STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case Nos. 22-0717E
22-2335E

OSCEOLA COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A due process hearing was held on September 1, 2, 26, and 27, 2022, by Zoom conference before Todd P. Resavage, an Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Amy J. Pitsch, Esquire
Sniffen & Spellman, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq*., as alleged in the Petitioner's consolidated requests for due process hearing (Complaints). Specifically, the undersigned construes Petitioner's Complaints as setting forth the following issues:

(a) Whether Respondent failed to communicate adequately with Petitioner's parent;

(b) Whether the individualized education programs (IEPs) developed for Petitioner during the 2021-2022 school year conferred a free appropriate public education (FAPE) on Petitioner, with respect to both the content of the IEPs and their implementation;

(c) Whether the proposed separate class placement for the 2022-2023 school year is appropriate;

(d) Whether Respondent implemented Petitioner's Behavior Intervention Plan (BIP) with staff trained on the BIP and whether Respondent's staff collected appropriate behavior data;

(e) Whether Respondent failed to provide parent training and counseling;

(f) Whether Petitioner should have received speech therapy in school in 20-minute sessions four times per week and whether Petitioner is discouraged from speaking based on goals in the IEP;

(g) Whether Respondent failed to provide appropriately trained staff to work with Petitioner in October 2021 and, specifically, whether Respondent trained school staff on Petitioner's epilepsy;

(h) Whether Petitioner should be classified as Other Health Impaired (OHI) due to epilepsy;

(i) Whether 30 minutes per week of occupational therapy is appropriate; and

(j) Whether Respondent denied Petitioner a FAPE with respect to carrying out physician's orders.

PRELIMINARY STATEMENT

Respondent received Petitioner's first Complaint on March 7, 2022. Respondent forwarded the Complaint to DOAH on March 8, 2022, and the matter (DOAH Case No. 22-0717E) was assigned to the undersigned.

On March 21, 2022, Petitioner's Agreed Motion to Continue Resolution Session Period was filed. On the same day, the motion was granted and the

time in which to conduct the resolution session was extended, by order, to April 6, 2022. On April 1, 2022, Petitioner filed another Agreed Motion to Continue Resolution Session Period. This motion was granted on April 4, 2022, and the resolution period was, by order, extended to April 22, 2022.

On May 3, 2022, Petitioner's counsel filed his Unopposed Motion to Withdraw as Counsel for Petitioner. The motion was granted on May 9, 2022. Petitioner's parent continued to represent Petitioner thereafter pro se.

On May 17, 2022, the undersigned issued an Order Requiring Response, wherein the parties were ordered to communicate and for Respondent to file, on or before May 20, 2022, a brief status report advising whether the resolution session has been conducted, and, if so, the status of this matter. The parties were further ordered, if the matter had not been amicably resolved, to provide several mutually agreeable dates on which the parties are available to conduct the due process hearing. Finally, the parties were advised that the resolution period shall remain open until May 20, 2022.

In response, Petitioner filed a document wherein Petitioner represented that "we will agree to schedule the hearing in August preferably, if not early September." Respondent also responded that it was available for hearing on several dates in August.

On May 24, 2022, the due process hearing was scheduled, at the parties' request, for August 22 and 23, 2022. On May 31, 2022, Respondent's Motion to Continue Hearing, which was unopposed, was filed. On June 1, 2022, the motion was granted and the due process hearing was rescheduled to September 1 and 2, 2022.

On August 5, 2022, Respondent received a separate due process complaint filed by Petitioner. Respondent forwarded the Complaint to DOAH on August 8, 2022, and the matter (DOAH Case No. 22-2335E) was assigned to the undersigned. On August 9, 2022, Petitioner filed a motion to consolidate DOAH Case Nos. 22-0717E and 22-2335E. An Order of Consolidation and an Order Rescheduling Hearing by Zoom Conference (providing additional dates of September 7 and 8, 2022, to conduct the consolidated hearing) were issued on August 12, 2022.

The hearing was conducted, as scheduled, on September 1 and 2, 2022. On September 7, 2022, this cause came before the undersigned for an emergency telephonic status conference. The undersigned's office was notified prior to the start of the hearing that counsel for Respondent was very ill and not available to participate in the scheduled due process hearing. Accordingly, an emergency telephonic status conference was conducted with all parties in attendance. Ultimately, an Order Granting Emergency Continuance was granted. The conclusion of the due process hearing was rescheduled, and conducted, on September 26 and 27, 2022.

Upon the conclusion of the hearing, the parties agreed to the submission of proposed final orders within three weeks after the filing of the transcript at DOAH and the issuance of the undersigned's final order within two weeks after the parties' proposed final order submissions. The hearing Transcript was filed on October 18, 2022. The identity of the witnesses and exhibits and rulings regarding each are as set forth in the Transcript.

