

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████, )  
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Petitioner, )  
 )  
vs. ) Case Nos. 06-5243E  
 ) 07-1054E  
BROWARD COUNTY SCHOOL BOARD, )  
 )  
Respondent. )  
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FINAL ORDER

Pursuant to notice, a due process hearing was held in this case on March 1, 2007, May 20 through 22, June 3, 4, 29, and 30, July 2 and 13 through 17, August 24, September 11, and October 19 and 20, 2009, in Fort Lauderdale, Florida,<sup>1</sup> before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alice K. Nelson, Esquire  
Kristen Clanton, Esquire  
Southern Legal Counsel, Inc.  
1229 Northwest 12th Avenue  
Gainesville, Florida 32606

For Respondent: Edward J. Marko, Esquire  
Barbara J. Myrick, Esquire  
Broward County School Board  
600 Southeast Third Avenue, 11th Floor  
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

The issue for determination is whether the School Board failed to implement the Child's 2002 Stay-Put Individual Educational Plan (IEP) during the 2006-2007 school year and the 2007-2008 school year, up to and including February 18, 2008, thereby denying the Child a free appropriate public education (FAPE).

PRELIMINARY STATEMENT

On December 20, 2006, the School Board received a request for a due process hearing (DPH Request) from the Parent of the Child. The DPH Request was referred to the Division of Administrative Hearings (DOAH) by the School Board on the same date and was assigned Case No. 06-5243E by DOAH. The Parent proceeded pro se. The due process hearing was scheduled to begin within the 45-day requirement. The Parent requested and was granted a continuance of the due process hearing, which was re-scheduled. During the re-scheduled due process hearing, the Parent requested and was granted a continuance to file another request for a due process hearing, which was to be consolidated with Case No. 06-5243E. The 45-day requirement was extended.

Subsequently, the School Board received another request for a due process hearing (Second DPH Request) from the Parent, which was referred to DOAH and assigned Case No. 07-1054E. The School Board challenged the sufficiency of the Second DPH

Request; the Second DPH Request was determined insufficient; and the Parent was permitted to amend the Second DPH Request. The Parent amended the Second DPH Request (Amended Second DPH Request) and requested consolidation of Case Nos. 06-5243E and 07-1054E. The time lines began to run again when the Parent filed the Amended Second DPH Request. The School Board challenged the sufficiency of the Amended Second DPH Request. Some allegations of the Amended Second DPH Request were determined to be insufficient, and the Parent was permitted to file an amendment to the Amended Second DPH Request. Also, the Parent withdrew the motion to consolidate, along with other motions filed by the Parent. Thereafter, a question arose as to whether the Parent desired to proceed with the Second DPH Request; and the Parent was directed to state whether the Parent desired to proceed with Case No. 07-1054E.

Several requests were filed by the Parent in Case No. 06-5243E, including a request to engage in discovery. The discovery request was granted and the Parent was permitted, among other things, to take videotaped depositions. Additionally, several motions were filed by the School Board, including a motion in limine regarding the Parent's witness list. The motion in limine was granted in part and denied in part after an extended telephone conference. The 45-day decision requirement was extended.

Case Nos. 06-5243E and 07-1054E were eventually consolidated. Furthermore, the Parent obtained counsel for representation in these proceedings.

After consolidation, the DPH Request was amended again. In total, the DPH Request was amended six times, resulting in a Sixth Amended DPH Request. Prior to the due process hearing, the parties engaged in discovery and filed a pre-hearing stipulation. During the due process hearing, issues of the Sixth Amended DPH Request were being eliminated by the Parent. Even after the due process hearing, additional issues were eliminated by the Parent. The 45-day decision requirement was extended several times.

At hearing, the Parent presented the testimony of 15 witnesses, including the Parent, and the School Board presented the testimony of 13 witnesses. The parties entered 586 joint exhibits into evidence; and the Parent entered four impeachment exhibits into evidence.<sup>2</sup>

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was extended. The Transcript, consisting of 24 volumes, was filed in its entirety on November 12, 2009. The parties moved to extend the length of the post-hearing submissions beyond 40 pages, which was granted.<sup>3</sup> Several extensions of time were requested and granted for the filing of the post-hearing

submissions. The Parent requested and was granted permission to file a corrected post-hearing submission. The 45-day decision requirement was extended several times. The parties filed their post-hearing submissions, which were considered in the preparation of this Final Order.<sup>4</sup>

FINDINGS OF FACT

1. The Child was born in May [REDACTED] and is an only child. The Parent of the Child is a single parent.

2. The Child entered the School Board's school system in kindergarten and attended its elementary and middle schools. During the school years, the Child also attended a charter school.

3. In the fifth grade, the Child was placed in a gifted classroom.

4. At the time of hearing, the Child was not in the School Board's school system. In February 2008, the Child began attending a residential school. The School Board is the fiscal agent for the Child's attendance at the residential school.

5. There is no dispute that the Child is eligible for the Exceptional Student Education (ESE) program on the basis of Autism Spectrum Disorder and Speech/Language Impairment; and that the Child is also eligible for Occupational Therapy services.

6. There is no dispute that the Child's education is governed by the Individuals with Disabilities Education Act (IDEA).

7. The Child's intelligence was tested in 1996, around three years of age. The child received an IQ score of 85.

8. The Child has communication difficulty, including not possessing the language to express anxiety or stress, which might result in acting out physically, instead of using language. Also, the Child has difficulty with pragmatics, the social part of language, including greeting people, starting and initiating conversations (requiring the need for conversation starters), and staying on topic.

9. Additionally, the Child has difficulty with social interactions. The Child has difficulty with reading cues, the inability to anticipate what someone might be feeling, and being receptive to another person's perspective. Also, the Child lacks understanding of social proximity, standing too close or too far away from people and understanding other people's personal space and the boundaries of other individuals with whom there is interaction. Further, the Child has difficulty with making and maintaining friendships; friendships are developed better with adults than peers.

10. The Child focuses on the same thing over and over.

11. The Child's language is repetitive, repeating information over and over in different environments.

12. The Child has problems with pronouns, confusing he and she, I and you, and my and your. Additionally, sometimes, the Child references the Child when speaking about the Child, instead of using I or my.

13. The Child has difficulty with fine motor skills, such as grasping a pencil, handwriting, and, when writing, staying within the space on the paper.

14. The Child has difficulty with attention and focus.

15. The Child sometimes uses louder than conversational speech, which caused the Child to stand out in the classroom.

16. The Child had a number of problematic behaviors at school. Some of the problematic behaviors were high frequency and low intensity and others were high intensity and low frequency.

17. The Child had the capacity to learn positive behaviors.

18. Social stories were helpful to the Child.

19. The Child likes sensory activities, including fidget toys that the Child can squeeze when feeling anxious or overwhelmed to calm the Child down; and movement activities, such as hopping, jumping, jumping jacks, and chair pushups, to calm the Child's body down.

20. The Child enjoys eating, especially at restaurants where the Child can read the menu and choose meals independently.

21. Also, the Child enjoys cooking, using a computer, traveling, and watching television, memorizing call letters for television and PBS stations across the country.

22. Further, the Child has the extraordinary capability of giving directions to geographic locations.

23. The school years covered by the Sixth Amended DPH Request are 2006-2007 and 2007-2008 up to and including February 18, 2008.

24. The Child's stay-put IEP was developed in 2002 during the Child's attendance at elementary school. The Child's IEP placement was in a general education setting.

25. Among other things, the Child has special needs, including health care needs, assisted technology needs, transportation needs, behavioral needs; accommodations; and a one-on-one aide/paraprofessional (Paraprofessional).

26. The evidence demonstrates that the relationship between the Parent and the School's personnel<sup>5</sup> directly impacted the cooperation between them and impacted the behavior of the Child.

## The Child's Behavior

### Behavior in General

27. A functional behavior assessment (FBA) is used to write a positive behavior intervention plan (PBIP). A PBIP usually contains three parts: (1) the prevention (proactive) strategies; (2) the teaching plan, teaching replacement behavior; and (3) the response plan or consequence strategies.

28. Prevention (proactive) strategies are environmental adjustments to prevent the negative behavior and encourage positive behavior, to make a student more successful and to decrease the recognized problems interfering with education.

29. Replacement behaviors are appropriate behaviors that a student is taught to replace the problem behavior, so that the student no longer needs to use the problem behavior. A plan for how to teach the replacement behavior must be developed. A one-on-one aide is critical to the teaching plan since the one-on-one aide usually provides the direct instruction and direct intervention to prevent the behavior and to respond to it. Likewise, the teaching plan must clearly show, step-by-step what is to be said and what is to be done so that there can be consistency every day.

30. The response plan or consequence strategies are things done by the staff to minimize the reinforcement of the problem behavior and to limit its impact on other students in the

environment. Consequence strategies are either proactive strategies or teaching replacement skills.

31. Consistency in all environments, including home, is crucial for the implementation of a PBIP, so that its efficacy can be assessed.

32. Every teacher who is involved with the student, including the one-on-one aide, should know the PBIP. The student's teacher oversees the aide, and the teacher needs to be able to step in and assist the aide if the aide is incorrectly implementing the PBIP.

33. The effectiveness of a PBIP is generally monitored through data collection. The data collection is used to determine whether progress is being made and whether the PBIP is effective, which determines whether modifications to the PBIP are necessary. The data collected should be placed on a sheet; a designated person should write a summary or graph the data; and the data should be reviewed at least bi-weekly.

34. The data should be accurate. However, a certain level of inaccuracy is acceptable in that some errors are inevitable.

35. The data should be discussed at team meetings. If certain information is insufficient on the sheet, the team can make inquiry of the staff person(s) involved in the incident.

36. If the team determines that changes should be made to the PBIP, there is no need to change the entire PBIP. The

changes made at a team meeting should be reflected in the minutes of the team meeting. Changes made in a PBIP should be communicated to all persons involved with a student.

### Sensory System

37. Students with autism generally have difficulty handling the stimulation that they encounter; they might be overly aroused or irritated or might lack focus or difficulty concentrating.

38. With the sensory difficulty, as each arousal gets higher and higher, at the end of the day, the student might be extremely irritable and oversensitive to even the mildest of inputs. For instance, if a student is sensitive to sound, loud noises would trigger a response and would increase a sense of arousal; or, if a student is sensitive to touch, a casual bump from another person or even a shirt tag might be enough to trigger an increase in arousal. Even though each event might not trigger the overreaction at the moment, over the course of a day, sensory experiences might build to high states of sensory overloads.

39. It is important to understand the sensory needs of a student with autism, so that a sensory diet can be developed to enable the student to remain calm and be less anxious.

40. A sensory diet can help to regulate the sensory system. The sensory activities chosen can change the

neurological brain activity of the student. Sufficient reinforcing stimulation might replace stimulation provided by the problematic behavior; therefore, the sensory reinforcements replace the reinforcements produced by the problematic behavior. Additionally, there are specific sensory activities that are known to change the way the brain handles the environment; for instance, deep pressure hugs can calm the brain, whereas bouncing on a ball and running around excitedly could do the opposite by stimulating a student to become more sensitive.

41. If a student has not been seen for an extended period of time, the standard practice is to evaluate the student to obtain an update of how the student's motor skills or sensory activities might have changed. This evaluation is especially important for a child with autism or with behavior issues in order that the trigger for a negative behavior is known. It is important to know the activities that help prevent a student from becoming irritated and those that help calm the student if the student is already in a state of over-arousal.

42. From the evaluation, a plan is developed. The plan includes specific therapeutic activities to help change the student function and status, including those sensory inputs that help calm the student through the day or when events occur.

43. Regulating the sensory system was very difficult for the Child.

### Multi-Function Behavior

44. There is no dispute that the Child's behavior was complex. On some days, a number of events might make the Child's behavior more likely to occur than others. Additionally, some behaviors seem to have some kind of internal reinforcement or motivation, causing them to appear to have an automatic reinforcement that was very difficult to assess.

45. Further, the same kind of behavior might occur for different reasons at different times. Also, the function of the Child's behaviors might be identifiable and predictable, but not always predictable. For instance, if the Child's behavior was a function of attempting to obtain something that the Child wanted and the Child's request was denied, it was predictable that that was a situation in which the problem behavior might occur so the staff person needed to plan to honor the request; or, if the request would be denied, the staff person should know that a potential problem behavior might occur and should be prepared to handle the problem behavior.

