STATE OF FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

Case No. 21-3019E

vs.

MANATEE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A due process hearing was held in this matter on February 7, 2022, in Bradenton, Florida, before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Petitioner, pro se
(Address of record)

For Respondent: Amy J. Pitsch, Esquire
Sniffen & Spellman

123 North Monroe Street

Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The issues for determination in this proceeding are whether Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §

1400 *et. seq.*, by removing Petitioner from his educational placement following a behavioral incident; inappropriately restraining and secluding Petitioner following the incident; failing to provide Petitioner's parent appropriate notice of the restraint and seclusion; and failing to implement Petitioner's positive behavior intervention plan (BIP).

PRELIMINARY STATEMENT

Respondent received Petitioner's Complaint for Due Process Hearing (Complaint) on October 1, 2021. The Complaint was forwarded to DOAH on October 4, 2021, and assigned to ALJ Diane Cleavinger. On October 22, 2021, ALJ Cleavinger issued a Notice of Hearing, scheduling the due process hearing for December 6, 2021. On October 25, 2021, the matter was transferred to the undersigned for all further proceedings.

On December 2, 2021, Respondent filed a motion to exclude witnesses and exhibits for failing to timely comply with the required disclosures set forth in Florida Administrative Code Rule 6A-6.03311(9)(v) and 34 C.F.R. § 300.512. On December 3, 2021, a telephonic motion hearing was conducted regarding the filing. During the telephonic conference, the undersigned advised Petitioner that Respondent's motion, if granted, would result in the prohibition of any evidence at hearing that had not been disclosed to Respondent at least five business days prior to the hearing. The undersigned further advised Petitioner that it was within the undersigned's discretion to grant a continuance of the non-disclosing party, if requested, thus allowing Petitioner the opportunity to comply with the disclosure rule. Petitioner made an *ore tenus* motion to continue the final hearing and stipulated to an extension of the timelines for conducting the hearing and the undersigned's final determination of this matter. Petitioner's motion was orally granted. On

December 3, 2021, the undersigned's Order Granting Continuance and Canceling Hearing was issued.

The parties were further ordered to confer and advise, in writing, no later than December 10, 2021, of several mutually agreeable dates in which the parties were available to reschedule the due process hearing. On December 21, 2021, an Order Requiring Response was issued. Said Order was necessitated by the fact that the parties had not filed a written response providing suggested dates for rescheduling the due process hearing. On January 3, 2022, the parties filed unilateral responses indicating that the parties were available on February 7, 2022.

Accordingly, the due process hearing was noticed for and conducted on February 7, 2022. At the conclusion of the hearing, the parties stipulated and agreed to submit proposed final orders within 21 days after the filing of the transcript and to the commitment of the undersigned's final order within 42 days after the filing of the transcript. The Transcript was filed on February 28, 2022. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

The parties timely filed proposed final orders, which were considered in preparing this Final Order. Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged misconduct and violations.

For stylistic convenience, the undersigned will use male pronouns in the Final Order when referring to Petitioner. The male pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. Petitioner is currently [redacted] years old.

2. At some point in time, prior to April 1, 2021, Petitioner had been found eligible for and had begun receiving exceptional student education (ESE) services under the eligibility category of Specific Learning Disability (SLD).

3. For the 2020-2021 school year, Petitioner was in [redacted] grade and attended School A, a public kindergarten through eighth grade school in Respondent's school district. His educational placement was in a regular classroom where he participated with nondisabled peers for 80 percent or more of the day.

4. On [redacted], Petitioner's individualized education program (IEP) team met for the purpose of conducting an annual review, and to discuss whether additional evaluations or reevaluations were necessary. The relevant and necessary members of the IEP team, including Petitioner's mother (via phone), attend the meeting.

5. At that time, it was noted that, as a result of his disability, Petitioner had needs to be addressed in the domains of curriculum and learning environment, as well as social or emotional behavior. It was documented in the IEP that Petitioner's behavior impeded his learning or the learning of others.

6. With respect to the domain of social or emotional behavior, the IEP documented the following:

> The strengths of the student related to this domain(s) are as follows:
>
> [Petitioner] has participated in accomplishing [his] work while on campus with minimal prompting. [He] enjoys whenever [he] has improved in [his] academic abilities and is acknowledged in a small group setting.
>
> Based on available data related to this domain, including formal and informal assessments,

> observations, work samples, and age-appropriate transition assessments (if appropriate), the student is able to:
>
> [Petitioner] does better when working with a trusted adult that [he] has build [sic] a rapport with. [He] struggles to remain on task when completing work independently in the classroom. [Petitioner] also needs assistance with keeping [himself] organized and on task.
>
> The student's exceptionality affects his/her involvement and progress in the general curriculum in this domain in the following ways:
>
> [Petitioner's] disability hinders [his] ability to stay focused in the classroom and control [his] impulsivities. [He] is working on filling out a behavior chart daily to work towards earning a reward.

