STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs. Case No. 17-4277E

OKEECHOBEE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this matter before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), on February 27 through March 1, 2018, in Okeechobee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether, as alleged in Petitioner's request for due process hearing (Complaint), Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq.; and whether Respondent violated Section 504 of the Rehabilitation Act of 1973 (Section 504); and, if so, to what remedy is Petitioner entitled.

PRELIMINARY STATEMENT

On July 20, 2017, Respondent received Petitioner's Complaint. On July 27, 2017, the Complaint was forwarded to DOAH and assigned to the undersigned for all further proceedings. At the parties' request, on August 21, 2017, the undersigned issued an Order Extending Due Process Hearing Timeline to allow the parties to participate in mediation.

When mediation proved [redacted], the undersigned requested the parties provide several mutually agreeable dates in November 2017 to conduct the final hearing. Ultimately, the final hearing was scheduled for January 10 through 12, 2018. Thereafter, the final hearing was continued on Respondent's motion and rescheduled for February 27 through March 1, 2018. The hearing proceeded as scheduled.

The final hearing Transcript was filed on March 22, 2018. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

Based upon the parties' stipulation at the conclusion of the hearing, the parties' proposed final orders were to be submitted on or before April 5, 2018, and the undersigned's final order would issue on or before April 19, 2018. After granting three extensions of time to submit proposed final orders, the same were timely submitted on April 17, 2018. Based upon the extensions, the undersigned's final order was to be issued on or before May 2, 2018. The proposed final orders have been considered in issuing this Final Order.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use [redacted] pronouns in the Final Order when referring to Petitioner. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

Background Facts:

1. Petitioner was [redacted] at the time of the final hearing. [redacted] had been previously determined, in the Okeechobee County, Florida, public school system, to be eligible for exceptional student education (ESE) services under the eligibility categories of [redacted], [redacted], and requiring [redacted] during [redacted] ([redacted]) school year. [redacted] was subsequently determined to be

eligible for ESE services under the eligibility category of [redacted] ([redacted]) on June 2, 2014, following [redacted].

2015-2016 School Year ([redacted]):

2. On June 1, 2015, Petitioner's Individual Education Plan (IEP) was amended. At that time, Petitioner's educational placement was in a general education class at School A, a public [redacted] school in Okeechobee County, Florida. The IEP noted that Petitioner's behavior [redacted] or the [redacted] of others. The IEP documented the following [redacted] concerns:

> [Petitioner's] actions are [redacted] for [redacted] and [redacted] classmates. [redacted] has [redacted], [redacted] can be [redacted] and [redacted] [redacted] can [redacted], [redacted], and needs [redacted]. Due to these [redacted], [redacted] is in need of [redacted] to help with [redacted]. [redacted] also try [redacted] to [redacted]. [redacted] will include [redacted] due to [redacted], [redacted], [redacted] given by a [redacted], [redacted], [redacted], and [redacted].

3. An appropriate [redacted] ([redacted]) and [redacted] ([redacted]) had previously been drafted to address [redacted]. Petitioner's IEP team agreed to continue with [redacted] previously drafted ([redacted]), and it was noted

that faculty and staff would collaborate and follow the [redacted] to better understand Petitioner and [redacted] needs to help [redacted] attain [redacted] goals. Additionally, an ESE teacher was available to provide additional support and the Non-violent Crisis Intervention Team was to be available for support, as needed.

4. Petitioner started the 2015-2016 school year, at School A, in the [redacted] receiving support [redacted]. In addition to the classroom teacher, [redacted], an ESE paraprofessional, [redacted], was assigned to the class.

5. From August 17 through August 26, 2015, Petitioner [redacted]: [redacted]; [redacted]--[redacted], [redacted], [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; and [redacted].

6. On August 27, 2015, an IEP meeting was conducted to review Petitioner's [redacted] and to [redacted]/[redacted]/[redacted] an [redacted] and/or a [redacted]. At various times throughout the meeting, Petitioner [redacted] in [redacted] that resulted in the need to [redacted]. These [redacted] included [redacted] on the team; [redacted]; [redacted]; and [redacted] Principal, [redacted], in an attempt to [redacted]. The meeting was continued to August 31, 2015.

