

Broward County School District  
No. 09-0568E & 09-1233E  
Initiated By: District and Parent  
Hearing Officer: Robert E. Meale  
Date Of Final Order: September 9, 2009

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

█, )  
)  
Petitioner, )  
)  
vs. ) Case No. 09-0568E  
)  
BROWARD COUNTY SCHOOL BOARD, )  
)  
Respondent. )  
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BROWARD COUNTY SCHOOL BOARD, )  
)  
Petitioner, )  
)  
vs. ) Case No. 09-1233E  
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█, )  
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Respondent. )  
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FINAL ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing from March 31 to April 3, 2009, in Fort Lauderdale, Florida, and, on April 17, 2007, by videoconference between Tallahassee and the school board's videoconference site in Fort Lauderdale.

APPEARANCES

For Petitioner ■■■:

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STATEMENT OF THE ISSUES

In DOAH Case No. 09-0568E, the issues are whether the individual education plan (IEP) of November 10, 2008 (2008 IEP), provides ■■■ a free appropriate public education (FAPE) and whether the School Board of Broward County denied ■■■ FAPE when multiply suspending him, during the 2008-09 school year, with options to attend a program known as alternative to external suspension (AES). The latter issue depends on whether the suspensions constituted a change in placement, pursuant to Florida Administrative Code Rule 6A-6.03312(7)(a)1.

In DOAH Case No. 09-1233E, the issue is whether the IEP of March 4, 2009 (2009 IEP), provides ■■■ FAPE.

■■■ is the Petitioner in DOAH Case No. 09-0568E and the Respondent in DOAH Case No. 09-1233E. For ease of reference in

this Final Order, █████ shall be referred to as Petitioner, and School Board of Broward County shall be referred to as Respondent.

PRELIMINARY STATEMENT

I. Identification of Issues

By Request for Due Process Hearing filed with Respondent on January 30, 2009, Petitioner requested a due process hearing. As the issues emerged during the prehearing process, Petitioner alleged two bases for the denial of FAPE: the 2008 IEP denied █████ FAPE and multiple suspensions constituted an unlawful change in placement without compliance with the procedural safeguards.

Although asserting at all times that the 2008 IEP provided Petitioner FAPE at the time of its preparation, Respondent engaged in the educational-planning process in early 2009. However, Petitioner's mother declined to join in this effort due to the pendency of DOAH Case No. 09-0568E. Respondent adopted the 2009 IEP on March 4, 2009, and filed a Request for Due Process Hearing to obtain an order that the 2009 IEP provides FAPE. On March 16, 2009, the Administrative Law Judge consolidated the two cases.

Also on March 16, 2009, Petitioner filed an Amended Complaint for Due Process Hearing for Inadequate IEP, Failure to Hold a Manifestation Determination, Violations of Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act.

On the following day, the Administrative Law Judge denied Respondent's motions in opposition to this pleading without prejudice to addressing jurisdictional questions as to certain claims in this Final Order.

## II. Specific Extensions of 45-Day Deadline

Three Orders address compliance with the timeframe for issuing a final order following the receipt by a school board of a request for due process hearing. The timeframe for the issue of whether the 2008 IEP provides FAPE is 45 days between the filing of the request for due process hearing with a school board and the issuance of a final order (75 days, after the addition of another 30 days for the resolution conference). As addressed in the March 17 Order, the timeframe for the issue of whether the disciplinary suspensions constituted a change in placement is calculated differently--and often is much shorter--but was not applied because the issue of whether the disciplinary suspensions constituted a change in placement did not clearly emerge until later in the prehearing process. (It is unclear whether Petitioner ever served another AES after January 30, 2009, although this scenario is briefly addressed in the Conclusions of Law.)

In addition to applying the 75-day timeframe to both issues in DOAH Case No. 09-0568E, the Administrative Law Judge also

applied the same deadline to the due process request filed by Respondent, as discussed in the March 17 Order.

The Administrative Law Judge granted three specific extensions for the issuance of this Final Order: two of these extensions are in prehearing Orders. On February 20, 2009, the Administrative Law Judge issued an Order Denying Motion to Dismiss, Granting Motion for More Definite Statement, Granting Specific Extension of 21 Days, and Denying Petitioner's Motion for Sanctions. This extension of 21 days corresponded to the additional time given Petitioner to file a sufficient due process hearing request.

On March 11, 2009, the Administrative Law Judge issued an Order Denying Petitioner's Motion For Summary Final Order And Final Order, Petitioner's Request For Another Prehearing Conference, And Respondent's Motion To Dismiss A Portion Of Petitioner's Amended Request For Due Process Hearing As Being Moot And Order Setting Case For Final Hearing. In this Order, the Administrative Law Judge noted that Petitioner had filed a sufficient due process hearing request on March 12, 2009, and the 45-day timeframe would apply because the resolution conference had already taken place. This Order calculates that the 45 days to issue the final order expires on April 24, 2009, and the hearing would take place from March 30 to April 3, 2009,

absent an agreement from the parties to start the hearing later in that week.

On March 19, 2009, the parties filed a pleading jointly agreeing to start the hearing on March 31, instead of March 30. On the following day, the Administrative Law Judge issued an Amended Notice of Hearing resetting the hearing for March 31 to April 3, 2009. However, at the hearing, although the parties presented their evidence in an exceptionally efficient manner, it became clear that they required additional time to finish the hearing. In resetting the final day of hearing from April 3 to April 17, which was the first available date, the Administrative Law Judge granted an additional specific extension of 14 days, so that the new deadline was May 8, 2009.

On April 17, at the conclusion of the hearing, the parties advised the Administrative Law Judge that, due to the complexity of the issues, they would require extensions of time to obtain a transcript and prepare and file proposed final orders. The parties asked for 30 days from the filing of the transcript within which to file proposed final orders. The Administrative Law Judge granted this request, noting that he would address the final specific extension in the final order. The court reporter filed the final volume of the Transcript on May 28, 2009, and the parties filed their Proposed Final Orders by June 26, 2009. In addition to the 30-day specific extension given the parties,

the Administrative Law Judge has required a specific extension of an additional 94 days to prepare this Order.

III. Witnesses and Exhibits at Final Hearing

At the final hearing, Petitioner called five witnesses, including the student, and offered into evidence 47 exhibits: Petitioner Exhibits 1-47. Respondent called ten witnesses and offered into evidence 42 exhibits: Respondent Exhibits 1-42. All exhibits were admitted except Respondent Exhibit 42, which was proffered. During the hearing, the Administrative Law Judge allowed Respondent to add page 2010A to Respondent Exhibit 38. At the hearing, the Administrative Law Judge advised the parties that he would take official notice of the Diagnostic Statistical Manual--IV (DSM IV) and all written policies of Respondent.

On July 6, 2009, Petitioner filed a Motion to Compel Missing School Records. On July 7, 2009, Respondent filed a response. This motion is denied.

FINDINGS OF FACT

1. Petitioner was born on [REDACTED]. [REDACTED] lives with [REDACTED] biological mother, three older siblings, and one younger sibling. [REDACTED] reached the milestones of sitting up, walking, and toilet training at the appropriate times.

2. Petitioner has attended Respondent's schools continuously since pre-kindergarten: nine of them in [REDACTED] years, counting once the Pine Ridge Alternative Center (Pine Ridge),

which Petitioner attended twice, four years apart. Except for the alternative center, school names are omitted in the interest of confidentiality.) Excluding Pine Ridge, which Petitioner attended once during elementary school and once during middle school, Petitioner attended four elementary schools and four middle schools. The only explanations in the record for this educational instability are, early in his schooling, Petitioner sometimes lived with another relative, and ■■■ mother has moved the family several times in search of safer neighborhoods.

3. Petitioner attended the same elementary school for pre-kindergarten (1998-99) and the first half of kindergarten (1999). ■■■ attended a second elementary school for the second half of kindergarten (2000), first grade (2000-01), and second grade (2001-02). After three days of third grade at the second elementary school, Petitioner transferred to a third elementary school for third grade (2002-03), which ■■■ repeated (2003-04). In February 2004, Respondent assigned Petitioner to Pine Ridge, which he attended through the first quarter of fourth grade (ending November 12, 2004). At that time, Petitioner returned to ■■■ third elementary school for about one-third of fourth grade. However, on February 10, 2005, Petitioner transferred from this school to ■■■ fourth elementary school, where ■■■ finished fourth grade (2004-05) and fifth grade (2005-06).

4. Petitioner's middle-school education displays even less stability than ■■■ elementary-school education. Petitioner started sixth grade at ■■■ first middle school on August 14, 2006, but ceased attendance at that school on September 29, 2006. A few days later, Petitioner transferred to ■■■ second middle school, which ■■■ attended for one year--for the remainder of sixth grade (2006-07) and about one-third of seventh grade (ending October 2, 2007). Petitioner attended this third middle school for only one month of seventh grade (2007-08): October 2 to November 2, 2007. At that time, Respondent again assigned Petitioner to Pine Ridge, which ■■■ attended from November 14, 2007, to June 6, 2008, completing seventh grade during this period of attendance.

5. At the start of eighth grade (2008-09), Petitioner transferred to ■■■ fourth middle school. While attending this school, Respondent prepared the 2008 IEP in the fall, Petitioner filed a due process request on January 30, 2009, and Respondent prepared the 2009 IEP in the spring and filed its own due process request. It is from this school during this school year that Respondent also imposed numerous AESs.

6. Petitioner seems to have started formal schooling on a positive note. During kindergarten, ■■■ had no absences or suspensions.

7. IEPs prepared in 1999, 2000, 2001, and 2002 (May 2) focus exclusively on speech and language therapy--Petitioner's sole eligibility at the time--and find that Petitioner was performing acceptably in school, including in relating to peers, transitioning between tasks, and expressing [REDACTED] wants and needs. This speech and language eligibility is irrelevant to the present cases.

8. Despite the positive notations in the early IEPs, these years were not free of behavioral and academic problems. At the start of first grade, a parent-teacher conference record dated September 22, 2000, states that Petitioner was reading below grade level and displaying "poor behavior" and that the mother was taking [REDACTED] for counseling and psychiatric therapy. Respondent developed an Academic Improvement Plan for the student. At the end of first grade, the IEP team considered and rejected the option of adopting behavior management techniques, but staff, on May 16, 2001, prepared a Student Assistance Program for Petitioner. The planning document notes various disruptive classroom behaviors, such as defiance, difficulty accepting correction, and temper tantrums; two academic concerns in the form of failure to learn and not following directions; one physical concern in the form of frequent fatigue; and various deficits in social skills, including little eye contact, pouting, no sense of fair play, and unresponsiveness to

interaction. The Student Assistance Program recommended that Petitioner be retained in first grade, but [REDACTED] was passed to the next grade.

9. Second grade was worse. According to education-planning documents, Petitioner displayed numerous inappropriate behaviors, including multiple instances of playing or sleeping in class, talking out, creating disruptions, and exhibiting disrespect or defiance to staff, and poor academic performance due to, among other things, multiple instances of failing to focus or remain in his seat, failing to complete [REDACTED] homework or schoolwork, working below grade level, and displaying a short attention span. At the end of the year, the IEP dated March 11, 2002, records that Petitioner required special transportation to serve an external suspension, for an unspecified offense, at the "Mt. Olive YMP Program," which is not identified in the record, but may not be an educational or behavioral program administered by Respondent.

10. Obviously prompted by two difficult school years, during the summer after second grade, Respondent prepared Petitioner's first school psychological report, which was authored by one of Respondent's school psychologists, Krista Price, on August 15, 2002. The referral was due to "major behavior concerns," including "explosive behaviors," disrespect, and "stubborn[ness]."

11. Petitioner's mother reported to Ms. Price that Petitioner had difficulty sleeping at night, so [REDACTED] often fell asleep during the day, including while in class. Petitioner's mother told Ms. Price that her [REDACTED] was hyperactive and unable to stay focused. She asked for a "better understanding of the reason for [Petitioner's] behavior so that she may be in a better position to help [REDACTED]." Additionally, Petitioner's mother reported that a psychiatrist had seen her [REDACTED] in late June 2002 and prescribed Adderall and Atarax for ADHD and sleep problems.

