

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

\*\* ,

Petitioner,

vs.

Case No. 16-5579E

PALM BEACH COUNTY SCHOOL BOARD,

Respondent.

\_\_\_\_\_ /

FINAL ORDER

A final hearing was held in this case before Diane Cleavinger, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on February 6 through 10 and May 1 through 4, 2017, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Rochelle Marcus, Esquire  
Marcus Ed Law  
5550 Glades Road, Suite 500  
Boca Raton, Florida 33431

Alice K. Nelson  
Nelson Law Group  
14043 Shady Shores Drive  
Tampa, Florida 33613

For Respondent: Laura E. Pincus, Esquire  
Palm Beach County School Board  
Post Office Box 19239  
West Palm Beach, Florida 33416-9239

STATEMENT OF THE ISSUES

The issues in this proceeding are whether Respondent School Board failed to provide a free appropriate public education (FAPE) to Petitioner by failing to:

1. Timely evaluate the Student in all areas of [REDACTED] suspected eligibility;
2. Design an IEP or 504 Plan to deliver FAPE; and
3. Allow the Student's reading specialist to observe [REDACTED] in all reading classes.

PRELIMINARY STATEMENT

At the final hearing, Petitioner presented the testimony of 18 witnesses and introduced Petitioner's exhibits numbered 102 through 104; 108 through 118; 122; 124; 126; 132; 134 through 140; 145 through 147; 149 through 154; 156 through 161; 163 through 167; 169 and 170; 173 and 174; 182 through 184; 188; 190 through 193; 195; 199 through 206; 214; 219; 222 through 225; 228; 235; 259 through 264; 267; 269 and 270; and 276 through 282 into evidence. Respondent presented the testimony of six witnesses and offered Respondent's exhibits numbered 1 and 2; 5 through 7; 9; 11; 22; and 24 through 31 into evidence. Additionally, the parties introduced 76 joint exhibits numbered 1 through 76 into evidence.

At the conclusion of the final hearing and after discussion of post-hearing timelines, the deadline for the filing of proposed final orders was established for July 14, 2017, with the final order to follow by August 15, 2017. Later, Petitioner's Motion for Extension of Time was granted and the deadline for filing proposed final orders was set for August 7, 2017, with the final order to follow by October 2, 2017. All times were extended by order dated September 7, 2017. Thereafter, the impacts from Hurricane Irma caused a delay in the preparation of the final order and the deadline was extended to October 13, 2017, by order dated September 27, 2017. Finally, due to the size of the record and the length of this case for review, the deadline for the final order was extended to October 20, 2017, by order dated October 16, 2017.

After the hearing, Petitioner timely filed a Proposed Final Order on August 7, 2017. Respondent filed a Proposed Final Order on July 24, 2017. To the extent relevant the filed proposed orders were considered in preparing this Final Order.

Further in this Final Order, unless otherwise indicated, all rule and statutory references are to the version in effect at the time the subject IEP was drafted. Additionally, for stylistic convenience, [REDACTED] pronouns in the Final Order will be used when referring to the Student. The [REDACTED] pronouns are

neither intended, nor should be interpreted, as a reference to the Student's gender.

FINDINGS OF FACT

1. The Student was born on [REDACTED]. [REDACTED] has been enrolled in a Palm Beach County school in a general education classroom receiving a regular core curriculum since at least [REDACTED], the 2012-2013 school year. The Student has a full-scale IQ of [REDACTED] and falls in the [REDACTED]-[REDACTED] range. There was some evidence that indicated the Student's IQ might be underestimated. However, the better evidence demonstrated that even if underestimated the Student's IQ would be in the [REDACTED] range and [REDACTED] actual intellectual capability would remain the same. Further, the evidence was clear that Petitioner should remain in a general education placement with a regular core education curriculum.<sup>1/</sup>

