STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],

Petitioner,

vs. Case No. 14-5669E

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a due process hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on February 23 through 27, March 11 through 13, and April 8 and 9, 2015, in Miami, Florida.

APPEARANCES

For Petitioner: Allison Louise Hertog, Esquire
Making School Work, P.L.
1550 Madruga Avenue, Suite 333
Coral Gables, Florida 33146

Stephanie Langer, Esquire
Langer Law, P.A.
216 Catalonia Avenue, Suite 108
Coral Gables, Florida 33134

Kristina Tilson, Esquire
Langer Law, P.A.
216 Catalonia Avenue, Suite 108
Coral Gables, Florida 33134

For Respondent: Mary C. Lawson, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

STATEMENT OF THE ISSUES

Whether the student's Individualized Education Plan (IEP) was reasonably calculated to confer a meaningful educational benefit.

Whether the School Board failed to implement the IEP, thereby denying the student a free, appropriate public education (FAPE).

Whether the School Board violated Section 504 of the Rehabilitation Act (Section 504) by discriminating against the student due to his disabilities.

PRELIMINARY STATEMENT

On December 2, 2014, the student's parent (Petitioner) filed a request for a due process hearing. By request of both parties, the due process hearing was scheduled for February 23 through 27, 2015. The student is a [redacted]; [redacted] attended the same school during [redacted] grades. The student's parent filed due process hearing requests on behalf of each of the [redacted]. The parties agreed to consolidate the cases only to the extent that one due process hearing would encompass the three due process requests. The [redacted] attended two of the same schools, the issues raised are identical in all three cases,

the Respondent and Petitioner are the same, counsel for both parties is the same in all three cases, and the witnesses were identical for each case. Accordingly, the undersigned agreed to hold one hearing that would encompass all [redacted]. The Transcript of the hearing in this case addresses the [redacted], but the cases are not consolidated in any other aspect.

The hearing was held on February 23 through 27, 2015, but not concluded. The hearing was continued, and reconvened on March 11 through 13, 2015. Once again, the hearing did not conclude; it was rescheduled for April 8 and 9, 2015. At the hearing, Petitioner presented the testimony of the following witnesses: the student's mother; the student; [redacted], a science teacher; [redacted], a parent of a fellow student; [redacted], a parent of a fellow student; [redacted], the director of Disability Research Center at Florida International University; [redacted], an expert in psychoeducational evaluations; [redacted], principal of the [redacted] school; [redacted], an expert in technology in special education and reading; and [redacted], a handwriting expert. Petitioner Exhibits 2 through 38, 40, 41, 45, 47, and 49 through 51 were admitted into evidence.

The School Board presented the testimony of the following witnesses[redacted], a special education consultative teacher; [redacted], a chemistry and marine

science teacher; [redacted], an environmental science teacher; [redacted], a math teacher; [redacted], a biology and physics teacher; [redacted], an english teacher; [redacted], a middle school assistant principal; [redacted], a special education consultative teacher; [redacted]e, a history teacher; [redacted] a language arts and journalism teacher; [redacted], a human geography teacher; [redacted], a guidance counselor; [redacted], a math teacher; [redacted], a curriculum support specialist; [redacted], a lead teacher; [redacted], an instructional supervisor and expert in special education; and [redacted], an instructional supervisor and expert in school psychology in relation to special education. School Board Exhibits 1 through 12, 14, 15, 18 through 24A, and 27 were admitted into evidence.

The court reporter had indicated at the conclusion of the hearing that she would have the transcript ready in 45 days, which would fall at the end of May 2015. Inexplicably, even though three weeks had transpired between the first week of the hearing and the dates when the hearing was reconvened, and then another four weeks occurred before the final two days of hearing, by the end of May 2015, the transcript was not prepared. After waiting another two months for the transcript, on August 7, 2015, the undersigned entered an Order requiring the parties to file

proposed final orders by September 21, 2015, with or without the benefit of a transcript. The 18-volume Transcript was filed with the Division of Administrative Hearings on August 27, 2015, in both paper and electronic formats. On that same date, the undersigned entered an Order Memorializing Final Order Due Date, which allowed for the parties to submit proposed final orders by September 21, 2015; the Final Order would be filed by October 21, 2015.

Both parties timely submitted proposed final orders; however, a dispute arose as to the page limit of the proposed final orders and the attachments. Accordingly, on September 23, 2015, the undersigned entered an Order requiring the parties to file amended proposed final orders, by September 30, 2015, in compliance with the directions set forth in the Order, and the final order would be filed by October 30, 2015.