7. The IEP documented one social or emotional annual goal and three short-term objectives or benchmarks. The goal provided that, "[Petitioner] will display productive school behavior on a daily basis with 80% frequency as measured by daily point system in 6 out of 7 opportunities." The IEP also documented the specially designed instruction Petitioner was to receive. Of relevance to the issues in this proceeding, Petitioner was to have a "[h]ighly structured behavior plan infused throughout the school day."

8. From the record evidence, it appears that, on or about [redacted], when Petitioner was in [redacted] grade, a functional behavioral assessment (FBA) was completed and a BIP adopted. The documented reasons for initiating an FBA were that Petitioner's behavioral difficulties persisted, despite consistently implementing behavioral management strategies, and because Petitioner's behavioral concerns were resulting in his exclusion from participation in activities and current settings with peers.

9. Pursuant to the FBA, the target behavior to be addressed was classroom disruption. It was hypothesized that this behavior occurs when

Petitioner was given directions for a non-preferred task or when he was not receiving peer attention. The FBA documented that the behavior manifested by Petitioner making disrespectful comments to adults, refusing to follow directives, refusing to complete assignments, and leaving the area without permission.

10. The FBA further noted, as a consequence of the behavior, that Petitioner would gain adult or peer attention and escape non-preferred tasks. For Petitioner, documented triggers preceding this unwanted behavior included not being able to wear his hoodie, and being presented with nonpreferred activities.

11. As noted, a BIP was developed with prevention strategies to help prevent the problem behavior from occurring and reduce the environmental circumstances that had been identified as increasing the likelihood of the problem behavior. Interventions were drafted to address escape and avoidance, power struggles, and attention. The BIP further provided procedures on how to implement the positive interventions.

12. As an "Additional Consideration," the BIP documented that, for Petitioner, there was a need for de-escalation strategies. Specifically, the strategies to be used for Petitioner were as follows:

> 1. Use nonthreatening non-verbals. The more a person loses control, the less they hear your words—and the more they react to your nonverbal communication. Be mindful of your gestures, facial expressions, movements, and tone of voice.
>
> 2. Avoid overreacting. Remain calm, rational, and professional. While you can't control the person's behavior, how you respond to their behavior will have a direct effect on whether the situation escalates or defuses.
>
> 3. Ignore challenging questions. Answering challenging questions often results in a power struggle. When a person challenges your authority, redirect their attention to the issue at hand.

> 4. Choose wisely what you insist upon. It's important to be thoughtful in deciding which rules are negotiable and which are not. For example, if a person doesn't want to shower in the morning, can you allow them to choose the time of day that feels best for them?

13. During the course of the [redacted], IEP meeting, the IEP team reviewed the existing FBA and BIP and agreed to maintain the BIP as previously written.

14. Petitioner returned, as a [redacted]grader, to School A for the 2021-2022 school year. On [redacted], Petitioner was involved in an incident which resulted in violations of the Student Code of Conduct and subsequent discipline.

15. Pursuant to the disciplinary student referral form, the incident was documented as follows:

> **Referral Comments**
> Student appeared to video a fight in the courtyard during transition to 7th period. All students reported to class as directed with the exception of [Petitioner], who proceeded to run throughout the courtyard causing more disruption to the middle grades. It was reported that student videoed both staff and students which is not allowed. When student was directed to the ISS room student refused both verbally and physically by running, again causing more disruption. Student was told to give [his] phone to staff and refused. Student was redirected to put [his] phone in an envelope while in the ISS room and again refused. Student got the phone out while in the ISS room, and was redirected.
>
> **Disciplinary Action**
> Parent was called for student pickup. Student did admit to videoing fight. Parent will be asked to verify video was deleted.
>
> *Information added [redacted]. Situation escalated to battery on [redacted] and [redacted] [redacted] Case [redacted].

> Parent informed school staff that mom did not want to return to [School A].