2. During the time of the hearing in the 2016-2017 school year, Petitioner was in the [REDACTED] grade. Throughout [REDACTED] education, Petitioner has been well-liked by both school staff and [REDACTED] peers. As a Student, Petitioner was eager to learn. On October 22, 2014, [REDACTED] was recognized as eligible for a 504 Plan during [REDACTED] [REDACTED]-grade year, 2014-2015, based upon a diagnosis of [REDACTED] [REDACTED] ([REDACTED]) [REDACTED]. [REDACTED] exhibits both [REDACTED] and [REDACTED]. On May 4, 2016, towards the end of [REDACTED] [REDACTED]-grade year, 2015-2016, the Student was recognized as

eligible for exceptional student education (ESE) in the exceptionality category of [REDACTED] [REDACTED]. At the beginning of [REDACTED] [REDACTED]-grade year, during the 2016-2017 school year, Petitioner was recognized as eligible for the exceptionality categories of [REDACTED] on August 15, 2016, and [REDACTED] on August 30, 2016. The evidence showed that the last agreed to IEP was the August 15, 2016, IEP. The August 30, 2016, IEP was not completed.

3. As indicated, the Student was in [REDACTED] during the 2012-2013 school year. In February 2013 of [REDACTED] [REDACTED] year, the parents of the Student were concerned with [REDACTED] [REDACTED] skills and communicated those concerns to the Student's teacher. The evidence was not specific as to the nature of the [REDACTED] deficit the parents felt the student had. The teacher, based on [REDACTED] experience, felt that the Student was young and needed more time to develop better [REDACTED] skills.

4. Because of the parents' concern, the Student was evaluated by a tutor hired by the parents to assist the Student. The tutor assessed the Student using a "[REDACTED]" form to determine the Student's level of function and to guide the instruction the tutor would provide to the Student. The form was part of the assessment screenings used in a reading achievement program. The evidence did not demonstrate the overall nature of this program. In this case, the assessment

demonstrated areas of weakness such as [REDACTED]  
[REDACTED] ([REDACTED])  
[REDACTED]  
[REDACTED]). The assessment also demonstrated areas of  
mastery such as [REDACTED]  
[REDACTED] ([REDACTED]) and a [REDACTED] ([REDACTED]). The evidence  
was not clear as to whether the Student had been taught the  
skills being assessed or whether the skills that were assessed  
were appropriate for a [REDACTED] student. The evidence was  
also not clear that the tutor's February assessment was shared  
with the school that year. Tutoring services were provided to  
the Student through the spring of 2015, the Student's [REDACTED]-  
grade year, and contributed greatly to the Student's ability to  
progress academically from year to year. It is unlikely the  
Student would have progressed without these private services.

5. In May 2013, towards the end of [REDACTED], the  
Student's parents had the Student assessed by [REDACTED].  
[REDACTED] completed a Psychological Evaluation to assess the  
Student's learning strengths and weaknesses and issued [REDACTED]  
report on June 4, 2013.

6. The June 4 report was inconclusive, but indicated the  
Student did not appear to have a [REDACTED]. However, the  
report noted that the Student showed some signs of [REDACTED]  
and [REDACTED]. The doctor advised that the parents observe

the Student over the summer and return for further evaluation. The report was not provided to the school in June 2013.

7. The evidence did demonstrate that at the end of the Student's [REDACTED] year, the Student was proficient in all areas of [REDACTED], [REDACTED], and [REDACTED]. However, [REDACTED] teacher noted areas of concern in [REDACTED]. Those concerns were within the ordinary concerns a teacher might have for a [REDACTED] student. The evidence did not show that the teacher's concerns were sufficient to alert school staff that the Student should be evaluated for a disability under the school's Child Find responsibilities during the school year 2012-2013.

