STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 22-0406E

HENDRY COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final due process hearing was conducted via Zoom conference on April 1, 2022, before Administrative Law Judge (ALJ) Todd P. Resavage of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Molly Lauren Shaddock, Esquire
Sniffen and Spellman
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STATEMENT OF THE ISSUE

Whether, as alleged, Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et. seq.*, by determining that Petitioner was not eligible for participation in the Access Points to Next General Sunshine State Standards (Access Points) curriculum.

PRELIMINARY STATEMENT

Respondent received Petitioner's Request for Due Process Hearing (Complaint) on February 4, 2022. Respondent forwarded the Complaint to DOAH on February 8, 2022, and the matter was assigned to the undersigned.

For stylistic convenience, the undersigned will use male pronouns in this Final Order when referring to Petitioner. The male pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender. The factual allegations of Petitioner's Complaint are set forth in full, verbatim, as follows:

> [Petitioner] is a child with silent seizures and a traumatic brain injury. [He] has been in main stream class and is fail[ing] because [he] can not maintain the information due to [he] has issues with retaining information due to memory. I have fought with this school to put [him] in access points and the iep team refuses to saying [his] iq does not qualify [him]. How ever in my research it state that a child who scored a level one or lower on fsa scores and a child with a severe cognitive disorder out does the iq. The iep state that a letter from a doctor dont mean anything and they are not using the evals and fsa score they are only using his iq.
>
> Iq score 77/fsa reading math level 1/nwea (math 181 body and 186 moy and equi level 1 9 percentile) (ela 177 level 1 12 percentile).

Petitioner's Complaint sets forth the following proposed remedy, resolution, or solution: "access point class so he can learn in a slow paced environment so he can maintain information on a repetitive classes and not continue to fall and be beat down."

On February 21, 2022, the due process hearing was scheduled for April 1, 2022. On the same date, Respondent filed its Motion to Dismiss Petitioner's Due Process Request, Notice of Insufficiency, and Memorandum of Law

(Motion). An Order Denying Motion to Dismiss and Order of Sufficiency was entered by the undersigned on February 22, 2022.

The hearing proceeded, as scheduled, on April 1, 2022. Upon the conclusion of the hearing, the parties agreed to the submission of proposed final orders within four weeks after the filing of the transcript at DOAH and the issuance of the undersigned's final order within four weeks after the parties' proposed final order submissions.

The hearing Transcript was filed on May 9, 2022. The identity of the witnesses and exhibits and rulings regarding each are as set forth in the Transcript. Both parties filed proposed final orders, which have been considered in the preparation of this Final Order.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violation.

FINDINGS OF FACT

1. Petitioner is currently [redacted] years old and resides in [redacted] County, Florida.

2. During the 2020-2021 school year, Petitioner was a [redacted]-grade student attending the [redacted]. Some time prior to January 20, 2021, Petitioner had been evaluated and determined to be eligible for exceptional student education (ESE) services under the eligibility category of Speech Impairment (SI), and an individualized education program (IEP) had been designed to address his educational needs.

3. On January 20, 2021, an IEP meeting was conducted. The purpose of the meeting was to conduct a review of his previously drafted IEP, review recent evaluations, and to determine whether he was eligible for additional ESE categories.

4. Petitioner's mother set forth several concerns during the meeting. Those concerns are documented in the January 20, 2021, IEP as follows:

> [Petitioner] has a hard time remembering what happens in school. [He] gets tired very quickly and has a hard time looking at the screen for long periods of time due to [his] seizures and TBI [Traumatic Brain Injury]. [His] parents are concerned about [his] ability to remember things like spelling words, [his] reading comprehension, and [his] ability to do math on [his] own. They would like for [him] to be able to remember and maintain information.
>
> According to a statement provided by [his] physician [Petitioner] has a medical diagnosis of seizures, learning delays, history of traumatic brain injury, ADHD [Attention-deficit/hyperactivity Disorder], mood instability, and insomnia. [He] is currently taking medication.

5. During this meeting, the IEP team considered numerous evaluations that had been previously conducted. Among the many evaluations reviewed was the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V). The IEP documented that pursuant to the results of the WISC-V, obtained on April 3, 2020, Petitioner had obtained a full-scale intelligent quotience (IQ) of 77, placing Petitioner in the sixth percentile. Petitioner's IQ score of 77 is undisputed.

