

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 10-3160E
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a due process hearing was conducted by telephone in this case pursuant to Section 1003.57, Florida Statutes,¹ and Florida Administrative Code Rule 6A-6.03311, before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on July 13, 2010, August 23, 2010, and September 15, 2010.

APPEARANCES

For Petitioner: ██████████, Parent
(address of record)

For Respondent: Barbara J. Myrick Esquire
Office of the School Board Attorney
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

Whether the request for a due process hearing filed by the Broward County School Board (School Board) in the instant case

should be dismissed on the ground that the School Board waited too long, after the Parent had requested it to pay for an independent Functional Behavioral Assessment (FBA), to file the request?

If not, is the School Board's most recent FBA of [REDACTED] (found on pages 5 through 9 of Petitioner's Exhibit 2) appropriate?

PRELIMINARY STATEMENT

On June 9, 2010, the Broward County School Board (School Board) filed a request for a due process hearing (Hearing Request) seeking a determination of the appropriateness of its most recent Functional Behavioral Assessment (FBA) of [REDACTED]. In its Hearing Request, the School Board stated that the Parent had "requested an Independent Educational Evaluation for Functional Behavioral Assessment (FBA) [of [REDACTED]] at public expense," and that it was "denying the [Parent's] request."

On June 10, 2010, the undersigned issued a Notice of Hearing by Video Teleconference scheduling the due process hearing requested by the School Board for June 25, 2010. The Notice provided that the issue to be litigated at the scheduled due process hearing was "[w]hether the School Board's Functional Behavioral Assessment (FBA) is appropriate." Together with the with the Notice, the undersigned also issued an Order of Pre-Hearing Instructions, which provided as follows:

1. Not less than seven business days before the due process hearing is scheduled to begin, the parties shall confer and discuss the possibility of settlement of the instant controversy. Within one business day after this settlement conference, the School Board shall file a brief status report confirming that the settlement conference was held and advising the undersigned as to whether the due process hearing the School Board has requested is still necessary.

2. Not less than five business days before the due process hearing is scheduled to begin, the parties shall file a joint statement of undisputed facts.

3. Not less than five business days before the due process hearing is scheduled to begin, each party shall:

a. Provide each other and the undersigned with a list containing the name and address of each person that the disclosing party intends to call as a witness at the due process hearing.

b. Provide each other and the undersigned with an authenticated set of exhibits (documents) that the disclosing party intends to introduce in evidence at the due process hearing. Each exhibit shall bear an exhibit number and be paginated. These exhibits shall be accompanied by an exhibit list which gives the exhibit number, the number of pages, and a brief description of each exhibit intended to be offered into evidence.

4. The parties are hereby notified that (a) any evidence not disclosed at least five business days before the start of the due process hearing might be excluded from the evidentiary record and (b) any witness not

disclosed at least five business days before the start of the due process hearing might be precluded from testifying. Evidence and testimony excluded because of nondisclosure will not be relied upon by the undersigned in making the findings of fact relevant to the disposition of this case.

5. The final order in this case shall be issued on or before July 26, 2010, unless the undersigned, at the request of either party, grants a specific extension of time with respect to this or any other deadline in this case.

6. The parties are hereby notified that any request for extension of time shall be deemed to seek, and if granted shall effect, a like extension of the final order deadline.

7. Requests for specific extensions of time should ordinarily be made in writing and state with particularity the reasons for the relief sought. Before filing such a request, the requesting party shall confer with the other party to determine whether the latter objects to the desired extension. The requesting party shall state in its request whether the other party objects to the request.

8. Failure to confer with the other party before filing a request for extension of time or to include in such request an informed and accurate statement regarding the other party's position shall be cause for denial of the request.

On June 15, 2010, the School Board filed a motion requesting that the due process hearing (scheduled for June 25, 2010) be continued. In its motion, the School Board asserted that it was "unable to have specific school district employees

available as witnesses to present its case on June 25, 2010." A hearing on the motion was held by telephone conference call on June 18, 2010. A court reporter recorded the hearing. On June 22, 2010, the undersigned issued an Order Granting Continuance and Re-Scheduling Due Process Hearing for July 13, 2010. The Order provided, in pertinent part, as follows:

1. Good cause having been shown, the motion is granted, and the due process hearing in this case, scheduled for June 25, 2010, is cancelled.

2. The due process hearing in this case is rescheduled for July 13, 2010, starting at 8:45 a.m. . . . Continuances will be granted only by order of the Administrative Law Judge for good cause shown.

* * *

6. Pursuant to paragraph 6 of the Order of Pre-Hearing Instructions, the final order deadline is extended 18 days (the length of the continuance that was granted at the School Board's request).

7. Except as modified herein, all other provisions of the first Notice of Hearing and of the Order of Pre-hearing Instructions shall remain in full force and effect.

On June 15, 2010, the School Board also filed a motion requesting that the undersigned issue "an Order for Protection that states (1) THE SCHOOL BOARD is not responsible to provide RESPONDENT'S due process hearing documents to the Administrative Law Judge; (2) THE SCHOOL BOARD is not required to provide RESPONDENT a[n] electronic transcript of the due process hearing

in Microsoft Word; and (3) the Positive Behavior Intervention Plan is not an issue in the instant case." In its motion, the School Board further requested that the undersigned "require RESPONDENT to identify the relevance of each individual listed on RESPONDENT'S Witness List, as to the issue of the due process hearing." The motion's certificate of service reflected that the motion had been "served via US Mail and facsimile" on the Parent on June 15, 2010. Not having received any written response to the motion, the undersigned, on June 25, 2010, issued an Order on the School Board's Motion for Order of Protection, which provided as follows:.

1. There is no legal basis for requiring the School Board to bear the responsibility of "providing RESPONDENT'S due process hearing documents to the Administrative Law Judge."
2. The undersigned will defer ruling on the issue of whether the School Board must provide the Parent an electronic transcript of the due process hearing that is in Microsoft Word format until after the hearing begins. The parties shall confer and attempt to resolve this matter before the hearing.
3. The instant case is before the undersigned on the School Board's due process hearing request seeking a determination that its Functional Behavioral Assessment (FBA) of [REDACTED] is appropriate. The School Board filed this due process hearing request after the Parent had requested an independent FBA of [REDACTED] at public expense. The School Board's due process hearing request was made

pursuant to Florida Administrative Code Rule 6A-6.03311(6)(g), which provides as follows:

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

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

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

In view of the foregoing, the only issue to be litigated at the due process hearing in this case is the appropriateness of the School Board's FBA of [REDACTED]. No other issues, including whether a new Positive Behavioral Intervention Plan should be devised for [REDACTED], are before the undersigned, and no evidence, either testimonial or documentary, regarding these other issues will be received at the due process hearing in this case.

4. Accordingly, the witness list that each party is required, pursuant to paragraph 3.a. of the Order of Pre-Hearing Instructions, to provide the other party and the undersigned "[n]ot less than five business days before the due process hearing is scheduled to begin" shall include only individuals who have information bearing on the issue of the appropriateness of the School Board's FBA of [REDACTED].

5. The Parent shall provide the School Board and the undersigned "[n]ot less than five business days before the due process hearing is scheduled to begin" an amended witness list that complies with this requirement.

6. The undersigned will not require the Parent "to identify the relevance of each individual listed" on the Parent's previously filed witness list, and the School Board's request that the undersigned do so is denied as unnecessary at this time. The undersigned trusts that the Parent will file a streamlined, amended witness list in compliance with paragraph 5. above that includes only individuals who have information bearing on the issue of the appropriateness of the School Board's FBA of

On July 1, 2010, the Parent advised the undersigned in writing that she had "filed in federal court." Appended to the Parent's written advisement was a copy of the first page of the pleading that she had "filed in federal court," on which the following "appeal issues" were listed:

1. I appeal Administrative Law Judge Stuart M. Lerner's decision that the SCHOOL BOARD OF BROWARD COUNTY does not have to take me to due process within 45 days of my request for an independent functional behavioral assessment and an independent positive intervention plan.