8. In June and August 2013, the Student returned to [REDACTED] for additional testing. [REDACTED] issued a second report on August 21, 2013, outlining [REDACTED] findings. [REDACTED] noted that due to the [REDACTED] and [REDACTED] the Student demonstrated, test results likely represented underestimates of the Student's capabilities. In the report, [REDACTED] diagnosed the Student with [REDACTED], [REDACTED]. The doctor did not diagnose a [REDACTED], such as [REDACTED], because there was not a [REDACTED] [REDACTED] between the [REDACTED] and the Student's [REDACTED] [REDACTED]. The doctor made eight specific recommendations in [REDACTED] report. The first recommendation was for medication. The other seven recommendations were for accommodations in the Student's school

environment (extra time on assignments and tests, quiet test environment, special seating, chunked instructions and assignments, written calendars and schedules, warning for longer assignments, and a fill-in outline of oral presentations). All of these accommodations were available through ordinary classroom management strategies used by the Student's teachers in school. Both reports were provided to the school in August 2013 at the beginning of the Student's ██████-grade year.

9. At the beginning of ██████ grade, the Student was not ██████ correctly, was having difficulty ██████ ██████, and difficulty ██████ (█████) ██████.<sup>2/</sup> In ██████ ██████ assessments, the school's literacy assessment system for ██████ and ██████, ██████ regressed from level █ to level █ and was ██████ behind in ██████. Because of these difficulties, the teacher provided the Student with immediate intensive intervention (III) utilizing the ██████ reading approach with a comprehension component added on. The ██████ ██████ approach consists of an intensive, multi-sensory and sequential phonics-based system that teaches the basics of word formation before whole meanings. Intervention instruction is provided only to students who are lagging behind their classmates in the development of critical reading skills. Such instruction will usually be guided by a specific intervention program that focuses on one or more of the key areas needed to

master a given subject, such as phonics for reading, which a student needs to improve. This type of instruction is needed by only a relatively small minority of students in a class.

10. Immediate intensive intervention is specifically designed and customized instruction for homogeneous small group or one-on-one reading instruction. It is considered "immediate" because it should begin as soon as the teacher becomes aware that a student is lagging seriously behind in the development of one or more critical reading skills. It involves systematic and explicit instruction, like the [REDACTED] reading approach used by the Student's teacher in this case, that specifically addresses the student's deficiency in a [REDACTED], and it also involves more frequent progress monitoring on target skills to ensure adequate progress.

11. Immediate intensive instruction can be provided both within and outside of the 90 minute reading block. For example, during the small group instructional period within the 90 minute block, a resource teacher could provide an intensive intervention to one small group of students, while the teacher was providing differentiated instruction to another group of students, and the rest of the students were working at independent reading centers.

12. In this case, the Student was provided an extra 30 minutes of reading instruction by the teacher in the classroom.

The evidence demonstrated that the iiii instruction used in this case was the same type of intervention instruction provided in a Tier 2 Response to Intervention (RtI) program. Further, in addition to the iiii instruction the Student received during school, the Student participated after school in an hour long tutorial for reading and the Florida Standards Assessment (FSA). The tutorial was taught by ■■■■■-grade teacher.

13. On September 20, 2013, around the beginning of the Student's ■■■■■-grade year, the June and August reports from ■■■■■ were presented to the school's multidisciplinary school base team<sup>3/</sup>, which included the Student's parent and the Student's private reading tutor. The team was aware that the Student was receiving private tutoring in ■■■■■ and ■■■■■ because of ■■■■■ struggles in those areas. The team was also generally aware of the private tutor's findings in ■■■■■ assessment, since ■■■■■ had input into the meeting. However, the evidence did not demonstrate that the tutor's actual assessment was provided to the team.

14. At the time of the team meeting, the Student was performing in the ■■■■■, commensurate to ■■■■■ peers in the classroom. The vast majority of ■■■■■ scores fell within the ■■■■■ range, with a few that ■■■■■ slightly ■■■■■ the ■■■■■ range. At that time, the Student was reading approximately ■■■■■ grade level. ■■■■■ difficulties of ■■■■■

██████████ and ██████████ to words were in line with a student with ██████. The team discussed ██████████ diagnosis of ██████ during the meeting.