12. Ms. Price documented Petitioner's educational performance, noting that [REDACTED] was being instructed in reading and written expression, according to [REDACTED] second-grade teacher, at the first-grade level. However, [REDACTED] was receiving additional reading instruction in computer reading lab. In math, Petitioner's second-grade teacher reported that [REDACTED] was at an instructional level between first and second grade. The second-grade teacher added that Petitioner participated in a small group focusing on behavior modification. The teacher believed that Petitioner could perform better academically, but [REDACTED] playfulness, tardiness, and lack of self-control impeded [REDACTED] progress.

13. The testing conducted by Ms. Price revealed a general conceptual ability score of 78, which, for the instrument administered to Petitioner, is in the borderline to low average

range of 72-85. On an academic achievement test, Petitioner scored at a grade level of 1.6 in broad reading, 2.3 in broad math, and 1.4 in broad written language. Ms. Price noted that Petitioner's scaled score of 93 on broad math "is suggestive of higher learning ability."

14. Ms. Price's assessment of Petitioner's personality "suggests the profile of an immature, overactive, and impulsive youngster who has difficulty focusing and persisting on tasks in the classroom." Interpreting ratings from the teacher and mother, which were consistent, Ms. Price found clinically significant scores on Hyperactivity, Aggression, and Conduct Problems scales. The teacher's completion of another rating instrument supported the ADHD diagnosis a couple of months earlier by Petitioner's psychiatrist.

15. Ms. Price concluded that Petitioner was demonstrating "some of the characteristics" associated with ADHD and recommended that Respondent obtain additional relevant information from Petitioner's mother to confirm an ADHD diagnosis. This request for additional information to confirm a diagnosis already made by a psychiatrist seems odd, especially given the data already present in the child's cumulative file. Nevertheless, Ms. Price noted that Petitioner would benefit from a classroom setting with "clear set limits and well-defined consequences," and she referred the case to the school's

Eligibility and Placement Committee. Ms. Price also recommended, among other things, implementing a "contract or behavior management system" with Petitioner, frequent interacting between the teacher and Petitioner to improve on-task performance, breaking up tasks into small segments to improve Petitioner's attending skills, and adjusting the classroom and homework assignments to avoid frustrating the child.

16. The first IEP after Ms. Price's school psychological report is dated December 2, 2002, which is midway in Petitioner's first attempt at third grade, and appears to incorporate work from meetings in October and November 2002. Evidently responding to the material contained in Ms. Price's psychological report, this IEP adds Other Health Impaired (OHI) to Petitioner's previously recognized speech and language eligibility. Acknowledging Petitioner's behavioral issues, the IEP team implicitly discredited Ms. Price's finding about the relatively high broad math score as indicative of higher learning ability. The IEP team instead stated:

The psychologist noted that [Petitioner's] attention level is a concern. However, his cognitive thinking and achievement are commensurate with his ability.

17. Based on the resulting IEP, the IEP team seemed to pin its hopes on interventions of a medical nature to the exclusion

of interventions of an educational nature. For example, the IEP team cautioned that, if a Behavior Intervention Plan (BIP) proved ineffective, "consideration will be made with the 504 plan" and noted the intent of the mother to take her child back to the psychiatrist to reevaluate ■■■ medications. Although innocuous in themselves, these statements later evolved into a policy that, when fully expressed, manifested a failure of the educators to support in the classroom the work of the health-care providers, as more fully explained below.

18. The IEP team that met on October 28 did not dispense entirely with educationally based behavioral interventions, however. The IEP team agreed that Petitioner would benefit from a "strong behavior management plan," and it developed some goals, discussed below, "to enhance [Petitioner's] behavior in an academic setting." However, neither the IEP team nor any of Respondent's other employees prepared a BIP at this time, at least based on the present record.

19. After a meeting in November, at which the IEP team told the mother she would need documentation of ADHD before they could add an OHI eligibility to the IEP, the IEP team agreed on December 2, 2002, to add this eligibility. The comments from this meeting mention that Petitioner was to act twice weekly as a peer tutor for kindergarten students, "which will hopefully help ■■■ to learn skills that are equated with responsibility

and self control." The comments again reveal the reliance by the IEP team on medical solutions to Petitioner's behavioral problems: "[Petitioner] is now on medication and should begin to demonstrate signs of improvement behaviorally." The reference to "now" is misleading because the Ms. Price's psychological report had noted earlier that Petitioner had already been prescribed medications for ADHD and sleep disturbances.

20. The December 2, 2002, IEP contains only one goal: "at the end of 36 school weeks, [Petitioner] will improve in overall classroom behavior as measured by teacher informal assessment with 90% accuracy." The short-term objectives are to refrain from getting angry in class when there is a problem 80 percent of the time, attend to the teacher with no more than two reminders 85 percent of the time, complete assignments 90 percent of the time, and not leave the desk more than one time every half hour.

21. The next IEP is dated April 30, 2003. The IEP team documented that Petitioner had not mastered any of the short-term objectives contained in the December 2, 2002, IEP: the first two objectives had been continued with revisions, and the last two objectives had been discontinued. To address these failures, the April 30, 2003, IEP adds "Support Facilitation" for "social/behavior," "attention skills," and reading and math,

while continuing speech and language therapy. This IEP adds accommodations in flexible seating and flexible timing for exams.

22. The comments contained in the April 30, 2003, IEP state that the IEP team called Petitioner's mother at work, and she reported that her [REDACTED]'s behavior had improved with recent adjustments to the medications. Confirming the mother's report, this IEP states that Petitioner "gets along with teachers and peers and attempts to display good manners."

23. The April 30, 2003, IEP also identifies present levels of performance. At the end of Petitioner's first attempt at third grade, [REDACTED] was reading on a second-grade level and was performing math skills at a point midway through second grade. Linking the behavioral and academic issues, this IEP states that Petitioner's inattentiveness did not allow him to absorb the information necessary to complete his academic tasks.

24. This IEP contains one goal under social/emotional behavior: Petitioner will "improve in overall classroom behavior" 90 percent of the time. The four short-term objectives are to refrain from outbursts when confronted with a "minor crisis" 80 percent of the time, remain seated with no more than two teacher prompts every 30 minutes 85 percent of the time, remain seated with no more than one teacher prompt every 45 minutes 90 percent of the time, and transition from

instructional activities within the classroom when asked to do so. Nine months later, Petitioner had mastered all of these objectives, except the first, which was continued with revisions.

25. The April 30, 2003, IEP contains two academic goals: within 36 weeks, to read at the third-grade level and to do three-digit addition and subtraction with regrouping. Nine months later, Petitioner had mastered both of the math objectives and one of the two reading objectives; the other reading objective was continued with revisions.

26. Third-grade students are required to take the Florida Comprehensive Assessment Test (FCAT). Petitioner took and failed the exam during his first attempt at third grade. Repeating third grade, though, Petitioner passed the FCAT the following year.

27. During Petitioner's second attempt at third grade, he received IEPs dated September 12, 2003; November 2, 2003; and February 5, 2004. The first two IEPs are updates to the April 30, 2003, IEP and do not attempt to restate all of the contents of that IEP. The February 5, 2004 IEP predates, by less than two weeks, Petitioner's transfer to the Pine Ridge Alternative Center.

28. The narrative in the September 12, 2003, IEP, explains that the IEP team met to discuss Petitioner's progress in

behavior and academics. The narrative adds that Petitioner's behavior had "slightly improved" and that "█ has just begun new medication and therapy which will hopefully create a more successful situation in the classroom environment." The IEP notes that Petitioner is taking two ADHD medications.

29. One purpose of the September 12 IEP is to add a BIP, which seems to have been completed two months later, as described below, and to provide direct instruction for reading and math. Petitioner was now removed from regular-education classes about one-quarter of the time. The new IEP documents the assistance of a paraprofessional in the classroom to help with behavior and warns that, without significant improvement in behavior over the following four weeks, it would be necessary to adopt a "Behavior Change Program"--meaning a transfer to the alternative center. This IEP expands the accommodations to include multiple options in flexible presentation, scheduling, timing, and setting, as well as reduced assignments and at least weekly communication with the mother.

30. The November 2, 2003, IEP provides present levels of performance for Petitioner, who was then in █ first semester of █ second attempt at third grade: █ is working on a 3.0-grade level in reading and a 2.5 grade-level in math. Clearly, though, █ behavior had not shown any sign of improvement, but had likely deteriorated. After stating that Petitioner is in

"constant need of guidance for [REDACTED] unwillingness to follow classroom rules and schoolwide policies" and "needs constant supervision to prevent [REDACTED] from displaying verbal or physical outbursts in the classroom and school campus," the IEP clearly reveals the finding of the IEP team that the behavioral problems are entirely within Petitioner's control: "[Petitioner's] choice not to conduct [REDACTED] in an appropriate manner in the classroom or on school campus has interfered with [REDACTED] classroom progress this school year," although, in the next sentence, the IEP acknowledges: "[Petitioner's] frustrational [sic] level is low which results in impulsive acts which relates [sic] to [REDACTED] disability." In contrast to the findings contained in the April 30, 2003, IEP, Petitioner was now having difficulties maintaining good relationships with [REDACTED] peers.

31. Attached to the November 2, 2003, IEP is a BIP dated November 4, 2003. The BIP notes that, when confronted with a task that [REDACTED] deems to be too difficult, Petitioner will become aggressive, shut down, or leave the area in order to maintain control and avoid the task. The BIP directs school staff to use daily point sheets and positive reinforcements, ignore minor misbehaviors, and maintain regular communications with Petitioner's mother--all while working with Petitioner to help [REDACTED] develop communication skills so [REDACTED] can express [REDACTED] wants.

32. The February 5, 2004, IEP accompanies Petitioner's reassignment to the Pine Ridge Alternative Center because Petitioner "does not wish to comply with school rules and classroom procedures." The narrative states: "The [IEP] committee agrees that [REDACTED] disability does not relate to [REDACTED] behavior in the school setting." Petitioner's mother attended the IEP meeting and apparently joined in this agreement. The February 5, 2004, IEP lacks any statement of Petitioner's present levels of performance, but notes that Petitioner is now taking Paxil, in addition to Adderall.

33. An alternative center addresses a student's behavioral issues through means, such as behavior modification, careful implementation of a BIP, and predictable discipline. An alternative center does not address the emotional or mental-health issues that a child may present. An alternative center provides behavioral, but not therapeutic, intervention, in addition to academic instruction.

34. The February 5, 2004, IEP contains modest academic goals: to "improve in higher level thinking skills in reading comprehension without prompts with 75% accuracy" and to "improve in computational skills as it [sic] relates to critical thinking without teacher assistance with 75% accuracy." Nine months later, Petitioner had mastered the reading short-term objectives, which, like the goal, lacked a grade level, and he

had mastered two of the math short-term objectives and failed to master two other math short-term objectives, which provide some indication of math grade level. Behaviorally, 11 months later, Petitioner had mastered [REDACTED] short-term objectives to verbalize [REDACTED] frustration three out of five times with adult modeling and three out of five times with verbal prompts.

35. On March 26, 2004, about six weeks after Petitioner was transferred to Pine Ridge, [REDACTED] tried to hang [REDACTED] at home following a period of depression. [REDACTED] mother promptly informed the school, but nothing of this incident, directly or indirectly, appears on any of Petitioner's education-planning documents.

36. On November 9, 2004, Respondent issued a Notice of Proposal for returning Petitioner to [REDACTED] home school because [REDACTED] had worked successfully on the behavior-management system at Pine Ridge and shown changes in [REDACTED] behavior. Notes on the November 4, 2003, BIP reflecting a review that took place on November 15, 2004, reveal that Petitioner's mother was pleased with Pine Ridge and hesitant about her [REDACTED]'s return to [REDACTED] home school.