7. At the August 31, 2015, IEP meeting, the IEP team, including Petitioner's mother, agreed that, due to [redacted], Petitioner's placement should be amended to a more [redacted]. Specifically, the entire IEP team agreed that [redacted] educational placement should be changed to a [redacted] room ([redacted]) wherein [redacted] would be with nondisabled peers for [redacted]. At the mother's request, the IEP provided that a paraprofessional would be added to Petitioner's classroom to [redacted] of [redacted].

8. Despite the change in placement, Petitioner continued to [redacted] in the [redacted]. On September 10, 2015, Petitioner [redacted]; [redacted]; [redacted], [redacted], and [redacted]; was [redacted] saying "[redacted]," and "[redacted]"; [redacted]; and ultimately [redacted], which resulted in [redacted].

9. Petitioner's [redacted] occurred in the [redacted] and while [redacted].

10. On September 28, 2015, a manifestation determination was held due to the [redacted] and Petitioner's

continued [redacted]. The team determined that the [redacted]. The team, however, [redacted] and substantial relationship to Petitioner's disability. Specifically, the documentation noted that, "[redacted] are [redacted] of [redacted] also [redacted] are where they were at the time of placement." Ultimately, the team, including Petitioner's mother, [redacted]. Specifically, Petitioner's [redacted] placement was School B.

11. School B is a more [redacted] than School A and [redacted] and [redacted]. School B includes students in [redacted] through 12, and includes ESE and nondisabled students. Petitioner was placed in the [redacted] classroom, which is for [redacted] for [redacted]. Petitioner's classroom was ultimately [redacted], all of whom were ESE students.

12. Despite the [redacted], [redacted], [redacted], [redacted] (via [redacted] and the use of the [redacted]), Petitioner's [redacted]. Indeed, Petitioner continued to [redacted] in

[redacted], [redacted]. Although it is undisputed that [redacted], Petitioner's classroom teacher, [redacted] duties in [redacted] (and [redacted]), Petitioner continued to [redacted] with [redacted]. Due to [redacted], [redacted] [redacted].

13. On October 19, 2015, Petitioner's IEP was amended to [redacted] Petitioner's new school placement. Thereafter, [redacted] continued as noted above. [redacted] continued to use the "[redacted]" [redacted], and other [redacted], in the presence of [redacted] fellow classmates, some as [redacted]. As an example, on December 14, 2015, [redacted] "[redacted]" and a "[redacted]"; and told [redacted] classmates to "[redacted]."

14. As [redacted], Petitioner's [redacted] continued as [redacted], with [redacted] towards students and faculty, alike. [redacted] "[redacted]," [redacted], and [redacted]. It was reported that [redacted] called [redacted] fellow ESE classmates such things as "[redacted]," "[redacted]," "[redacted]," and [redacted].

15. On March 8, 2016, Petitioner was [redacted], pursuant to section 394.451 et. seq., after [redacted] eloped from school, [redacted], and [redacted] and [redacted]. Shortly thereafter, on March 11, 2016, School B began the process of revising Petitioner's [redacted]. The process did not conclude until September 2016.

16. On May 24, 2016, an annual review of Petitioner's IEP was conducted. The IEP noted that Petitioner had a [redacted] for [redacted], [redacted], [redacted], and [redacted]. It was noted that a [redacted] was a [redacted]. Consistent with [redacted] last IEP, Petitioner's placement remained in a [redacted] with [redacted] with nondisabled peers.

17. Notwithstanding the above [redacted], [redacted] believed that Petitioner's [redacted] had [redacted] in April through May 2016 compared to earlier in the school year. Petitioner's mother also believed Petitioner was [redacted] in the [redacted]. Around this time, [redacted] was assigned to Petitioner's classroom as [redacted] paraprofessional. It is undisputed that [redacted] and [redacted] were [redacted] with [redacted]. At the end of the year, Petitioner [redacted] IEP goals.

2016-2017 School Year ( ):

18. For year at School B, Petitioner's teacher was , and was . The inception of the year was relatively benign with Petitioner's . Unfortunately, however, Petitioner's .

19. In September 2016, it was documented that Petitioner ; ; ; ; ; ; , ; and . During this same time period, continued to the classroom , , , etc. also continued to use . On October 10, 2016, it was documented that Petitioner picked and on various cabinets.

20. In an attempt to towards other students, to prevent Petitioner from . During October 2016, the record documents that Petitioner , , and and /

21. Petitioner's [redacted] continued to [redacted]. On October 26, 2016, School B contacted the School [redacted] ([redacted]) in reference to an allegation by Petitioner's father that [redacted]. Said allegations were [redacted]. Although there was some evidence establishing that the allegation was subsequently investigated, the evidence [redacted] any agency establishing the [redacted].

