

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
BUREAU OF SPECIAL EDUCATION APPEALS**

In re: Zeke<sup>1</sup>

BSEA #2200246

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

A hearing was held remotely via Zoom on August 2, 2022, before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings, all of whom agreed to participate virtually, were:

Mother	
Nicole Alton-Moore	Director of Family Services and Admissions, Evergreen Center School (Evergreen)
Kim Beckman	Behavior Education Team Supervisor, Evergreen
Jessica DeLorenzo	Director of Student Services, Pembroke Public Schools
Kelly McLeod	Board Certified Behavioral Analyst, Pilgrim Area Collaborative
Tami Joia	Advocate for Parent
Mary Ellen Sowyrda, Esq.	Attorney for Pembroke Public Schools
Kayla Shim	Legal Intern, BSEA (observer)
Alexander K. Loos	Court Reporter

The official record of the hearing consists of documents submitted by Parent and marked as Exhibits P-1 to P-24;<sup>2</sup> documents submitted by Pembroke Public Schools (Pembroke, or the District) and marked as Exhibits S-1 to S-13; one day of recorded testimony and argument; and a transcript produced by a court reporter. At the request of the parties, the case was continued to September 8, 2022, and the record held open for submission of closing arguments. The parties' closing arguments were received and the record closed on that date.

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<sup>1</sup> "Zeke" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

<sup>2</sup> The parties agreed that rather than reproduce the same exhibits, for the sake of efficiency Parent could refer to the exhibits submitted by Pembroke Public Schools (Pembroke or the District) as her own. Parent's binder of exhibits also lists the District's exhibits S-1 through S-13 as P-23 through P-34. There are two discrepancies, however, as Parent has submitted her own exhibits P-23 and P-24 and labeled the District's exhibits, S-1 and S-2, different documents, as P-23 and P-24. As such, throughout this decision I refer to those exhibits submitted as S-1 and S-2 as school district exhibits.

## INTRODUCTION

The procedural history of this matter is complex. It began with the filing of a *Hearing Request* by Parent on or about July 9, 2021. A series of postponement requests were allowed for good cause. On May 13, 2022, Parent filed a *Motion to Amend Due Process Hearing (Amended Hearing Request)*; following this amendment, the Hearing was postponed further for good cause until August 2, 2022. The specific issues for Hearing, based upon the information contained in the *Amended Hearing Request* and my July 21, 2022 *Ruling on Parent's Motion to Withdraw IEP Claim and Continue with Functional Behavior Assessment Claims Against Pembroke Public Schools and Motion to Join Evergreen Center, Inc. School (Motion to Withdraw Certain Claims)* are as follows:

- A. Whether Pembroke was obligated to conduct one or more functional behavioral assessments (FBAs) of Zeke between July 9, 2019 and his twenty-second birthday in July 2022, and failed to complete those FBAs in a timely, comprehensive manner, resulting in a substantive deprivation of a free, appropriate public education (FAPE); or
- B. Whether Pembroke committed procedural errors in connection with the FBAs it conducted that amounted to a deprivation of a FAPE because they impeded Zeke's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE for Zeke, or caused a deprivation of educational benefits; and
- C. If the answer to A and/or B is yes, what is the appropriate remedy?

For the reasons set forth below, I conclude that Pembroke did commit a significant procedural error when it failed to conduct an FBA for which parental consent had been obtained, as part of Zeke's three-year reevaluation at the end of 2019, without issuing prior written notice, and that this failure constitutes a violation of Zeke's right to a FAPE. As a result, Pembroke owes Zeke compensatory services in the form of an updated FBA that incorporates observation of him in a community setting.

## PROCEDURAL HISTORY

Parent's *Hearing Request* alleges that Pembroke impeded Zeke's right to a FAPE; significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Zeke; and/or or caused a deprivation of educational benefit, primarily through its failure to evaluate Zeke appropriately. Specifically, Parent contends that the transitional and functional behavioral assessments conducted over the last two years by the District were inadequate, resulting in insufficient transition planning, services, and goals for Zeke, who was then 21 years old.<sup>3</sup> Parent requested that Pembroke be ordered to conduct a comprehensive transition assessment and an FBA that, among other things, includes "the identification of any decreased or any deficits or lack of any age-appropriate daily living skills,

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<sup>3</sup> Additional information regarding Parent's allegations appears in my *Ruling on Parent's Motion to Withdraw IEP Claim and Continue with Functional Behavior Assessment Claims Against Pembroke Public Schools and Motion to Join Evergreen Center, Inc. School*, issued July 21, 2022. As many of Parent's claims were withdrawn prior to Hearing, I need not detail them here.

vocational, and independent living skills and that the behaviors identified become a part of the Individualized Education Program (IEP) with measurable goals and objectives.” She requested a modified behavior intervention plan, containing specific components, to be developed and monitored by a Board-Certified Behavior Analyst (BCBA) monthly. Finally, Parent requested a minimum of two years of compensatory services for the denial of a FAPE; an order that Pembroke conduct a number of assessments in multiple areas; and an order outlining the District’s obligations with respect to data collection and reporting and discussion of evaluations, among other things. The Hearing was scheduled for August 13, 2021.

In its *Response*, Pembroke asserts that it was funding Zeke’s attendance at the Evergreen Center School (Evergreen), a Department of Elementary and Secondary Education-approved program, as a full-time residential student on a fully accepted IEP at the time the *Hearing Request* was filed.<sup>4</sup> The District contends that it has not violated Zeke’s and/or Parent’s procedural or substantive rights, and that Zeke’s assessments and IEP goals address his disabilities and areas of deficit appropriately, are reasonably calculated for him to make effective progress, and provide him with a FAPE. According to Pembroke, Zeke participated in a transition assessment as part of his three-year reevaluation in January 2020, that included all areas of suspected disability and addressed all of his needs. Moreover, Evergreen conducted behavioral assessments and analysis and communicated the results to Parent on an ongoing basis, both formally and informally. Parent has been afforded opportunities to participate in planning Zeke’s education, including multiple attempts to include her in Team meetings that she has declined to attend. As Zeke was not denied services, assessments, or procedural protections, no compensatory services are owed.

Following a Pre-Hearing Conference in September 2021, after an initial postponement of the Hearing for good cause, the parties jointly requested that the Hearing be postponed several more times to allow for the completion of additional assessments, consideration by the Team of these assessments, and amendment of the *Hearing Request* to incorporate claims regarding these assessments. I allowed all requests, none of which was contested, for good cause.<sup>5</sup> Parent amended her *Hearing Request*, and the Hearing was then postponed again due to the unavailability of Counsel and the Advocate. It was ultimately scheduled for August 2, 2022.

In the meantime, on July 7, 2022 Parent filed her *Motion to Withdraw Certain Claims*,<sup>6</sup> which indicated that she wished to withdraw “certain claims concerning the IEP allegations she has made against the school district [and to] continue to move forward in her complaint on the issues regarding the allegations made regarding the Functional Behavior Assessment that the District administered pursuant to the Parent’s signed consent form.” Neither Pembroke nor Evergreen filed a written response, however I heard arguments from all entities during a

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<sup>4</sup> Following Zeke’s twenty-second birthday, in July 2022, Pembroke discontinued its services and funding, but Zeke continued to reside at Evergreen. Although Zeke’s eligibility for special education has terminated, I use the present tense in this decision to refer to the time period in issue.

<sup>5</sup> In the meantime, Parent filed several additional motions in November 2021. The parties were able to resolve the underlying issues, as well as discovery disputes, without BSEA intervention.

<sup>6</sup> At this time, Parent also moved to join Evergreen, alleging that Evergreen had failed to implement Zeke’s behavior plans, failed to conduct an FBA in connection with Zeke’s three-year reevaluation in 2019, and failed to include the community setting in the FBA that was conducted in December 2021. I denied Parent’s *Motion to Join Evergreen* because Pembroke, as the local educational agency, bears ultimate responsibility for Zeke’s education.

Conference Call that took place July 19, 2022. I granted Parent's *Motion to Withdraw Certain Claims*, narrowing the focus of this Hearing to the alleged substantive and procedural violations of Zeke's right to a FAPE arising from Pembroke's failure to timely and properly conduct FBAs during the relevant period, as outlined above.

### FINDINGS OF FACT<sup>7</sup>

1. Although Zeke was 21 years old at the time the *Hearing Request* was filed, he turned 22 in July 2022. He has attended Evergreen in Milford, Massachusetts since he was placed there as a full-time residential student by Pembroke in 2017. (P-23; S-1; DeLorenzo, 81)
2. Zeke has been diagnosed with Autism Spectrum Disorder (ASD) and an Intellectual Disability. (S-1) In August 2013, prior to Zeke's placement at Evergreen, Pembroke had placed him at Amego, Inc., a private day program. (P-1; S-1; DeLorenzo, 109-10)
3. Evergreen assesses and analyzes Zeke's behavior on an ongoing basis as part of his program. (P-9; DeLorenzo, 33, 92-93; Beckman, 222) The results are shared with Parent through data charts and quarterly reports. These charts, findings, and analysis are also regularly shared at Team meetings, and meeting notes are provided to Parent in the event she cannot attend. (DeLorenzo, 80, 93-94; Beckman, 216) Zeke's behavior support plans are modified in accordance with the data, and Parent is informed about these changes through verbal discussions and/or email. (P-2, P-3, P-4, P-5; S-3; Beckman, 238-39)
4. On November 24, 2019, Parent accepted a three-year reevaluation proposed for Zeke. The Evaluation Consent Form she signed listed specific assessments to be conducted: Academic Achievement; Speech/Language Assessment; Occupational Therapy Assessment; Physical Therapy Assessment; Functional Behavioral Assessment; and Residential Assessment. Parent consented to all but the Academic Achievement. (P-6; DeLorenzo, 27-28, 97) As acknowledged at Hearing by Pembroke's Director of Student Services, Jessica DeLorenzo,<sup>8</sup> by signing the form Parent agreed to, and expected that, all evaluations for which she had provided consent would be conducted. (DeLorenzo, 41)
5. The District submitted as exhibits a 3-Year Educational Review (S-5), a 3-Year Residential Review (S-6), a Psychological Evaluation (S-7), and a VB-MAPP (S-8), all completed in late 2019 to early 2020. The District did not submit an FBA from this time period.
6. According to Ms. DeLorenzo, an FBA "is conducted when an identified behavior has been exhibited and the [T]eam, or BCBA, is trying to figure out the function of a behavior. So there is an analysis done . . . by data that is taken over a period time to look at . . . and hypothesize the function of a student's behavior." (DeLorenzo, 19, 22) At Hearing, Ms. DeLorenzo testified that a "full" or "more formal" FBA might be done where a behavior is

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<sup>7</sup> I have carefully considered all of the evidence presented in this matter. I make findings of fact with respect to the documents and witness' testimony, however, only as necessary to resolve the issues presented.