Unless otherwise noted, citations to the United States Code, Code of Federal Regulations, Florida Statutes, and Florida Administrative Code are to the current codifications. For stylistic convenience, the undersigned will use [redacted] pronouns in the Final Order to refer to the student. The [redacted] pronouns should not be interpreted to reflect the student's actual gender.

FINDINGS OF FACT

1. The student is [redacted]. [redacted] is, by all accounts, a bright student who tends to get more

depressed than the average student. [redacted] has been diagnosed with [redacted]. [redacted] received [redacted] education through [redacted] schooling from [redacted] grade.

2. In [redacted] grade, [redacted] entered the Miami Dade County public school system, and attended a [redacted] school. Because the student had been diagnosed with [redacted] after a private evaluation, and the School Board had reviewed that diagnosis, the student was made eligible under Section 504 in February 2012. At this point, the student was in [redacted] grade. The School Board concluded that the student's disability substantially limited his concentration, learning, and thinking.

3. The 504 Plan listed the following accommodations for the student: seat student near teacher, seat student out of main traffic area, seat student in an area free from distraction, and allow student extended time to take tests.

4. In March of 2013, when the student was in [redacted] grade, the parent provided the school with a private psychological evaluation that had been conducted by [redacted]. [redacted] ultimately found that the student presented with [redacted].

5. Also in March 2013, the school reconvened the 504 team and addressed the accommodations list, adding several: seat student in an area free from distractions; allow student to

determine the best place to sit; extended time for all assignments and projects; modify or reduce the amount of homework; no penalty for spelling mistakes, poor handwriting, or poor drawing; read test items to student; extended time for tests; provide student with a copy of lab procedure when there is an excused absence; seat student out of main traffic areas; shorten length of assignments based on mastery of concept; allow student more time to complete homework; use a homework assignment notebook to communicate with parents; read test directions to student; repeat direction; and provide student a copy of class notes.

6. In April of 2013, the school conducted a Functional Assessment of Behavior (FAB) to address the student's [redacted]. The FAB revealed that the student had [redacted], and that the student had trouble expressing [redacted] needs to teachers. The upcoming transition to [redacted] school was causing the student the most [redacted]. A Behavior Intervention Plan (BIP) was developed for the student, to help [redacted] manage [redacted].

7. Also in the spring of 2013, the school had its own school psychologist, [redacted], review [redacted] evaluation. [redacted] found that the student had difficulty with all aspects of executive functioning. Although [redacted] found that the student's academic performance was appropriate for [redacted]

grade level, and that [redacted] could remain in the general education setting, [redacted] recommended that [redacted] receive special instruction and the accommodations spelled out in the 504 Plan.

8. Also in [redacted], [redacted], a curriculum support specialist, was asked to come to the school to work with the [redacted]. [redacted] provided all [redacted] with access to two programs designed to assist with reading: [redacted].

9. [redacted] is an application that provides audio versions of textbooks and other books, such as novels. With [redacted], the student could download a textbook and have a human voice read the book. The student could speed up the pace of the reading, or slow it down. The program can also highlight the words as it reads. This application was not mandated by an IEP (the student at this point did not have one) or by a 504 Plan.

10. [redacted] is a different reading program, which gave the student audio versions of informational text and then asked the student reading comprehension questions. The student could reply in writing, practicing [redacted] reading and writing skills. This program, like [redacted], was never mandated by an IEP or a 504 Plan.

11. Both programs are purchased by the School Board, and students are given "licenses" to access them. The student in

this case was given access to both programs and performed well in [redacted] grade classes. During [redacted] grades, the student's grades ranged from [redacted].

12. On May 31, 2013, the student was made eligible for Exceptional Student Education (ESE) in the category of Other [redacted]. An IEP was developed for the student on that same day.

13. The IEP set forth goals in the following areas: organizational skills, task completion skills, and self-help skills. No academic deficiencies were noted or addressed in the IEP because the student was performing at grade level in all areas.

14. A long list of accommodations, which were to be implemented daily in all classes, was created for the student: written notes, outlines, and study guides; extended time to complete assignments, tests, and projects; allow the student to sit away from distractions; flexibility in presentation; provide copy of directions for tasks when available; teachers should clarify, repeat, and summarize directions; flexibility in scheduling/timing and additional time for tasks; small group testing; preferential seating; providing a set of textbooks for home; providing weekly information prior to upcoming assignments; and reducing the amount of copying.

15. The student returned to [redacted] school for [redacted]. [redacted] successfully completed honors level courses through virtual school so that [redacted] could gain admittance to a marine science and technology [redacted] school, which was a [redacted] program housed on a university campus.

