STATE OF FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

VS.

Case No. 17-6478E

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

A due process hearing was held before Administrative Law Judge Jessica Enciso Varn on March 20 through 22, 2018, in Miami, Florida.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire

Langer Law, P.A.

15715 South Dixie Highway, Suite 405

Miami, Florida 33157

For Respondent: Mary C. Lawson, Esquire

Miami-Dade County Public Schools

1450 Northeast 2nd Avenue Miami, Florida 33132

STATEMENT OF THE ISSUES

Whether the School Board failed to properly implement the student's Individualized Education Plan (IEP) by failing to have appropriate back-up paraprofessionals who could meet all of the

Whether the School Board denied the student a free and appropriate public education (FAPE) by not providing transportation for school field trips.

Whether the School Board violated Section 504 of the Rehabilitation Act of 1973 (Section 504) by against the student on the

PRELIMINARY STATEMENT

A request for a due process hearing was filed on December 1, 2017. A Case Management Order was issued on the same day, establishing deadlines for a sufficiency review, as well as for the . On December 8, 2017, the School Board filed a Motion of Insufficiency, arguing that Petitioner's due process complaint did not sufficiently place the School Board on notice of what issues would be addressed in this case, and moved for a determination of insufficiency. An Order finding the request for a due process hearing sufficient was entered on December 13, 2017. On January 9, 2018, the parties were ordered to file a status report by January 15, 2018. The due process hearing was subsequently scheduled for March 20 through 22, 2018.

The Transcript was filed on May 1, 2018. On May 3, 2018, an Order was entered whereby the deadlines for the proposed orders were extended to May 16, 2018. Additionally, the deadline for the final order was extended to May 31, 2018. On May 14, 2018, the parties jointly requested a five-day extension of time for filing the proposed final orders, which was granted. The parties timely filed proposed final orders on May 21, 2018, which were duly considered in the preparation of this Final Order. The deadline for this Final Order was extended to June 5, 2018.

Unless otherwise noted, citations to the United States Code,
Florida Statutes, Florida Administrative Code, and Code of Federal
Regulations are to the current codifications. For stylistic
convenience, the undersigned will use pronouns in this
Final Order when referring to Petitioner. The pronouns
are neither intended, nor should be interpreted, as a reference to
Petitioner's actual gender.

FINDINGS OF FACT

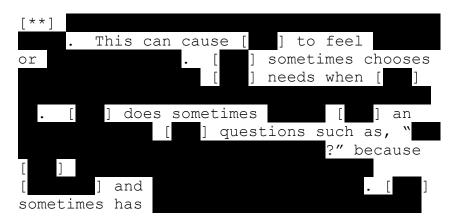
1. The student is a	t
School B, eligible for ESE in the categories of	
() and is	
with of ; and,	I
and ,	
2. The student's placement is in	
, with a to	
. The	S
necessary for the student because	
,	
an	
, as was evident to the undersigned du	uring
the three-day due process hearing. 1/	

4. The IEPs placed into evidence all

, and , and , and , and , and , and , no IEP, either in , provided for the student to be given a

(student uses). As it relates to , it was well documented that the student with .

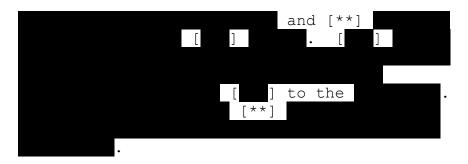
5. In IEPs created in June 2016 and April 2017, the following was recorded:



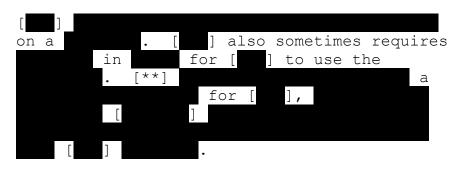


6. On IEPs created in June 2016 and May 2017, the

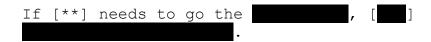
of the IEPs included this statement:



7. In the May 2017 IEP, the following language was added in the area of

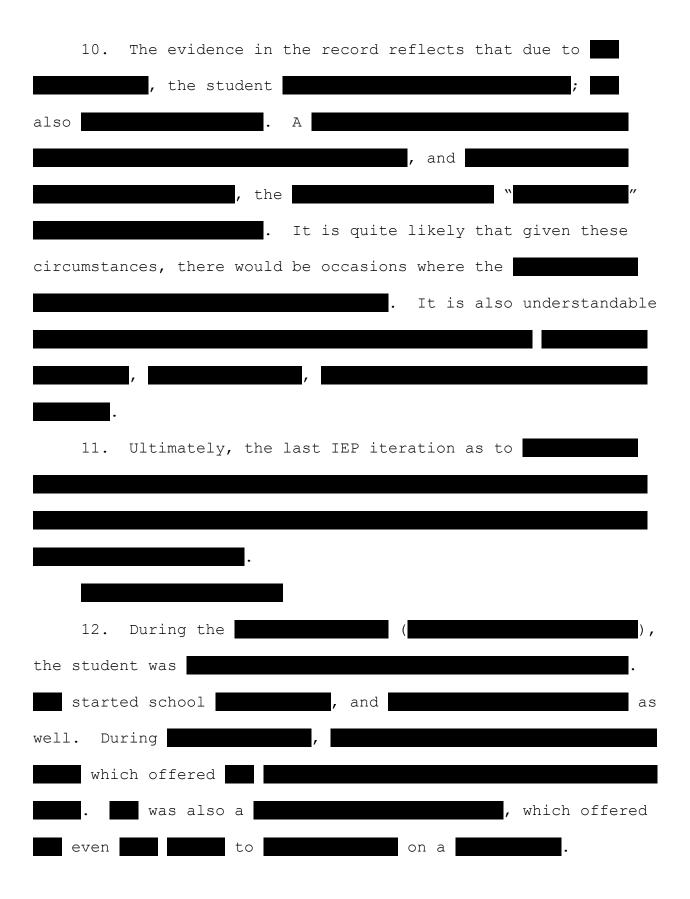


8. On a _____, done on August 18, 2017, it was noted:



9. Lastly, in an IEP created in October 2017, the following was noted:





13. of the testified that the student was , and was in came later in 14. the and than , given the student's ; thus, that they were to take were " for the _____ , and . Since the student often had (during that time to be present), and the student could with a or in the front office, the generally took during the student's session or . 15. The also accepted the input when selecting the student's —this was done as an , as it is not required by law. were only needed when the 16. was other reason not able to ... Understandably, the hiring of the than the , since the amount of time spent with the student was

17. The student testified that spent approximately

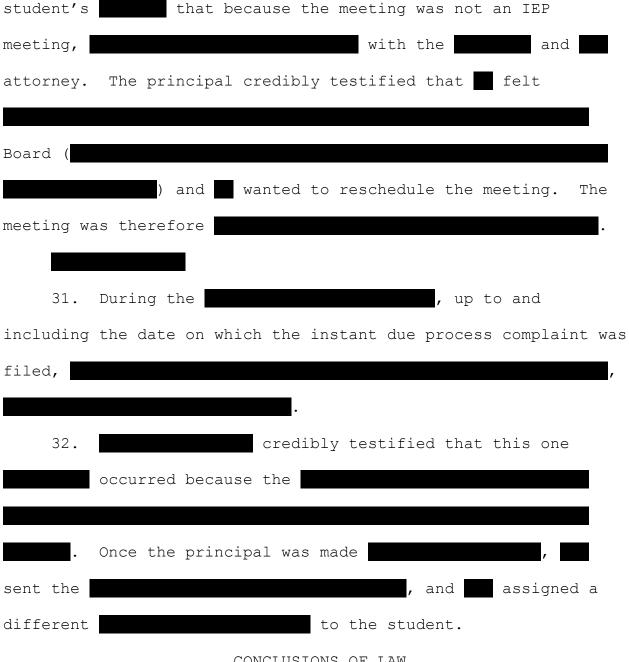
, and that halfway through the year, the
days, and when the student knew would , the student
also The
credibly testified that had the student attended school on those
days when the, there would have been a
assigned to the student for the
18. During, the student testified
that
on a 19. The student and testified that
"" times during , and that it occurred
because the
student asked to, or because
20. The school staff credibly testified that during
school, the student had a
total—and
The educators provided details on the