<sup>8</sup> Ms. DeLorenzo has a master's degree in education and is licensed as an elementary educator, grades one through six, a special education administrator, and a principal and assistant principal for the elementary level. (DeLorenzo, 20-21)

recently occurring and “needs to be analyzed to figure out what the function is in order to address it,” whereas at times, school-based teams may create behavior support plans informally based on ongoing data collected in the classroom. In the latter circumstances, parental consent is not required. (DeLorenzo, 24-25)

7. Nicole Alton-Moore, Evergreen’s Director of Family Services and Admissions,<sup>9</sup> testified at Hearing that an FBA involves data collection and “would be looking at specific targeted behavior in order to identify what often is occurring before, during and after that targeted behavior in an effort to come to a hypothesis of the function of that targeted behavior. [That information] would be used, then, to develop a treatment plan to address the targeted behavior.” (Alton-Moore, 115)

8. Kelly McLeod, an independent BCBA who works for the Pilgrim Area Collaborative (PAC),<sup>10</sup> described an FBA as follows:

. . . a functional behavior assessment . . . can include data, collecting data, analysis, observations, indirect and indirect assessments. It could be formal or informal, and usually includes interviews with the staff, interviews with other important stakeholders like parents and teachers . . . We’re usually trying to determine a function of maladaptive or interfering behaviors, or looking at deficits and trying to increase behaviors to increase prosocial skills, such as functional communication, to focus on increasing the prosocial behaviors and reducing any maladaptive or interfering behaviors that might be taking away from the progress of the individual.

Asked about procedures a BCBA might use for conducting an FBA, Ms. McLeod explained that some baseline data and information on antecedents, behaviors, and consequences might be recorded in advance. During an FBA, a BCBA looks at behaviors across environments, both through direct observation of those behaviors and through interviews of parents and staff who work with a child. She then considers the social significance of the behavior. (McLeod, 132-36)

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<sup>9</sup> Nicole Alton-Moore is a licensed social worker with a master’s degree in public administration, specializing in nonprofit management. She has completed the coursework for a certificate in behavior analysis and has completed about 1800 hours of the practicum hours required to sit for the BCBA examination. Ms. Alton-Moore has held her current position at Evergreen for approximately seven years. (Alton-Moore, 114-15, 120)

<sup>10</sup> Ms. McLeod holds a master’s degree in education and national certification as a behavior analyst. She is licensed as a BCBA in the state of Massachusetts. (McLeod: 130-131)

9. According to Ms. McLeod,<sup>11</sup> “a lot of the assessments that go into a functional behavioral assessment can be completed by other people but [they] have to be scored by a behavior analyst,” who might incorporate the Vineland or the AFLS into an FBA. (McLeod, 185-86)

10. Kim Beckman is the BCBA who worked with Zeke at Evergreen in the period leading up to the Hearing.<sup>12</sup> Ms. Beckman described an FBA as a measure for trying to assess the function of a behavior, or why it occurs, as a precursor to implementing a behavior plan aimed at reducing the instances of problem behaviors and replacing them with more functional behaviors. According to Ms. Beckman, to complete an FBA, a BCBA must identify target behaviors and collect data regarding those behaviors. Direct assessments require the BCBA to observe the behavior directly and collect data on the antecedents and consequences occurring in the environment. Indirect assessments involve interviews of parents and/or caregivers to inform hypothesized functions. (Beckman, 217-19)

11. No witness testified that a formal stand-alone FBA, as described above, was conducted by Pembroke or Evergreen at any time in 2019 or 2020 in connection with Zeke’s three-year reevaluation. (DeLorenzo, 97-98; Beckman, 232-34) At Hearing, Ms. DeLorenzo appeared to suggest that by “embedding the behavior assessment” through a VB-MAPP, a psychological assessment, and the Vineland, Pembroke met its obligation to conduct an FBA, pursuant to Parent’s consent, within the relevant timeframe. (DeLorenzo, 98-101) Ms. Beckman testified that a VB-MAPP, “which does assess behavior in some way,” in combination with a review of behavior in the educational and residential reviews, “could be considered a functional behavior assessment.” (Beckman, 283)

12. The VB-MAPP Assessment Summary submitted by a BCBA as part of Zeke’s three-year reevaluation describes this tool as “a language and learning assessment for young children with autism or related disabilities and language delays . . . based on applied behavior analysis and the analysis of verbal behavior.” By assessing all the functions of a student’s language, the VB-MAPP “benefits the assessment and treatment of language delays in children with autism by ensuring all functions of language are in place or directly taught.” One portion of the VB-MAPP, the Barriers Assessment, examines a student’s barriers to effective learning, including behavior problems, problems with generalizing information, and limited motivation. The results of Zeke’s evaluation were summarized in one paragraph that highlights areas in which he experiences problems; none of the underlying data appears in this Summary report. (P-30; S-8)

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<sup>11</sup> An FBA was conducted by Ms. McLeod on December 8 and 10, 2021. Her December 27, 2021 FBA report described an FBA as:

a process of gathering data regarding target behaviors, antecedents, and consequences, controlling variables, student’s strengths, and the communicative and functional intent of the behavior. A functional behavior assessment includes direct assessment, indirect assessment, and data analysis designed to identify and define the challenging behavior in concrete terms and identify the contextual factors that contribute to the behavior. This information will lead to formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and the probable consequences that maintain the behavior. With this information, an intervention plan can be developed to target specific behaviors. (S-1)

<sup>12</sup> Ms. Beckman has a master’s degree in autism and holds national certification as a BCBA. She is also in the process of applying for Massachusetts licensure as a BCBA. Ms. Beckman has worked at Evergreen for 10 years and has been a BCBA since February of 2020. (Beckman, 217)

13. Pembroke convened Zeke's three-year reevaluation Team meeting on January 21, 2020. Parent declined to attend. The Team determined Zeke's continued eligibility for special education. The IEP proposed for the period from 1/21/20 to 1/20/21 (2020-2021 IEP) included goals in the areas of Behavior Reduction, Social Competence, Functional Academics, Community Participation, Vocational Development, Daily Living Skills, Physical and Emotional Health, Personal Residential Maintenance, Communication, and Adapted Physical Education. A Transition Planning Form and a Behavior Support Plan were both included with the IEP. (P-32; S-10)

14. Under Key Evaluation Results (2020), the 2020-2021 IEP included summaries of an Educational Assessment, a Residential Assessment, a Speech and Language Assessment, a VB-MAPP Assessment, a Motor Assessment, a Physical Therapy Assessment, an Occupational Therapy Assessment, and a Psychological Evaluation, all dated 2020. The IEP contained no reference to an FBA. (P-32; S-10)

15. On the ASD Form accompanying the 2020-2021 IEP, dated 1/21/20, Pembroke indicated that the IEP information reflecting discussion of the need for positive behavioral interventions, strategies, and supports to address behavioral difficulties resulting from ASD appeared in the Behavior Intervention Plan and the Behavior Reduction Goal. The form did not reference an FBA. (P-32; S-10)

16. Parent did not object to, or express concerns about, the assessments that were completed in conjunction with the three-year reevaluation at that time. (Alton-Moore, 124-25) Following the meeting, the District proposed an IEP and placement, which Parent accepted in full on June 1, 2020. (P-32; S-10)

17. The following year, Zeke's Annual Review was originally scheduled for January 11, 2021, but it was rescheduled and held on January 19, 2021. Parent did not attend this meeting either. (Alton-Moore, 125) An IEP dated 1/19/21 to 1/18/22 (2021-2022 IEP) was developed. (S-2) In the section entitled Key Evaluation Results, the 2021-2022 IEP summarizes an Educational Assessment, a Residential Assessment, a Speech and Language Assessment, a VB-MAPP Assessment, a Motor Assessment, an Occupational Therapy Assessment, and a Psychological Evaluation, all completed in 2020. No reference to an FBA, or to FBA results, appears in the 2021-2022 IEP. Parent initially rejected the IEP but accepted the placement on March 17, 2021, explaining that she believed the IEP had been developed based on "assessments" (which Evergreen had characterized as informal summaries) conducted without her consent, and that Evergreen had failed to provide her with copies of those assessments prior to meetings. Parent later accepted this IEP and placement in full on May 24, 2021. (S-2)

18. In the meantime, during the spring of 2021, Parent expressed concerns to both Pembroke and Evergreen staff regarding behavioral support practices at Evergreen, and she requested an FBA. Evergreen referred her to its updated Parent Handbook, which contained its Behavior Support Policy. Pembroke proposed several Team meetings, and offered to engage a BSEA facilitator, to address these concerns. Parent declined to attend any of the offered Team meetings. (P-17; DeLorenzo, 33, 67, 89, 92, 108; Beckman, 268; Alton-Moore, 292-93)