2. I appeal Administrative Law Judge Stuart M. Lerner's decision granting the SCHOOL BOARD OF BROWARD COUNTY a time extension because school staff are on vacation and unavailable.

3. I appeal Administrative Law Judge Stuart M. Lerner's decision that the school

Attorney does not have to take me to hearing on my request for an independent positive behavior plan since the SCHOOL BOARD OF BROWARD COUNTY is not taking me to Due Process.

4. I appeal Administrative Law Judge Stuart M. Lerner's decision to refuse to order a transcript of the pre-hearing at no cost to me.

5. I appeal Administrative Law Judge Stuart M. Lerner's decision that I should file a due process hearing on my request for an independent positive behavior intervention plan.

6. I appeal the decision and policy of the SCHOOL BOARD OF BROWARD COUNTY to take me to Due Process hearing when they are aware that their functional behavior assessment and positive behavior plan are not appropriate making the due process ordered a frivolous hearing.

The following day, July 2, 2010, the School Board filed a Status Report, which provided, in pertinent part, as follows:

4. In the afternoon of July 1, 2010, the undersigned again emailed [REDACTED]'s mother regarding settlement and proposed four undisputed facts for her consideration. Exhibit "C."

5. [REDACTED]'s mother responded to the afternoon of July [1], 2010 email by stating that she had filed in federal court. Exhibit "C."

6. The undersigned inquired whether [REDACTED]'s mother was going to request a continuance of the due process hearing, as the undersigned did not believe that the filing in federal court automatically stopped the due process. Exhibit "C."

7. ■■■'s mother did not respond to the undersigned's query regarding the possibility of resolution, proposed undisputed facts, or, the continuance of the due process hearing.

8. Therefore, this Statu[s] Report is written in response to the Administrative Law Judge's Order of Pre-Hearing Instructions that the instant case has not been resolved and there are no facts that are undisputed.

Thereafter, on July 8, 2010, in light of these filings, the undersigned issued an Order Concerning Due Process Hearing, which provided as follows:

The due process hearing in the instant case is presently scheduled for July 13, 2010. To date, neither party has filed a motion requesting a continuance of the due process hearing on the ground that the Parent has "filed in federal court," nor has the federal court ordered that the due process hearing not be held as scheduled. The undersigned is unaware of any legal requirement that this case not go forward under the foregoing circumstances. Accordingly, the due process hearing in this case will be held as scheduled on July 13, 2010.

The undersigned has instructed his legal assistant to e-mail a copy of this Order to the parties.

On July 12, 2010, the Parent filed a Motion to Dismiss, arguing that the School Board failed to timely initiate the instant due process proceeding and "therefore must provide [the] IEE [the Parent has requested] at public expense." That same day, the School Board filed a response in opposition to the

Parent's Motion to Dismiss. Thereafter, still on July 12, 2010, the undersigned issued an Order advising the parties that he would "hear argument from the parties on the Parent's Motion to Dismiss at the outset of the due process hearing in this case, which is presently scheduled for July 13, 2010."

The due process hearing was held as scheduled, but not completed, on July 13, 2010. After seeking and obtaining input from the parties, the undersigned, on July 14, 2010, issued an Notice of Resumption of Due Process Hearing, informing the parties that the due process hearing in this case would resume at 8:45 a.m. on July 29, 2010.

On July 23, 2010, the Parent filed a motion requesting a continuance of the scheduled July 29, 2010, resumption of the due process hearing in this case because of her inability to participate in the hearing on that date. On July 27, 2010, the School Board of Broward County (School Board) filed a response to the Parent's motion. In its response, the School Board indicated that it was "prepared to proceed on July 29, 2010" (but it did not state that it was opposed to the requested continuance). On July 27, 2010, the undersigned issued an Order on the Parent's motion, which provided, in pertinent part, as follows:

Upon consideration, it is hereby ORDERED:

1. Good cause having been shown, the Parent's motion for continuance is granted, and the scheduled July 29, 2010, hearing session is cancelled.

2. No later than August 3, 2010, the parties shall advise the undersigned in writing of those dates on which they will be unavailable for the resumption of the due process hearing in this case, along with a brief explanation, for each date of unavailability, as to why they will be unavailable on that date. The parties are encouraged to confer and file a joint written advisement. If each party files its own written advisement, a copy of such written advisement must be served on the opposing party pursuant to Florida Administrative Code Rule 28-106.104(4).

3. The undersigned will, after August 3, 2010, reschedule the resumption of the due process hearing in this case.

4. The final order deadline is extended pursuant to paragraph 6 of the Order of Pre-Hearing Instructions. (The length of the extension will depend on when the due process hearing in this case is rescheduled to resume.)

The School Board and the Parent filed separate responses to the undersigned's July 27, 2010, Order on August 3, 2010. On that same day (August 3, 2010), the undersigned issued a Notice of Resumption of Due Process Hearing by Video Teleconference, advising the parties that "the due process hearing in this case w[ould] resume by video teleconference on August 23, 2010^[2] (from 1:00 p.m. to 5:00 p.m.) and, if additional time [was] necessary, on August 25, 2010 (from 9:00 a.m. to 5:00 p.m.), at

sites in Broward County and Tallahassee, Florida" specified in the Notice. The undersigned further advised in the Notice that:

The length of the additional extension of the final order deadline (referred to in paragraph 4. of the undersigned's July 27, 2010, Order Granting Continuance) is 41 days, which is the amount of time between the first hearing session (July 13, 2010) and the now scheduled date of the second hearing session (August 23, 2010).

The Notice was subsequently amended to reflect that the hearing session on August 23, 2010, would begin at 9:00 a.m. instead of at 1:00 p.m.

The due process hearing resumed at 9:00 a.m. on August 23, 2010, as scheduled. The August 23, 2010, hearing session ended early (to accommodate the Parent, who had an appointment to speak with a surgeon treating one of her children), and "additional time [was therefore] necessary" to finish the hearing.

On August 25, 2010, shortly before the due process hearing was scheduled to resume again, the undersigned's legal assistant received the following e-mail from [REDACTED]'s father:

Please inform Honorable Judge Lerner that I am writing on behalf of my wife Ms. [REDACTED], who is representing [REDACTED] herein]. Yesterday evening she suffered a medical emergency and had to be taken to the emergency room. She is not well, and it will take her several days to recover. She is being closely monitored by her doctors.

She was aware of the hearing today but given the circumstance she will not be able to participate in the proceedings. I will be sending a letter from her doctor . . . to formally excuse her absence.

At approximately 8:45 a.m., the undersigned (who was at the Tallahassee hearing site) went on the record and read the father's e-mail to the School Board attorney, Barbara Myrick, Esquire (who was at the Lauderdale Lakes hearing site). Ms. Myrick expressed the view that it would be inappropriate to go forward with the hearing in the Parent's (█████'s) absence. The undersigned agreed, and he therefore cancelled the hearing session scheduled for that day. Later that day, he issued an Order which provided, in pertinent part, as follows:

No later than August 31, 2010, the parties shall confer and file a joint written advisement informing the undersigned of those dates on which they will be unavailable for the resumption of the due process hearing in this case. The undersigned will, after receiving this joint written advisement, reschedule the resumption of the due process hearing in this case. Before doing so, however, he may, if he believes it would be helpful, have the parties participate in a brief telephone conference call with him to discuss the matter. Accordingly, the parties shall, in their joint written advisement, also indicate when they would be available for any such telephone conference call were the undersigned to decide, after receiving the advisement, to have one.

The final order deadline is extended pursuant to paragraph 6 of the Order of Pre-Hearing Instructions. (The length of the

extension will depend on when the due process hearing in this case is rescheduled to resume.)

The undersigned has instructed his legal assistant to email a copy of this Order to the parties.