16. [redacted] was admitted to the [redacted] school program as a [redacted] grader. The school had opened its doors only one school year prior to [redacted] admission; the [redacted] program in [redacted] first opened in the fall of 2013, with approximately 89 students, [redacted]. It is housed on a [redacted] but it operates as an [redacted]. The goal of the program is to educate the [redacted] as [redacted] schoolers, but then the [redacted].

17. When it opened, it had the bare minimum in terms of staff. There was no on-site principal, or any assistant principals. There was no guidance counselor, no information technology staff, no cafeteria staff, no office staff, no activities coordinator, no treasurer, no attendance clerk, no department chairs, and no ESE specialist. The faculty was led by [redacted], who worked as the lead teacher; she took on most of the responsibilities assigned to the vacant positions.

18. In its [redacted] year, when the student was admitted, the staff had grown to include an on-site principal, a part-time

guidance counselor, and one staff member who worked as the principal's secretary and the treasurer for the school. It had also only admitted another [redacted]; for the [redacted] school year, the school only educated [redacted].

19. Although the student had been found eligible for ESE services in May of 2013, the school did not form a team to address the student's ESE needs at the start of the student's [redacted]-grade school year. The last IEP was dated May 2013 and was current through May 2014. The student began [redacted] grade at the [redacted] school on or around August 18, 2014, without a current IEP in place.

20. On September 4, 2014, [redacted], who had worked with the [redacted] in [redacted] school, visited the school to address their ESE needs in [redacted] school. [redacted] had been asked to speak to the faculty about implementing IEP accommodations, and once again provide the students access to [redacted], the text-to-speech program.[1/] [redacted] spoke to all the teachers and went through the accommodations that were on the [redacted] school IEP, even though [redacted] was of the opinion that it had "expired." [redacted] made suggestions on how to implement the accommodations in each of their classes, and specifically recommended that extended time be given by calculating time and a half (e.g., if a test was allotted one hour, the student would receive one hour and a half). [redacted] believed that because the teachers and

students used a program called [redacted] to communicate about the classes and assignments, many of the accommodations on the IEP were being met with that digital platform. [redacted], though, did not confirm that the outlines and class notes that many of the teachers said they posted on the [redacted] site were in a format that could be accessed with text-to-speech technology.[2/] Although [redacted] had given the teachers some guidance, ultimately it was not [redacted] job to supervise them and ensure that they followed [redacted] recommendations.

21. The first grading period ended on or around October 23, 2014. For the entire first quarter of [redacted] grade, the student was without a current IEP in place. [redacted] attended school as a student deemed eligible for ESE services, but without a current IEP in place to assess [redacted] deficiencies, establish measurable goals, or mandate interventions or accommodations for [redacted].[3/]

22. The record contains multiple communications between school officials which demonstrate the school's knowledge that the IEP for this student was not current, yet the entire first grading quarter transpired without the IEP team convening. Common sense dictates that the School Board should have known that the [redacted] school IEP was inadequate for the student when [redacted] was in [redacted] grade. The student's skill set would likely change, the curriculum is undoubtedly more complex and challenging in [redacted] school, and [redacted] social environment was entirely different.

There is also a significant difference between a general education [redacted] school and a [redacted] school program for [redacted]. Thus, even if the school was faithfully implementing the May 2013 IEP from middle school, that IEP was not reasonably calculated to address the student's needs in his second year of [redacted] school.

23. Assuming for the moment that the school was faithfully attempting to implement the middle school IEP, it failed in its efforts. Many teachers did not implement the accommodations, and many expected the student to request the accommodations before they decided whether to provide them.

24. Almost every teacher confirmed at the hearing that the student did not request particular accommodations in their respective classes; therefore, they were not consistently provided. The undersigned finds this practice troubling, given that the IEP team specifically articulated the student's deficiency in the area of self-help skills. To require this student to request [redacted] IEP accommodations or go without them, seems particularly obtuse, given that [redacted] struggles with self-advocacy. Further, the IEP team was certainly capable of stating that the accommodations should only be provided if requested by the student; in the absence of such a pre-requisite, it was

highly inappropriate to withhold accommodations until the student requested them.

25. In [redacted] chemistry class, the student never received small group testing or class notes, and only sporadically received extended time if [redacted] requested it. [redacted] testified that [redacted] did provide all of these accommodations, but the undersigned does not find [redacted] testimony credible.[4/]

26. In [redacted] advanced placement environmental science class, the student did not consistently receive the accommodation of extended time, and never received small group testing, or class notes. [redacted] testified that he did provide the student with all of [redacted] IEP accommodations when they were requested, but the undersigned does not find [redacted] testimony credible.