37. The next IEP in the record is dated February 5, 2005, which is the second semester of fourth grade. This IEP states that Petitioner is working on Sunshine State Standards, but not on his grade level. This IEP states that Petitioner is on grade

level in academic achievement, except "reading[,] word recognition and comprehension[--] 1 yr below." For intellectual functioning, the IEP states that Petitioner's reading and written language are commensurate with his ability, but ■■■ strength is in mathematics.

38. Although noting ongoing eligibilities in OHI and Speech and Language, this IEP states that Petitioner is to receive only a limited amount of ESE services and only in speech therapy. There is also a twice weekly consultation for socialization. The IEP states that Petitioner continues to display behavioral problems, such as leaving the classroom without permission, reacting with rage and angry outbursts to minor or no provocations, and refusing to accept responsibility for ■■■ actions. Only on occasion could ■■■ interact appropriately with adults and peers.

39. The February 1, 2005, IEP contains two academic goals, both in reading: to "improve word recognition to a 4.0 level with 75% accuracy" and to "increase reading comprehension to a 4.0 grade level with 75% accuracy." The seven short-term objectives are similarly measurable, but each was continued with revisions one year later, as Petitioner had mastered none of them. The apparent explanation lies in Petitioner's failure, one year later, to master, even partially, any of the eight short-term objectives under ■■■ two behavioral goals: to

"improve on[-]task behaviors, using teacher[-]taught strategies with 50% accuracy" and to "demonstrate self-control, when given teacher prompting and reminders to remain in [REDACTED] classroom environment 50% of the time."

40. On January 31, 2006, Respondent issued a Notice of Refusal for the elimination of speech services because of Petitioner's progress. From this point forward, Petitioner received no more speech therapy.

41. On May 5, 2006, Respondent issued a Notice of Proposal to increase consultative services from once monthly to once weekly because of Petitioner's needs. The May 5, 2006, Interim IEP increases academic assistance from 15 minutes per month to 30 minutes per week and maintains behavior support at 30 minutes per week.

42. The May 5, 2006, Interim IEP addresses academic matters, noting that Petitioner is now working on Sunshine State Standards on grade level. This assertion somewhat contradicts the fact that, even though now at the end of fifth grade, Petitioner is reported to recognize words and silently read only on a second-grade level, while [REDACTED] oral reading is on a third-grade level and [REDACTED] understanding of word meaning is on a fifth-grade level. Retreating from the objectives of the IEP dated February 5, 2005, in terms of reading at a fourth-grade level, this IEP, 15 months later, set the reading goals at a third-

grade level: the oral-reading goal is, by January 2007, to "read 20 third[-]grade sight words independently in 3 of 4 trials." ■■■ other reading goal is to "read a third[-]grade passage and answer 5 comprehension questions correctly in 3 of 4 trials." The oral-reading goal is odd because Petitioner was already at this level, according to the present levels of performance.

43. Equally odd is the May 5, 2006, Interim IEP's treatment of "social/emotional behavior." The Interim IEP states that Petitioner "is able to interact appropriately with peers and adults" and "there is no impact of the disability on this [area]." For independent functioning, the Interim IEP notes that Petitioner "often needs to be re-directed in order to stay on task and complete an assignment," so the Interim IEP states a goal, by January 2007, to "display on-task behavior in order to independently complete an assignment in 3 of 4 trials." Unmentioned in this IEP is the fact that the school had to resort to external suspensions for a total of 12 days during Petitioner's fifth-grade year. The necessary inference is that Petitioner is able to interact appropriately, but refuses to do so. As always, the IEP does not discuss the data and analysis that support this conclusion by the IEP team.

44. Unfortunately, no IEP team closed out any of the short-term objectives after the February 1, 2005, IEP.

(Belatedly, Respondent produced a two-page document showing that three goals from the IEP from October/November 2007 IEP, discussed below, were continued with revisions on November 13, 2007--the greater weight of the evidence still favors the first sentence in this paragraph.) The failure to close out goals or objectives means that the planning documents after January 2006 failed to record the extent to which Petitioner mastered the stated goals and objectives concerning academics and behavior.

45. One week after the preparation of the May 5, 2006, Interim IEP, on May 11, 2006, Petitioner's mother threatened to spank ■■■ due to something that had happened at school earlier in the day. Petitioner picked up a knife and told ■■■ mother to leave ■■■ alone. ■■■ mother called emergency services to transport her ■■■ to a psychiatric hospital, where ■■■ was taken and evaluated. Within a few days, Petitioner's mother met at school with a counselor from the Chrysalis Center, a community mental-health center that provides support services to children and, indirectly, to schools. The Chrysalis counselor informed the school about the incident, which never was incorporated, directly or indirectly, into any of Petitioner's education-planning documents.

46. In August 2006, Petitioner commenced middle school, but ■■■ attended ■■■ first middle school for only six weeks. At that time, ■■■ transferred to ■■■ second middle school, which

■■■ attended for one year. Shortly after arriving at the second middle school, ■■■ IEP team prepared another Interim IEP, which is dated October 23, 2006. Petitioner's mother did not attend this meeting, and the Interim IEP does not document any action taken at that meeting, which may have been limited to a review of the preceding Interim IEP.

47. The next IEP, which is also an Interim IEP, is dated December 18, 2006, which is about midway through sixth grade at his second middle school. The main effect of the December 18, 2006, Interim IEP is to return Petitioner fulltime to the regular-education classroom, where ■■■ would receive targeted specialized instruction for 120 minutes per week and behavior support for 30 minutes per week. This Interim IEP confirms that Petitioner is working at grade level on Sunshine State Standards.

48. For academics, the December 18, 2006, Interim IEP states that Petitioner is able to read independently and answer questions requiring comprehension of what ■■■ has read, and ■■■ can write five-paragraph essays, although neither statement indicates the grade level. For math, the Interim IEP says only that Petitioner can "solve multi-digits using the basic operations as well as solve simple word problems." Based on the 2006 FCAT scores, the Interim IEP states that Petitioner's

disability does not affect [REDACTED] work, so there are no academic goals or objectives.

49. For behavior, the December 18, 2006, Interim IEP states that Petitioner is a "very sweet student that [sic] knows how to respect authorities and other peers[;] however, [REDACTED] frequently has difficulties following school and classroom rules." The Interim IEP states that Petitioner's disabilities cause difficulties in self-control that hinder [REDACTED] academic progress. The Interim IEP states two behavior goals: by October 2007, Petitioner is to "accept correction from a staff member in a socially appropriate manner with 70% success" and to "exhibit impulse control in school with 70% accuracy." For independent functioning, the Interim IEP states that, "due to [Petitioner's] disability, [Petitioner] chooses not to follow a bell-schedule, stay on task in the classroom, and to [sic] independently complete an assignment." The Interim IEP states one independent-functioning goal: at the end of 36 weeks, Petitioner is to "prolong his attention for a task completion in a variety of settings." The Interim IEP states that Petitioner is working on Sunshine State Standards on grade level.

50. Offering some context to the vague description of this child as "sweet" is the fact, unmentioned anywhere in the IEP, that this school resorted to suspending this student 20 days, pursuant to AES program described in more detail below. This

school year was also marred by a pattern of absences, tardy arrivals, and early departures, so that, when combined with the suspensions, Petitioner simply was not in school very much in order to receive instruction and failed to achieve educational stability. The implied reason for the IEP team's failure to address the problems evidenced by multiple suspensions and absences is, again, the implication that, although sweet, Petitioner is capable of making better choices and refuses to do so.

51. On April 12, 2007, Pilomene Carrenard, one of Respondent's school social workers, completed a psychosocial assessment report on Petitioner. Ms. Carrenard noted that middle-school administrators had referred Petitioner for an assessment due to "major behavior problems." According to Ms. Carrenard, the reported behaviors included "temper tantrums, blaming and bullying others, arguing and talking back to teacher, using foul language, [and] refusing to comply with medication at school." Petitioner's mother added that her [REDACTED] displayed "extreme mood swings" and was unable to eat and to sleep at night. At the time of this assessment, Petitioner's mother reported that her [REDACTED] was taking "Respidol" and Metadate, but that [REDACTED] was noncompliant with the medications due to "extreme side effects." Ms. Carrenard recommended that Respondent place Petitioner in an alternative center:

so that they can address the behavior as well as the academic component; however in the event that [Petitioner] is not making progress in this new setting, other placements should be considered. It will be imperative for them to address his mental health issues along with his academic and behavioral problems.

52. But Respondent did not transfer Petitioner to an alternative center at that time. On May 11, 2007, one month after Ms. Carrenard's recommendation, the IEP team reevaluated Petitioner because [REDACTED] was still having difficulties at school. At a meeting that Petitioner's mother did not attend, the IEP team noted Petitioner's antagonistic and disruptive behaviors at school and posed the crucial question, "Is [Petitioner's] lack of success in school due to behavior or emotional functioning?" The team also noted that Petitioner was being assessed for a new BIP.

53. On May 14, 2007, a BIP was prepared for Petitioner. The description of the student contained in this document describes Petitioner as an "excellent reader" with "good comprehension skills" and notes that [REDACTED] interacts better with adults than peers. The BIP reports that Petitioner has difficulty staying on task, acts impulsively, disregards the consequences of his actions, and shows no remorse. The BIP reports that Petitioner frequently says "fuck" and "shit" when speaking to staff and, since arriving at the school in October

2006, has had 16 documented referrals for disrespect, disobedience, and profanity toward staff, three referrals for threats/assault, four referrals for leaving an area without permission, two referrals for fighting, and one referral each for numerous other infractions, such as causing property damage, failing to comply with the rules, and instigating a major disruption. The BIP states that the mother needs help in determining whether her [REDACTED] has a "mental disorder" and believes that Petitioner needs a "more structured school environment." The BIP then describes several intervention strategies.

54. Petitioner completed sixth grade and started seventh grade at [REDACTED] second middle school, although, six weeks into seventh grade, [REDACTED] transferred to [REDACTED] third middle school. One effect of this was to transfer the responsibility for implementing the BIP from school personnel, who were just acquiring familiarity with Petitioner, to school personnel who were unfamiliar with Petitioner.

55. The transfer to a third middle school occurred two weeks after the completion of a new school psychological report. Prepared by Stephanie Messana on September 17, 2007, this was the first such report since the 2002 school psychological report, which is described above. Unfortunately, Ms. Messana did not rise to the challenge of squarely addressing the crucial question posed by the IEP team four months earlier.

56. After summarizing the 2002 school psychological report, Ms. Messina found that Petitioner was now bearing medical diagnoses of ADHD and Oppositional Defiant Disorder. Ms. Messina also noted the multiple entries and withdrawals of Petitioner in numerous elementary and middle schools. She noted that, in May 2007, Respondent received a Medical Evaluation Form, in which a physician diagnosed ADHD, combined type, and Mood Disorder--Not Otherwise Specified, for which he had prescribed Petitioner Metadate and "Risperdol."

57. Ms. Messina documented that a "staff member" completed a Student Rating Form that indicated that Petitioner demonstrated grade-level reading and math skills last school year. Ms. Messina noted that Petitioner was receiving support services from a zone (i.e., a subregion of the school district) family counselor and had a BIP to address [REDACTED] "manipulative and disruptive behaviors." Ms. Messina stated that, when denied [REDACTED] way, Petitioner argues, curses, throws things at others, and runs out of the room. Ms. Messina documented that staff, at a recent reevaluation meeting, had reported that Petitioner was antagonistic, sexually assaultive, and physically threatening at school--both to staff and peers. Ms. Messina also noted that Petitioner's teachers had stated that Petitioner displayed clinically significant problems of hyperactivity, aggression, depression, atypicality, and somatization. Ms. Messina

recommended only that the IEP team consider continuing exceptional student education (ESE) services and address new information.