16. As indicated in the preceding paragraph, School A staff determined that Petitioner's initial conduct was a violation of School A's cellular phone use policy. School A's policy, which mirrors that of the Manatee County School District, provides in pertinent part, that:

> Cell phones are to be turned off and in student backpacks while they are on campus. ... Again, cell phones are not permitted to be turned on during the school day. If any electronic device is visible or in use during the day, it is an automatic confiscation and will need to be picked up by a parent.

17. It was further determined by School A staff that Petitioner's conduct resulted in a disruption of campus.

18. Unfortunately, Petitioner's conduct ultimately resulted in his arrest. [redacted] is a [redacted] for the Manatee County Sheriff's Office, and on the day of the incident, was assigned as a [redacted] to School A. [redacted] testimony concerning the arrest is as follows:

> Q. Did you arrest the student on [redacted]?
>
> A. Yes, I did.
>
> Q. Can you briefly explain why you arrested the student on that date?
>
> A. There was a disturbance in the courtyard. [He] allegedly recorded the incident on [his] cell phone. [He] was ultimately detained in the classroom. Actually, while I was responding, [he] pushed me a couple of times in the courtyard as I was trying to keep [him] from leaving the courtyard. Once in the classroom, [he] tried to leave the classroom, and [he] pushed me. I placed [him] in handcuffs at that point. [He] then tried to leave the classroom again, a second time, and [he] pushed [redacted], and at that point, [he] was under arrest.

19. Deputy [redacted] credibly testified that it was his sole decision to arrest Petitioner and that he was the only adult present with the authority to make an arrest. Petitioner was criminally charged with [redacted]. Petitioner's mother credibly testified that the criminal charges were ultimately dismissed.

20. Assistant Principal [redacted] credibly testified that she had enlisted the help of [redacted], Petitioner's ESE teacher (and one of Petitioner's trusted adults), to assist in obtaining the cellular phone from Petitioner. According to Petitioner's mother, "Teacher [redacted] is the teacher my baby went to and was the teacher who walked to the ISS room with [him] on [redacted]." Petitioner's mother further testified that, while Petitioner has a good relationship with [redacted], [redacted] was asked to leave the room. Based on the evidentiary presentation, the undersigned lacks sufficient information to make a finding of fact on whether [redacted] was requested to leave the room.

21. Petitioner's mother was contacted initially by phone concerning the incident and ultimately arrived on campus. By the time she arrived, Petitioner had been transported to a juvenile detention center. She was advised of the incident and subsequent arrest. Due to the evidentiary presentation, the undersigned cannot make a finding of fact as to whether Petitioner's mother was notified on [redacted], that Petitioner was mechanically restrained by the use of handcuffs.

22. Based on the cellular phone usage and disruption violations, Petitioner's scholastic discipline included two days of out-of-school suspension (OSS) to be followed by three days of in-school suspension (ISS). Principal [redacted] credibly testified that, as a result of the incident and subsequent arrest, Petitioner was not recommended for placement at an alternative education school as a result of the incident. She further credibly

testified that, from Respondent's perspective, there was no reason why Petitioner could not return to School A after serving the two-day OSS. Petitioner, however, did not return to School A until [redacted].

23. A Restraint and Seclusion Incident Report was prepared by School A staff. [redacted], is the date reflected at the top of said report. Petitioner's mother testified that she did not receive a copy of the report "on [redacted] and [redacted]."

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. *See* § 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u) and 6A-6.03312(7).

25. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Dep't of Educ., Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46724 (Aug. 14, 2006)(explaining that the parent bears the burden of proof in a proceeding challenging a school district's manifestation determination).

26. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *Phillip C. v. Jefferson Cnty. Bd. of Educ.*, 701 F.3d 691, 694 (11th. Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies (LEA), which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. *Doe v.*

Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

27. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

Disciplinary change in educational placement:

28. School districts have certain limitations on their ability to remove disabled children from their educational placement following a behavioral transgression. Specifically, the IDEA provides that where a school district intends to place a disabled child in an alternative educational setting for a period of more than 10 school days, it must first determine that the child's behavior was not a manifestation of his disability. 20 U.S.C. § 1415(k)(1)(C). Pursuant to the IDEA's implementing regulations, "[o]n the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504." 34 C.F.R. § 300.530(h).

29. The necessary inquiry is set forth in 34 C.F.R. § 300.530(e), as follows:

> Manifestation determination.
>
> (1) Within 10 school days of any decision to change the placement of a child with a disability

> because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—
>
> (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.
>
> (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.
>
> (3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

30. Generally, if the conduct is deemed a manifestation of the child's disability, the student must be returned to the educational placement from which he or she was removed. 34 C.F.R. § 300.530(f)(1). Additionally, if a BIP was not in place at the time of the misconduct, the school district is obligated to conduct an FBA, and implement a BIP for such child. *Id.*

31. If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the school district may apply the relevant disciplinary procedures in the same manner and duration as would be applied to children without disabilities. 34 C.F.R. § 300.530(c).