19. By email on June 3, 2021, Parent requested a full FBA, including formal measures. After consultation with Evergreen, the District did not feel a full FBA was necessary, as Evergreen was already collecting and analyzing data on a regular basis and using that data to develop and modify Zeke's programming and behavior support plans, as needed. (P-31; S-9; DeLorenzo, 97; Alton-Moore, 116-17)

20. On June 4, 2021, Pembroke issued an N-2 in which it explained its refusal to conduct a formal FBA for the reasons above. In the N-2, Pembroke noted that it had offered Parent a meeting to discuss her concerns, and that a meeting previously scheduled for this purpose had been cancelled by Parent, who indicated she did not wish to reschedule. (P-31; S-9; DeLorenzo, 29-31, 35, 108)

21. Pembroke attached to the N-2 a two-page document entitled "Functional Behavior Assessment Summary" (Summary), dated May 2021, which had been completed by Ms. Beckman due to an observable increase in rates of Zeke's aggressive behavior in the classroom and the residential setting. The behaviors targeted for assessment during the observation period, from April 8 to April 27, 2021, were grimacing, head shaking, and waving a flat hand in front of the face. Ten instances of "signal behavior" were observed, and Ms. Beckman hypothesized that the function of these behaviors was attention. She recommended that Zeke's providers continue collecting Antecedent-Behavior-Consequences (ABC) data; continue with the token program to reinforce rule-following; and provide frequent attention in the absence of problem behavior. (P-31; S-9; Beckman, 220-21, 226-28)

22. When asked at Hearing what a "Functional Behavior Assessment Summary" is, Ms. Beckman explained that she had created the document because Evergreen had noticed increased episodes of Zeke's aggression, and she stated that it did not require parental consent because it was simply a write-up of data regarding Zeke that was regularly collected at Evergreen in a format "that could be understood by the parent and people who wanted to review the data . . . to better explain why [she] was making changes to his behavior plan." (Beckman, 220-22, 227)

23. Asked to explain an "FBA Summary" at Hearing, Ms. DeLorenzo testified that "it may be where a behaviorist, a BCBA, would analyze recent data and summarize, whether it's a formal FBA that was completed prior to current data being taken, and summarize . . . findings." (DeLorenzo, 28) Ms. Alton-Moore testified that the term referred to a "concise summary of the target behaviors that were being focused on, the definitions therein, the data that were collected and then the reasonable hypotheses stemming from those data." (Alton-Moore, 118-19)

24. At the time it issued the N-2, Pembroke again offered Parent an opportunity to discuss the District's determination not to conduct an FBA, and to review data that had been collected regarding her concerns about Zeke's behavior. Parent again declined. (DeLorenzo, 89-91)

25. On June 8, 2021, Parent emailed Ms. Alton-Moore asking, among other things, when a "full behavior assessment" would be done.<sup>13</sup> In response, Ms. Alton-Moore wrote the following day, "Kim [Beckman] initiated and continues to conduct a Functional Behavior Assessment."

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<sup>13</sup> Parent also expressed concern at this time regarding the use of restraints on Zeke. (P-7, P-8)

She referenced, and attached, a report that she stated had been emailed to Parent on May 26, 2021.<sup>14</sup> (P-8)

26. Ms. Alton-Moore also advised in this email that Evergreen staff believed that the function maintaining Zeke's challenging behavior is attention. Subsequent to issuing the Summary, Evergreen made one change to Zeke's program: the addition of noncontingent attention on a two-minute schedule. This helped reduce the rate of aggression and precursor signal behaviors. (P-8; Beckman, 274-75)

27. On or about July 9, 2021, Parent filed the instant *Hearing Request*.

28. A Progress Review Meeting was held on August 26, 2021 but Parent declined to attend. Evergreen staff and Pembroke representatives reviewed quarterly progress reports, and service providers shared that Zeke was progressing toward all goal areas. (DeLorenzo: 83-85)

29. In response to Parent's and her Advocate's continued requests for evaluations of Zeke's "community, vocational, home and independent living skills and to determine the function of his inappropriate touching behavior," on September 20, 2021, Pembroke provided an N-1 form to Parent proposing transitional and functional behavioral assessments. Parent signed the accompanying Evaluation Consent Form on October 21, 2021, and the District received it by email on November 8, 2021. The form specified that the following assessments would be conducted: Functional Behavioral Assessment (including the Functional Assessment Screening Tool, or FAST) and Transitional Assessment (AFLS). (S-11; DeLorenzo, 58)

30. In the meantime, in October, 2021, Parent, through her Advocate, communicated to Pembroke that she was concerned that Zeke's sexualized behavior, which he had demonstrated in previous settings, but which Evergreen did not view as an ongoing issue, was continuing in the community. She indicated that she did not trust Evergreen to conduct an FBA focused on sexualized behaviors and requested that the District contract with an independent agency. (P-33; S-1, S-12; DeLorenzo, 67, 89)

31. Parent and Pembroke agreed that Pembroke would contract with PAC for an FBA that would include "observations across settings, including classroom, residence, and community settings identified in collaboration with [P]arent and Evergreen staff and through data collection through means of [Zeke]'s current service providers." The contract between the two entities was signed on November 9, 2021. (P-22, P-24; DeLorenzo, 65)

32. Pembroke, Parent, and Evergreen agreed that the community setting portion of the FBA would be comprised of an observation of Zeke at a doctor's appointment, given Parent's concern regarding his self-touching in this context. Parent initially provided November 8 and 12, 2021 as dates for these observations, but as of those dates the BCBA who would perform the assessment had not yet been identified. Parent then noted that Zeke was scheduled for a neurology

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<sup>14</sup> It appears that Ms. Alton-Moore may have been referring to the Summary, as no formal FBA was submitted into evidence, nor did anyone testify that a document had been created but omitted from the District's evidence binder, and the Summary was provided to Parent around this time. (P-8; Beckman, 229-33)

appointment in December 2021. (P-20, P-21; S-11; DeLorenzo, 65-66, 71-72; McLeod, 151, 154, 163, 169-70)

33. During a neurology appointment on November 8, 2021, and while driving there with Parent, Zeke touched himself. Parent emailed Ms. DeLorenzo to inform her. Parent also reported about Zeke's behaviors during this doctor's visit in her interview with the BCBA conducting the FBA, noting that during this appointment she noticed more instances of Zeke trying to touch himself and also attempting to touch the doctor. The BCBA hypothesized that this was an attempt to gain access to social and verbal attention. (P-20; S-1)

34. Shortly thereafter, Pembroke contracted Ms. McLeod, an independent consultant who works with PAC, to conduct the FBA. Ms. DeLorenzo described Ms. McLeod as "a district contracted employee through a contract the district has with" PAC. Ms. McLeod has been contracted to conduct FBAs for other Pembroke students besides Zeke. (P-22, P-24; DeLorenzo, 62-63; McLeod: 130-131)

35. On November 18, 2021, Ms. DeLorenzo informed Parent that the testing would be completed by December 22, 2021, and that a meeting would occur within 15 school working days. (P-22)

36. Ms. McLeod conducted the FBA on December 8 and December 10, 2021. She had been scheduled to observe Zeke during a doctor's appointment on December 15, 2021, but that appointment was cancelled because Zeke had been exposed to COVID. (S-1; DeLorenzo, 71-73; McLeod, 136-37, 140, 163, 170) Parent requested that Ms. McLeod observe the rescheduled doctor's appointment on December 29, 2022, but Ms. McLeod responded by email, explaining that the testing window would be closed by then. She suggested that Parent could email Ms. DeLorenzo to request that the deadline be extended, but Parent did not do so. Moreover, Evergreen was not engaging in community outings during this period of time because of the COVID spike. As such, Ms. McLeod never observed Zeke at a doctor's appointment or elsewhere in the community as part of the FBA. (S-4; DeLorenzo, 72-73; McLeod, 153-54, 161-63, 171-172)

37. The target behaviors identified as the focus of Ms. McLeod's FBA were unsolicited touching of others and inappropriate touching of self. She used the following tools: record review, staff interview (Functional Assessment Information Record for Educators (FAIR-E)), Parent interview (Functional Assessment Information Record for Parents (FAIR-P), the Motivation Assessment Scale (MAS), Questions About Behavioral Functioning (QABF), FAST, direct observation of Zeke in educational and residential environments, and data analysis. Ms. McLeod produced a 14-page report, which also discussed the results of a 2020 psychological evaluation and a 2020 VB-MAPP Assessment, among other things. (S-1)

38. Zeke's special education teacher reported to Ms. McLeod that he considered aggression Zeke's most socially significant behavior; the target behaviors of unsolicited touching of others and inappropriate touching of self had been strongly supported by a behavior intervention plan, which enabled Zeke to maintain low rates of both behaviors, such that they were occurring less than once or twice a day. Zeke's teacher also noted that the target behaviors were more likely to

occur in an unstructured or public environment, such as a doctor's appointment, but that Evergreen had developed successful prevention and intervention strategies, such as reviewing social storyboards prior to outings, reminding Zeke to use his functional communication skills to access his internal feelings and self-preservation skills out in the community, and practicing these skills. (S-1)

39. Parent, on the other hand, reported to Ms. McLeod during her two-hour interview that she was seriously concerned about Zeke's sexualized behaviors as well as his aggression. According to Parent, she had to redirect Zeke's behaviors in the car and with new female doctors frequently; in the latter situation, he was more likely to engage in these behaviors, as he became excited and did not know what to do with himself. Parent reported that Zeke's target behaviors are not manageable, highly disruptive, and can occur more than 13 times a day. However, Ms. McLeod suggested that perhaps this was anecdotal information, as her interviews with Evergreen staff and review of Zeke's record did not indicate that these behaviors were occurring at this frequency.<sup>15</sup> (P-20; S-1; MacLeod, 142-43, 159)