58. Three weeks after Petitioner started [REDACTED] third middle school, the IEP team at the school prepared a Transition Interim IEP following a meeting that Petitioner's mother attended. The IEP team met on October 23 and November 13, 2007. The resulting Transition Interim IEP, dated November 13 2007, but bearing comments from the earlier meeting, notes that Petitioner wants to pursue a career in law, and [REDACTED] is pursuing an academic diploma. The October/November 2007 Transition Interim IEP carries forward the commentary about present levels of performance from the December 18, 2006, Interim IEP--again, without any mention of grade level of instruction in math and reading. However, an addition dated November 13, 2007, states that, based on the psychological (presumably, Ms. Messana's report, which mentions ratings from a teacher), Petitioner demonstrated grade-level reading and math in the preceding school year. The October/November 2007 Transition Interim IEP concludes that Petitioner's disability has no impact on his academic performance, Petitioner has no priority educational needs at this time, and Petitioner requires no specialized instructional services at this time. There is thus no goal or objective for academics in this IEP.

59. The behavioral and independent-functioning short-term objectives in the October/November 2007 Transition Interim IEP, which bear different labels, are largely the same as those found in the Interim IEP one year earlier, which, one may safely infer, were never mastered.

60. The October/November 2007 Transition Interim IEP calls for 30 minutes per week of specialized instruction in Community Experience, 30 minutes per week in specialized instruction in Employment, 120 minutes per week in Targeted Specialized Instructional Assistance in all Academic Areas, 30 minutes per week of Behavior Support, and 30 minutes per week in Family Counseling. Listing the usual supplementary aids and services in terms of flexibility in presentation, scheduling, and setting, the October/November 2007 Transition Interim IEP records Petitioner's health-care needs as taking the following medications for bipolar disorder, ADHD, and a sleeping disorder: Depakote, 250 mg; Metadate, 40 mg; and Trazidone, 100 mg.

61. Acting on at least the first part of the recommendation, seven months earlier, of Ms. Carrenard, the October/November 2007 Transition Interim IEP identifies succinctly the services required by Petitioner: "11/13/07 [Petitioner] need [sic] a structured behavior program throughout his school day. [REDACTED] is assigned to the alternative center."

62. Although unmentioned in the October/November 2007 Transition Interim IEP, the event that precipitated the reassignment to Pine Ridge took place on October 24, 2007--one day after the October 23, 2007, IEP team meeting. Petitioner created a disruption at school and threatened to hurt ■■■ mother and walk out into traffic. The school resource officer detained Petitioner and transferred ■■■ to a crisis stabilization unit of a local hospital, pursuant to the Baker Act. As was the case with the prior psychiatric incidents, Respondent failed to incorporate any mention of the event, directly or indirectly, into any of Petitioner's education-planning documents.

63. Petitioner has been seen by a counselor or psychotherapist employed by the Chrysalis Center since he was seven or eight years old. The Chrysalis psychotherapist working with Petitioner at the time of the hearing, Bridget Moreno, testified that she has been seeing ■■■ since October 2006. She explained that Petitioner sees a Chrysalis psychiatrist once per month, and ■■■ diagnoses are ADHD, Oppositional Defiant Disorder, and bipolar disorder with manic episodes.

64. When she first was assigned to work with Petitioner, Ms. Moreno met with teachers and counselors from Petitioner's second middle school, which ■■■ had just started to attend in October 2006, and explained the techniques that would work to calm down Petitioner when ■■■ became agitated. Ms. Moreno

testified that school staff implemented her recommendations to deal with Petitioner's Oppositional Defiant Disorder.

65. Although Ms. Moreno did not consult with staff at Petitioner's third middle school, which [REDACTED] attended for only one month starting October 2, 2007, she did consult with staff at Pine Ridge, which [REDACTED] attended from mid-November 2007 to June 6, 2008. At one point, when Pine Ridge was in the process of suspending Petitioner, presumably for disruptive behavior, Ms. Moreno attended a meeting arranged at the instance of Petitioner's mother to discuss with school staff effective techniques for managing Petitioner's behavior, especially when agitated. The techniques for managing Petitioner included specific things to avoid when [REDACTED] was agitated, including touching [REDACTED], raising one's voice toward [REDACTED], or repeatedly ordering [REDACTED] to do something. Ms. Moreno helped Petitioner's mother implement these techniques and observed a marked improvement in the child's behavior at home. Ms. Moreno was also available to school staff when visited the school once or twice per week while Petitioner was in attendance there.

66. Unfortunately, notwithstanding Ms. Moreno's efforts, probably in May or June 2008, an incident occurred at Pine Ridge that resulted in Petitioner's suffering a fractured elbow, reportedly at the hands of a staffperson attempting to restrain him. Ms. Moreno testified that this would not have happened if

Pine Ridge staff had implemented her advice. This inference, as well as the rest of Ms. Moreno's testimony, is credited.

67. Based on her extensive work with Petitioner, Ms. Moreno has determined that [REDACTED] is not a bad child, as in making bad choices and refusing to conform to rules; [REDACTED] suffers from disabilities. As to [REDACTED] ADHD, Petitioner is "very hyperactive" and exhibits a short attention span. [REDACTED] cognitive function is moderate, so [REDACTED] can understand what is said to [REDACTED] and demonstrate a good thought process. [REDACTED] Oppositional Defiant Disorder is characterized by [REDACTED] tendency to resist whatever is asked of [REDACTED], so it is necessary to offer positive incentives and reinforcement to [REDACTED]. Petitioner's bipolar disorder is associated with very low periods and very high periods, where Petitioner is impulsive.

68. Following the broken elbow, Petitioner's mother refused to allow her [REDACTED] to return to Pine Ridge, and there is nothing in the record that suggests this assignment at Pine Ridge produced the results that the first visit did. As of September 2, 2008, Petitioner was assigned to [REDACTED] fourth middle school for eighth grade. This is the middle school to which [REDACTED] was assigned at the time of the preparation of the 2008 IEP and 2009 IEP and the final hearing.

69. Petitioner reported to [REDACTED] fourth middle school on September 2, 2008. On the same date, school staff conducted a

reevaluation meeting that reflects they were aware of Petitioner's significant academic and behavioral problems. A Consent for Reevaluation/Reevaluation Plan dated September 2, 2008, reports that, based on an undated Diagnostic Assessment of Reading, Petitioner's word recognition was at grade-level three, oral reading and spelling at grade-level four, and word meaning at grade-level nine. The Reevaluation Plan notes Petitioner's earlier score in February 2005 of a 78 on the cognitive abilities scale and problems in relating to peers and adults. The Reevaluation Plan cites as issues to be addressed Petitioner's academic achievement, cognitive functioning, and behavior or emotional functioning.

70. School staff received a good understanding of Petitioner's behavior problems from [REDACTED] mother, who attended the September 2 meeting, at which time she consented to the reevaluation. A note from the meeting, probably written by Respondent's ESE Specialist or ESE Support Facilitator in attendance, states in part: "Talked at length with [mother] regarding [Petitioner's] emotional needs at school and how we would best serve [REDACTED] here in 8th grade with all of [REDACTED] special problems."

71. The school moved forward without delay to acquire data to address the behavioral issues. On September 4, 2008, Petitioner's mother completed a Parent Information Form for the

upcoming psychological evaluation. In answering the form, Petitioner's mother stated that she was unhappy with her [REDACTED]'s current educational placement and was "trying to find a school that fits [REDACTED] needs." She added that she had been doing so since [REDACTED] "first started school." Describing her [REDACTED], the mother wrote: "[REDACTED]'s very smart . . . when [REDACTED] is happy in the setting. W[ill] try [REDACTED] best but have a very hard time trusting people."

72. An unidentified staffperson at Pine Ridge completed a survey on September 5, 2008. In its entirety, [REDACTED] narrative states:

**Comments on academic performance (including specific areas of substantial difficulty):**

[Petitioner] does not demonstrate [REDACTED] full potential--[REDACTED] is bright and [REDACTED] achievement is inconsistent--If [Petitioner] would cooperate, [REDACTED] would more than likely be successful in school.

**Comments on productivity and related skills (including specific areas of substantial difficulty):**

Due to his disability, [Petitioner] has difficulty with follow through on assignments.

**Comments on social/behavioral functioning (including specific areas of substantial difficulty):**

In this category, I believe [Petitioner] is making choices to act out inappropriately--To some extent, it does pertain to [REDACTED] disability--But, largely, he is very verbal

about [REDACTED] dislike for school authority and what school in general represents-- [REDACTED] is not willing to conform-- [REDACTED] knows how to behave because I have seen [REDACTED] count[less?] times behave approp[riately.]

**Comments on other areas not covered above (including specific areas of substantial difficulty):**

I think [Petitioner] is a terrific kid-- [REDACTED] has a lot of promise--but, if [REDACTED] doesn't start making a conscientious effort to follow rules and procedures in the school environment, [REDACTED] will surely be at risk!!!

73. On September 22, 2008, the fourth middle school's principal signed off on the request by an ESE Specialist for psychological evaluation services for Petitioner. The stated reason for the referral is: "The student is struggling in all academics and exhibits difficulty in social/emotional behaviors." This referral includes a psychiatric update dated March 6, 2008, from a Chrysalis psychiatrist. The update states that Petitioner suffers from ADHD and bipolar disorder.

74. On October 3, 2008, Respondent prepared a new BIP, which identifies Petitioner's exceptionalities as "Emotional/Behavioral Disabilities" (EBD) and OHI. The behavioral and academic goals of the interventions are: Petitioner will "demonstrate effective social communication skills towards staff and peers when expressing [REDACTED] wants and needs" and "attend classes and increase [REDACTED] ability to comply with teacher instructions/directions/redirections and increase

■■■■ work productivity." Specific interventions emphasize positive praise and reinforcement of good behaviors. Evaluation is based on daily points and attendance. Updates on October 23 and December 15, 2008, reveal problems, though. The October 23 update states that Petitioner was not attending classes regularly, and the December 15 update discloses that Petitioner had earned less than 25 percent of the available points daily and, over seven weeks, had been absent 50 percent of the time.

75. During the first week of October 2008, Petitioner and ■■■■ mother each filled out questionnaires concerning ■■■■ behavior. The mother's information is largely what she had been telling school staff for sometime. Petitioner's questionnaire required ■■■■ to complete a sentence with whatever popped into ■■■■ mind. Some of his responses are as follows (with Petitioner's responses in boldface): "Most of all I want **a change**"; "I'm afraid **I might fail**"; "There is nothing **in front of me**"; "I will never **hurt you**"; "My friends think I **am crazy**"; and "I get mad when **you tell me to shut up.**"

76. Unable to handle the student, school administrators were frequently calling Petitioner's mother to pick up her son. She works from 10:00 p.m. to 7:00 a.m. at Wal-Mart so she can be available to supervise her ■■■■ when ■■■■ is home after school, but calls during the school day often occur when she is asleep after a night shift. Petitioner's mother testified candidly

that, given her exhaustion and frustration, when her [REDACTED] missed the morning bus to go to school, she was relieved because she knew that she would not get a call to come pick [REDACTED] up.

77. One of the school administrators who often called Petitioner's mother is Cheryl Rubin, the assistant principal. She testified that Petitioner's first couple of weeks were uneventful, but [REDACTED] needed to be reminded that [REDACTED] could not leave class whenever [REDACTED] wanted. Ms. Rubin recognized that students at Pine Ridge were allowed to leave class, so she was not especially concerned about this behavior early in the new school year.

78. However, class attendance became a greater problem with more walk outs, tardies, skips, and absences--absences alone accounted for 38 percent of days that Petitioner was supposed to be in school. Petitioner dismissed all attempts by school staff to address this problem with [REDACTED]. One time, when Ms. Rubin confronted Petitioner about the requirement to attend class, [REDACTED] replied that she could not require [REDACTED] attendance because "I don't work here; you don't pay my bills."

79. From talking to Petitioner, Ms. Rubin soon learned that disrupted sleeping patterns often determined when Petitioner would arrive at school or [REDACTED] level of fatigue on a given day. Recognizing that Petitioner's attendance was best in the morning, school administrators quickly changed Petitioner's

U.S. History class from later in the day to morning; Petitioner was already taking a two-hour block of reading at 8:30 a.m.