22. Petitioner's last day of attending School B was [redacted]. Petitioner was [redacted] beginning on October 28, 2016; however, Petitioner's parents [redacted]. This request was not [redacted].

23. Shortly thereafter, on November 1, 2017, [redacted] contacted the [redacted] in [redacted] against Petitioner. The [redacted], after conducting [redacted] investigation, and [redacted], [redacted] [redacted] to the State Attorney's Office for review and approval. [redacted]. Upon [redacted], the warrant was forwarded to the Sheriff's Office for service.

24. As of November 17, 2016, Petitioner had [redacted] returned to school, [redacted]

[redacted]. Petitioner's parent(s) continued to advise that Petitioner would [redacted] reassigned. Petitioner's parent further advised that [redacted] wanted to [redacted] manifestation determination until [redacted] attorney could participate.

25. Ultimately, a manifestation determination/IEP meeting regarding Petitioner's [redacted] was conducted on December 6, 2016. At the meeting, which was properly convened with all necessary members, including Petitioner and Petitioner's attorney, it was [redacted], [redacted], Petitioner had [redacted], [redacted], and [redacted].

26. After reviewing all relevant information in Petitioner's file, including information supplied by Petitioner's mother and attorney, teacher observations, and the current IEP, it was determined by the team that the conduct in question was not the direct result of School B's failure to implement the IEP. The team did determine, however, that the conduct in question was caused by, or had a direct and substantial relationship to Petitioner's disability.

27. During the meeting [redacted], Respondent's Director of ESE, recommended evaluating Petitioner's current [redacted] eligibility, as well as evaluating Petitioner for other potential eligibility categories, such as [redacted] [redacted],

[redacted], and [redacted]. It was determined that Petitioner would be reevaluated and a [redacted] evaluation would be conducted by Respondent. It was further agreed that a [redacted] would be conducted [redacted], [redacted] ([redacted]). Additionally, the team recommended, and Petitioner's mother agreed to, the following additional testing: [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted] which may [redacted]. It was noted that Petitioner's mother would be contacted to set up an appointment to review evaluation results and other reports on Petitioner.

28. The team further discussed Petitioner's educational placement. Initially, the team discussed Petitioner's gradual [redacted] to School B. [redacted] subsequently recommended [redacted] until the evaluations were completed. Petitioner's mother asked if Petitioner could [redacted] while the [redacted] was being conducted.

29. The team determined, and Petitioner and Petitioner's [redacted], [redacted], with [redacted] of [redacted]. After discussing various [redacted] for providing instruction to Petitioner [redacted], it was decided that Petitioner would receive [redacted] instruction, in person, from the [redacted], [redacted]. Due

to the [redacted], it is difficult to discern the [redacted]. For all that appears, the curriculum appears [redacted] teacher in conjunction with some form of computer-based instruction.

30. It is undisputed that Respondent did not amend Petitioner's operative IEP (May 24, 2016 IEP) following the December 6, 2016, meeting. Pursuant to [redacted] operative IEP, Petitioner was to receive [redacted], [redacted], [redacted], [redacted], and [redacted]. Pursuant to [redacted] operative IEP, [redacted] was to be in school [redacted], [redacted]. It is undisputed that Petitioner did not receive the services as set forth in [redacted] IEP from December 7, 2016, through the balance of the school year.

31. It was the intention of all parties that the [redacted], with the team reconvening at the end of January or beginning of February 2017, to consider the results of the agreed-upon evaluations.

32. Unfortunately, none of the [redacted] were [redacted] by Respondent in January or February 2017. It appears from the record evidence that a [redacted] March 30, 2017. The evidence establishes the following:

1) Petitioner's mother, if she received the report, never shared the same with Respondent prior to the final hearing; 2) Respondent did not contact [redacted] with respect to whether the evaluation(s) had been completed, and, if so, did not request a copy; and 3) [redacted], if the evaluations were completed, did not contact Respondent to provide a copy of any reports authored.[2/]

33. Against this backdrop, Petitioner began receiving [redacted] on January 10, 2017. Due to Respondent's requirement that [redacted] is provided, [redacted] primarily provided [redacted] instruction [redacted]. Not surprisingly, the results were [redacted]. As conceded by [redacted], Petitioner was [redacted] and [redacted].

