STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs.

Case No. 21-2627E

PALM BEACH COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A due process hearing was held from April 25 through 29, 2022, before Administrative Law Judge Jessica E. Varn of the Division of Administrative Hearings (DOAH), via Zoom video teleconferencing.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
Langer Law, P.A.
2990 Southwest 35th Avenue
Miami, Florida 33133

For Respondent: Laura E. Pincus, Esquire
Anna Morales Christiansen, Esquire
School Board of Palm Beach County, Florida
3300 Forest Hill Boulevard, Suite C-331
West Palm Beach, Florida 33406

STATEMENT OF THE ISSUES

Whether the Palm Beach County School Board (the School Board) failed in its child find obligation, in violation of the Individuals with Disabilities Education Act (IDEA); and

Whether the School Board predetermined the design of the Individualized Educational Plan (IEP) without meaningful parental participation; and

Whether the June of 2021 IEP provided a free and appropriate public education (FAPE); that is, whether it was reasonably calculated to enable the student to make progress in light of her circumstances; and

Whether the School Board discriminated against the student based on [redacted] disability, in violation of Section 504[1]; and

Whether the School Board retaliated against the parents, in violation of Section 504, for advocating on behalf of their [redacted]; and

Whether, if Petitioner proved any of the above alleged violations, Petitioner is entitled to appropriate relief.

PRELIMINARY STATEMENT

The request for a due process hearing (Complaint) was filed on August 31, 2021, with the School Board. On that same date, the School Board filed the Complaint with DOAH, and a Case Management Order was issued on September 2, 2021. On September 13, 2021, the School Board filed a Response to Petitioner's Complaint. On September 28, 2021, the parties attended a resolution meeting, but the student's parents were not present due to work-related emergencies. Subsequently, on September 29, 2021, Petitioner filed a Motion to Stay Discovery Pending Resolution Meeting, which the School Board opposed. An Order on Staying Discovery was entered on September 30, 2021, ruling in favor of Petitioner. The second resolution

[1] The Rehabilitation Act of 1973, 29 U.S.C. § 795, *et seq*. (Section 504).

meeting was held on October 7, 2021, and the parties were again unable to reach a settlement.

On that same date, the School Board filed a Notice of Taking Depositions, which included Subpoenas Ad Testificandum for [redacted]. Further, on October [redacted], 2021, the School Board filed a Notice of Production from Non-Party, regarding [redacted]. On October [redacted], 2021, Petitioner filed an "Objection and Depositions and Motion for Protective Order." On October [redacted], 2021, the School Board filed a Response, and on October [redacted], 2021, the School Board requested an emergency motion hearing.

After seeking leave to do so, Petitioner filed a reply on October [redacted], 2021. On that same date, the School Board filed a "Notice of Cancellation of Depositions of [redacted] and Withdraw Request for Production from Non-Parties, [redacted]." Once the School Board filed this Notice of Cancellation, Petitioner's remaining objection was regarding the issuance of a third-party subpoena to [redacted] and a request to limit the scope of [redacted] deposition. An Order on Petitioner's remaining objection and Motion for Protective Order was entered on October [redacted], 2021, in favor of the School Board.

On November [redacted], 2021, the School Board filed a Motion to Compel, and Petitioner filed a response on November [redacted], 2021, noting that the Motion to Compel was moot. On that same date, Petitioner filed objections and a response to the School Board's first set of interrogatories. On November [redacted], 2021, an Order was entered requiring the School Board to reply to Petitioner's response to the Motion to Compel. On November [redacted], 2021, the School Board filed a reply. On December [redacted], 2021, an Order was entered in

favor of Petitioner and the School Board's Motion to Compel was denied as moot.

On November [redacted], 2021, the School Board filed a Notice of Production from Non-Party ([redacted]). On November [redacted], 2021, Petitioner filed another Objection and Motion for Protective Order, in regard to the School Board's subpoenas for records from non-parties ([redacted], the [redacted], and [redacted]). On November [redacted], 2021, the School Board filed a response to Petitioner's objection and Motion for Protective Order. On December [redacted], 2021, an Order was entered in favor of the School Board, and Petitioner's Motion for Protective Order was denied.

On December [redacted], 2021, the School Board filed a "Motion to Enjoin Petitioners and Their Counsel from Interference with Third Party Witnesses." On December [redacted], 2021, Petitioner filed a response, and the School Board filed a "Motion to Compel [redacted] to Comply with Third Party Subpoena." On December [redacted], 2021, a motion hearing was held to address the pending motions. Both motions were denied.

On December [redacted], 2021, Petitioner filed an unopposed Motion for Continuance to reschedule the final hearing scheduled for January [redacted] through [redacted], 2022. On January [redacted], 2022, an Order Granting Continuance was entered and the parties were ordered to propose mutually-agreeable dates to reschedule the final hearing. On January [redacted], 2022, the parties jointly filed dates of unavailability. On January [redacted], 2022, a second Order was entered requiring the parties to file mutually agreeable hearing dates to reschedule the final hearing.

On February [redacted], 2022, the parties filed a "Joint Notice to the Court Regarding Hearing Dates." Subsequently, on February [redacted], 2022, an Order

Rescheduling Hearing and Extending Time for Final Order was entered, and the final hearing was rescheduled for April [redacted] through [redacted], and May [redacted] through [redacted], 2022. The final hearing was scheduled to be held live in West Palm Beach, and, by request of the parents, the hearing would be open to the public.

On April [redacted], 2022, the School Board filed a Notice to Court informing the Court that one of the School Board's representatives had tested positive for COVID-19; however, the School Board did not wish to postpone the final hearing. On April [redacted], 2022, Petitioner filed a Response and requested that the final hearing be converted to a virtual hearing or continued to a later date. Following a telephonic status conference on April [redacted], 2022, an Amended Notice of Hearing by Zoom Conference was issued on April [redacted], 2022. The due process hearing was held via Zoom video-teleconferencing from April [redacted] through [redacted], 2022. All members of the public who were in attendance were muted and their video cameras were turned off.

The exhibits entered into the record and the list of witnesses who testified during the course of the hearing is memorialized in the Transcript.

At the conclusion of the due process hearing, the parties agreed to file proposed final orders 14 days after the transcript was filed with DOAH, and this Final Order would be filed no later than 28 days after the transcript was filed. The Transcript was filed on June 27, 2022. The parties had the opportunity to file Proposed Orders by July 11, 2022; and this Final Order was due on July 25, 2022. On June 30, 2022, the School Board filed a Motion for Extension of Time to File the Proposed Final Order, indicating that the parties had agreed to extend the deadline for Proposed Final Orders (PFOs) to July 15, 2022. The request was granted, and the parties were invited to file PFOs by July 15, 2022; and the Final Order deadline was extended to

July 29, 2022. On July 26, 2022, the undersigned sought a two-business day extension of the Final Order deadline due to illness. The parties had no objection. The Final Order deadline was, therefore, extended to August 2, 2022.

Also, on July 26, 2022, Petitioner filed a Motion to Strike, alleging that the School Board, in its PFO, had cited to evidence that had not been entered into the record, and that the School Board had omitted words or entire phrases from quotes without indicating the omission. In a response, the School Board explained that there were many scrivener's errors in the PFO citing to the record. On July 28, 2022, a telephonic conference was held with the parties to address pending motions regarding the electronic exhibits and the Motion to Strike, which was denied. The parties were advised that in preparing this Final Order, the undersigned limited her review to record evidence and reviewed the Transcript in its entirety, and that the parties' PFOs were also considered.

All references to statutory or regulatory provisions are to the provisions in effect during the relevant time period of this case, when the Complaint was filed.

FINDINGS OF FACT[2]

1. The student in this case has a family history of dyslexia. Both of the student's parents are [redacted]. Having already managed their [redacted] challenges with dyslexia, the parents were well versed in the intricacies of dyslexia and understood the importance of early intervention to remediate the effects of dyslexia on a student's ability to read and write fluently. Naturally, they alerted the student's [redacted] and [redacted]-grade teachers of

[2] The Findings of Fact that follow do not incorporate references to every witness who testified, but all testimony was considered in the preparation of this Final Order.

the family history, and asked the teachers to let them know if there was any sign of dyslexia in their [redacted].