On September 1, 2010, the School Board filed a Notice of Communication with Respondent and Dates of Unavailability for Continuance of Due Process Hearing. Appended thereto as an "exhibit" ("Exhibit A") was an August 30, 2010, e-mail from the Parent to the School Board attorney advising that the Parent would "no longer be participating in the [due process] hearing." On September 2, 2010, the undersigned issued a Notice of Resumption of Hearing by Telephone, which provided as follows:

Having reviewed the School Board's Notice of Communication with Respondent and Dates of Unavailability for Continuance of Due Process Hearing (filed on September 1, 2010) and the "exhibit" ("Exhibit A") attached thereto (an August 30, 2010, e-mail from the Parent to the School Board attorney advising that the Parent would "no longer be participating in the [due process] hearing"), the undersigned hereby gives notice that the due process hearing in this case will resume by telephone on September 15, 2010, starting at 9:00 a.m., at sites in Broward County and Tallahassee, Florida. The Broward County site will be the 11th Floor Conference Room at the School Board's offices located at 600 Southeast Third Avenue, Fort Lauderdale, Florida (which location shall be equipped with a functioning speakerphone). The Tallahassee site will be at the Division of Administrative Hearings, the DeSoto Building, 1230 Apalachee Parkway. The

Administrative Law Judge will be at the Tallahassee site. All other hearing participants (including the court reporter retained by the School Board to record the due process hearing) shall report to the Broward County site. The School Board shall initiate this telephonic hearing session by calling (at 9:00 a.m. on September 15, 2010), on the speakerphone at the Broward County site, the following telephone number: (850)488-9675, extension 245.

Pursuant to paragraph 6 of the Order of Pre-Hearing Instructions, the final order deadline is extended an additional 23 days, which is the amount of time between the last hearing session at which evidence was taken (August 23, 2010) and the scheduled September 15, 2010, hearing session.

The undersigned has instructed his legal assistant to e-mail a copy of this Order to the parties.

The hearing resumed, as scheduled, on September 15, 2010, and was completed on that date. Neither the Parent, nor anyone representing her or ■■■, made an appearance at either the Broward County or Tallahassee hearing site.

Over the three days of the due process hearing (July 13, 2010, August 23, 2010, and September 15, 2010), five witnesses testified (Christine Orlando, Mary Whalen, Felicia Starke, Marian Klinger, and Christine Reeve, Ph.D.), and six exhibits were offered and received into evidence (Petitioner's Exhibits 2 (pages 5 through 9 only), 4, 5, 8 (pages 89 and 90 only), 13, and 19.

On September 15, 2010, following the conclusion of the hearing, the undersigned issued an Order Concerning Deadlines for the Filing of Proposed Final Orders and Issuance of the Final Order, which provided as follows:

As the undersigned announced at the September 15, 2010, hearing session in this case (after the close of the evidentiary record): 1) if a party desires to file a proposed final order, it must do so no later than October 22, 2010, and 2) given this October 22, 2010, proposed final order filing deadline, the deadline for the issuance of the final order has been extended to November 15, 2010.

The Transcript of the due process hearing (consisting of four volumes) was filed with DOAH on October 1, 2010.

The School Board timely filed its Proposed Final Order on October 22, 2010. To date, the Parent has not filed a post-hearing submittal.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, including the parties' Joint Stipulation of Facts, the following findings of fact are made:

1. The School Board is a district school board responsible for the operation, control and supervision of all public schools (grades K through 12) in Broward County, Florida (including,

among others, [REDACTED] Elementary School) and for otherwise providing public instruction to school-aged children in the county.

2. [REDACTED] Elementary School ([REDACTED]) has a four-classroom suite where students with Autism Spectrum Disorder (ASD) are "clustered." Two of these "self-contained" classrooms are for students with "more complex[] needs" (Complex Needs Classrooms) Mary Whalen teaches in one of these two Complex Needs Classrooms. A paraprofessional is assigned full-time to her classroom.

3. Ms. Whalen's classroom has a square "main area" that is approximately 20 feet by 20 feet in size. Off this "main area" is an "alcove that does not have doors" and is used as a "play area." There are two other areas in the classroom that do have doors: a "storage room" and a "sensory room" (or "sensory area"). The door to the "sensory room" (or "sensory area") is kept propped open all of the time.

4. Ms. Whalen has a Florida educator's certificate in the area of varying exceptionalities. Since 1987, she has been teaching "in . . . classroom [settings with] . . . children . . . on the spectrum" (first in Pennsylvania and then in Florida). The last nine years, she has done her teaching in "autism cluster classes." She has been at [REDACTED] since 2007.

5. Christine Orlando is now, and has been since 2003, the Autism Coach at [REDACTED]. It is her responsibility to provide "support" to the students, teachers, and staff in the school's four "autism cluster" classrooms (including Ms. Whalen's). She spends more of her time during the school day (approximately one to three hours per day) in the Complex Needs Classrooms than in the other two "autism cluster" classrooms at the school.

6. Ms. Orlando has a master's degree in varying exceptionalities. Her Florida educator's certificate is in the areas of varying exceptionalities and elementary education. She has been employed by the School Board for the last 16 years.

7. Ms. Whalen and Ms. Orlando have both received training in the conducting of FBAs.

8. A fourth staff member (in addition to Ms. Whalen, her paraprofessional, and Ms. Orlando) who has occasion to be present, on a regular basis, in Ms. Whalen's classroom (for approximately an hour each school day) is the speech language pathologist (J. Mehlman) who serves the students in the school's four "autism cluster" classrooms.

9. [REDACTED] is a [REDACTED]-year-old who is eligible to receive special education and related services as a student with ASD, a student with language impairments, and a student who requires occupational therapy. After having gone to a private preschool (Baudhuin Preschool), [REDACTED] attended [REDACTED] for the 2008-2009

school year (as a kindergartener) and for the 2009-2010 school year (as a first grader). Ms. Whalen was ■■■'s classroom teacher both of these school years. While ■■■ spent most of the school day in Ms. Whalen's "self-contained" classroom, ■■■ did have occasion (during "lunch, specials, recess, [and] playground") to be in a "general education setting." During the 2009-2010 school year, there were three to four other students (in addition to ■■■) in Ms. Whalen's class.³

10. Three FBAs of ■■■ have been conducted: one in preschool, one in ■■■'s kindergarten year, and one in ■■■'s first-grade year. It is the appropriateness of the latter FBA (the one conducted in ■■■'s first-grade year, during the 2009-2010 school year, hereinafter referred to as the "Subject FBA") that is at issue in the instant due process proceeding.

11. The Subject FBA was undertaken because of the persistence of the "behavioral difficulties" that were "interfering" with ■■■'s "accessing ■■■ education."

12. Marian Klinger, a Program Specialist for Behavior with the School Board, was the "leader" of the team that worked on and developed the Subject FBA, a role for which she was well qualified. The other members of the team included Ms. Whalen, Ms. Orlando, and the Parent. All School Board personnel on the team were sufficiently trained and knowledgeable to assume their respective roles.

13. Ms. Klinger is a board-certified Assistant Behavior Analyst. She has a master's degree in special education, and her Florida educator's certificate covers the areas of varying exceptionalities and learning disabilities.

14. Under Ms. Klinger's leadership, the team, starting at the very beginning of the 2009-2010 school year, systematically, over a period of time, employing technically sound, reliable, race and culture-neutral "measures," obtained information from a variety of sources about ■■■ and about the impact contextual variables have on ■■■'s behavior in an effort reasonably designed to shed light on why, at school, ■■■ was engaging in "[t]antrum/aggressive behaviors: kicking objects/people, throwing objects, screaming/crying, pulling adults['] hair, [and] attempting to bite" and in "[a]voidance behaviors: dropping to [the] ground, hiding under furniture, [and] running away from [an] assigned area." These so-called "target behaviors" were selected for study by the team because "[t]hey were considered the most problematic at the time."

15. The team gathered the information it needed through a review of ■■■'s records (including materials such as prior FBAs, IEPs, evaluations, and "home notes"); interviews and less formal discussions with persons who personally interacted with ■■■ and, as a result, had direct knowledge of ■■■'s behavior (including the Parent, Ms. Whalen, and Ms. Mehlman); an "informal"

interview with ■■■, during which ■■■ was asked to select preferred items and activities (to be used as "reinforcers") from "visuals" on a "choice board"; Ms. Klinger's "direct observations" of ■■■ in Ms. Whalen's classroom on September 1, 2009, and September 21, 2009; and "daily data collection." It is standard practice to use these types of information-gathering "measures" in conducting FBAs.