15. At the meeting, the parent reported that the Student was currently on medication. The Student's ██████-grade teacher reported that since beginning the medication, the Student did not ██████████ and was using better ██████████. The parent asked for information on a 504 Plan. Eligibility criteria for a 504 Plan was explained to the parent. The evidence did not show that the parent requested an evaluation or that a 504 Plan be created. However, at the time, because of the Student's better ██████████ with medication and ██████████ success in school, the team chose to further monitor and observe the Student to determine ██████ progress as the year advanced.

16. Importantly, the better evidence did not demonstrate a need for either a 504 Plan or an IEP at this time, although there should have been growing concern that evaluation was warranted, since the school was already utilizing specialized intensive instruction with the Student, but needed time to determine if such instruction would ameliorate the Student's ██████ issues.

17. Thereafter parent/teacher conferences were held to monitor the Student throughout the year on October 2, 2013, February 28, 2014, and April 29, 2014.

18. In the interim, on February 5 and February 20, 2014, the parents had [REDACTED] complete a [REDACTED] and [REDACTED] Assessment on the Student based upon a referral from [REDACTED] private tutor, [REDACTED]. A [REDACTED] [REDACTED] does not evaluate whether a person can physically hear. Rather, it looks at whether an individual has difficulty processing information when there is background noise, like a crowded room or cafeteria. [REDACTED] found that the Student "achieved [REDACTED] word recognition scores in quiet." However, [REDACTED] noted "[REDACTED] demonstrated [REDACTED] extracting relevant auditory information from a background of noise . . . ." [REDACTED] concluded that [REDACTED] met the criteria for a diagnosis of [REDACTED] ([REDACTED]).

19. [REDACTED] also administered the [REDACTED] [REDACTED] ([REDACTED]). The [REDACTED] test is a normed test of language skills that provides a measure of language form and content skills, depending on the subtest and a student's responses on the subtest. In this case, the Student scored in the [REDACTED] range in the areas of sentence completion, linguistic concepts, word structure, following directions, and understanding spoken paragraphs. [REDACTED] scored in the [REDACTED] range in the areas of word classes and recalling sentences. Based on [REDACTED] scores, the Student exhibited a "[REDACTED] [REDACTED]," with difficulty using [REDACTED] [REDACTED]

and difficulty [REDACTED]. [REDACTED] recommended a [REDACTED] program, training in [REDACTED], [REDACTED] development, training in [REDACTED] and [REDACTED], development of [REDACTED], efforts to improve [REDACTED], small group with [REDACTED], and that [REDACTED] modifications be integrated into the Student's [REDACTED]. [REDACTED] also recommended many of the same accommodations recommended in the earlier report from [REDACTED].

20. With the use of the III reading program and a private tutor, the Student continued to read [REDACTED] in October 2013, but was reading [REDACTED] at an independent level [REDACTED] by February 28, 2014. The Student's teacher continued to monitor the Student's progress throughout the year. In September, when given a list of 50 high frequency words to read, the Student read [REDACTED]; in October, [REDACTED] read [REDACTED]; and in January, [REDACTED] read [REDACTED]. The teacher also regularly administered assessments from the [REDACTED] to the Student to determine [REDACTED] independent and instructional reading levels. [REDACTED] is a way to assess a student's reading progress by systematically evaluating a student's oral reading and identifying error patterns. In this case, the teacher used the information to assist in driving [REDACTED] instruction in the classroom and to individualize instruction for the Student.

assessments were administered on September 4, 2013; October 7, 2013; December 12, 2013; January 22, 2014; April 28, 2014; and May 27, 2014. Throughout the year, the Student in reading, with considerable intervention from private reading tutor and teacher; from an Level to an Level, and was reading at by the end of the school year.

