



## SUMMARY

The Campaign for a Commercial-Free Childhood (“CCFC”) asks the Federal Trade Commission to bring an action against Baby Einstein and Brainy Baby for engaging in deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.

The American Academy of Pediatrics (“AAP”) recommends “no screen time” for children under age two, including television or videos promoted for that age group. Despite this recommendation, companies have aggressively marketed videos for children under two, making over one billion dollars from the sales of these videos. Companies such as Baby Einstein and Brainy Baby have capitalized on parents’ desires to give their very young children a leg up on learning and development by deceptively and falsely marketing their videos as educational and beneficial for infant development. For example, Baby Einstein claims that with its *Baby da Vinci* video, “your child will learn to identify her different body parts, and also discover her five senses... in Spanish, English, and French!” Brainy Baby claims that “the educational content of Brainy Baby can help give your child a learning advantage!”

These claims are deceptive and false in violation of the Federal Trade Commission Act. The claims are deceptive because no research or evidence exists to support Baby Einstein and Brainy Baby’s claims that their videos are educational or beneficial for very young children. In fact, preliminary research suggests that television is a poor tool for educating very young children. They are false because research indicates that television viewing by children under three negatively affects cognitive development. Furthermore television viewing has been linked to sleep irregularity in babies and obesity in preschoolers. Finally, experts are concerned that television may be harmful for infants and toddlers because it displaces brain stimulating activities with proven developmental benefits, such as interaction with parents and siblings and

creative play. Baby Einstein, Brainy Baby, and other infant-video producers' claims influence consumer purchasing decisions and decisions about their infant's media usage. These choices directly impact the health and safety of thousands of very young children and put them at risk for significant harm. For these reasons, the CCFC calls on the Commission to take prompt action to prevent consumers from being misled into purchasing infant videos and to protect thousands of infants and toddlers from the potential harms caused by early television viewing.

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## **I. FACTUAL BACKGROUND**

### **A. Campaign for a Commercial-Free Childhood**

The Complainant, Campaign for a Commercial-Free Childhood (CCFC), is a non-profit national coalition of health care professionals, educators, advocacy groups, and concerned parents. The coalition is headquartered at the Judge Baker Children's Center and affiliated with Harvard Medical School and Boston Children's Hospital. CCFC is committed to countering the harmful effects of marketing to children through action, advocacy, education, research, and collaboration among organizations and individuals who care about children. CCFC has been at the forefront of a growing movement to protect children from commercial exploitation.

### **B. The Companies**

#### **1. Baby Einstein**

The Baby Einstein Company (1201 Grand Central Ave, Glendale, CA 91201) was founded in 1997 by Julie Ainger-Clark, a mother and former educator, and made its name producing videos and CDs for infants and toddlers. In 2001, the Walt Disney Company bought Baby Einstein. It heavily markets the videos and has expanded the company's product line to include toys, books, and apparel promoted for infants and toddlers. Baby Einstein controls approximately 90 percent of the infant-video market<sup>1</sup> and in 2005 Baby Einstein's annual sales reached \$200 million.<sup>2</sup> Baby Einstein sells and markets approximately 20 different video titles. They are named after famous artists, inventors, and other notable figures, such as *Baby Van Gogh – World of Colors*, *Baby da Vinci – From Head to Toe*, *Baby Wordsworth – First Words Around the House*, *Baby Shakespeare – World of Poetry*, *Numbers Nursery*, and *Language*

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<sup>1</sup> Dianne Brady, *Disney's Bets on Baby Brainiacs*, Bus. Wk. Online, February 14, 2003, [http://www.businessweek.com/bwdaily/dnflash/feb2003/nf20030219\\_6058\\_db035.htm](http://www.businessweek.com/bwdaily/dnflash/feb2003/nf20030219_6058_db035.htm).

<sup>2</sup> Don Oldenburg, *Experts Rip 'Sesame' TV Aimed at Tiniest Tots; Producers Defend DVDs as Right for Under 2's*, Wash. Post, Mar. 21, 2006, at C1.

*Nursery*. Baby Einstein's videos are labeled primarily for three different age ranges: 1-month to 3 years, 9-months and up, and 1 year and up. They run between 28 and 39 minutes. The videos cost \$15 to \$20 each and are sold both individually and in multiple video packages. They can be purchased at [www.BabyEinstein.com](http://www.BabyEinstein.com), national retail chains including Wal-Mart and Target, and through online retailers such as Amazon.com.

## **2. Brainy Baby**

The Brainy Baby Company (1200 Alpha Dr. Suite B, Alpharetta, GA 30004) was founded by President and CEO Dennis Fedoruk in 1995. The company sells videos, CDs, toys and books for infants, toddlers and preschool aged children. The video titles include *Left Brain*, *Right Brain*, *Laugh & Learn*, *Peek-A-Boo Baby*, *Shapes and Colors*, and *ABC's*. The videos are labeled primarily for age ranges of 6 to 36-months and 1 to 5 years. Each video runs between 35 and 45 minutes with additional features that bring the total running time of some videos to 108 minutes. Videos can be purchased for approximately \$15 to \$20 at [www.BrainyBaby.com](http://www.BrainyBaby.com), as well at national retail chains and online retailers such as Amazon.com.

### **C. Infants and television viewing**

The American Academy of Pediatrics, an organization of 60,000 pediatricians committed to optimal physical, mental, and social health and well being of all infants, children, adolescents, and young adults, recommends “no screen time” for children under age two, regardless of the content.<sup>3</sup> It first made the statement in 1999 because there was no research showing that television was educational for this age group. The AAP emphasized that from birth until two, children have a critical need for positive interaction with other children and adults to develop

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<sup>3</sup> *Media Education*, 104(2) Pediatrics 341, 342 (Aug. 1999), hereinafter “AAP Media Education policy statement.” (The AAP reviews its statements every three years). Understanding the Impact of Media on Children and Teens, American Academy of Pediatrics, <http://www.aap.org/family/mediainpact.htm>.

good language and social skills. Subsequent research has failed to demonstrate any benefits of television for babies and toddlers, and even indicates potential harms from early television viewing. *See infra* pp. 17-19.

