimes demonstrates the skill, is for taking responsibility for ■ own actions.

147. The classroom teacher's ratings of adaptive behaviors presents the most mixed picture of the student. ■ only sometimes is organized, recalls instructions and lessons, transfers what was learned from one situation to another, turns in homework, completes classwork on time, and turns in classwork. ■ often tries, copies accurately from the board or textbook, pays attention to spoken instructions, and brings supplies to class. ■ almost always--the highest level--fills out ■ daily planner and asks for help when confused. The classroom teacher reported that the child has no conduct problems.

148. On May 9, 2011, the mother filed a demand for an independent education evaluation in the form of a FBA. On

June 1, 2011, the student filed a due process request on the issues set forth in the Preliminary Statement. On June 15, 2011, the School Board filed a due process request on the appropriateness of the Charter School's FBA.

149. The FBA done in these cases is inappropriate. It targets the wrong behavior and was executed improperly. As noted by the classroom teacher at the end of third grade, the student's behaviors, including adaptive behaviors, impact █████ progress in the general curriculum and require careful analysis in an FBA. The behaviors that need to be targeted are impulsivity, self-control, and inattentiveness, as well as the adaptive behaviors of organization, recalling instructions and lessons, transferring what was learned from one situation to another, turning in homework, completing classwork on time, and turning in classwork.

150. The parties presented evidence on whether the intervening five weeks constituted an unnecessary delay in filing the due process request. It did not, but this issue is mooted by the determination that the FBA is inappropriate in any event.

151. In a similar vein, the student presented evidence that the School Board and Charter School did not timely identify █████ as eligible for ESE services. This claim is unsupported by the record. The Charter School moved expeditiously to complete

the evaluation process in December 2009. With some justification, the student contends that more could have been done more quickly after receipt of Dr. Rodriguez-Dowling's report in the spring of 2009, but the student overlooks the fact that the report of Mr. Roesler in December 2009 suggests that the student made educational progress in the interim between the two reports. Thus, any delay in processing the matter was immaterial.

152. The role of the claimed procedural violations involving predetermination are addressed in the Conclusions of Law. The remaining issues raised by the student in [REDACTED] due process request are more difficult to resolve. The ultimate questions are whether the design and implementation of the May 2011 IEP, as well as its predecessors, provided FAPE to the student.

153. In the final analysis, the important facts are that the Charter School started provided specialized instruction and classroom accommodations--both reasonably well-tailored to the child's disability--in January 2010 when the child was mid-way through second grade. It is impossible to find a discrete point at which the child began to gain educational benefit in second grade, which was not an especially successful year for [REDACTED], but it is equally impossible to find that the commencement of

specialized instruction, even if limited to reading, and basic classroom accommodations were unrelated to this turnaround.

154. By the start of third grade, the Charter School added specialized instruction in math and the additional classroom accommodation of highlighting keywords in directions and tests. Mid-way through third grade, the January 2011 interim IEP added the classroom accommodation of having the child repeat or paraphrase directions. The April 2011 interim IEP extends the classroom accommodations to allow the child extra time for tasks and assignments. And the May 2011 IEP adds frequent breaks to the classroom accommodations. The strongest elements of the May 2011 IEP are the accommodations, which the IEP team was able to identify from more extensive experience working with the child and from the work of the student's outside consultants, and the specialized instruction, which has been delivered by classroom and ESE teachers, who have, from the same sources, acquired considerable insight in how to teach the student.

155. Clearly, the pace of educational gain quickened mid-way through third grade. In the fall of third grade, benchmark assessment tests predicted FCAT failure in math and reading. By the spring of third grade, the child passed the FCATs in math and reading. Ironically, this achievement in April 2011, on which the FAPE determination probably turns, is due to the extraordinary efforts of the mother to obtain for her son,

almost at the last minute, the FCAT accommodation of extra time, on which ■ depended in order to pass these tests. In making this extraordinary effort for her child, the mother, in effect, spared the Charter School from what would have been a major consequence (colloquially speaking) of its lack of insight into the impact of the child's disability.

156. The credit due the mother, the child, the Charter School classroom and ESE teachers, and possibly outside professionals is difficult to gauge, but clearly outweighs the credit due the Charter School's education planning efforts for the student. In addition to the inappropriate FBA attempted in early 2011, the Charter School has managed to craft myriad academic goals, report that the child was making progress toward attaining some of them, and eventually abandon all but one of them--all in the space of 16 months. During this time period, not a single IEP has adequately described the child's present levels of performance or, in particular, the impact of ■ disability on ■ progress in the general curriculum.

157. These procedural flaws undermine even the most recent educational planning effort--the May 2011 IEP, which was prepared with the assistance of a School Board ESE specialist. For reasons that will emerge at the end of the Conclusions of Law, it is necessary to catalog these procedural violations, even though they cannot sustain a determination of a denial of

FAPE due to the above-described educational gains that the child has experienced.

