STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs. Case No. 22-0742E

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,

Respondent.
_____/

FINAL ORDER

A due process hearing was held in this matter before Brittany O. Finkbeiner, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), over the course of twelve non-consecutive days between September 12, 2022, and April 27, 2023, via Zoom video conference.

APPEARANCES

For Petitioner: Josephine Amato, Qualified Representative
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Lithia, Florida 33547

For Respondent: LaKisha M. Kinsey-Sallis, Esquire
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STATEMENT OF THE ISSUES

The undersigned finds that the justiciable issues to be resolved in this case are properly framed as follows:

Whether Petitioner's individualized education plans ("IEP") provided a free and appropriate public education ("FAPE"); that is, whether they were

reasonably calculated to enable the student to make progress in light of her circumstances;

Whether the School Board discriminated against the student based on her disability, in violation of The Rehabilitation of Act of 1973, 29 U.S.C. § 795, *et seq*. ("Section 504");

Whether Respondent retaliated against the parents, in violation of Section 504, for advocating on behalf of their daughter; and

Whether Petitioner is entitled to any relief.

PRELIMINARY STATEMENT

Petitioner filed her Due Process Complaint on March 8, 2022. There were multiple continuances at the request of the parties throughout the pendency of this case. The undersigned allowed Petitioner to present evidence during the partially-held due process hearing dating back to 2017, based on Petitioner's argument that the facts would support a tolling of the applicable two-year statute of limitations. After the completion of Petitioner's case-in-chief, at the parties' request, the undersigned delayed scheduling Respondent's case, allowing time to determine whether sufficient evidence was presented to toll the statute of limitations. Considering argument from both parties, the undersigned issued an Order on Respondent's Motion to Establish Statute of Limitations ("Order") on April 23, 2023. The Order concluded that the Individuals with Disabilities Education Act ("IDEA") claims that accrued two years before March 8, 2022, the date of the Due Process Complaint, would be considered; and Section 504 claims that accrued four years before March 8, 2022, would be considered.

Despite the undersigned's ruling in the Order, and a clarifying conversation on the record wherein the undersigned specifically dispelled any remaining misunderstanding of the governing law, Respondent maintained the position, without research or analysis, that facts dating back four years should not be considered. In other words, Respondent unilaterally chose to only partially analyze the case. The undersigned invited Respondent to include legal argument in its proposed final order to the extent that Respondent believed that facts in the record should be time-barred and thereby not considered. Instead, Respondent simply included a conclusory statement in a footnote.

Petitioner was represented by a qualified representative ("QR") in this case. The QR was authorized to appear, having included all of the required elements in Petitioner's Request to Qualify a Representative, filed May 4, 2022. In practice, Petitioner's QR displayed a broad misunderstanding of the applicable law. Under the circumstances, it should be emphasized that arguments attributed to Petitioner are those of the QR, whom Petitioner and her parents relied on for her purported expertise.

Throughout these proceedings, there was ongoing confusion caused by Petitioner's handling of exhibits, which were voluminous—numbering over 860; disorganized; and often duplicative. The undersigned directed the parties to identify which exhibits were in evidence, and to collaborate in order to communicate to the undersigned any disagreement that might arise as to what should be considered part of the record. The parties ignored the directive. Petitioner provided an exhibit list earlier in the proceedings, although it contained inaccuracies when cross-referenced with the Transcript. Respondent did not make any attempt to identify its own admitted exhibits. The definitive list of admitted exhibits, as compiled by the undersigned from contemporaneous notes and review of the Transcript, is

available on the docket. The list of witnesses who testified during the course of the hearing is memorialized in the Transcript.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use female pronouns in this Final Order when referring to Petitioner. The female pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. Petitioner was initially found eligible for early intervention services in New Jersey in December [redacted] as a "Preschool Child with a Disability." On the Battelle Developmental Inventory, 2nd Edition ("BDI-2"), Petitioner earned a total score of 73 (Mean=100, Average Range=85-115).

2. In a later evaluation, Petitioner was administered the Stanford-Binet Intelligence Scales-Fifth Edition ("Stanford-Binet"), in which she demonstrated moderately delayed intellectual abilities with a full-scale IQ of 46. Age equivalents on the Stanford-Binet indicated that her intellectual abilities were more comparable to a child of approximately three years and four months, despite her chronological age of [redacted] years at the time of the evaluation.