16. Of these "measures," the one perhaps yielding the most detailed information about the "target behaviors" under examination was the "daily data collection."

17. For this "daily data collection," Ms. Klinger devised a "daily data sheet" that was used on a daily basis to chart each instance of "target behavior" engaged in by ■■■ during the school day, by describing (through the use of codes), for each such instance: the particular "target behavior" engaged in ("hitting, kicking, slapping throwing"; or "[p]ulling hair"; or "leaving area"; or "attempting to bite"; or "dropping to floor"); when and under what circumstances the behavior occurred; the specific "sensory activity [or activities]/proactive strategy [or strategies]" used by staff to deal with the behavior; whether the behavior "decrease[d]," "remain[ed] the same," or "escalate[d]"; and whether ■■■ used the "safe area," which was an "open area" in Ms. Whalen's classroom, equipped "with a bean bag, with a blanket, [and] with

other sensory items," where █████ could go to "calm . . . down" when █████ was "feeling agitated."

18. The vast majority of entries on the "daily data sheet[s]" were made by Ms. Whalen (whom Ms. Klinger trained to perform this task). The entries Ms. Whalen made were based on what she had personally observed and what had been reported to her by others who had observed █████ (when █████ was in a general education setting). On rare occasion, Ms. Orlando also recorded information on the "daily data sheet[s]."

19. Copies of completed "daily data sheet[s]" were provided to the Parent on a weekly basis.

20. A preliminary draft of the results of the Subject FBA (written by the School Board members of the FBA team) was presented to the Parent on September 10, 2009. A second draft was given to the Parent on November 6, 2009. At that time (November 6, 2009), the Parent was asked to obtain the input of █████'s "private [behavior] analyst" so it could be incorporated in the document. This was the only information that then remained to be gathered for the FBA. It was not provided, however, and, on or about January 7, 2010, the second draft (FBA Report) was "finaliz[ed]" without it.

21. The FBA Report contains sections identifying the members of the FBA team; explaining the "[r]ationale" for conducting the FBA; giving a "[p]rofile" of █████; describing the

"[t]arget behavior[s]" that were examined; indicating how information was gathered and what that information revealed; and summarizing the findings made.

22. The "Rationale" section of the FBA Report gives the following explanation as to why the FBA was undertaken:

- Behavioral concerns may result in exclusion from participation in activities or settings with peers.
- The student's behavioral difficulties persist despite consistently implemented behavior management strategies based on a less comprehensive or systematic assessment.

23. The following "Student Profile" is set forth in the FBA Report:

A. Describe the student's strengths, skills and interests:

[■] enjoys singing songs, dancing, and using manipulatives. [■.] enjoys playing on the playground equipment and activities that involve running. [■.] has good self help skills, likes to be independent, and appears confident. [■.] has good visual matching skills and is able to follow one step directions. [■.] enjoys sensory activities such as rice, water play, playdoh, using the tunnel, scooter board, spaghetti press, tent and bouncing ball. [■.] enjoys playing with a variety of toys such as cars, trains, letters, and blocks. [■.'s] favorite toys are letter blocks, fire truck, books, microphone and a peanut ball. [■.] also enjoys tickles, funny faces, and social praise. [■.] also enjoys using the computer and can navigate the internet to open sites on "favorites."

B. Describe the student's limitations:

[█.] has difficulty accepting correction or redirection. [█.] often perseverates on certain topics such as scripted movies, songs and items. [█.] demonstrates difficulty in attending and participating in activities. [█.] also has difficulty transitioning from highly preferred activities. [█.] has weak expressive/receptive language skills and weak sensory integration.

24. Under "Target Behavior" in the FBA Report is the following:

What is the specific behavior identified for increase or decrease?

Description of behavior (What does the student say or do?)

1. Tantrum/aggressive behaviors: kicking objects/people, throwing objects, screaming/crying, pulling adults['] hair, [and] attempting to bite.
2. Avoidance behaviors: dropping to ground, hiding under furniture, [and] running away from [an] assigned area.

Baseline Estimate (how often, how long)

1. These behaviors [Tantrum/aggressive behaviors] were occurring 3-6x per day from August through October 16, 2009. Tantrums can last from 15 minutes to 3 hours in duration.
2. These behaviors [Avoidance behaviors] were occurring 2-10x per day. These behaviors range from 5 to 30 minutes.

25. The FBA Report states the following regarding the "[r]ecords" that were reviewed as part of the assessment process:

What records were reviewed?

Curriculum/IEP

What relevant information was obtained?

As stated in the social/emotional behavior PLP section of [█.'s] current IEP, [█.] initiates social interactions with adults by smiling, making eye contact, saying "hi" to them and by touching them . [█.] initiates social interactions with [█.'s] peers by smiling, looking at them and by touching them. In non-heightened situations [█.] protests by saying "no, no . . ." and names the item [█.] does not want. In less-heightened situations [█.] may toss, crush, and bang classroom items, lie on the ground or crawl under furniture. In emotionally heightened situations [█.] may, kick and hit adults and peers, pull [an] adult['s] necklace, throw classroom materials and elope within the classroom to the hallway and to outside areas. This usually occurs when transitioning from home to school, when [█.] desires a highly preferred item, when there is a change in routine, when [█.] wants to go home, when [█.] is forced to transition to a non-preferred activity, when [█.] doesn't feel well, when an activity is difficult, when [█.] is frustrated and when [█.'s] demands are not immediately met. When moderately distressed[,] given wait time and no physical contact[,] [█.] will self-modulate and then join the class activity. If forced to join a non-preferred activity immediately [█.'s] distress may escalate.

In the play area with adult facilitation [█.] will enact play scenarios with large

blocks, a truck and a doll house. [█.] makes a trade of a non-preferred toy given adult facilitation and uses the visual "my turn" given physical, gestural, verbal and visual prompts.

Reinforcers that [█.] currently likes are pretzels, cake, donuts and starburst. Other preferred classroom items often change on a daily basis, but include markers, bubbles, letters, sensory items, cars, trains, [and] view master.

Previous interventions

What relevant information was obtained?

A Functional Behavior Assessment was conducted at █ Preschool in 7/07 and a PBIP was implemented. In the 08/09 school year, [█.] attended kindergarten at █ and PBIP was revised and implemented in the new setting. Interventions that worked included fading out adult proximity and allowing [█.] to calm down independently. [█.] also enjoyed watching a movie ([█.'s] transition object) prior to the arrival bell ringing in the morning.

Anecdotal/home notes

What relevant information was obtained?

The home notes provide information on the activities [█.] did that day and [█.'s] behavior throughout the morning. The parent can also report what happens in the evening. Parent is also given a copy of "Daily Data Collection" of proactive strategies, sensory activities, and details [█.'s] behavior during all activities. This is shared weekly.

Other records

What relevant information was obtained?

Communication Evaluation was conducted on 10/19/07 w[h]ere i[t] was determined that [█.] had delays in expressive, receptive and pragmatic language.

Records were reviewed by: Behavior Specialist

26. The interviews that were done as part of the assessment process are described the "Indirect Assessment" section of the FBA Report, which reads as follows:

Indirect Assessment:

What indirect assessments were conducted?

Parent(s)

What were the results of the Indirect Assessment?

Based on interview with parent, Mrs. [█.] stated that [█.] enjoys following along with other children, enjoys singing, follows routines well and is very animated. She also stated that [█.] becomes frustrated when [█.] can't express [█.'s] wants and needs. [█.] will tantrum when there are changes in routine or staff. Mrs. [█.] feels that [█.] would benefit from learning to self-regulate, increased language instruction, and consistency in both home and school. Mrs. [█.] also stated that behaviors will be demonstrated if [█.] does not eat breakfast/lunch/snack. [█.] is a picky eater and often wants the same food items for lunch. At a parent conference, mom stated that [█.] responds better to different staff members and using a firm, nurturing tone of voice is more effective in getting compliance. She said [█.] feels happier at school this year. They are currently working with a behaviorist in the home and the strategies will be shared between the school and home. Mom commented

that the sensory room that was being used last year has affected [█.'s] anxiety level and the aggressive behaviors toward others (peers, adults and mom) has increased. Mom [is] concerned that on one occasion [█.] crawled into the class when [█.] came to school and she felt this was not appropriate. The teacher asked [█.] to stand up and walk, [█.] would not, but independently [█.] went into the class.