On November 7, 2022, Petitioner filed a motion for extension of time to submit briefs. An Order Granting Extension of Time was issued on November 8, 2022, wherein the parties were granted an extension of time to November 15, 2022, to submit proposed final orders.

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.

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.

FINDINGS OF FACT

1. Petitioner is currently [redacted] years old.

2. In the 2021-2022 school year, Petitioner was a [redacted] student at a public elementary school (School A) in Osceola County, Florida. On August 6, [redacted], an IEP meeting was held. In addition to the school-based members of the team, Petitioner's parents participated along with their private Board Certified Behavior Analyst (BCBA) and their special education advocate.

3. At this meeting, Petitioner was found and determined to be eligible for exceptional student education (ESE) under the eligibility categories of Autism Spectrum Disorder (ASD), Language Impairment (LI), and for the related service of Occupational Therapy (OT). An IEP was designed and developed to address Petitioner's educational needs.

4. The IEP team documented that Petitioner's behavior impeded his learning or the learning of others and that Petitioner had a functional behavioral assessment (FBA) and/or BIP. The IEP further documented that Petitioner had communication needs.

5. Based on a language evaluation conducted on March 11, [redacted], it was documented on the IEP that Petitioner "is a limited verbal communicator

who is able to understand and respond to simple commands, communicate through vocalizations, gestures, facial expressions, and PECS."[1]

6. The IEP team determined that Petitioner's educational placement was that of a regular classroom, where he would be inside of a regular class 80% or more of the school day. Pursuant to the IEP, Petitioner was to receive the following specially designed instruction: language therapy-small group for 80 minutes per week; specialized instruction in social skills through support facilitation for 10 minutes three times per week; and specialized instruction in social skills for 15 minutes twice per week; specialized instruction in math through support facilitation for 30 minutes five times per week; specialized instruction in English Language Arts (ELA) through support facilitation for 40 minutes five times per week. He was further to receive OT for 30 minutes per week in individual sessions.

7. The IEP was further designed to provide the following supplementary aids and services: manual communication book (PECS) on a daily basis; a daily communication log; a specialized chair for safety and health; an individual healthcare plan (Health Plan); a parent-provided helmet; bi-weekly speech language pathologist-teacher consultation; a toileting schedule (every 45 minutes); and a sensory area in the general education classroom. Petitioner was also provided "one-on-one" paraprofessional support for close proximity to monitor him for seizures and safety; to assist with adjusting or fastening his clothing related to toileting; provide assistance with eating; assistance with the implementation of the BIP; and to support participation in communication, classroom instruction, and therapy sessions under the guidance of teachers and therapists.

8. The August 6, [redacted], IEP further provided that Petitioner was to receive the following classroom/instructional accommodations: oral presentation of

[1] As discussed further below, the Picture Exchange Communication System (PECS) is a type of augmentative and alternative communication that uses visual symbols to teach the learner to communicate with others with the primary goal of teaching functional communication.

directions; oral presentation of items and answer choices; verbal encouragement; and that he would respond using PECS. It was further documented that his assignments or tests would be administered in a small group setting of a size comparable to the normal instruction group size (one-to-one) and that he would have preferential seating.

9. Petitioner has a "Very Elevated" score on the ASD Rating Scales, and an adaptive behavior score in the "Extremely Low" range. He possesses multiple medical diagnoses, including epilepsy, and is deemed medically complex by his physicians. As noted above, a Health Plan was developed for Petitioner on August 9, [redacted]. The Health Plan is subtitled as a "STUDENT HEALTH ALERT" for "SEIZURE DISORDER/EPILEPSY." In summary, the Health Plan sets forth what school staff is to look for if Petitioner is having various types of seizures, such as: Grand Mal, complex partial, simple partial, or Petit Mal; and it documents how school staff is to respond including timing the start of the seizure, protecting Petitioner from injury, the potential for calling 911, notification of Petitioner's parents, and the administration of seizure medications such as Diastat.

10. The August 6, [redacted], IEP documented that Petitioner's teachers, service providers, and paraprofessionals would receive health and safety training as related to the Health Plan provided by the district nurse. District Nurse [redacted] provided training to School A staff who worked with Petitioner on his seizure disorder. On August 10, [redacted], she trained paraprofessional [redacted], classroom teacher [redacted], paraprofessional [redacted], and school nurse [redacted]. District nursing staff trained additional employees between August 2021 and January 2022, totaling fifteen employees trained on the Health Plan, including both of Petitioner's ESE teachers.

11. For the 2021-2022 school year, [redacted] trained three staff members to administer Diastat rectally to Petitioner as required by the Health Plan: [redacted], and [redacted]

[redacted]. These three individuals, in addition to seven others at the school, had CPR certification last school year. Petitioner never required Diastat or CPR at school during the 2021-2022 school year.