2. The student attended [redacted], which only serves children in grades [redacted] grade. Those students then transfer to [redacted] Elementary in [redacted] grade, to finish elementary school.

3. At the start of [redacted] grade, the student was evaluated for giftedness by a private school psychologist, [redacted], who found that she indeed was gifted, but had a weakness in decoding. The parents shared the evaluation with the school, and after conducting an out-of-system review of the evaluation, the student was found eligible as a gifted student. A gifted educational plan (EP) was developed in October of 2018.

4. In March of 2019, during the student's [redacted]-grade year, the classroom teacher told the parents that the student was struggling with reading, specifically in the area of phonics. The parents acted immediately.

5. In April of 2019, the parents, who already employed a tutor, [redacted], to help their [redacted], hired [redacted] to also work with their [redacted] after school. [redacted] is trained in the [redacted] program, which is considered the gold standard for dyslexic students, although there are other programs that are also effective. This private tutoring continued throughout the rest of [redacted] grade, and through all of [redacted] grade. The student attended tutoring sessions twice a week, then eventually built up to four times a week throughout the relevant period in this case. At all times during the relevant period, the school staff was aware that the student received intense, one-on-one reading intervention specifically designed for remediating dyslexia, *after* school, paid by the parents.

6. During the summer between [redacted] grade, the parents had their [redacted] evaluated by [redacted], who is recognized as an expert in learning disabilities, and specifically in dyslexia. [redacted] was focused on identifying any areas of disability in learning or reading. During the

evaluation, the student appeared to labor with reading tasks, sounding out most of the words, and rereading them to understand their meaning. [redacted] exhibited poor fluency in reading and math processes. While doing math, the student confused numbers, wrote numbers out of order, and used concrete representations to solve basic math problems. The standardized testing revealed that the student's phonological awareness, phoneme isolation, and spelling were significantly low, with percentiles in the teens; and for spelling, the [redacted] percentile. [redacted] reading fluency placed [redacted] in the [redacted] percentile. Overall, in reading, [redacted] report reflected that the student had difficulties storing and retrieving phonological information and difficulty identifying phonological segments and isolating sounds in words. In writing, the student reversed many letters. [redacted] diagnosed the student with ADHD; a learning impairment in reading fluency, comprehension, and spelling; and mild dyslexia.

7. The parents shared [redacted] evaluation with the school at the start of [redacted] grade, in August of 2019. An out-of-system review was conducted and completed by the school staff in September, and the evaluation was accepted.

8. In late September of 2019, the school staff noted that the student had poor reading comprehension skills. In writing, the student's sentences were basic and contained few details. [redacted] was described as disorganized, unmotivated, unable to concentrate, consistently off task, easily distracted, unable to sit still, and unable to work well independently or in groups.

9. In October of 2019, the student was found eligible for a Section 504 Plan, based on [redacted] ADHD diagnosis, but there was no mention of the student's dyslexia diagnosis, or [redacted] impairment in reading fluency, reading comprehension, or spelling. The 504 Plan accommodations were as follows: seat student near teacher; increase distance between desks; place student in area of room with least distractions; seat student near point of instruction; cue the student to stay on task; check comprehension of lesson directions;

provide a variety of presentations; break long presentations into short segments; teachers to stand near student when giving directions; graphic organizer for writing; provide visuals when necessary; pre-introduce lessons to prepare student; check comprehension of directions before beginning task; require fewer correct responses to achieve mastery; reduce homework assignments; reduce the length of the regular assignment; break larger assignments into series of smaller assignments; arrange for short breaks between assignments; extra time/days for homework as needed; use of a reading tracker; read aloud to self; and extended time for classroom-based tests. According to the school staff, the student's [redacted] was given a consent-for-evaluation form, the [redacted] had taken it home, and never returned it. The school staff also questioned the student's gifted eligibility, noting that recent evaluations had revealed significantly lower IQ scores.

10. In early December 2019, two months after the school staff had requested consent for evaluations, the EP Team met. The notes reflect that the student lacked stamina in reading and had difficulty staying on task while reading. [redacted] also worked slower than [redacted] peers while doing math. At this juncture, school staff was apparently still waiting for the consent form to be signed but made no more effort to acquire consent for evaluation. There is no record evidence establishing that the School Board initiated a consent override process or simply offered another consent form.

11. At this point, the school staff had questioned the student's giftedness, had found the student eligible for a 504 Plan that addressed only ADHD, and were still waiting for consent to be provided by the parents. This was, of course, in spite of the evaluations which had already been provided by the parents, the extensive Orton-Gillingham tutoring support in reading that the parents were providing, and the classroom teacher's observations. In late December of 2019, given the refusal to provide any reading interventions, the parents filed a state complaint. The parents alleged a child find violation due to the School Board's failure to consider the student for ESE eligibility.

12. In mid-January of 2020, the school staff, who had in October found that the student needed no reading interventions, placed the student in Response to Intervention (RTI). The school principal testified that [redacted] was told by district staff to place the student in RTI; therefore, the student was placed in a small reading group with a teacher, [redacted], who is not ESE certified. [redacted] uses the Leveled Literacy Intervention System (LLI) program, which is not designed for dyslexic students. [redacted] Elementary does, of course, employ ESE teachers who implement reading programs designed for dyslexic students, but since the student had not yet been evaluated for ESE, [redacted] was not provided that type of reading support.

13. In February of 2020, reading notes from the school staff reflected that the student tended to read too quickly, omitting words and phrases, and [redacted] tended to skip punctuation.

14. On February [redacted], 2020, the 504 Team met and added the additional diagnosis of impairment in reading fluency and comprehension and spelling, as well as mild dyslexia. [redacted]-grade teacher, [redacted], noted that the student needed to pick up [redacted] stamina in reading and writing, and [redacted] was concerned that the student may not be able to do so until [redacted] decoding skills improved. [redacted] also noted that the student was struggling with reading comprehension. Here again, the parents were not asked to sign a consent form and there is no record evidence of the initiation of a consent override process. The 504 team also added accommodations: use computer-assisted instruction; graphic organizers; starting essays at school for homework writing; provide visuals when necessary; pre-introduce lessons to prepare student; directions and expectations explicitly stated; agenda check for accuracy and signed by teacher; use of study guides; copy of notes if available; teacher to review student notes for accuracy; read all allowable items except when assessing reading; and do not penalize for spelling when not assessed.

15. In March of 2020, the State Department of Education issued its decision on the state complaint, finding that the School Board had failed in its child find obligation by not evaluating the student for ESE eligibility. The School Board was ordered to meet with the parents to determine eligibility for ESE supports and related services, and conduct any evaluations that were needed. If the student was ultimately found eligible, the School Board was ordered to provide compensatory education for the instruction, supports, and services missed between August [redacted], 2019, and the beginning date of provision of services.

16. On March [redacted], 2020, the 504 Team met and decided to conduct several evaluations, including psychoeducational; speech and language (SLP); occupational therapy (OT); audiological; and assistive technology (AT). [redacted] stated that the student was performing inconsistently in reading and [redacted] was having trouble with computer-based assessments due to [redacted] tracking issues. The parent added that the student performs better academically when questions are read to [redacted].

17. Within days of this meeting, the global COVID-19 pandemic closed down schools across the state of Florida and all school functions were suddenly forced to pivot to virtual settings for the remainder of the school year.

18. In April 2020, the school's psychoeducational evaluation was initiated by [redacted]. In [redacted] partial report, [redacted] noted that the student's teachers were concerned about the student's academic success. This evaluation would not be completed until October.

19. The AT assessment was completed by May [redacted], 2020. The evaluator noted that teachers should not grade for spelling if spelling is not being assessed, and that the student could type faster than [redacted] could write. The recommendations included using Google Chrome because it has learning supports that could help the student, such as text to speech; that is, when the student types something, the computer can read it back to her. The use of

this technology was recommended specifically for extended response items. The AT evaluator also recommended using a computer-based program called Learning Ally as a reading support.