ESE Teacher(s)

What were the results of the Indirect Assessment?

Based on interview with ESE teacher, Ms. Whalen stated that [█.] has good self help skills, likes to be independent and when motivated, [█.] will use previously taught language skills. [█.] has difficulty with changes in routine especially in activities [█.] is used to doing a certain way. Last year [█.'s] mornings were better and afternoons not good (we had a very early lunch and [█.] just wanted to go home). This school year, lunch is later in the day and [█.] usually leaves after lunch. The morning routine is more difficult because [█.] has to wait longer for lunch, interact more often with peers and adults and complete more academic demands. At times [█.] does try to verbally engage other students in the activity that they are doing in the class. Ms. Whalen feels that [█.] would benefit from learning strategies for handling frustrating situations, improving [█.'s] expressive language skills, attending school daily and consistency in routines both at home and school.

Related Service Provider(s)

What were the results of the Indirect Assessment?

Based on interview with S/L Pathologist:
Ms. Mehlman stated that [█.] enjoys singing.
[█.] reacts positively to verbal praise and
enjoys sensory activities. She also stated
that [█.] has difficulty with transitions
and needs to know what is coming next or
[█.] will resist transition. Ms. Mehlman
feels that [█.] would benefit from learning
coping skills and developing better
communication skills.

Indirect Assessments were conducted by:
Behavior Specialist, ESE Provider.

27. The "Direct Assessment" section of the FBA Report
describes the "[d]irect [o]bservations" that were made as part
of the assessment process. It reads as follows:

Direct Assessments

What direct assessments were conducted?

Direct Observation

What were the results of the Direct
Assessment?

Observation: classroom-9/1/09 9:50-11:45

[█.] transitioned to snack, came in from
recess- [█.] did not want to go to circle-
[█.] is at snack, told [█.'s] para "my teeth
hurt, pull"- [█.'s] front tooth is loose
and [█.] is playing with it. [█.] begins to
take cheese puffs from the other students,
wants to get more food- got up, sat down
and asked "I want my lunch box" [█.] asked
for more cheese puffs- said "thank you."
[█.] transitioned to circle time and then to
work with [█.'s] teacher, working on reading
program "my sound book." [█.] was earning 5
token[s] = water. [█.] earned [█.'s]
reinforcement. [█.] then transitioned to
the lesson table and completed 7 activities.
[█.] used a transition object to transition

to the table. Went to speech and enjoyed making choices, bubbles, story, puzzles, [and] clapping. [█.] was happy, and laughing during this activity.

Observation- office/classroom 9/21/09
8:05-8:45

[█.] was outside with [█.'s] mom. [█.] did not want to come in, [█.] was sitting on the bench. She got [█.] into the school, and then [█.] ran back to class. [█.] was throwing items, dropped to the floor, kicking and pulling [█.'s] shirt. [█.] ran into the morning circle area and knocked items off of the shelf. Teacher brought [█.] a visual- what do you want- [█.] picked "play." [█.] went to play and when play was finished [█.] was asked to join circle for [█.'s] favorite "train" song. [█.] did and then ran out of the room. [█.] was asked, first, get up- then train song. Prompt to stand up by yourself or with help, [█.] needed help and then [█.] went to circle time.

Scatter Plot

What were the results of the Direct Assessment?

Based on the scatter plot and a time sampling, behaviors tend to occur more frequently upon arrival to school during the transition from car to building, or when [█.] is waiting in the front office for someone to come get [█.]. There is a pattern of aggressive behavior and avoidance behaviors occur[ing] more often on the 1st day back after a weekend or when [█.] is absent.

ABC - recording

What were the results of the Direct Assessment?

The antecedent to most problem behaviors occurs when a task demand is asked of [█.]. Also, when [█.] is denied a request that is something that is not at school i.e. going to Dominos, Burger King or home/mommy.

Other

What were the results of the Direct Assessment?

A direct observation was conducted by the home behavior analyst on 9/21/09.[⁴]

Direct Assessment/Observations were conducted by: Behavior Specialist

28. According to the FBA Report, the following are "[s]etting [e]vents" for █ (i.e., "variables that appear to be affecting [█'s] behavior"):

When arriving to school and coming in the office, when hungry/thirsty/tired or sick. When changes in routine occur. During non-preferred activities or ending highly preferred activities. When denied objects or activities. When activities are too difficult.

29. The FBA Report concludes with the following "Summary (Hypothesis) Statements":

Pattern: What patterns were identified in the data collected? (i.e. circumstances in which the behavior is most likely/least likely; possible functions of the behavior)

When this occurs (describe the circumstances): When denied a preferred item or activity

the student does (describe the behavior): [█.] may demonstrate tantrum behaviors

to get, or avoid (describe consequences):
In order to get the preferred item or activity.

When this occurs (describe the circumstances): When made to transition to activities during the morning rotation schedule (when there are social requirements or specified undesired task demands and directions).

the student does (describe the behavior):
[█.] may demonstrate tantrum behaviors

to get, or avoid (describe consequences):
In order to avoid the demand.

When this occurs (describe the circumstances): When hungry, thirsty, feeling ill or tired.

the student does (describe the behavior):
[█.] may demonstrate tantrum behaviors

to get, or avoid (describe consequences):
In order to communicate his wants, needs or feelings.

As a result of the FBA, what are the outcomes?

A Positive Behavior Intervention Plan will be developed or revised.

30. A Positive Behavior Intervention Plan was thereupon implemented.

31. At an IEP meeting for █ held on March 24, 2010, the Parent mentioned that "she was not in agreement with the

behavior plan and wanted an independent evaluation." Ms. Klinger was among those present at the meeting.

32. It is "[s]tandard operating procedure[]" for School Board staff to notify the district office, through one of the two School Board Due Process Coordinators in the office, "if there is a request made for an independent educational evaluation."

33. The district office was not notified of the above-described statement made by the Parent at the March 24, 2010, IEP meeting, wherein she expressed her disagreement with ■■■'s Positive Behavior Intervention Plan and her desire to have an "independent evaluation." The School Board staff present at the meeting believed that the development of an independent Positive Behavior Intervention Plan to replace the School Board-developed plan then in place (which, it appeared, was what the Parent wanted) was premature because a School Board reevaluation, which had a "behavioral piece [as] part of [it]," was still in the process of being completed.⁵

34. On May 12, 2010, the Parent sent the following e-mail to Ms. Klinger:

What [■■.] needs is a proper and updated FBA by an independent BCBA and an effective BIP as I have been requesting for months.^[6] Changes to the BIP have been made without my consent or participation.

Clearly what the school is doing is not working. Also, pacifying [■.] with food and play does not provide [■.] with an appropriate education.

A tent is not evidence based or appropriate. I have told school staff this repeatedly.

35. The following day, May 13, 2010, Ms. Klinger sent a copy of the Parent's May 12, 2010, e-mail to Felicia Starke, one of the School Board's Due Process Coordinators. Ms. Starke reasonably beleived it would helpful to have the Parent clarify whether she was formally asking the School Board to provide an independent FBA at public expense. Ms. Starke, therefore, later that same day (May 13, 2010), made the following request to the Parent in an e-mail:

This morning I was forwarded an email from Marian Klinger (see email below). It appears in your email you are requesting an Independent Educational Evaluation for an FBA for [■.] Could you please confirm if this is a formal request for this? As you are aware, if you are requesting an IEE for an FBA, the District has a responsibility to respond and either approve the request or file a Due Process to defend our evaluation. Please let me know so that we know how to proceed to assist [■.].