, and made 21. There is no dispute that one of the , was described by all as . Accordingly, during the (approximately) that the student was being , there was yet another) on call in the event the student had to use the 22. As to the , the undersigned finds the testimony of the educators to be credible to the extent it conflicts with the testimony provided by the student and . testimony is not based on since , and the student's testimony was _____. 23. As to field trips, the best evidence established that the student participated in most field trips and chose to provide the transportation. There was simply insufficient

evidence establishing that the student was excluded from field
trips during , or that the was
·
24. Another allegation pertaining to was
regarding : and
were reviewing and
. The use of a
() was being demonstrated,
and the student was placed in the . The
student testified that
,
OF The adults procent during the
25. The adults present during the
in much the same manner—with one major
distinction: the student's The undersigned
finds the testimony of the school staff credible, and rejects th
student's .2/
26. Lastly, the student alleges that

, and that the 27. and all the 28. The evidence as a whole leads the undersigned to , and find the school staff testimony credible. There was no evidence, documentary or witness testimony, to corroborate the student's Ιt is also highly that the student, , and Given the staff, , coupled with the amount of The student was on school, 30. Before a meeting with the school principal that was scheduled for May 22, 2017, the student's notified the principal that would be bringing attorney to the meeting.

When the meeting time arrived, the principal notified the



CONCLUSIONS OF LAW

The Division of Administrative Hearings (DOAH) has 33. jurisdiction over the subject matter of this proceeding and of the parties thereto. See §§ 120.65(6) and 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

- 34. Petitioner bears the burden of proof with respect to each of the issues raised herein. <u>Schaffer v. Weast</u>, 546 U.S. 49, 62 (2005).
- In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education 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). 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. \S 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 each agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Ala. State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).
- 36. Parents and students with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. <u>Bd. of Educ. v. Rowley</u>, 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).

37. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

[S]pecial 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).

38. The central mechanism by which the IDEA ensures a FAPE for each child is the development and implementation of an IEP.

20 U.S.C. § 1401(9)(D); Sch. Comm. of Burlington v. Dep't of

Educ., 471 U.S. 359, 368 (1985)("The modus operandi of the [IDEA] is the . . . IEP.")(internal quotation marks omitted). The IEP must be developed in accordance with the procedures laid out in the IDEA, and must be reasonably calculated to enable a child to

make progress appropriate in light of the child's circumstances.

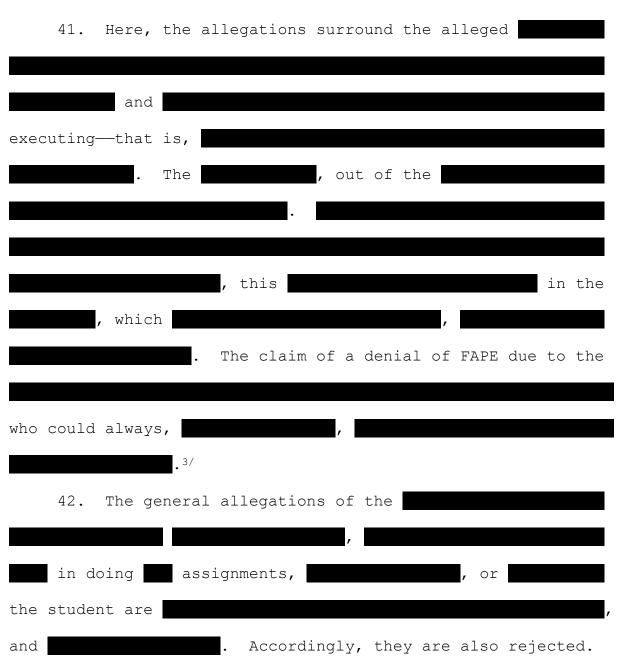
Endrew F. v. Douglas Cnty. Sch. Dist., RE-1, 13 S. Ct. 988, 999

(2017).