27. In [redacted] Honors English class, the student never received small group testing, class notes, and only sporadically received extended time. [redacted] testified that [redacted] did provide all accommodations to the student when [redacted] requested them, and sometimes without the student having to request them. The undersigned does not find [redacted] testimony credible.

28. The student's grades for the first quarter were:

[redacted]

[redacted]. These grades are not what one would expect from a student with high average intelligence.

29. The IEP team did not meet until November 10, 2014. The team found that academically, the student's disability affected [redacted] writing skills, noting that [redacted] had failed Honors English and Research in the first quarter. The team set the following goal for [redacted] academic deficiency: given a writing prompt, the student will utilize a graphic organizer to express [redacted] thoughts and ideas. As to self-help skills, the student was also found to have a deficiency. The team noted that the student required assistance orally advocating for [redacted] when [redacted] needed help or when [redacted] found himself frustrated with an assignment, and set the goal for the student to ask a different adult for help when [redacted] was having trouble advocating for himself. Lastly, [redacted] was found to have a deficiency in organizational skills. The team noted that the student needed assistance organizing [redacted] assignments and projects into chronological steps. They set a goal for the student to remain focused on his classroom tasks without teacher prompting and medication in 4 out of 5 opportunities. All of the student's identified needs were properly addressed in the IEP.

30. A long list of accommodations was placed in the IEP: written notes, outlines, and study guides; extended time to complete assignments, projects, and tests; allow student to sit away from the hallway and windows to minimize distractions; break

long assignments into small, sequential steps; flexible presentation and provide copy of directions for tasks, when available; repeat, clarify, and summarize directions; flexible responding, student allowed to use tape recorder, computer, or word processor for responding; flexible scheduling, providing additional time for tasks; preferential seating with proximity control; small group testing; in the content area of all classes, allow student to orally test rather than write answers; allow student to take screen shots of classroom board or screen; allow student to write directly in workbooks or textbooks if allowable; no penalty for spelling or drawing, other than in language arts or when required; preferential seating with proximity control; provide a set of textbooks for home; provide weekly information prior to upcoming assignments; read classroom and test directions and classwork/test items as needed in class; reduce the amount of copying; shortened assignments based on mastery of key concepts; provide student with lab procedures if student has an excused absence; use verbal prompting to remain on task, as needed; and allow student to utilize assistive technology device for academic work when reading and writing is not being measured, as needed.[5/]

31. According to the IEP, all of the accommodations were to be implemented daily in all classes. There was no requirement that the student request the accommodations from [redacted] teachers before they were implemented.

32. The IEP team also made the following notes regarding the IEP meeting:

33. As can be readily seen, the [redacted] school IEP and the [redacted] school IEP are quite different. The student's deficiencies had changed, the goals were tailored for [redacted] school, and the list of accommodations was made much longer. Notably, "Assistive Technology when reading and writing were not being measured," was added to the IEP.

34. The student testified that during the IEP meeting, [redacted] heard [redacted] make false statements, and it upset [redacted]. Specifically, [redacted] was bothered because they both insisted that the accommodations were being implemented, and [redacted]

knew they were lying. [redacted] was certain that things would not change, that some of the teachers were not willing to help [redacted], and that [redacted] would not receive the accommodations [redacted] needed to access [redacted] education. One week later, [redacted] withdrew from the school.

35. During the week after the IEP was developed, the same teachers who failed to implement the accommodations continued with the practices they had employed since the beginning of the year. For that last week in the school, the student's accommodations were not consistently implemented in the three classes listed above.

36. Many of the teachers testified that the student failed or earned a [redacted] grade because [redacted] refused to turn in work. [redacted], who provided informative expert testimony on assistive technology in special education, explained this pattern of behavior in the following manner:

> One of the challenges of academic failure with some people is it begins a downward spiral. It's once I start failing, it doesn't take too long before I start to internalize that message and say, "I'm no good at this," and then that lowers my motivation and interest to try and come back to the table and try again. And so I'm very concerned about that long-term effort, about what it really means.
>
> So one of the questions that I share with districts is: How much failure do you need before you know I can't do it?

* * *

> So what you see is--the immediate effect in [redacted] drop out; and [redacted] involvement of any sort because of that negative academic pattern.

37. The student's [redacted] explained how the student's behavior changed during this period of [redacted] education:

> As far as [the student], [the student], I would say, took the worst turn. [redacted] at first acted out--well, first, [redacted] left the school, and then [redacted] acted out, and then after that, [redacted] had a period of time where [redacted] kind of crawled into [redacted] shell and wouldn't talk to anybody. And [redacted] just now getting back to [redacted].

38. While there is clear evidence that the November IEP was untimely, and that the IEP, once drafted, was not properly implemented, the totality of the evidence did not establish that the School Board intentionally discriminated against the student based on [redacted] disabilities.