A 2003 Kaiser Family Foundation (“KFF”) report indicates that many parents and caregivers are not following the AAP’s advice. The report found that each day, 68 percent of children under age two use screen media for an average of two hours and five minutes.<sup>4</sup> That means that babies who are only awake for about 12 hours a day are spending between 10 and 20 percent of their waking hours watching television.<sup>5</sup> This report also found that that 26 percent of babies 6-months to 24-months old have a television in their bedroom.<sup>6</sup> Finally, a recent survey found that the average baby starts watching videos at 6-months and television at 10-months of age.<sup>7</sup>

Meanwhile, the infant video market, which promotes “content-specific” programming for infants and toddlers, has exploded over the past several years and continues to grow. To date, sales of videos promoted for children under age two are estimated at over a billion dollars.<sup>8</sup> Thousands of well-educated mothers, fathers, and grandparents are spending millions of dollars a year on infant videos that claim to be educational and beneficial. In fact, the KKF report found that 27 percent of young children owned Baby Einstein videos and 49 percent of parents thought that educational videos were “very important” in the intellectual development of children.<sup>9</sup>

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<sup>4</sup> Victoria J. Rideout, et al., *The Henry J. Kaiser Family Foundation, Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers, at 5-6* (2003), hereinafter “KFF 2003,” <http://www.kff.org/entmedia/3378.cfm>. Of the children who use screen media, 59% watch television, 42% watch videos, 5% use the computer, and 3% play video games.

<sup>5</sup> Oldenburg, *supra* note 2 (citing Dr. Dimitri Christakis, a national expert on the effects of media on children).

<sup>6</sup> KFF 2003, *supra* note 4 at 5.

<sup>7</sup> Marilyn Elias, *Study Takes a New Look at Tots and TV*, USA Today, August 4, 2004, at 8D (citing a study presented by Dr. Dorothy Singer at an American Psychological Association annual meeting).

<sup>8</sup> Barbara C. Meltz, *DVD Series for Babies, Parents Fuels TV Debate*, Boston Globe, Mar. 22, 2006, at A1.

<sup>9</sup> KFF, Fall 2003, *supra* note 4 at 10.

Therefore it is no surprise that more and more children's companies are seeking to enter the market with their own infant-videos.<sup>10</sup>

Despite the numerous claims about the educational and developmental benefits for babies who watch these videos, a spokesman for AAP recently confirmed that the AAP continues to recommend that children under two should not watch any TV, regardless of content.<sup>11</sup> Moreover, there is very little research that examines the impact of television viewing of any kind on very young children.<sup>12</sup> In fact, Dr. Daniel Anderson, a developmental psychologist at the University of Massachusetts with a National Science Foundation grant to study the impact of baby videos, warns, "As a society, we are engaged in a vast and uncontrolled experiment with our infants and toddlers, plunging them into home environments that are saturated with electronic media. We should try to understand what we are doing and what [the] consequences [are]."<sup>13</sup>

According to Dr. Anderson, "there is absolutely no evidence that baby videos enhance that world at all, and there's some weak evidence that they might actually do harm."<sup>14</sup> For example, a study published in the Archives of Pediatrics and Adolescent Medicine found that television viewing before age three adversely affected cognitive development.<sup>15</sup> Researchers have also found a link between infant television viewing and irregular sleep patterns.<sup>16</sup> Another recent study found that excessive television exposure is a risk factor for obesity in

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<sup>10</sup> Other companies include, So Smart!, Sesame Beginnings, Baby Nick Jr., Baby Bumblebee, Baby Genius, Teach-Me TV, and Baby Prodigy.

<sup>11</sup> Meltz, *supra* note 8.

<sup>12</sup> AAP Media Education policy statement, *supra* note 3 at 342.

<sup>13</sup> Daniel R. Anderson, and Tiffany A. Pempek, *Television and Very Young Children*, 48(5) American Behavioral Scientist 505, 519 (Jan. 2005).

<sup>14</sup> Patricia Simms, *Baby Einstein? Or Just Baby Couch Potatoes?* Wisconsin State Journal, February 3, 2006, at A1.

<sup>15</sup> Frederick J. Zimmerman and Dimitri A. Christakis, *Children's Television Viewing and Cognitive Outcomes*, 159(7) Archives of Pediatrics & Adolescent Medicine 619 (Jul. 2005).

<sup>16</sup> Darcy A. Thompson and Dimitri A. Christakis, *The Association Between Television Viewing and Irregular Sleep Schedules Among Children Less Than 3 Years of Age*, 116(4) Pediatrics 851 (Oct. 2005).

preschoolers.<sup>17</sup> Finally, research has shown that television viewing by infants and toddlers is displacing brain stimulating activities with proven developmental benefits, such as parent and sibling interaction and creative play.<sup>18</sup> Experts fear that because parents think Baby Einstein and Brainy Baby videos are beneficial, they will substitute some of these critical activities with videos. This concern is well-founded because children are spending a significant time with these videos. One mother has even referred to Baby Einstein videos as “crack cocaine for babies. Once an infant or toddler has seen one, the child becomes addicted. No matter how many times you play the tape, the kid will want more.”<sup>19</sup>

## **II. BABY EINSTEIN AND BRAINY BABY’S PRACTICES ARE DECEPTIVE IN VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT ACT.**