3. Petitioner continued to be eligible for early intervention through the state of New Jersey as a "Preschool Child with a Disability" for the [redacted] school year and in need of academic instruction, occupational and physical therapies, and speech and language therapies. The New Jersey school district was continually unable to obtain a teacher to provide academic instruction to Petitioner. Her basic preschool concepts were incorporated into speech and language therapy sessions to the extent possible.

4. Petitioner is part of an active-duty military family, which requires the family to move frequently. She enjoys a loving and supportive home life, which includes the substantial involvement of both parents.

5. Petitioner's family relocated to Florida where she was enrolled in the Hillsborough County Public Schools ("District") for the start of the [redacted] school year.

6. The District is large and contains a military base within its borders. The District has significant experience working with children who are from military families and who have rare and complex medical needs.

7. During the time period relevant to the present case, beginning in March [redacted], Petitioner was a student in the District for pre-school, kindergarten, and first grade for the [redacted] school years, respectively.

Hospital Homebound/Petitioner's Individual Needs

8. Based on her medical needs, Petitioner was determined to be eligible for services provided through the Hospital/Homebound Program as a student with a Developmental Delay, Language Impairment, and Speech Impairment with related services of occupational and physical therapy. Petitioner's eligibility category was later changed from Developmental Delay to Other Health Impairment.

9. Petitioner has a primary diagnosis of [redacted], which is a complex and rare disease. As a result of her [redacted], Petitioner's hypothalamus does not function, adversely affecting her metabolism; feelings of hunger; body temperature; and her physical and cognitive growth and development. [redacted] also causes weakened internal and external muscles, creating significant challenges with eating and drinking, as well as overall mobility. Petitioner suffers from other medical conditions, including chronic lung disease, sleep apnea, hypoglycemia, severe scoliosis, and adrenal insufficiency.

10. Petitioner exhausts easily and experiences daytime sleepiness as a symptom of her [redacted]. During the night, her sleep is not continuous, which requires her to sleep later in the morning to get sufficient rest. For that reason, along with Petitioner's tendency to fatigue quickly, she could only tolerate instruction for two hours per day between 10:00 a.m. and 12:00 p.m. This time constraint was repeatedly emphasized by Petitioner's parents and medical providers.

11. The Hospital/Homebound program is not meant to mimic a typical brick-and-mortar classroom setting. The program is uniquely tailored for students who are often medically fragile with compromised immunity.

12. During the time period relevant to the present case, beginning in March [redacted], Petitioner was a student in the District for [redacted], [redacted], and [redacted] for the [redacted] school years, respectively. At all relevant times, Petitioner received one-to-one instruction in her home.

February [redacted] - May [redacted] IEPs

13. Petitioner's February [redacted] IEP was the operative IEP in March [redacted]. The February [redacted] IEP was updated from the previous iteration to include revisions based on updated assessments covering motor skills, development through the BDI-2, and Applied Cognitive and Technology ("ACAT") evaluations. At that time, Petitioner's goals and objectives were revised and her academic instructional time was set for 10 hours per week, which was an increase in hours from the previous IEP. Her occupational and physical therapy services were increased to 60 minutes per week.

14. Petitioner's annual IEP was held in October [redacted] and her progress was reviewed, with goals/objectives revised as appropriate. An IEP review/revision meeting was held in May [redacted] to discuss Extended School Year ("ESY"), compensatory services, and academic goals. Language therapy, occupational therapy, and physical therapy were recommended for ESY.

September [redacted] IEP

15. At the annual IEP meeting in September [redacted], the IEP team reported that Petitioner was excited to see her teachers each day and described her as a sweet and happy child with an enjoyment for music and books.

16. Petitioner's literacy goals focused on letter and sound identification. She was able to identify the letters A, B, C, e, O, p, P, I, J, and give sounds for /s, t, m/. Petitioner was learning to trace and write her letters, identify her name out of a field of three, rote count from 1 to 10 and count with one-to-one correspondence to five with cues and prompts, name and describe basic shapes, and sort two-dimensional shapes by their attributes. She scored 2/18 correct on the enVision Kindergarten Readiness Math Assessment.