46. No dispute exists that it was important to determine the functions of the Child's behaviors. There were different behaviors on the hypotheses page of the Child's PBIP, and the behaviors had possible multi-functions. The behaviors included eloping (running away from staff), screaming or hitting, throwing objects, and calling out inappropriate comments. The

behaviors were high intensity/low frequency behaviors, and, as stated earlier, the ABC records were used to collect the data on the high intensity/low frequency behaviors.

47. High intensity/low frequency behaviors occurred on an occasional basis, but they were severe and more difficult to assess. These behaviors were the most significant for the Child and had the most significant consequences; but, these behaviors present the least opportunity to observe what might set them off because they occurred so infrequently.

48. Additionally, the high intensity/low frequency behaviors could be antecedents, such as when the computer was not working or when there was a change in routine. But, the behaviors might also have a cumulative effect.

#### The Child's PBIP

49. The Child came to the School with a PBIP from a charter school. The charter school's PBIP was written to mostly increase behaviors, with the only behavior targeted for decreasing was physical aggression. Furthermore, the charter school's PBIP was part of the stay-put IEP. The School reviewed the charter school's PBIP.

50. In the Fall of 2005, the School developed the Child's PBIP; the PBIP is dated September 12, 2005. At that time, the Child had only attended the School for three weeks. The information for the School's PBIP was taken from the charter

school's PBIP, and additional information was provided by the Child's teachers at the School, who had interacted the Child for the three-week period. Moreover, at the time of the development of the School's PBIP, the Child was no longer at school.

51. The target behaviors identified on the School's PBIP were physical aggression (hitting, kicking, and throwing), verbal aggression (loud piercing screams), and elopement (running into other classrooms, kitchen, and parking or perimeter road).

52. The hypotheses or summary statements (patterns) of the School's PBIP were divided into three columns: (1) "When this occurs (describe the circumstances)"; (2) "the student does (describe the behavior)"; and (3) "to get, or avoid (describe consequences)."

53. The description of the interventions of the School's PBIP was in three columns: (1) "Proactive Strategies"; (2) "Replacement Skills"; and (3) "Consequence Strategies."

54. The School's PBIP called for fading reinforcement when compliance is at a high level.

55. The School's PBIP had a monitoring plan, which identified the person responsible and provided for "weekly data collection." The data to be collected was described and provided that, once the data was reviewed, the data would

determine the need to change the reinforcements or update the PBIP.

Background: 2005-2006 School Year (Middle School)

56. Early in the 2005-2006 school year, when the school bus arrived to take the Child to school, the Child would shake and cry and would refuse to go to school. The Parent was successful in getting the Child on the bus and to school by giving the Child rewards of food.

57. At the end of August, the Child was involved in a behavioral incident. The Child was suspended for three days. The Parent did not agree with the action taken in that the Parent felt that, since the Child did not want to go to school and wanted to avoid school, the suspension was a reward for the behavior engaged in by the Child. The principal agreed to reduce the suspension to one day. Shortly thereafter, another behavior incident occurred and the Child was again suspended. When the Child returned after the second suspension, the Child was suspended for a third time for a behavioral incident.

58. The Child's behavior increased in intensity, with police reports being filed. The Parent did not allow the Child to return to the School, concerned that the Child would become fearful of the police and that the Child or others at school might be injured.

59. During the remainder of the year, the Parent attempted to provide the Child with the same hours of education that the School provided and provided tutors to work with Child on academics. The Parent wanted professionals involved in the Child's behavior; the Parent believed that professionals could effectively assist with the Child's behavior.

60. The Child's high intensity behaviors did not occur at home.

61. Overall, the Child did not, in essence, attend school during the 2005-2006 school year.

#### 2006-2007 School Year Aversion

62. The Child continued to be very resistant to returning to the school during the 2006-2007 school year. At the beginning of the school year, the Child exhibited fear and distress and would state, "No [naming the school]" and "No [naming a particular teacher]." In one instance, the Child locked the Parent out of the house to avoid getting on the bus; and, when the Parent was finally able to gain access to the home, the Child was in a bathroom, had locked the bathroom door, and had taken off school clothes, leaving on only underwear. In another instance, the Child ran away from the school bus. The Parent tried several things to get the Child on the bus, including facilitating interactions between the Child and the bus driver, the attendant, and other students.

63. In early August 2006, to obtain assistance with the school avoidance by the Child, the Parent reached out to the School Board's School Social Worker. The Parent then reached out to the ESE Specialist for the School, who agreed to write a social story to try to get the Child excited about school. The ESE Specialist wrote the social story, but the Parent did not receive it. Additionally, the ESE Specialist informed the Parent that the Child's paraprofessional would meet the Child each morning at the bus loop.

64. The situation worsened with the Child refusing to go to school. Also, the Parent had not received the social story. At one point in time, the Parent drove the Child to school, but the Child locked the doors to the vehicle when the School's staff arrived, refusing to get out of the vehicle.

65. Several avenues were explored in trying to get the Child back to school. On September 5, 2006, a meeting was held between the Parent and the School to discuss getting the Child back to school. On September 12, 2006, the School Board developed a written plan with the Center for Autism and Related Diseases (CARD). Additionally, the Parent would hide doughnuts in the Parent's vehicle to be a reward for the Child when the Child arrived at the School.

66. However, the dilemma with getting the Child on the bus continued. Another meeting was held on October 5, 2006, by the

School to address the bus problem, but the Parent was unable to attend.

67. The Child's first day at the School was October 6, 2006. The Child was not expected to remain at the School the entire school day and did not. Eventually, the Child's stay during the school day was for progressively longer periods.

68. At some point in time, the Child began to ride the bus to school. Problems continued with the Child's riding of the bus, but the problems were not as intense as they had been.

69. In addition to being reluctant to go to school, the Child was sick a great deal of time. As a result, from October 2006 through March 2007, the Child had many absences from school. According to the form used by the School Board for absences, the Child was absent 144 days, which was a large increase from the 2004-2005 school year of 13 days when the Child attended a charter school.

Independent Educational Evaluation (IEE) During the 2006-2007 School Year Regarding the Child's Behavior

70. In October and November 2006, an IEE was conducted by Timothy R. Vollmer, Ph.D., a psychologist. The IEE was ordered in a final order by an administrative law judge at the DOAH. Dr. Vollmer was evaluating the Child's behavior.

71. The School Board is not required to adopt an IEE, only consider it.

72. Among other things, Dr. Vollmer reported that, at the time, the Child was doing very well and had zero instances of aggressive behavior since returning to school; that the Child had dramatically improved in behavior considering the previous year; that the Child appeared to be very happy; and that the Child was participating in assigned activities, with some mild off-task behaviors. Dr. Vollmer concluded that, at that time, the Child's environment was properly arranged.

73. Dr. Vollmer made nine general recommendations in the following areas: (1) Improved Home-School Communication; (2) Classroom Behavior; (3) Data Collection Systems; (4) Task Analyses; (5) IEP; (6) Peer Interaction; (7) Speech Schedule; (8) Back-To-School Plan; and (9) General Scheduling Issues.

74. As to Improved Home-School Communication, Dr. Vollmer opined that both the Parent and the School's personnel wanted to do what was in the best interest of the Child even though their methods of achieving that goal were different; that communication between the Parent and the School's personnel was poor; that the Parent and the School's personnel should work together as a "team"; and that the poor communication was the "largest potential impediment to the [Child's] continued success." He recommended using a specially designed, simple formatted home-school and school-home notes; using the Child's aide/paraprofessional as a conduit for the notes; and using the

weekly meetings to augment the notes, paying attention to the mode of communication in the meetings. Further, he pointed out that the Child could "very likely detect any tension that exists between home and school" and that, establishing "a good working relationship and good working (clear) communication between home and school" was "critical" from a behavioral standpoint.

75. As to Classroom Behavior, addressing the displays of mildly disruptive behavior reported by the teachers, Dr. Vollmer recommended data collection on the behavior of a "loud voice" and the behavior of "out-of-seat" when the Child should be seated and working. Additionally, for more aggressive behavior that may occur, he recommended the strategy of minimizing any attention or change in environment as a consequence for the behavior, such as avoiding suspension or being sent home when possible; no discussion about the behavior with the Child or in front of the Child; consistently reinforce appropriate communication by the Child; more clearly specify, on the Child's PBIP, the schedule of social reinforcement during classroom activity; and gradually withdraw the Child's aide/paraprofessional from the Child's side by having the aide/paraprofessional step away, at first, for very short periods of time and then systematically increase the time periods away from the Child's side.

76. As to Data Collection Systems, Dr. Vollmer praised the School's data collection systems of using scatter plots to estimate problem behavior frequency and using the ABC records to attempt to identify behavior-environment correlations.

Regarding the ABC records, he recommended using the "older ABC form," which he considered better than the new form; and simplifying the antecedent categories to reflect antecedents known to correlate with the Child's problem behavior.

Additionally, Dr. Vollmer recommended the data collection for the Child's milder disruptive behavior for tracking and discussing the data at the weekly meetings, while sampling possible interventions. Further, he recommended formalizing a system for data reliability and treatment integrity checks, pointing out that data reliability checks were important because decisions were based on the data collection and that treatment integrity checks were important because the extent to which the prescribed procedures were carried out as recommended needed to be known; thereby, appropriate decisions could be made about whether a procedure was having the desired effect.

77. As to Task Analyses, Dr. Vollmer recommended the use of task analyses to break up larger tasks into smaller, more teachable tasks.

78. As to the IEP, Dr. Vollmer acknowledged that the Child's IEP was "outdated." He recommended that, when a new IEP

was developed, special attention should be paid to state the goals in a measurable manner, indicating specifically that academic goals should be especially conducive to measurement and that behavioral goals should be written in a favorable format.

79. As to Peer Interaction, Dr. Vollmer emphasized that he was "favorably impressed" by the interaction opportunities presented by the Child's peers. Recognizing that, at times, peer reinforcement might need to be arranged or prompted, he recommended that a plan for arranging social reinforcement from peers be written into the Child's behavioral plan.

80. As to Speech Schedule, Dr. Vollmer acknowledged that that area of speech therapy was best left to speech pathologists. But, he recommended the therapy approach of "teach[ing] complex skills in the therapy environment while simultaneously programming for generalization of those skills in the natural (classroom or home) environment." He stated that that approach allows speech pathologists "to use [their] techniques to teach various target skills, while arranging for reinforcement and generalization of those skills through the use of natural contingencies."

81. As to the Back-To-School Plan, Dr. Vollmer generally agreed to what was then occurring. However, he recommended increasing the time at the School at 15 minute increments on a weekly basis, assuming no behavior problems arise; and, when the

Child's second class was added, allowing the Child some time to explore the room prior to the Child entering the classroom as a student.

82. As to General Scheduling Issues, Dr. Vollmer recommended using a timer to show the Child how much time was remaining for a scheduled event or class.

83. Additionally, a few inquiries were made of Dr. Vollmer regarding his position of placement. He stated that he had no strong position on placement.

84. Dr. Vollmer prepared a draft of his report and provided it to the School Board. The draft was reviewed.

85. Dr. Vollmer's final report was sent to and received by the School Board's Due Process Coordinator on December 12, 2006.

86. The School's ESE Specialist did not receive Dr. Vollmer's final report from the School Board's Due Process Coordinator until January 18, 2007. (The School's ESE Specialist had not received the final report from the Due Process Coordinator and was making an inquiry about it.)

87. The School Board adopted and implemented some of Dr. Vollmer's recommendations. Regarding Improved Home-School Communication, in November 2006, a form for the daily notes home was used.

88. Regarding Classroom Behavior, Dr. Vollmer's recommendation to consistently reinforce appropriate

communication by the Child was considered by the School Board's Behavior Program Specialist (BPS) to be already a part of the proactive strategies of communicating with the Child. However, the School Board misinterpreted the recommendation. The recommendation's aim was to reinforce the Child's appropriate communication with others, not staff's communication with the Child. Additionally, Dr. Vollmer's recommendation to gradually withdraw the aide/paraprofessional was considered by the School Board's BPS to already be a part of the aide's training, but the gradual withdrawing did not occur.