34. On April 12, 2017, Petitioner presented to School B to take the [redacted] ([redacted]) test. Once at School B, Petitioner would [redacted] due to [redacted]. After the [redacted] [redacted] attempt, while at School B, Petitioner was [redacted] on the [redacted].

35. On April 17, 2017, Petitioner's mother advised Respondent that Petitioner did "[redacted]

[redacted] [redacted],” and requested that Respondent “[redacted] [redacted] in [redacted] [redacted] [redacted].”

36. On April 24, 2017, Respondent advised Petitioner’s mother that [redacted]. The correspondence further advised that Respondent has a continuing duty to provide educational options and that Petitioner’s mother has a continuing duty to comply with [redacted]. Respondent provided Petitioner’s mother with four options: 1) [redacted]; 2) [redacted], [redacted]; 3) [redacted]; and 4) convening an IEP [redacted].

37. [redacted], on April 27, 2017, Petitioner’s [redacted] requesting the IEP meeting option. Respondent promptly responded the [redacted] to Petitioner’s mother seeking [redacted] availability for the IEP meeting. On April 29, 2017, Petitioner’s [redacted] to the [redacted], but rather, requested Respondent to copy [redacted], and advised that they would “[redacted]” with Respondent [redacted].

38. On May 5, 2017, Respondent followed up with Petitioner's [redacted] dates for the IEP meeting. On May 9 and 11, 2017, Respondent continued to request dates for the IEP meeting. On May 22, 2017, Petitioner's mother advised that she and counsel would be available on May 25, 2017. The last day of school was May 26, 2017. Respondent was unavailable to conduct the meeting on May 25, 2017. Respondent testified that the IEP team was not available during the summer.

39. At the time of the filing of the instant Complaint, the IEP team had not met. Petitioner was [redacted].

40. Throughout Petitioner's education at School A and B, [redacted] was the recipient of [redacted] and subjected to [redacted]. The evidence [redacted] to establish that the disciplinary referrals and subsequent sanctions were [redacted]. The evidence further fails to establish that the use of restraints or the location of certain [redacted].

CONCLUSIONS OF LAW

41. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 1003.57(1)(b) and 1003.5715(5), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

42. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

43. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th. Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). 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).

44. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. See 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; receive written notice prior to any proposed change 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).

45. Local school systems must 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).

46. "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).

47. 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. "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

48. "The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 13 S. Ct. 988, 994 (2017) (quoting Honig v. Doe, 108 S. Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." Id. (quoting Rowley, 102 S. Ct. at 3034).

49. The IDEA further provides that, in developing each child's IEP, the IEP team must, "[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."

20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (emphasis added).

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. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Rowley, 458 U.S. at 206-207. A procedural error does not automatically result in a denial of FAPE. See 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 FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 (2007).

51. Here, Petitioner [redacted]. First, Petitioner [redacted] for IEP meetings, and, therefore, at the time the [redacted], [redacted] have a valid IEP. The undersigned concludes that Respondent's [redacted] to conduct an IEP meeting from December 7, 2016, through April 24, 2017, was a [redacted] that [redacted] Petitioner's right to a FAPE and caused a [redacted] of educational benefits. The [redacted] to conduct an IEP meeting from April 25, 2017, through the end of the 2016-2017 school

year was due to Petitioner's [redacted] to Respondent's [redacted] to schedule an IEP meeting, and, therefore, does [redacted]. Respondent's [redacted] to conduct an IEP meeting during the summer is also a [redacted]. Neither the IDEA nor Florida law contains a [redacted].

52. Petitioner's Complaint further alleges a procedural violation in Respondent's [redacted]. [redacted] evidence of this broad claim. Finally, Petitioner's [redacted] Respondent [redacted]. The evidence, however, establishes that manifestation determinations were properly convened and conducted. Accordingly, said [redacted].

53. Petitioner further contends, globally, that Petitioner's [redacted] were [redacted]. The IDEA requires that each public agency must ensure that a parent of a child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. 34 C.F.R. § 300.501(c). Predetermination occurs when district members of the IEP team [redacted]. Here, Petitioner [redacted]

[redacted]. To the contrary, the evidence establishes that Respondent provided Petitioner's parents, and counsel, with a [redacted]. Furthermore, the evidence establishes that Petitioner's mother concurred with each of the placement decisions.