Congress enacted Section 5 to protect consumers from “unfair and deceptive” practices, including false and misleading advertising.<sup>20</sup> A company violates the Act when it makes a representation or omission, or engages in an act or practice, that is likely to mislead consumers acting reasonably under the circumstances.<sup>21</sup> Baby Einstein and Brainy Baby’s marketing practices are based on express and implied claims that their videos are educational and beneficial for early childhood development. These claims are both misleading and false. They are misleading because they lack substantiation required by the Federal Trade Commission (“Commission”) for all express and implied claims.<sup>22</sup> They are false because research shows

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<sup>17</sup> Julie C. Lumeng, et al., *Television Exposure and Overweight Risk in Preschoolers*, 160(4) *Archives of Pediatrics & Adolescent Medicine* 417 (Apr. 2006).

<sup>18</sup> Elizabeth A. Vandewater, et al., *Time Well Spent? Relating Television Use to Children’s Free-Time Activities*, 117(2) *Pediatrics* 181 (Feb. 2006).

<sup>19</sup> *Baby Einstein’s Creator is a Genius*, *Toronto Star*, Jan. 3, 2005, at E1.

<sup>20</sup> 15 U.S.C. § 45(a)(1).

<sup>21</sup> FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 168-170 (1984), hereinafter “Substantiation Statement”).

<sup>22</sup> FTC Policy Statement Regarding Advertising Substantiation, appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), hereinafter “Substantiation Statement.”

that television viewing is potentially harmful for infants and toddlers. Baby Einstein and Brainy Baby are likely to mislead consumers acting reasonably under the circumstances because the overall net impression of the marketing sends a message to consumers that the videos are educational and beneficial for infants and toddlers. Finally, these educational and developmental claims are material because they are important to parents in choosing whether to purchase infant videos and because use of the product may be harmful to children.

**A. Baby Einstein and Brainy Baby make numerous representations that their videos are educational and beneficial for infant development.**

Under Section 5, representations include any express or implied claims by a company in virtually any form, including Internet marketing, advertising, and any other oral, written or visual communication with consumers.<sup>23</sup> Through numerous express and implied claims on their product packaging, websites, and in traditional media advertising, Baby Einstein and Brainy Baby create the net impression that the videos are educational and beneficial for very young children.<sup>24</sup>

**1. Baby Einstein makes claims that its videos are educational and beneficial for infant development.**

Baby Einstein bombards consumers with claims about the educational benefits of its videos in its product descriptions, testimonials, and traditional media advertising, to create an overall net impression that the videos have educational value and developmental benefits for infants. To start, the brand name “Baby Einstein” sends an initial message to consumers that the

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<sup>23</sup> Deception Statement, n. 21 at 171-172. See also, FTC Bureau of Consumer Protection Advertising and Marketing on the Internet (Sept. 2000).

<sup>24</sup> *Id.* at 178-179, citing *Grolier*, 91 F.T.C. 315, 430 (1978), remanded on other Grounds, 615 F.2d 1215 (9th Cir. 1980), modified on other grounds, 98 F.T.C. 882 (1981), reissued, 99 F.T.C. 379 (1982) (The Commission observed “[i]n determining the meaning of an advertisement, a piece of promotional material or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace.”).

videos are educational and beneficial.<sup>25</sup> Even Baby Einstein founder Julie Clark has admitted that the name “Einstein has become a generic term for a smart person.”<sup>26</sup> Second, the company slogan, “Great minds start little,” builds upon the impression of the name “Einstein.” Third, the message is reinforced by the video titles, such as *Baby da Vinci – From Head to Toe*, *Baby Wordsworth – First Words Around the House*, and *Numbers Nursery*. Finally, the DVD packaging which overtly claims that young viewers will receive “Bonus Learning!” continues to build upon the impression that the videos are educational.<sup>27</sup>

Baby Einstein’s website is full of claims that its products are educational and beneficial for infants and toddlers. In its company description on the “About Us” page of its website, Baby Einstein claims to be the creator of the “infant developmental media category” of videos “specifically designed for babies and toddlers.”<sup>28</sup> Baby Einstein also makes numerous claims in product descriptions found in the “Products” section of its website. Here, Baby Einstein claims: (1) *Baby Wordsworth* is a “rich and interactive learning experience that introduces your little one to the concepts of verbal and written communication and sign language... fosters the development of your toddler’s speech and language skills... your little one can learn new words in Spanish, French, and English, (2) with *Baby da Vinci* “Your child will learn to identify her different body parts, and also discover each of her five senses... in Spanish, English and French!” and (3) *Numbers Nursery* will “help develop your baby’s understanding of what numbers mean.”<sup>29</sup>

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<sup>25</sup> See *Telebrands* Initial Decision at 41 (citing *Jacob Seigel Co. v. F.T.C.*, 327 U.S. 608, 609 (1946)) (Commission held that a product’s name can play a role in implying a claim).

<sup>26</sup> Eric Hubler, *Baby Videos Spell Big Money*, *The Denver Post*, Mar. 12, 1999, at C1.

<sup>27</sup> See Attachment 1. This DVD was found on the shelf of major retailers in February 2006.

<sup>28</sup> See Attachment 2.

<sup>29</sup> See Attachment 3.