158. Goal 1 of the May 2011 IEP fails to state a grade level for the exercise in inferential reading comprehension. Goal 2 is a restatement of Goal 3 from the January 2011 interim IEP, but the new goal drops the former goal's criterion that the fluency goal pertain to grade-level reading material. This destroys the value of the fluency goal. Goal 3 is the math goal that substitutes word problems for computations and application, but also fails to specify a grade level, so it too is worthless.

159. Goals 4 and 5 of the May 2011 IEP are of negligible value, as they grow out of the misconceptions that plague the FBA. These goals are to keep █████ hands to █████ and not invade other people's space. Based on the remaining behaviors that the third grade teacher listed at the end of the 2010-11 school year, important independent functioning goals remain for this child, and they overshadow whatever importance may be assigned to the goals that the Charter School has chosen to place in the May 2011 IEP.

160. Compounding the problem of the technical shortcomings of the goals, the May 2011 IEP fails to contain a clear statement of the child's present levels of performance in math, reading, and language arts. Some data is reported, but the IEP team never exercised its educational expertise to analyze this

data and conclude where the student is, as of May 2011, in terms of these three critical subjects.

CONCLUSIONS OF LAW

161. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1003.57(1)(b), Fla. Stat.; Florida Administrative Code Rule 6A-6.03311(9)(u).

162. The School Board bears the burden of proof as to whether the Charter School's FBA was appropriate, although, in this case, the allocation of the burden of proof has no effect on the outcome of this issue. Rule 6A-6.03311(6)(g)2. The student bears the burden of proof on the remaining issues. Schaffer v. Weast, 546 U.S. 49 (2005). The party with the burden of proof must prove the material allegations by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

163. The School Board is responsible for the identification, evaluation, and educational placement of the student, as well as the provision of FAPE to the student. § 1003.57(1)(a) and (b), Fla. Stat.; Fla. Admin. Code Rule 6A-6.03311(9). The purposes of an evaluation are "to determine whether a student has a disability . . . and the nature and extent of the ESE that the student needs." Rule 6A-6.03411(1)(1).

164. As part of the responsibility to evaluate a student, the School Board must perform an appropriate evaluation, or the mother will have the right to an IEE at public expense. Florida Administrative Code Rule 6A-6.03311(6)(g)2.

165. A FBA is:

A FBA is a systematic process for defining a student's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior.

Rule 6A-6.03411(1)(q).

166. For the reasons noted in the Findings of Fact, the evaluation in the form of the FBA conducted by the Charter School, as the agent of the School Board, was not a FBA and was not appropriate. The child is still plagued by a serious complex of behaviors that, despite the specialized instruction and accommodations currently provided [REDACTED], may increasingly impact [REDACTED] as [REDACTED] attempts to progress in the general curriculum of the later primary years. A competent FBA addressing these behaviors is essential at this time.

167. For this reason, there is no need to determine whether the School Board filed its due process request "without unnecessary delay," as required by rule 6A6.03311(6)(g). However, the case law does not suggest that five weeks

constitutes unnecessary delay, given the coordination required between the School Board and Charter School and the myriad end-of-year responsibilities of school employees. More than two months with extenuating circumstances has been held not to be unnecessary delay, J. P. v. Ripon Unified Sch. Dist., 2009 U.S. Dist. LEXIS 32035 (E.D. Cal. 2009), but three months without extenuating circumstances has been held to be unnecessary delay. Pajaro Valley Unified Sch. Dist. v. J. S., 2006 U.S. Dist. LEXIS 90840 (N.D. Cal. 2006).

168. The student raises multiple issues. First, the student requests, at public expense, an IEE in the form of a FBA. Given the determination that the Charter School's FBA is not appropriate, under rule 6A-6.03311(6)(g), the student is entitled, at public expense, to an IEE in the form of a FBA. This determination does not imply that the right to an FBA means that the student has the right to a BIP, or that a BIP must be incorporated into ■■■ IEP.

169. Second, the student claims that the School Board failed to timely identify ■■■ disabilities. For the reasons set forth in the Findings of Fact, the record fails to support this claim. The student may contend that ■■■ has disabilities in addition to OHI, but the important fact is that the Charter School timely provided ESE services, not the eligibility under which it has provided them. See, e.g., Ft.

Osage R-1 Sch. Dist. v. B.S., 641 F.3d 996, 1004 (8th Cir. Mo. 2011).

170. Third, the student has raises a series of FAPE issues, including procedural violations in the educational planning process and the IEPs themselves, and the substantive FAPE issues of whether the child has received educational benefit and whether the IEPs have been reasonably calculated to provide educational benefit to the child. Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982).

171. For a procedural violation to rise to the denial of FAPE, it must meet the rigorous criteria of rule 6A-6.03311(9)(v)4.:

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.