89. Regarding Data Collection Systems, the School Board used the older ABC forms and added two of the four suggested behaviors to the scatter plots being used by the School.

90. Regarding Task Analyses, Dr. Vollmer's recommendation to break larger tasks into smaller teachable units was considered by the School Board to be accomplished by the creation of the School Board's "schedule within a schedule," which was a schedule of the day's activities with more specific information about the day's activities than the general schedule. However, the "schedule within a schedule" did not fall within the Dr. Vollmer's description of breaking larger tasks into smaller more teachable units.

91. Regarding the Back-To-School Plan, the School Board appeared to have agreed with the plan, but the evidence failed

to demonstrate that the plan was worked on in any systematic manner.

Second Visit by Dr. Vollmer After the IEE

92. In April 2007, at the request of the School Board's Due Process Coordinator, Dr. Vollmer returned to the school a second time. The request was made as a result of a higher intensity in the Child's disruptive behavior at the School since the beginning of 2007, including damage to the computer room by the Child; and as a result of a concern that the Parent was observing higher stress and anxiety in the Child at home. The purpose of the second visit was to evaluate the Child's PBIP.

93. The Child was not attending school at the time of Dr. Vollmer's visit, but was at home.

94. No change had been made in the Child's PBIP between Dr. Vollmer's first and second visit.

95. Again, the relationship between home and school was a major concern for Dr. Vollmer even though there had been some improvement, including home-school notes were regularly used, weekly meetings were scheduled and, on several occasions, were conducted; the Parent was not openly criticizing individuals; and the School's personnel were cordial during most of the time period of the meetings until toward the end of the meetings. Dr. Vollmer opined that the negative behavior between the Parent

and the School's personnel would most likely affect the Child's behavior both directly and indirectly.

96. Dr. Vollmer had several recommendations regarding the home and school relations. He recommended continued use of the home-school notes and weekly meetings to communicate, with a collateral recommendation regarding the notes being a little clearer.

97. Also, regarding the home and school relations, Dr. Vollmer recommended changes in the interpersonal interaction style of both the Parent and the School's personnel. He emphasized that "the adults need to change their behavior if they expect positive behavior change from [the Child] and (especially) if they expect a cooperative and collaborative approach to [the Child's] educational development."

98. Additionally, Dr. Vollmer recommended, regarding the home and school relations, organizing the Parent's "idealized academic environment." He suggested two approaches. One approach was to separate the Parent's idealized academic environment into three categories--(1) agreed upon items; (2) negotiable items; and (3) philosophical items. He indicated that the strategy was to have a finite list of items and the agreement would be to focus first on those items before moving to other issues. Another approach was for the Parent and the School's personnel team to make an "action plan" during student-

specific meetings, with a column for "who" is assigned the action and a column for "when" the action will be taken, and with the Parent also being assigned actions.

99. As a last resort, Dr. Vollmer recommended, regarding the home and school relations, an alternative placement "in order to start fresh, where no history of tension exists."

100. Dr. Vollmer recommended several changes to behavioral (proactive) protocols. He recommended that specific features of the protocol, identifying examples of the features, needed to be written and be clearly written to state specifically what was to be done and when.

101. Further, Dr. Vollmer recommended that, for the Child to successfully re-enter the school environment, the environment be made as rewarding as possible, indicating that it appeared that some of the prior behavioral events were "escape-maintained behavior." He provided that making the school environment as rewarding as possible could be accomplished by using very clear reinforcement contingencies that were discussed with the Child in advance and by beginning with a low response requirement.

102. Also, Dr. Vollmer recommended that a systematic plan be in place in order to determine the "fading schedule." He stated that the key was to clearly define agitation by agreeing upon which forms of behavior constituted agitation (not aggression or destruction). With agitation clearly defined, he

provided that the one-on-one aide/paraprofessional would actually score or rate the level of agitation during each 30-minute block of the day, thereby collecting data. The data would be translated into action on a behavior intervention plan. As a consequence, if agitation increases, the fading process might be slowed down in order to prevent a crisis situation.

103. Additionally, regarding a behavioral (proactive) protocol of increasing the Child's time in school, Dr. Vollmer recommended that a specific time should be agreed upon as a starting "end" point to end the Child's stay at school and that the "end" point should be gradually increased, with data being collected as to the Child's agitation around the "end" point. As a consequence, an increase in agitation toward the end of the day would suggest slowing down the fading process.

104. Further, Dr. Vollmer recommended that specific protocols be established to be used when an episode does occur. Furthermore, he recommended that, when an episode does occur, changing the environment as little as possible so that the behavior was not reinforced by excessive attention or excessive escape.

105. After making recommended changes to behavioral (proactive) protocols, Dr. Vollmer made recommendations regarding miscellaneous behavior. One recommendation addressed what he considered to be an insufficient number of persons

dedicated and focused on crises or potential crisis situations, "under-resourced." He recommended having an actual team of professionals "dedicated" to resolution of the Child's situation and other situations. At the time of his visit to the School in April, Dr. Vollmer was not aware of the School Board's "behavior case study team," but stated that he learned of the team after his visit and that the team should be used.

106. Another recommendation by Dr. Vollmer, regarding miscellaneous behavior, was for the Child to have clear task analyses for various activities, including transitions from one location to another. He provided that the purpose of such analyses was to make a student more independent.

107. Also, Dr. Vollmer recommended, regarding miscellaneous behavior, brief, weekly or bi-weekly data reliability checks and treatment integrity checks. He indicated that data reliability and treatment integrity information was useful in that there would be immediate staff feedback and the information would be useful at weekly team meetings for decision-making purposes. He recommended data reliability and treatment integrity checks in the IEE.

108. Additionally, even though he found the ABC forms to be useful, Dr. Vollmer found that it was not clear whether all behavioral episodes had been recorded on the ABC forms and that he had obtained more information from briefly interviewing staff

who were present during the episodes. Because the Child's episodes were severe (high intensity but low frequency) and because there were data omissions, he recommended that, following all episodes, a brief interview should be conducted and a short summary should be written.

109. Dr. Vollmer forwarded a draft of his second report to the School Board's Due Process Coordinator for comments by the school personnel, so that there could be revisions. He wanted to avoid any misstatements, misinformation, or omitted information.

110. After the second report, Dr. Vollmer was not again requested to examine the Child's situation at the school.

#### Data Collection Systems by the School

111. The School Board's BPS created the School Board's data collection system. The data collection system used two daily forms for collecting behavioral data: (1) the PBIP Daily Data form, and (2) scatter plots.

112. For the Child, the forms directly related to the strategies that were developed for the Child from the PBIP. The two daily data forms contained, among other things, every class period of the Child (not the transition period from one class to another); targeted behaviors of the Child; the strategies that were developed to be used for the Child, including

proactive strategies and consequence strategies; whether the strategies were used; and replacement skills.

113. The PBIP Daily Data form contained the categories of proactive strategies; replacement skills; consequence strategies; and target behavior. The Scatter Plot Data Collection form (Scatter Plot Form) contained the categories of running away from staff; screaming - loud piercing; physical aggression; and destruction of property - ripping paper, throwing.

114. The data were reviewed to determine whether there was a decrease in problem behavior and whether the sensory activities would decrease the behaviors to calmer levels. The evidence fails to demonstrate that the reviews resulted in changes to the PBIP.

115. In or around November 2006, a third form, Daily Sensory Program Data Collection (Sensory Form), was added. The Child's Occupational Therapist (OT) for the 2006-2007 school year, in consultation with the School Board's BPS, developed the Child's Sensory Form. The Sensory Form's purpose was to assist in looking at sensory activities. The Sensory Form contained, among other things, the different types of sensory activities available; whether the Child's behavior decreased, or remained the same, or increased; and the level of prompting used. The OT developed the list of sensory activities by thinking of things

that would be calming and would help the Child to stay in the classroom and be successful.

116. In developing the Sensory Form, the OT did not evaluate the Child. During the previous school year (2005-2006 school year), the evidence demonstrates that the Child had attended school for a very limited period of time and, therefore, for that year, there was very little information available to assist in developing the Sensory Form. Further, the OT did not review any occupational therapy data from the previous school year. An evaluation of the Child was invaluable in the development of the Sensory Form, and the failure to perform an evaluation of the Child resulted in the Sensory Form being inadequate for the needs of the Child.

117. The Scatter Plot Form was a way of tracking the Child's target behaviors by gathering data about the Child's behavior during periods of time. Through the use of the Scatter Plot Form, a determination could be made regarding when the behaviors were occurring and the frequency of the behavior. If a behavior was happening frequently during a particular period, there would be no need to observe a child all day, but only to look closely at that particular period. Additionally, if an intervention was to be tried, but it was uncertain as to whether the intervention would be successful, one could look at the time

period that the behavior would more likely occur and focus on that time period.

118. The Scatter Plot Form was first used on or about October 16, 2006. Four behaviors of the Child were being tracked. Two other behaviors (leaving area/out of assigned seat; and loud talking - not conversational (later changed to louder than conversational speech)) were added to the form on or about November 3, 2006; totaling six behaviors. Also, on or about November 6, 2006, directions for completion of the Scatter Plot Form were added. Additionally, on or about November 8, 2006, another behavior (tapping pen) was added, but was not used again; totaling seven behaviors. Further, on or about November 20, 2006, space was added for comments. Moreover, on or about November 22, 2006, a comment key for the comments was added.

119. The Scatter Plot Form tracked targeted challenging behaviors of the Child, which were separated into high intensity behaviors and low intensity behaviors. A tally mark was made for each time that a behavior occurred, with a line through four tally marks if the behavior occurred five times.

120. When high intensity behaviors occurred, another form was also used by the School Board--the ABC Recording Form. The ABC Recording Form was used to provide more information than could be obtained through the Scatter Plot Form.

121. Whenever the information on the forms failed to make it clear as to what had occurred at an incident, in order to clarify the data, the School Board's BPS would contact the actual staff person involved. That person most often times was the Child's Paraprofessional.

122. The evidence demonstrates that the data collection sheets did not distinguish the various possible behavior functions of the Child's multi-function behavior.

123. Identifying, determining, and knowing setting events, which were identified in the functional assessment, are important in determining and understanding the Child's behaviors. Setting events are events or things that happened before the problem behavior occurred. The Child could accept redirection on some days without considerable trouble, but, on other days, it was more troublesome. The difficult part was trying to figure out what was different about the first day from the second day. At times, the setting event was clear and known, while at other times, the setting event was not clear or known. Furthermore, at times, the Child was more agitated and restless, which might be behaviors or signs that the day was going to be more difficult for the Child than the other days. All of these factors made it more difficult to predict the Child's behavior.

124. The evidence does not demonstrate that the data collected were reviewed in connection with setting events.

125. A high intensity behavior on which data was collected was the throwing of glasses, which was the only property destruction behavior recorded. The frequency was not recorded. Further, the evidence does not demonstrate that an attempt was made to determine the multi-function of the property destruction.

126. Concerning the low intensity/high frequency behaviors, the data documents did not contain information to assist in understanding the multi-functions of the lower intensity behaviors. Such a behavior was when the Child, on a number of occasions, requested a bathroom break. The evidence fails to demonstrate that an analysis was done on the behavior, which might have been a task-avoidance or might have meant that the Child actually needed to use the bathroom.

#### Collection of the Data on The Child's Behavior

127. The evidence demonstrates that the School Board collected sufficient data to "attempt" to determine and understand the functions of the Child's behavior. However, the evidence further demonstrates that the School Board failed to meaningfully analyze the data in order to adequately develop effective intervention strategies and, thereby, failed to use the data collected to change the Child's treatment strategies.

128. For instance, on January 30, 2007, the Child had over 50 occurrences of louder than conversational speech behavior. On January 31 and February 1, 2007, the behavior continued and the Child had over 25 occurrences and over 24 occurrences, respectively, of louder than conversational speech behavior. On February 2, 2007, the Child experienced a high intensity behavior when asked to participate in a handwriting task. The data suggested that, on February 2, 2007, the Child might not experience a very good day and that the Child's OT and teacher should have been alerted to this possibility, but they were not. If the Child's OT and teacher had been alerted, they could have prepared strategies to attempt to deal with the possible behavior.