36. Not yet having heard back from the Parent, Ms. Starke, on May 25, 2010, sent the Parent another e-mail. It read as follows:

On May 13, 2010, I sent you an email (see below) in response to an email you sent to Marian Klinger. To date, May 25, 2010, there has been no response to my email. As

I stated previously, please confirm if you are requesting an IEE for an FBA. If so, I will review your request. If I do not hear from you by Friday, May 28, 2010, I will proceed as if it is [a] formal request and will provide you with a response to your request.

37. The Parent responded to Ms. Starke (and other School Board personnel) on May 28, 2010, through an e-mail which read as follows:

I am demanding an Independent Functional Behavior Assessment and a positive behavior intervention plan that is not an environmental control plan. Do you know the difference? I do not believe that you do because the behavior plan that [the] school created for my [REDACTED] is an environmental control plan with nothing to address his anxiety and fears from when [REDACTED] school staff abused [REDACTED] at the beginning of this school year.

I expect the district to pay for a professional to do the FBA and then formulate a real positive behavior intervention plan since I know you have never written one before. My [REDACTED] needs counseling and to be taught coping skills to learn to control [REDACTED] behaviors that are manifestations of [REDACTED] Autism. Your school staff abused my [REDACTED] instead of providing [REDACTED] with interventions and an ABA program to address [REDACTED] behaviors that are from [REDACTED] Autism.

Instead, [REDACTED] is the end product of your eclectic approach. [REDACTED] has lost the most important years of [REDACTED] life because of BCS district policy of refusing ABA to all children with Autism.

At the truancy meeting it was strongly recommended that I go and deal

with . . . Ms. Klinger She is not capable of writing a behavior plan that is not a[n] environmental control plan.

This is why I want a professional who knows how to do an FBA and develop an PBIP. I expect to prove at the due process hearing that the behavior plan has failed. Unlike [█.'s] hearing where the ALJ refused to discuss the failure of the PBIP, because she did not ask for a PBIP, I am sure that we will go over the failure of your past, present and new PBIP.

I am requesting that BCBA Rene Saulnier conduct an FBA and a PBIP. . . .

38. Ms. Klinger spoke with Ms. Klinger, Ms. Orlando, and Ms. Whalen to determine whether the Subject FBA was "accurate and appropriate." After having done so, she made the decision to file a request for a due process hearing so that the School Board would have the opportunity to defend the appropriateness of the Subject FBA. The request was filed with DOAH on June 9, 2010.

CONCLUSIONS OF LAW

39. District school boards are required by the "Florida K-20 Education Code"⁷ to "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students [ESE] as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) and 1003.57, Fla. Stat.

40. "Exceptional students," as that term is used in the "Florida K-20 Education Code," are students who have "been

determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who have an intellectual disability; autism spectrum disorder; a speech impairment; a language impairment; an orthopedic impairment; an other health impairment; traumatic brain injury; a visual impairment; an emotional or behavioral disability; or a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; students who are deaf or hard of hearing or dual sensory impaired; students who are hospitalized or homebound; children with developmental delays ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e)." § 1003.01(3)(a), Fla. Stat. It is undisputed that [REDACTED] is an "exceptional student," as that term is used in the "Florida K-20 Education Code."

41. An "initial evaluation" is required before a student is determined to be an "exceptional student" eligible to receive ESE. Fla. Admin. Code R. 6A-6.0331(3). Florida Administrative Code Rule 6A-6.0331(3)(c) provides as follows with respect to such "initial evaluations":

The school district shall be responsible for conducting all initial evaluations necessary to determine if the student is eligible for

ESE and to determine the educational needs of the student. Such evaluations must be conducted by examiners, including physicians, school psychologists, psychologists, speech-language pathologists, teachers, audiologists, and social workers who are qualified in the professional's field as evidenced by a valid license or certificate to practice such a profession in Florida. In circumstances where the student's medical care is provided by a physician licensed in another state, at the discretion of the district administrator for exceptional student education, a report of a physician licensed in another state may be accepted for the purpose of evaluation and consideration of eligibility as a student with a disability. Educational evaluators not otherwise covered by a license or certificate to practice a profession in Florida shall either hold a valid Florida teacher's certificate or be employed under the provisions of Rule 6A-1.0502, F.A.C.

1. Tests of intellectual functioning shall be administered and interpreted by a professional person qualified in accordance with Rule 6A-4.0311, F.A.C., or licensed under Chapter 490, F.S.

2. Standardized assessment of adaptive behavior shall include parental input regarding their student's adaptive behavior.

42. Once a student has been determined to be eligible to receive ESE, the following "reevaluation requirements," set out in Florida Administrative Code Rule 6A-6.0331(7), must be met:

(a) A school district must ensure that a reevaluation of each student with a disability is conducted in accordance with Rules 6A-6.03011 through 6A-6.0361, F.A.C., if the school district determines that the educational or related services needs, including improved academic achievement and

functional performance, of the student warrant a reevaluation or if the student's parent or teacher requests a reevaluation.

(b) A reevaluation may occur not more than once a year, unless the parent and the school district agree otherwise and must occur at least once every three (3) years, unless the parent and the school district agree that a reevaluation is unnecessary.

(c) Each school district must obtain informed parental consent prior to conducting any reevaluation of a student with a disability.

(d) If the parent refuses to consent to the reevaluation, the school district may, but is not required to, pursue the reevaluation by using the consent override provisions of mediation or due process. The school district does not violate its child find, evaluation or reevaluation obligations if it declines to pursue the evaluation or reevaluation.

(e) The informed parental consent for reevaluation need not be obtained if the school district can demonstrate that it made reasonable efforts to obtain such consent and the student's parent has failed to respond.

43. Florida Administrative Code Rule 6A-6.0331(5) prescribes the following "[e]valuation procedures" governing "initial evaluations" and "reevaluations," as appropriate:

(a) In conducting an evaluation, the school district:

1. Must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may

assist in determining whether the student is eligible for ESE and the content of the student's IEP or EP, including information related to enabling the student with a disability to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), or for a gifted student's needs beyond the general curriculum;

2. Must not use any single measure or assessment as the sole criterion for determining whether a student is eligible for ESE and for determining an appropriate educational program for the student; and

3. Must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(b) Each school district must ensure that assessments and other evaluation materials used to assess a student are:

1. Selected and administered so as not to be discriminatory on a racial or cultural basis;

2. Provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;

3. Used for the purposes for which the assessments or measures are valid and reliable; and

4. Administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.

(c) Assessments and other evaluation materials shall include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(d) Assessments shall be selected and administered so as to best ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's sensory, manual, or speaking skills, unless those are the factors the test purports to measure.

(e) The school district shall use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student.

(f) A student shall be assessed in all areas related to a suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(g) An evaluation shall be sufficiently comprehensive to identify all of a student's ESE needs, whether or not commonly linked to the disability category in which the student is classified.

44. The "Florida K-20 Education Code's" imposition of the requirement that "exceptional students" receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under the Individuals with Disabilities Education Act, 20 U.S.C. §§

1400 et seq., as most recently amended (IDEA),⁸ which mandates, among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school."⁹ 20 U.S.C. § 1412(a)(1); see also Forest Grove School District v. T. A., 129 S. Ct. 2484, 2488 (2009) ("The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq., requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State."); J. P. v. County School Board of Hanover County, 516 F.3d 254, 257 (4th Cir. 2008) ("Under the IDEA, all states receiving federal funds for education must provide disabled schoolchildren with a 'free appropriate public education' ('FAPE')."); and Shore Regional High School Board of Education v. P. S., 381 F.3d 194, 198 (3d Cir. 2004) ("All states receiving federal education funding under the IDEA must comply with federal requirements designed to provide a 'free appropriate public education' ('FAPE') for all disabled children."); cf. Agency for Health Care Administration v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998) ("[A] state that has elected to participate [in the Medicaid program], like

Florida, must comply with the federal Medicaid statutes and regulations."); Public Health Trust of Dade County, Florida v. Dade County School Board, 693 So. 2d 562, 564 (Fla. 3d DCA 1996) ("The State of Florida elected to participate in the Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1994), which provides federal funds to states for the purpose of providing medical assistance to needy persons. However, once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with the federal Medicaid statutes and regulations"; held that where a Florida administrative rule is in direct conflict with federal Medicaid statutes and regulations, the federal Medicaid law governs); and State of Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976) ("Once a state chooses to participate in a federally funded program, it must comply with federal standards.").