12. District nursing staff reviewed and updated the Health Plan frequently during the school year. Specifically, this occurred on August 18 and 19, September 22 and 29, [redacted]; and January 5 and 31, February 21, April 11, and May 3 and 4, [redacted].

13. A Prior Written Notice (PWN) issued by Respondent on August 10, [redacted], documented the following: "The team proposed that when current medical information is provided to the district nurse by the parent, the Individual Healthcare Plan will be amended outside of an IEP meeting, uploaded into FOCUS, and a copy will be provided to the parent via email." This language appears to be the primary source of conflict between Petitioner's parent and Respondent.

14. The record evidence establishes that not every piece of medical information or documentation provided by Petitioner resulted in an amendment to the Health Plan, which is unequivocally Petitioner's parent's construction of the above-quoted language. Respondent's interpretation is more limited. Under Respondent's view, if Petitioner's parent provided medical information to Respondent, [redacted] would include these directives on the Health Plan if the orders instructed staff on how to take care of Petitioner in the event of a seizure.

15. It is axiomatic that a public elementary school is not a medical facility, and, therefore, prior to setting forth directives for school staff to follow regarding the healthcare of a student, Respondent needs to have the best and most accurate information available. The undersigned finds that Respondent's efforts to address Petitioner's multiple medical considerations were significantly hampered by Petitioner's parent's unwillingness to authorize consent allowing Respondent to communicate directly with Petitioner's healthcare providers. Indeed, due to a stated lack of trust,

Petitioner's parent dictated that information from Petitioner's healthcare providers be funneled through her.

16. The above notwithstanding, School A ensured someone in the classroom present with Petitioner had seizure training and materially complied with Petitioner's concerns. Pursuant to a doctor's order dated September 2, [redacted], concerning Petitioner's hydration at school, Petitioner's paraprofessional carried out this order by prompting him to drink water throughout the day. A doctor's note dated September 28, [redacted], requested the school record Petitioner's food and fluid intake and School A staff did so on the communication log.

17. In a doctor's note dated January 29, [redacted], the doctor again directed the school to ensure the student is staying hydrated and "toileting well." The school carried out this order. As noted above, Petitioner had a toileting schedule on his IEP the entire school year and School A staff reported data about toileting on the communication log.

18. In a doctor's note dated February 9, [redacted], the doctor recommended that Petitioner's paraprofessional be Cardiopulmonary Resuscitation (CPR) and Basic Life Support (BLS) trained. Petitioner's paraprofessional always carried a radio and could summon CPR-trained staff at the school, if needed. At all times throughout the school year, multiple staff at School A had CPR and BLS training. School A received another note on February 14, [redacted], that indicated Petitioner should have access to someone who is BLS trained at all times. Petitioner always had this access at school.

19. Another note provided on February 25, [redacted], directed School A to allow Petitioner's paraprofessional to take him to the nearest bathroom, not the bathroom in the nurse's office. Prior to receiving this note, at times, Petitioner would resist going to the bathroom in the classroom and preferred the nurse's bathroom, and, therefore, staff would permit him to do so.

20. [redacted], Respondent's BCBA, recalled that Petitioner led adults to the nurse's bathroom, demonstrating his preference by his actions.

The nurse's bathroom was very close to Petitioner's classroom, about 20 meters away. At Petitioner's parent's insistence, School A staff took Petitioner to the bathroom every 45 minutes.

21. In a doctor's order dated May 2021 (prior to Petitioner's kindergarten year), the doctor recommended Petitioner have close supervision at all times. As noted above, Petitioner had a paraprofessional to maintain close supervision of him the entire 2021-2022 school year; each IEP created during the 2021-2022 school year provided for a designated one-to-one for Petitioner for this purpose.

22. In a doctor's note dated April 5, [redacted], the doctor directed the school to offer Petitioner a snack every hour, and School A staff offered Petitioner snacks on this schedule.

23. During the 2021-2022 school year, Petitioner never had a medical emergency at school due to dehydration, failure to eat, or constipation. Additionally, the undersigned could not locate any evidence to support a finding that Respondent failed to properly administer the Health Plan with respect to any seizure activity related to Petitioner's epilepsy.

24. Respondent evaluated Petitioner's speech in 2020 and 2021 prior to his entry to [redacted]. District Speech Language Pathologist (SLP) [redacted] evaluated Petitioner in 2021, and with respect to his speech, concluded as follows:

> A phonemic inventory of sounds was collected based on imitations, vocalizations, and approximations. Student demonstrated difficulties with overall speech intelligibility due to [his] limited verbal output. Student was able to follow simple commands such as "show me your tongue." However, [he] was not able to consistently follow directions for all active oral motor requests. Due to [his] inability to follow complex directions for correct tongue placement as well as [his] inability to self-monitor [his] own speech errors, prognostic indicators for success in speech therapy may be limited.