17. Petitioner's occupational therapist reported that Petitioner was making progress toward copying strokes needed for shapes and letter production, including right and left diagonal lines, and using various writing utensils. She was working with fading physical assistance to trace the letters of her name, manuscript upper- and lower-case letters, and numbers 0 through 10. She was using "spring back" or loop scissors with verbal cueing and slight physical assistance to stabilize the paper with her right hand. She continued to work on manipulating the letters in her name, stringing items, lacing, and working with small in-hand manipulatives.

18. Speech and language therapy targeted receptive and expressive language skills and articulation to improve Petitioner's functional communication. She made significant growth in her language skills. Petitioner consistently used between four- and five-word sentences to express her wants and needs, and to describe information. She partially met this objective, continuing to need verbal prompts to answer questions in sentences. She answered "wh" questions with up to [redacted] accuracy and yes/no questions with up to [redacted] accuracy. She was most successful with "what" and "where" questions but needed increased prompting for "who" and "when" questions. Petitioner's ability to identify functions was emerging—she needed

continued work to label functions and attributes. She was beginning to use linguistic concepts to describe information. Petitioner was able to consistently imitate /k, g, l, f, v/ in isolation and was more successful correctly producing /k/ in the initial and final position of single words. With models, prompts, and cues she demonstrated the ability to correctly produce /f, v/ in single words. The phonemes /l, g/ when produced in words continued to be difficult; however, she was learning each of these sounds.

19. Petitioner met her goals of following a toileting routine and repositioning her clothing and of navigating steps, curbs, and uneven surfaces with cues and prompts and some assistance. She was able to consistently transition from sitting on the floor to and from standing without physical assistance, and access different areas of her home with standby assistance from an adult and one of her hands for upper extremity support to negotiate thresholds. She was able to ambulate on the sidewalk and grass with hand-held assistance, and showed progress in her motor planning, dynamic balance, and overall coordination with stepping up and/or down surfaces as high as a 10-12 inches with contact guard assistance. She showed improvement in her upper extremity strength by being able to pull her sibling (20+ pounds) on a blanket across the floor, and participate in throwing and catching a ball while sitting on a bench with good postural correction.

20. Petitioner's ongoing needs, as detailed in the September [redacted] IEP, included improving her academic skills, independent functioning, expressive and receptive language, speech intelligibility, and social skills. Her schedule included two hours daily of academic instruction as tolerated, 90 minutes weekly of speech (60 minutes language, 30 minutes articulation), and two weekly sessions of 30 minutes each for occupational and physical therapy.

21. In March [redacted], Petitioner's IEP team convened via videoconference due to COVID-19 school closures. Compensatory services were included in the IEP and an updated ACAT consultation was requested because the team believed that Petitioner required assistive technology.

22. An updated psychoeducational evaluation was recommended to provide information regarding Petitioner's current cognitive, academic, and adaptive strengths and weaknesses to support educational planning. No face-to-face evaluation was able to be completed due to school closures, though those portions of the evaluation were completed remotely where possible.

May [redacted] IEP

23. The IEP team convened in May [redacted] to review the portions of the evaluation that were able to be completed and revise the IEP as needed. Petitioner was engaged and socially interactive during e-learning, though she needed frequent breaks due to distractibility and the school psychologist noted that cognitive drain from computer-based learning may present as frustration or anxiety. Petitioner was described as hardworking and eager to please. She responded well to verbal praise and attempted to complete all presented speech and language tasks. She was working on producing /k, g, i, f, v/ in isolation, syllables, and words; and demonstrated the ability to produce /k, g/ in isolation and significant improvement in her ability to produce /k, g/ in words.

24. Petitioner was making gains toward improving her ability to use expanded sentences to ask and answer questions. She independently used short, simple sentences to ask questions, gain attention from others, and respond to questions. She was able to formulate sentences of at least four words to answer questions when presented with expansion cues and correctly identify spatial concepts (under, next to, over) when presented with minimal prompts.

25. Petitioner continued to require verbal prompts to use the appropriate concept to respond to "where" questions and respond to "what" questions related to stating the functions of targeted objects with [redacted] accuracy and two verbal choices. She identified simple qualitative and quantitative concepts (big, little, short, tall, some, none) within pictured items and worked on using the targeted concepts to describe familiar nouns. Her parents reported that

Petitioner was able to put her clothes on after toileting but they may be placed incorrectly (inside out or backwards). Teachers reported that she dressed with minimal prompting to reposition her clothing.