129. Another incident, on February 13, 2007, involved the Child being told to use a different rest room than the Child had wanted to use. The Child, among other things, screamed loudly and threw water on a staff person. The ABC Recording Form failed to capture sufficient information, but the Scatter Plot Form captured additional information. However, the information captured was insufficient to determine whether a preventative strategy of a social story would have been appropriate. Further, the Child's behaviors were not defined in that the Child's PBIP failed to contain definitions for behaviors.

130. Later on that same day of February 13, 2007, around 2:30 p.m., another incident of high intensity behavior occurred in the computer lab. The Child, among other things, broke the mouse to the computer and attempted to throw the computer's monitor on the floor. Data collected were insufficient to determine the function of the behavior or the setting events or triggers. The data revealed that the consequence was that the Child was removed from the room--went for a walk--and the Child calmed down. The function of the inappropriate behavior could have been avoidance or escape, and, if so, the consequence might have reinforced the behavior by allowing the Child to leave the room--escape--and, thus, avoid the instructional task. Furthermore, the person in the computer lab should have been alerted about the earlier incident and that there was a possibility that the Child might experience some behavioral problems, but no alert was provided. If the person had been alerted, that person could have prepared strategies to attempt to deal with the possible behavior.

131. Additionally, on March 6, 2007, two incidents of high intensity behavior occurred. One incident occurred shortly after 9 a.m. in the gym. The Child, among other things, threw chairs. For this incident, no antecedent was recorded and no record was made on the Scatter Plot Form, although a record was made on the ABC Recording Form. The second incident occurred

shortly after 10:30 a.m., approximately one and one-half hour later, involving the School Board's Program Specialist for Assistive Technology in the speech room. The Child, among other things, threw a chair and turned over a table. The evidence demonstrates that a record was made on the ABC Recording Form and the Scatter Plot Form, but it does not demonstrate that the Program Specialist was alerted to the Child's earlier problem behavior, so that the Program Specialist could look for warning signs or situations that might be setting events for problem behavior.

132. Also, on March 15, 2007, around 12:00 noon, an incident of high intensity behavior occurred involving the Child's Paraprofessional and the ESE Support Facilitator. The Child, among other things, pushed some laptops from a desk onto the floor and attempted to grab the Support Facilitator's arm. The incident was recorded on the ABC Recording Form and the Scatter Plot Form. One of the proactive strategies to be used with the Child was to indicate a positive choice rather than make negative statements. Although the ABC Recording Form does not indicate that negative statements were used during the incident, at hearing the evidence demonstrates that the negative word "no" was used during the incident by the staff.

133. Approximately one and one-half hours later, another incident of high intensity behavior occurred in the library

during computer reinforcement time. The Child pushed over a computer. An ABC Recording Form was completed reflecting, among other things that the antecedent was presented with instruction/task engaged and "preferred website PBSKids.org." However, even though the antecedent was recorded and a preferred website was stated on the ABC Recording Form, there were no indication as to whether the preferred website was denied or what instruction was provided and no indication as to what the problem was; in other words, what had actually occurred was missing. The evidence does not demonstrate that there was follow-up to determine what had actually occurred.

134. Regarding high intensity problem behavior, for the 2007-2008 school year, the first incident occurred on October 15, 2007, around 10:15 a.m. The Child ran away from staff, wanting to exercise. The ABC Recording Form and Scatter Plot Form were completed. What actually happened before the problem behavior occurred cannot be determined, but this information needs to be known.

135. Another incident of high intensity problem behavior occurred on October 19, 2007, around 9:30 a.m. The Child ran away from staff, wanting to exercise. The ABC Recording Form and Scatter Plot Form were completed. What actually happened before the problem behavior occurred cannot be determined, but this information needs to be known.

136. Additionally, on November 1, 2007, an incident of high intensity problem behavior occurred in the cafeteria. The Child, among other things, threw kitchen equipment on the floor and attempted to bite and pull the hair of a cafeteria staff person. No ABC Recording Form was completed, but a referral form was. The information did not reveal what the trigger was for the problem behavior. The evidence demonstrates that the situation was defused by a cafeteria staff person giving the Child a lollipop, which might have reinforced the Child's negative behavior.

137. Further, on November 5, 2007, an incident of high intensity problem behavior occurred. The Child has a fascination with calendars and likes for calendars to be accurate. The Child was in the Language Arts and Reading teacher's class, accompanied by the Paraprofessional, and asked the Paraprofessional about the calendar being changed by the Child, to which the Paraprofessional replied to ask the teacher. The Child remained seated but kept pointing to the calendar. The Child then walked to the calendar and touched it without asking the teacher; the teacher told the Child "no." Having been denied, the Child, among other things, turned over tables and, when being restrained by staff, the Child kicked and pulled the staff's hair. Even though the teacher used the word "no," the teacher had been informed by the School Board's BPS that

"no" was not an "effective strategy" with the Child. The evidence demonstrates that the Child's high intensity problem behavior was predictable with the combination of the Child's fascination with the correctness of calendars and the negative trigger of the word "no." Additionally, the evidence demonstrates that the teacher was not, but should have been, made fully aware of the calendar and the word "no" issues.

138. The evidence demonstrates that the School Board did not understand the functions of the Child's behavior.

The Child's Occupational Therapy Plan (OTP)

139. Sensory strategies were to be used with the Child at scheduled times, and more often, if needed. The Child was to get frequent sensory breaks in order to stay on-task and be more focused. The Child's Proactive Strategies on the PBIP's Daily Data Sheets stated that the Child was to receive at least three scheduled sensory breaks. However, even though the PBIP's Daily Data Sheets, showing the sensory breaks, were usually checked, the Sensory Form, prior to February 26, 2007, did not have a column to indicate whether sensory breaks were done; and, as a result, the data failed to show that the sensory breaks were given according to schedule. On or about February 26, 2007, the Sensory Form was changed to reflect a column for sensory breaks. Even after the changing of the Sensory Form, the data failed to

show that sensory breaks were given as scheduled, except for May 23, 24, 15, 29, and 30, 2007.

140. Further, regarding providing sensory breaks as needed, the PBIP's Daily Data Sheet reflected requested breaks as a target behavior. During the 2006-2007 school year, the PBIP data reflected that the Child engaged in the target behavior of requesting breaks on October 12, 16, 17, 19, and 23-26, 2006.

#### Occupational Therapy Data Collection

141. The Child's Paraprofessional was the primary person working on sensory activities reflected on the Sensory Form. The paraprofessional would choose the sensory activity based upon the information provided by the OT. The OT would conduct a reliability check of the Sensory Form by checking to determine whether the Paraprofessional was correctly completing the Sensory Form. The evidence failed to show the frequency of the reliability check performed by the OT.

142. The Sensory Forms were incomplete.

143. The first Sensory Form was used on November 6, 2006, after the Child had been in school for almost a month. The Sensory Form for that day was incomplete in that the Child was at the School for four full periods but the times indicated on the Sensory Form were from 10:40 a.m. until 11:00 a.m.

Additionally, even though the Sensory Form contains 27 sensory activities, 13 were not used.

144. Also, on November 22, 2006, the Child had six instances of louder than conversational speech from 11:15 a.m. until 12:00 noon. However, the Sensory Form does not reflect any sensory breaks from 11:05 a.m. until 1:40 p.m.

145. Over time, the Sensory Form changed. On December 5, 2006, the number of possible sensory activities was reduced to 20; and, on February 26, 2007, it was changed again, including adding directions as to which type of exercise to use under four different conditions and adding five possible behaviors.

146. But, from the time that the Sensory Form changed on February 26, 2007, to November 5, 2007, eight of the possible 20 sensory activities were not used. Further, from the period of December 5, 2006, to February 13, 2007, one sensory activity was used only once.

#### Implementation of the OTP

147. The OT was required to spend thirty minutes, once a week with the Child. The majority of the occupational therapy treatment by the OT was in an educational environment setting, not one-on-one, individual therapy sessions. The OT's opinion was that the Child would benefit more from being in the general education classroom where the Child was getting instruction and trying to infuse the sensory ideas into that setting.

148. The OT failed to fulfill the requirement of thirty minutes, once a week in its entirety. The OT engaged the Child once a week for 12 weeks in the 2006-2007 school year.

149. Additionally, the evidence is insufficient to show and, therefore, fails to demonstrate that the OT provided the Child with assistance/instruction in learning how to choose the appropriate sensory tool to develop the Child's independence. Choosing a sensory tool of choice to develop the Child's independence was one of the Child's short-term goals.

150. Even though the OT had interactions with the staff that were casual in nature and interactions with the Child when the OT was in the classroom for another student or passing the Child in the hall, such interactions are not considered engaging the Child in occupational therapy in accordance with the OTP.

151. Also, the occupational therapy data failed to show the behavioral strategies that the OT used with the Child.

152. The evidence does not demonstrate that an analysis of the interrelationship between the Child's sensory needs and behaviors was performed.

153. The evidence does not demonstrate that the School Board used the sensory data that was collected to determine whether the strategies that were being used were effective in preventing the Child's inappropriate behaviors.

154. As a result, the evidence demonstrates that the School Board failed to provide the occupational therapy services to the Child to provide an educational benefit to the Child.

Modification of the Child's PBIP

155. No written changes were made to the Child's PBIP during the 2006-2007 school year even though the Child's behavior did not change for the better. Although the forms for data collection were "tweaked," the evidence demonstrates that the data were not reviewed and discussed meaningfully, i.e., analytically or interpretively, to determine whether changes needed to be made to the Child's PBIP.

156. Hence, the evidence demonstrates that the PBIP was inadequate to meet the needs of the Child.

157. For the 2007-2008 school year, the Child's PBIP was changed in December 2007. However, the new PBIP was almost identical to the previous PBIP. The main differences were that the new PBIP contained replacement skills that were actually asking the Child to do the same thing that the Child wanted to avoid doing; that it contained additional strategies that were not replacement strategies but were actually prevention strategies, and, therefore, the Child was being taught probing strategies that were preventing a problem behavior, but not replacing a problem behavior; and that some of the consequence strategies were prevention strategies, such as access to sensory

activities and continued verbal praise were indicated as consequence strategies but were actually prevention strategies.

158. Hence, the evidence demonstrates that the new PBIP was inadequate to meet the needs of the Child.

159. The evidence fails to demonstrate that the Child's absence from school affected the adequacy and implementation of the Child's PBIP and the adequacy of the new PBIP.

#### Reading Issue

160. The Child was reading far below grade level, and the Child's reading capacities varied.

161. On a reading test, referred to as a STAR test, administered on October 6, 2006, by the School's reading coach, the Child's reading grade level equivalent was two years, three months.

162. In November 2006, the Child's reading teacher reported that the Child's fluency, using a sixth grade book, was about 100 words per minute.

163. In December 2006, the School Board's Due Process Coordinator requested the School Board's ESE Curriculum Development Specialist to perform instructional testing and try some instructional strategies regarding the Child's reading.

164. From December 2006 through February 2007, several reading assessments, including the Diagnostic Assessment of Reading (DAR), were administered by the School Board's ESE

Curriculum Development Specialist and the School's Speech-Language Pathologist (SLP); an informal maze assessment, a cloze reading test, was administered; and trial teaching strategies were tried.

165. During the testing period by the School Board's ESE Curriculum Development Specialist, on February 6, 2007, the Child's reading teacher administered a STAR test, and the Child obtained the grade level equivalent of one year, four months. Additionally, on or about February 9, 2007, the Child's reading teacher administered a timed maze test, using the sixth grade version, and the results indicated that the Child was below grade level and in need of interventions. The Child's reading teacher reported to the School Board's ESE Curriculum Development Specialist that the data indicated that the Child was more than two years below grade level and the testing indicated approximately four years below grade level.

166. The School Board's ESE Curriculum Development Specialist made several determinations regarding the Child's reading, including: decodes words in isolation on a sixth grade level; orally reads a passage on the 11th/12th grade level; unable to give meaning to words in isolation; struggles with reading comprehension tasks involving multiple choice questions; unable to silently read passages involving challenging tasks;

and comprehension deficits extend into listening comprehension, as well as text comprehension.