80. However, disciplinary referrals began piling up by late September. By the end of September, Petitioner earned [REDACTED] first internal suspension for the use of profanity. [REDACTED] ultimately received eight days of internal suspension for such infractions as profanity, skipping classes, and classroom disruptions. During the internal suspensions, which were served at [REDACTED] home school, Petitioner received [REDACTED] classwork from the classroom teachers, although it is not entirely clear how and to what extent Petitioner performed the assignments.

81. On October 29, 2008, Petitioner again used profanity toward a staff person, and, this time, the school imposed a three-day AES, which is the first AES that Petitioner received that school year. After the preparation of the 2008 IEP two weeks later, Petitioner received more AESs; these are discussed below.

82. An excellent teacher who developed good rapport with Petitioner is his U.S. history teacher, Tom Allen. According to Mr. Allen, at the start of the school year, Petitioner was hardly distinguishable from his classmates. [REDACTED] did his work and took extensive notes from overhead presentations. Petitioner actively participated in group discussions and performed well in class. It helped that the material was the

Bill of Rights of the U.S. Constitution. Students of this age are especially interested in their rights, according to Mr. Allen, and Petitioner is clearly no exception. The students were also enthralled by another subject covered during this period--the campaign that led to the election of the first black U.S. president.

83. However, in October, Petitioner's behavior and classroom participation deteriorated. ■ became fidgety in class. At times, Petitioner lay across his desk or tried to engage his neighbors in off-topic conversation. Petitioner began to pace around the class and leave the classroom excessively to use the restroom. Petitioner's attitude toward Mr. Allen changed, as Petitioner became more defiant and aggressive. In contrast to September, when Petitioner was engaged with the material, ■ began to groan at assignments or say, out loud, "this shit's boring." Once or twice per week in October, Petitioner would leave his seat, walk up to Mr. Allen, entering his space, and tell him to quit "sizing me [i.e., looking at me] or I'll pop off at you." After the presidential election, the frequency of this behavior increased to two or three times per day, as class material shifted from the Bill of Rights and presidential election to less engaging topics.

84. Exhibiting remarkable patience, Mr. Allen did not responding to every provocation, but tried to balance the needs

of Petitioner and those of ■■■ classmates. Mr. Allen learned from other teachers that Petitioner's performance was cratering in their classes, as well. As already known by Petitioner's mother and Ms. Moreno, Mr. Allen knew that it was important not to engage in behavior that Petitioner construed as disrespectful, especially in the presence of others. Thus, Mr. Allen talked to Petitioner privately or, if during class, quietly, while squatting down beside him at his desk in class so as to be at his eye level. Mr. Allen tried to bargain where he could, such as agreeing to move him away from someone whom Petitioner did not like in return for Petitioner's allowing teaching to take place in the classroom.

85. Despite Mr. Allen's extraordinary accommodations, even during the first quarter of the fall semester of 2008, while Petitioner was doing well, he had earned a C or a D. Due to the timing of ■■■ crash that fall, though, ■■■ failed the first quarter of U.S. History and later failed the second quarter.

86. The instructional level of the U.S. history class was supposed to be eighth grade, and the class was supposed to cover the curriculum required by Sunshine State standards for eighth grade. In practice, neither of these standards was attainable, despite Mr. Allen's obvious talents as a teacher. Because Petitioner was not alone in ■■■ inability to read the eighth-grade text used in the class, Mr. Allen did a lot of the reading

to the class and simplifying of material. It is clear from Mr. Allen's testimony that Petitioner did not read at anything near an eighth-grade level, although Mr. Allen thought that [REDACTED] written expression might be at a fifth-grade level. Mr. Allen estimates that he covers 75-80 percent of Sunshine State standards in this eighth-grade class.

87. Danny Young, Petitioner's reading teacher during eighth grade, testified that Petitioner could read at a level somewhere between sixth and eighth grades. This testimony is discredited. Mr. Young, whose training is largely in ESE, administered no achievement tests to Petitioner, has never administered the most common achievement test (Woodcock Johnson) and is unfamiliar with it, and never offered his opinion about Petitioner's reading level at the IEP meeting that he attended for the 2008 IEP.

88. In this context, Respondent prepared the 2008 IEP on November 10, 2008. The 2008 IEP (actually, a Transition IEP) was developed at a meeting on November 10, 2008. The 2008 IEP identifies Petitioner's eligibilities as EBD and OHI. The post-school outcome is to proceed to high school and, later, to go to college and become a lawyer or judge. The 2008 IEP states that Petitioner is working toward an academic diploma. The duration of the 2008 IEP is one year. The 2008 IEP states that the next required annual review will take place no later than November 9,

2009, and the next scheduled reevaluation will take place no later than August 22, 2010.

89. The 2008 IEP states that Petitioner is currently in the eighth grade in all general education classes. A Diagnostic Assessment of Reading administered on October 20, 2008, reports grade level four for Word Recognition and Oral Reading, grade level five for Silent Reading Comprehension, and grade level six for Word Meaning. The only information about present level of performance in math is a report from Petitioner's math teacher that ■■■ current grade in her class is a D. ■■■ grade in science is an F.

90. In terms of functional performance, the 2008 IEP states:

■■■ teachers report that [Petitioner] is easily distracted, has difficulty completing his work, is out of ■■■ seat often. [Petitioner] has a limited attention span. ■■■ sometimes comes to school prepared. [Petitioner] sometimes calls out and is disruptive in class. ■■■ becomes annoyed when ■■■ is not called on quickly each time ■■■ raises his hand. ■■■ is often out of uniform. [Petitioner] is sleepy sometimes and has difficulty getting started in the morning. [Petitioner] can be kind and thoughtful at times. ■■■ does seek attention when situations become difficult for ■■■.

91. The 2008 IEP notes: "Due to his disability, [Petitioner] has difficulty accessing the general education curriculum." The 2008 IEP identifies the educational needs to

improve reading skills and to improve social/emotional skills. Continuing the ambivalence found in earlier IEPs, though, the 2008 IEP adds that Petitioner "gets along well with adults when [REDACTED] chooses to."

92. The 2008 IEP contains two instructional goals. The first is: "Given reading comprehension activity on his grade level, [Petitioner] will answer 8 out of 10 questions, in 4 out of 5 trials, by November of 2009." The second goal, which seems mislabeled as an instructional goal, is, when frustrated, to "independently remove [REDACTED] from an instructional task, 8 out of 10 times successfully, by November of 2009." The short-term objectives under each goal are similar to each goal, except that the number of successful trials is incrementally increased over time.

93. The 2008 IEP contains one employment goal, which is, by November 2009, "when given a classroom assignment, [Petitioner] will complete the task within the allotted time 4 out of 5 times." The four short-term instructional objectives are borrowed from the October/November 2007 Transition Interim IEP and, thus, the December 2006 IEP and include arriving to class on time 80 percent of the time, following a daily schedule without tardiness, and listing and prioritizing assignments using [REDACTED] planner. The 2008 IEP contains two community experience goals and six short-term instructional objectives,

which are largely borrowed from the October/November 2007 Transition Interim IEP and, thus, the December 2006 IEP.

94. The 2008 IEP specifies two hours twice per week of collaboration in all academic areas and family counseling 30 minutes per week. This IEP records the medications that Petitioner is taking for ADHD, bipolar disorder, and a sleeping disorder. Placement under the 2008 IEP is 100 percent in regular-education classes. According to the IEP, which states that Petitioner is working toward an academic diploma, the mother asked for help for her [REDACTED].

95. The first issue in these cases is whether the 2008 IEP provides FAPE. It does not. Interestingly, this is also the testimony of Lauren Adam, one of Respondent's ESE Program Specialists and a member of the November 2008 IEP team. However, she testifies, and Respondent contends, that the 2008 IEP provided FAPE when it was prepared, and no one could have realized that it failed to provide FAPE until the issuance of a new psychological report by Dr. Suzanne Spindler, one of Respondent's school psychologist.

96. This critical qualification, though, is rejected. The 2008 IEP failed to provide FAPE based on what was already known, or reasonably should have been known, to the IEP team on November 10, 2008. Additionally, Dr. Spindler's psychological

report, discussed below, provided nothing that was not already available to the IEP team.

97. Using data readily available to the IEP team, two of Respondent's witnesses, Dr. Ralph Eugene Cash and Dr. Spindler, provide a sufficient description of Petitioner's salient characteristics to reveal why the 2008 IEP fails to provide FAPE. The analysis of this data by these witnesses occurred after the IEP was prepared. However, due to the age of the relevant data, longstanding problems that Petitioner had long posed, and increasing lack of success in the fall of 2008--prior to the 2008 IEP--of similar educational planning that Respondent had done for Petitioner, Respondent cannot escape the consequences of these fairly obvious conclusions by citing to the post-November date that it retained Dr. Cash or the five-week interval between the IEP meeting and the issuance of Dr. Spindler's psychological report.

98. Dr. Cash, president of the National Association of School Psychologists, worked for four years as a school psychologist with Respondent in the late 1970s, Dr. Cash has worked as a licensed psychologist for the past 22 years. He has taken a leave of absence from Nova University while serving in his present role. Except in two respects, his testimony has been credited.

99. Dr. Cash described Petitioner academically, behaviorally, and emotionally. Petitioner's academic characteristics are essentially that [REDACTED] is not on grade level. [REDACTED] behavioral characteristics include behaviors that are unsafe to [REDACTED] or others. [REDACTED] behavioral characteristics may include some triggered by environmental circumstances, such as not hearing from [REDACTED] biological father in the Caymans for many years, but also include some triggered by mental illness.

100. Addressing Petitioner's educational needs, Dr. Cash opined that [REDACTED] lack educational stability has contributed to underachievement academically. Dr. Cash added that Petitioner requires sufficient educational and behavioral structure to permit classroom instruction to take place. Once these two prerequisites are met, Dr. Cash added that more intensive educational instruction could be provided; until the first two prerequisites are met, Dr. Cash warned that more intensive educational instruction would not produce a "big bang."

101. Dr. Cash opined that Petitioner's intellectual ability is probably at the low end, although not as low as borderline. Dr. Cash noted that Petitioner talked better than [REDACTED] scores would suggest that he could. Some of Petitioner's standard scores are in the high 80s, which is atypical for a student with a borderline IQ. (Six years earlier, one broad math score was 93, as noted above.) Dr. Cash also testified

that research suggests that IQ tests, especially of minority students with emotional difficulties, such as Petitioner, tend to depress the scores of their subjects. Obviously, Petitioner also presents extreme difficulties as a testing subject due to [REDACTED] extreme case of ADHD, as noted below. While it is true, as Dr. Cash testified, that Petitioner's cognitive capacity will limit [REDACTED] ultimate academic achievement, this limitation has not yet been approached.

102. Reviewing the records, Dr. Cash confirmed that Petitioner suffered from ADHD, mixed type--meaning that he was inattentive and impulsive. Ultimately, health-care professionals diagnosed Petitioner with Oppositional Defiant Disorder, after earlier considering or finding Bipolar Disorder or Mood Disorder--Not Otherwise Specified. Dr. Cash underscored the importance of diagnoses, not in isolation, but in the context of helping to understand academic functioning of a child and how [REDACTED] learning is impacted by [REDACTED] diagnoses.

103. At this point, the second of Respondent's two witnesses, Dr. Spindler, offers useful details to the portrait of Petitioner. Dr. Spindler interviewed [REDACTED] in October 2008 and describes [REDACTED] as among the most ADHD-afflicted children she has ever seen, and she has seen a couple of thousand children in her 21 years of practice. She described Petitioner's impulsivity as extreme, as when [REDACTED] kept reaching onto her desk and touching

her personal items. ■■■ behavior appeared "sudden, frantic and manic," as when ■■■ took off ■■■ shoes and began playing with them, or ■■■ abruptly made "big" movements, as in jumping out of ■■■ chair and running around the room. Dr. Spindler described a "large percentage" of this behavior as not controllable, but impulsive.