[redacted] Extended School Year

26. Petitioner was eligible for ESY services for summer [redacted]. The IEP team determined that she required three hours (Monday through Thursday) of weekly specially-designed instruction to address her goal of academic development with objectives including letter and sound identification; rote counting to 15 and with one-to-one correspondence to 10; recognizing 25 sight words; recognizing numerals 1 through 10; and cutting out simple shapes with fading verbal cues.

27. Language therapy was to be provided 30 minutes weekly to work toward her objectives of forming five+ word sentences and responding to "wh" questions. She was eligible for the related service of physical therapy to address navigating architectural barriers, gross motor movement breaks, and negotiating low level obstacles. She was also eligible for occupational therapy to work toward her objectives of writing her name and numbers up to 15 with fading prompts and cutting curvy lines.

[redacted] E-Learning

28. In preparation for lockdown caused by the COVID-19 pandemic, Petitioner's teacher delivered a touchscreen laptop to Petitioner's home and instructed Petitioner's mom on how to use the device. Petitioner's teacher also delivered printed instructional materials and other various supplies. Thereafter, assignments were delivered in electronic form and Petitioner interacted with her teachers through Zoom.

29. The very nature of e-learning was challenging for Petitioner because Petitioner learned best with one-on-one instruction in close proximity to her teachers. Petitioner's parents had to take a more active role in helping Petitioner access her education. However, it is unclear what Respondent could have done to more effectively educate Petitioner under the

circumstances. Petitioner's teachers continued to implement her individualized instruction and accommodations with adaptations to the virtual setting.

30. Petitioner's teachers worked with her parents in an ongoing attempt to adjust e-learning strategies to provide Petitioner with the most benefit possible. At the request of Petitioner's parents, her teachers focused on embedding the standards into activities that Petitioner enjoyed the most to limit the stress and anxiety that was inherent for her in the shift to virtual learning.

31. Petitioner made progress in her education during e-learning despite the additional struggles she faced.

Petitioner's Progress/Impact of Medical and Behavioral Challenges

32. Due to the complexities of Petitioner's condition, Petitioner's mom regularly monitored her blood sugar, oxygen, swallowing, temperature, and medications. Petitioner's IEP team did not determine that she required nursing as a related service to access her education and Petitioner's parents never requested such service.

33. Petitioner's [redacted] manifests behavioral challenges such as meltdowns, anxiety, perseveration, obsession with food from inability to feel satiated, and decreased social skills. The record evidence conflicts as to how pervasive behavioral issues were during instructional time and whether it was a barrier to Petitioner accessing her education. During her time as a student in the District, Petitioner was a young child. Her teachers observed that her behavioral issues during instruction were not significantly different from any other typical child in the same age group. When adverse behaviors did arise, Petitioner was successfully redirected to a different task.

34. None of Petitioner's teachers or other providers had specific training in [redacted]. However, those testifying at hearing all had experience working with students with all types of disabilities and understood that every student is an individual entitled to services tailored to her circumstances, however complex

or rare they may be. There is no evidence in the record showing that a lack of specialized [redacted] training negatively impacted Petitioner's access to her education.

35. In the judgment of Petitioner's teachers, Petitioner did not need a behavioral therapist. Her teachers credibly and consistently testified that they effectively used strategies such as cues, prompts, breaks, and positive praise with Petitioner such that behaviors were not an impediment to her learning. When employing the behavioral supports and strategies in Petitioner's IEPs, her behaviors were successfully redirected most of the time.

General Education Curriculum

36. General education standards are set by the State of Florida. Teachers do not have discretion to modify general education standards. Curriculum is a broad term used to describe methods, accommodations, and materials used by the teacher for the student to access the general education standards in light of her individual needs. For example, curriculum could include textbooks, worksheets, videos, manipulatives, or any other vehicle used to deliver standards to the student. Teachers have discretion as to the type of curriculum they use to help an individual student access the general education standards. This is true across educational settings, whether in a brick-and-mortar classroom or in a student's home.

37. The academic goals in Petitioner's IEPs were developed based on her individual needs. Her teachers used the appropriate grade-level general education standards to create specially-designed instruction and accommodated her needs to make progress toward those standards. Petitioner's teachers also used assessments to inform the instruction she received with data.