6. At the January 20, 2021, meeting, Petitioner was determined to be eligible for ESE services, in addition to SI, under the categories of Specific Learning Disability, Language Impairment; and was eligible to receive the related service of Occupational Therapy. Petitioner's Complaint raises no issues with respect to this IEP.

7. In the 2021-2022 school year, Petitioner was a [redacted]-grade student and remained a student of the [redacted]. An IEP meeting was conducted on January 14, 2022, to review the existing IEP. At this meeting, Petitioner's mother reported that Petitioner's behavior was impeding his

learning. Specifically, she noted that Petitioner could "become violent when he gets frustrated from sitting in classes for too long or is overwhelmed with the work."

8. The conference notes from the IEP meeting document Petitioner's mother's request that he participate in the Access Points curriculum. The notes provide as follows:

> Mom is insistent that [he] receives Access Points, it was explained that [he] did not qualify in 2020 when formal evaluations were completed and that with the new state guidelines it would be harder to qualify as they [sic] requirements have changed.
>
> * * *
>
> Parent was very upset, and the compliance coordinator was called in to help answer questions from the parents. Parent was insistent that the school put [Petitioner] in modified content classes because [he] doesn't get upset when [he] sits in on [his] sister's modified content classes. Coordinator explained the school must follow state guidelines as [Petitioner] does not qualify for ACCESS point instruction. Parent explained she would contact the state and district because she believes [he] does qualify. The meeting had to be tabled, and the IEP did not get updated.

9. For all that appears, the IEP meeting was rescheduled to February 4, 2022. [redacted], Special Programs Manager for [redacted], attended this IEP meeting as Respondent's local education agency (LEA). [redacted] credibly testified that, at the beginning of the meeting, Petitioner's mother again raised the issue of Access Points eligibility. When advised that Petitioner did not meet the requisite standards, Petitioner's mother, during the meeting, filed the instant Complaint.

10. Notwithstanding, the IEP team continued to meet and draft Petitioner's current IEP. The IEP documented that, for Petitioner, instruction in Access Points and assessment through the Florida Standards Alternate

Assessment (FSAA) were not applicable. It was further documented that Petitioner would be educated in the regular class setting with specially designed ESE instruction, accommodations, related services and supports; and that he would participate in the general statewide assessment, the Florida Standards Assessment (FSA), with allowable accommodations. Excepting the Access Points curriculum issue, Petitioner's Complaint raises no further complaints regarding the February 4, 2022, IEP.

11. [redacted] has taught the Access Points curriculum for approximately five years, has received all available training on the FSAA, and administers the FSAA throughout Florida. She credibly testified that the Access Points curriculum is made available to students who are eligible and off grade-level standards. She credibly testified that pursuant to the current Department of Education regulations, among other factors, the student must have a sufficiently low IQ score. She credibly testified that the Access Points curriculum and the FSAA are for those students who are the most significantly impaired. She further credibly testified that placing a student on the Access Points curriculum potentially denies the student a free appropriate public education (FAPE) because it limits their access to grade-level curriculum and standards.

12. Petitioner's mother testified at the due process hearing. She credibly testified that Petitioner has a traumatic brain injury and has difficulties maintaining information. She believes that his seizures "wipe away" the information he has been provided. She opines that Petitioner is overloaded with the general curriculum and the required homework. She further testified that his most recent score on the FSA was a 1 (not passing) and that he needs significant assistance.

13. Petitioner's mother further testified Petitioner is frustrated because he is not receiving passing grades, and does not understand why he is failing. She opines that these issues would be alleviated by his inclusion in the Access Points curriculum wherein there is significant focus on repetition.

14. In support of her position, Petitioner's mother provided two exhibits. The first admitted exhibit is a letter dated September 3, 2020, from [redacted], APRN, CPNP, PMHS.[1] Pursuant to this document, it appears Advanced Practice Registered Nurse [redacted] is employed at [redacted], Florida.[2] The letter documents that Petitioner is followed at [redacted] and that he has met the diagnostic criteria for seizures, learning delays, traumatic brain injury, attention-deficit/hyperactivity disorder, mood instability, and insomnia of childhood. The correspondence further documents that Petitioner was recently found to have an abnormal electroencephalogram and seizure activity; and that seizures are known to be associated with learning disorders, memory deficits, and difficulty processing and retaining information. The correspondence further includes the opinion that Petitioner's conditions "makes it incredibly difficult for [Petitioner] to succeed in a typical learning environment."