20. In May of 2020, at the end of [redacted] grade, the standardized program used by the School Board, I-Ready, revealed that the student was performing at an early [redacted]-grade level for overall reading skills; early [redacted]-grade level for phonics, vocabulary, and literature comprehension; and [redacted]-grade level in comprehension of information text.

21. Another program, called Mind Play, took a snapshot of the student's ability on May 22, 2020. It revealed that the student did not meet the goal for correct letter identification of words that are spelled with the letters A, B, D, P, or Q; the student was on a [redacted]-grade level in reading comprehension; fluency in reading was 51 words a minute, but [redacted] graders should read 85 words a minute; and in spelling [redacted] was still working on long vowels, vowel teams, and spelling rules. Consistent with all evaluations and teachers at this juncture, the student was above grade level in listening vocabulary.

22. On May [redacted], 2020, the LLI teacher, [redacted], noted that the student's attention did not impact [redacted] reading. Instead, a majority of [redacted] errors were deletions, insertion and modification of word endings, and verb tenses. Sometimes, the student would completely omit 1-2 lines of text while reading.

23. At the end of [redacted] grade, three teachers commented on the student's performance and proficiency. [redacted] commented that the student continued to confuse short and long vowel sounds, both in isolation and in text. [redacted] explained that the student still confused consonant-vowel-consonant words like CAT and BOX with consonant-vowel-consonant-silent e words like RAKE.

24. [redacted] wrote that the student had problems with reading accuracy; [redacted] skipped words and reversed letters, which caused [redacted] to lose meaning while reading. The student also struggled with fluency. [redacted] pointed

out that at the end of the school year, the student was not proficient in reading; instead, [redacted] was approaching grade-level reading.

25. A different teacher, [redacted], commented that the student was not able to identify rhyming words.

26. The [redacted]-grade report card reflected that the student was proficient in math and social studies. [redacted] was approaching grade level in reading, and reading and writing literacy skills. The areas of concern at the end of [redacted] grade were: fluency, range of reading, production of writing, and conventions of Standard English.

27. In June of 2020, [redacted] noted that the student was still below grade level in fluency and comprehension, which was consistent with the observations made by the teachers at school. [redacted] listed these areas of concern: knowledge of basic phenomes, segmenting, blending, spelling, and handwriting.

28. In July of 2020, the parents hired [redacted], who has a doctorate in educational psychology and is recognized nationally as an expert in dyslexia, for a review of the evaluations that had been done to date. [redacted] reviewed [redacted] report from August of 2018, [redacted] report from July of 2019, and [redacted] report.

29. [redacted] diagnosed the student with dyslexia and opined that the student needed intensive intervention to improve [redacted] reading and spelling. [redacted] noted that the Orton-Gillingham tutoring had resulted in some improvements in the student's reading, but that [redacted] was still in the range that was considered dyslexia.

30. During the summer of 2020, the parents sent the student to a [redacted] sleep-away summer camp focused on dyslexic students, called [redacted]. In a progress report from camp, dated August [redacted], 2020, the camp staff noted that the student showed issues with reversing letters B and D; that teachers should encourage the student to use cursive because it helps

in naturally chunking words into syllables; and that the student struggled with independence, often giving up too easily to move on to other tasks.

31. The transition to [redacted] for [redacted] grade was unfortunately rough, from the perspective of the parents. By all accounts, the parents had strenuously advocated for their [redacted] while [redacted] was at [redacted] Elementary. It bears repeating that they had been, since April of 2019, providing the student with intense reading intervention by hiring an Orton-Gillingham tutor for *after* school sessions, because during the school day she had no such support. They had also succeeded in the state complaint process, and were hopeful that their [redacted] would finally receive intensive reading instruction *during* the school day at [redacted] new school.

32. In attempting to keep all options open for their [redacted], the parents filed registration paperwork in June of 2020, with The [redacted], a [redacted] school for dyslexic children. The Bilgrav School only admits dyslexic children with average or above average intelligence. Their motto, as described by [redacted], is: "Where dyslexic students thrive instead of just survive."

33. Leading up to the start of school, the student's mother reached out to [redacted], to chat about the student's needs. [redacted] was surprised and disappointed that the staff did not know that the student had a 504 Plan and an EP, or that there existed an open consent for ongoing and yet-to-be completed evaluations, or that the School Board had been ordered by the state education department to go through the eligibility process, or that the student was performing below grade level in reading and spelling.

34. The student attended the first days of [redacted] grade at [redacted], and although the staff offered to meet in the first week of school to discuss the student's 504 Plan, the parents withdrew the student from [redacted] on August [redacted], 2020. The student was transferred to the [redacted], where [redacted] was employed as the [redacted] of the school, after the School Board was given notice.

35. This change in school, of course, did nothing to change the School Board's obligation to complete all the evaluations that had not yet been completed or initiated since March of 2020.

36. In a progress report from October of 2020, [redacted] reported that the student's cursive had improved enough to use in all [redacted] classes, and that the student had improved [redacted] use of syllable division to decode unfamiliar two-syllable words containing a mixture of open, closed, and silent-e syllables.

37. Also in October of 2020, [redacted] school staff met with the parents to complete the evaluation process. The SLP evaluation was conducted by [redacted]. [redacted] report, issued in two parts in October, revealed that the student's scores revealed low ability in phonology and word structure knowledge; and below-average ability in non-word reading ([redacted] reversed B and D, inserted sounds/syllables to words, and consonant blends). [redacted] found that the student did not present with a language disorder, but did present with weaknesses that were consistent with mild dyslexia, ADHD, and weakness in auditory memory.

38. [redacted] completed [redacted] psychoeducational evaluation, which had begun in April, by the end of October, and it was done in at least five different sessions. In the many detailed findings, there were items that were consistent with all the prior evaluations. The student, on the spelling portion, reversed letters (BULE instead of BLUE); scored in the low-average range on the phonological processing portion; and, according to [redacted], was at low risk for dyslexia. Overall, [redacted] found the student presented with average academic skills, except for writing fluency. The timing of this evaluation is key in understanding its weight; that is, this evaluation was conducted after the student had received one-on-one Orton-Gillingham tutoring *after* school for all of [redacted] grade, after [redacted] attended a sleep-away camp for dyslexic children all summer, and after [redacted] had spent the first quarter of [redacted] grade attending [redacted], learning in a curriculum that is designed

specifically for dyslexic children. All of these interventions had been provided by the parents, but the intensive one-on-one Orton-Gillingham tutoring was not mentioned in [redacted] report.

39. In November, the OT evaluation was finally done. The student was still sometimes reversing B and D, and the spacing in [redacted] handwriting was inconsistent. The OT noted that the student did not like writing, and that this indifference, [redacted] distractibility, and [redacted] impulsivity might hinder [redacted] participation in education.

40. For [redacted] first grading report at [redacted], the student earned all [redacted]'s in math, history, science, and language arts. The teacher commented that in math, one issue was that the student rushed to finish [redacted] work; and that while [redacted] did well on hands-on projects, [redacted] struggled with worksheets.

41. In January of 2021, [redacted] agreed to observe the student and help the family. [redacted] was a key witness in this case, given [redacted] background, [redacted] experience, and [redacted] undisputed expertise in dyslexia, literacy, and reading. [redacted] spent [redacted] decades working for the School Board, eventually becoming the leader for the entire district on all issues of [redacted] department. [redacted] was described by the current [redacted] of ESE for the School Board, [redacted], as a good person whose expertise [redacted] respected.

42. [redacted], who currently works for the [redacted], was extremely reluctant to get involved in any case against [redacted] prior employer. After being contacted by the family's attorney, [redacted] first told the family that [redacted] had never worked on the side of parents, and that [redacted] needed to think about whether [redacted] would agree to do so. After thinking about it, [redacted] offered to do a file review. [redacted] told the family's attorney that if [redacted] agreed that the student needed ESE services, [redacted] would help the family. The parents agreed. [redacted] did the file review, an exercise [redacted] regularly performed when [redacted] worked for this School Board, and [redacted] agreed that the student needed ESE services based solely on the records review.