38. With one-to-one instruction, Petitioner's teachers were able to implement scaffolding, or immediately pivoting to try something else if a particular strategy was not successful in light of her individual needs. A fading model was also used in Petitioner's instruction, which is like a

descending ladder of accommodations to help a student gradually understand how to respond to questions following a lesson. For example, Petitioner's teacher would ask her to identify the main character in a story first by physically moving Petitioner's hand to point to the correct picture. This would help Petitioner understand what she is supposed to do, at which point the teacher would fade down incrementally with less assistance each time.

39. It is undisputed that Petitioner was not meeting grade-level standards, but she was making progress. Petitioner's teachers and other providers attempted to bridge the gap in Petitioner's learning caused by her disability through interventions identified in her IEPs.

Records Request

40. Petitioner's parents requested copies of Petitioner's student records on March 3, [redacted]. The request was mishandled by Respondent, which resulted in the records not being provided until May 13, [redacted].

41. A number of factors contributed to the delay in Respondent's production of the student records—some that were Respondent's fault and some that were not. A factor beyond control, for example, was that the records request came in the early stages of COVID-19 lockdown procedures. The timing created unforeseeable obstacles to personnel gaining access to buildings where physical records were stored. Respondent initially charged copying fees as a prerequisite for providing the records, having confused the protocols for public records versus student records. This caused further delay, but the records were ultimately provided without charge.

42. Although Respondent's handling of the records request was inept, the allegation that the delay was intentional and based on discriminatory animus is an assumption that has no evidentiary basis in the record. The record is also devoid of any evidence that the delay in the provision of records negatively impacted Petitioner's access to her education.

Family Relocation/Compensatory Hours

43. Petitioner's family had military orders to relocate to Pennsylvania in the summer of [redacted]. Leading up to the family's relocation, Respondent attempted to complete any remaining compensatory education hours that were reflected in Petitioner's IEP.

44. Respondent's goal was to attempt to provide all of Petitioner's compensatory education hours prior to the family's relocation. Respondent understood, however, some of the remaining hours may have to be provided in an alternative manner after the move.

45. Petitioner was already having challenges sustaining her existing instruction because of her disability; while at the same time, her parents and QR continued to advocate for additional compensatory hours.

46. Respondent offered different options to Petitioner's family to provide compensatory education while accommodating her individual needs.

47. Respondent offered cotreating as a proposed solution, which might entail, for example, a speech and language pathologist and teacher working together with Petitioner on overlapping goals. Petitioner's family rejected the idea of cotreating, believing that it was not appropriate for Petitioner's needs.

48. Respondent offered to participate in state-sponsored mediation in an effort to reach a consensus as to how compensatory services could be provided prior to Petitioner's relocation. Petitioner's parents declined this option.

49. Respondent set up a meeting for Petitioner's parents with District leaders in May [redacted] to discuss compensatory services.

50. Respondent offered to contract for compensatory education services for Petitioner through the receiving school district, or with a contracting third party, both of which Petitioner's parents declined.

51. Respondent offered monetary compensation based on research for the cost of services in the general Pittsburgh area, although Respondent did not have any more specific information as to where the family was moving. Petitioner's parents rejected the amount that was offered.

52. Respondent asked Petitioner's parents to provide information indicating exactly where they were moving and offered to set up compensatory education services for Petitioner with providers once they knew the specific school district. Petitioner's parents never provided Respondent with the requested information.

53. Respondent learned Petitioner's address only after it was listed on the due process complaint, filed in [redacted]. Having learned Petitioner's location, Respondent contacted the special education director in her school district and left several messages, but never received a return call. Petitioner's mom later informed Respondent that she would not consent to any communication between Respondent and Petitioner's new school district. At that point, Respondent tried to arrange services for Petitioner with private providers, but scheduling questions posed to Petitioner's parents went unanswered.

54. The last IEP that Petitioner had in the District reflected compensatory education of 150 hours.

CONCLUSIONS OF LAW

55. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 1003.57(1)(a) and 1003.5715(5), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u); and the Rehabilitation Act of 1973, 29 U.S.C. § 794.