45. Under the IDEA and its implementing regulations, a parent of a child with a disability is entitled, under certain circumstances, to obtain an independent educational evaluation of the child at public expense. The circumstances under which a parent has a right to an independent educational evaluation at public expense are set forth in 34 C.F.R. § 300.502(b), which provides as follows:

Parent right to evaluation at public expense.^[10]

(1) A parent has the right to an independent educational evaluation^[11] at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b) (2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

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

46. Florida law, specifically Florida Administrative Code Rule 6A-6.03311(6) (a), (g), (h), and (i), similarly provides as follows:

(a) A parent of a student with a disability has the right to an independent educational evaluation^[12] at public expense^[13] if the parent disagrees with an evaluation obtained by the school district.

* * *

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

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

(h) If a parent requests an independent educational evaluation, the school district may ask the parent to give a reason why he or she objects to the school district's evaluation. However, the explanation by the parent may not be required and the school district may not unreasonably delay either

providing the independent educational evaluation at public expense or initiating a due process hearing to defend the school district's evaluation.

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

47. These provisions make clear that a district school board in Florida is not automatically required to provide a publicly funded independent educational evaluation whenever a parent asks for one. It has the option, when presented with such a parental request, to file a request that DOAH conduct a due process hearing on the "appropriate[ness]" of the school board-conducted evaluation with which the parent disagrees¹⁴ (Due Process Hearing Option).¹⁵

48. At any such hearing, the district school board has the burden of proving, by a preponderance of the evidence, that its evaluation is "appropriate." See Serpas v. District of Columbia, No. 02-02227 (HHK), 2005 U.S. Dist. LEXIS 44536 *16 (D. D.C. October 28, 2005) ("Once Serpas requested an independent educational evaluation at public expense, as both parties acknowledge she did, it was DCPS's burden to demonstrate . . . that the evaluations performed by DCPS were appropriate."); and Flagler County School Board v. E. B., No. 97-1500E, 1998 Fla. Div. Adm. Hear. LEXIS 5893 *7 (Fla. DOAH May 6, 1998) (Final

Order) ("[T]he Board carries the burden of proving by a preponderance of the evidence that its evaluation of the student was 'appropriate.'). If the district school board is able to meet its burden and establish the "appropriate[ness]" of its evaluation, it is relieved of the obligation it would otherwise have had, had it not exercised its Due Process Hearing Option, to provide the requested independent educational evaluation.

49. To take advantage of the Due Process Hearing Option, a district school board must file its hearing request with DOAH "without unnecessary delay." If the district school board waits unnecessarily before filing its request, the request will be subject to dismissal. If the request is dismissed, the district school board will have no option but to "[e]nsure that an independent educational evaluation is provided at public expense," as the parent has requested, provided the matter has not become moot due to the family's relocating outside the district (and thereby relieving the school board of its responsibility to educate the student) or for any other reason.

50. The instant due process proceeding was initiated by the School Board on June 9, 2010, pursuant to 34 CFR § 300.502(b)(2)(i) and Florida Administrative Code Rule 6A-6.03311(6)(g), after the Parent had requested that the School Board pay for an independent FBA of [REDACTED]. The School Board exercised this Due Process Hearing Option in the hopes of having

the opportunity to show that the Subject FBA was appropriately done and to thereby free itself of the obligation it would otherwise have, under federal and state law, to provide the independent FBA requested by the Parent.

51. The School Board acted "without unnecessary delay" in filing its Hearing Request. The same day (May 13, 2010) she received a copy of the May 12, 2010, e-mail in which the Parent expressed the view to the School Board (for the first time, so far as the record evidence reflects) that "[w]hat [█.] needs is a proper and updated FBA by an independent BCBA," Ms. Starke reasonably responded to the e-mail by asking the Parent to provide clarification as to whether she was formally requesting a School Board-provided independent FBA of █. Upon finally hearing back from the Parent on May 28, 2010 (after having sent the Parent a second, follow-up e-mail on May 25, 2010), and learning that the Parent was "demanding an Independent Functional Behavior Assessment" that she was "expect[ing] the district to pay for," Ms. Starke took the prudent and necessary measure of investigating how the Subject FBA had been completed so as to determine whether the School Board should accede to the Parent's "demand[]" or, instead, defend the Subject FBA in a due process hearing. Within less than two weeks, Ms. Starke completed her investigation, determined that the Subject FBA should be defended, and filed the Hearing Request. Under these

circumstances, the undersigned finds there was no "unnecessary delay" on the School Board's part in initiating the instant due process proceeding. Cf. J. P. v. Ripon Unified School District, No. 2:07-cv-02084-MCE-DAD, 2009 U.S. Dist. LEXIS 32035 **20-21 (E.D. Cal. April 14, 2009) ("[E]ven after Plaintiffs' IEE request was tendered, the parties continued to discuss provision of an IEE through a series of letters. The evidence shows that the parties did not come to a final impasse in that regard until February 7, 2007, less than three weeks before the District's due process report was filed. Additionally, as also noted by Defendant, the District's Winter Break also began immediately after the Plaintiffs' IEE request on December 21, 2006, a factor that must also be considered in determining the timeliness of the District's due process request. Whether or not unwarranted delay has occurred must be determined given the facts of each particular case. Given the circumstances present here, the Court cannot say that "unnecessary delay" was present so as to invalidate the underlying due process request made by the District in this matter. Plaintiffs' request that the District's due process request be invalidated on timeliness grounds is therefore denied."). Accordingly, the Parent's Motion to Dismiss is denied.

52. By filing its Hearing Request, the School Board evinced its agreement with the Parent that an FBA is an "educational evaluation," within the meaning of 34 C.F.R. § 300.502(b)¹⁶ and Florida Administrative Code Rule 6A-6.03311(6),¹⁷ and therefore may be the subject of a parental request for a publicly funded "independent educational evaluation."¹⁸ See Harris v. District of Columbia, 561 F. Supp. 2d 63, 68 (D. D.C. 2008) ("[A]n FBA is an "educational evaluation" for purposes of Section 300."); K.B. v. Haledon Board of Education, No. 08-4647 (JLL), 2010 U.S. Dist. LEXIS 51337 *13 (D. N.J. May 24, 2010) ("Given Defendant's failure to utilize the appropriate procedural route to avoiding independent evaluations of J.B., this Court finds that Plaintiffs are entitled to independent evaluations consisting of an FBA, a psychiatric assessment, and an educational evaluation."); Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSERS June 1, 2009) ("Question E-5: If a parent disagrees with the results of an FBA, may the parent obtain an independent educational evaluation (IEE) at public expense? Answer: Yes. The parent of a child with a disability has the right to request an IEE of the child, under 34 C.F.R. § 300.502, if the parent disagrees with an evaluation obtained by the public agency. However, the parent's right to an IEE at public expense is subject to certain conditions, including the LEA's option to

request a due process hearing to show that its evaluation is appropriate. See 34 C.F.R. § 300.502(b)(2) through (b)(5). The Department has clarified previously that an FBA that was not identified as an initial evaluation, was not included as part of the required triennial reevaluation, or was not done in response to a disciplinary removal, would nonetheless be considered a reevaluation or part of a reevaluation under Part B because it was an individualized evaluation conducted in order to develop an appropriate IEP for the child. Therefore, a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP also is entitled to request an IEE. Subject to the conditions in 34 C.F.R. § 300.502(b)(2) through (b)(5), the IEE of the child will be at public expense."); Letter to Christiansen, 48 IDELR 161 (OSEP February 9, 2007) ("If an FBA is used to evaluate an individual child in accordance with 34 C.F.R. §§ 300.304 through 300.311 to assist in determining whether the child is a child with a disability and the nature and extent of special education and related services that the child needs, it is considered an evaluation under Part B and the regulation at 34 C.F.R. § 300.15."); and Letter to Scheinz, 34 IDELR 34 (OSEP June 7, 2000) ("We believe that the functional behavioral assessment described in your inquiry, while not part of the initial evaluation or part of the required triennial evaluation, was a reevaluation under Part B. Therefore, if the

parents disagree with the evaluation, we believe that they are entitled to an IEE.").