43. Here [redacted] describes the records review [redacted] performed:

> So the [family's] previous attorney, [redacted], provided to me any educational records that [redacted] had, which included Reading Running Record scores. Reading Running Records are used as a benchmark in Palm Beach County to compare if the child is on track, on grade level.
>
> I-Ready scores. I-Ready is a computer assessment and program that is regularly used for student progression decisions in Palm Beach County. It's also recognized by the State as something they can use as an alternate type of assessment for promotion, retention decisions for 3rd grade.
>
> There were observations that classroom teachers had done.
>
> There were computer print-outs from like a database that Palm Beach County has that had like different scores on it for collecting the data from the Reading Running Record and the I-Ready scores.
>
> There were private evaluations in there that the parents had had done.
>
> And there were psychoeducational evaluations that were also done by the School District.
>
> That's what I reviewed in there.
>
> And then I also looked at student progression plans. You know, they change regularly in Palm Beach County, so I had to pull up the one that was for the current -- for the year that [**] was in a particular grade level. I made sure I was comparing accurately what was expected for that particular time in School Board policy compared to where [redacted] was. I also pulled up reading Decision Trees that were used in Palm Beach County to see like what types of recommendations or guidelines were suggested for schools to see where [**] placed at that time.

And that's what I reviewed.

44. [redacted] immediately noticed some obvious red flags in the records. [redacted] explained:

> Then I looked at the private evaluation from that year [redacted] grade], which although it was intended to be a gifted evaluation, it really struck me that [redacted] had a very low working memory and very, very low scores in phonological awareness. Those are key indicators of dyslexia, but they are also key factors in being able to read. And almost certainly when students struggle in those areas, we can with a high probability predict that they are going to have a reading deficit.
>
> So at this point this would have been when I would say refer this to School Based Team, really closely monitor this student because [redacted] at risk for reading failure. And we know we can prevent that, right? We know we don't have to have a student that significantly behind because we know what to do for kids with dyslexia. So that would have been what I recommended at that point [redacted] grade].
>
> And so [redacted] continued to struggle.
>
> And then in [redacted] grade that -- oh, I'm sorry, I forgot to mention, the parents started tutoring because the school wasn't providing any actual reading intervention.
>
> And the parents knew because they are well educated and they have gone through this before –
>
> * * *
>
> And even with that [redacted] was still a year below grade level in basic reading skills. [redacted] never was reaching grade level standard, even with all the outside help that the parents were providing. And I noticed that that gap was actually widening over time.

* * *

[redacted] was always below grade standard [while attending public school] according to the District benchmarking assessments. [redacted] never reached grade level standard, despite the fact that [redacted] getting four days a week from specialized instruction from [redacted] parents, [redacted] was still a year below grade level.

* * *

[redacted] consistently scored low in relation to [redacted] peers in the basic building blocks of reading, so in what we call phonemic awareness, which is your ability to hear and interpret speech sounds.

In phonics, which is your ability to sound out words. And in [redacted] ability to spell. [redacted] across all of [redacted] testing, private and public school testing, [redacted] scored low in those areas, which are, you know, your basic building blocks of reading.

* * *

[redacted] scored low in working memory, phonological awareness and rapid naming. So when a student scores low in those three areas, we call that in dyslexia research or literature, we call that a triple deficit. And so when a student scores low in all three of those areas, that is extremely concerning because the evidence that we have from the research on dyslexia is that if you do not immediately act and help that student, that they are not going to be able to learn to read proficiently.

That is extremely concerning to see a child with a triple deficit like that.

(Emphasis added)

45. [redacted] did not limit [redacted] review of the student's abilities or deficiencies to a records review, though. [redacted] also observed the student on two consecutive school days at [redacted], January [redacted] and [redacted], 2021. [redacted] observations are best captured in [redacted] detailed testimony:

> Q. Can you briefly summarize for the Court what you observed when you went to watch [**]?
>
> A. Yes, I observed [redacted] in – originally when I got there, [redacted] was in [redacted] science class and [redacted] was working on an assignment orally having to do with atoms and molecules. I remember it struck me as very... how should I say? [redacted] was incredibly brilliant in [redacted] oral answers. It struck me because I remember reflecting that [redacted] was answering like it was high school AP biology class. I was so impressed with how smart [redacted] was and how inquisitive [redacted] was, how engaged [redacted] was in the activity and incredibly focused on the activity. So that struck me.
>
> And then we moved to [redacted] English language arts class where [redacted] needed to do some writing and the difference in the student was pretty obvious to me. [redacted] really, really struggled with writing. Even things at a basic, basic level. [redacted] was trying to read simple three-letter words, trying to write simple three-letter words that should have been mastered in kindergarten and [redacted] was struggling to accomplish that. [redacted] was incredibly focused. I sat next to [redacted] and talked to [redacted] a little bit about what strategies [redacted] was trying to use while [redacted] was trying to read and, you know, [redacted] had been taught some strategies, but [redacted] was really struggling with like simple short vowels sound which are like a, e, i, ah, o (phonetics). Those are things that are primarily mastered in like pre-K or kindergarten. And [redacted] really wasn't even able to with consistency tell me the sounds of those short vowel sounds, even like in a one-on-one setting where [redacted] was incredibly focused on me.

So I tried to like coach [redacted] through some of that writing and it was very, very laborious for [redacted]. Very difficult. Definitely not in agreement with what I saw from [redacted] orally in that science class, right?

There was a great discrepancy between what [redacted] was doing when [redacted] was just talking to someone and being able to express [redacted] great knowledge base as opposed to when actually [redacted] had to do a task that involved reading and writing. It was almost like a different student, if you will.

And then I also observed [redacted] in [redacted] one-on-one instruction that [redacted] gets at her [redacted] school in an Orton-Gillingham program, which is a very specialized program for students with dyslexia to help teach them how to read. So [redacted] was one-on- one in that setting, you know, right in front of the teacher, you know, no distraction whatsoever. Definitely trying [redacted] best. And, again, I saw [redacted] struggle with basic sounds of letters, like consonant sounds, like the letter B or the letter C. These are things that kids are supposed to master in kindergarten and [redacted] was struggling to read those with consistency, even with visual supports from the teacher, even with error correction from the teacher. [redacted] still hadn't mastered those things.

And those standards in the State of Florida are all things that are supposed to be mastered in kindergarten. And some of them were 1st grade standards, but at this point [**] was in [redacted] -- beyond [redacted] grade, [redacted] was a [redacted] grader when I observed her. So [redacted] a [redacted] grader that was still consistently struggling with those simple tasks that are included in the Florida Standards in kindergarten. So, you know, to me, that's, you know, typical of a gifted student with dyslexia. That's typically what we see from them is that orally they are able to complete a lot of tasks that are even sometimes above grade level, but they struggle with those basic skills.

> I mean, the good news of that is that you can remediate that with appropriate intervention and so we can correct that and bring those written expression and reading skills up to where [redacted] language skills are if we provide that appropriate instruction for them.
>
> (Emphasis added)

46. Not surprisingly, [redacted] decided to help the family. [redacted] prepared a written report, which included some of [redacted] observations. [redacted] noted that during an independent writing activity, the student requested an instructional aide. Initially, the student spelled "SHELF" as "SELF" and the teacher corrected this by having the student sound out what [redacted] had written. The student was able to self-correct this error. While reading from an R-controlled nonsense word reading list, the student had difficulty with the word "TIRGE." The student required several error-corrections to read the words with the R-controlled and soft G sound. During an activity called "vowel tower," the student incorrectly read several words with a long vowel sound.

47. [redacted] also wrote that a review of the student's file indicated a family history of dyslexia and early struggles with foundational skills. Both of these facts should have been clear indicators to the school that the student was at-risk for dyslexia. [redacted] opined that the school failed to provide appropriate interventions to address the student's phonological processing deficit, failed in its child find obligation since the end of the student's [redacted] grade, and that the school staff inappropriately focused on behavior issues rather than the student's reading issues. [redacted] opined that the LLI program was inappropriate and could actually be harmful for this student, given [redacted] specific needs.