54. Pursuant to the second step of the Rowley test, it must be determined if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive "educational benefits." Rowley, 458 U.S. at 206-07. Recently, in Endrew F., the Supreme Court addressed the [redacted]" of determining a standard for determining "[redacted] benefits to satisfy the requirements of the Act." Endrew F., 13 S. Ct. at 993. In doing so, the Court held that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 999. As discussed in Endrew F., "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." Id.

55. The determination of whether an IEP is sufficient to meet this standard differs according to the individual circumstances of each student. For a student who is "fully integrated in the regular classroom," an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Id. (quoting Rowley, 102 S. Ct. 3034). For a student not fully integrated in the regular classroom, an IEP must aim for progress that is "appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." Id. at 1000.

56. The assessment of an IEP's substantive propriety is further 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. 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); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990)("An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable

when the snapshot was taken, that is, at the time the IEP was promulgated.").

57. Second, an assessment of an IEP must be limited to the terms of the document itself. Knable v. Bexley Cty. Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001); Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1315-16 (8th Cir. 2008)(holding that an IEP must be evaluated as written).

58. Third, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See Endrew F., 13 S. Ct. at 1001 ("This absence of a bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review" and explaining that "deference is based on the application of expertise and the exercise of judgment by school authorities."); A.K. v. Gwinnett Cnty. v. Sch. Dist., 556 Fed. Appx. 790, 792 (11th Cir. 2014)("In determining whether the IEP is substantively adequate, we 'pay great deference to the educators who develop the IEP.'")(quoting Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991)). As noted in Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1048 (5th Cir. 1989), "[the undersigned's] task is not to second guess state and local policy decisions; rather, it is the narrow one of

determining whether state and local officials have complied with the Act."

59. To the extent Petitioner's Complaint may be construed as alleging that Petitioner's IEPs from [redacted], said claims are not supported by the evidence. Similarly, to the extent Petitioner's Complaint may be construed as [redacted], such claims are not supported by the evidence.

60. Petitioner [redacted]. In determining whether the failure to comply with the terms of the IEP constitutes a denial of FAPE, two primary standards have been articulated. In Houston Independent School District v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000), the following standard was set forth:

> [A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failure and for providing the disabled child a meaningful educational benefit.

61. Utilizing the foregoing standard, which requires proof of "substantial or significant" implementation failures, the court in Bobby R. held that the school district's failure to provide speech services for four months——among other implementation deficiencies——did not constitute a denial of FAPE. 200 F.3d at 348-49.

62. A competing standard was set forth in Van Duyn v. Baker School District 5J, 502 F.3d 811, 822 (9th Cir. 2007). In Van Duyn, the Ninth Circuit articulated a standard that, similar to Bobby R., 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. However, in contrast to Bobby R., the court in Van Duyn held that its materiality standard "does not require that the child suffer demonstrable educational harm in order to prevail." Id. at 822 (emphasis added). Thus, under the Van Duyn standard, a material failure to implement an IEP could constitute a FAPE denial even if, despite the failure, the child received non-trivial educational benefits.

63. The undersigned concludes that, from December 7, 2016 through April 24, 2017, Respondent materially failed to implement Petitioner's May 24, 2016, IEP. While it is recognized that all parties agreed that the [redacted]

[redacted] were intended to be temporary, Respondent's failure to deliver educational services consistent with [redacted] IEP cannot be excused.

64. Petitioner's Complaint further alleges that the educational placement decisions run afoul of the IDEA. In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on students' placements or education environment in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A) provides as follows: Least restrictive environment.

> (A) In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

65. Pursuant to the IDEA's implementing regulations, states must have in effect policies and procedures to ensure that public agencies in the state meet the least restrictive environment (LRE) requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related

services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the above-referenced mandates concerning LRE and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

66. In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1). Additionally, the child's placement must be determined at least annually, based on the child's IEP, and as close as possible to the child's home. 34 C.F.R. § 300.116(b).

67. With the LRE directive, "Congress created a statutory preference for educating handicapped children with nonhandicapped children." Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act, School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs." Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

68. In Daniel, the Fifth Circuit set forth a two-part test for determining compliance with the mainstreaming requirement:

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. See § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Daniel, 874 F.2d at 1048.

69. In Greer, infra, the Eleventh Circuit adopted the Daniel two-part inquiry. In determining the first step, whether a school district can satisfactorily educate a student in the regular classroom, several factors are to be considered: 1) a comparison of the educational benefits the student would receive in a regular classroom, supplemented by aids and services, with the benefits [redacted] will receive in a self-contained special education environment; 2) what effect the presence of the student in a regular classroom would have on the education of other students in that classroom; and 3) the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the student in a regular classroom. Greer, 950 F.2d at 697.