21. On April 29, 2014, three quarters of the way through the Student's -grade year, the multidisciplinary school base team met and considered ' evaluation and again discussed 's evaluation. The team included School Psychologist as well as Speech Language Pathologist.

22. Importantly, at the time of the April 29th meeting, the Student, according to report card, was not proficient in areas of .<sup>4/</sup> The Student continued to struggle with , , and . involves breaking words down into individual sounds or syllables. Blending involves pulling together individual sounds or syllables within words. also involves combinations of two or more consonant letters. Letter generally appear at the beginning or end of words to create specific sounds. In you can hear the sound of each letter, such as "bl," "br," "cl," and "cr." If the letters make a single sound they are

called [REDACTED] ("sh," "ch," "th"). Both [REDACTED] and [REDACTED] are used in [REDACTED] during reading and are necessary skills for reading.

23. The Student's reading fluency, or the ability to read a text accurately, quickly, and with expression, had [REDACTED]. The Student continued to struggle with [REDACTED] and [REDACTED]. [REDACTED] difficulty with such skills prevented [REDACTED] from [REDACTED] what [REDACTED] read. Further, the Student could read [REDACTED] of the words on a page, but did not read for [REDACTED]. Additionally, [REDACTED] had difficulties with [REDACTED] [REDACTED] and [REDACTED].

24. In writing, [REDACTED] struggled to add [REDACTED] and [REDACTED]. [REDACTED] also struggled with [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] needed help in [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and had to be [REDACTED]. The team documented that the Student tended to [REDACTED] [REDACTED] assignments and reading, and did not routinely use [REDACTED] [REDACTED] [REDACTED].

25. The evidence demonstrated that the educational staff attributed the Student's [REDACTED] difficulties to [REDACTED] [REDACTED] reading and assignments. Further, the evidence showed that the educational professionals focused on the Student's [REDACTED] as the cause of [REDACTED] [REDACTED] difficulties. Surprisingly, educational staff did not entertain the idea that the Student's

██████ difficulties might be due to a ████████ (██████), such as ████████, even though by this time the error pattern in the Student's ████████, and the difficulties in ████████ and ████████ was ████████ in the classroom and at home, strongly indicated that a ████████, like ████████, might be underlying the Student's continued difficulty with ████████ and ████████.

26. At the April 29th meeting, it was reported that the Student had received III for ████████, but no longer required such support. The parents reported that the Student could be ████████ at home and did not ████████. The team discussed beginning RtI, but elected not to implement the program. The team also discussed creating a 504 Plan, but rejected creating such a plan. The team concluded that the school would continue to monitor the Student and encourage ████████ to ████████ and use ████████ strategies. However, after a year of significant intervention where the Student continued to be recognized by educational staff as significantly struggling in ████████ and ████████, the evidence demonstrated that the school, even with a mixed educational performance picture, had information sufficient to put it on notice that the Student needed further evaluation for a ████████, and potentially special education services.

27. As a result, the team failed to begin evaluation for a possible ████████ based on ████████ and consequently failed to

address the major disability impacting the Student's education. In that regard, Respondent failed in its duty to find and evaluate a child in all areas of suspected disability and, in essence, left the Student in intervention limbo. This failure was a violation of the Individuals with Disabilities Education Act (IDEA) and denied FAPE to the Student.

28. The evidence showed that the parents were clearly concerned with the Student's difficulties with █████, █████, and █████. The parents thought the Student's school grades were █████ and that the Student better understood █████ and █████, but that █████ was also not where █████ should be, since █████ continued to struggle with █████, which struggle carried over to █████ and █████. The evidence indicated that the parents were not in agreement with the school's wait and see course of action and were growing more irritated at the school's limited action regarding the Student's clear █████ difficulties. The evidence did not show that the parents requested an evaluation at the meeting. However, the School's duty to find and evaluate students who exhibit signs of a suspected disability, even if they are meeting standards, does not fall on the parents. The fact that the parents did not ask for an evaluation, and reluctantly acquiesced in the school's proposed course of action, does not relieve Respondent of its duty under Child Find.