Baby Einstein uses the consumer testimonial section of its website, “Family to Family,” to make even more claims about the educational and developmental benefits of its videos. Baby Einstein makes claims in headings found at the top of the testimonials page and in headings used to introduce individual consumer testimonials. For example, the heading of the “Development Testimonials” page claims, “Developmental Skills Increased With Baby Einstein.” In headings to individual testimonials, Baby Einstein makes claims such as: (1) “Baby Einstein videos appeal to curious little ones while helping their development,” (2) “Baby Einstein helps develop recognition skills,” (3) “*Baby Shakespeare* encourages Jennifer’s son to start talking,” (4) “*Baby Van Gogh* helps Jennifer’s son learn his colors,” and (5) “Baby Einstein videos helped increase JJ’s attention span.”<sup>30</sup> These claims all send the message to consumers that the videos have educational and developmental benefits for babies as young as 6-months old.

Finally, in traditional modes of advertising, Baby Einstein claims that its videos are educational and enhance learning. For example, in an advertisement in *Pregnancy*, a magazine targeted for expecting mothers, Baby Einstein claims that its videos are “educational.”<sup>31</sup> Baby Einstein also has a television commercial that implies the videos will help a child’s brain development.<sup>32</sup> The commercial shows a baby and toddler watching a Baby Einstein video. The parents are talking about the videos in an interview-like style. The father-figure says, “I could almost see my baby’s mind expanding.” This reference to the mind growth sends the message that babies’ brains will develop simply by watching the videos. Thus, throughout its marketing and advertising materials, Baby Einstein inundates consumers with numerous claims which create the net impression that their videos are educational and beneficial for infant development.

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<sup>30</sup> See Attachment 4.

<sup>31</sup> *Pregnancy*, Buyer’s Guide 2005. See Attachment 5.

<sup>32</sup> <https://ad-rag.com>, search for Baby Einstein (CCFC found the commercial on this advertising blog called AdRag.com where visitors post commercials they recorded.) (Available from CCFC upon request).

Baby Einstein might try to rebut the charge that it markets its videos as educational and beneficial for infants and toddlers by arguing that it has merely represented them as useful tools for parents to interact with their infants and that educational value results from this interaction. This claim, however, should be rejected on three grounds. First, although Baby Einstein's marketing materials make isolated references to parent interaction, they are either extremely vague or unlikely to be seen by prospective consumers.<sup>33</sup> Second, Baby Einstein designs its videos to be used without the need for parental interaction. For example, each video DVD has a "repeat play" feature which allows children to watch it over and over without parents having to push the play button each time.<sup>34</sup>

Third, Baby Einstein's website testimonials, to which consumers are likely to give great weight,<sup>35</sup> portray the videos being used as a "babysitter," instead of as a tool for parents to interact with their babies.<sup>36</sup> For example, one testimonial says, "[The videos] have been almost like a babysitter to me, while I shower or wash the dishes, I can just pop in a video and he is completely glued to the television for the whole duration of the show. I think Baby Einstein has revolutionized the idea of a parent letting his or her child watch television." Another consumer wrote to Baby Einstein, "thanks to you, I get to take a shower every day, knowing that she is in good company." Similarly, another parent says that showing the videos to her 9-month old have

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<sup>33</sup> For example, buried in the "History" subsection, where consumers are unlikely to seek out product usage information, Baby Einstein says that its videos are "not designed to make babies smarter... [the] products are specifically designed to engage babies and provide parents with tools to help expose their little ones to the world around them in playful and enriching ways." See Attachment 6. The only reference to parent involvement with the actual product is on an insert to the DVD, accessible to consumers only after purchasing the DVD and opening the package. See Attachment 7.

<sup>34</sup> When the "repeat play" function is set on the DVD, it will automatically replay from the beginning over and over without end. See Attachment 3.

<sup>35</sup> The Kaiser Family Foundation reported that Fischer Price and other infant-media product companies say that marketing studies show that parents were more heavily influenced by the experiences of other parents than they were by any expert opinions. Michelle M. Garrison and Dimitri A. Christakis, *The Henry J. Kaiser Family Foundation, A Teacher in the Living Room? Educational Media for Babies, Toddlers and Preschoolers* 28 (Dec. 2005), <http://www.kff.org/entmedia/7427.cfm>.

<sup>36</sup> See Attachments 4 and 8.

“bought [her] precious minutes (and hours) of time to do things like ‘take a shower’...” Finally, a mother writes that her son watches a Baby Einstein video “anywhere from 5 to 10 times a day” and that sometimes “he plops himself down with his blanket and binky and watches.” These testimonials imply that Baby Einstein endorses using videos without parental involvement and as a “babysitter,” thus undermining other references to parental interaction. In any event, the few references to parent interaction are overwhelmed by the claims that the videos are educational, creating the overall net impression that the videos on their own are educational and beneficial for infant development.

## **2. Brainy Baby makes claims that its videos are educational and beneficial for infant development.**

Like Baby Einstein, Brainy Baby also makes numerous claims in its product packing, website and print advertising to create the overall net impression that its videos are educational and beneficial for infants’ brain development. The product name, “Brainy Baby,” and slogan, “a little genius in the making,” give a first impression to consumers that the videos have educational and developmental value to infants.

Brainy Baby also makes several claims on its product packaging. For example, the back of DVD packages claim that “the educational content of Brainy Baby can help give your child a learning advantage!”<sup>37</sup> It also encourages parents to “give [their] child the power to excel by using the video series that’s more than just a lot of pretty pictures.” The “Infant Learning Pack” contains four Brainy Baby videos, *Left Brain*, *Right Brain*, *Laugh & Learn*, and *Peek-A-Boo Baby*. The front of this 4-pack of DVDs says “Over 3 hours of learning fun!”<sup>38</sup> The front of the *Left Brain* DVD box claims that the program, “Inspires logical thinking.”<sup>39</sup>

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<sup>37</sup> See Attachment 9.

<sup>38</sup> See Attachment 10.

<sup>39</sup> See Attachment 11.