48. [redacted] made written recommendations, and was careful to only recommend programs and interventions that [redacted] knew were regularly used in Palm Beach County. [redacted] did not recommend that the student only receive

Orton-Gillingham interventions because [redacted] knew, from [redacted] years of experience with this school district, that they could implement an equally effective program for this student's needs, and they already possessed the knowledge and skill set to address this student's needs. Stated another way, the parents were not advocating for unreasonable interventions. The parents were simply asking for the school to provide reading interventions equivalent to those that they had been providing out of school for years.

49. In late January, [redacted] reported some raw scores from standardized assessments given to the student. The student performed at a [redacted] grade equivalence on the Woodcock-Johnson Word Attack; a [redacted] grade equivalence (or [redacted] percentile) on the TWS-5; a [redacted] grade equivalence on the DSPT; and the Gray Oral Reading Test (GORT) revealed scores of [redacted] percentile in rate, [redacted] percentile in accuracy, [redacted] percentile in fluency, and [redacted] percentile in comprehension.

50. In February of 2021, [redacted] issued a second report card. The student had earned [redacted]'s in science and social studies, and [redacted]'s in literature and math. The student was noted to rush through assignments in order to move on to art projects, [redacted] took on leadership roles, and [redacted] needed to develop self-advocacy skills. As to writing, the school reported that the student's B and D reversals were still profound, and [redacted] also reversed J and F.

51. [redacted] issued an addendum to [redacted] previous report on March [redacted], 2021. [redacted] summarized that differences in test scores could indicate multiple conclusions: the student is dyslexic; the student has dysgraphia or poor handwriting; the student was receiving limited instruction in school; the student is unmotivated, disinterested, or fears school; the student has a visual impairment; or the student had experienced loss of literacy skills due to a traumatic brain injury.

52. In April of 2021, [redacted] was once again asked to review the evaluations and records that had accumulated since [redacted] prior review. [redacted]

found that on one assessment, named the TOWRE, the student scored in the [redacted] percentile for word reading and in the [redacted] percentile in non-word reading, which indicated a significant difficulty with accurate and fluent word reading. [redacted] also noted that on another assessment, the TILLS, the student scored in the [redacted] percentile for phonological awareness skills and in the [redacted] percentile for sound and word skills. These scores also indicated a significant difficulty with phonological awareness skills. Ultimately, [redacted], who testified at the hearing, opined that the student was dyslexic and also had dysgraphia.

53. [redacted] agreed to accompany the parents to the eligibility meeting that was held over the course of several dates starting in April and ending in June 2021. [redacted] first step, though, before attending the meetings, was to call [redacted], [redacted] prior boss and the School Board's [redacted]. [redacted] told [redacted] that the School Board needed to take a look at this student's file, because [redacted] was in need of reading interventions and should have already been found eligible for ESE services. [redacted] decision to first call [redacted] was an act of goodwill and a professional courtesy to the School Board, which had employed her for [redacted] decades, and had trusted [redacted] judgment on all ESE matters relating to reading.

54. [redacted] responded by saying that [redacted] could not interfere with the decisions made by the student's IEP team.

55. [redacted] agreed to attend the eligibility meetings because [redacted] thought [redacted] could collaborate with the school team to finally find the student eligible for ESE services and create an IEP that addressed the student's reading needs. But [redacted] was terribly disappointed in what [redacted] witnessed. The IEP team included roughly 16 school employees; and [redacted], the School Board's [redacted]. Here again, it's best to capture [redacted] recollection with [redacted] own words:

Q. Did those sixteen people -- did the majority of those people provide that expertise to the IEP team?

A. No. Most of them didn't speak at all. There was just a couple people that spoke. Mostly [redacted] was speaking for most of the meeting, the person who evaluated shared the evaluation and then we had like a compliance person who spoke. I did recognize some people who were reading people, but we...they never spoke during the meeting. I found that to be odd since we were talking about reading and that's what the parents were concerned about. You would hope that the reading people from the District would share some input.

Q. How do you believe -- or were the parents able to participate at this meeting?

A. Yeah, they were able to participate.

Q. Okay. Are you aware of the fact that after the meeting the parents submitted their own meeting notes?

A. They did.

Q. Do you know why that happened?

A. They did that because the notes that were taken by the District either didn't include their input or so drastically skewed their input that it didn't resemble what their input actually was.

Q. And do you recall who took the notes at that first meeting that you attended April [redacted], 2021?

A. Ms. -- [redacted] took the notes.

Q. Anything else you remember about the April [redacted], 2021 meeting that you would like to share with the Court?

A. I mean, I can share my opinion on it.
Q. Oh, okay. Then do so.

A. So from my understanding, IEP meetings are supposed to be a collaboration where parental input is seriously considered and included in decision making. It was really disturbing to me that what I witnessed was the 10th largest School District in the nation wielding power over parents that were trying to advocate for their child. And, in my opinion, the general sense of the meeting was we're gonna take what they are gonna give us and if you don't like it, you can take it to due process.

And that remark was actually made several times during that meeting, you can bring it up at due process. And to me, that tells me that it had already been determined, you know, what was gonna happen and the parental input really didn't matter and wasn't really considered.

* * *

Q. Do you have an opinion about whether there was anything the parents could have brought or any person the parents could have brought to the meeting that would have changed the dynamic?

A. No, because I brought all of the evidence that in my experience had previously been used to qualify students for SLD [Specific Learning Disability] and get them services. I mean, I brought everything that I thought the District would recognize and used terminology that I thought they would recognize.

I don't think that there was ever an option that [redacted] was going to be provided reading services from the start of the very first meeting that I attended.

Q. Do you believe that decision had been decided by the District before you even started attending meetings?

A. It's my opinion, yes.

Q. Did you see any evidence in the documentation or in the meeting notes that... well, did the parents often provide their own meeting notes?

A. I think every single one that I attended they wrote notes afterwards.

Q. Is that typical or normal practice in your [redacted] years with the School District?

A. I think normally at the end, like the notes are read out loud and a few corrections are made. But I don't know that I ever remember parents like completely providing their own notes. That isn't something I recall having happened.

(Emphasis added)

56. [redacted] also testified that, based on [redacted] vast experience with this School Board, [redacted] understood why the majority of the school staff remained quiet during the meetings, and "voted" to not provide reading interventions. [redacted] explained that if the district level staff had already decided that no reading services would be placed in the IEP, the school staff would never "vote" to place them on the IEP.

57. [redacted] also witnessed something that troubled [redacted] greatly, which occurred before the parents and their attorney had logged into the virtual meeting: [redacted] showed the team members, while [redacted] was already logged on (but likely not noticed), a t-shirt that [redacted] had made, which read: "I read the manual too"—it was apparently a reference to a dispute between the student's [redacted] and the school based evaluators regarding the manuals for the various assessments used with the student. According to [redacted], the rest of the school staff laughed, and no one told [redacted] that it was inappropriate. [redacted] felt that this action minimized the importance of the parental input and mocked the parents. After the meeting,

[redacted] told the parents what had occurred. Neither party called [redacted] as a witness during the hearing.

58. Curiously, [redacted] and [redacted], who had worked on reading the most with the student, were not in attendance at any of the multiple meetings.

59. The student's [redacted] testified and corroborated all of [redacted] recollections regarding the multiple eligibility meetings.[3] They are both found credible, and to the extent that their testimony in any fashion is contradicted by any other fact witness as to the nature and dynamics of these meetings, [redacted] and the [redacted] are found more credible and their testimony is more persuasive, given the record as a whole.

60. [redacted] intended to charge for [redacted] expert services rendered to the family, but after attending the eligibility meetings, [redacted] opted to do [redacted] work for free, because [redacted] felt strongly that [redacted] needed to be on the side of "right," and felt morally obligated to help the student without charging the family.

61. The eligibility team eventually found the student eligible for ESE services under the Other Health Impairment (OHI) category, but no reading goals or interventions were placed in the IEP, despite the parents repeated requests that reading goals and services be included.

62. The more persuasive evidence in this record as a whole established that the IEP developed in June of 2021 was not properly designed to address the student's reading needs, and that it was predetermined.