39. Petitioner presented the testimony of two parents of other disabled students who claimed that the [redacted] school was unwilling to accommodate their disabled children; therefore, the students withdrew from the school. A teacher who had been dismissed by the [redacted] school also claimed that the [redacted] school administration was unwilling to accommodate disabled children. The student and parent testified regarding several instances

where derogatory comments were allegedly made by teachers regarding the provision of accommodations.

40. The School Board also brought forth many witnesses who explained the difficulties faced by this upstart [redacted] program—the lack of staff and resources that plagued this [redacted] school. The School Board claims that it essentially did its best to provide an adequate education given its limited resources. The School Board witnesses also categorically denied making any derogatory comments regarding the student's disabilities or the provision of accommodations to the student.

41. On balance, the undersigned believes that because the school was understaffed and ill-prepared for the demands of running a [redacted] school, the IEP was not timely prepared and its implementation was flawed due to the lack of guidance and leadership at the school. These unfortunate circumstances do not serve as an excuse for failing to provide the student with a FAPE, but they also do not rise to the level of intentional discrimination.[6/]

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

43. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. See Schaffer v. Weast, 546 U.S. 49, 62 (2005)("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.").

44. The Individuals with Disabilities Education Act (IDEA) ensures that all children with disabilities receive a FAPE with emphasis on special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

45. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; the right to be involved in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the

provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

46. Local school systems must also satisfy the IDEA's substantive requirements by providing all eligible students with FAPE, which is defined as:

> special education services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

47. "Special education," as that term is used in the IDEA, is defined as:

> [S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings . . . .

20 U.S.C. § 1401(29).

48. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance," establishes measurable annual goals, addresses the services and accommodations to be provided to the child and whether the child will attend mainstream classes, and specifies the measurement

tools and periodic reports that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320.

49. The IDEA further provides that an IEP must include measurable annual goals designed to meet each of the educational needs that result from a student's disability. 20 U.S.C. § 1414(d)(1)(A)(i)(II); Alex R. v. Forresville Valley Cmty. Unit Sch. Dist. #221, 375 F.3d 603, 613 (7th Cir. 2004)(explaining that an IEP must respond to all significant facets of a student's disability, both academic and behavioral).

50. In Rowley, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. First, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Id. at 206-07. A procedural error does not automatically result in a denial of FAPE. G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to a free appropriate public education, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 (2007); M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 (2d Cir. 2012).

51. The second step of the Rowley test examines whether the IEP developed pursuant to the IDEA is reasonably calculated to enable the student to receive educational benefits. 458 U.S. at 206-07 (1982).

52. The due process complaint in the instant case challenges the timeliness of the student's IEP, the facial adequacy of the IEP, and the implementation of the IEP.

53. As to timeliness of the IEP, of particular importance is the provision in the IDEA requiring a school district to have an IEP in effect for each child with a disability at the beginning of each school year. 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).

54. The School Board in this case did not develop an IEP for the student until the second quarter of the student's [redacted] grade year. From the beginning of the school year until then, the student was enrolled in a rigorous magnet program without a current IEP to address [redacted] deficiencies, set measurable goals, or mandate interventions and accommodations.

55. The School Board asserts that it was faithfully adhering to the [redacted] school IEP until November, when the [redacted] school IEP team convened. Even if the undersigned accepted this contention, it is obvious that the [redacted] school IEP was not reasonably calculated to provide the student a FAPE in [redacted] school. In fact, the [redacted] school IEP team formulated an entirely

different IEP: the list of accommodations was different (notably adding assistive technology) and lengthier, and the IEP team set different measurable goals for the student. The [redacted] school IEP necessarily formulated an IEP with the [redacted] school curriculum in mind; that is, the IEP team was cognizant of the fact that [redacted] school demands on a student are different from those in [redacted] school; the content is more challenging, the workload is increased, the amount of guidance and assistance given to students diminishes, and the social setting is quite different. Here, there is also a significant difference between a general education [redacted] school and a [redacted] program for [redacted]. Thus, even if the undersigned accepts that the middle school IEP was being implemented from August 18th through November 10th, the middle school IEP was not reasonably calculated to provide this student with a FAPE. See Anchorage Sch. Dist. v. M.P., 68 F.3d 1047, 1058 (9th Cir. 2012)(holding district's use of an outdated IEP resulted in FAPE denial where a second grade IEP was being implemented at the end of third grade, and as the student was advancing to fourth grade).