70. Here, Petitioner does not appear to argue that [redacted] can be educated in a regular classroom setting, with the use of

supplemental aids and services. To the extent Petitioner's complaint can be so construed, Petitioner failed to present sufficient evidence to support such a claim.

71. Accordingly, the instant proceeding turns on the second part of the test: whether Petitioner has been mainstreamed to the maximum extent appropriate. In determining this issue, the Daniel court provided the following general guidance:

> The [IDEA] and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation under the [IDEA].

Daniel, 874 F.2d at 1050 (internal citations omitted).

72. The evidence establishes that, at all times relevant to this proceeding prior to December 6, 2016, Respondent attempted to mainstream Petitioner to the maximum extent

appropriate given Petitioner's behaviors, which at times posed a danger to [redacted] and others.

73. At the December 6, 2016, manifestation determination meeting, the relevant members of the IEP team, Petitioner's mother, and Petitioner's counsel determined that the conduct in question was a manifestation of Petitioner's disability. If, as here, the conduct is deemed a manifestation of the child's disability, the student must be returned to the educational placement from which [redacted] was removed, "unless the parent and the school district agree to a change in placement as part of the modification of the behavior intervention plan." Fla. Admin. Code R. 6A-6.03312(3) (c). Here, the undersigned concludes that Petitioner's parent and Respondent agreed to the [redacted] in lieu of returning Petitioner to School B. The undersigned further concludes that this joint decision was made in an effort to confront Petitioner's escalating behavioral concerns.[3/] Accordingly, the December 6, 2016, temporary change in placement was substantively appropriate.

74. While the aforementioned temporary change in placement was substantively appropriate, as discussed above, Respondent's failure (from December 7, 2016 through April 24, 2017) to conduct an IEP meeting, and its failure to amend the IEP to reflect the placement determination was a procedural inadequacy

that impeded Petitioner's right to a FAPE and caused a deprivation of educational benefits.

75. Petitioner contends that the discipline administered to Petitioner was inappropriate and overused. In essence, Petitioner argues that Petitioner should not be disciplined for behaviors that are known, identified, and being addressed through a behavior plan. While Respondent is not precluded from disciplining an ESE student for known targeted behaviors, there are different limitations and requirements that apply to disciplinary actions taken against students with disabilities than apply to actions taken against nondisabled students. See 34 C.F.R. § 300.530; Fla. Admin. Code R. 6A-6.03312. Petitioner failed to present sufficient evidence to establish Respondent violated the procedural safeguards set forth for discipline of students with disabilities.

76. Petitioner's Complaint alleges that the utilization of restraint was not a proper intervention and the utilization of a quiet room during Petitioner's [redacted] was an [redacted] approach utilized by Respondent in fulfilling its mandate to consider the use of positive behavior interventions and supports. State law and regulations generally determine the legality of using aversives, such as restraint and seclusion. In Florida, the use of restraint and seclusion on students with disabilities is addressed in section 1003.573,

Florida Statutes. This section provides, in pertinent part as follows:

> (4) PROHIBITED RESTRAINT.--School personnel may not use a mechanical restraint or a manual or physical restraint that restricts a student's breathing.
>
> (5) SECLUSION.--School personnel may not close, lock, or physically block a student in a room that is unlit and does not meet the rules of the State Fire Marshal for seclusion time-out rooms.

77. Section 1003.573 does not define the term restraint. The U.S. Department of Education, however, has provided the following definition of physical and mechanical restraint:

> [A physical restraint is defined as a] personal restriction that immobilizes or reduces the ability of a student to move [redacted] or [redacted] torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location.
>
> [A mechanical restraint is defined as] the use of any device or equipment to restrict a student's freedom of movement. This term does not include devices implement by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed.

Restraint and Seclusion: Resource Document (U.S. Dept. of Ed. 2012).

78. It is undisputed that, at various times throughout [redacted] education at School A and B, Petitioner was restrained and, at times, taken to a quiet room (at School B). Petitioner failed to present any evidence, however, that Petitioner's utilization of restraint or placing Petitioner in the quiet room was violative of section 1003.573(4) and (5). Accordingly, such claims are dismissed.