32. Here, the unrefuted evidence is that Petitioner was not subjected to a disciplinary change of his educational placement. To the contrary, following the behavioral incident, Petitioner's disciplinary sanction was that he was to serve two days in OSS, followed three days of ISS at School A. No competent evidence was presented to support a finding that Respondent placed or even sought to place Petitioner in an alternative educational setting.

33. Accordingly, Petitioner failed to meet his burden that Respondent inappropriately removed Petitioner from his educational placement following a behavioral incident or failed to follow the appropriate procedural safeguards for an educational change of placement.

Restraint or seclusion:

34. Petitioner's Complaint contends that he was improperly restrained and secluded, and that the same were not properly reported.

35. State law and regulations generally determine the legality of using aversives, such as restraint and seclusion. In Florida, the use of restraint and seclusion on students with disabilities is addressed in section 1003.573. The term "restraint" means "the use of a mechanical or physical restraint." § 1003.573(1)(c)(*1*). "Seclusion" is defined as "the involuntary confinement of a student in a room or area alone and preventing the student from leaving the room or area." § 1003.573(1)(e), Fla Stat. Seclusion does not include "time-out used as a behavior management technique intended to calm a student." *Id.*

36. This section further addresses limitations of seclusion and restraint as follows:

> (2) Seclusion. — Each school district shall prohibit *school personnel* from using seclusion.
>
> (3) Restraint. —
>
> (a) Authorized *school personnel* may use restraint only when all positive behavior interventions and supports have been exhausted. Restraint may be used only when there is an imminent risk of serious injury and shall be

> discontinued as soon as the threat posed by the dangerous behavior has dissipated. Techniques or devices such as straightjackets, zip ties, handcuffs, or tie downs may not be used in ways that may obstruct or restrict breathing or blood flow or that place a student in a facedown position with the student's hands restrained behind the student's back. Restraint techniques may not be used to inflict pain to induce compliance.
>
> (b) Notwithstanding the authority provided in s. 1003.32, restraint shall be used only to protect the safety of students, school personnel, or others and may not be used for student discipline or to correct student noncompliance.
>
> (c) The degree of force applied during physical restraint must be only that degree of force necessary to protect the student or others from imminent risk of serious injury.

Id. (emphasis added).

37. Florida Administrative Code Rule 6A-6.03312(11) addresses the authority of law enforcement with respect to students with disabilities and provides as follows:

> Nothing in this rule prohibits a school district from reporting a crime committed by a student with a disability to appropriate authorities or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a student with a disability.

See also 20 U.S.C. § 1415(k)(6) and 34 C.F.R. § 300.535(a).

38. Pursuant to section 1006.12, each district school board and school district superintendent is required to partner with law enforcement agencies or security agencies to establish or assign one or more safe-school officers at each school facility within the district. An SRO is a "safe-school officer." § 1006.12(1), Fla Stat. [redacted], an SRO, is not one of Respondent's

employees, but rather, an employee of a law enforcement agency—here, the Manatee County Sheriff's Office. § 1006.12(1)(a), Fla. Stat.

39. It is undisputed that, on September 22, 2021, Petitioner was restrained by [redacted] via a mechanical restraint (handcuffs). No evidence was presented to establish that any school personnel improperly restrained or secluded Petitioner following the subject incident or at any other time. Accordingly, Petitioner failed to present sufficient evidence to establish that Respondent violated section 1003.573.

Restraint documentation and reporting:

40. Section 1003.573 also imposes upon a school certain documentation and reporting requirements. Schools are directed to prepare an incident report within 24 hours after a student is released from restraint. § 1003.573(7)(a), Fla Stat. The completed incident report must be provided to the parent or guardian by mail within three school days after a student was restrained. § 1003.573(7)(d). Additionally, the school is required to obtain, and keep in its records, the parent's or guardian's signed acknowledgement that he or she received a copy of the incident report. *Id.*

41. Schools are also required to notify the parent or guardian of a student each time restraint is used. The notification is required to be in writing and provided before the end of the school day on which the restraint occurs. § 1003.573(7)(c), Fla. Stat. Reasonable efforts must be taken by the school to notify the parent or guardian by telephone or e-mail, or both, and the efforts must be documented. *Id.* Additionally, the school is required to obtain, and keep in its records, the parent's or guardian's signed acknowledgement that he or she was notified of his or her child's restraint. *Id.*

42. Here, Respondent was obligated to provide Petitioner with a completed incident report by mail within three school days after [redacted]. The third school day would have been [redacted]. Petitioner's mother presented unrefuted evidence that she did not receive a copy of the incident report on [redacted] or [redacted], [redacted]. Based on the

evidentiary presentation, however, the undersigned cannot discern from the record when Petitioner received the incident report.