56. Based on the totality of the circumstances, the failure to provide the student with a current IEP until the thirteenth week of [redacted] grade year resulted in substantive harm to the student, and resulted in a denial of a FAPE for thirteen weeks of

the student's [redacted] grade. See, e.g., K.E. v. Dist. of Columbia, 19 F. Supp. 3d 140, 149 (D.D.C. 2014)(finding that an eleven-day delay from the start of the school year before developing an IEP for a student was a denial of a FAPE); Maynard v. Dist. of Columbia, 701 F. Supp. 2d 116, 123-24 (D.D.C. 2010)(finding that it was a denial of a FAPE where, as a result of the school's failure to convene any IEP team meeting prior to the first day of school, the student's IEP was not developed by that date); Alfono v. Dist. of Columbia, 422 F. Supp. 2d 1, 5-8 (D.D.C. 2006)(finding that the school's failure to incorporate the findings of various evaluations in the student's IEP prior to the first day of school amounted to a denial of a FAPE until two months later when the student's "goals and objectives or a means for measuring [redacted] progress" were incorporated into [redacted] IEP).

57. Petitioner also argues that the IEP, when it was eventually developed, was not facially adequate, thus advancing a substantive challenge to the IEP.

58. Most circuits describe the second Rowley step as requiring "some benefit" that is "more than de minimis." See, e.g., Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1313 (10th Cir. 2008). This standard has been articulated in slightly different terms: "[T]o comply with the IDEA, an IEP must be reasonably calculated to confer a *meaningful* educational benefit." D.B. v. Esposito, 675 F.3d 26, 34 (1st Cir. 2012);

Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3d Cir. 2012); N.B. v. Hellgate Elem. Sch. Dist., 541 F.3d 1202, 1212-13 (9th Cir. 2008); Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 862 (6th Cir. 2004).

59. The assessment of an IEP's substantive propriety is guided by several principles, the first of which is that it must be analyzed in light of circumstances as they existed at the time of the IEP's formulation; in other words, an IEP is not to be judged in hindsight. See M.B. v. Hamilton Se. Sch., 668 F.3d 851, 863 (7th Cir. 2011)(holding that an IEP can only be evaluated by examining what was objectively reasonable at the time of its creation).

60. Second, an assessment of an IEP must be limited to the terms of the document itself. See Knable v. Bexley Cnty. Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001)(stating that IEPs must be evaluated as written); Cnty. Sch. Bd. v. Z.P., 399 F.3d 298, 306 n.5 (4th Cir. 2005)("The School District complains that the hearing officer ignored the fact that an aide was hired for Z.P. after the IEP was written. We believe that the hearing officer properly focused on what was actually contained in the written IEP when determining the appropriateness of that IEP.").

61. Third, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP.

See Sch. Dist. of Wisc. Dells v. Z.S. ex rel. Littlegeorge, 295 F.3d 671, 676-677 (7th Cir. 2002).

62. Guided by these principles, the undersigned concludes that the IEP developed for the student—as written—was reasonably calculated to confer a meaningful educational benefit to the student. The IEP, once it was developed, addressed the student's needs, gave measurable goals, and mandated appropriate interventions and accommodations.

63. Petitioner also challenges the implementation of the IEP. The determination that a school board has failed to implement an IEP, and therefore denied the student a FAPE, requires proof of a material failure to implement the child's IEP—that is, something more than a "minor discrepancy" between the services a school district provides and the services required by the IEP. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007). This materiality standard "does *not* require that the child suffer demonstrable educational harm in order to prevail." Id. at 822 (emphasis added). Thus, a material failure to implement an IEP could constitute a FAPE denial even if, despite the failure, the child received non-trivial educational benefits.

64. Here, the IEP accommodations were not properly implemented in that they were conditioned upon the student requesting them. This practice is inappropriate not only because

it was a condition imposed by the faculty but never articulated in the IEP; it is also wholly inappropriate given that the IEP identified self-advocacy as an area in which the student had a deficiency. More troubling is the fact that even if the student requested the accommodations, they were not consistently provided. From the first day of school to [redacted] last day in November, [redacted] did not consistently receive accommodations (specifically class notes, extended time, and small group testing, all found in the middle school IEP) in three classes.

65. The fact that the student passed the first quarter of [redacted] grade is not dispositive of the implementation issue. In fact, since the school was not providing many of the accommodations, the student was tutored by another [redacted] school student who was performing well in school. See Houston Indep. Sch. Dist. v. V.P., 582 F.3d 576, 587-90 (5th Cir. 2009)(finding that although the student received passing grades, the school district materially failed to implement the IEP, and therefore denied the student a FAPE).

66. Accordingly, the School Board materially failed to implement the IEP (the [redacted] school IEP or [redacted] school IEP which was in effect for only one week) for thirteen weeks of [redacted] grade, thereby denying the student a FAPE.