Brainy Baby’s website contains numerous claims about the educational and developmental benefits of its videos. For example, the company’s home page proudly states, “Not Just a Bunch of Pretty Pictures!” On this page, Brainy Baby goes on to claim that its products “are an entertaining way to help little ones learn educational basics, stimulate cognitive development and gain a smart start to learning!”<sup>40</sup> The company description in the “About Us” section claims that “The Brainy Baby Company produces videos and DVDs that are entertaining and educational for babies, toddlers and pre-schoolers.”<sup>41</sup>

Brainy Baby makes even more claims about the educational and developmental benefits of individual videos in the “Products” section of the website.<sup>42</sup> The *Laugh & Learn* video description says, “The first few years of life are critical periods for brain development,” and claims that “this video is a wonderful tool to stimulate learning in babies and toddler. Young viewers will laugh at silly faces... while learning critical skills like problem solving, listening skills, classifying skills and concept awareness.” The *Peek-A-Boo* description explains that, “The very best way to help develop your child’s brain is to give them what they need to do it!” It goes on to claim that “this brain stimulating video helps nurture such important skills as object permanence, communication skills, cause and effect, language development and many others.” Brainy Baby claims that the *Left Brain* and *Right Brain* videos help “develop both [the] Left and Right sides of the brain.” *Left Brain* “focuses on such cognitive skills as Logic, Patterns, Letters & Numbers, Sequencing, Analyzing Details and more!” *Right Brain* “focuses on such cognitive skills as Creative Thinking, Art & Drawing, Rhymes, Spatial Reasoning, and Imagination, Intuition and more!” All of these descriptions send consumers a clear message that the videos are educational and will benefit infant development.

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<sup>40</sup> See Attachment 12.

<sup>41</sup> See Attachment 13.

<sup>42</sup> See Attachment 14.

Finally, Brainy Baby makes claims about the educational value of videos and their benefits for brain development in traditional print advertising. An ad that appeared in *Pregnancy* magazine states in large print, “Because no parent asks, ‘Got anything that’ll make my kid dumber?’”<sup>43</sup> It goes on to explain, “Your child’s education begins at birth. That’s why the Brainy Baby video series was created, to give your child a jump-start on learning.” The ad then claims that “Every Brainy Baby video features 45 minutes of solid educational content... that will both entertain and educate your child.” Brainy Baby’s claims about its videos, targeted to influence consumers through product packaging, website marketing, and print advertisements, send the message the videos are educational and beneficial for infant development and learning.<sup>44</sup>

**B. Baby Einstein and Brainy Baby claims are deceptive because they are unsubstantiated and false in violation of Section 5.**

Baby Einstein and Brainy Baby violate Section 5 because they make deceptive claims. A claim is deceptive when the seller cannot substantiate the claim with a reasonable basis of support or when the claim is false. Section 5 requires sellers and advertisers to have substantiation for their claims.<sup>45</sup> That is, they must possess either the amount of support implied by the claims or a reasonable basis of support for the claims before disseminating them.<sup>46</sup> Baby Einstein and Brainy Baby’s claims lack substantiation because there is no available scientific research to prove that very infants and toddlers receive educational or developmental benefits

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<sup>43</sup> *Pregnancy, Buyer’s Guide 2005*, See Attachment 15.

<sup>44</sup> Brainy Baby makes a single reference to parent involvement on its website. In the “Products” section, Brainy Baby mentions that the videos are “designed for your and your child to watch together.” This one statement is not enough to overcome the blitz of claims about the educational and developmental benefits of the videos. Furthermore, the statement is nestled in between a statement about how the videos are designed to “maximize your child’s learning!” and product descriptions that make several statements about learning and development. See Attachment 14.

<sup>45</sup> Substantiation Statement, *supra* note 22 at 433.

<sup>46</sup> *Id.* at 434.

from their videos or television viewing. Baby Einstein and Brainy Baby’s claims that their videos are beneficial for infant development are false because research suggests that early television viewing can actually be harmful for very infants and toddlers.

**1. Baby Einstein and Brainy Baby’s claims are unsubstantiated because there is no research that demonstrates that videos are educational and beneficial for very young children.**

Baby Einstein and Brainy Baby make deceptive claims in violation of Section 5 because they do not have evidence to substantiate their claims about the educational and developmental benefits of their videos. The Commission requires substantiation because consumers would be less likely to rely on claims for products and services if they knew the advertiser did not have a reasonable basis for believing them to be true.<sup>47</sup> Prior to disseminating information, a company must possess the type and amount of support explicitly or implicitly claimed in the ads. Even if a company does not expressly or implicitly claim a certain level of support, the Commission assumes that consumers expect a “reasonable basis” of support.<sup>48</sup>

Baby Einstein and Brainy Baby imply that scientific studies and research support their claims because they refer to collaboration with experts and use scientific terms. For example, Baby Einstein’s description of its *Numbers Nursery* cites collaboration with Dr. Kevin Nugent, Director of the Brazelton Institute, Children’s Hospital and Harvard University.”<sup>49</sup> Similarly, Brainy Baby claims that it uses input from doctors and educators, and that “Studies show time and again that very young children learn better when they see things they can relate to from their own world.”<sup>50</sup> Brainy Baby also makes several references to child development terms that imply

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<sup>47</sup> *Id.* at 433.

<sup>48</sup> *Id.* at 434-435. The Commission requires sellers to have prior substantiation for any claims that are reasonable interpretations of which the seller should generally be aware. Where an ad conveys more than one meaning, a seller is liable for the misleading interpretation even if non-misleading interpretations are possible. See, e.g., *Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983).

<sup>49</sup> See Attachment 3, *Numbers Nursery* description.