104. Dr. Spindler observed less intense presentation of bipolar symptoms, which can overlap with ADHD symptoms. However, she opined that some of ■■■ behavior is clearly emotionally based, and ■■■ has had emotionally based problems, as well as behavioral problems, for a "long time."

105. The common purpose of treating all of these mental conditions is to help the subject acquire or improve self-control, but there are different degrees of volitional behavior in each condition, especially if untreated. Dr. Cash explained that the child presenting with untreated bipolar disorder probably presents with the least role for volition, and the child presenting with Oppositional Defiant Disorder probably presents with the greatest role for volition, not of mood, but of mood-based behavior. Dr. Cash added that ADHD was probably between these two disorders in terms of the role of volition because most ADHD children can focus their attention for short or even long periods of time, depending on their interest in the task or the importance that they attach to it. This, of course,

can account for the Pine Ridge staffperson's observation of Petitioner's self-control on countless occasions.

106. According to Dr. Cash, a child with any of these conditions will continue to suffer unmodulated emotional reactions to stimuli, far in excess of those experienced by his peers to the same stimuli. The point of treatment is to help the child learn, through careful training, how to control the excesses of his behavioral responses that have followed these emotional reactions.

107. The first of the two elements of Dr. Cash's testimony that are not credited is his contention that, just as Petitioner's ADHD has prevented accurate testing of his intellectual ability, so has it prevented accurate testing of his academic achievement. As to cognition, Petitioner's teachers also have found that he has greater intellectual ability than borderline. In achievement in reading, though, Petitioner's teachers have generally found that, day in and day out, Petitioner displays substantially sub-grade reading skills. This is addressed in more detail below.

108. The second element of Dr. Cash's testimony that is not credited is his opinion that the 2008 IEP provides FAPE. In forming his opinion, Dr. Cash has not adequately accounted for the overall educational experience of Petitioner in regular education, but especially in eighth grade when he finally fell

apart at school--a process that was well underway when the 2008 IEP was prepared. Stressing the importance of the least restrictive environment for educating Petitioner, Dr. Cash bravely testified that the 2008 IEP balanced the educational and behavioral interventions, so it has "the potential" to provide FAPE, even though he conceded that a better program for Petitioner would be a day center, which is described below. Failing to appreciate the significance of Petitioner's deterioration in the fall of 2008, Dr. Cash fails to assign sufficient importance to the lack, in a regular-education program, of the carefully controlled structure and specially trained staff, as well as the therapeutic component, without which Petitioner can no longer make educational progress.

109. Like Dr. Cash, Mr. Allen also testified that the 2008 IEP provides FAPE. However, Mr. Allen never tried to reconcile this opinion with his testimony of how Petitioner continued to deteriorate after the 2008 IEP and through Thanksgiving, by which time ■■■ had totally lost contact with the class in terms of the material being taught. Like Dr. Cash, Mr. Allen never ventured to say that the Petitioner's disruptions were entirely due to a matter of choice.

110. If reduced to a single reason, the 2008 IEP fails because, rather than including a therapeutic component, it places Petitioner 100 percent of the time in regular education

that was proving unworkable, despite the best efforts of motivated teachers and school staff, even before the IEP was drafted. Ms. Adams recalls that the IEP team considered, at the November meeting, the extent to which Petitioner was presenting a behavioral/conduct issue, which would be more amenable to behavior modification and discipline, and the extent to which Petitioner was presenting an emotional issue, which would be less amendable to behavior modification and discipline. The IEP team badly erred when it determined [REDACTED] problems were more of a behavior/conduct nature than an emotional or mental health nature. Ms. Adams testified, though, once the IEP team received Dr. Spindler's psychological report, they knew that the 2008 IEP was not "adequate."

111. Shortly after the 2008 IEP was prepared, Respondent's professionals released two reports on Petitioner. The first was a psychosocial assessment report by one of Respondent's school social workers, Jeerdean Ferguson, and dated December 4, 2008. The school, which Petitioner had been attending only three months, requested the psychosocial "for consideration to an alternative educational program." School staff were reporting that Petitioner was "experiencing extreme difficulty in the traditional school setting," as reflected by "several referrals for using profanity and for being defiant with authority figures" and refusing to attend classes. In fact, the expressed

intent of the psychosocial report "is to provide a comprehensive assessment . . . to assist with determining an appropriate educational program for [Petitioner]."

112. The psychosocial report states that, since entering middle school, Petitioner "has continuously displayed disruptive behavior, which has resulted in multiple internal suspensions." In fact, the psychosocial report adds, the disruptive behavior has taken place since pre-kindergarten.

113. Ms. Ferguson's interview with Petitioner's mother revealed that the mother believed that Petitioner is smart, but ■■■ academic performance is not commensurate with ■■■ ability, partly because of ■■■ behavior and refusal to complete school work. The mother told Ms. Ferguson that she felt a fourth middle school's "general education program is not appropriate" for her ■■■ and that she was happy with Pine Ridge until a staffperson broke her ■■■'s elbow. The mother informed Ms. Ferguson that her ■■■ "will respond more appropriately in a more structured and smaller classroom setting." The mother also told Ms. Ferguson that Petitioner had been hospitalized four or five times under the Baker Act.

114. The psychosocial report concludes:

. . . [Petitioner] appears to be in need of a highly structured program where behavioral modification techniques are applied in an immediate and consistent manner.

█ is not performing academically on grade level and is currently failing in all subjects. █ has been suspended internally and externally several times because █ openly defies authority figures, uses profanity, exercises no impulse control, and rarely accepts responsibility for █ actions. The traditional school based interventions with [Petitioner] have proven to be futile (internal suspensions, parent conferences, individual counseling, and referrals to AES, etc.).

115. Based on these conclusions, Ms. Ferguson recommended that Petitioner

appears to be in need of a highly structured education program with a therapeutic component to address █ severe behavior. █ is in need of consistent monitoring because █ exercises no impulse control, which is enhanced by █ level of hyperactivity, lack of sleep, and defiance.

116. Dr. Spindler's psychological report, which is dated December 17, 2008, echoes the recommendation of Ms. Ferguson's psychosocial report. The report was not available before the November 10 IEP team meeting, although Dr. Spindler interviewed the child in October 2008, and nothing explains why she was not invited to the IEP meeting or, if invited, did not attend.

117. In any event, the psychological report repeats much of the history of the preceding psychosocial report. Dr. Spindler found that Petitioner presented as an "extremely impulsive, hyperactive, and distractible student." Administering a test of intelligence, Dr. Spindler found that

his full scale IQ was 72, which was borderline. Based on achievement tests, Dr. Spindler refined the earlier achievement data used by the IEP team, noting that Petitioner displayed a grade equivalent of 4.5 for broad reading, 5.4 of broad math, and 2.4 of written expression.

118. Dr. Spindler's suggestions include:

[Peticioner] might benefit from a highly structured educational environment that offers behavioral and therapeutic support.

Because of [REDACTED] hyperactivity and impulsivity, close monitoring is suggested.

\* \* \*

[Peticioner] might benefit from social skills training in the areas of aggression replacement, empathy training, and managing emotions.

\* \* \*

119. By the time of the 2008 IEP, nothing was particularly new about Petitioner's educational plans, except that [REDACTED] behavior was escalating in an educational setting devoid of therapeutic interventions. For several years, professionals had suggested the possible need of a therapeutic component--at times when Respondent was far less outrageous in [REDACTED] behavior--and IEP teams had contented themselves with chanting the mantra that the child was making bad choices, cutting and pasting of unmastered goals and objectives, and finally omitting from IEPs objective measures of the student's nonachievement in reading and written

expression. For at least five reasons, the IEP team cannot legitimately claim that Ms. Ferguson or Dr. Spindler provided some sort of revelation that, supposedly unavailable a couple of months earlier, justifies a finding that the 2008 IEP was reasonably calculated to provide educational benefit.

120. First, Respondent had long known that health-care providers had diagnosed and treated Petitioner for ADHD and some sort of mood disorder. Respondent failed to incorporate in any of the IEPs any educational support for these efforts; instead, as repeatedly mentioned in IEPs, Respondent acknowledged the work of the health-care providers and hoped for the best from every new medication or dosage.

121. Second, while hoping for a sudden transformation from the work of the health-care providers, Respondent, in the meantime, continued to treat the child on the assumption that ■■■ was simply making bad choices or could control ■■■ own behavior and would not. Thus, all of the IEPs called for nothing more than behavior modification and discipline--by the end, entirely in a regular-education classroom. Ms. Ferguson and Dr. Spindler's suggestions of a therapeutic intervention were not the first time a professional had raised this issue with Respondent. Ms. Carrenard had raised the same possibility one and one-half years earlier, and Ms. Moreno had provided specific techniques one year earlier. It is not as though, in

the increasingly tumultuous 18 months following Ms. Carrenard's prudent warning, that Respondent implemented therapeutic interventions or even gave the matter any serious thought.

122. Third, Respondent was aware that Petitioner had undergone at least three crises that required short-term psychiatric hospitalizations for behaviors that threatened harm to ■■■ or others. This should have suggested an emotional component to Petitioner's behavior or, at the very least, a disciplined, focused, result-oriented inquiry into the child's makeup. The proximity of the three crises to IEPs that preceded them should have underscored the emotional component missing from the IEPs: IEP dated February 5, 2004 (Petitioner can control behavior and no disability-related problems with behavior; seven weeks later, Petitioner tried to hang himself); IEP dated May 5, 2006 (Petitioner interacts appropriately with peers and adults and no disability-related problems with relationships; one week later, Petitioner threatened mother with a knife); and IEP dated October 23, 2007 (Petitioner can achieve at school without disability-related problems; one day later, while at school, Petitioner threatened to hurt mother or walk into traffic).

123. Fourth, Respondent was aware that Petitioner's gaps, in reading and written expression, between ■■■ grade level and ■■■ actual skill level, were growing worrisomely large and that

educational planning since the IEP dated February 5, 2005, had failed to produce results. Among others, Petitioner's teachers knew this, but clear signs of these problems are in the IEPs. The February 5, 2005, IEP set goals and objectives based on a fourth-grade level of reading. When these were not mastered, 15 months later, the May 5, 2006, IEP reduced the goals and objectives to a third-grade level of reading. Subsequent IEPs in 2006 and 2007 failed to find any link between Petitioner's disabilities and ■■■■ academics and failed to document reliable information of academic achievement, so there were no academic goals or objectives.

124. At this point, the 2008 IEP laudably addresses reading, but the one legitimate academic goal is to have Petitioner reading, in one year, at an eighth-grade level: in other words, raise ■■■■ reading level three to four years in a single year, and with no ESE instruction. The IEP team did not require the wisdom of Ms. Ferguson or Dr. Spindler to know, as of November 2008, that this is not a serious plan. Nor did the IEP team require the wisdom of Dr. Cash to know, as of November 2008, that intensive instruction must await the parties' (Petitioner's mother in relocating, as well as probably not always insisting on attendance, and Respondent in suspending) providing Petitioner educational stability and Respondent's identification of the right menu of therapeutic, behavioral, and

academic services so as to create sufficient educational and behavioral structure.

125. The illogic of this reading goal, essentially standing alone, without the components required for educational stability and the proper blend of therapeutic and behavioral supports, is revealed by an examination of Petitioner's academic experience the past five years, during which [REDACTED] behavior was generally not as bad as it was in the fall of 2008 prior to the IEP meeting. From early in [REDACTED] second attempt at third grade, when Petitioner was at grade level 3.0 in reading, until shortly into eighth grade--five years later--Petitioner had raised [REDACTED] reading skills only 1.5 years' worth. During the same time, [REDACTED] written-expression skills presumably languished, so that, in eighth grade, they were at a grade equivalent of 2.4.

126. Nor can these records of nonachievement be attributed to a lack of intellectual capacity. During the same five-year period, Petitioner's math skills rose from a grade equivalent of 2.5 to 5.4, not as much as they should have increased, but highly impressive given, among other things, the lack of educational stability caused by constant changes in schools, the attendance problems caused by absences and suspensions, and Petitioner's struggle to deal with medical conditions whose management was not supported in Respondent's classrooms.