39. In the instant case, the parent alleges that the School Board failed to properly implement the student's IEP by , and , and who . The parent also alleges that the School Board for

implementation of Petitioner's educational programming—rather than its substance—a different standard of review applies. L.J. v. Sch. Bd. of Broward Cnty., 850 F. Supp. 2d 1315, 1319 (S.D. Fla. 2012). In particular, a parent raising a failure-to-implement claim must present evidence of a "material" shortfall, which occurs when there is "more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 (9th Cir. 2007). Notably, this standard does not require that the student suffer demonstrable educational harm in order to prevail. Id. at 822; Colon-Vazquez v. Dep't of Educ., 46 F. Supp. 3d 132, 143-44 (D.P.R. 2014); Turner v. Dist. of Columbia, 952 F. Supp. 2d 31, 40 (D.D.C. 2013). Rather, the

materiality standard focuses on "the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." Wilson v. Dist. of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).



- 43. Lastly, the allegation regarding school field trips is also rejected. The best evidence in the record establishes that the student attended most field trips, and that mother chose to provide the student's transportation. The School Board provided credible evidence that it was always ready, willing and able to provide transportation for school-sponsored field trips during the school year. Thus, this allegation is also rejected.
- 44. Applying the materiality standard detailed above, the credible evidence in the record leads to the conclusion that the School Board has properly implemented the student's IEP.

Section 504 Claim

- 45. Section 504 of the Rehabilitation Act of 1973 forbids organizations that receive federal funding, including public schools, from discriminating against people with disabilities.

 29 U.S.C. § 794(b)(2)(B). In relevant part, Section 504 provides that no otherwise qualified individual with a disability shall,

 "solely by reason of 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).
- 46. In the educational context, a disabled student can prove disability discrimination under three distinct approaches. First, a school board violates Section 504 by intentionally discriminating against a student on the basis of

disability. T.W. v. Sch. Bd. of Seminole Cnty., 610 F.3d 588, 603-04 (11th Cir. 2010). The second approach, which does not require evidence of intentional discrimination and not alleged in this case, examines whether a school board has "reasonably accommodated the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits." Ridley Sch. Dist. v. M.R., 680 F.3d 260, 18 280 (3d Cir. 2012). Finally, and also of no relevance here, a school board violates Section 504 where it applies a rule that disproportionally impacts disabled students. Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840, 847 (7th Cir. 1999).

- 47. The due process complaint in this case raises one theory under Section 504: that the School Board committed acts of intentional discrimination against the student.
- 48. To prove a claim of intentional discrimination,

 Petitioner must demonstrate by a preponderance of the evidence
 that the School Board subjected the student to an act of

 discrimination solely by reason of disability. T.W. v. Sch.

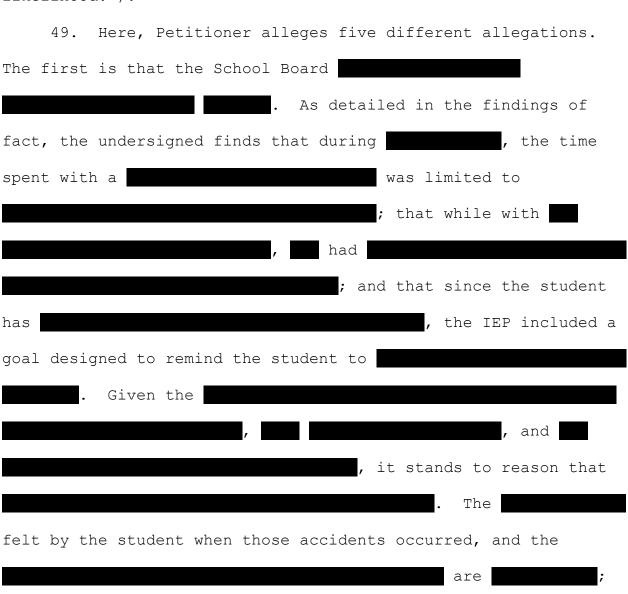
 Bd. of Seminole Cnty., 610 F.3d 588, 603-04 (11th Cir. 2010).