43. The evidence establishes that Respondent used reasonable efforts to notify Petitioner via phone and in person of the subject incident and arrest. The undersigned, however, cannot discern from the evidentiary record whether Respondent did or did not provide notification to Petitioner's mother, in writing, on [redacted], that Petitioner was restrained by [redacted]. Accordingly, Petitioner failed to present sufficient evidence to support a conclusion that Respondent violated its documentation and reporting obligations.

Implementation of BIP:

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

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

20 U.S.C. § 1401(9).

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

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

20 U.S.C. § 1401(29).

46. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and

functional performance"; establishes measurable annual goals; addresses the services and accommodations to be provided to the child, and whether the child will attend mainstream classes; and specifies the measurement tools and periodic reports that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i). "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017)(quoting *Honig v. Doe*, 484 U.S. 305, 311 (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.).

47. The IDEA further provides that, in developing each child's IEP, the IEP team must, "[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).

48. Petitioner's Complaint alleges that Petitioner has a BIP; however, "[t]he teacher who knows how to implement my [child]'s IEP was ordered to get out of the room by the principal who does not know how to implement my [child]'s behavior plan." Petitioner's Complaint further alleges that at the [redacted] IEP meeting, "there was no data taken the past school year on how [my child's] behavior plan was being implemented and [my child's] progress and/or lack of progress was being monitored."

49. In *L.J. v. School Board of Broward County*, 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit Court of Appeals confronted, for the first time, the standard for claimants to prevail in a "failure-to-implement case." The court concluded that "a material deviation from the plan violates the [IDEA]." *Id.* at 1206. The *L.J.* court expanded upon this conclusion as follows:

> Confronting this issue for the first time ourselves, we concluded that to prevail in a failure-toimplement case, a plaintiff must demonstrate that the school has materially failed to implement a child's IEP. And to do that, the plaintiff must prove more than a minor or technical gap between the plan and reality; de minimis shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child's IEP.

Id. at 1211.

50. While declining to map out every detail of the implementation standard, the court did "lay down a few principles to guide the analysis." *Id*. at 1214. To begin, the court provided that the focus in implementation cases should be on "the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld." *Id*. (external citations omitted). "The task for reviewing courts is to compare the services that are actually delivered to the services described in the IEP itself." In turn, "courts must consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole." *Id*.

51. Additionally, the *L.J.* court noted that the analysis must consider implementation as a whole:

> We also note that courts should consider implementation as a whole in light of the IEP's overall goals. That means that reviewing courts must consider the cumulative impact of multiple implementation failures when those failures, though minor in isolation, conspire to amount to something more. In an implementation case, the question is not whether the school has materially failed to implement an individual provision in isolation, but rather whether the school has materially failed to implement the IEP as a whole.

Id. at 1215.

52. With respect to Petitioner's allegation that [redacted], Petitioner's ESE teacher, was ordered to leave the room during the subject incident, Petitioner has failed to present sufficient evidence to support this contention. Even assuming, for the sake of argument, that [redacted] had been requested to leave the room, the same would fail to rise to the level of a material deviation from the plan which resulted in a material failure to implement the IEP as a whole.

53. Petitioner appears to contend that Respondent failed to obtain and present data on Petitioner's behavioral progress and BIP implementation at the [redacted] IEP meeting, and, therefore, the BIP was not implemented. Succinctly, Petitioner failed to present sufficient evidence to establish a violation of the IDEA. Indeed, outside of Petitioner's bald allegation, Petitioner failed to present sufficient evidence to establish what aspects of the BIP Respondent failed to implement or when the alleged failures occurred. Accordingly, Petitioner failed to satisfy his burden of proof.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioners failed to satisfy his burden of proof with respect to the claims asserted in Petitioner's Complaint. Petitioner's Complaint is, therefore, denied in all aspects.

DONE AND ORDERED this 6th day of April, 2022, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the Division of Administrative Hearings this 6th day of April, 2022.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

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

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