<sup>50</sup> See Attachment 13.

scientific backing, including “cognitive skills” and “brain development.”<sup>51</sup> These claims are likely to lead consumers into thinking that that Baby Einstein and Brainy Baby have actual competent and credible scientific studies to support their claims.

But even in the absence of statements implying the existence of scientific support, Baby Einstein and Brainy Baby would still need at least a “reasonable basis” of support for its claims. What constitutes a “reasonable basis” of support depends on a number of factors including the consequences of a false claim, the amount of substantiation experts in the field believe is reasonable, and the cost of developing substantiation for the claim.<sup>52</sup> Applying these factors,<sup>53</sup> Baby Einstein and Brainy Baby must have credible and competent scientific studies to support their claims.

Baby Einstein and Brainy Baby lack substantiation to support their claims. In fact, representatives from both companies have publicly admitted that they do not rely on any scientific research in developing their videos. Brainy Baby President and CEO, Dennis Fedoruk, acknowledged in an interview with the *Atlanta Journal-Constitution* that there has been no research to support videos as learning devices for babies and toddlers.<sup>54</sup> A Baby Einstein representative, Rashmi Turner, admitted in the *Chicago Tribune* that Baby Einstein DVDs are

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<sup>51</sup> See Attachment 14.

<sup>52</sup> Substantiation Statement, *supra* note 22 at 434-435.

<sup>53</sup> First, the consequences of consumers relying on these false claims put millions of children at risk of the potential harms from early television viewing. See *infra* pp. 17-19. Second, any costs associated with trying to substantiate these claims are necessary and justifiable when the claims will affect the health, safety, and well-being of today’s infants and toddlers and those of future generations. Third, experts agree that more research in the area of media products and their impact on very young children is necessary. See *infra* p. 19.

<sup>54</sup> Marlon Manuel, *Dreams of Raising Extra-Smart Tots Drive Billion-Dollar Baby Video Industry*, *The Atlanta Journal-Constitution*, Apr. 15, 2005, at 1G. Instead, Fedoruk claims he relies on thousands of anecdotes from customers who indicate that the videos help. However, the Commission rarely finds that statements from satisfied customers are sufficient to support a health or safety claim, or any other claim that requires objective evaluation. *Removatron Int’l Corp.*, 111 F.T.C. 206, 304 (1985); see also, FTC Frequently Asked Advertising Questions: A Guide for Small Business, <http://www.ftc.gov/bcp/online/pubs/buspubs/ad-faqs.htm>.

“not research-based” and the company “does not have any data showing that children learn anything from watching them.”<sup>55</sup>

Baby Einstein and Brainy Baby are unlikely to be able to produce substantiation for their claims because publicly available research and studies fail to identify educational or developmental benefits from television or video viewing by very young children. Early childhood development experts point out that very little research has looked at the cognitive processing of television by children under 24-months, and that more must be done in order to understand the short and long term impacts of infant television viewing.<sup>56</sup> The little research that does exist indicates that learning from television is associated with relatively poor outcomes.<sup>57</sup> A review of existing research suggested that children under age two have difficulty comprehending television content and concluded that “evidence thus far indicates that the AAP recommendation is well taken, although considerably more research is needed.”<sup>58</sup> Moreover, another study indicates not only that television viewing is not beneficial for children under age three, but that it adversely affects their cognitive development.<sup>59</sup> Thus, Baby Einstein and Brainy Baby will not likely be able to produce any substantive evidence to show that their videos are educational and beneficial for infant development.

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<sup>55</sup> Nell Minow, *Are 'Educational' Baby Videos a Scam? Research Lacking to Support Claims*, Chicago Tribune, Dec. 14, 2005, at C1.

<sup>56</sup> Dimitri A. Christakis and Frederick J. Zimmerman, *Media as a Public Health Issue*, 160 *Archives of Pediatrics & Adolescent Medicine* 445 (Apr. 2006); Ellen A. Wartella, et al. al, *Electronic Media Use in the Lives of Infants, Toddler and Preschoolers*, 48(5) *American Behavioral Scientist* 501 (Jan. 2005); Anderson and Pempek, *supra* note 13 at 519.

<sup>57</sup> Anderson and Pempek, *supra* note 13.

<sup>58</sup> *Id.*

<sup>59</sup> Zimmerman and Christakis, *supra* note 15.

**2. Baby Einstein and Brainy Baby’s claims are false because research suggests that television viewing is potentially harmful for very young children.**

The AAP’s recommendation of “no screen time” for children under two years of age directly contradicts Baby Einstein and Brainy Baby’s claims that the videos are educational and beneficial for infants and toddlers.<sup>60</sup> This recommendation has been endorsed by Dr. T. Berry Brazelton, one of the nation’s leading pediatricians and author of 38 books on pediatrics and child development. Dr. Brazelton was recently quoted in the *Washington Post* saying, “I absolutely support the American Academy of Pediatrics’ recommendation that children under two be kept away from screen media. It’s too expensive for them physically as well as psychologically.”<sup>61</sup>

The AAP’s recommendation is supported by recent studies demonstrating that television viewing may harm very young children. One study published by the *Archives of Pediatrics and Adolescent Medicine*, an American Medical Association (AMA) publication, found that television viewing by children under age 3 had adverse effects on the subsequent cognitive development of children. The study showed each hour of daily television viewing before age 3 was associated with reduced scores on tests that measured reading recognition, reading comprehension and memory.<sup>62</sup> A study published in *Pediatrics* linked television viewing to

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<sup>60</sup> Baby Einstein addresses the AAP’s recommendation on its website. Attachment 2. Baby Einstein misrepresents the AAP’s position by implying that its videos are acceptable under the recommendation when it says, “It is important to note that the AAP’s recommendation does not distinguish between television and video viewing, nor does it address the content of what is being viewed.” However, the AAP clearly recommends against children under two watching videos because the recommendation calls for “no screen time.” Understanding the Impact of Media on Children and Teens, American Academy of Pediatrics, <http://www.aap.org/family/mediaimpact.htm>.