127. Fifth, Respondent was aware that Petitioner's behavior had remained unchanged for several years, despite years of behavior modification and discipline. From the IEP dated December 18, 2006, through the 2008 IEP, the same goals and objectives were dragged along, unmastered and without regard to why they were unmastered, again implicitly because Petitioner was continuing to make bad choices. These goals and objectives were dragged along, unmastered and unaddressed, as Petitioner's behavior became more outrageous and the suspensions and absences more numerous. All along, returning to the first reason, any competent health-care professional (and Dr. Cash is much more than that) could explain that, due to his medical conditions, Petitioner's emotional reactivity to stimuli would sometimes be heightened and [REDACTED] ability to control proximal impulses would be impaired--absent careful training and handling, highly impaired.

128. The second issue in these cases is whether Respondent failed to conduct a required manifestation hearing after the tenth day of AES. It is undisputed that Respondent imposed 12 days of AES on Petitioner during the 2008-09 school year and never conducted a manifestation determination hearing. Respondent claims that it was not required to conduct a manifestation hearing because the AESs are not a change in placement that would necessitate a hearing. However, the AESs are a change in placement.

129. Consistent with its policy, in all cases of AES, Respondent gave Petitioner and [REDACTED] mother the option of AES or external suspension. The advantages of an AES are that, if served, the suspension does not go on the student's record, and he is able to stay current with his classwork, at least in theory, and receive credit for his work. AES takes place at a different facility, usually an alternative center, than the student's regular-education school, from which [REDACTED] has been suspended.

130. There are two problems with Respondent's contention. First, for her [REDACTED] to attend the AES, Petitioner's mother would have to ensure, not merely that the election was made, but that [REDACTED] followed through and attended the class. At a time of great volatility, which is what caused the AES in the first place, Petitioner's cooperation in actually attending the AES was unlikely. It is not that the mother lacks insight into the unacceptability of her [REDACTED]'s behavior, although she blames the school for much of what transpired that fall. By the point of the AESs, the mother was at wit's end. The mother was afraid to answer her phone from fear that Petitioner had done something outrageous, again, at school and she would be summoned to get [REDACTED]. As noted above, lacking an abundance of resources, the mother was silently relieved when [REDACTED] missed the bus because she knew that she would have one day's peace from her [REDACTED]'s problems

at school. Thus, the AES assignment, for a child of Petitioner's considerable emotional instability and impulsivity, was tantamount to external suspension and a change in placement because ■■■ would rarely attend the alternative program.

131. Even when Petitioner attended the AES program, AES was tantamount to external suspension and a change in placement. If the student elects an AES assignment, ■■■ reports to the AES classroom, which is based on the level of school that ■■■ is in, so that an eighth grader would be in an AES classroom that has sixth-, seventh-, and eighth-grade students in it. In bins alongside the seating area are the classroom materials, arranged by school. The students are encouraged to work on academic materials, but are not effectively required to do so, nor is it likely with students of impaired motivation, such as Petitioner shortly after incurring another suspension, that they would do any school work at all.

132. Even if Petitioner were motivated when ■■■ attended the AES program, an insurmountable problem exists. At ■■■ home school, Petitioner has teachers like Mr. Allen and Mr. Young, who tailor their instructional methods to Petitioner's skill levels and learning style, while applying their knowledge of Petitioner to raise the chances of effective instruction in a regular-education classroom. The AES student is required to work independently using texts that are written at grade levels

that, in Petitioner's case, far exceed [REDACTED] ability to read. If asked, the AES teacher, whose specialty is ESE, not a specific subject area, will address a student's material, but there is otherwise no academic instruction taking place in the classroom, nor is any practical given the varying schools, grades, classes, and teachers of the AES students. If no one is working on academics, the teacher may instruct the group in social skills. But the program is lax: if a student fails to report to AES at all, the AES probably will not inform the student's home school of the absence.

133. Bearing out this assessment of AES, the suspended student's classroom teachers, although required to send materials to the AES facility, do not ever get anything back in the form of completed assignments, at least according to the testimony of Mr. Allen and Mr. Young. Thus, on the occasions that Petitioner sat, idle, in the AES classroom, lacking even the reading skills to read the assigned text, if [REDACTED] had been motivated to do so, [REDACTED] lost more ground to his classmates, who continued to progress in a curriculum that teachers such as Mr. Allen had modified for them, as in reading the inaccessible text or using student reenactments to transfer information kinesthetically that could not be transferred visually or even auditorily. Mr. Allen conceded that the returning AES student never performed as well as [REDACTED] classmates over the materials

covered while the student was in AES, so he tried to compensate for this fact by giving the returning AES student an open-book test or omitting that test score from [REDACTED] overall grade.

134. The third issue in these cases is whether the 2009 IEP provides FAPE. It does.

135. Following winter break, Respondent's employees continued the education-planning process, in fact because of the obvious inadequacy of the 2008 IEP, although they claim due to the receipt of Dr. Spindler's psychological report. On January 14, 2009, the IEP team conducted a meeting to consider Sunset School, a day school operated by Respondent with a prominent therapeutic component.

136. Sunset School offers academic and special diplomas and a curriculum compliant with the Sunshine State Standards. It is attended entirely by ESE students, almost all with an EBD eligibility, but this is not to say that Sunset is the ideal placement for all EBD students, as discussed below. The school employs two registered nurses to administer medications or handle minor illnesses or injuries, mental health counselors with at least a master's degree, and teams consisting of behavior specialists and behavior techs. Classrooms at Sunset, which is a secure facility, feature 6-10 students per class. Each class has a teacher, paraprofessional, and an additional paraprofessional for one student. If a classroom is self-

contained, one teacher teaches all subjects; otherwise, the students changes classes by period and receive instruction from different teachers. The students in circulating classes tend to be higher functioning than the students in self-contained classes.

137. Prior to the IEP meeting, Rona Kelly, a mental health therapist at Sunset, and Dr. DeFilipo, the school psychiatrist at Sunset, interviewed Petitioner's mother and Petitioner, separately. Ms. Kelly testified that she had not seen a [REDACTED] the age of Petitioner with ADHD to the extent that [REDACTED] manifested the condition. She described Petitioner as showing serious difficulty in remaining seated and pacing about the room. She was struck, though, by the absence of pressured speech. It seemed that, if [REDACTED] could move around, [REDACTED] could remain attentive to her questions and appropriate in [REDACTED] responses. [REDACTED] passed a simple test of short-term memory. [REDACTED] maintained good eye contact.

138. In her notes, Dr. DeFilipo detected no signs of a thought disorder at the time, but found Petitioner immature with unrealistic thinking and limited insight and judgment. Dr. DeFilipo concluded: "This child needs to receive intensive therapeutic support."

139. The 2009 IEP team, which included Dr. DeFilipo and Ms. Kelly, discussed Petitioner in detail, and Ms. Kelly

described the Sunset program in detail, as well. As Ms. Kelly explained, many of the Sunset students experience hallucinations, of which Petitioner has been entirely or almost entirely free, and suffer from psychoses, which have not afflicted Petitioner. Many of the Sunset students are also lower functioning than Petitioner in terms of cognition. They discussed Smith Community Mental Health, a smaller school where the students, all of whom are ESE, suffer from more of a blend of mental health and behavioral issues and are generally less severe than the Sunset students. The Sunset students tend to remain at this school for long periods of time, as in years, rather than a few months.

140. The IEP team met for nearly four hours. Ultimately, Ms. Kelly concluded that Petitioner lacked the emotional or mental-health component and severity of diagnosis necessary to benefit from a placement at Sunset School. Ms. Kelly found that Petitioner's disability was behavioral, not emotional, and she disagreed with a placement at Sunset. She testified at the hearing that she still disagreed with this placement.

141. Ms. Kelly's opinion persuaded the IEP team not to place Petitioner at Sunset, so, on January 15, 2009, they issued a Notice of Refusal to change his IEP to require attendance at Sunset School on the ground that his primary need is behavioral.

142. After some changes to the BIP in December and the addition of classroom support in January, Petitioner was still performing unsatisfactorily at school, as documented in the 2009 IEP, which is described below." On January 30, 2009, Petitioner filed [REDACTED] due process request, challenging the 2008 IEP.

143. After proper notice of an IEP team meeting, which Petitioner's mother declined to attend, on March 4, 2009, Respondent prepared the 2009 IEP, which is a Transition Interim IEP. The eligibilities are EBD and OHI, but the ultimate goal of college is the same, although now Petitioner wants to be a football player, not a lawyer. The 2009 IEP states that, based on [REDACTED] current grades, which were almost entirely Fs, Petitioner needs to complete "course recovery" to get to high school.

144. The 2009 IEP adds information from Dr. Spindler's psychological report, as well as from various disciplinary referrals. The goal of this IEP is to improve skills in reading, math, and instructional behavior. The IEP contains two reading goals, both involving reading at the eighth grade-level within one year (or possibly the 9.5 grade-level within one year). There are instructional behavior goals that are not unlike the behavior and independent-functioning goals of the last several IEPs. Although there are no math goals, the addition of several new goals of an academic nature provide ample material on which Petitioner and [REDACTED] teachers can work.

145. The big changes in the 2009 IEP are that it provides Petitioner with extended school year services and places [REDACTED] 100 percent of the time in ESE for intensive instruction in academics, behavior, independent functioning, and communication; behavior support; mental health counseling; and school nursing. The specific placement is a separate day school, of which Sunset School is one.

146. The presumptive placement at Sunset School is an issue of dispute among Respondent's witnesses. As noted above, Ms. Kelly, who has considerable experience with EBD children and Sunset School, believes that placement at Sunset is inappropriate because Petitioner's disabilities are not sufficiently severe, and they are excessively behavioral, rather than of an emotional or mental-health nature. Dr. Cash, though, believes that a placement at separate day school is more appropriate than a placement in an alternative center.

147. Petitioner's main problem with the 2009 IEP is that it is too ambitious. One of Petitioner's contentions, which, to this point, has been implicitly rejected, is that the child's intellectual ability is borderline. This is unsupported by the record--by [REDACTED] relatively high scaled score in math several years ago; [REDACTED] ongoing achievement in math during the ensuing tumultuous years; [REDACTED] mother's insights over the years; [REDACTED] teachers' insights, at least as to intellectual ability, which

is within their expertise, not the source of disruptive behaviors, which, when partly the product of complex medical conditions, is not; ■■■ wit; and, of course, ■■■ resistance to testing.

148. In particular, Petitioner questions whether an IEP can realistically include an ultimate goal of attending college. On this record, the IEP cannot be found not to provide FAPE simply because of the inclusion of this goal. Petitioner has made impressive strides in math the past five years despite considerable trouble in school. Once ■■■ emotional and mental-health disorders respond to therapy in the educational setting and Respondent can confidently differentiate between the behaviors that, whether behavioral, emotional, or mental health in nature, Petitioner can reasonably control and the behaviors, if any, that Petitioner cannot reasonably control, then more intensive instruction can be undertaken. After a period of intensive instruction, there will be time enough to assess where Petitioner can go from there and the shape of ■■■ educational plan at that time.

149. Had Petitioner raised a more typical challenge to the 2009 IEP--least restrictive environment--he would not have prevailed either. For a time, ■■■ education requires separation from regular-education peers, so that Respondent's professionals can have an opportunity to work with Petitioner in a controlled,

safe setting. Although it is clear that 100 percent regular education and the alternative center are not appropriate for Petitioner's needs, it is also unlikely, at present, that a blend of pull-out ESE services and regular education would provide educational benefit for Petitioner.

150. Although Ms. Kelly's insight into Petitioner was not equal to her knowledge of the Sunset program and the kinds of students who work best in the program, ultimately, the least-restrictive question only involves the blend of regular education with ESE. It may well be that Sunset School is less suitable than Smith Community Mental Health or some other separate day school, but that is a medical distinction that finds no counterpart in education planning. Because all separate day programs are 100 percent ESE, in determining the least restrictive environment, all these programs are the same, and the 2009 IEP reserves to Respondent the decision of which of these separate-day-school settings to choose.