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

57. Respondent is a local educational agency ("LEA"), as defined under 20 U.S.C. § 1401(19)(A). By virtue of receipt of federal funding, Respondent is required to comply with the IDEA, 20 U.S.C. § 1401, *et seq*. As an LEA, under the IDEA, Respondent was required to make a FAPE available to Petitioner. *Sch. Bd. of Lee County v. E.S.*, 561 F. Supp. 2d 1282, 1291 (M.D. Fla. 2008) (*citing M.M. v. Sch. Bd. of Miami-Dade Cnty.*, 437 F.3d 1085, 1095 (11th Cir. 2006)); *M.H. v. Nassau Cnty. Sch. Bd.*, 918 So. 2d 316, 318 (Fla. 1st DCA

2005). Section 504 also applies to public schools based on the receipt of federal financial assistance. 29 U.S.C. § 794(b)(2)(B).

58. At all relevant times, Petitioner was a student with a disability as defined under 34 C.F.R. § 300.8(a)(1); 20 U.S.C. § 1401(3)(A)(i); and Florida Administrative Code Rule 6A-6.03411(1)(f).

59. There are three major overlapping pieces of federal legislation that are generally applicable to a student with a disability claim of discrimination in a public school district: the IDEA, Section 504, and Title II of the American with Disabilities Act ("ADA"). *See A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1202 (9th Cir. 2016). The undersigned does not have authority to construe the ADA. The justiciable issues in this case turn on the interplay between the IDEA and Section 504.

I. <u>IDEA</u>

60. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *See 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); *See also Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

61. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *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, educational placement of their child, or the provision of FAPE. 20 U.S.C. § 1415(b)(1), (b)(3), and (b)(6).

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

A. IEP Procedure

63. Petitioner alleges a procedural violation in the form of Respondent withholding educational records from Petitioner's parents, thereby depriving them of meaningful participation in their daughter's education. Petitioner's parents were active participants in every decision the IEP team made with respect to Petitioner over the course of numerous meetings spanning three school years. The records request was not made until over halfway through Petitioner's final grading period in the District. There is no evidence in the record that the delay on Respondent's part significantly infringed on the parents' opportunity to participate in the decision-making process or caused actual deprivation of educational benefits.

B. IEP Substance

64. Petitioner also alleges a substantive violation; that is, that the IEP was flawed in its design and did not provide FAPE. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

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

20 U.S.C. § 1401(9).

65. Pursuant to the second step of the *Rowley* test, it must be determined whether the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07. In *Endrew F.*, the Supreme Court held that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 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.*

66. The IDEA ensures that students receive FAPE through the development of the IEP, "the centerpiece of the statute's education delivery

system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). An IEP is a comprehensive plan collaboratively prepared by a child's "IEP Team" (including teachers, school officials, and the child's parents). *Endrew F.*, 137 S. Ct. at 994.

67. The IEP must describe the "special education and related services ... that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

68. Specific to Florida, "FAPE means special education or specially designed instruction and related services… ." Fla. Admin. Code R. 6A-6.03411(1)(p).

a. *Instruction*

69. "Specially designed instruction" is defined as:

> adapting, as appropriate to the needs of an eligible exceptional student, the content, methodology, or delivery of instruction to address the unique needs of the student that result from the student's disability or giftedness and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the school district that apply to all students.

6A-6.03411(1)(jj).

70. Petitioner repeatedly argues that her parents were misled into believing that she was receiving general education instruction when she was not. In support of that argument, Petitioner characterizes the tailoring of instruction to fit her individual needs as a denial of FAPE. The very definition of FAPE under Florida law, however, includes an entitlement to "specially designed instruction." Such instruction, by definition, requires teachers to adapt instruction to the needs of the individual student, ensuring "access…to the general curriculum." This is exactly what Petitioner's

teachers did by exposing Petitioner to the general curriculum and tailoring it to her individual needs.

71. *Lessard v. Wilton-Lyndeborough Cooperative School District*, 518 F.3d 18, 28 (1st Cir. 2008), provides:

> The Supreme Court has pointed out with conspicuous clarity that the IDEA confers primary responsibility upon state and local educational agencies to choose among competing pedagogical methodologies and to select the method most suitable to a particular child's needs. *Rowley,* 458 U.S. at 207, 102 S.Ct. 3034[, 3051]. Then–Justice Rehnquist, writing for the majority, added that "it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to [the IDEA]." *Id.* at 207-08.