53. The IDEA and its implementing regulations "do not specifically explain what an FBA is or what components must be included in an FBA. . . ."; nor do they "specify which individuals must conduct the FBA." Letter to Janssen, 51 IDELR 253 (OSERS June 5, 2008). They merely require that district school boards, as part of their general obligation to "ensure that all personnel necessary to carry out the purposes of Part B [of the IDEA] are appropriately and adequately prepared," "have properly trained professionals available to conduct FBAs" Id.; see also D. B. v. Houston Independent School District, No. H-06-354, 2007 U.S. Dist. LEXIS 73911 *8 (S.D. Tex. September 29, 2007) ("The requirements for an FBA are not well defined by federal law or regulation."); and 34 C.F.R. § 300.156(a) ("The SEA must establish and maintain qualifications to ensure that [district school board] personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.").

54. Florida law, however, does contain a definition of the term "[f]unctional behavioral assessment (FBA)." This

definition is found in Florida Administrative Code Rule 6A-6.03411(1)(q), which provides, as follows:

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

Functional behavioral assessment (FBA). A FBA is a systematic process for defining a student's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior. The purpose of conducting an FBA is to determine whether a behavioral intervention plan should be developed.

55. An FBA's appropriateness must be measured against what the law requires, not simply what some expert or other individual may opine is desirable or best practice. See Holmes ex rel. Holmes v. Millcreek Township School District, 205 F.3d 583, 591 (3d Cir. 2000) ("Although the Holmeses contend that the School District's evaluation was inappropriate because of the lack of expertise of the individuals who conducted it, they base their position not on statutory or regulatory language but on expert opinions which do not have the force of law. The Holmeses argue that the Pennsylvania Department of Education's 1995 Guidelines on the "Education of Students with Hearing Loss" supports their position. The Holmeses are correct that these guidelines recommend the use of a psychologist fluent in sign

language or in another form of communication preferred by the student, in evaluating hearing disabled students. These guidelines do not, however, establish law. As the Appeals Review Panel noted, these Guidelines suggest an optimum level of educational services and were made for purposes of advocacy. They were not binding on the School District at any time relevant to this suit.") (citation omitted). Accordingly, to show the appropriateness of an FBA it has conducted, a district school board must establish, not only that "properly trained professionals" were responsible for the FBA's development, but also that the FBA meets the definition of an FBA set forth in Florida Administrative Code Rule 6A-6.03411(1)(q).

56. The School Board made such a showing in the instant case. It demonstrated that the purpose behind the Subject FBA, and the process and methodology that was followed in developing it, were such to make it an FBA, as described in Florida Administrative Code Rule 6A-6.03411(1)(q). Moreover, the record evidence further establishes that the School Board personnel who were involved in the development of the Subject FBA were "properly trained" to perform their roles in the process, as required.

ORDER

In view of the foregoing, the undersigned finds that the Subject FBA is "appropriate," within the meaning of 34 C.F.R. § 300.502(b) and Florida Administrative Code Rule 6A-6.03311(6).

DONE AND ORDERED this 3rd day of November, 2010, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2010.

ENDNOTES

¹ Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2010).

² According to the parties' responses to the undersigned's July 27, 2010, Order, August 23, 2010, was the earliest date they both would be available for the resumption of the hearing.

³ The school year began with four other students in the classroom. By the end of the school year, there were three.

⁴ As noted above, the "home behavior analyst" did not share any thoughts about this observation with the team as a whole.

⁵ Ms. Klinger's testimony regarding what happened at the March 24, 2010, IEP meeting is the only record evidence on the subject.

⁶ As far as the record evidence reflects, this was the first time that the Parent expressed to the School Board her desire to have an "updated FBA by an independent BCBA." (According to Ms. Klinger's testimony, which the undersigned has credited, at the March 24, 2010, IEP meeting, the Parent had expressed her disagreement, not with the Subject FBA, but with ██████'s "behavior plan.")

⁷ Chapters 1000 through 1013, Florida Statutes, are known as the "Florida K-20 Education Code." § 1000.01(1), Fla. Stat.

⁸ "The IDEA was [most] recently amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004)," effective July 1, 2005. M. T. V. v. Dekalb County School District, 446 F.3d 1153, 1157 n.2 (11th Cir. 2006); see also Lessard v. Wilton-Lyndeborough Cooperative School District, 518 F.3d 18, 21 n.1 (1st Cir. 2008) ("The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, but the relevant amendments did not take effect until July 1, 2005.").

⁹ In Section 1003.571, Florida Statutes, which took effect on July 1, 2009, the Florida Legislature has directed that:

(1) The State Board of Education shall comply with the Individuals with Disabilities Education Act (IDEA), as amended, and its implementing regulations after evaluating and determining that the IDEA, as amended, and its implementing regulations are consistent with the following principles:

(a) Ensuring that all children who have disabilities are afforded a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(b) Ensuring that the rights of children who have disabilities and their parents are protected; and

(c) Assessing and ensuring the effectiveness of efforts to educate children who have disabilities.

(2) The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section.

¹⁰ "Public expense" as that term is used in 34 CFR § 300.502, "means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103." 34 CFR § 300.502(a)(3)(ii).

¹¹ "Independent educational evaluation," as that term is used in 34 CFR § 300.502, "means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 CFR § 300.502(a)(3)(i).

¹² "Independent educational evaluation," as that term is used in Florida Administrative Code Rule 6A-6.03311(6), "mean[s] an evaluation conducted by a qualified evaluation specialist who is not an employee of the school district responsible for the education of the student in question." Fla. Admin. Code R. 6A-6.03311(6)(c).

¹³ "Public expense," as that term is used in Florida Administrative Code Rule 6A-6.03311(6), "mean[s] that the school district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent." Fla. Admin. Code R. 6A-6.03311(6)(d).

¹⁴ "There is no Federal requirement that a parent notify the public agency in writing or in an IEP meeting that the parent will be requesting an IEE at public expense." Letter to Anonymous, 110 LRP 52283 (OSEP January 4, 2010). A verbal request, even one made outside of an IEP meeting, is sufficient to trigger the district school board's duty to act, provided that it adequately identifies the district school board evaluation with which the parent disagrees and conveys the parent's desire to have another evaluation done at public

expense. See, e.g., School Board of Lee County v. E. S., 561 F. Supp. 2d 1282, 1289 (M.D. Fla. 2008) ("The Court agrees with the magistrate judge that E.S.'s initial request for 'independent evaluations' was too vague to trigger any obligation concerning an IEE by the School Board.").

¹⁵ If there has been no school board-conducted evaluation with which the parent can disagree, there can be no parental entitlement to a publicly funded independent educational evaluation. See Hiram C. v. Manteca Unified School District, No. CIV. S-03-2568 WBS KJM, 2004 U.S. Dist. LEXIS 29175 *9 (E.D. Cal. August 26, 2004) ("[I]n order to obtain reimbursement, the parents must disagree with an evaluation that the public agency has already 'obtained.'").

¹⁶ As used in 34 C.F.R. § 300.502(b), "[e]valuation means procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 C.F.R. § 300.15.

¹⁷ As used in Florida Administrative Code Rule 6A-6.03311(6), "[e]valuation means procedures used in accordance with Rules 6A-6.03011 through 6A-6.0361, F.A.C., to determine whether a student has a disability . . . and the nature and extent of the ESE that the student needs." Fla. Admin. Code R. 6A-6.03411(1)(1).

¹⁸ A behavioral intervention plan, on the other hand, is a "related service," not an "evaluation," and therefore cannot properly be the subject of such a request. See, e.g., T. S. v. Weast, No. DKC 09-1581, 2010 U.S. Dist. LEXIS 57946 * 13 (D. Md. June 10, 2010) ("T.S. requires special education and related services including: a . . . a behavioral intervention plan").

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

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