40. Based on these assessments, Ms. McLeod hypothesized that Zeke's target behaviors were maintained by a sensory (internal) automatic function. The assessment revealed successful maintenance of low levels of these target behaviors; staff reports, direct observation, and analysis of data collected demonstrated that these behaviors – unsolicited touching of others and inappropriate touching of self – were occurring, on average, once a month. Ms. McLeod recommended thoughtful and proactive planning in advance of outings in public or community settings; continued implementation of the current Behavior Intervention Plan; repeated and supported practice in community settings; consistent and coordinated staff behavioral responses across settings; and antecedent and consequent management. Ms. McLeod also noted that given the potential for unintended harassment and/or police involvement, continued and constant adult/staff supervision by familiar adults, as well as monitoring and proactive intervention, would be necessary for Zeke as he grew older and transitioned into adult programming. (S-1)

41. Ms. McLeod testified that she had sufficient information to complete a comprehensive, appropriate FBA, even in the absence of an observation of Zeke in the community. Evergreen's data<sup>16</sup> reflected that Zeke was experiencing less than one instance per month of unsolicited touching of others and himself out in the community. Ms. McLeod observed Zeke in the classroom, cafeteria, and residential settings, where she did not observe any incidences of these behaviors.<sup>17</sup> She testified that staff and Parent interviews reflected low intensity and frequency of

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<sup>15</sup> Ms. Beckman also testified that according to the summaries provided by Parent after Zeke's doctor's appointments, Zeke has not exhibited any behaviors that have not been easily redirectable. As such, Ms. Beckman believes the strategies she is providing, including a story board, are effective. (Beckman, 263-65) The summaries themselves were not submitted in evidence, and Ms. Beckman's description of them conflicts with the information Parent provided to Ms. McLeod. (S-1)

<sup>16</sup> Ms. McLeod relied on data collected by Evergreen staff during Zeke's community outings to stores, parks, bowling, and/or movies, in addition to that collected on Evergreen's educational and residential campuses. The data sheets are recorded by time of day, but not delineated by context, such that instances of targeted behaviors were not divided by community, residential, or educational settings. However, if Zeke had engaged in any unusual behaviors directed at a community member, such as aggression and/or other behavior requiring restraints, incident reports would have been created; none were. (McLeod, 190; Beckman, 243-45)

<sup>17</sup> Ms. McLeod testified that it would not have been responsible practice to attempt to evoke target behaviors through manipulating the community setting for purposes of conducting an FBA. (McLeod, 175-76, 201)

the target behavior<sup>18</sup>, which was easily redirectable, and an effective intervention plan was in place to address these behaviors when they did arise. This plan included strategies such as providing fidgets and engaging Zeke's hands through snapping or high-fives, movements incompatible with hugging and touching others; supplying potent reinforcers; and managing antecedents through storyboards. Ms. McLeod believes that this information, garnered through other tools, was sufficient for her to draw conclusions about Zeke's behavior in the community setting. (McLeod, 136, 140, 149-50, 173-174, 177-78, 207-11)

42. At Hearing, Ms. DeLorenzo testified that although Ms. McLeod did not conduct an evaluation in the community setting at a doctor's appointment, she was still able to conduct a comprehensive and appropriate FBA to address Parent's concerns. (DeLorenzo, 75)

43. At Hearing, Ms. McLeod testified that if she had conducted observations of Zeke in the community, "it would have been the same report and the same recommendations and the same data so it would say the same thing." (McLeod, 183)

44. Ms. Beckman also testified that she believed Ms. McLeod's FBA would not have been any different if she had been able to observe Zeke in the community, as the programming in place has been shown to be effective, as evidenced by minimal instances of problem behaviors in the community that are easily directable. (Beckman, 267, 270, 273-74)

45. Ms. Beckman has never included information in her reports or behavior plans from her own observations of Zeke at a doctor's appointment, because neither Pembroke nor Evergreen has Parent's consent to attend these appointments or speak to his medical providers. (P-20; Beckmann, 247, 263, 267; Alton-Moore, 294)

46. Once per month in January, February, and March 2022, Zeke aggressed against staff, requiring staff escorts and/or restraints. Ms. Beckman informed Parent of each of these incidents and sent her corresponding forms and reports. (P-10, P-11, P-12, P-13, P-15, P-16, P-17, P-18)

47. On January 26, 2022, Zeke's Team convened for his annual review, with Parent in attendance, and to review Ms. McLeod's FBA.<sup>19</sup> The Team discussed Zeke's progress toward his goals, including the reduction of many of his targeted behaviors. After presenting her findings and her hypothesis, Ms. McLeod concluded that Zeke's current behavior plan was appropriate, as data showed that the use of strategies such as storyboards and reinforcers for engaging in expected and prosocial behaviors had decreased the rate and intensity of target behaviors. Ms. McLeod recommended that the Team continue to implement Zeke's behavior plan without changes. Ms. McLeod's recommendations were integrated into the IEP for the period from January 26 to July 10, 2022 (2022 IEP), and a summary of her report was added to the Evaluation Results section.<sup>20</sup> No objections were made during the Team meeting to the

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<sup>18</sup> Ms. McLeod's testimony regarding Parent's interview conflicts with other evidence in the record.

<sup>19</sup> The virtual meeting was initially scheduled for January 17, 2022, but was rescheduled due to a snow day. It was then scheduled for January 19, 2022. Parent failed to appear, and the meeting was rescheduled again. (P-15, P-25; S-3)

<sup>20</sup> The Evaluation Results section of the proposed 2022 IEP also included a summary of the Transition Assessment that was conducted at the end of 2021 and/or beginning of 2022. A Behavior Support Plan, updated January 26, 2022, and a Transition Planning Form, completed January 19, 2022, accompanied the IEP. (P-25, P-343; S-3, S-13)

assessment, the recommendations, or the proposed IEP. Parent rejected the proposed IEP, but consented to the placement, on March 16, 2022. (P-15, P-25; S-3; DeLorenzo: 75-77, 79-80; McLeod, 166, 177-81)

48. During the five years that Zeke’s placement at Evergreen was maintained by Pembroke, Parent was provided with multiple opportunities to observe Zeke there and to participate in six-month review and annual Team meetings. During the two years prior to the Hearing, Parent attended only one Team meeting. She frequently cancelled meetings, sometimes moments before they were to begin. (DeLorenzo, 83-84, 89-90) Parent did, however, meet with Ms. Alton-Moore to review Zeke’s data sheets and his task book; during these meetings Ms. Alton-Moore explained how data on his maladaptive behaviors was collected and how Evergreen worked with Zeke to build his skill set. (Alton-Moore, 290-91)

49. Parent was also offered parent training by Evergreen while Zeke was a student there, focused on the implementation of Zeke’s behavior support plan while Zeke was with Parent, but she cancelled and/or no-showed at least five times. (Alton-Moore, 289-90)

## DISCUSSION

It is not disputed that Zeke is a student with a disability who is entitled to special education services under state and federal law. To determine the outcome of this case, I must consider substantive and procedural legal standards governing special education, including evaluations, consent, and prior written notice. As the moving party, Parent bears the burden of proof.<sup>21</sup> To prevail, she must prove – by a preponderance of the evidence – that during the specified time period, Pembroke failed to properly conduct one or more FBAs it was obligated to conduct, and that such failure compromised Zeke’s ability to receive a FAPE.

### A. Legal Standards

#### 1. *Substantive and Procedural Violations of the IDEA*

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and prepare them for further education, employment and independent living.”<sup>22</sup> The statute contains both substantive and procedural protections to effectuate this purpose.<sup>23</sup> As such, there are “two types of arguments available to the parents at a due process hearing, both of which center on the denial

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<sup>21</sup> See *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005) (party seeking relief bears burden of proof in administrative hearing).

<sup>22</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>23</sup> See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982) (“Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation in every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard”); see also *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1095 (1st Cir. 1989) (internal citation omitted) (complaints authorized by the IDEA include both procedural and substantive violations); *Curtis v. Lexington Public Schools*, BSEA # 1600388 (Reichbach, 2016) (“The IDEA contains both substantive and procedural protections for children with disabilities”).

of a FAPE. They can argue that their child is being denied a FAPE substantively, on the grounds that his or her IEP lacks certain special education or related services . . . and they can argue that their child is being denied a FAPE due to procedural violations.”<sup>24</sup>

a. Substantive violations

To fulfill its substantive obligations, a school district is required to develop and implement an IEP tailored to a child’s current academic and functional needs.<sup>25</sup> To provide a FAPE, the IEP must be individually designed and include, “at a bare minimum, the child’s present level of educational attainment, the short- and long-term goals for his or her education, objective criteria with which to measure progress toward those goals, and the specific services to be offered.”<sup>26</sup> An IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” will be substantively sound.<sup>27</sup> The continued adequacy of a student’s IEP is ensured through the requirement that a student’s team meet annually to reevaluate whether the goals and services offered remain appropriate.<sup>28</sup>

Under the IDEA, a substantive violation occurs where the content of an IEP is insufficient to afford the student a FAPE.<sup>29</sup> By way of example, courts have found such violations where an IEP proposes a full inclusion model but the information before the Team demonstrated that the student requires a therapeutic school due to significant mental health needs,<sup>30</sup> and where an IEP fails to provide the “substantial related services and greater individualized attention” a child needs to make educational progress and receive an educational benefit.<sup>31</sup>

Alternatively, an IEP’s failure to identify measurement methods, where there is evidence a teacher will measure progress over the course of a school year, does not constitute a substantive violation.<sup>32</sup> Nor does a school district’s determination to place a child in a setting other than that selected by certain experts or the child’s parents constitute a substantive violation, so long as the program offered is reasonably calculated to provide the child with a FAPE.<sup>33</sup>

b. Procedural violations

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<sup>24</sup> *Pollack v. Reg'l Sch. Unit 75*, 886 F.3d 75, 80 (1st Cir. 2018) (internal citations omitted). See *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 679 n.7 (4th Cir. 2007) (explaining that an alleged deficiency in what a school district offers is considered substantive, whereas an alleged deficiency by which the offer is developed or conveyed is procedural).