67. The denial of a FAPE in this case, which was due to an untimely IEP, and the material failure to implement the IEP once

it was in effect, resulted in substantive harm; therefore, Petitioner is entitled to an award of compensatory education.[7/] The goal of such an award is to place the student in the same position that [redacted] would have occupied but for the denial of a FAPE. An award of compensatory education must be reasonably calculated to provide the educational benefits that would have accrued from special education services the School Board should have provided to begin with. Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005); Jana K. v. Annville Cleona Sch. Dist., 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014).

68. The School Board argues that Petitioner failed to present any evidence as to the amount of compensatory education that should be awarded; therefore, the undersigned should not award any compensatory education. The undersigned is guided by the court's reasoning in Pennsbury School District, 65 IDELR 220 (Pa. S.E.A. Mar. 2, 2015), wherein the court explains that in the absence of evidence to prove the type or amount of compensatory education, the hour-for-hour approach is the default approach,[8/] unless the record establishes such a widespread decline that full days of compensatory education are warranted, as is the case here. See also Jana K. v. Annville Cleona Sch. Dist., 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014)(explaining that an award of full days of compensatory education is warranted where the school board's "failure to provide specialized services permeated the

student's education and resulted in progressive and widespread decline in [the student's] academic and emotional well-being."); Tyler W. v. Upper Perkiomen Sch. Dist., 963 F. Supp. 2d 427, 439 (E.D. Pa. 2013)(awarding full days of compensatory education for 15 school weeks, the span of time that the school district failed to implement the child's IEP).

69. Here, the School Board's failure to develop the IEP until the thirteenth week of [redacted] grade deprived the student of a FAPE for 11 of those weeks.[9/] The material failure to then implement the IEP permeated the student's entire education for the one week [redacted] attended school after the IEP was developed.

70. Accordingly, Petitioner is entitled to full days of compensatory education for 12 weeks of his fall semester of [redacted] grade year.

71. As the prevailing party in this due process hearing, Petitioner is entitled to attorney's fees and costs pursuant to Florida Administrative Code Rule 6A-6.03311(9)(x).

Section 504

72. Section 504, which is found at 29 U.S.C. § 794(a), provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of [redacted] disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program

or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

73. While the IDEA imposes an affirmative obligation on states to assure disabled children a FAPE, Section 504 broadly prohibits discrimination against disabled persons in federally assisted programs or activities. D.A. v. Houston Indep. Sch. Dist., 629 F.3d 450, 453-54 (5th Cir. 2010).

74. Because denial of a FAPE is an actionable claim under the IDEA, there is obvious overlap between Section 504 and the IDEA. Brennan v. Reg'l Sch. Dist. No. Bd. of Educ., 531 F. Supp. 2d 245, 279 (D. Conn. 2008). Nonetheless, there is at least one important difference between claims under the IDEA and Section 504: Section 504 only remedies acts of intentional discrimination against the disabled. Id.

75. As applied in this case, Petitioner must present evidence that the School Board was deliberately indifferent to a strong likelihood that the student's federal rights would be violated. Id.

76. When a petitioner's claims under Section 504 are factually and legally indistinct from the IDEA claims, as is the case here, general principles of issue preclusion will bar redundant claims. Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 297 (5th Cir. 2005). "[T]o establish a claim for disability discrimination, in the educational context, something more than a

mere failure to provide the free appropriate education required by IDEA must be shown." D.A., 629 F.3d at 454 (internal citations omitted). Thus, facts demonstrating professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under Section 504 against a school district when the claim is based on a disagreement over compliance with the IDEA. Id. at 455.

77. Here, Petitioner is claiming that by not implementing the IEP, and by not providing the student with a working tablet and particular assistive technology tools (speech-to-text technology and text-to-speech technology), the School Board violated Section 504. Citing treatment of the student by administrators and the faculty, Petitioner alleges that the School Board acted with deliberate indifference to a strong likelihood that the student's federal rights would be violated.

78. There is no credible evidence of professional bad faith or gross misjudgment on the part of the school staff and faculty; instead, the evidence establishes that the school was ill-prepared to handle student needs because it was understaffed. One lead teacher was essentially the acting on-site ESE specialist, part-time guidance counselor, and various assistant principals. Under these conditions, it was inevitable that tasks would not be completed and duties would be mishandled or simply not performed. This was an unfortunate setting for the student

to find [redacted] in; the end result was a failure to provide [redacted] with a FAPE. These circumstances, though, fall short of demonstrating intentional discrimination based on the student's disability.

ORDER

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

1. The IEP was untimely; this procedural violation caused substantive harm by denying the student a free, appropriate public education.