63. As to the student's time at [redacted], the record contains detailed report cards, tutoring records, and records of observations. Petitioner also presented the testimony of [redacted], who gave details about the school and how it works, and who credibly testified about the student's weaknesses and deficiencies. The June 2021 notes from The [redacted]

[3] The [redacted] also recounted an ill-advised analogy made by [redacted], which understandably offended the [redacted]. [redacted] analogized ESE eligibility to getting a ticket to Disney World. Once a student is found eligible, regardless of the eligibility category, the student could ride Space Mountain or the Dumbo ride.

indicate that the student's phonic skills had gotten stronger; [redacted] demonstrated a strength in three-dimensional thinking; the student's spelling issues are directly related to [redacted] continued difficulty with phonological awareness, specifically [redacted] difficulty perceiving the separate sounds within words; [redacted] improvement in phonics translated to [redacted] spelling skills; and [redacted] scores on spelling assessments remained low due to [redacted] difficulties with sight words and homonyms.

64. The student once again attended [redacted] the summer of 2021, and a progress report dated July [redacted], 2021, reflected that the student was reading and comprehending grade level text; that [redacted] read fairly fluently, and that [redacted] needed to improve [redacted] written expression. The student tended to skip words and parts of sentences while reading, which hindered [redacted] comprehension. In [redacted] writing, [redacted] had difficulty with spelling. But [redacted] did learn how to spell larger words, and was making progress.

65. After the IEP was created, the family hired [redacted], a doctorate-level educational consultant who was tendered and accepted, over the School Board's objection, as an expert in dyslexia, reading, and literacy. [redacted] was tasked with a records review, and was specifically asked to review the IEP created for the student. [redacted] also reviewed the school district evaluations and the private evaluations.

66. [redacted] testified that the IEP did not address the student's reading needs, which were reflected in all of the school evaluations and the private evaluations. [redacted] echoed and corroborated all of [redacted] detailed and thorough analysis. [redacted] highlighted the huge flaw in the IEP: it had an incredibly long description of all the student's well-documented reading deficiencies, but provided no goals and interventions to address those deficiencies.

67. The School Board offered the testimony of [redacted], an expert in psychological and educational assessments, as well as psychometric measurements. [redacted] conducted a very thorough records review, and like

[redacted] and [redacted], never actually evaluated the student or observed the student. [redacted] opined that in [redacted] grade, the student needed to improve [redacted] decoding skills, by reinforcing phonics rules. [redacted] did, in his report, find that the student had notable low scores in letter-naming facility, object-naming facility, orthographic processing, writing fluency, spelling, and rapid symbolic naming. On balance, though, [redacted] opined that, based solely on the standardized assessments that [redacted] reviewed, the student was not in need of ESE services for reading because all of [redacted] composite scores revealed average reading skills. However, [redacted] also emphasized that formalized assessments only provide one piece of the puzzle when looking at any student's potential disability; that is, the entire universe of data, including classroom observations, information on how the student functions at school, and comparing the student to state standards for grade level performance, should all be considered. [redacted] opinion regarding the student's need for ESE services is not consistent with the greater weight of the record, which does include all the remaining pieces of the puzzle, those pieces [redacted] described as essential in assessing a student's needs.

CONCLUSIONS OF LAW

68. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 1003.57(1)(a) and 1003.5715(5), Fla. Stat., and Fla. Admin. Code R. 6A-6.03311(9)(u).

69. Petitioner bears the burden of proof with respect to each of the issues raised herein. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

70. The School Board is a local education authority (LEA) as defined under 20 U.S.C. § 1401(19)(A). By virtue of receipt of federal funding, the School Board is required to comply with certain provisions of the IDEA, 20 U.S.C. § 1401, *et seq*.

71. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully

realized. *Bd. of Educ. 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 FAPE. 20 U.S.C. § 1415(b)(1), (b)(3), (b)(6).

72. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a student with FAPE. As an initial matter, it is necessary to examine whether the school district has complied with the IDEA's procedural requirements. *Rowley*, 458 U.S. at 206-07. A procedural error does not automatically result in a denial of FAPE. *See G.C. v. Muscogee Cnty. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the students 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).

73. In this case, Petitioner's Complaint contains two alleged procedural violations: that the School Board failed in its child find obligation and that the parents were deprived of meaningful participation in the creation of the IEPs, because the School Board predetermined the IEP.

74. The first and arguably most important procedural obligation, logically, is to identify and evaluate students for IDEA eligibility, most often referred to as the School Board's child find obligation. Child find "refers to a school's obligation, under relevant federal law, to identify students with disabilities who require accommodations or special education services proactively rather than waiting around for a child's parents to confront them with evidence of this need." *Culley v. Cumberland Valley Sch. Dist.*, 758 Fed. Appx. 301, 306 (3d Cir. 2018).

75. The IDEA sets forth the child find obligation as follows:

> All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).

76. In compliance with the child find mandate, Florida Administrative Code Rule 6A-6.0331 sets forth the school district's responsibilities regarding students suspected of having a disability. This rule provides that school districts have the responsibility to ensure that students suspected of having a disability are subject to general education intervention procedures. Additionally, they must ensure that all students with disabilities and who are in need of ESE are identified, located, and evaluated, and FAPE is made available to them if it is determined that the student meets the eligibility criteria.

77. As an initial matter, the school district has the "responsibility to develop and implement a [multi-tiered system of support, or RTI], which integrates a continuum of academic and behavioral interventions for students who need additional support to succeed in the general education environment." Fla. Admin. Code R. 6A-6.0331(1).

78. The general education intervention requirements include parental involvement, observations of the student, review of existing data, vision and hearing screenings, and evidence-based interventions. Fla. Admin. Code R. 6A-6.0331(1)(a)-(e). Rule 6A-6.0331(1)(f) cautions, however, that nothing in

this section should be construed to either limit or create a right to FAPE or to delay appropriate evaluations of a student suspected of having a disability.

79. In *J.N. v. Jefferson County School District,* 12 F.4th 1355 (11th Cir. 2021), the Eleventh Circuit provided some guidance on the child find obligation, explaining that a parent must, after establishing a child find violation, also put forth evidence that the student was owed ESE services for the time that lapsed before finally receiving an IEP. ("So to succeed in her claim, Molly's mother needs to show more than a child-find violation. She needs to show that Molly's education 'would have been different but for the procedural violation.'" *Id.* at 1366; *quoting Leggett v. District of Columbia*, 793 F.3d 59 at 68.

80. Here, the parents submitted [redacted] evaluation in [redacted] grade, which identified a weakness in decoding. At the end of [redacted] grade, the classroom teacher expressed concern about the student's reading ability. The parents immediately began to provide Orton-Gillingham tutoring after school, and the school staff was aware of this. Next, in August of 2019, at the beginning of [redacted] grade, the parents provided [redacted] evaluation, which diagnosed the student with ADHD: a learning impairment in reading fluency, comprehension, and spelling; and mild dyslexia. At this point in time, as found by the Florida Department of Education and as explained by [redacted], the School Board should have suspected that the student was in need of ESE services to address [redacted] reading needs. It had in its possession two evaluations that had been approved through its out-of-system review process, teacher observations, knowledge of intensive one-on-one instruction by a trained dyslexia tutor addressing the student's reading difficulties, and it was aware that there was a family history of dyslexia.

81. The evidence demonstrated that the School Board failed in its child find obligation in August of 2019, as recognized by the State Department of Education. The evidence also demonstrated that this student required ESE services in reading from August 2019 to August 2021, when the Complaint

was filed. As detailed above, the student remained below grade level in reading, despite the fact that [redacted] had been receiving intensive one-on-one tutoring from a highly trained dyslexia tutor. The standardized testing and teacher and tutor observations were all consistent on this issue, from the entire time she attended public school, and up until the IEP was finally developed.

82. The second procedural violation alleged in the Complaint is that the School Board predetermined the IEP it eventually finalized.