29. By the end of the Student's [REDACTED]-grade year, the evidence showed that [REDACTED] continued to have difficulty with [REDACTED] in the area of [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] did not read for [REDACTED]. At the end of [REDACTED]-grade, the Student knew [REDACTED] out of [REDACTED] sounds for beginning sound recognition. [REDACTED] [REDACTED]-grade report card noted areas of concern for every semester of [REDACTED]-grade in the skill areas of [REDACTED], [REDACTED] and [REDACTED], [REDACTED], and [REDACTED] of standard [REDACTED]. In addition, the last semester of [REDACTED] [REDACTED]-grade report card reflected areas of concern in the skill areas of "[REDACTED] [REDACTED], [REDACTED] and [REDACTED], [REDACTED] and [REDACTED] of [REDACTED], [REDACTED] and [REDACTED] involving [REDACTED] and [REDACTED], and work with [REDACTED] and [REDACTED]."

30. Because the Student continued to be a struggling [REDACTED], which was now having impacts on [REDACTED] [REDACTED], [REDACTED], and [REDACTED], the Student's [REDACTED]-grade teacher volunteered to tutor the Student during the summer, free of charge to the parents or the School District. The Student came to some of the sessions, but not all of them. Again, Respondent failed to recognize that the Student needed further evaluation, and continuing to monitor the Student using similar interventions violated IDEA.

31. The evidence did demonstrate that staff at the school was caring and very concerned about the Student's education. They were not indifferent, deliberate or otherwise to [REDACTED]

situation, and did not violate the Student's civil rights under Section 504. The evidence demonstrated that this caring and concern for the Student by staff was evident throughout the Student's educational career in school.

32. The Student began [REDACTED] [REDACTED]-grade year, the 2014-2015 school year, on [REDACTED] in [REDACTED] based upon the [REDACTED]. However, the evidence also showed that the Student had [REDACTED] during the summer, since [REDACTED] retest of the [REDACTED] levels [REDACTED] and [REDACTED] at the start of [REDACTED]-grade. Additionally, the Student received III for [REDACTED] [REDACTED] and writing because [REDACTED] frequently [REDACTED] words in a [REDACTED] and continued not to read for [REDACTED].

33. On October 22, 2014, a team meeting was held. During the meeting, the school finally requested and received consent to evaluate for the Student's disabilities which, from the evidence the school had, were [REDACTED]. The team did develop a 504 Plan based upon the Student's [REDACTED], which it had known about since the beginning of [REDACTED] grade 2013. Additionally, a RtI was developed for a Tier 2 supplemental intervention in [REDACTED] [REDACTED]. The goal was to increase [REDACTED] words per minute (wpm) reading rate to [REDACTED] wpm with [REDACTED] percent accuracy on six out of eight assessments. The [REDACTED] wpm goal was a [REDACTED] from the Student's earlier goal of [REDACTED] wpm. The Tier 2 intervention consisted of [REDACTED] before school five days a week

and was remarkably similar to the III intervention provided to the Student in [REDACTED] grade, even though different curriculum was used in the RtI program. Weekly curriculum based measurement using [REDACTED]-grade fluency probes were to be used to monitor the Student's progress. The Student would also continue to receive III for [REDACTED], evaluations under the [REDACTED] [REDACTED] would be updated, as well as a [REDACTED] [REDACTED] ([REDACTED]) evaluation would be completed.

34. The team again failed to begin evaluation for a possible [REDACTED] based on [REDACTED] and consequently failed to address the major disability impacting the Student's education. For that reason, the appropriateness of the 504 Plan cannot be determined, since it failed to encompass all of the Student's disabilities. Additionally, the team agreed to continue to monitor the Student, as it had been doing for all of the past school year, and reconvene in 8 to 10 weeks, as it had been doing for all of the past school year. Again, this delay in evaluating the Student in all the Student's suspected disabilities and delay in determining eligibility for special education services was a violation of IDEA and failed to provide FAPE to the Student.