167. The School Board's ESE Curriculum Development Specialist made several recommendations, including: using the cloze procedure for reading instruction, using a variety of cloze materials; monitoring progress in reading comprehension using an instrument that uses the cloze procedure; working on comprehension strategies using text on the Child's level; developing vocabulary using picture cues; and a comprehensive language evaluation, with specific emphasis on auditory processing, vocabulary, and receptive language, in order to plan appropriate intervention strategies.

168. However, the School Board's ESE Curriculum Development Specialist did not determine alternative reading strategies for teaching the Child; and, in the alternative, did not provide sufficient information about the Child's reading abilities and deficiencies in order to develop and determine alternative reading strategies or an adequate reading program.

169. On a STAR test administered on May 22, 2007, the Child's reading grade level equivalent was one year, six months.

170. The Child's reading teacher was unaware of the School Board's ESE Curriculum Development Specialist's recommendations. As a result, none of the recommendations were implemented by the reading teacher.

171. For the 2007-2008 school year, the evidence demonstrates that the School Board had no greater understanding of the Child's reading capacities.

172. Additionally, the evidence fails to demonstrate that any of the recommendations were implemented.

173. As a result, the evidence demonstrates that the School Board failed to provide the Child with the reading instruction appropriate to meet the Child's needs and remediate the Child's deficits.

#### Access to General Education (Inclusion) Issue

174. For the 2007-2008 school year, the Child's Language Arts and Reading class was comprised of 12 students, one teacher, and four aides. Ten of the students were ESE students, with IEPs. The IEPs of the ten students required that the majority of the instruction be specialized education rather than general education. The class consisted predominately of students with IEPs. As a result, the class was not a general education setting.

175. The evidence demonstrates that the class was not an inclusion class.

#### Buddy System/Social Skills Training Issue

176. As an accommodation, the Child was to receive peer assistance through the buddy system.

177. Typically, a buddy system involves matching an ESE student with a non-ESE student/peer to support the ESE student with participation in school activities, and non-ESE students may be assigned on a rotating basis essentially to assist the ESE student.

178. An annual goal of the Child's IEP was for the Child to verbally initiate interactions with non-ESE peers four times a day, with the staff documenting their observations. The evidence fails to demonstrate that such documentation occurred. Further, the evidence fails to demonstrate that the short-term goals associated with this annual goal were addressed.

179. The evidence shows that the SLP was working with the Child on proper greetings. However, working on proper greetings does not satisfy the buddy system.

180. The evidence demonstrates that the school did not engage in the buddy system in a meaningful way with the Child. Further, no reasonable reason was demonstrated for not engaging in the buddy system.

181. Additionally, social skills training for the Child was to occur once a week for 30 minutes, with a specific provider providing the training. The evidence does not demonstrate that the training was provided by the specific provider or any other provider.

The Child and The Sun Issue

182. Two of the Child's identified special needs were "sun sensitive" and "sun screen," with a notation of "see attached prescription 3/26/03." The Child's special sensitivity required extraordinary care for protection from sun exposure, which included wearing special (sun-protective) clothing, a hat, and sunglasses, while outside. (The sun-protective clothing included long pants and long sleeved shirt made of special material.) Further, the Child was required to apply sunscreen every three hours, before going outside, and after hand-washing and sweating. Moreover, outside time was limited to ten minutes a day.

183. These protections were prescribed by the Child's dermatologist by prescriptions, beginning in March 2003. The prescriptions were provided to the School.

184. Difficulties regarding these requirements did not arise until the 2006-2007 school year. In September 2006, the School's Principal interpreted the staff's being in charge of or responsible for prompting the Child to apply the sunscreen, as had always been the situation, as the equivalent of the administration of medications. According to School Board policy, an authorization for medication/treatment form for the administration of medications, including over the counter ones,

was required. The Principal's position was that the matter should be referred to health services.

185. Furthermore, having made this interpretation, the Principal, on September 5, 2006, without the knowledge or consent of the Parent, telephoned the Child's dermatologist to discuss, among other things, a letter that the dermatologist had written, regarding the sunscreen, and the medical necessity of the sun protection measures. Subsequently, the same day, the Principal followed up the telephone conversation with written communication to the dermatologist, which prompted the dermatologist to respond in writing. The dermatologist took issue with what the Principal had written asserting, among other things, that what the Principal had stated in the written communication was not correct and that the dermatologist should not have engaged in the conversation at all with the Principal and regretted doing so.

186. Shortly thereafter, the dermatologist advised the Parent that their medical relationship was at an end and that the Parent had to obtain the services of another dermatologist.

187. The Principal insisted that the authorization for medication/treatment was required. Additionally, the Principal would not allow the Child's Paraprofessional to prompt the Child to put on the sunscreen.

188. Sometime after the Principal's decision to not permit the prompting and before November 30, 2006, on one occasion, the Child's forearm was sunburned; and, on other occasions, the Child's hands were pink.

189. Later, on February 13, 2007, the Principal allowed the Paraprofessional to prompt the Child to put on the sunscreen, but only after hand-washing.

190. On or about April 28, 2007, the School Board and the Parent settled, among other things, the issue regarding the Child's sunscreen and exposure to the sun.

#### Lesson Plans and Other Study Materials Issue

191. As a provision of a settlement agreement between the School Board and the Parent, entered into on October 25, 2002, (Settlement Agreement), the Child's classroom teacher was to provide lesson plans two weeks in advance, but no less than seven days in advance. The Settlement Agreement was included in the Child's IEP.

192. By providing the lesson plans in advance, the Parent was able to "pre-teach" the Child. Additionally, the Parent had private tutors who worked with the Child and who could also pre-teach. Pre-teaching is a technique used with autistic children to assist the autistic child to participate in class and provides the autistic child a better opportunity to learn.

193. Lesson plans were constantly not received as required, but were received less than seven days in advance.

194. Additionally, the Principal advised the Parent that the Child would be receiving lesson plans only for the classes attended by the Child, not for the ones that the Child missed. The Child was not attending all classes. The Parent believed the Principal's position to be inappropriate.

195. Further, the Parent wanted to preview test questions, which was an accommodation required by the IEP.

196. Also, as an accommodation, the IEP required written notes, outlines, and study guides to be provided to the Parent. Furthermore, as a clarification, the Settlement Agreement provided that study materials would be provided two weeks in advance.

197. The School did not clearly understand what a study guide was. The Parent provided the School with an example of a study guide that had been helpful to the Child. The School was still unclear as to what it was. The evidence demonstrates that the School made no meaningful effort to determine what a study guide was and to provide it to the Parent.

198. Even though providing the study guides to the Parent were required by the IEP, the evidence demonstrates that the study guides were not provided to the Parent.

199. Study materials were to be given to the ESE Support Facilitator by the teachers and the ESE Support Facilitator was to provide the materials to the Parent. Some of the teachers complied, and the materials were provided to the Parent.

200. Further, as an accommodation, a set of books were to be provided to the Parent for the home. Having the books at home was for pre-teaching and for work missed by the Child. The Parent was not provided all of the books, which was unknown to the Parent until a home note referred to a book that the Parent did not have.

201. Also, during the Summer of 2007, the Parent requested books, but did not receive any. The position of the School's staff was that, even though the Parent was requesting seventh grade textbooks, the Stay-Put IEP required third grade textbooks; and that the Child's ability level was not seventh grade level based upon their experience with the Child during the 2006-2007 school year when the Child had been in attendance.

202. The evidence demonstrates that the School Board repeatedly failed to provide the Parent with lesson plans, study guides, books, and other study materials, as required. This failure resulted in the Child not adequately preparing for lessons, which resulted in difficulty with assignments.

203. There is no dispute that, due to the Child's behavior challenges, the inadequate preparation for lessons and the

resulting difficulty with assignments would likely cause behavior problems with the Child.

204. The evidence demonstrates further that such failure negatively impacted the Child's ability to succeed in the general education placement and obtain meaningful education benefit.

#### Progress Reports Issue

205. IEP progress notes were provided to the parent(s) of an ESE child to inform the parent(s) whether the ESE student was meeting the IEP goals. IEP progress notes were to be provided on a quarterly basis, i.e., every nine weeks, with report cards or separately, specifying the ESE student's progress on IEP goals.

206. The evidence demonstrates that the School Board failed to timely provide progress reports. Further, the evidence demonstrates that progress reports were not considered an item of importance to the School Board that required a timely response.

#### Weekly Meetings Issue

207. As a collaboration, the entire IEP team (SLP, general education teachers, ESE Specialist, Paraprofessional, and the Parent) were required to meet weekly, except that the SLP was to meet separately with the Parent.

208. A rotation of the different general education teachers occurred resulting in one general education teacher, instead of all the general education teachers, attending the meetings. The School Board's position was that a collaboration was very difficult and that the general education teacher attending the meeting was only a representative. However, the evidence does not demonstrate that the representative conferred with the other general education teachers, prior to the meeting, so that the representative would be aware of the Child's work in all the classes; as a result, the representative was only aware of the Child's work in that representative's class.

209. Consequently, the evidence demonstrates that no collaboration occurred as required and that the reason presented for the failure to collaborate was not reasonable.

CARD Not Permitted to Work With the Child Issue

210. CARD had worked with the Child for several years. To the Parent, CARD had proven its effectiveness with the Child.

211. CARD would only assist a school if invited by the school to do so.

212. During the 2005-2006 school year, CARD met with the School's IEP team and performed some observations.

213. During the 2006-2007 school year, CARD'S Educational Consultant, who had known the Child since kindergarten and was the Child's first grade teacher, consulted with the School

regarding the Child's aversion to school. CARD's Educational Consultant made recommendations to the School, including social stories, a systematic plan for reinforcements, and incremental steps to slowly reintroduce the Child into the school environment.

214. Subsequently, in September 2006, CARD's Educational Consultant was invited to participate in an IEP meeting, but was unable to do so. Later, CARD's Educational Consultant contacted the School and requested permission to come into the School to make suggestions. In November 2006, CARD's Educational Consultant was invited to perform an observation and did so, with a subsequent meeting in December 2006.

215. The next step was for CARD's Educational Consultant to make a return visit to the School. However, the School notified CARD's Educational Consultant that the School would no longer be working with CARD.

216. Even though the evidence demonstrates that CARD was a benefit to the Child, the evidence further demonstrates that the School Board was not required to use the services of CARD.

#### FCAT Accommodations Issue

217. For the 2007 FCAT, the Parent requested from the School FCAT accommodations for the Child consisting of the test booklet being printed in a font size of 16 (an enlarged font) and with fewer items per page. Both requests were made as to

not overwhelm the Child by too much stimuli and to enable the Child to focus.

218. Requests for FCAT accommodations that involve the preparation of the test booklet must be requested by a school through the School Board's testing office, which would make the request to the State Department of Education (DOE). A school's request for accommodations must be approved by the School Board's ESE Director and Department of Assessment and Testing; and, once approved, the request is forwarded to DOE by the School Board. DOE provides school districts with the applications for students requiring any unique accommodations. All school ESE specialists are advised of this process and procedure by the School Board's Curriculum Supervisor.

219. The School's ESE Specialist advised the Parent that only one of the requests, not both, could be made. The Parent did some research and determined that both requests were permitted. The Parent notified the School's ESE Specialist of results of the research and insisted that both were required and should be requested.

220. The School made the request to the School Board for the unique accommodations of 16-inch font, fewer items per page, and increased spacing. In turn, the School Board made the request to DOE for 16-inch font, fewer items per page, and increased spacing. DOT granted the request for fewer items per

page and increased spacing, but denied the request for 16-inch font.

221. For the 2008 FCAT, the same requests for accommodations were made. DOT denied the request for fewer items on the page on the basis of there being no current IEP.

222. There is a significant difference between 16-inch font and 16-point font--an inch is much larger in size than font point (a font is a unit of about 1/72nd inch). No one making the request was aware of the difference.

223. The School Board's Curriculum Supervisor determined that DOE denied the request for 16-inch font because DOE was not permitted to enlarge the test booklet's font. However, the evidence demonstrates that, for the 2006-2007 and 2007-2008 school years, DOE used an 18-point font for the large test and answer booklets.