83. In *R.L., S.L, individually and on behalf of O.L. v. Miami Dade County School Board*, 757 F.3d 1173 (11th Cir. 2014), the Eleventh Circuit addressed the issue of predetermination for the first time; finding that the school district had predetermined the student's placement when it foreclosed all discussion of the placement sought by the parents, relying heavily on the Sixth Circuit's decision in *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004) (finding predetermination where the state "did not have open minds and were not willing to consider" a particular service the parents thought the child needed to access his education). The Eleventh Circuit explained that predetermination occurs when the school district makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team. *R.L.*, 757 F.3d at 1188; *see also Deal*, 392 F.3d at 857-59. The school district cannot come into an IEP meeting with closed minds, having already decided material aspects of the child's IEP without parental input. *R.L.*, 757 F.3d at 1188, *see also N.L. v. Knox Cnty. Schs.*, 315 F.3d 688, 694-95 (6th Cir. 2003) (finding no predetermination where school district representatives "recognized that they were to come to the meeting with suggestions and open minds, not a required course of action").

84. This is not to say that school-based members of the IEP team may not have any preformed opinions about what is appropriate for a child's education. *R.L*, 757 F.3d at 1188. But any preformed opinion the school

district might have must not obstruct the parents' participation in the planning process. It is not enough, the Court explained, that the parents are present and given an opportunity to speak at an IEP meeting. *Id.*

85. The Court went on to explain that in order to avoid a finding of predetermination, there must be evidence that the school district has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child. *Id.* A school district can make this showing by, for example, evidence that it was receptive and responsive at all stages to the parents' position, even if it was ultimately rejected. *Id.* Those responses, though, should be meaningful responses that make it clear that the school district had an open mind about and actually considered the parents' concerns. *Id.* at 1189. This inquiry is inherently fact intensive, but should identify those cases where parental participation is meaningful and those cases where it is a mere formality. *Id.*

86. In this matter, the facts as detailed in the Findings of Fact above, as recounted by [redacted] and corroborated by the student's [redacted], make abundantly clear that the School Board predetermined the IEP. The School Board offered no persuasive evidence establishing that it had an open mind during the eligibility meetings; and, unfortunately, the more persuasive evidence established that the parental participation was nothing more than a mere formality.

87. This procedural violation resulted in a denial of FAPE because it significantly infringed upon the parent's ability to meaningfully participate in the creation of the IEP. At every turn, no matter what independent evidence the parents compiled, and by willfully turning a blind eye to the private intensive one-on-one Orton-Gillingham tutoring provided by the parents, the parents' concerns regarding their [redacted] undisputed dyslexia diagnosis were ultimately dismissed, or begrudgingly addressed. They were heard, and responded to, but those responses were not meaningful responses

that made it clear that the school staff had an open mind and could actually be swayed.

88. Petitioner also alleges a substantive violation; that is, that the IEP was flawed in its design and did not provide FAPE. 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).

89. 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. In *Endrew F. v. Douglas County School Board District RE-1,* 137 S. Ct. 988 (2017), the Supreme 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.*

90. The components of FAPE are recorded in an IEP, which, among other things, identifies the student's present levels of academic achievement and functional performance; establishes measurable annual goals; addresses the

services and accommodations to be provided to the student, and whether the student will attend mainstream classes; and specifies the measurement tools and periodic reports that will be used to evaluate the student's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F.,* 137 S. Ct. at 994 (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*, 458 U.S. at 181).

91. Most importantly, the IDEA provides that an IEP must be individualized to the student and include measurable annual goals and services designed to meet *each* of the educational needs that result from the child's disability. 20 U.S.C. § 1414(d)(1)(A)(i)(II); *Alex R. v. Forrestville 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 the student's disability, both academic and behavioral); *CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 642 (8th Cir. 2003)("We believe, as the district court did, that the student's IEP must be responsive to the student's specific disabilities").

92. Here, the IEP did properly identify the student's levels of performance and academic achievement, but it failed to address the student's specific reading deficiencies, established no measurable annual goals on reading, and was not tailored to meet [redacted] reading needs. Without the necessary reading services focused on [redacted] specific disability, the IEP was not designed to provide this student FAPE.

93. Because the School Board procedurally violated the IDEA by failing in its child find obligation, and by predetermining the IEP; and because the student was deprived of adequate reading services from August 2019 to August 2021, and was denied FAPE in the IEP eventually created, the student is entitled to appropriate remedies.

94. In that regard, if a district court or administrative hearing officer determines that a school district has violated the IDEA by denying the

student in question FAPE, then the court shall "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). In so doing, the court or administrative hearing officer has broad discretion. *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009)(observing that 20 U.S.C. § 1415(i)(2)(C)(iii) authorizes courts and hearing officers to award appropriate relief, notwithstanding the provision's silence with regard to hearing officers).

95. Such "appropriate" relief may include reimbursing parents for the cost of private replacement therapy; transportation expenses; credit card transaction fees and interest; and, in circumstances where a trained service provider is unavailable, reimbursement for the time a parent spent in providing therapy personally. *See Bucks Cnty. Dep't of Mental Health v. Pa.*, 379 F.3d 61, 63 (3d Cir. 2004)("[W]e hold that under the particular circumstances of this case, where a trained service provider was not available and the parent stepped in to learn and performed the duties of a trained service provider, reimbursing the parent for her time spent in providing therapy is 'appropriate' relief'"); *D.C. ex rel. E.B. v. N.Y.C. Dep't of Educ.*, 950 F. Supp. 2d 494, 516 (S.D.N.Y. 2013)(awarding reimbursement for transportation costs); *JP v. Cnty. Sch. Bd.*, 641 F. Supp. 2d 499, 506-07 (E.D. Va. 2009) (awarding parents a reasonable rate of interest to compensate them for tuition payments made on their credit cards, as well as credit card processing fees). Further, appropriate relief depends on equitable considerations, so that the ultimate award provides the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Reid v. Dist. of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005).

96. In addition, one type of relief that a court may provide is an award of compensatory education. *Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985) (*quoting* 20 U.S.C. § 1415(e)(2))

Compensatory education is an award "that simply reimburses a parent for the cost of obtaining educational services that ought to have been provided free." *Hall v. Knott Cnty. Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *see also 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).

97. Guided by the above stated principles, Petitioner is entitled to compensatory reading services, designed specifically for [redacted] reading needs, for the period between August 2019 and August 2021; and the School Board must reimburse the parents for all of the Orton-Gillingham tutoring they provided in that same time period.

98. In regard to reimbursement for private school tuition, the U.S. Supreme Court first recognized and laid the groundwork for the parent's right to private school tuition reimbursement in *Burlington School Committee v. Massachusetts Department of Education*, 556 IDELR 389 (U.S. 1985). The IDEA later codified the tuition reimbursement remedy expressed in *Burlington*. The IDEA provides, in relevant part:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

34 C.F.R. § 300.148 (c).

99. In *Forest Grove*, the United States Supreme Court ruled that a child's lack of previous enrollment in special education is not a categorical bar to tuition reimbursement; instead, it is one of the various equitable forms of relief that the IDEA calls for. 557 U.S. 233.

100. Notably, for purposes of the IDEA, a parental placement is appropriate if it is "reasonably calculated to enable the child to receive educational benefits." *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 488 (4th Cir. 2011). Significantly, the parental placement need not satisfy every last one of the child's special education needs. *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006). Rather, the placement must "provide only some element of the special education services missing from the public school alternative in order to qualify as reasonably calculated to enable the child to receive educational benefit." *Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 25 (1st Cir. 2007); *see also Frank G.*, 459 F.3d at 364 ("An appropriate private placement need not meet state education standards or requirements. For example, a private placement need not provide certified special education teachers or an IEP for the disabled student")(*internal citations and quotation marks omitted*); *Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999)(holding that the test for the parents' private placement is that it is appropriate, and not that it is perfect.).

101. Here, the parents placed the student at [redacted] after seeing that even with the Orton-Gillingham tutoring they were providing, their [redacted] was still finishing [redacted] grade below grade level in reading, and the school had yet to offer any reading services or find [redacted] eligible for any of the dyslexia programming they had within their school. There is no dispute as to the School Board being placed on notice of this parental decision, and no doubt that the staff knew why the parents made the decision.