<sup>25</sup> See, e.g., *Andrew F. v. Douglas Cty. Sch. Dist.*, 580 U.S. 386, 403 (2017); *Johnson v. Bos. Pub. Sch.*, 906 F.3d 182, 194-95 (1st Cir. 2018); *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

<sup>26</sup> *Esposito*, 675 F.3d at 34.

<sup>27</sup> *Andrew F.*, 580 U.S. at 403.

<sup>28</sup> See *Doe v. Newton Pub. Sch.*, 48 F.4th 42, 48 (1st Cir. 2022) (internal citations omitted).

<sup>29</sup> See *Andrew F.*, 580 U.S. at 403; *P.K. v. Dep't of Educ.*, 819 F. Supp. 2d 90, 111 (E.D.N.Y. 2011).

<sup>30</sup> See *Newton Pub. Sch.*, 48 F.4th at 55.

<sup>31</sup> *P.K.*, 819 F. Supp. 2d at 111.

<sup>32</sup> See *Amann v. Stow Sch. Sys.*, 982 F.2d 644, 651 (1st Cir. 1992); *James S. v. Lincoln*, No. 11-236 ML, 2012 U.S. Dist. LEXIS 119315 (D.R.I. 2012) (unpublished), at \*36-37.

<sup>33</sup> See *Amann*, 982 F.2d at 651; *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948 (1st Cir. 1991); *Gonzalez v. Puerto Rico Dep't of Educ.*, 969 F. Supp. 801, 811 (D.P.R. 1997).

The Supreme Court has recognized the centrality of the procedural safeguards in the IDEA, which serve a dual purpose: they ensure that each eligible child receives a FAPE, and they provide for meaningful parental participation.<sup>34</sup> Procedural protections are so important that the IDEA recognizes that even if no substantive irregularities have occurred, procedural errors may amount to a deprivation of a FAPE if “the procedural inadequacies – (I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.”<sup>35</sup>

Procedural errors do not automatically render an IEP legally defective; to constitute a violation of FAPE, “[t]here must be some rational basis to believe that the procedural violations had those effects [on FAPE], and that they were not mere technical violations.”<sup>36</sup> As such, procedural violations generally do not amount to a *per se* denial of a FAPE, without some showing that they have impacted a student negatively.<sup>37</sup> Recently, however, the United States District Court for the District of Massachusetts upheld a Hearing Officer’s determination that “although plaintiffs did not make any showing that [Student] suffered any educational harm as a result of” the District’s failure to propose an IEP for a particular school year, the “failure to produce an IEP is so significant and fundamental a procedural misstep that some remedy was justified.”<sup>38</sup>

## 2. *Reevaluations*

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<sup>34</sup> See *Rowley*, 458 U.S. at 205 (1982); see also *Honig v. Doe*, 484 U.S. 305, 311 (1998) (“Congress repeatedly emphasized throughout the [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness”).

<sup>35</sup> 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); see *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990). See also *Geraldo v. Springfield Public Schools*, BSEA #064908 and #065863 (Byrne, 2007) (administrative unenrollment of minor students with disabilities entitled to attend school constituted change in placement; district’s failure to comply with procedural requirements violated students’ procedural and substantive rights to a FAPE such that district must provide compensatory services).

<sup>36</sup> *Doe v. Attleboro Pub. Sch.*, 960 F. Supp. 2d 286, 295 (D. Mass. 2013) (internal citations and quotation marks omitted); see *Gonzalez*, 969 F. Supp. at 808; see also *Student v. Winchester Public Schools*, BSEA #1804106 (Berman, 2018) (*de minimis* procedural errors that do not interfere with parent’s or student’s abilities to participate in Team process or deprive student of FAPE not compensable).

<sup>37</sup> See, e.g., *A.M. v. Monrovia Unified Sch. Dist.*, 627 F.3d 773, 779-80 (9th Cir. 2010) (although district failed to develop a new valid IEP within thirty day deadline, student suffered no deprivation of educational benefit and therefore has no claim”); *Gonzalez*, 969 F. Supp. at 812 (explaining that the failure to comply with procedural safeguards may be sufficient grounds to hold that a school district has failed to provide a FAPE where there is “some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits”; even a state department of education’s failure to hold a timely hearing and render a decision does not constitute a violation of the IDEA unless it meets these criteria). But see *Acton-Boxborough Regional School District*, BSEA #2103253 (Figueroa, 2021) (“Certainly, failures to meet procedural requirements may be adequate grounds by themselves for holding that a school failed to provide a FAPE”).

<sup>38</sup> *C.D. v. Natick Pub. Sch. Dist.*, No. CV 19-12427, 2020 WL 7632260 (D. Mass. 2020) at \*12, \*16. In a footnote, the Court observed that “although it appears that Parents had, in general, obstructed Natick’s attempts to provide [Student] with a FAPE, the burden to review the IEP annually falls on the school, and there is no evidence that Parents specifically acted to prevent Natick from proposing a new IEP or scheduling a Team meeting during the relevant period.” As such, the Court concluded that the District’s procedural missteps impeded Parents’ ability to participate meaningfully in educational planning for that school year. *Id.* at \*16 n.12.

Under the IDEA, school districts must reevaluate eligible students at least once every three years, unless the parent and the district agree that the three-year reevaluation is unnecessary.<sup>39</sup> Like an evaluation, a reevaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs . . .”<sup>40</sup> As such, a school district must assess a child in all areas of suspected need, whether or not commonly linked to the disability area in which he has been classified, including social/emotional and behavioral functioning.<sup>41</sup> The school district is not required to administer every test requested by a parent, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information.<sup>42</sup> However, the district must employ the “comprehensive and reliable methods that the IDEA requires,” in conducting its assessments, to ensure that the Team has available to it sufficient information to adjust special education and related services to meet the student’s current needs.<sup>43</sup> Parents may elect to waive any individual assessment at the time of the three-year reevaluation because an equivalent school assessment has been completed recently and the person who conducted it determines that the results are still accurate, or if such waiver has been recommended by the school district.<sup>44</sup>

This matter involves a particular type of assessment: an FBA. An FBA is an “educational evaluation,” and as such, the procedural protections related to evaluations described above apply.<sup>45</sup> Neither the IDEA nor its corresponding regulations define an FBA; Massachusetts law does not provide a definition either.<sup>46</sup> As such, I look to other sources for guidance.

The United States Court of Appeals for the Second Circuit cited to New York regulations describing an FBA as “an identification of [a disabled student’s] problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior . . . and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it.”<sup>47</sup> In an

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<sup>39</sup> See 20 USC § 1414(a)(2)(b)(ii); 34 CFR § 300.303(b). See also 603 CMR 28.04(3) (“every three years, or sooner if necessary, the school district shall, with parental consent, conduct a full three-year reevaluation consistent with the requirements of federal law”).

<sup>40</sup> 34 CFR § 300.304(c)(6).

<sup>41</sup> See 20 USC § 1414(b)(3)(B); 34 CFR § 300.304(c); *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1121 (9th Cir. 2016).

<sup>42</sup> See *Easthampton Public Schools v. Student*, BSEA #2203513 n. 40 (Kantor Nir, 2022).

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*Timothy O.*, 822 F.3d at 1121-22; see *Neville v. Sutton Public Schools*, BSEA # 077534 (Crane, 2008).

<sup>44</sup> See 603 CMR 28.07(2).

<sup>45</sup> See *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008). *But cf. D.S. v. Trumbull Bd. of Educ.*, 975 F.3d 152, 163-64 (2nd Cir. 2020) (differentiating between an evaluation as a “comprehensive assessment of a child’s disability,” and an FBA as a “purposefully targeted examination of the child’s behavior” that often contributes to a child’s initial or triennial evaluation).

<sup>46</sup> See *Harris*, 561 F. Supp. 2d at 67; *Cobb Cnty. Sch. Dist.*, 215 WL 5691136 (N.D. Ga. 2015) (unpublished), at \*1; *D.B. v. Houston Indep. Sch. Dist.*, 2007 U.S. Dist. LEXIS 73911 (S.D. Tex 2007) (unpublished), at \*7 n.6.