224. The evidence demonstrates that the School Board should have known that both requests for the FCAT accommodations by the Parent could have been made.

225. Further, the evidence demonstrates that the School Board's mistake in requesting the incorrect font was a reasonable mistake.

226. However, the evidence demonstrates also that the School Board should have been aware that large print was available from DOE; and that the School Board should have been

more diligent to determine the largest font by DOE that was available. Obtaining such information would have involved a minimal effort, which was not unreasonable, and would have revealed the font size available and would have revealed the correct font to request.

#### Section 504: Discrimination and Retaliation Issues

227. Official Recognition was taken at hearing that the 2002 Stay-Put IEP remained in effect, during the 2006-2007 school year, as a result of the Parent exercising the right to appeal to federal court an administrative law judge's final order, rendered July 21, 2006, in a due process hearing.

#### Truancy

228. School Board Policy 5.5 indicates that the parents of school age children are responsible for their child's daily school attendance. When a student has an established pattern of non-attendance, the student is referred to an outside agency for assistance.

229. The School's Principal defined truancy as a pattern of non-attendance.

230. For the 2005-2006 school year, the Child was absent for almost the entire school year. No action was taken by the School or the School Board regarding the absences.

231. During the 2006-2007 school year, the Child had an aversion to attending the School, of which the School was aware,

and absences continued. The School and the Parent were using different techniques in an attempt to get the Child to attend school.

232. The School Board's attendance policy provides, among other things, that, when there is a pattern of non-attendance, the principal/designee shall refer the student to the child study team. The evidence does not demonstrate that such a referral occurred.

233. The Child began attending the School again at the beginning of October 2006, but not all day. Even though the aversion continued, some progress was made in that the Child was able to attend on a shortened schedule, until 1 p.m. Strategies to get the Child to attend the School continued.

234. On February 6, 2007, the Child was referred to the State Attorney's Office for truancy--a pattern of non-attendance--for appropriate action by the State Attorney, including criminal prosecution.

235. The State Attorney viewed the intent of the truancy policy was for parents who abused the policy.

236. An Assistant State Attorney met with the Parent, the School's Principal, and School Board personnel on at least two occasions. The evidence demonstrates that the Assistant State Attorney did not view the Child's situation to be covered by the truancy policy.

237. The State Attorney never filed criminal charges against the Parent for truancy of the Child.

238. The evidence demonstrates that the Child's situation did not fall within the intent of the truancy policy and that it was unreasonable to have referred the Child's situation to the State Attorney for truancy.

#### The Matrix

239. The matrix is a funding document developed after an IEP is completed. The matrix identifies the level of supports that are needed based on the IEP and then calculations are performed to determine the cost factor that the student receives. The funding determined by the matrix comes from the State.

240. The matrix establishes eligibility for the McKay Scholarship for ESE students. If a parent elects to send a child to private school, the McKay Scholarship provides money, determined by the matrix, for tuition at the private school. The higher the matrix number, the more money provided.

241. The matrix for a child is to be reviewed no less than every three years.

242. The Parent of the Child, who was considering the McKay Scholarship, became concerned about the accuracy of the matrix number derived from the Child's IEP and wanted the matrix reviewed in August 2006. The School Board was in agreement that

the matrix was three years old and might not reflect the Child's then current needs.

243. However, the School Board did not agree to review the Child's matrix until the Assistant State Attorney strongly encouraged the School Board to review the matrix at one of the meetings regarding the truancy of the Child. As a result, the School Board's Due Process Coordinator directed a matrix review.

244. In March 2007, the matrix was upgraded to the highest possible cost factor of 255.

245. The evidence is demonstrates that the time elapsed for the review of the matrix was unreasonable. The School Board presented no reasonable reason for the delay in reviewing the matrix.

#### Dress Code Violation

246. The Child, as previously indicated, wears protective clothing for protection from the sun. The Child wore the same type of clothing during the 2005-2006 school year and through the Fall 2006.

247. On January 11, 2007, the Child was issued an "Unified Dress Code Noncompliance Letter" for failure to have the School's logo patch on the Child's jacket. The document required the signature of the Child, who was in the sixth grade, and the Child signed the document.

248. A subsequent "Administrative Detention Form" indicated that the Child was to serve detention for the violation on February 15, 2007. The document required the signature of the Child, but it did not contain the Child's signature. Also, the document contained the date of February 9, 2007, which was obviously an incorrect date.

249. The Child never wore a jacket to the School. Also, the Child had sensory issues, which required removing the tags from the Child's clothing. Adding a patch to the Child's clothing, which would involve stitching and threads against the Child's skin, would have been problematic for the Child due to the sensory issues.

250. Additionally, both documents required the Parent's signature. Neither document contained the Parent's signature.

251. Furthermore, the Parent was not notified of the noncompliance or the scheduled detention at the weekly meeting held on January 16, 2007; and neither was discussed at the IEP team meeting held, without the Parent presence, on January 22, 2007.

252. The School Board's BPS agreed that it was not appropriate to discipline the Child for any dress code violation.

253. The evidence demonstrates that there was no reasonable reason to discipline the Child for a dress code violation.

Police Reports

254. The Child was involved in behavioral incidents at the School on November 1 and 5, 2007, previously indicated, involving high intensity problem behavior associated with the cafeteria and a calendar, respectively. As a result of the incidents, the Child was suspended, and it was administratively recommended that the Child be expelled from the School.

255. Additionally, police reports were filed regarding the two incidents. The decision to file the police reports was made by the School's Principal and Resource Officer.

256. An option recommended to the expulsion was an alternative to external suspension (AES). AES is for students who violate the code of conduct, and placement is made to another school site where the student continues to receive services. For ESE students, the IEP is to be implemented at the alternative site.

257. The Child was recommended for expulsion because the behavior involved battery on a School Board employee, which required a mandatory expulsion according to the School Board's discipline matrix. However, the principal of a school has the

discretion not to expel a student depending upon the wishes of the employee involved.

258. A manifestation hearing was held. It was determined that the battery incident was a manifestation of the Child's disability and was not an expellable act.

#### Post-November 2007 Issues

##### Suspension/Expulsion/December 6, 2007, IEP Meeting

259. (See Paragraphs numbered 254 through 258.).

260. Following the manifestation hearing held regarding the incidents on November 1 and 5, 2007, an IEP meeting was held on December 6, 2007. In addition to the School, two other schools were being considered for the Child's placement. Everyone agreed that one of the other schools was not appropriate. Also, the School was determined to be not appropriate for the Child to return to, but another school was determined to be appropriate.

##### Another School Determined to be Appropriate

261. Another school (Other School) was determined to be appropriate for the Child. The Other School was considered by the School Board to be able to meet all the behavior and academic needs of the Child, offering "wrap-around services." The position of the School Board's BPS was that the Other School offered a more comprehensive program to meet the Child's needs.

262. The Parent did not consider the Other School to be appropriate. The Other School operated on a school-wide behavioral level system, which meant that the behavioral plan for all the students would be the same--children with autism would have the same behavioral plan as children with other disabilities. Also, the Other School had no non-ESE students for the Child to have as role models.

263. The evidence is insufficient to demonstrate that the behavioral plan would meet the needs of the Child.

264. The Parent also believed that the students at the school were exposed to drugs and harsher experiences.

265. In spite of [REDACTED] misgivings and belief that the Other School was not appropriate, the Parent attempted to enroll the Child at the Other School. However, the Child would not leave the Parent's vehicle. Staff at the Other School attempted to convince the Child to leave the vehicle, but the Child would not. The Child did not attend the Other School.

266. The evidence is insufficient to determine whether the school was appropriate or not appropriate for the Child.

#### Additional Issues

##### Assistive Technology

267. Assistive technology (AT) is essentially any device that increases, improves, or maintains the functional capabilities of a student with a disability. AT has become a

"tool for inclusion, independence, self-determination, improved opportunities, and greater quality of life."

268. In November 2006, the Parent requested an AT reassessment. The reassessment was performed by the Program Specialist for AT. As part of the reassessment, background information is gathered--how the Child is currently functioning; what the task demands are in each of the classes; what modifications and accommodations are currently being provided; and what AT is currently assigned, what was being used, and how it was being utilized. Observations of the Child in the classroom by the Program Specialist for AT were part of that background information gathering.

269. Also, as part of the reassessment, a written productivity profile was administered to the Child by the Program Specialist for AT. Most of the written productivity profile was administered orally and the Child would write and type.

270. Features of an AT device are matched to the needs of a child identified during the assessment process. Once that is determined, an equipment trial is implemented and data taken, during the trial, to determine if the match is a good one and if the equipment achieves the purpose for which it was intended.

271. The assessment process resulted in a recommendation to use an AT device referred to as a DANA. The Child was using

another AT device, an AlphaSmart. The DANA was similar to, but more complex than, the AlphaSmart.

272. On the day that the equipment trial was to begin, the Child left the School. Even though the Child returned to the School before the end of 2006-2007 school year, the Program Specialist for AT was not aware of the Child's return. As a result, no equipment trial was completed and the assessment process was not completed during the 2006-2007 school year.

273. The evidence does not demonstrate a reasonable reason why the equipment trial should not have begun again when the Child returned to the School. Further, the evidence demonstrates that the equipment trial should have begun again when the Child returned to the School.

274. Another Program Specialist for AT was hired and began in August 2007 for the 2007-2008 school year. This Program Specialist for AT became aware that the equipment trial was not completed and began the equipment trial in October 2007. The equipment trial was scheduled for eight weeks, ending around the beginning of December 2007. The Child left the School in early November, and, therefore, the equipment trial was not completed. Insufficient data were collected to determine whether the DANA was helpful to the Student.

AlphaSmart/Property Pass

275. The Child used an AlphaSmart because of the difficulty the Child had with writing. The AlphaSmart was required by the Child's IEP.

276. During the 2006-2007 school year, a dispute arose regarding the Child taking the AlphaSmart home. The School Board required a property pass from parents whenever equipment goes back and forth to home. The Parent refused to sign the property pass because the Parent interpreted the wording of the property pass to require the Parent to be responsible for the AlphaSmart when it was not in the Parent's possession; the Parent did not want to have responsibility for the AlphaSmart when it was not in the Parent's possession. The School Board's Due Process Coordinator agreed that the Parent should not be responsible for the AlphaSmart when it was not in the Parent's possession.

277. The Child's OT used the AlphaSmart with the Child and believed that it was important for the Child to use the AlphaSmart at home. The Child's OT expressed to the Parent the importance of the AlphaSmart being used at home.

278. The Child's OT and the School's staff were concerned that, by not taking the AlphaSmart device home, the Child, in doing homework, would not have access to the work completed at

school. Therefore, to them, not taking the AlphaSmart home would be a hindrance.

279. The Program Specialist for AT wanted to perform an AT assessment using a new AT device. The Program Specialist was concerned that the Parent's not signing a property pass in order to take the new AT device home would limit the applicability/functionality of the new AT device to determine the area of need for the Child.

280. The Child's OT and the Program Specialist for AT unilaterally decided to limit the Child's use of the AlphaSmart. They unilaterally decided that it would not be effective or fair for the Child to use the AlphaSmart in the classroom if the Child was not able to take it home.

281. The evidence demonstrates that the Child's OT and the Program Specialist for AT unilaterally changed the Child's IEP regarding the AlphaSmart.

282. Further, the evidence demonstrates that the Child's OT and the Program Specialist for AT failed to implement the IEP regarding the AlphaSmart.

#### FM System

283. As a Special Consideration, the Child was to use an FM System. The FM System was used by the Child to block distractions.

284. The FM System is a device into which a teacher speaks, which is connected to a speaker next to the student, and it enhances the teacher's (the speaker's) voice.

285. For the 2006-2007 school year, the Child had returned to the School on October 6, 2006. As of November 29, 2006, the School's ESE Specialist wanted to re-introduce the FM System to the Child and to make certain that the teachers knew how to properly use the FM System. Also, the ESE Support Facilitator and the Paraprofessional should know how to use the FM System in order to know and make certain that the teachers were using it correctly.