<sup>61</sup> Oldenberg, *supra* note 2. In response to Sesame Beginnings, Dr. Brazelton supported CCFC’s letter to Zero to Three, a respected Washington-based, nonprofit child-development and advocacy organization. The letter criticized Zero to Three’s involvement with Sesame Workshop on its infant-video series. It calls on Zero to Three “to end its partnership with Sesame Workshop” and “work instead to educate parents about the potential harms of screen media for young children.”

<sup>62</sup> Zimmerman and Christakis, *supra* note 15, at 619 (The researchers used results from aspects of the Peabody Individual Achievement Test and the Memory for Digit Span assessment from the Wechsler Intelligence Scales for Children, both well-known and commonly used measures).

irregular sleep patterns of children younger than 3 years of age.<sup>63</sup> Regular sleep schedules are critical to ensuring good sleep, which is important to the overall well-being of children.

Consequences of sleep problems for a child may include problems of mood, behavior, learning, and poor health.<sup>64</sup>

Interaction with adults and other children and engaging in unstructured play are critical components of neurological development for children under age two.<sup>65</sup> Researchers are concerned that television may harm infants and toddlers because it displaces activities with proven developmental benefits, such as social interaction and traditional play.<sup>66</sup> One study verified such concerns when it found that the more time children spend viewing television, the less time they spend interacting with parents or siblings.<sup>67</sup> It concluded that the study's findings provide empirical support for the AAP's screen time recommendation.<sup>68</sup>

Early television use may also lead to excessive media dependency later in life which has been proven to harm children's health and well-being. For example, one study found that preschoolers (ages 3 to 4 ½) who were exposed to two or more hours of television per day, by either directly watching it or through background exposure during other activities, had a greater risk of being obese.<sup>69</sup> Excess television viewing by children and adolescents has been linked to negative health effects such as violent or aggressive behavior, substance use, sexual activity, obesity, poor body image, and decreased school performance.<sup>70</sup> Finally, media use does not

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<sup>63</sup> Thompson and Christakis, *supra* note 16.

<sup>64</sup> *Id.* at 854-855 (A child's sleep problem could also lead to inadequate sleep for the parent, thus putting the parent at risk for, at a minimum, mood imbalances and poor parenting).

<sup>65</sup> AAP Media Education policy statement, *supra* note 3 at 342; Vandewater, et al, *supra* note 18 at 182.

<sup>66</sup> Daniel R. Anderson and Marie K. Evans, *Peril and Potential of Media for Infants and Toddlers, Zero to Three*, October/November 2001, 10-16,16.

<sup>67</sup> Vandewater et al., *supra* note 18.

<sup>68</sup> *Id.*

<sup>69</sup> Lumeng, *supra* note 17.

<sup>70</sup> American Academy of Pediatrics, Committee on Public Education, *Children, Adolescents and Television*, 107(2) *Pediatrics* 423 (Feb. 2001).

provide children with the level of contingent, responsive, and emotional interaction so vital for positive social and cognitive development.<sup>71</sup> Dr. Tanya Altmann, a pediatrician and AAP spokesperson concludes, “TV is a major factor leading to childhood obesity and decreased school performance so why start your child with a bad habit at this young and vulnerable of an age?”<sup>72</sup>

Finally, not enough research has been done on the potentially harmful effects that television may have on infants and toddlers. Dr. Frederick P. Rivara, editor of the *Archives of Pediatrics and Adolescent Medicine* and Professor of Pediatrics at the University of Washington, recently said that the “Media is a major public health issue,” and that “research has not kept pace with the rise in media” for children.<sup>73</sup> For example, pediatricians and ophthalmologists are concerned about television viewing because no research has looked at the physiological effects it may have on children.<sup>74</sup> Baby Einstein and Brainy Baby’s claims about the benefits of their videos are false because research has shown that television viewing can be harmful for very young children. They are also false because researchers are concerned that infant and toddler exposure to television may be harmful in ways that research has not yet identified.

**C. Baby Einstein and Brainy Baby are likely to deceive consumers acting reasonably under the circumstances into thinking that infant videos are educational and beneficial.**

The sheer number and frequency of Baby Einstein and Brainy Baby’s claims, from the brand name to company and product descriptions to consumer testimonials, create an overall net impression that is likely to mislead reasonable consumers into thinking that the videos are

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<sup>71</sup> Anderson and Evans, *supra* note 66 at 16.

<sup>72</sup> Tina Benitez, *Concern over Sesame DVDs*, Playthings, Apr. 10, 2006, <http://www.playthings.com/article/CA6323589.html>.

<sup>73</sup> Press Conference, Archives of Pediatrics & Adolescent Medicine, Children’s Hospital and Regional Medical Center, Seattle, Washington (Apr. 3, 2006); see also, Christakis and Zimmerman, *supra* note 56 at 445.

<sup>74</sup> Claire Lerner, et al., *Computers, TV, and Very Young Children: What Impact on Development?* Zero to Three, October/November 2001, 30-33, 31.

educational and beneficial for infant development. Although the Commission does not require “actual deception” to find a Section 5 violation, anecdotal evidence demonstrates that consumers buy these videos because they think they will be educational, and at the very least, not harmful for their infants and toddlers.