172. One of the procedural violations claimed by the student is the statement of the School Board ESE specialist that "we"--not including the mother or her advocate--had decided that a BIP was inappropriate. In a similar vein, perhaps, is the

statement of the Charter School principal to the effect that these are the only services that the child will receive. While both of these statements suggest a unilateralism that is not in the spirit of parent participation envisioned by the law, neither statement represents a procedural violation because of the justification for each statement.

173. At no time has a BIP been appropriate for the student. For the complex of behaviors that await analysis by a FBA, a BIP, if applicable, must await the determinations that will take place with the FBA process. For horseplay, a BIP is simply unnecessary.

174. Likewise, a statement that these are the only services that the child will receive is justified. The principal made this statement well into the educational planning process that the Charter School had undertaken for the child and at a time that the Charter School was providing specialized instruction and accommodations that ensured that the child would receive educational benefit.

175. This is not to say that such statements of unilateralism may never rise to procedural violations. If they occur prior to the school's having undertaken any effort to familiarize itself with the student or at a time that the school was not providing needed ESE services to the student, a different result might obtain. But, here, they appear to be

typical of the occasional expressions of frustration of which all participants in the educational planning process are capable. They are indicative of nothing more.

176. There are more serious procedural violations in the above-described failings of the present levels of performance and goals in the May 2011 IEP. As noted above, without these two elements, it is impossible to identify where the child started in May 2011 and where the IEP intends to guide him one year later.

177. The failings of the goals of the May 2011 IEP have been detailed in the Findings of Fact.

178. The failings of the present levels of performance have also been detailed in the Findings of Fact, but these failings are two-fold. As noted in the Findings of Fact, the first failing is that the May 2011 IEP, as well as its predecessors, is strewn with random reports of achievements, mostly on periodic computerized tests. But even if the IEP had reported clear grade-equivalent levels in reading, math, and language arts, the second failing is in the lack of analysis of this data. By law, the IEP team must place this information in a larger, more coherent picture, explaining, in all cases, the specific links between the child's disability and any lack of progress in the general curriculum and, in these cases, the discrepancy between the failed benchmark tests in reading and

math in the fall of 2010 and the passing of the FCATs in reading and math in April 2011. See, e.g., Anello v. Indian River Sch. Dist., 355 Fed. Appx. 594, 599 (3d Cir. Del. 2009).

179. As noted above, though, these procedural violations in terms of present levels of performance and goals do not satisfy any of the materiality criteria set forth in rule 6A 6.03311(9)(v)4. At all material times, the Charter School has provided FAPE to the student because ■ has made educational gain during these times. And the IEPs, including the May 2011 IEP, have provided FAPE because they have all been reasonably calculated to provide educational benefit.

180. Although the law does not justify a determination of a denial of FAPE, in design or implementation of the student's educational plan, Florida law permits some relief, as to the two procedural violations that undermine the May 2011 IEP. As quoted above, the last sentence of rule 6A-6.03311(9)(v)4. provides:

This [the preceding requirements of materiality for procedural violations] 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

181. Within the stated range of rules, rule 6A-6.03028(3)(h)1. and 2. provides:

Contents of the IEP. The IEP for each student with a disability must include:

1. A statement of the student's present levels of academic achievement and functional performance, including how the student's disability affects the student's involvement and progress in the general curriculum . . .; [and]
2. A statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general curriculum . . . and meeting each of the student's other educational needs that result from the student's disability[.]

ORDER

It is

ORDERED that:

1. The School Board's due process request for a determination that the FBA performed in early 2011 by the Charter School is appropriate is denied.
2. The student's due process request is denied, except as follows.
  - A. First, the School Board is ordered to provide the student (or ■■■ mother), at public expense, an IEE in the form of an FBA to address at least the following behaviors: impulsivity, self-control, and inattentiveness, as well as the adaptive behaviors of organization, recalling instructions and lessons, transferring what was learned from one situation to another, turning in homework, completing classwork on time, and turning in classwork. The School Board and Charter School shall

provide reasonable access to the school and the student's records to the professional(s) retained by the student for the purpose of preparing the FBA.

B. Second, the School Board and Charter School are ordered, pursuant to the last sentence of Florida Administrative Code Rule 6A-6.03311(9)(v)4., to amend the May 2011 IEP to comply with rule 6A-6.03028(3)(h)1. and 2. in all respects set forth in this rule and the above-described case law concerning the requirements of a statement of present levels of academic achievement and functional performance and a statement of measurable annual goals, including academic and functional goals. They shall amend the present levels of academic achievement and functional performance immediately and prior to the performance of the FBA, and they shall amend the statement of goals as soon after the completion of the FBA as is reasonably practicable.

DONE AND ORDERED this 14th day of September, 2011, in  
Tallahassee, Leon County, Florida.

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ROBERT E. MEALE  
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Filed with the Clerk of the  
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this 14th day of September, 2011.

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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 Section 1003.57(1)(b), Florida Statutes (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).