102. The parents chose to send their [redacted] to a school that [redacted], a school tailored to meet [redacted] needs. The record evidence

demonstrated that [redacted] is an appropriate placement for this student until the School Board creates an IEP that addresses the student's specific reading needs, and provides interventions that are designed to address [redacted] dyslexia. Accordingly, the School Board must reimburse the parents for their tuition costs.

103. Finally, Petitioner also alleges that the procedural and substantive IDEA violations also constitute violations of Section 504; that is, the School Board discriminated against the student due to her disability, and also retaliated against the parents in response to their advocacy. In that regard, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides, in pertinent part, as follows:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C. § 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 . . .

104. 29 U.S.C. § 794(b)(2)(B) defines a "program or activity" to include a "local education agency . . . or other school system." 29 U.S.C. § 794(a) requires the head of each executive federal agency to promulgate such regulations as may be necessary to carry out its responsibilities under the nondiscrimination provisions of Section 504.

105. The U.S. Department of Education has promulgated regulations governing preschools, elementary schools, and secondary schools. 34 C.F.R. § 104, subpart D. The K-12 regulations are at 34 C.F.R. § 103.31-39. 34 C.F.R. § 104.33-.36 enlarge upon the specific provisions of Section 504 by substantially tracking the requirements of IDEA. 34 U.S.C. § 104.33 requires that School Boards provide FAPE to "each qualified handicapped person who is in the recipient's jurisdiction." For purposes of Section 504, an "appropriate education" is the provision of regular or special education and related aids

and services that (1) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (2) are based upon adherence to procedures that satisfy the requirements of 34 U.S.C. §§ 104.33(b)(1), 104.34, 104.35 and 104.36. An "appropriate education" can also be provided by implementing an IEP that is compliant with the IDEA. 34 C.F.R. § 104.33(b)(2).

106. Turning to the issue of discrimination, in order to establish a prima facie case under Section 504, Petitioner must prove that she: (1) had an actual or perceived disability; (2) qualified for participation in the subject program; (3) was discriminated against solely because of her disability; and (4) the relevant program is receiving federal financial assistance. *Moore v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1313 (M.D. Ala. 2013)(*citing L.M.P. v. Sch. Bd. of Broward Cnty.*, 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007)); *see also J.P.M. v. Palm Beach Cnty. Sch. Bd.*, 916 F. Supp. 2d 1314, 1320 (S.D. Fla. 2013).

107. Assuming Petitioner has established a prima facie case, the School Board must present a legitimate, nondiscriminatory reason for the adverse actions it took. *Lewellyn v. Sarasota Cnty. Sch. Bd.*, 2009 WL 5214983, at *10 (M.D. Fla. Dec. 29, 2009)(*citing Wascura v. City of S. Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001)). The 11th Circuit has stated that the respondent's burden, at this state, is "exceedingly light and easily established." *Id. quoting Perryman v. Johnson Prods. Co. Inc.*, 698 F.2d 1138, 1142 (11th Cir. 1983). Once the School Board has articulated a nondiscriminatory reason for the actions it took, Petitioner must show that the School Board's stated reason was pretextual. "Specifically, to discharge their burden, Plaintiffs must show that Defendant possessed a discriminatory intent or that the Defendant's espoused nondiscriminatory reason is a mere pretext for discrimination." *Id.; see also Daubert v. Lindsay Unified Sch. Dist.*, 760 F. 3d 982, 985 (9th Cir. 2014).

108. Here, the evidence demonstrated that Petitioner meets the first, second, and fourth factors for establishing a prima facie case. Thus, the remaining issue is whether the School Board discriminated against Petitioner solely by reason of her disability. As noted in *J.P.M.*, the definition of "intentional discrimination" in the Section 504 special education context is unclear. *J.P.M.*, 916 F. Supp. 2d at 1320 n.7. In *T.W. ex rel. Wilson v. School Board of Seminole County*, 610 F.3d 588, 604 (11th Cir. 2010), the 11th Circuit stated that it "has not decided whether to evaluate claims of intentional discrimination under Section 504 under a standard of deliberate indifference or a more stringent standard of discriminatory animus." However, in *Liese v. Indian River County Hospital District*, 701 F.3d 334, 345 (11th Cir. 2012), the 11th Circuit, in a case involving a Section 504 claim for compensatory damages, concluded that proof of discrimination requires a showing, by a preponderance of the evidence, that the School Board acted or failed to act with deliberate indifference. *Id.*

109. Under the deliberate indifference standard, Petitioner must prove that the School Board knew that harm to a federally protected right was substantially likely and that the School Board failed to act on that likelihood. *Id.* at 344. As discussed in *Liese*, "deliberate indifference plainly requires more than gross negligence," and "requires that the indifference be a 'deliberate choice.'" *Id.*

110. On balance, the school staff simply ignored the needs of this student, and was content to allow the parents to continue to provide the dyslexia interventions the school should have been providing for an entire school year. Then, when ordered to go through the eligibility process, the School Board doubled down and predetermined the services on the IEP, shutting out meaningful parental input. This record does demonstrate deliberate indifference, and Petitioner's claim of discrimination is sustained. As such, Petitioner is entitled to the relief set forth above.

111. On the issue of retaliation, because Petitioner has adduced no direct evidence of retaliatory animus, the claim must be analyzed under the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pursuant to that framework, the initial burden falls on Petitioner to establish a prima facie case of retaliation. *Id.* That requires Petitioner to prove that: (1) either she or her parents engaged in activity protected under Section 504; (2) the School Board took adverse action against her or her parents; and (3) there was a causal connection between the protected activity and the adverse action. *D.B. v. Esposito*, 675 F.3d 26, 41 (1st Cir. 2012).

112. Should Petitioner satisfy these elements, the burden of production shifts to the School Board to articulate a legitimate, non-retaliatory explanation for its conduct. *D.B.*, 675 F.3d at 42. If the School Board carries this burden of production, Petitioner must prove that the legitimate, nonretaliatory explanation is a pretext for unlawful retaliation. *Id.*

113. Here, the evidence demonstrated that the parents were engaged in protected activity when they filed a state complaint, and the School Board begrudgingly went through the eligibility process and then predetermined the IEP, denying the parents meaningful participation. But, temporally, the causal connection between the state complaint and the eligibility meeting is muddled by many interfering events. The COVID-19 pandemic created an unprecedented challenge for all schools and parents alike, the shifting to virtual evaluations delayed many of the evaluations, and the parents delayed the process as well with the request for protocols and manuals. Because the causal connection is not clear, the claim of retaliation is dismissed.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board did commit procedural and substantive violations of the IDEA and Section 504; and is

ORDERED to:

1. Provide compensatory education for the period of August 2019 to August 2021, in the form of reading interventions designed to meet the student's dyslexia needs;

2. Reimburse the parents for the reading tutoring they provided during the student's second grade year;

3. Reimburse the parents private tuition costs for the 2020-2021 and 2021-2022 school years;

4. Reconvene the IEP team, which shall include [redacted], and create an IEP that addresses the student's reading needs within 30 days of this Final Order; and

5. Allow the parents to continue the private placement at [redacted] for the 2022-2023 school year at public expense, if they so choose.

6. All other forms of requested relief are denied.

DONE AND ORDERED this 2nd day of August, 2022, in Tallahassee, Leon County, Florida.

JESSICA E. VARN
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of August, 2022.

COPIES FURNISHED:

Amanda W. Gay, Esquire
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399-0400

Michael Newsome, M.Ed.
Educational Program
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399-0400

Stephanie Langer, Esquire
Langer Law, P.A.
2990 Southwest 35th Avenue
Miami, Florida 33133

Laura E. Pincus, Esquire
School Board of Palm Beach County, Florida
3300 Forest Hill Boulevard, Suite C-331
West Palm Beach, Florida 33406

Anna Morales Christiansen, Esquire
Palm Beach County School District
3318 Forest Hill Boulevard C331
West Palm Beach, Florida 33406

Michael J. Burke, Superintendent
Palm Beach County School Board
3300 Forest Hill Boulevard, C-316
West Palm Beach, Florida 33406-5869

James Richmond
Acting General Counsel
Department of Education
Turlington Building, Suite 1544
325 West Gaines Street
Tallahassee, Florida 32399-0400

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).