Many customers who purchase media products from Amazon.com write reviews of those products that are posted with the product on the Amazon website. These customer reviews suggest that consumers buy Baby Einstein and Brainy Baby videos because they think they are educational.<sup>75</sup> For example, one Baby Einstein customer wrote, “I bought [the Baby da Vinci] for [my son] because he is completely in love with the television set, and I figure if he's going to watch it, he may as well watch something that's good for his development instead of just whatever happens to be on.” Similarly, a Brainy Baby customer reported, “I have been educating my child with the Brainy Baby videos since she was 8 months old...I believe that by allowing my child to view Brainy Baby right brain left brain has allowed her to be a whole brain thinker, making it easier for her to retain information.” Another one wrote, “Our daughter is either busy trying to find the flash card that goes with what is being shown on the screen or she is twirling to the music. Either way she is learning and that is the whole reason we bought these in the first place.”

The reviews also demonstrate that consumers buy these videos because they specifically think that “regular” TV is bad and these infant videos are “good.”<sup>76</sup> One Brainy Baby consumer wrote, “Since I don't want her watching regular TV for a long time to come, this DVD is perfect. I am so thrilled to have found something educational and entertaining for her that also gives me a bit of rest.” A Baby Einstein customer wrote, “I usually don't let my 15 month old watch TV,

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<sup>75</sup> See Attachments 16 (Baby Einstein) and 17 (Brainy Baby).

<sup>76</sup> *Id.*

but when she is sick, I put in DVDs... Maybe some TV isn't so bad for them after all..." These testimonials show that reasonable consumers purchasing products for infants and toddlers are likely to think, and do think, that Baby Einstein and Brainy Baby videos are educational and beneficial.

#### **D. Baby Einstein and Brainy Baby's deceptive claims are material**

A material act or practice is one which is likely to affect a consumer's choice of or conduct regarding a product.<sup>77</sup> Claims are also material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned.<sup>78</sup> Baby Einstein and Brainy Baby's claims are material. First, they are likely to affect consumer decisions about whether to purchase a Baby Einstein or Brainy Baby video. Second, the claims are material because they significantly involve the potential harm to the health, safety, and well-being of infants and toddlers.

In the case of Baby Einstein and Brainy Baby, as demonstrated by the customer reviews on Amazon, consumers are likely to purchase the videos and make decisions about their infant's exposure to television based on their beliefs about a video's educational and developmental benefits. And, as Baby Brainy aptly states in its magazine ad, "No parents asks, 'Got anything that will make my kid dumber?'"<sup>79</sup>

The promise of educational videos is particularly influential to consumers of baby products because of the emphasis on education at earlier and earlier stages of life. Education experts say that because of increasing competition for preschools, high schools, and universities,

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<sup>77</sup> Deception Statement, *supra* note 21 at 187.

<sup>78</sup> *Id.* at 190-191.

<sup>79</sup> See Attachment 15.

parents want more education for their children at earlier ages.<sup>80</sup> A 2002 survey conducted by Parents Magazine found that 42 percent of respondents felt pressure to raise smarter kids. When asked if they were inclined to purchase a brain-boosting video or toy, 69 percent said they were “somewhat” or “very likely” to do so.<sup>81</sup> The Kaiser Family Foundation found that nearly half of parents they surveyed deemed educational videos “very important” for intellectual development.<sup>82</sup> Dr. Ellen Wartella, a researcher at the Children’s Research Initiative: Children’s Digital Media Center, thinks that “[t]oy and video companies prey on the belief of parents that such toys have important effects and have fostered notions that simply watching certain videos or listening to tapes can enhance infant IQ and reading ability.”<sup>83</sup>

The overarching claim that Baby Einstein and Brainy Baby videos are beneficial for infants is also material because of the risk of harm to very young children. As mentioned above, research shows that television viewing by infants poses potential harms by negatively affecting cognitive development, causing irregular sleep patterns, displacing critical live interaction and creative play, and leading to future excessive media use, associated with health effects such as obesity and emotional developmental problems. *See supra* pp. 17-19.

### **III. CONCLUSION AND REQUEST FOR RELIEF**

This complaint demonstrates that Baby Einstein and Brainy Baby violate Section 5 of the FTC Act. Both companies make false and unsubstantiated claims that mislead consumers into purchasing their infant-videos. Purchases based on these false claims not only harm consumers, but they put infants and toddlers at great risk of harm. Consumers need to know that Baby

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<sup>80</sup> Donna Espy, *Quality child care: Cost no object*, The Atlanta Journal and Constitution, Mar. 16, 1995, at 4S.

<sup>81</sup> Marco R. della Cava, *The Race to Raise a Brainier Baby*, USA Today, June 25, 2002, at 1D (Online survey conducted for USA Today by Parents magazine).

<sup>82</sup> KFF, Fall 2003, *supra* note 4 at 10.

<sup>83</sup> Wartella, et al, *supra* note 56 at 501.

Einstein, Brainy Baby, and other infant video maker's claims of educational and developmental benefits are unfounded. Furthermore, parents must know that by showing infants and toddlers these videos, they are not only experimenting on their children, but they may be harming them.

For the foregoing reasons, the Complainants request that the Commission:

1. Bring an action pursuant to Section 5 of the FTCA, 15 U.S.C. § 53, to obtain preliminary and permanent injunctive against the Baby Einstein and Brainy Baby for their deceptive acts and practices in marketing and selling their videos.
2. Initiate action under 15 U.S.C. § 45 to permanently prohibit Baby Einstein, Brainy Baby, and other companies that produce videos for children under age two, from making claims about the educational developmental benefits of their videos.
3. Require makers of videos promoted for infants and toddlers to clearly and conspicuously disclose the AAP's recommendation against no screen time for children under age two, regardless of content, on their websites, packaging, and other forms of advertising.
4. Provide such other relief as the Commission finds appropriate.

Respectfully Submitted,

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