<sup>47</sup> *M.W. v. Dep’t of Educ.*, 725 F.3d 131, 139 (2d Cir. 2013) (internal quotation marks omitted); see *Trumbull Bd. of Educ.*, 975 F.3d at 164 (an FBA is “a means of assessing and understanding the root causes and functions of a child’s behavior,” and “any given FBA might employ different techniques, but those techniques are uniformly aimed at understanding only the child’s behavior”); *D.B.*, 2007 U.S. Dist. LEXIS 73911, at \*7 n.6 (“The requirements for an FBA are not well defined by federal law or regulation; nevertheless, a proper FBA attempts to identify the likely triggers to and the appropriate interventions for problem behaviors”).

unpublished opinion, the United States District Court for the Northern District of Georgia explained that FBAs “rely on the premise that all behaviors serve a purpose [and, as such] attempt to identify the underlying reasons and environmental variables that contribute to the problem behaviors.”<sup>48</sup> To flesh out the content and methodology of an FBA, the judge looked to “industry standards,” and described the evaluation as follows:

First, the evaluator relies on teacher and parent interviews, direct observation, and school records to identify targeted behaviors and form a hypothesis about the purpose of the problem behaviors. Next, the evaluator collects “ABC” – Antecedent, Behavior, Consequence – data . . . [and] looks for patterns in the ABC data to create a hypothesis about the function of problem behaviors. Because FBAs have no explicit requirements, analysts may exercise substantial discretion in tailoring their data collection to the particular student. But analysts must ensure the accuracy of the data by, e.g., including explanations and demonstrations of data collection, asking data takers to define variables to ensure understanding across all data takers, observing data collection, or providing feedback during the collection.<sup>49</sup>

### 3. *Informed Consent and Notice*

Consistent with federal law, M.G.L. c. 71B §3 requires parental consent for evaluations, including reevaluations.<sup>50</sup> For the purposes of the IDEA, consent is defined as follows:

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought...
- (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity,
- (c) The parent understands that the granting of consent is voluntary ... and may be revoked at any time.<sup>51</sup>

In *Student v. Scituate Public Schools*, the Hearing Officer recently considered the extent of a school district’s obligations once a parent has consented to an initial evaluation.<sup>52</sup> As she explained, “School districts must evaluate children whenever a parent with educational decision-making authority consents to an initial evaluation: Upon consent of a parent, the school district shall provide or arrange for the evaluation of the student by a multidisciplinary school team within 30 school days” (emphasis in the original).<sup>53</sup>

The regulatory language referenced above is mandatory.<sup>54</sup> However, in *In Re Boston Public Schools*, the Hearing Officer characterized the right to a consented-to initial evaluation as

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<sup>48</sup> *Cobb Cnty.*, 215 WL 5691136 at \*1.

<sup>49</sup> *Id.*

<sup>50</sup> 20 U.S.C. § 1414(a)(1)(D); §1414(c)(3).

<sup>51</sup> 34 CFR § 300.9; see *J.S. v. Westerly Sch. Dist.*, 910 F.3d 4, 7 (1st Cir. 2018).

<sup>52</sup> BSEA #221241 (Berman, 2022).

<sup>53</sup> 603 CMR 28.04(2) (internal citation and quotation marks omitted).

“unequivocal,” but recognized that after an initial evaluation and eligibility determination, a parent might request another evaluation, which the school district may properly refuse.<sup>55</sup> If the District does refuse to conduct a particular evaluation, however, it must provide notice of its refusal, as explained below.

A school district is also required to provide a parent with prior written notice when it makes a determination to act, or not act, in particular circumstances. For example, when a school district proposes to initiate or change, or refuses to initiate or change, an identification, evaluation, or educational placement of a child, it must provide notice.<sup>56</sup> Such notice must be sufficient in detail to inform parents about the action being taken or refused, the reasons for taking the action, and procedural safeguards.<sup>57</sup>

In accordance with this emphasis on notice, if a student’s Team determines that additional data are not needed to determine whether the child continues to be a child with a disability and to determine the child’s educational needs, the school district must notify the child’s parents of that determination and the reasons therefore, as well as parents’ right to request an assessment to determine, among other things, the child’s educational needs.<sup>58</sup> The District need not conduct that assessment unless it is then requested by the child’s parents.<sup>59</sup>

## B. Analysis

Parent contends that Pembroke violated Zeke’s right to a FAPE in connection with FBAs it conducted, or failed to conduct, between July 9, 2019 and Zeke’s twenty-second birthday in July 2022. Her allegations pertain to three separate time periods: (1) Pembroke’s failure to conduct an FBA as part of Zeke’s three-year reevaluation at the end of 2019; (2) Pembroke’s refusal to conduct an FBA when Parent requested one in the spring of 2021; and (3) the exclusion of observations in the community from the FBA Pembroke ultimately did fund in December 2021.

As to Parent’s substantive violation claim, Parent provided little evidence at Hearing regarding the substantive appropriateness of Zeke’s IEP. Although she did demonstrate that Zeke continues to experience behavioral challenges at Evergreen and in the community (resulting in restraints in the former context), she did not offer any evidence, through testimony or documents, to suggest that Zeke should be making more progress than he is. As such, I cannot conclude that his IEPs are not reasonably calculated to provide him with a FAPE, and Parent’s substantive challenge fails.<sup>60</sup>

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<sup>54</sup> See *Scituate, supra* (despite refusal of student’s other parent, once school district received written consent to evaluate student from a parent who had shared legal custody and educational decision-making authority, failure to conduct the evaluation constitutes procedural error that deprived student of a FAPE).

<sup>55</sup> *In Re Boston Public Schools*, BSEA #012461, *Ruling on Parents’ Motion for Partial Summary Judgment and the Department of Education’s Motion for Summary Judgment* (Crane, 2001).

<sup>56</sup> See 34 CFR § 300.503.

<sup>57</sup> See 34 CFR § 303.421(a).

<sup>58</sup> See 20 U.S.C. § 1414(c)(4)(A).

<sup>59</sup> See *id.* at (c)(4)(B).

<sup>60</sup> See *Andrew F.*, 580 U.S. at 403.

I turn now to the issue of procedural violations. Parent is entitled to relief if she proves that Pembroke committed any of the procedural errors outlined above and that those procedural inadequacies, alone or in combination, impacted Zeke negatively by impeding his right to a FAPE; significantly impeding Parent's opportunity to participate in decision-making regarding Zeke's access to a FAPE; or caused a deprivation of educational benefits.<sup>61</sup> If Parent proves that the procedural error(s) did any one of these three things, she has established a violation of FAPE.<sup>62</sup>

*1. Pembroke's Failure to Conduct an FBA as Part of Zeke's Three-Year Reevaluation Constitutes a Significant Procedural Violation.*

It is undisputed that Pembroke proposed a three-year reevaluation of Zeke in the fall of 2019, which included an FBA. (S-6) When Parent signed the consent form, she had reason to believe that all listed evaluations she had not rejected would be performed, as conceded by Pembroke's Director of Student Services. One of the assessments to which Parent consented was an FBA. (S-6)

An FBA aims to identify the underlying reasons and environmental variables that contribute to a child's behavior.<sup>63</sup> It identifies that child's problem behavior, defines it in concrete terms, identifies contextual factors that contribute to the behavior, formulates a hypothesis regarding the functions of the behavior and probable consequences that seek to maintain it, and attempts to identify appropriate interventions.<sup>64</sup> To accomplish these ends, an FBA incorporates stakeholder interviews, direct observations of the child, and a record review, in addition to the collection and analysis of data regarding identified behaviors.<sup>65</sup> Pembroke's witnesses acknowledged as much at Hearing. Pembroke's Director of Student Services Jessica DeLorenzo testified that an FBA focuses on hypothesizing the function of a student's behavior. Evergreen's Director of Family Services and Admissions Nicole Alton-Moore testified that an FBA looks at what is occurring before, during, and after a targeted behavior, to develop a hypothesis of its function. Kelly McLeod, who administered the December 2021 FBA, referenced antecedents, behaviors, and consequences; stakeholder interviews; and the observation of behaviors across environments. Evergreen BCBA Kim Beckman explained that to complete an FBA, a BCBA must identify target behaviors, observe those behaviors in the environment, and collect data.

By any of these definitions, it is clear that Pembroke did not conduct a formal FBA as part of its three-year reevaluation of Zeke in November 2019. The District had proposed an FBA

<sup>61</sup> See 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); *Roland M.*, 910 F.2d at 994; *Natick Pub. Sch. Dist.*, 2020 WL 7632260 at \*16; *Springfield Public Schools*.

<sup>62</sup> See 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); *Roland M.*, 910 F.2d at 994; *Natick Pub. Sch. Dist.*, 2020 WL 7632260 at \*16; *Springfield Public Schools*. See also *Timothy O.*, 822 F.3d at 1118 (“While some procedural violations can be harmless, procedural violations that substantially interfere with the parents’ opportunity to participate in the IEP formulation process, result in the loss of educational opportunity, or actually cause a deprivation of education benefits “clearly result in the denial of a FAPE”) (quoting *Amanda J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001) (emphasis added).

<sup>63</sup> See *Cobb Cnty.*, 215 WL 5691136 at \*1.

<sup>64</sup> See, e.g., *M.W.*, 725 F.3d at 139; *Trumbull Bd. of Educ.*, 975 F.3d at 164; *D.B.*, 2007 U.S. Dist. LEXIS 73911 at \*7.

<sup>65</sup> See *Cobb Cnty.*, 215 WL 5691136 at \*1.

as part of its obligation to assess Zeke in all areas of suspected need,<sup>66</sup> and given Zeke's presentation, this proposal to conduct an FBA was appropriate. Parent consented. However, the District never informed Parent that it had subsequently determined that a formal, stand-alone FBA was not necessary in light of the behavioral data Evergreen was collecting on a regular basis. Had it done so, Parent could have opted to waive that assessment.<sup>67</sup> Had she chosen not to waive it, Pembroke would have been required to administer the FBA, consistent with its reevaluation obligations.<sup>68</sup>

At Hearing, Pembroke acknowledged that it did not produce, and did not conduct, a formal FBA as part of Zeke's three-year reevaluation in 2019. The District asserts, however, that the assessments it did administer, in combination, served the same purpose and, as such, it did not commit a procedural violation in failing to conduct the FBA for which Parent provided consent, and which she expected to be conducted. Specifically, Pembroke asserts that the VB-MAPP and the Vineland, in combination with observations of Zeke's behavior reported in the educational and residential reviews, was adequate.