25. Accordingly, his IEP entering [redacted] provided language therapy but not speech therapy. District assessment in [redacted] in 2021 also indicated that PECS, as opposed to a more complex technology device, was the "natural, preferred, and most effective mode of communication" for Petitioner.

26. PECS is an Applied Behavioral Analysis behavior-based communication system that allows users to communicate using visual images that are widely understood in the community. PECS helps to decrease frustration in the communicator and allows adults working with the child to work on syntactic structure building. Users are encouraged to verbalize while using PECS in order to build that skill; however, for an individual such as Petitioner who cannot consistently verbalize or imitate words, PECS affords a communication system that the recipient easily understands.

27. When Petitioner's parent challenged Respondent's speech-language evaluations, Respondent agreed to provide an independent education evaluation (IEE) at public expense. Thereafter, a private SLP evaluated Petitioner during the Fall 2021 semester and provided the evaluation report to Respondent. The IEP team reviewed this report with the private evaluator at a meeting in January 2022, which two District SLPs, [redacted] and [redacted], attended.

28. At the January 2022 meeting, the IEP team discussed that, per the private report, Petitioner could not engage with the oral mechanism part of the evaluation and the evaluator indicated Petitioner may have an apraxia of speech. The school-based members of the IEP team again found, consistent with the private evaluator's report, that Petitioner could not follow oral motor commands, which is a requirement to engage in effective speech therapy. The private SLP noted that in the area of pragmatics, he "rarely initiates and even with consistent moderate cuing, rarely responds to communication, even in familiar settings with familiar communications partner." The private SLP also found that with respect to speech, "[c]hild attempts to communicate, but,

even with consistent maximal cueing, child rarely produces meaningful communication with familiar people in routine situations."

29. [redacted] credibly testified that an individual must be able to engage in placement and drill techniques in order to work on the fine motor skills needed to produce intelligible speech, and Petitioner cannot do so at this time. Accordingly, the focus in school becomes instructor speech modeling and student expressive communication through any means that is functional, including verbalization. For Petitioner, the SLP who worked with him during the 2021-2022 school year focused on skill building in these areas, giving him opportunities to communicate, which could include speaking or using pictures in his preferred mode, to enhance his communication at school.

30. Respondent consistently provided Petitioner language therapy in a group of two to promote peer-to-peer communication. [redacted] credibly testified that research supports children learning from other children, which is critical for a child with autism whose disability detrimentally affects pragmatic language development and social skills. In this setting, [redacted], Petitioner's SLP, reported progress toward Petitioner's IEP goals.

31. Petitioner's educational staff consistently testified that PECS was effective in Petitioner's communication development. [redacted] was assigned as Petitioner's one-to-one paraprofessional from October 2021 through May 2022. She testified that Petitioner used PECS to express his needs and wants during times of frustration when he exhibited behaviors. She further reported that by the end of the school year, he could provide a four-word sentence independently that he would sometimes pair with his use of PECS.

32. [redacted], who was assigned as Petitioner's one-to-one paraprofessional from August through October 2021, credibly testified that PECS helped communication with Petitioner "a lot," and that she observed Petitioner pair PECS with some verbal communication. Petitioner's ESE teacher, [redacted], an ESE teacher; and [redacted]

provided similar testimony that PECS was effective for communicating with Petitioner.

33. Pursuant to Petitioner's August [redacted] IEP, Petitioner's teachers, service providers, and paraprofessionals would attend a PECS training conducted by the Florida Diagnostic and Learning Resources System (FDLRS). The undersigned concludes that Respondent materially complied with this component of the IEP. Respondent provided competent evidence that the following individuals received the FDLRS training: [redacted]; [redacted], occupational therapist; [redacted], [redacted] teacher; [redacted]; [redacted], varying exceptionalities teacher; [redacted]; [redacted], ESE teacher; [redacted]; and [redacted], ESE teacher.

34. On or about May 29, [redacted], Respondent completed an FBA and drafted a BIP to address Petitioner's target behavior. As a result of the FBA, it was determined that when Petitioner was given a non-preferred activity, he would engage in self-harming behavior such as hitting his head on the table or the ground, and would hit his ears with both hands. It was hypothesized that Petitioner would engage in this behavior to gain access to a preferred activity or escape non-preferred activities. The BIP set forth the following replacement behaviors:

> [Petitioner] will request a preferred activity and/or items using pictures (PECS). [Petitioner] will request a break when [he] is upset or wants a break from the demand being presented to [him].
>
> If the activity or item is not available use first/then contingencies, however, try to provide items as much as possible in order to reinforce the use of the communication device. The goal is to increase "manding" and reduce the frequency of TB.

35. The BIP set forth additional proactive strategies such as letting Petitioner know a few minutes before a preferred activity that it would be ending; offering choices of new activities when a preferred activity was about

to change; using visual first/then picture cards to encourage Petitioner to complete non-preferred activities in order to earn preferred activities when they are not available at that time. Finally, the BIP set forth how Petitioner's behaviors would be monitored and data collected. The August [redacted] IEP documented that Petitioner's paraprofessional would receive training from a District BCBA to assist in the implementation of the BIP and in data collection.