35. The team met again on January 22, 2015. At that meeting, Tier 2 progress in fluency was shared, as well as the [REDACTED]. The Tier 2 progress monitoring showed the Student achieved

a reading rate of █ wpm. More importantly, the progress monitoring showed that the Student did not achieve the █ level set for █ █ goal. The █ reflected that █, █, █, and █, were all reported to be at █ level. The █ also reflected that the Student's ability regarding █, █/, and █ with █ were █.

36. The evidence was unclear why the Student's ability to █ words and █ words was not tested. Such information would have been useful in assessing the Student's █. Further, there was no available score for █. Again, such an assessment would have been useful for assessing the Student's █.

37. █ assessment also had █ technically at █ level, reading at an █ level █, and working on an █ level █. However, the █ level █, by the halfway point in the school year, was not real █, since that level placed the Student where █ was at the end of █ grade before █ █ at the beginning of █ grade.

38. Even with this information and greatly lacking some information, the team decided to move the Student back to Tier 1 interventions under the RtI system, but agreed to continue III for the remainder of the semester as needed. The evidence

showed that the Student was [REDACTED] better in school, [REDACTED] [REDACTED], and not [REDACTED] as much.

39. The parent continued to voice serious concerns over the Student's [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. The parent did not agree with the schools plan of continued monitoring of the Student and the loss or absence of a variety of supports for the Student. The evidence also showed that educational staff continued to attribute the Student's difficulties in [REDACTED] to [REDACTED] and failed to further evaluate the Student for an [REDACTED]. The Student continued to struggle in [REDACTED] even after a year of III and private tutoring.

40. On May 14, 2015, towards the end of the [REDACTED]-grade school year, the Student's 504 Plan was updated to include [REDACTED] [REDACTED] in the classroom based on standardized testing. The parents continued to voice concerns about the Student's struggles with [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. The Student's report card showed some [REDACTED], but that [REDACTED] also continued to struggle in [REDACTED] and [REDACTED], [REDACTED] and [REDACTED], [REDACTED], and [REDACTED] and [REDACTED]. The evidence showed that the Student's [REDACTED] at the end of [REDACTED] grade remained unchanged at [REDACTED] level [REDACTED] with level [REDACTED] being too hard to master. Level [REDACTED] is the expected level for students at the end of [REDACTED] grade.

41. ██████ grade began around the middle of August 2015. On September 16, 2015, the Student's ██████-grade teacher reported that the Student was distracted during the ██████ portion of the 90-minute reading block in the curriculum, but that ██████ was staying alert during ██████ and ██████. The parent suggested a weekly reward so that the Student focused on ██████.

42. The evidence showed that the Student continued to struggle with ██████, ██████, ██████, and ██████. By September 21, 2015, about one month into the school year, the Student was reading at level ██████, ██████ level ██████ the expected level ██████ for ██████ grade. ██████ was ██████. The evidence did not reflect proficiency in ██████, but did reflect a struggling student in ██████. ██████ also struggled with ██████ and did not appear to ██████ as well as a ██████-grade student should, given ██████ intelligence.

43. On October 2, 2015, a meeting was held between the Student's other parent and the ██████-grade teacher. At that meeting, even though the Student continued to struggle with ██████, the teacher reported that the Student was proficient in ██████, but needed to improve with ██████ and ██████. The Student continued to read at an ██████ level ██████ on the ██████, and was working toward an ██████ level ██████. ██████ was not proficient in ██████

since the Student had difficulty with [REDACTED] and ongoing issues with [REDACTED]. The issue with [REDACTED] stemmed from [REDACTED] and [REDACTED] difficulty with the use of [REDACTED]. [REDACTED] was proficient in [REDACTED]. The [REDACTED]-grade teacher reported that [REDACTED] provided the accommodation of [REDACTED], but the Student wanted to do the work without [REDACTED] and would not ask [REDACTED] to [REDACTED]. [REDACTED] reported that the Student's [REDACTED] and [REDACTED] were fine.