79. As discussed above, Respondent denied this student FAPE from December 7, 2016, through April 24, 2017, to which the student is entitled to compensatory education. In calculating an award of compensatory education, the undersigned is guided by Reid v. District of Columbia, 401 F.3d 516, 523 (D.C. Cir. 2005), wherein the D.C. Circuit emphasized that IDEA relief depends on equitable considerations, stating, "in every case . . . the inquiry must be fact specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Id. at 524. The court further observed that its "flexible approach will produce different results in different cases depending on the child's needs." Id. at 524.

80. This qualitative approach has been adopted by the Sixth Circuit and a number of federal district courts. See Bd.

of Educ. v. L.M., 478 F.3d 307, 316 (6th Cir. 2007) ("We agree with the district court . . . that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the child's] educational problems successfully.); Petrina W. v. City of Chicago Pub. Sch. Dist., 2009 U.S. Dist. LEXIS 116223, at *11 (N.D. Ill. Dec. 10, 2009) ("Because a flexible, individualized approach is more consonant with the aim of the IDEA . . . this Court finds such an approach more persuasive than the Third Circuit's formulaic method."); Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1352-53 (N.D. Ga. 2007) (holding that, in formulating a compensatory education award, "the Court must consider all relevant factors and use a flexible approach to address the individual child's needs with a qualitative, rather than quantitative focus"), aff'd, 518 F.3d 1275 (11th Cir. 2008); Barr-Rhoderick v. Bd. of Educ., 2006 U.S. Dist. LEXIS 72526, at *83-84 (D.N.M. Apr. 3, 2006) (holding that an award of compensatory education "must be specifically tailored" and "cannot be reduced to a simple, hour-for-hour formula"); Sammons v. Polk Cnty. Sch. Bd., 2005 U.S. Dist. LEXIS 45838, at *21-22 (M.D. Fla. Oct. 7, 2005) (adopting Reid's qualitative approach).

81. Guided by the above-noted principles, and the undisputed failure of the [redacted], Petitioner is entitled to day-for-day compensatory education from December 7,

2016, through April 24, 2017 (excluding weekends and school holidays).

Section 504 Claims

82. Section 504's statutory text, succinctly provides, in pertinent part, as follows:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(20) 29 USCS § 705(20), shall, solely by reason of her or his 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation,
>
> Comprehensive Services, and Developmental Disabilities Act of 1978.

29 U.S.C. § 794(a).

83. In contrast to the IDEA, Section 504's text does not create a number of different procedures that a school district must follow to comply with the statute. The U.S. Department of Education, however, has promulgated regulations under Section 504 addressing, inter alia, identification, evaluation, and educational placement of disabled preschool, elementary, secondary, and adult education students. See 34 C.F.R. § 104.32-35.

84. Pursuant to Section 504's implementing regulations, participating school districts are required to establish procedural safeguards with respect to actions regarding the "identification, evaluation, or educational placement" of students with disabilities who "need or are believed to need special instruction or related services." 34 C.F.R. § 104.36. The procedural safeguards must include "notice, an opportunity for the parents or guardian of the [student] to examine relevant records, an impartial hearing with opportunity for participation by the [student's] parents or guardian and representation by counsel, and a review procedure." 34 C.F.R. § 104.36. An "impartial hearing" as contemplated in section 104.36 may not be conducted by an employee of the subject school district or a school board member. See, e.g., Leon Cnty. (FL) Sch. Dist., 50 IDELR 172 (OCR 2007).

85. In addition to the impartial hearing right with respect to identification, evaluation, or educational placement, an individual may file a complaint with the U.S. Department of Education Office for Civil Rights (OCR) alleging discrimination based on disability or retaliation. See 34 C.F.R. § 104.61; OCR Case Processing Manual (revised Feb. 2015). Moreover, under 34 C.F.R. § 104.7, any school district that employs 15 or more persons must designate an individual responsible for coordinating its compliance efforts and to "adopt grievance

procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part." Thus, any person who believes [redacted] has been subjected to discrimination on the basis of disability may file a grievance with the school district under this procedure.

86. With respect to IDEA claims, sections 1003.571 and 1003.57 provide this tribunal with jurisdiction over the subject matter and the parties, and rule 6A-6.03311 sets forth how an IDEA due process hearing shall be conducted and the scope of the administrative law judge's (ALJ) hearing decisions. By contrast, with respect to Section 504, Florida does not have a statute adopting or mandating compliance with Section 504. Concomitantly, the Florida Department of Education has not promulgated any regulations addressing compliance with Section 504, how an impartial Section 504 hearing should be conducted, or the scope of the decision to be determined.