36. On August 17, [redacted], [redacted], a District BCBA, trained Petitioner's one-to-one paraprofessional [redacted], an additional paraprofessional designated by School A, and Petitioner's kindergarten teacher, [redacted], with respect to the BIP. Subsequently, [redacted] provided BIP training to Petitioner's replacement one-to-one paraprofessional, [redacted], on November 9, [redacted].

37. On January 24, 2022, District BCBA [redacted] trained [redacted], Petitioner's SLP; and [redacted], the next day, January 25, [redacted]. On February 1, [redacted], [redacted] trained another paraprofessional, [redacted], an ESE teacher who provided one-to-one paraprofessional support to the student occasionally during the 2021-2022 school year, also received training on the BIP.

38. With respect to BIPs, [redacted] provided the following credible testimony:

> BIPs are written to be – they are written so someone can pick it up and actually implement. They are not written where they are difficult to implement. If that was the case, then we are not doing our jobs. So they are designed to be picked up and implemented with ease. So at any point in time, someone could have read that behavior plan, and they would have been able to implement the strategies on there – because it outlines how to do it. So when we talk about training, yes, you are going over it, and you do go over the behavior plans. But the plans are typically designed so where anyone can pick up that plan and

> implement, and it's not a challenge for that person to put those things – the strategies in place.

39. Data collected throughout the 2021-2022 school year indicated Petitioner was making behavioral progress. [redacted] observed Petitioner every one to two weeks throughout the school year in addition to reviewing data collected by school staff.

40. With the exception of a three-week period during the third quarter where Petitioner's behaviors spiked across all settings as reported by various providers (home, community, and school), he had overall low rates of self-injurious behavior and physical aggression, as reflected in school behavioral data.

41. [redacted] was part of the team that collected behavioral data on Petitioner and credibly testified that the behavioral strategies contained in the BIP were effective and helped her redirect Petitioner to his work. Petitioner's behavior specialist, therapists, and paraprofessionals testified that Petitioner responded positively to behavioral reinforcers and sensory items provided to him, including clay, Play-Doh, TheraPutty, fidgets, squeeze toys filled with liquid, coloring, walking breaks for 4-5 minutes, and Legos. Notwithstanding, Petitioner's parent objected to some of these reinforcers. She objected to Petitioner, a [redacted], coloring "for fun"; she complained that walking breaks took away from Petitioner's instructional time, even though [redacted] and [redacted] indicated it did not; and objected to the use of Legos, even though this activity was highly positively reinforcing for Petitioner according to the District BCBA.

42. As the District BCBA explained, "it is a challenge when we are unable to use highly preferred reinforcers, because then the student may lose that motivation throughout the day to work." [redacted] credibly testified that when Petitioner was struggling to communicate and engaging in physical aggression or tantrums, when prompted to communicate his needs or wants, he would typically use his PECS to request Legos or a break. Petitioner's

parent opposes Respondent's use of Petitioner's two most preferred reinforcers.

43. During the Spring 2022 semester, Respondent agreed to provide, at public expense, an IEE FBA. The private FBA was completed on May 16, [redacted]. [redacted] accompanied the parent-selected private evaluator, [redacted], during nine hours of school observations of Petitioner as part of the assessment. Thereafter, the two BCBAs collaborated to prepare an updated August [redacted] BIP, which the team approved following [redacted] in-depth review of the FBA he performed.

44. For the entire 2021-2022 school year, Petitioner's IEPs listed "Communication Log" as a Supplementary Aid and Service. At the second IEP meeting of the year, held on September 16, [redacted], Petitioner's parent proposed a new communication log. The IEP team discussed her proposal and agreed to a revised log format, and Respondent memorialized the agreed-upon changes in a PWN. School staff prepared extensive communication logs and sent them home daily for the entire school year. [redacted] credibly testified that this log was the most detailed communication log he had ever seen in 17 years of experience.

45. Respondent convened eight IEP meetings for Petitioner over the course of the 2021-2022 school year, in which Petitioner's parent participated and communicated with Respondent's staff. At parent request, the State Board of Education facilitated an IEP meeting on April 18, [redacted]. [redacted] credibly testified that every time the IEP team convened, after the meeting, Petitioner's parent would message the school and demand changes, necessitating yet another meeting.

46. [redacted], who delivered language therapy to Petitioner during the 2021-2022 school year, provided therapy notes to the parent every four to six weeks, per parent request. She considered strategies that Petitioner's parent indicated benefitted him in non-school settings. [redacted] also engaged with the parent via email when the parent had questions. [redacted], who

delivered OT to Petitioner during the 2021-2022 school year, provided responses to parental requests for information regarding sensory items and handwriting difficulties.