15. The second exhibit is also correspondence from APRN [redacted], where she documents that Petitioner, based on his diagnoses, would benefit from classroom accommodations; however, she notes that "[f]ull recommendations should be made by a qualified school psychologist, along with [Petitioner's] education team, as recommendations for the full extent of [Petitioner's] educational needs are not within the scope of this provider."[3]

16. No additional documentary evidence was provided by Petitioner.

CONCLUSIONS OF LAW

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

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[1] Based on the evidentiary presentation, it appears these exhibits were previously provided to the IEP team on or before the January 20, 2021, meeting.

[2] APRN [redacted] did not testify at the due process hearing.

[3] This exhibit is undated.

18. 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).

19. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a [FAPE] that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *Phillip C. v. Jefferson Cnty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

20. 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).

21. "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).

22. 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*, 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 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982)).

23. In this case, Petitioner's Complaint is construed as alleging a failure on Respondent's behalf to properly design an IEP providing for his participation in the Access Points curriculum and the FSAA. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. *Rowley*, 458 U.S. at 206-207. A procedural error does not automatically result in a denial of FAPE. *See G.J. v. Muscogee Cnty. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to FAPE, significantly infringed the parents' opportunity to participate in the

decision-making process, or caused an actual deprivation of educational benefits. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007).

24. Here, Petitioner does not advance a procedural argument. 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 206-207. Recently, in *Endrew F.*, the Supreme Court addressed the "more difficult problem" of determining a standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Endrew F.*, 137 S. Ct. at 993. In doing so, the Court held that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. As discussed in *Endrew F.*, "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Id.*

25. Whether an IEP is sufficient to meet this standard differs according to the individual circumstances of each student. For a student who is "fully integrated in the regular classroom," an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* For a student not fully integrated in the regular classroom, an IEP must aim for progress that is "appropriately ambitious in light of [the student's] circumstances." *Id.* at 1000.

26. Additionally, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. *Id.* at 1001 ("This absence of a bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review" and explaining

that "deference is based on the application of expertise and the exercise of judgment by school authorities.").

27. In addressing Petitioner's claim, a review of another federal educational statute, the Every Student Succeeds Act (ESSA), 20 U.S.C. § 6301, *et seq,* is a necessary excercise.[4] The ESSA sets forth as its goal "to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps." Pursuant to the ESSA, states are required to implement annual assessments in reading and math for each grade from third through eighth grades and once in high school. States must further test students in science once in the following grade spans: third through fifth grades, sixth through ninth grades, and tenth through twelfth grades. 20 U.S.C. § 6311(b)(2). States must include students with disabilities in all assessments with appropriate accommodations 34 C.F.R. § 200.6(a).

28. For students with the most significant cognitive disabilities, states may utilize an alternative assessment. 20 U.S.C. § 6311(b)(2)(D) provides as follows:

> (i) Alternate assessments aligned with alternate academic achievement standards
>
> A State may provide for alternate assessments aligned with the challenging State academic standards and alternate academic achievement standards described in paragraph (1)(E) for students with the most significant cognitive disabilities, if the State—
>
> (I) consistent with clause (ii), ensures that, for each subject, the total number of students assessed in such subject using the alternate assessments does not exceed 1 percent of the total number of all students in the State who are assessed in such subject;

[4] The ESSA was enacted in 2015 and reauthorized the 50-year-old Elementary and Secondary Education Act (ESEA), and renamed the previous version of the law, the No Child Left Behind Act.

(II) ensures that the parents of such students are clearly informed, as part of the process for developing the individualized education program (as defined in section 614(d)(1)(A) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)(1)(A))--

(aa) that their child's academic achievement will be measured based on such alternate standards; and

(bb) how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(III) promotes, consistent with the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum;

(IV) describes in the State plan the steps the State has taken to incorporate universal design for learning, to the extent feasible, in alternate assessments;

(V) describes in the State plan that general and special education teachers, and other appropriate staff--

(aa) know how to administer the alternate assessments; and

(bb) make appropriate use of accommodations for students with disabilities on all assessments required under this paragraph;

(VI) develops, disseminates information on, and promotes the use of appropriate accommodations to increase the number of students with significant cognitive disabilities--

> (aa) participating in academic instruction and assessments for the grade level in which the student is enrolled;
>
> (bb) who are tested based on challenging State academic standards for the grade level in which the student is enrolled;
>
> (VII) does not preclude a student with the most significant cognitive disabilities who takes an alternate assessment based on alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma.