72. Throughout these proceedings, Petitioner conflated the concepts of curriculum and standards. Her position that Petitioner should have received instruction identical to that of a full school day in a brick-and-mortar setting represents an impossibility that is also repugnant to the core promise of the IDEA—an individualized education. The need for a tailored education is especially prominent in Petitioner's case where her disability limited her to tolerating instruction for only two hours per day.

b. *Related Services*

73. The definition of "related services," in the text of 20 U.S.C. § 1401(a)(17), "broadly encompasses those supportive services that 'may be required to assist a child with a disability to benefit from special education.'" *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex. rel. Charlene F.*, 526 U.S. 66, 73 (1999).

74. In *Cedar Rapids*, it was undisputed that a ventilator-dependent student could not attend school unless nursing services were provided. In other words, the services were the difference between the student's ability to attend school alongside his peers or be forced into a more restrictive learning environment. *Id.* at 79. This is distinguishable from the present case, where

Petitioner's needs necessitated instruction at home by agreement of all involved, and "[t]he parent, guardian or primary caregiver" was required to "ensure that a responsible adult [was] present" while student and teacher were working. Fla. Admin. Code R. 6A-6.03020(5)(a).

75. There is no evidence in the record showing that Petitioner required nursing services in order to benefit from special education in her home. The same is true of behavioral therapy services.

c. *Progress*

76. In Florida, "most significant cognitive disability" is measured, in relevant part, by "[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) … ." Fla. Admin. Code R. 6A-1.0943(1)(f)1.

77. The record reflects that Petitioner's IQ is 46, over twenty points below the benchmark for a most significant cognitive disability. Although Petitioner's specific IQ was not known during her time in the District, the number is consistent with her teachers' determination based on the information they had at the time that she required instruction tailored to her abilities in order to make progress toward general education standards.

78. "[L]evels of progress must be judged with respect to the potential of the particular child." *Lessard*, 518 F.3d at 29 (citing *Polk v. Cent. Susquehanna Intermed. Unit 16,* 853 F.2d 171, 185 (3d Cir.1988)). Petitioner's progress, although modest, is reasonable in the context of her manifold disabilities. The record reflects that Petitioner is positive, eager to learn, and has the ability to continue progressing in her education. However, Petitioner's IEP team, and especially her teachers, were required to meet her where she was at the time, which they did.

79. No persuasive evidence was presented to prove the alleged deficiencies in Petitioner's IEP. The greater weight of the record evidence established that the IEPs were all appropriately ambitious in light of Petitioner's

circumstances in all identified areas of need. And, as detailed in the Findings of Fact, Petitioner made progress.

C. IEP Implementation

80. Turning to the issue of implementation, in *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019), the Court articulated 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]." *L.J.*, 927 F.3d 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.

81. In *L.J.*, the court provided principles to guide the analysis of the implementation standard. *Id.* at 1214. To begin, the court stated 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. In other words, the task 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.*

82. The record does not reflect a material failure to implement Petitioner's IEP.

II. Section 504

A. FAPE

83. "While the IDEA focuses on the provision of appropriate public education to children with disabilities, the Rehabilitation Act more broadly addresses the provision of state services to individuals with disabilities." *McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 911 (9th Cir. 2020).

84. The core provision of Section 504 states:

> No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a).

85. Section 504's implementing regulations require qualifying public schools to "provide a free appropriate public education to each qualified handicapped person." 34 C.F.R. § 104.33(a). The FAPE requirements in the IDEA and in Section 504 are "overlapping but different." *McIntyre*, 976 F.3d at 911. (internal citations omitted). "Thus, Section 504's regulations gauge the adequacy of services provided to individuals with disabilities by comparing them to the level of services provided to individuals who are not disabled." *Id.*

86. Implementing a valid IEP for students also eligible for services under the IDEA is one of the primary mechanisms for ensuring that Section 504's FAPE requirement is met. *Id.* at 912.

87. A Section 504 discrimination claim requires proof of the following:

> (1) the child is a qualified individual with a disability;
>
> (2) she was denied a reasonable accommodation that she needs to enjoy meaningful access to the benefits of public services; and

> (3) the program providing the benefit receives federal financial assistance.

Id.

88. Prongs (1) and (3) of the *McIntyre* analysis are not disputed and are established. However, Petitioner has not established that "she was denied a reasonable accommodation that she needs to enjoy meaningful access to the benefits" of a public education.