87. Pursuant to section 120.65(6), Florida Statutes, however, DOAH "is authorized to provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by [section 120]." Thus, if such a contract exists, DOAH may assign an ALJ to preside over an impartial hearing regarding Section 504 claims concerning the

student's "identification, evaluation, or educational placement."

88. If a student with a disability qualifies for services under the IDEA, as Petitioner here does, Respondent can satisfy Section 504's standard of FAPE by developing and implementing an appropriate IEP. See 34 C.F.R. § 104.33(b)(2). To the extent Petitioner's complaint can be construed as contending Respondent violated Section 504's FAPE requirements, the undersigned concludes that Petitioner succeeded or failed to satisfy [redacted] burden regarding said claims based on the facts and analysis of those claims as set forth in the preceding IDEA claims section of this Order.

89. Petitioner's Complaint further contends that Respondent engaged in acts of retaliation and discrimination. While the undersigned's authority to make a determination concerning Petitioner's "non-FAPE" claims is dubious, the exercise will be undertaken for the purposes of administrative exhaustion.

90. A parent has a private right of action to sue a school system for violation of Section 504. Ms. H. v. Montgomery Cnty. Bd. of Educ., 784 F. Supp. 2d 1247, 1261 (M.D. Ala. 2011). To prevail on a Section 504 claim, a plaintiff must show "(1) the plaintiff is an individual with a disability under the Rehabilitation Act; (2) the plaintiff is otherwise qualified for

participation in the program; (3) the plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reasons of [redacted] disability; and (4) the relevant program or activity is receiving federal financial assistance." L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cnty., Fla., 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007). As the Middle District of Alabama has explained:

> To prove discrimination in the education context, courts have held that something more than a simple failure to provide a FAPE under the IDEA must be shown. A plaintiff must also demonstrate some bad faith or gross misjudgment by the school or that he was discriminated against solely because of [redacted] disability. A plaintiff must prove that [redacted] has either been subjected to discrimination or excluded from a program or denied benefits by reason of their disability. A school does not violate § 504 by merely failing to provide a FAPE, by providing an incorrect evaluation, by providing a substantially faulty individualized education plan, or merely because the court would have evaluated a child differently. The deliberate indifference standard is a very high standard to meet.

J.S. v. Houston Cnty. Bd. of Educ., 120 F. Supp. 3d 1287, 1295 (M.D. Ala. 2015)(internal citations omitted).

91. The Eleventh Circuit has defined deliberate indifference in the Section 504 context as occurring when "the defendant knew that harm to a federal protected right was

substantially likely and failed to act on that likelihood." Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 344 (11th Cir. 2012). This standard "plainly requires more than gross negligence," and "requires that the indifference be a deliberate choice, which is an exacting standard." Id. (internal and external citations omitted).

92. Succinctly, Petitioner has failed to provide the requisite level of evidence to support any of [redacted] "non-FAPE" claims. As said claims are not supported by the evidence, they are therefore denied.

ORDER

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

Respondent denied Petitioner a FAPE from December 7, 2016, through April 24, 2017, by failing to implement [redacted] IEP, [redacted] to conduct an IEP meeting, and [redacted] to [redacted] IEP. Petitioner is entitled to [redacted] from December 7, 2016, through April 24, 2017 (excluding weekends and school holidays).

It is further ORDERED that the parties shall convene an IEP meeting as soon as reasonably practicable, and in no case, more than 30 days from the date of this Order.

The balance of Petitioner's IDEA claims and Section 504 claims fail as a matter of fact or law, and, therefore are dismissed.

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, 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.

Petitioner's remaining requests for relief are denied.

DONE AND ORDERED this 2nd day of May, 2018, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of May, 2018.

ENDNOTES

[1/] On October 18, 2016, School B contacted the Okeechobee County [redacted] ([redacted]) in reference to the [redacted]. The [redacted] ultimately deemed the [redacted].

[2/] The record evidence provides that, on April 10, 2017, Respondent inquired of Petitioner's mother as to whether there had been any [redacted] for Petitioner, and, if so, requested the names of the health care providers to prepare a release of records. The record is unclear as to whether a response was provided.

[3/] It appears, however, that Petitioner's [redacted] [redacted].

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(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).