29. The ESSA's implementing regulations further provide as follows:

> (c) Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.
>
> (1) *If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities*, the State must measure the achievement of those students with an alternate assessment that—
>
> (i) Is aligned with the challenging State academic content standards under section 1111(b)(1) of the Act for the grade in which the student is enrolled;
>
> (ii) Yields results relative to the alternate academic achievement standards;
>
> (iii) At the State's discretion, provides valid and reliable measures of student growth at all alternate academic achievement levels to help ensure that the assessment results can be used to improve student instruction.

34 C.F.R. § 200.6(c) (emphasis added).

30. Consistent with the ESSA, Florida students participate in the state's assessment and accountability system. Section 1008.22, Florida Statutes, entitled "Student assessment program for public schools," provides that "[t]he primary purpose of the student assessment program is to provide student academic achievement and learning gains data to students, parents, teachers, school administrators, and school district staff." Pursuant to section 1008.22(3)(d)4., "[f]or students with significant cognitive disabilities, the Department of Education shall provide for the implementation of the Florida Alternate Assessment to accurately measure the core curricular content established in the Next Generation Sunshine State Standards." The Florida Department of Education has, in turn, promulgated Florida Administrative Code Rule 6A-1.09401(1), which provides as follows:

> Student Performance Standards in Florida are defined as the Next Generation Sunshine State Standards and establish the core content of the curricula to be taught and specify the core content knowledge and skills that K-12 public school students are expected to acquire. The Next Generation Sunshine State Standards are rigorous and reflect the knowledge and skills students need for success in college and careers. The standards and benchmarks describe what students should know and be able to do at grade level progression for kindergarten to grade 8 and in grade bands for grade levels 9-12. The access points contained in the Next Generation Sunshine State Standards provide access to the general education curriculum for students with significant cognitive disabilities.

31. Rule 6A-1.0943 is entitled "Statewide Assessment for Students with Disabilites." Subsection (5) is set forth, in pertinent part, as follows:

> (5) Participation in the Statewide, Standardized Alternate Assessment.
>
> (a) The decision that a student with a significant cognitive disability will participate in the statewide, standardized alternate assessment as

> defined in Section 1008.22(3)(c), F.S., must be made by the IEP team and recorded on the IEP.
>
> (b) The provisions with regard to parental consent for participation in the statewide, standardized alternate assessment found in subsection 6A-6.0331(10), F.A.C. must be followed.
>
> (c) In order for a student to participate in the statewide, standardized alternative assessment, all of the following criteria must be met:
>
> 1. The student must receive exceptional student education (ESE) services as identified through a current IEP and be enrolled in the appropriate and aligned courses using alternate achievement standards for two (2) consecutive full-time equivalent reporting periods prior to the assessment;
>
> * * *
>
> 11. The student has a most significant cognitive disability as defined in paragraph (1)(f) of this rule.

32. Rule 6A-1.0943(1)(f) defines "most significant cognitive disability" as follows:

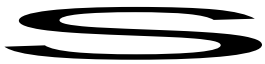
> "Most significant cognitive disability" means a global cognitive impairment that adversely impacts multiple areas of functioning across many settings and is a result of a congenital, acquired or traumatic brain injury or syndrome and is verified by either:
>
> 1. A statistically significant below average global cognitive score that falls within the first percentile rank (i.e., a standard, full-scale score of sixty-seven (67) or under); or
>
> 2. In the extraordinary circumstance when a global, full-scale intelligent quotient score is unattainable, a school district-determined procedure that has been approved by the Florida Department of Education under paragraph (5)(e) of this rule.

33. Based on the above-cited legal authority, it is concluded that participation in the Accesss Points curriculum and the availability of participating in the FSAA is limited to those students who meet the definition of having a most significant cognitive disability. Based on the Findings of Fact above, it is concluded that because Petitioner does not have a full-scale IQ score of 67 or under, Petitioner failed to establish that he is a student with a most significant cognitive disability. Accordingly, Petitioner failed to estabish that the IEP team violated the IDEA in determining that he was not eligible for participating in the Access Points curriculum, and for designing an IEP consistent with that determination.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner failed to present sufficient evidence to support the claim asserted, and, therefore, Petitioner's Complaint is dismissed and the requested relief is DENIED.

DONE AND ORDERED this 30th day of June, 2022, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 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).