 Notably, a claim of intentional discrimination need not be
 supported by proof of discriminatory animus—for example,

 prejudice, spite, or ill will. Liese v. Indian River Cnty. Hosp.

 Dist., 701 F.3d 334, 344-45 (11th Cir. 2012). Instead,

Petitioner must supply proof of "deliberate indifference," which occurs when a "defendant knew that harm to a federally protected right was substantially likely and . . . failed to act on that likelihood." Id. at 344-45; Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001) ("Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood.").



however, the totality of the evidence falls short of the legal standard required to prove intentional discrimination. The best evidence as to the student's _______, and that the student had _______, which was

, but not evidence of deliberate indifference.

presence of several adults. As fully explained in the findings of fact, the undersigned rejects the student's rendition of the training session, and finds the testimony of the School Board witnesses to be credible.

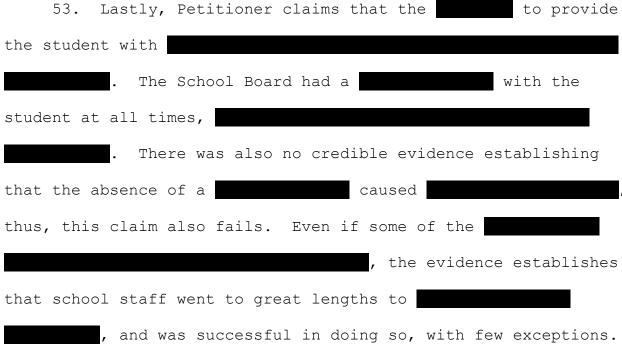
50. Second, Petitioner alleges that during a

. As detailed in the findings of fact, these allegations are also not found credible.

51. Third, Petitioner alleges that

52. Fourth, Petitioner claims that by delaying a meeting with the because was accompanied by legal counsel (and had given notice that would be because notice that would be had simply fashion. This delay in the meeting does not rise to the legal standard of "deliberate indifference"—the Principal testified that had simply felt intimidated by the presence of counsel, understandably feeling

unprepared to go forward without counsel for the School Board also being present. This claim is also unpersuasive.



54. For these reasons, Petitioner's claims of intentional discrimination under Section 504 are rejected.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is DISMISSED in its entirety.

DONE AND ORDERED this 1st day of June, 2018, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN

Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the Division of Administrative Hearings this 1st day of June, 2018.

ENDNOTES

The student was present for the entire due process hearing.

also to all the testimony provided, and all the arguments presented.

2/ Once the student told

. The immediately reported this allegation to turn reported the incident to the principal. An independent investigation was done by the Miami-Dade County Public Schools Office of Civil Rights Compliance. The investigator testified at the hearing and report was entered into evidence. Among other things investigated, the investigator found no evidence to support the student's allegations.

Programming and services that are found appropriate under the IDEA standard of appropriateness cannot be successfully challenged as not meeting the individual needs of a student with a disability under the Section 504 regulations concerning FAPE.

See 34 C.F.R. § 104.33(b)(2); and see, e.g, Kasprzyk v. Banaszak, 24 IDELR 735 (N.D. Ill. 1996)(stating that a decision concerning what constitutes FAPE is not res judicata with respect to a claim of discrimination on the basis of disability under Section 504).

COPIES FURNISHED:

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

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).