47. The unrefuted evidence establishes that [redacted] fielded 532 emails from Petitioner's parent during the 2021-2022 school year, which represents an average of three emails per day to a principal responsible for a school of 1,100 students.

48. Pursuant to his IEP, for the 2021-2022 school year, Petitioner received his education in a general education classroom with support facilitation in the areas of social skills, math, and ELA. Neither of the consolidated Complaints allege that his educational placement for the 2021-2022 school year violated the IDEA.

49. Petitioner's Complaint in DOAH Case No. 22-2335E, however, alleges that "[w]e object to our [son] being put in a [redacted] class with access points students." Said complaint further provides that, "[h]e cannot be in a general education classroom." Petitioner's allegations appear to be related to Petitioner's educational placement determined at an IEP meeting on August 2, [redacted], at the beginning of the 2022-2023 school year.

50. The IEP team, with the exception of Petitioner's parent, determined that he required a [redacted] placement in order to receive a FAPE at the beginning of the 2022-2023 school year. The school-based members of the team who worked with Petitioner during the prior school year unanimously recommended this placement. Those members consisted of 2021-2022 general education teacher [redacted]; ESE teacher [redacted]; related service providers [redacted] and [redacted]; the District BCBA, [redacted], who worked on Petitioner's BIP; [redacted]; and Petitioner's most recent one-to-one paraprofessional, [redacted].

51. The conference notes from that meeting summarize the discussion as follows:

> Considering [Petitioner's] needs as discussed in today's meeting (including but not limited to [his] high level of distractibility and sensitivity to sound), the IEP team has recommended that [he] receive small group instruction for all of [his] core academics in a separate class setting. In this setting, [Petitioner] would be able to rotate in small group stations and will continue to be taught on general education standards. [He] would interact with [his] non-disabled peers at breakfast, lunch, recess, and [his] elective classes/specials (Art, PE, Music). [Petitioner's parent] inquired about the number of students in the [redacted] class setting; it is typically 7-9 students and 2 adults (not including 1:1s assigned to individual students).

52. As noted above, it appears that Petitioner's parent objected to this placement as she believed it placed Petitioner on the Access Points curriculum, even though there is no reference to Access Points on the IEP or in the conference notes from the August [redacted] meeting. The unrefuted evidence is that, at no time did Respondent propose to place Petitioner on the Access Points curriculum. The PWN generated after this meeting, and provided to Petitioner's parent, dated August 9, [redacted], provides that "[t]he district proposed placement is the separate class setting for all general education core academic areas and for [Petitioner] to be with general education peers in electives." As documented in the PWN, the placement recommendation was that based on data, observations, evaluations, and information provided by the parent, Petitioner requires small group instruction for all academics with minimal distractions to access a FAPE. The PWN also indicates that Petitioner requires this setting for consistent constructive implementation of his BIP.

53. Petitioner's consolidated Complaints are construed as alleging Respondent violated the IDEA in failing to include training and counseling *to*

the parent on Petitioner's IEP with respect to Petitioner's various therapies, his BIP, and his Health Plan.

54. Petitioner's SLP during the 2021-2022 school year testified that she offered many times to have Petitioner's parent come to School A and meet with her. Respondent also attempted to arrange for Petitioner's parent to receive training on Petitioner's PECS with the FDLRS, the entity that provides PECS training; however, Petitioner's parent refused to attend both training sessions offered because she "was not interested" and refused to use PECS at home, even though she insisted that Respondent's staff, who worked with Petitioner, receive this training.

55. At the August 2, [redacted], IEP meeting, in response to parental request, the IEP team added parent training to the Supplementary Aids and Services section of the IEP.

56. During the 2021-2022 school year, Petitioner attended School A for a partial day on 55 school days. Additionally, he incurred 17 excused full-day absences and 11 full-day unexcused absences. Accordingly, out of 180 school days, he missed a full or partial day 83 days, so he was fully present only 54% of the time.

57. Petitioner's ESE teacher, [redacted], credibly testified that his absences interfered with her ability to render his social skills instruction. [redacted] also credibly testified that even if an absence is excused, absences interrupt the flow of instruction. Following an increase in behavioral concerns across all settings, in late February [redacted], Petitioner's parent removed Petitioner from School A. Thereafter, School A's attendance clerk, guidance counselor, and school principal met with Petitioner's parent and her advocate to discuss truancy concerns as Petitioner had 8 unexcused absences between February 15 and March 4, [redacted]. After the truancy meeting, Petitioner's parent allowed him to return to School A.

58. The IEP team found Petitioner eligible for Extended School Year Services (ESY) for the Summer 2022 term to include instruction in ELA,

math, language therapy, and OT; however, his parent did not send him to ESY.