89. Discrimination under Section 504 can be intentional or unintentional.

90. To prove a claim of intentional discrimination, Petitioner must demonstrate by a preponderance of the evidence that Respondent subjected her to an act of discrimination solely by reason of her disability. *T.W. v. Sch. Bd. of Seminole Cnty.*, 610 F.3d 588, 603-04 (11th Cir. 2010). To prove intentional discrimination, it is sufficient for Petitioner to supply proof of "deliberate indifference," which occurs when a "defendant knew that harm to a federally protected right was substantially likely and … failed to act on that likelihood." *Id.*; *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) ("Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that … likelihood."). As discussed by the Eleventh Circuit, "deliberate indifference plainly requires more than gross negligence," and "requires that the indifference be a 'deliberate choice.'" *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012).

91. With this framework in mind, the undersigned turns to the specific allegations, namely, that Respondent intentionally discriminated against Petitioner by failing to provide her with appropriate accommodations, supplies, and services resulting in a denial of FAPE. There is insufficient evidence in the record to show intentional discrimination.

92. Petitioner also asserts that, by virtue of a series of inactions, Respondent failed to make reasonable accommodations for Petitioner's disability, resulting in a denial of FAPE.

93. To prevail on this theory, Petitioner must prove by a preponderance of the evidence that Respondent failed to reasonably accommodate her needs as a disabled student, resulting in a "denial of meaningful participation in educational activities [or] meaningful access to educational benefits." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 274 (3d Cir. 2014); *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 (2d Cir 2000) (explaining that a school district must offer reasonable accommodations to disabled students to "ensure meaningful access to its federally funded program").

94. Here, the more persuasive evidence established that Petitioner made progress in her education, with the benefit of Section 504 accommodations imbedded in her IEPs that were appropriate to meet her needs and provide her meaningful access to a public education.

B. Retaliation

95. Petitioner alleges that Respondent retaliated against Petitioner's parents for their advocacy by intentionally withholding educational records. Section 504's implementing regulations include an anti-retaliation provision, which prohibits acts that "intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any [rights he or she has under Section 504]." 34 CFR § 100.7(e). In addition, acts of intimidation, or retaliation, taken against an individual because he or she has filed a complaint, testified, or otherwise participated in an Office for Civil Rights investigation are prohibited. Encompassed within this provision are retaliatory acts against people who complain of unlawful discrimination in violation of Section 504 on behalf of an individual with a disability. *Id.*

96. The record in this case is devoid of any evidence of a causal relationship between advocacy for Petitioner and any action taken by Respondent that would indicate unlawful retaliation. There is no evidence that Respondent intentionally withheld educational records.

III. Disposition

97. Petitioner did not prove that: Petitioner's IEPs failed to provide a FAPE; Respondent discriminated against the student based on her disability, in violation of Section 504; and Respondent retaliated against the parents, in violation of Section 504, for advocating on behalf of their daughter.

98. The balance of Petitioner's claims do not have sufficient foundation in law or fact to meet the burden of proof.

99. The following passage from a factually similar First Circuit case is instructive here:

> Many judges are parents too, and we can admire the determination with which the appellants have pursued the best possible education for their … daughter. That is as it should be. *See Rowley,* 458 U.S. at 209, 102 S.Ct. 3034 (predicting that parents "will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act"). But determination must be tempered by an understanding that school districts, like parents and children, have legal rights with respect to special education. In demanding more than the IDEA requires, the appellants frustrated the operation of a collaborative process and put the School District in an untenable position.

Lessard, 518 F.3d at 30.

IV. Compensatory Education

100. Petitioner requests three full school years of compensatory education totaling 2,916 hours, to be provided no later than October 1, 2023. This request is arbitrary and patently unreasonable, especially based on the fact that Petitioner's instructional time was limited to two hours per day by medical necessity when she was a student in the District.

101. Respondent, on the other hand, acknowledges that it committed to provide 150 hours of compensatory education in Petitioner's final IEP, yet

suggests that Petitioner should face a "substantial reduction" in those hours based on her parent's lack of cooperation. Such a reduction would be inequitable. Respondent is not absolved of its commitment to provide Petitioner with 150 hours of compensatory education.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Respondent shall provide Petitioner with 150 hours of compensatory education.

2. All other forms of requested relief are DENIED.

DONE AND ORDERED this 29th day of August, 2023, in Tallahassee, Leon County, Florida.

BRITTANY O. FINKBEINER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2023.

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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).