Because Pembroke did not inform Parent that the District would not conduct the formal FBA to which she had consented, I examine the evaluations and observations Pembroke did administer to determine whether the District's position that these measures constituted the formal FBA Parent had accepted was reasonable and consistent with the informed consent requirements of the IDEA. In other words, was Parent fully informed of all relevant information related to the formal FBA that she accepted, understood, and agreed to in writing by signing the Evaluation Consent Form, in terms of the activities that would – and would not – be carried out.<sup>69</sup>

The educational and residential reviews that were completed in conjunction with Zeke's three-year reevaluation list challenging behaviors and chart the rates of these behaviors during specific timeframes, but neither document contains a hypothesis of the functions of these behaviors. (S-5, S-6) Similarly, although the four-page psychological report scores Zeke's communication, daily living, and socialization skills, there is nothing about hypothesis or function therein. (S-7) By its own terms, the VB-MAPP focuses on language acquisition and barriers to learning. Although the evaluator listed 24 behaviors that might impede learning and rated Zeke in each area, her report does not analyze the function of any of these behaviors. (S-8) In light of this information, Pembroke cannot maintain, reasonably, that Parent provided informed consent for an FBA to be conducted via the measures that were administered, as those measures failed to do most of what both courts and its own witnesses describe as the purpose of an FBA.

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<sup>66</sup> See 34 CFR § 300.304(c)(6).

<sup>67</sup> See 603 CMR 28.07(2).

<sup>68</sup> See 34 CFR § 300.304(c)(6).

<sup>69</sup> See 20 U.S.C. § 1414(a)(1)(D); § 1414(c)(3); 34 CFR § 300.9.

This failure to conduct the consented-to FBA is a procedural violation.<sup>70</sup> Courts have found that failure to conduct an FBA does not render an IEP legally inadequate under the IDEA “so long as the IEP adequately identifies a student’s behavioral impediments and implements strategies to address that behavior.”<sup>71</sup> However, in some cases parents may assert that an FBA would have exposed a behavior intervention plan’s “obsolete assessment of the student’s behavioral problems or that the recommended behavior-modification strategies failed to accommodate the frequency or intensity of the student’s behavior problems,” in which case a failure to conduct one could constitute a violation of the student’s right to a FAPE.<sup>72</sup> Parents may also argue that a school district’s failure to conduct an FBA impacts a hearing officer’s ability to assess the substantive adequacy of an IEP, thus obstructing their ability to prove that the procedural violation impeded their child’s right to a FAPE or caused a deprivation of educational benefits.<sup>73</sup>

In this case, I do not have sufficient evidence before me to determine that Pembroke’s failure to conduct an FBA as part of Zeke’s three-year reevaluation in 2019 impacted the Team’s ability to develop an IEP (and behavior plan) that sufficiently described his “behavioral impediments and implements strategies to address that behavior.”<sup>74</sup> This does not, however, end the inquiry as to whether this procedural violation resulted in a denial of a FAPE to Zeke. Although Parent did not meet her burden to prove that this violation resulted in a deprivation of educational benefits to Zeke, or otherwise negatively impacted his right to a FAPE, it did impede Parent’s opportunity to participate in decision-making regarding Zeke’s access to a FAPE.<sup>75</sup> The District obtained consent to perform an evaluation, but it neither conducted that evaluation nor informed Parent of its determination not to do so. As such, Parent was deprived of her right to insist that an FBA be administered as part of Zeke’s three-year reevaluation. This was not a mere technical violation.<sup>76</sup>

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<sup>70</sup> See *P.K.*, 819 F. Supp. 2d at 105; see also *A. C. v. Bd. of Educ.*, 553 F.3d 165, 1711 (2d Cir. 2009) (treating claim for failure to conduct an FBA as a procedural concern); *R.E. v. Dep’t of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012) (“failure to conduct an adequate FBA is a serious procedural violation because it may prevent the [school district] from obtaining necessary information about the student’s behaviors, leading to their being addressed in the IEP inadequately or not at all”); *S.S. v. Bd. of Educ.*, 498 F. Supp. 3d 761, 780 (D. Md 2020) (quoting *R.E.* with approval).

<sup>71</sup> See *M.W.*, 725 F.3d at 140; *A.C.*, 553 F.3d at 172.

<sup>72</sup> See *M.W.*, 725 F.3d at 140.

<sup>73</sup> See *R.E.*, 694 F.3d at 190; *S.S.*, 498 F. Supp. 3d at 780.

<sup>74</sup> *M.W.*, 725 F.3d at 140; see *L.O. v. Dep’t of Educ.*, 822 F.3d 95, 114 (2d Cir. 2016); *A.C.*, 553 F.3d at 172. Here, Parent’s inability to prove that this procedural violation impeded Zeke’s ability to receive a FAPE or constituted an educational deprivation may be due, in part, to the violation itself. As the United States Court of Appeals for the Second Circuit has recognized, in the absence of an adequate FBA, a fact-finder cannot determine “exactly what information an FBA would have yielded and whether that information would be consistent with” an IEP. See *R.E.*, 694 F.3d at 190.

<sup>75</sup> See 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); *Roland M.*, 910 F.2d at 994. Cf. *Student v. Hampshire Regional School District*, BSEA #2103975 (Kantor Nir, 2020) (emphasizing importance of parental participation “at every step of the drafting process”) (citing *M.C. ex rel. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1196–97 (9th Cir. 2017) (citations omitted)).

<sup>76</sup> See *Attleboro Pub. Sch.*, 960 F. Supp. 2d at 295; *Gonzalez*, 969 F. Supp. at 808. See also *Student v. Mendon-Upton Regional School District*, BSEA #2203125 (Mitchell, 2022) (finding District’s failure to provide prior written notice of its refusal to conduct an FBA that parents had requested to be more than a *de minimis* procedural violation).

This case is distinguishable from *Student v. Mendon-Upton*, where the Hearing Officer concluded that although the school district's failure to provide prior written notice when it refused parents' request to conduct an FBA was more than a technical violation, such failure did not deprive the student of a FAPE. In *Mendon-Upton*, the school district had never proposed an FBA, as the Team did not believe one was necessary. Moreover, though the school district failed to respond in writing to parents' subsequent request for an FBA, an administrator did explain its reasoning to parents during a telephone call, and later, parents rejected the district's offer of a further observation to address parents' assertion that the Team needed more information relating to how student presents in an educational environment. Finally, the Hearing Officer determined both that even in the absence of an FBA, Mendon-Upton had met its obligation to evaluate the student in all areas of suspected disability, and that the school district "did not significantly impede [Parents'] procedural participation rights."<sup>77</sup>

Here, in contrast, the District appropriately determined that an FBA was necessary to reevaluate Zeke in all areas of suspected disability, as communicated in the Evaluation Consent Form sent to Parent in 2019. Even if Parent elected not to participate in Team meetings on a regular basis, there is no question that Pembroke's failure to administer this FBA, which Parent had consented to in connection with the 2019 three-year reevaluation, deprived her of her ability to provide informed consent for this FBA, and thus she was unable to participate meaningfully in the decision-making process regarding the administration of an FBA to Zeke.<sup>78</sup> As such, Parent has demonstrated that Pembroke's procedural error significantly impeded her opportunity to participate in decision-making regarding Zeke's access to a FAPE, which, in the context of a procedural violation, establishes a violation of Zeke's right to a FAPE.<sup>79</sup>

I consider this error even more significant because it impacts my ability to determine whether Pembroke's failure to conduct an FBA in 2019 impeded Zeke's right to a FAPE or caused a deprivation of educational benefits, the other two ways Parent could establish that a procedural error constituted a deprivation of a FAPE.<sup>80</sup> As in *C.D. v. Natick Public School District*, where parents had not cooperated fully and consistently with the school district, but

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<sup>77</sup> See *Mendon-Upton*, *supra*.

<sup>78</sup> See *Natick Pub. Sch. Dist.*, 2020 WL 7632260 at \*16 & n.12. Cf. *Timothy O.*, 822 F.3d at 1119 ("District's failure to assess [student] for all areas of suspected disability deprived his IEP Team of critical evaluative information about his developmental abilities as an autistic child. That deprivation made it impossible for the IEP Team to consider and recommend appropriate services necessary to address [student]'s unique needs, thus deprive him of critical educational opportunities and substantially impairing his parents' ability to fully participate in the collaborative IEP process.")

<sup>79</sup> See *Timothy O.*, 822 F.3d at 1119; *Natick Pub. Sch. Dist.*, 2020 WL 7632260 at \*16 & n.12. See also *Amanda J.*, 267 F.3d at 894-95 (where parents were deprived of important medical information about their child contained in school records, the court found a violation of FAPE without reaching the question of educational benefit, holding instead that parents were "prevented from participating fully, effectively, and in an informed manner in the development of" the IEP, and that, as such, the District's failure "to develop an IEP in accordance with the procedures mandated by the IDEA . . . in and of itself denied [student] a FAPE").

<sup>80</sup> Cf. *R.E.*, 694 F.3d at 190 (noting that failure to conduct an adequate FBA "seriously impairs substantive review of the IEP because courts cannot determine exactly what information an FBA would have yielded and whether that information would be consistent with the student's IEP," and, further, that "when an FBA is not conducted, the court must take particular care to ensure that the IEP adequately addresses the child's problem behaviors"); *L.O.*, 822 F.3d at 114 ("omission of FBAs in each IEP and the absence of a BIP in the March 2011 IEP constituted procedural violations impairing our ability to review the adequacy of the IEP provisions"). See *Roland M. v. Concord Sch. Comm.*, 910 F.2d at 994.

where there is no evidence that Parent specifically acted to prevent the school district from meeting the responsibility at issue (here, to conduct the FBA), Pembroke's failure to conduct an evaluation for which it had parental consent, without issuing prior written notice, is "so significant and fundamental a procedural misstep, that some remedy [is] justified," even in the absence of a showing of educational harm.<sup>81</sup> Given the significance of Pembroke's violation, Parent's subsequent ultimate acceptance of IEPs does not cure the violation.<sup>82</sup> Parent was deprived of both the information an FBA may have provided in 2019 and the opportunity to ensure that one be administered at that time in accordance with her informed consent (and the District's determination, communicated by its proposal of an FBA in the first place, that such assessment was a necessary).

Before determining the nature of that remedy, I review the remainder of Parent's allegations.