286. By late December 2006, the FM System was not in use.

287. On January 11, 2007, the School's ESE Specialist found it necessary to remind the Child's general education teachers to use the FM System. Also, the School's ESE Specialist advised the general education teachers that the Paraprofessional could show them how to use the FM System.

288. As of September 18, 2007, in the 2007-2008 school year, the teachers still did not know how to use the FM System.

289. Sometime later, the teachers used the FM System.

290. The evidence does not demonstrate a reasonable reason why the teachers did not know how to use the FM System and why they did not know how to use it prior to the end of the 2006-

2007 school year, and certainly, prior to September 18, 2007, in the 2007-2008 school year.

291. The evidence demonstrates that the teachers should have known how to use the FM System.

Study Carrels

292. As an accommodation, the Child was to be provided a study carrel for independent work.

293. Usually, in classrooms at the School, there was an area where a student could sit independently, but, there were no study carrels.

294. In the classroom of the Child's Language Arts and Reading Teacher, during the 2007-2008 school year, there were no study carrels.

295. The evidence demonstrates that a study carrel was not provided to the Child at the School.

Worksheet Adjustments/Shortened Assignments/Other Modifications

296. In order to accommodate the Child's learning needs, adjustments and modifications were required.

297. As to adjusting the Child's worksheets to 16-point font, the evidence demonstrates that this was not substantially accomplished. When copying was involved, the copies were of mixed font size. Some, but not a substantial part, of the printed worksheets were adjusted to larger type.

298. The evidence demonstrates that the 16-point font accommodation was not complied with.

299. As an accommodation, the Child's lessons were to be broken into smaller segments. The modification was to accommodate the Child's learning needs.

300. Some, but not a substantial number, of the lessons were modified. It is of no consequence that the Child answered some of the lessons correctly; the modification was determined required to accommodate the Child's learning needs.

301. The evidence demonstrates that the lessons accommodation was not complied with.

302. Further, the evidence demonstrates that a few of the required modifications were made to the Child's work. However, the evidence also demonstrates that the modifications were not done on a substantial basis.

303. Consequently, the evidence demonstrates that there was a failure to perform the modifications and adjustments, which negatively impacted the Child's ability to access the general education curriculum and to gain an educational benefit.

#### Specialized Bus Supervision

304. As a Special Consideration, an identified special need of the Child was specialized bus supervision.

305. The evidence demonstrates that the Child was not provided with specialized bus supervision.

### No Dairy Diet

306. As a Special Consideration, the Child had a special diet of no dairy products.

307. On two daily home notes, December 5 and 6, 2006, there is an indication on each that the Child had dairy products at lunch.

308. On two Sensory Forms, December 20, 2006, and January 31, 2007, lunch is indicated and there is an indication on each Sensory Form that the Child had dairy products at lunch.

309. The evidence demonstrates that, for a minimal number of times, the Child received dairy products at the School.

310. Consequently, there is insufficient evidence to demonstrate that the number of times that the Child received dairy products negatively impacted the educational benefit to the Child.

### Math Referral

311. During the 2006-2007 school year, the Parent requested the School for a math referral for the Child because the Child had difficulty with word problems and because the Child's math teacher indicated to the Parent that the Child was very behind.

312. On February 13, 2007, the Parent contacted the School Board's ESE Program Specialist for Math regarding a math

referral for the Child. On February 14, 2007, the ESE Program Specialist for Math advised the Parent about the process.

313. A math referral could come from a school as well as a parent according to the School Board's Due Process Coordinator.

314. On March 5, 2007, after contact from the Parent, regarding the math referral, the School Board's ESE Program Specialist for Math advised the Parent to contact the School's staff or teachers.

315. On March 9, 2007, and again on March 11, 2007, the School Board's ESE Program Specialist for Math informed the School Board's Due Process Coordinator that no math referral had been received from the School.

316. On April 16, 2007, the School Board's Curriculum Supervisor received the math referral.

317. On April 17, 2007, the School Board's ESE Program Specialist notified the School's ESE Specialist that, in order to move forward with the referral, among other things, additional information was needed, including diagnostic information.

318. At the end of the 2006-2007 school year, the Child was still working on simple subtraction.

319. The evidence does not demonstrate that the School performed any tests to obtain the diagnostic information.

320. The evidence demonstrates that the School Board's failure to perform the diagnostic tests and follow-through with the math referral negatively impacted the Child's educational benefit.

Speech/Language

321. It is undisputed that the Child's language deficits were severe and that improvements were critical for the Child's development.

322. As to Services/Placement, the IEP required speech/language services five times a week for 30 minutes each in a classroom. Additionally, the Speech and Language Therapist (SLT) was to provide pragmatics training once a week for 30 minutes in a classroom.

323. The SLT began the speech/language services on October 23, 2006.

324. Instead of rendering the speech/language services in the classroom, the services were rendered in the classroom and the speech room, with the majority of the services rendered in the speech room.

325. The SLT scheduled the speech/language services for the third and fourth periods of school.

326. Also, the SLT scheduled some of the speech/language services for the sixth period. Subsequently, around October 17, 2006, the SLT learned that, generally, the Child was not present

at the School for the sixth period; but the SLT could not change the schedule because the SLT's schedule was not flexible on the days scheduled for the sixth period. The Child was on shortened school days due to the Child's aversion to school.

327. The SLT's progress notes reflect that the Child's schedule with the SLT began on October 23, 2006, and ended on February 9, 2007, during which time the Child was seen a total of 17 times by the SLT. Ten sessions were scheduled for the sixth period on Tuesdays: there was no school for one day (one session); the Child was "absent" for three days (three sessions); and the Child left the School prior to the scheduled session on the remaining six days (six sessions). Eleven sessions were scheduled for the third period: there was no school for one day (one session); the Child was "absent" for two days (two sessions); and, of the remaining eight days (eight sessions), one session lasted 45 minutes and one session lasted 15 minutes (the Child arrived late). Thirty-three sessions were scheduled for the fourth period: there was no school for two days (two sessions); there was early release for one day, so no session was held on that day (one session); the Child was "absent" for eight days (eight sessions); the Child left the School prior to the scheduled session on four days (four sessions); the Child was "not at school" for three days (three sessions); the session was canceled by the SLP on four days

(four sessions); the session was canceled because of an IEP meeting and re-scheduled in the afternoon, but was not held because the Child left the School before the re-scheduled time, for two days (two sessions); and, of the remaining nine days (nine sessions), four sessions lasted 30 minutes and five sessions lasted 45 minutes.

328. The evidence demonstrates that, for the time period involved, i.e., a total of eleven weeks from October 23, 2006 through February 9, 2007, the Child received: week one--one 30 minute session; week two--one 30 minute session; week three--one 45 minute session and two 30 minute sessions; week three--two 30 minute sessions and one 45 minute session; week four--two 30 minute sessions and one 45 minute session; week five--one 30 minute session; week six--one 15 minute session and one 30 minute session; week seven--one 30 minute session; week eight--one 30 minute session and one 45 minute session; week nine--three 45 minute sessions; week ten--no sessions; and week 11--one 30 minute session.

329. Further, the evidence does not reflect that the School Board attempted to provide the Child with the required speech/language services for the times missed.

330. The School Board was obligated to ensure that the Child received the required speech/language services.

331. For the 2007-2008 school year, the new SLT's schedule was set. The new SLT attempted to schedule the Child into the available time slots on the SLT's schedule and on the SLT's planning days.

332. The new SLT did not perform an assessment of the Child's language capacities during the 2007-2008 school year. The assessment was not performed in spite of the recommendation by the School Board's ESE Curriculum Development Specialist for Reading in February 2007 that an in-depth comprehensive language evaluation be performed.

#### CONCLUSIONS OF LAW

333. The Division of Administrative Hearings has jurisdiction of these proceedings and the parties thereto pursuant to sections 1001.42(4)(1) and 1003.57(1), Florida Statutes (2010).

334. The Parent has the burden of proof in these proceedings. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). The standard of proof is a preponderance of the evidence. DeVine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).

335. Section 1001.42(4)(1) provides, among other things, that the School Board shall "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students . . . ."

336. States must comply with the IDEA in order to receive federal funding for the education of handicapped children. The IDEA requires states to establish policy which ensures that children with disabilities will receive a FAPE. Through an IEP, the educational program accounts for the needs of each disabled child.

337. Definitions applicable to the IDEA are set forth at 20 U.S.C.S. section 1401. FAPE is defined as follows:

- (9) . . . The term 'free appropriate public education' means special education and related services that—
  - (A) have been provided at public expense, under public supervision and direction, and without charge;
  - (B) meet the standards of the State educational agency;
  - (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
  - (D) are provided in conformity with the individualized education program . . . .

IEP is defined as follows:

- (14) . . . The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised . . . .

Special education is defined as follows:

- (29) . . . The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.

338. The Code of Federal Regulations (C.F.R.) implements the federal statutes. The C.F.R. applicable to the pertinent sections of the IDEA is 34 C.F.R. section 300 (2006) and (2008).<sup>6</sup> FAPE is found at 34 C.F.R. section 300.17 and is defined as follows:

Free appropriate public education or FAPE means special education related services that—

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA [State educational agency], including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

IEP is found at 34 C.F.R. section 300.22 and is defined as follows:

Individualized education program or IEP means a written statement that is developed, reviewed and revised in accordance with §§ 300.320 through 300.324.

Special education is found at 34 C.F.R. section 300.39 and is defined as follows:

- (a) General. (1) Special education means specially designed instruction, at no cost

to the parents, to meet the unique needs of a child with a disability, including—

- (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (ii) Instruction in physical education.

(2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

- (i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;
- (ii) Travel training; and
- (iii) Vocational education.

\* \* \*

(3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards with the jurisdiction of the public agency that apply to all children.

\* \* \*

(5) Vocational education means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

339. In general, a FAPE must be available to all children residing in a state between the ages of 3 and 21, inclusive.

34 C.F.R. § 300.101(a).

340. A state meets the IDEA's requirement of a FAPE when it provides personalized instruction with sufficient support services to permit the disabled child to benefit educationally from that instruction. The instruction and services must be provided at public expense, meet the state's educational standards, approximate grade levels used in the state's regular education, and correspond to the disabled child's IEP. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 102 S. Ct. 3034 (1982).

341. Inquiry in cases involving compliance with the IDEA, which is a de novo inquiry, is twofold: (1) whether there has been compliance with the procedural requirements of the IDEA, including the creation of the IEP, and (2) whether the IEP developed is reasonably calculated to enable the child to receive educational benefits. Id. at 3051.

342. A state is not required to maximize the potential of a disabled child commensurate with the opportunity provided to a non-disabled child. Rather, the IEP developed for a disabled child must be reasonably calculated to enable the child to receive some educational benefit. Id. at 3048-3049. The disabled child must be making measurable and adequate gains in the classroom, but more than de minimus gains. J.S.K. v. Hendry Cnty. Sch. Bd., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). The unique

educational needs of the particular child in question must be met by the IEP. Todd D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991). "The importance of the development of the IEP to meet the individualized needs of the handicapped child cannot be underestimated." Greer v. Rome City Sch. Dist., 950 F.2d 668, 695 (11th Cir. 1991).

343. In examining an IEP, great deference is given to the educators who develop the IEP. Todd at 1581.

344. The disabled child's education must be provided in the least restrictive environment (LRE) available. A determination of such environment requires consideration of whether there has been compliance with the procedural requirements of the IDEA and whether the IEP is reasonably calculated to enable the child to receive educational benefits. DeVries v. Fairfax Cnty. Sch. Bd., 882 F.2d 876 (4th Cir. 1989).

345. Furthermore, regarding the LRE in the placement of the child, generally, to the maximum extent appropriate, children with disabilities are to be educated with children who are non-disabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment are to occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C.S. § 1412(a)(5); 34 C.F.R.

§ 300.114(a). Further, in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs. 34 C.F.R. § 300.116(d). An IEP must be examined as to whether it provides a meaningful education in the LRE. Pachl v. Sch. Bd. of Anoka-Hennepin Indep. Sch. Dist. No. 11, 453 F.3d 1064, 1068 (8th Cir. 2006).