#### CONCLUSIONS OF LAW

151. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1003.57(1)(b), Fla. Stat. (2009), and Fla. Admin. Code R. 6A-6.03311(9)(u).

152. Section 1003.571(1), Florida Statutes, directs the Florida State Board of Education to conform to the principle

that "[ensures] 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[.]"

153. Section 1003.57(1)(d), Florida Statutes, prohibits the segregation of ESE students, unless "the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." This is Florida's least-restrictive-environment provision.

154. Section 1003.57(1)(c), Florida Statutes, requires that, while any due process proceeding is pending, absent agreement between the parties, "the student shall remain in his or her then-current educational assignment . . . until all proceedings have been completed." This is Florida's stay-put provision.

155. Either a parent or a school district may file a due process hearing request to litigate, among other things, the "educational placement of a student" or whether a 6A-6.03311(9)(a).

156. Florida Administrative Code Rule 6A-6.03028(1) provides that all students have a right to FAPE consistent with the requirements of the Individuals with Disabilities Education

Act and its implementing regulations. The rule requires that FAPE be made available to students with disabilities, including students who have been suspended or expelled.

157. Removals of ESE students for disciplinary reasons are governed by Florida Administrative Code Rule 6A-6.03312. Rule 6A-6.03312(1)(a)2. provides that removals totaling more than 10 in a single academic year, when the student's behavior "is substantially similar" in all the removals, may constitute a change in placement, so that the determination is subject to a due process hearing. Rule 6A-6.03312(3) requires a manifestation determination, within 10 days of a change in placement of an ESE student for violations of a code of student conduct. Rule 6A-6.03312(1)(f) explains that a manifestation determination is a process for examining the relationship between a student's disability and a specific behavior for which discipline is proposed. However, Rule 6A-6.03312(3)(d) provides that, even if the behavior is determined not to be a manifestation of the ESE student's disability, Respondent must continue to provide FAPE to the suspended student, pursuant to Rule 6A-6.03312(5)(b), so that the student continues "to receive educational services, including homework assignments in accordance with Section 1003.01, F.S., to as to enable the student to continue to participate in the general curriculum,

although in another setting, and to progress toward meeting the goals in the student's IEP . . . ."

158. Florida Administrative Code Rule 6A-6.03312(8)(a) authorizes an Administrative Law Judge to return the ESE student to the placement from which he was removed, if the Administrative Law Judge determines that the removal was in violation of this rule.

159. In general, the burden of proof is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528 (2005). This means that Petitioner bears the burden of proving that the 2008 IEP fails to provide FAPE and that the AESs were a change in placement, so that Respondent's failure to conduct a manifestation determination hearing also violated Petitioner's right to FAPE. However, Respondent, which filed the due process request concerning the 2009 IEP, bears the burden of proving that this IEP provides FAPE.

160. The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

161. For FAPE determinations with respect to an IEP, the standard is whether the IEP is reasonably calculated to provide educational benefit. Board of Education v. Rowley, 458 U.S. 156, 102 S. Ct. 3034 (1982). Most courts hold that the benefit must be more than trivial. See, e.g., Richardson Independent School District v. Michael Z., \_\_ F.3d \_\_, 2009 U.S. App. Lexis

19066 (5th Cir. 2009). This court has broken down the Rowley standard into four indicators, which, it says, require no special weighing:

1. the program is individualized based on the student's assessment and performance;
2. the program is administered in the least restrictive environment;
3. the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and
4. positive academic and non-academic benefits are demonstrated.

Id.

162. The question of the adequacy of the 2008 IEP must be addressed based on what was known or reasonably should have been known as of the time of the preparation of this document; although at least a couple of courts allow consideration of post-IEP events, they do so only to better inform the findings as to the factual conditions in effect at the time of the IEP, not to judge the IEP team's product with 20/20 hindsight. See M. S. v. Fairfax County School Board, 553 F.3d 315, 326-27 (4th Cir. 2009); Susan N. v. Wilson School District, 70 F.3d 751, 760-62 (3d Cir. 1995). Likewise, past progress, or the lack of it, from similar IEPs may provide useful evidence of whether the subject IEP is reasonably calculated to provide educational

benefit. See Thompson R2-J School District v. Luke P., 540 F.3d 1143, 1153 (10th Cir. 2008).

163. Based on the findings set forth above, the 2008 IEP was not reasonably calculated to produce positive academic and non-academic benefits. An IEP placing Petitioner entirely in a regular-education setting, with almost no ESE services, was not reasonably calculated to provide educational benefit. Even the not-insignificant gains in math the past five years could not take place in the turmoil that existed in the fall of 2008, prior to the 2008 IEP. And this IEP, carrying forward behavioral and independent-functioning objectives that had been unmastered for years, promised no benefit in these critical areas.

164. Based on the findings set forth above, the 2008 IEP was not individualized to Petitioner. It ignored ■■■ near-illiteracy in written expression. Except for one unrealistic goal, it ignored ■■■ serious deficiency in reading. And, worse of all, it ignored a long track record of failure in the implementation of programs of behavior management and discipline--without a therapeutic component--in managing Petitioner's escalating behavior.

165. Based on the findings set forth above, the 2008 IEP failed to provide services coordinated with the key stakeholders. To the contrary, the education plan was in

derogation of the services of the health-care providers, who had diagnosed serious emotional and mental health conditions and had found some techniques, which Respondent declined to use, for managing Petitioner's behavior.

166. Obviously, regular education is less restrictive than any other placement for Petitioner, but, in this case, this fact has nothing to do with whether a 100 percent regular-education program provides FAPE. This fact suggests the ineptness of analyzing the least restrictive environment within the FAPE determination. The better approach is to separate consideration of FAPE and least restrictive environment. See, e.g., Thompson R2-J School District v. Luke P., 540 F.3d 1143, 1148 (10th Cir. 2008), cert. denied, \_\_\_ U.S. \_\_\_, 2009 U.S. Lexis 1589 (2009). The inclusion of ESE students with regular-education students to the maximum extent feasible is not only of coequal importance with FAPE--and thus not to be reduced to a mere element of FAPE--but, given the nature of the inquiry, requires separate consideration, as these cases demonstrate. Especially since the Schaffer case, cited above, which allocates the burden of proof in FAPE cases based on which party is seeking relief, the better approach is to treat least restrictive environment as a discrete issue that, if raised at all, must be proved by the party asserting the suitability of a less inclusive environment. See Carlisle Area School v. Scott P., 62 F.3d 520, 533 (3d Cir.

1995), cert. denied, 517 U.S. 1135, 116 S. Ct. 1419 (1996); Oberti v. Board of Education, 995 F.2d 1204, 1219-20 (3d Cir. 1993).

167. Likewise, Petitioner has proved that Respondent changed ■■■ placement without conducting a manifestation determination hearing or, ultimately, without providing the specialized instruction that, given ■■■ disabilities and their effect on reading skills, precluded ■■■ keeping up with the curriculum. The failure to conduct a manifestation determination hearing is procedural, although the failure to provide specialized instruction is substantive.

168. In addition to the education-benefit, or substantive, requirement identified by Rowley, the Court also identified a procedural requirement--namely, whether the school district has complied with the procedural requirements set forth in the Individuals with Education Disabilities Act (or, actually, one of its predecessors, at the time of the Rowley decision). 458 U.S. at 206, 102 S. Ct. at 3051. A statutory amendment now requires that proof of a procedural violation may establish a failure to provide FAPE only if the procedural violation impeded a child's right to FAPE, significantly impeded a parent's right to participate in the decisionmaking process for providing FAPE, or caused a deprivation of educational benefit. 33 U.S.C. § 1415(f)(E)(ii).

169. The mere movement of Petitioner from [REDACTED] fourth middle school to the AES facility is not necessarily a change in placement. As considered in the stay-put context, a change in placement is determined by the environment in which the educational services are provided. If the change reduces the quality of the student's education or is a less restrictive environment, it is a change in placement in violation of stay-put. A. W. v. Fairfax County School Board, 372 F.3d 674, 682 (4th Cir. 2004).

170. In L.I.H. v. New York City Board of Education, 103 F. Supp. 2d 658, 664 (E.D.N.Y. 2000), the court held that the suspension of ESE students in an extended-school-year program, without providing them alternative instruction, constituted a change in placement for which a hearing was required.

171. In a decision involving the stay-put provisions of IDEA, the court in George A. v. Wallingford Swarthmore School District, 2009 U.S. Dist. Lexis 79024 (E.D. Pa. 2009), declined to treat the placement of a suspended child at an alternative high school as equivalent to [REDACTED] home school. In this case, the student could not get the hearing-support services that were available at [REDACTED] regular school.

172. A similar functional approach applies in cases involving the due-process rights of non-ESE students proposed for substantial suspensions. In Doe v. Todd County School

District, 2008 U.S. Dist. Lexis 97336 (D.S.D. 2008), the court rejected a school district's argument that placement of the student in an after-school program was not a suspension that would give rise to due-process requirements. The court stated that the proper analysis is to "look at the quality and quantity of classroom instruction given ■■■ while ■■■ was removed from regular high school classes." In this case, the student went from 30 hours per week of instruction to eight hours per week, and the court held that this was a suspension.

173. In Cole v. Newton Special Municipal Separate School District, 676 F. Supp. 749, 751 (E.D. Miss. 1987), the court determined that a suspension of at least ten days had occurred, triggering more substantial due-process protections prior to the suspension taking effect, when the student was kept in isolation from her class because she was excluded from classroom instruction.

174. In these cases, without a hearing, Respondent deprived Petitioner of specialized instruction and the accommodations and modifications that ■■■ teachers had found were necessary in order for ■■■ to access ■■■ curriculum. It is unimportant to determine the extent, if any, to which Respondent was receiving ESE instruction at the time of ■■■ AESs because the AES placements effectively deprived ■■■ of all instruction, and ■■■ was an ESE student.

175. It is not simply a case of substituting a team of a content-specific teachers, already familiar with the ESE student, ■■■ behavioral anomalies, learning style, and academic deficits, with a lone teacher in charge of a large classroom of students of varying grades from varying schools with a recent history of serious misbehavior. It is also a matter of removing the educational structure for this ESE student and replacing it with a pile of textbooks tossed in one of several bins along the side of the classroom. Given Petitioner's low motivation and even lower reading ability, there is no chance that any learning would take place in this setting. Because the number of days of AES exceeded ten, and were based on similar behavior over a reasonably focused period of time, it is unnecessary to consider the same question applied to the internal suspensions.

176. The change in placement from the AESs is either substantive itself or, if procedural, causes a denial of FAPE. Additionally, if any of these AES placements occurred after Petitioner filed ■■■ due process request, they also violated the stay-put provision.

177. For the reasons set forth above, the 2009 IEP provides FAPE. It is reasonably calculated to provide educational benefit. Petitioner has alleged no procedural violations or violations of the requirement of least restrictive environment.

178. This Order does not address Petitioner's claims under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act due to a lack of jurisdiction. As to the latter, the Division of Administrative Hearings reportedly has a contract with Respondent to conduct such hearings, but only after Respondent has transmitted the file to the Division for such purpose. As of the time of the final hearing, Respondent had not transmitted the file.

ORDER

Based on the foregoing,

It is

ORDERED THAT:

1. The 2008 IEP fails to provide FAPE.
2. Respondent failed to provide FAPE in assigning Petitioner to AES for the eleventh day during the 2008-09 school year for substantially the same misbehavior without conducting a manifestation determination hearing and without ensuring that ■■■ would be able to continue to participate in the general curriculum and make progress toward ■■■ IEP goals. Because the record fails to indicate that Petitioner was serving any suspensions at the time of the final hearing, the remedy of sending ■■■ back to the fourth middle school is moot.
3. The 2009 IEP provides FAPE.
4. All other requests for relief are denied.

DONE AND ORDERED this 9th day of September, 2009, in  
Tallahassee, Leon County, Florida.

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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of September, 2009.

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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.