59. Petitioner's Complaint in DOAH Case No. 22-2235E avers that "[o]ur son should be classified as other health impaired due to his epilepsy." The term "other health impairment" is defined in Florida Administrative Code Rule 6A-6.030152(1) as follows:

> Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems. This includes, but is not limited, to, … epilepsy, … .

60. It is undisputed that Petitioner has been diagnosed with epilepsy. On August 2, [redacted], an IEP meeting was conducted wherein Petitioner's parent requested the team to consider OHI as an eligibility classification for Petitioner. Respondent provided a PWN on August 5, [redacted], which provided as follows:

> The parent proposed an evaluation for dysgraphia and to consider eligibility for the Other Health Impaired Program. The District refused gaining consent at this meeting and instead proposed addressing the request for reevaluation at a meeting to be convened shortly with the school psychologist present to discuss the evaluation request.

61. The PWN also provided the following:

> The District Refused [sic] gaining reevaluation at this time because the District wants all possible evaluators present at the meeting to consider the parent's request for reevaluation. It is not clear to the District members of the IEP team how additional classifications under the IDEA would result in changes to the special education and related services being provided to the student. The team needs more information from the parent to establish the basis for the request to evaluate for

> additional eligibility classifications and deems it necessary to invite relevant evaluators to be present when the parent provides this rationale.

62. On the same day as the IEP meeting, Respondent received Petitioner's Complaint in DOAH Case No. 22-2335E.

63. Petitioner's Complaints are construed as alleging Respondent violated the IDEA in failing to design an IEP with an increased frequency of OT, and the failure to include "sensory integration" in the OT.

64. Throughout the 2021-2022 school year, Petitioner's IEPs provided that he was to receive 30 minutes per week of individual OT sessions. [redacted] provided OT to Petitioner during the 2021-2022 year as set forth on his relevant IEP. [redacted] testified that when working with Petitioner, he had an attention span of approximately one-to-two minutes. [redacted] testimony is consistent with that of an IEE conducted at parental request, by a private OT, at public expense. The private report from October 26, [redacted], documented that "[he] is able to attend to a task/object/toy for 1-2 minute intervals before moving on to something else. He requires max redirection to remain seated and attend to therapist directed structured activities."

65. [redacted] testified that, despite his very limited attention span, Petitioner made progress in coordination, visual motor, and visual perception activities including coloring, tracing, writing, and cutting during their prescribed sessions.

CONCLUSIONS OF LAW

66. 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 rule 6A-6.03311(9)(u).

67. 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).

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

69. 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).

70. "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).

71. 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 (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)).

72. The IDEA 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); Fla. Admin. Code R. 6A-6.03028(3)(g)5.

73. 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 206-07. A procedural error does not automatically result in a denial of FAPE. *See G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual

deprivation of educational benefits. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007).

74. Here, Petitioner advances a procedural argument. Petitioner contends that Respondent failed to appropriately communicate with Petitioner's parent. The undersigned construes Petitioner's Complaints as contending this alleged failure significantly impeded Petitioner's parent opportunity to participate in the decision-making process regarding the provision of a FAPE to Petitioner or caused a deprivation of educational benefit. This contention is quickly resolved. It is found and concluded, based upon a review of the voluminous evidentiary record, that Petitioner's parent was afforded extensive and meaningful input and participation in the development of Petitioner's IEPs and educational programming. Petitioner failed to meet his burden with respect to this procedural allegation.[2]

75. Pursuant to the second step of the *Rowley* test, it must be determined if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive "educational benefits." *Rowley*, 458 U.S. at 206-07. Recently, in *Endrew F.*, the Supreme Court addressed the "more difficult problem" of identifying 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

[2] Given the voluminous and ongoing communication from Petitioner's parent to Respondent, it is highly recommended, but not ordered, that Respondent consider the implementation of a communication plan or protocol prospectively.

appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Id.*

76. 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.

77. 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.").

78. Here, Petitioner's Complaints contend that Respondent failed to design an appropriate IEP with respect to speech therapy, OT, and assistive technology. The undersigned finds and concludes that Petitioner failed to meet his burden with respect to said claims.

79. While it is undisputed that Petitioner has significant communication concerns, Petitioner failed to meet his burden of establishing that speech therapy (in addition to language therapy) should have been included on his IEP during the relevant time period. Given Petitioner's communication needs, Respondent should continue to monitor the same and conduct an appropriate speech evaluation, should it be deemed appropriate by the IEP team in the future.

80. Similarly, the undersigned finds and concludes that Respondent appropriately designed IEPs for Petitioner responsive to his OT needs. Petitioner failed to satisfy his burden that his IEPs were not appropriate

with respect to OT, and Respondent presented competent evidence to support its position that the prescribed OT was appropriate for Petitioner during the relevant time.

81. Although Petitioner's Complaints allege that Petitioner needs typing, and, therefore, his IEP was not appropriate for the failure to include the same in assistive technology, succinctly, Petitioner failed to present sufficient evidence to support such a claim.