2. *Pembroke's Refusal to Conduct an FBA in the Spring of 2021 Was Not Error.*

Parent contends that Pembroke was obligated to conduct an FBA in the spring of 2021, when she requested one, and its failure to do so constitutes a procedural error that denied Zeke a FAPE and/or interfered with her right to participate in decision-making for Zeke.

Following the Team's proposal of an IEP for the 2021-2022 school year, Parent expressed concerns to both Pembroke and Evergreen regarding behavioral support practices at Evergreen. Though Pembroke sent information and offered a Team meeting, Parent declined to attend, and on June 3, 2021, she formally requested an FBA. The District determined that no such assessment was necessary at that time and issued a prior written notice (N-2) to notify Parent of its refusal.

Here, the District was in a different position than it was during Zeke's three-year reevaluation in 2019, as Pembroke had not already requested, and obtained, Parent's consent to perform an FBA. Instead, it had only received Parent's request to conduct one. In response to

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<sup>81</sup> See *Natick Pub. Sch. Dist.*, 2020 WL 7632260 at \*16.

<sup>82</sup> Cf. *S.S.*, 498 F. Supp. 3d at 780 (although an FBA was eventually conducted six months after the Team had deemed one necessary during a Team meeting, this "unexplainable delay" prevented the Team from addressing student's behavioral issues in a timely manner, such that this significant delay in assessment rendered the IEP substantively inadequate); *Jackson v. Franklin Cnty. Sch. Bd.*, 806 F.2d 623, 631 (5th Cir. 1986) (Court of Appeals recognized that even where school district had offered adequate proposals, remand to District Court was appropriate to determine whether, if school district had provided timely notice and a hearing, parent still would have rejected the educational placements offered, and whether the school district would have offered other options prior to the increased adversarial nature of the relationship between the parties, so that the extent of student's loss caused by the school district's procedural violations could be determined); *Timothy O.*, 822 F.3d 1119 (even where IEPs appear to have been accepted and implemented, as Decision references agreements at Team meetings and does not mention any rejected IEPs, District's failure to assess student for all areas of suspected disability deprived Team of critical evaluative information, rendering it "impossible for the IEP Team to consider and recommend appropriate services," such that student was deprived of a FAPE); *Amanda J.*, 267 F.3d at 891 (even though IEP appears to have been accepted, as Decision notes that student enrolled in a particular program and services were delivered pursuant to the IEP, District was found to have violated procedural requirements of the IDEA by failing to timely disclose important records to parents, including evaluations indicating a possible autism diagnosis; "District's egregious procedural violations denied [student] a FAPE").

this request, the District reviewed the information in its possession and determined that an FBA was not necessary, given the other information before the Team regarding Zeke's behavior and its functions. Pembroke was within its rights to decline to conduct an FBA, so long as it provided proper notice of its refusal.<sup>83</sup> The N-2 Pembroke sent to Parent on June 4, 2021 provided sufficient detail to inform Parent about its reasons.<sup>84</sup> The attached Functional Behavior Assessment Summary provided Parent with additional information. (S-9) Moreover, the testimony of Ms. Alton-Moore, Ms. Beckman, and Ms. DeLorenzo demonstrates that Evergreen was, in fact, collecting data regarding Zeke's target behaviors regularly and modifying his behavior plans as needed.<sup>85</sup>

For these reasons, Parent failed to prove that Pembroke committed any procedural errors in connection with its refusal to conduct an FBA in the spring of 2021, much less procedural errors that violated Zeke's right to a FAPE.

3. *Pembroke Was Not Obligated to Include an Observation at a Doctor's Office in its December 2021 FBA.*

Parent also asserts that Pembroke was obligated to include an observation of Zeke in the community as part of the FBA conducted in December 2021. Parent expressed her ongoing concerns to Pembroke and Evergreen regarding Zeke's sexualized behavior in the community, particularly at medical appointments. Though neither Pembroke nor Evergreen shared the extent of her concern, there is no dispute that the parties agreed that Ms. McLeod, the BCBA conducting the FBA, would observe Zeke at a doctor's appointment, given Parent's ongoing concerns regarding his behavior in that context. The appointment Ms. McLeod was scheduled to attend was cancelled, appropriately. The parties could have arranged for Ms. McLeod to observe Zeke at a future appointment. Parent sent her an additional date; Ms. McLeod informed Parent that the new date was beyond the evaluation timeline and that Parent could request an extension from Pembroke that would permit the rescheduling of the observation. Parent did not request this extension, however, and Ms. McLeod completed her FBA without observing Zeke in a community setting.

Parent argues that Pembroke's failure to include an observation of Zeke in the community setting as part of the FBA renders the FBA incomplete, such that the District committed an error impacting Zeke's right to a FAPE. Pembroke maintains that even without the doctor's appointment observation, Ms. McLeod had sufficient alternative community information before her to complete the FBA to which Parent had consented; in fact, according to the District, even without the December 2021 FBA altogether, the Team had sufficient

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<sup>83</sup> See *In Re Boston Public Schools*, BSEA #012461.

<sup>84</sup> See 34 CFR § 303.421(a).

<sup>85</sup> See *P.K.*, 819 F. Supp. 2d at 106 (collecting cases) (noting, in cases where school districts had not proposed, obtained consent for, yet failed to conduct, an FBA, that courts have found that if a District considers the use of positive behavioral interventions and supports, and other strategies to address a student's behavior that impedes the child's learning or that of others, in accordance with the IDEA, and the IEP sets forth other means to address student's problematic behaviors, failure to conduct an FBA does not constitute a procedural violation) (internal citations and quotation marks omitted). As described above, these circumstances differ from those that occurred in 2019, when the District, after proposing an FBA and obtaining parental consent, failed to conduct one, without providing prior written notice.

information before it regarding Zeke's behaviors to develop appropriate IEPs and behavior plans. Moreover, given the infrequency of Zeke's unsolicited touching of others or inappropriate touching of self, as demonstrated in the data collected by Evergreen, an observation of Zeke at a doctor's office would not have impacted Ms. McLeod's hypothesis regarding the functions of the behavior.

For the reasons I explained above regarding the adequacy of the behavioral data before the Team earlier in 2021, I do not believe that an observation of Zeke by Ms. McLeod in a community setting in December 2021 was necessary for him to receive a FAPE. In this regard, I am also mindful of Parent's decision not to request an extension of time for completion of the FBA so as to allow for a rescheduled observation of Zeke at a medical appointment. Given Parent's ongoing concerns specific to Zeke's behavior at doctor's appointments and the absence of any data regarding Zeke's behavior in that setting, I find Ms. McLeod's testimony that had she conducted observations of Zeke in the community, "it would have been the same report and the same recommendations and the same data so it would say the same thing," to be pure speculation. This impacts my formulation of the remedy, below.

## CONCLUSION

As I have determined that Pembroke violated Zeke's right to a FAPE by failing to complete the functional behavioral assessment to which Parent had consented as part of his three-year reevaluation in 2019, I must now consider the appropriate remedy.

When a school district fails to provide a student with a FAPE, compensatory services may be appropriate. Compensatory services are an equitable remedy, which allows a hearing officer discretion to design relief that attempts to make a student whole, or make up for what was lost as a result of a school district's "nonfeasance or misfeasance in connection with a school system's obligations under the IDEA."<sup>86</sup>

In this case, Pembroke's failure to conduct an FBA in 2019 deprived Parent of the opportunity to consider the results of that evaluation, as a member of Zeke's Team. This failure may have also deprived the Team of relevant information that could have been used to develop Zeke's IEP and/or behavior plans. At this point, Zeke has aged out of eligibility for special education services from Pembroke, but this does not preclude an order of compensatory services.<sup>87</sup> At the same time, Parent has not established that Zeke is entitled to particular services as a result of not having been administered an FBA in 2019, nor is she currently seeking any specific services from Pembroke as a form of compensation for that violation. Instead, as Zeke has transitioned to adult services, Parent has sought additional information to assist in planning and provision of those adult services.

The FBA conducted by Ms. McLeod in December 2021 provides a recent assessment of Zeke's behavioral functioning. It did, however, omit the community observations Parent sought, which Pembroke agreed to provide. Though an observation of Zeke in the community may not

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<sup>86</sup> *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 188 (1st Cir. 1993); see *C.G. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 290 (1st Cir. 2008); *Dracut Sch. Comm. v. Bureau of Special Educ. Appeals*, 737 F. Supp. 2d 35, 54-55 (D. Mass 2010); *In Re Dracut Public Schools*, BSEA #085330 (Crane, 2009).

<sup>87</sup> See *Pihl*, 9 F.3d at 189-90; *Dracut*, 737 F. Supp. 2d at 54.

be essential to the administration of an appropriate FBA, and may not have altered the BCBA's conclusions, such observation might lead to information that can be used in planning for Zeke's future.

For these reasons, I am exercising my discretion in ordering the following remedy so as to make Zeke whole for the District's failure to administer the consented-to FBA in 2019. Pembroke shall provide funding for a BCBA (ideally, Ms. McLeod, through a contract with PAC) for the limited purpose of observing Zeke at a doctor's appointment and updating the December 2021 FBA to incorporate the findings of said observation.

### **ORDER**

Pembroke Public Schools is hereby ordered to contract with PAC for additional hours, funded by Pembroke, for a BCBA to observe Zeke at a doctor's appointment within the next 90 days. The BCBA may then incorporate those observations into the December 2021 FBA or, if such incorporation would impact the validity of that FBA, the BCBA must conduct a new one.

By the Hearing Officer:<sup>88</sup>

/s/ Amy M. Reichbach  
Dated: October 18, 2022

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<sup>88</sup> The Hearing Officer gratefully acknowledges the diligent assistance of legal interns Teddy Hereid and Sofia Zocca in the preparation of this Decision.