2. The School Board materially failed to implement the IEP.

3. Petitioner is entitled to an award of full days of compensatory education for 12 weeks of [redacted] first semester of [redacted] grade.

4. Petitioner is entitled to attorney's fees and costs. Petitioner shall have 45 days from the date of this Final Order within which to file a motion for attorney's fees and costs (under this case number), to which motion (if filed) Petitioner shall attach appropriate affidavits (e.g., attesting to the reasonableness of the fees) and essential documentation in support of the claim, such as time sheets, bills, and receipts.

5. Petitioner's other requests for relief are denied.

DONE AND ORDERED this 29th day of October, 2015, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of October, 2015.

ENDNOTES

[1/] There is conflicting testimony as to whether the student had access to [redacted] in [redacted] grade, which would have given [redacted] access to textbooks and novels in digital format. The undersigned credits [redacted] testimony in this regard, and rejects all testimony to the contrary.

[2/] [redacted] explained that in order to access any document for text-to-speech technology, the document only has to be in Microsoft Word format. Most of the teachers admitted that they never checked to see if their [redacted] outlines and notes were available to be converted for text-to-speech assistance, and some were not certain that all of the notes from all of their classes were uploaded.

[3/] The School Board argues that during the month of September there were attempts to schedule an IEP meeting, but Petitioner's attorney was unavailable and being unreasonable in [redacted] demands as to the participants at the meeting. The portions of the exhibits that are cited for this argument do not support the School Board's contentions. While it is true that there was correspondence regarding [redacted] IEP meeting, there was no communication regarding this student's IEP meeting until October.

[4/] The teachers were all instructed, around the [redacted] of the fall semester, to begin filling out slips of paper where they checked off which accommodations were provided to the student for each assignment, test, or project. A slip was supposed to be attached by every teacher to every graded assignment or assessment. However, since at least one teacher admitted that the slips were not always accurate, and because the act of checking off boxes does not establish that the accommodations were actually given, the undersigned is not persuaded that the slips are accurate.

The teachers also annotated their electronic grade books throughout the school year. Many of the notations by the teachers reflect that accommodations were provided. Because these grade books can be accessed and edited by the user at any time, the undersigned does not find these notations persuasive on the issue of whether the accommodations were actually provided to the student. To the extent that they contradict the student's and mother's testimony, the documentary evidence is not found credible.

[5/] The undersigned construes the IEP accommodation which states "utilize AT device for academic work when reading and writing is not being measured, as needed" to mean text-to-speech and speech-to-text technology because, based on the totality of the evidence, it is the only logical meaning of the words. [redacted] testimony and the teachers' testimony support this meaning, as they also understood it to mean the ability to use text-to-speech and speech-to-text technology for their respective content areas. This meaning is also consistent with the fact that the School Board provided text-to-speech technology to the student via Learning Ally in eighth and tenth grade, despite the fact that in middle school, there was never a 504 Plan or IEP that mandated that type of assistance.

[6/] Findings of Fact 38 through 41 and Conclusions of Law 72 through 78 are to be considered recommended only; the undersigned has final order authority as to the due process complaint, but only recommended order authority as to the Section 504 allegations.

[7/] 20 U.S.C. § 1415(i)(2)(C)(iii); See, e.g., Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009)(stating that when a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors in determining whether reimbursement for some or all of the cost of the private school

is warranted); M. M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1101 (11th Cir. 2006)(stating that the ALJ and the district court did have jurisdiction to award the parents reimbursement for tuition and related services for a child who had never enrolled in the Dade County public school system, but had been denied FAPE).

[8/] See, e.g., M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

[9/] Guided by the cases cited in Conclusion of Law 61, where one court found that an 11-day delay (from the start of the school year) in developing the student's IEP was sufficient to find a denial of a FAPE, the undersigned finds that this school administration should have developed the IEP within the first two weeks of the school year.

COPIES FURNISHED:

Liz Conn, Dispute Resolution Program Director
Bureau of Exceptional Education
and Student Services
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400
(eServed)

Allison Louise Hertog, Esquire
Making School Work, P.L.
1550 Madruga Avenue, Suite 333
Coral Gables, Florida 33146
(eServed)

Mary C. Lawson, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132
(eServed)

Stephanie Langer, Esquire
Langer Law, P.A.
216 Catalonia Avenue, Suite 108
Coral Gables, Florida 33134
(eServed)

Kristina Tilson, Esquire
Langer Law, P.A.
216 Catalonia Avenue, Suite 108
Coral Gables, Florida 33134
(eServed)

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Alberto M. Carvalho, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 912
Miami, Florida 33132-1308
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

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

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).