82. Petitioner's Complaints are broadly construed as alleging that Respondent did not implement Petitioner's IEPs. In *L.J. v. School Board of Broward County*, 927 F.3d 1203 (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-to-implement 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.

83. 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.*

84. 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.

85. Here, Petitioner's most viable claim, regarding a failure on behalf of Respondent to implement, concerns the Health Plan. As set forth above, in the Findings of Fact, the undersigned finds that Respondent did not amend the Health Plan to include every piece of medical information or documentation provided by Petitioner. Notwithstanding, it is concluded that that this failure did not result in a material failure to implement the IEP as a whole.

86. The balance of Petitioner's failure to implement claims, including but not limited to, the failure to provide appropriate staff and family training, were not supported by the evidence. Petitioner failed to meet his burden in establishing that Respondent failed to properly implement his IEPs. The evidence supports the determination that Respondent did materially implement Petitioner's IEPs over the relevant time period.

87. Petitioner's Complaint alleges a disagreement with the educational placement determined at an IEP meeting on August 2, [redacted], at the beginning of the 2022-2023 school year. Specifically, Petitioner alleges that "[w]e object

to our [son] being put in a [redacted] class with access points." The evidence, however, does not support Petitioner's argument.

88. The IDEA provides directives on students' placements or education environments in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A), provides as follows:

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

89. Pursuant to the IDEA's implementing regulations, states must have in effect policies and procedures to ensure that public agencies in the state meet the least restrictive environment (LRE) requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the above-referenced mandates concerning LRE and providing a continuum of alternative placements. *See* Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

90. In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parent(s) and other persons knowledgeable about the child; the meaning of the evaluation data; and the placement options. 34 C.F.R. § 300.116(a)(1). Additionally, the child's placement must be

determined at least annually, based on the child's IEP, and as close as possible to the child's home. 34 C.F.R. § 300.116(b).

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

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

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

Daniel, 874 F.2d at 1048.

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

94. Petitioner's education placement did not, as alleged, include placing him on the Access Points curriculum. Petitioner otherwise failed to present any evidence that his educational placement was contrary to the LRE directives.

95. Petitioner's Complaint alleges that he should be classified as OHI due to his epilepsy. Petitioner had previously undergone an initial evaluation and had been determined to be eligible for ESE services under the eligibility categories of ASD and LI. At the IEP meeting on August 2, [redacted], Petitioner's mother made a request for a reevaluation. Respondent denied the request at that time, seeking additional time to conduct another meeting with the relevant potential evaluators present.

96. A child's IEP is based, in significant part, on the results of statutorily mandated evaluations of the child. *See, e.g.*, 20 U.S.C. § 1414(b)(2)(A)(ii), (c)(1)–(2), (d)(3)(A), and (d)(4)(A). Under the IDEA, a child with a suspected disability must receive a "full and individual initial evaluation" to determine the existence and extent of his disability and whether he is entitled to special education and related services under the Act. *Id.* § 1414(a)(1). The child is further entitled to a "reevaluation" at least once every three years for the purpose of updating his IEP. *Id.* § 1414(a)(2), and (d)(4)(a). Because it occurs by default every three years, this is generally referred to as a triennial reevaluation.

97. The IDEA requires that a child's initial evaluation and triennial reevaluations be comprehensive. In conducting these evaluations, a school must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information," *id.* § 1414(b)(2)(A), and the school must assess the child in "all areas of suspected disability." *Id.* § 1414(b)(3)(B). The child's IEP team takes the results of these evaluations and regularly collaborates to develop, maintain, and update the child's IEP over the course of their education. *See id.* § 1414(d)(4)(A) (a child's IEP team

must review their IEP "periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved.").

98. Here, the undersigned concludes that Respondent did not, on August 2, [redacted], violate the IDEA in declining Petitioner's mother's request for a reevaluation to consider eligibility for OHI. As noted above in the Findings of Fact, Petitioner meets the definition of OHI. Respondent did not decline to ever evaluate Petitioner for OHI, but rather, simply advised that it wished to reconvene at a time where the appropriate evaluators could be present to consider the matter further.

99. Petitioner's Complaint further alleges Respondent failed to appropriately evaluate Petitioner with respect to his targeted behaviors. The undersigned concludes that Respondent appropriately considered the use of positive behavioral interventions and supports, and other strategies, to address Petitioner's behavior. Moreover, Respondent approved a private FBA, paid for at public expense, which was completed at the end of the 2021-2022 school year. This FBA was appropriately considered in drafting Petitioner's IEP developed on August 22, [redacted]. Accordingly, it is concluded that Petitioner failed to meet his burden of proving that Respondent failed to appropriately evaluate Petitioner concerning his behavioral concerns.

ORDER

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

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

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
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this 30th day of November, 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).