346. Florida Administrative Code Rule 6A-6.03028 provides in pertinent part:

(1) Entitlement to FAPE. All students with disabilities aged three (3) through twenty-one (21) residing in the state have the right to FAPE consistent with the requirements of the Individuals with Disabilities Education Act, 20 USC Section 1400, et. seq (IDEA), its implementing federal regulations at 34 CFR Subtitle B, part 300 et.seq. which is hereby incorporated by reference to become effective with the effective date of this rule, and under Rules 6A-6.03011 through 6A-6.0361, F.A.C. . . .

\* \* \*

(m) IEP implementation and accountability. The school district, or other state agency that provides special education either directly, by contract, or through other arrangements, is responsible for providing special education to students with disabilities in accordance with the students' IEPs. However, it is not required that the school district, teacher, or other person be held accountable if a student does not achieve the growth projected in the annual goals and benchmarks or objectives. An IEP must be in effect before special education and related services are provided to an eligible student and must be

implemented as soon as possible following the IEP meeting. In addition:

1. The student's IEP shall be accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation.
2. All teachers and providers shall be informed of their specific responsibilities related to implementing the student's IEP and the specific accommodations, modifications, and supports that must be provided for the student in accordance with the IEP.
3. The school district must make a good faith effort to assist the student to achieve the goals and objectives or benchmarks listed on the IEP.
4. Nothing in this section limits a parent's right to ask for revisions of the child's IEP or to invoke due process procedures.

347. Florida Administrative Code Rule 6A-6.03411 provides in pertinent part:

(1) Definitions. As used in Rules 6A-6.03011 through 6A-6.0361, F.A.C., regarding the education of exceptional students, the following definitions apply:

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

(b) Assistive technology device. Assistive technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the

functional capabilities of a student with a disability. The term does not include a medical device that is surgically implanted, or the replacement of that device.

(c) Assistive technology service.

Assistive technology service means any service that directly assists a student with a disability in the selection, acquisition, or use of an assistive technology device.

The term includes:

1. The evaluation of the needs of a student with a disability, including a functional evaluation of the student in the student's customary environment;
2. Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;
3. Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
4. Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
5. Training or technical assistance for a student with a disability or, if appropriate, that student's family; and
6. Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student.

\* \* \*

(dd) Related services.

1. General. Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a student with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in students, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

\* \* \*

3. Individual related services terms defined. The terms used in this definition are defined as follows:

\* \* \*

b. Counseling services means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

\* \* \*

o. Speech-language pathology services includes identification of students with speech or language impairments; diagnosis and appraisal of specific speech or language impairments; referral for medical or other professional attention necessary for the habilitation of speech or language impairments; provision of speech and language services for the habilitation or

prevention of communicative impairments; and counseling and guidance of parents, students, and teachers regarding speech and language impairments.

348. The undersigned's decision, as to whether the Child received FAPE, must be based on "substantive grounds." 20 U.S.C.S. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(1). However, in matters regarding a procedural violation, the undersigned may find that the Child did not receive a FAPE "only if the procedural inadequacies impeded" the Child's "right to a FAPE" or "caused a deprivation of educational benefit." 20 U.S.C.S. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2)(i) and (iii).

349. "A party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the school board . . . failed to implement substantial or significant provisions of the IEP." Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000). "A material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007).

350. The IDEA requires that, during the pendency of an administrative proceeding regarding a due process complaint, the

child must remain in the educational placement unless the State or local agency and the parents agree otherwise. 20 U.S.C.S. § 1415(j); 34 C.F.R. § 300.518(a); Fla. Admin. Code R. 6A-6.03311(9)(y).

351. The age of the stay-put IEP and the difficulties in implementation do not excuse a school district from providing FAPE under the IDEA. See Maine Sch. Admin. Dist. No. 35 v. R., 321 F.3d 9, 19-20 (1st Cir. 2003) ("[where the stay-put provision is invoked] claiming to be caught between a rock and a hard place is no excuse for dereliction of duty. The IDEA charges school districts with making reasonable efforts both to work with parents and to satisfy the needs of special education students. That entails the responsibility to find a path that runs between the rock and the hard place.").

352. The evidence demonstrates that the Stay-Put IEP was the Child's 2002 IEP and that, as to the relevant time-period, the School Board was implementing the 2002 IEP during the 2006-2007 and 2007-2008 school years, up to and including February 18, 2008. The evidence further demonstrates that the School Board found the implementation of the IEP to be very difficult; however, the School Board was not relieved of its obligation, under the IDEA, to implement the Child's IEP.

353. Also, the evidence demonstrates that the Child's complex behavior played a major role in the implementation of

the Stay-Put IEP and that this was a realization to both the Parent and the School Board. Both the Parent and the School Board were in agreement that the PBIP needed changing along the way and that data needed to be collected, reviewed, and analyzed in order to determine whether changes needed to be made to the PBIP, and, if changes needed to be made, in order to make adequate changes to the PBIP.

354. Further, the evidence demonstrates that the School Board's data collection system was capable of collecting sufficient, but not all, data to develop methods and strategies to attempt to improve the Child's behavior. The School Board adopted some of the recommendations from the IEE, which improved the data collection. The person who performed the IEE was invited by the School Board to return again to the School.

355. However, the evidence further demonstrates that the School Board failed to meaningfully review and analyze the data collected in order to determine whether changes needed to be made to the Child's PBIP, and, if changes needed to be made, to adequately develop effective intervention strategies.

356. Additionally, the evidence demonstrates that the failure of the Parent and the School Board's and School's personnel was a factor negatively affecting the Child's complex behavior.

357. Furthermore, the evidence demonstrates that the Child's behavior did not change for the better.

358. Consequently, the evidence demonstrates that the Child's PBIP was inadequate to meet the needs of the Child.

359. As to the new PBIP in December 2007, the evidence demonstrates that the new PBIP was almost identical to the previous PBIP, and was, therefore, inadequate to meet the needs of the Child.

360. Furthermore, the evidence demonstrates that there were substantial or significant provisions of the Child's IEP that the School Board failed to implement, or that there were more than minor discrepancies between the services the School provided to the Child and the services required by the Child's IEP. The evidence demonstrates that those provisions or services that the School Board failed to implement were reading; math referral; occupational therapy; speech and language; collaboration weekly (weekly meetings) by the IEP team and by the SLT meeting separately; general education inclusion; lesson plans and other study materials; worksheet adjustments/modifications to Child's work; progress reports; AlphaSmart; assistive technology; FM System; Buddy System/social skill training; FCAT accommodations; and the Child's sensitivity to the sun.

361. Consequently, the evidence demonstrates that there was a material failure by the School Board to implement the Child's IEP; and, hence, the School Board failed to implement the Child's IEP. Houston Indep. Sch. Dist., id.; Van Duyn, id.

362. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits entities that receive federal funds from discrimination against qualified individuals with disabilities. 29 U.S.C.S. § 794(a).

363. Discrimination claims, pursuant to Section 504, are analyzed under the same framework as Title VII claims (the burden-shifting analysis in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). See Lewellyn v. Sarasota Cnty. Sch. Bd., 2009 Lexis 120786, at 28. To establish a prima case of discrimination, the Parent must establish (1) that the Child has a disability; (2) that the Child is a qualified individual; and that the Child was subjected to discrimination on the basis of the Child's disability. McDonnell Douglas at 802; See Lewellyn at 29.

364. After establishing a prima facie case, the School Board must present a legitimate, non-discriminatory reason for the adverse action that it took. McDonnell Douglas at 802; See Lewellyn at 29.

365. Once the School Board has articulated a non-discriminatory reason for the action that it took, the Parent

must show that the School Board's reason is a pretext for discrimination. McDonnell Douglas at 804; See Lewellyn at 29.

366. Retaliation is a separate offense and the underlying claim of discrimination need not be proven for the retaliation claim to succeed. See Lewellyn at 33, citing Sullivan v. National R.R. Passenger Corp., 170 F.3d 1056, 1059 (11th Cir.) (citations omitted).

367. To establish a prima facie case of retaliation, the Parent must establish (1) a statutorily protected expression; (2) adverse action; (3) a causal link between the protected expression and the adverse action. See id. at 32, citing Goldsmith v. City Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993).

368. After establishing a prima facie case of retaliation, the burden shifts to the School Board to produce a legitimate reason for the adverse action. See id. at 33, citing Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002).

369. Once the School Board has articulated a legitimate reason for the action that it took, the Parent must show that the School Board's reason is a pretext for prohibited retaliatory conduct--proving by a preponderance of the evidence that the legitimate reason offered for taking the adverse action was not the true reason. See id. at 34, citing Sullivan at 1059 and DeLong v. Best Buy Company, 211 F. App'x 856, 858 (11th Cir.

2006) (citing Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 143 (2000)).

370. However, at all times, the ultimate burden of persuasion that the School Board discriminated and retaliated against the Child remains with the Parent. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

371. Non-economic compensatory damages, as well as economic damages, are available under Section 504. Shelly v. MRI Radiology Network, 505 F.3d 1173, 1206 (11th Cir. 2007).

372. The evidence demonstrates that the Parent established a prima facie case for discrimination and a prima facie case for retaliation and that the School Board failed to present legitimate reasons for the adverse actions that it took or that the legitimate reasons expressed by the School Board for the adverse actions were not the true reasons. Consequently, the Parent established that the School Board discriminated and retaliated against the Child in violation of Section 504.

373. Hence, the Parent is entitled to non-economic compensatory damages for discrimination and retaliation under Section 504.

374. The Parent did not present authority for the undersigned to award damages in an administrative proceeding, and the undersigned is unaware of such authority. As a result, the undersigned does not have the authority to award damages.

375. "Compensatory education is [an] appropriate relief where responsible authorities have failed to provide a handicapped student with an appropriate education as required by the [IDEA]." Todd at 1584. In the instant case, the School Board failed to provide the Child with an appropriate education as required by the IDEA. Consequently, the Child is entitled to compensatory education.

376. Compensatory education can include the payment to obtain the educational services that were contemplated by the IDEA and that the Child ought to have received but had not received. See Hall v. Knott Cnty. Bd. of Educ., 941 F.2d 402, 407-408 (6th Cir. 1991). Such a remedy appears to be contemplated by the United States Supreme Court in Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S. 359, 369 (1985). See Hall v. Knott Cnty. Bd. of Educ., 941 F.2d 402, 407 (6th Cir. 1991).

377. The Child will be 18 years of age in May 2011. Consequently, the compensatory education needs to be extended to the maximum age of entitlement under the IDEA.

378. Further, the Parent requested attorney's fees. The Parent did not present authority for the undersigned to order the payment of attorney's fees in an administrative proceeding, and the undersigned is unaware of such authority. As a result,

the undersigned does not have the authority to award attorney's fees.

CONCLUSION

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

ORDERED that:

1. The School Board failed to provide the Child with FAPE.
2. The School Board shall provide the Child with compensatory education for the IDEA services that the Child should have received, but did not receive, consistent with this Final Order, through the Child's age of entitlement to IDEA services. Providing compensatory education shall include the payment to obtain those educational services.
3. The undersigned is without authority to award damages.
4. The undersigned is without authority to award attorney's fees.

DONE AND ORDERED this 11th day of January, 2011, in  
Tallahassee, Leon County, Florida.

**S**

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ERROL H. POWELL  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of January, 2011.

ENDNOTES

<sup>1/</sup> The due process hearing was held by in-person presentation and telephone.

<sup>2/</sup> See the parties Final Joint Exhibit List, filed June 21, 2010, for the specific numbering and description of exhibits admitted into evidence. Further, Joint Exhibit 305 was withdrawn by the School Board.

<sup>3/</sup> Florida Administrative Code Rule 28-106.215 limits proposed orders (post-hearing submissions) to 40 pages unless authorized by the presiding officer.

<sup>4/</sup> The Final Order addresses the issues presented by the Parent. Any issue not presented is considered abandoned and is not addressed.

<sup>5/</sup> The School is the school at which the 2002 Stay-Put IEP was being implemented by the School Board.

<sup>6/</sup> Unless indicated otherwise, 34 C.F.R. Section 300 refers to the 2006 Code of Federal Regulations and amended 2008 Code of Federal Regulations.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 90 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 90 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(b), Florida Statutes; or
- c) only if the student is identified as "gifted", files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(b) and 120.68, Florida Statutes.