44. On November 2, 2015, the parent asked the [REDACTED]-grade teacher to allow the Student to read questions on [REDACTED] own for reading assessments. The [REDACTED]-grade teacher noted the accommodation in the 504 Plan, but agreed to stop reading for a trial period. The parent also informed the [REDACTED]-grade teacher that [REDACTED] had hired a private reading specialist to work with the Student. [REDACTED] asked the [REDACTED]-grade teacher to communicate with the reading specialist. The [REDACTED]-grade teacher agreed and the tutor and teacher coordinated with each other.

45. On January 19, 2016, a very contentious team meeting took place. The parents, along with the Student's private tutor [REDACTED], and advocate [REDACTED], attended the meeting. The tutor provided intensive tutoring to the Student, beginning sometime in the last quarter of 2015. [REDACTED] used the [REDACTED] approach and [REDACTED] for instructing the Student in [REDACTED] because the Student's [REDACTED] issues stemmed from [REDACTED] and, to a lesser extent, [REDACTED] [REDACTED]. The

private tutor reported that [REDACTED] saw serious weakness in the Student's [REDACTED], [REDACTED], [REDACTED], and vocabulary abilities in [REDACTED]. At this mid-point in the school year, the Student continued to read at an [REDACTED] level [REDACTED], was working on [REDACTED] level [REDACTED], and was [REDACTED] level.

46. At the meeting, the team reviewed all current data and previous data from the Tier 2 intervention in [REDACTED] grade. The evidence showed that the Student had not made [REDACTED] on the [REDACTED] in the areas of [REDACTED] or [REDACTED]. The scores reflected that the Student was [REDACTED] [REDACTED]-grade level in these areas. The Student was also [REDACTED] in [REDACTED]. The area of [REDACTED] was not rechecked. The Student had not mastered [REDACTED] and [REDACTED] words. Errors on the [REDACTED] [REDACTED] of the [REDACTED] remained at a [REDACTED]-grade level, with consistent errors of leaving off [REDACTED]. Such [REDACTED] carried over to the Student's [REDACTED]. The evidence demonstrated that there were continuous and ongoing inconsistencies in the Student's performance and that [REDACTED] struggled with [REDACTED] on [REDACTED] [REDACTED]. [REDACTED] was inconsistent on [REDACTED] [REDACTED] [REDACTED]. [REDACTED] struggled with [REDACTED] [REDACTED] in [REDACTED], but did [REDACTED] with them when read in [REDACTED] and [REDACTED] were present. Progress reports on January 8 and 19 showed that the Student did not meet standards in [REDACTED] and [REDACTED]. The team discussed eligibility criteria for [REDACTED], [REDACTED], and [REDACTED]. The parent

requested, and the team agreed, to conduct a full psychoeducational evaluation to include [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. However, this testing should have been done more than a year ago with eligibility determinations in the area of [REDACTED] and [REDACTED] already made.

47. The team updated accommodations on the 504 Plan. They agreed that the Student would be allowed to do [REDACTED] reading log only one day per week with no penalty. They also agreed to restart III in reading and to address the Student's focus. The meeting ended with [REDACTED] requesting a due process form and advising that FAPE was not being provided to the Student. All parental forms for evaluation and eligibility determinations were completed by January 25, 2016.

48. On January 24, 2016, [REDACTED] again assessed the Student utilizing the [REDACTED] "to see what gains [REDACTED] made" over the years. The assessment showed the Student scored [REDACTED] percent in the [REDACTED] of skills assessed, with the lowest score being [REDACTED] percent on [REDACTED] of the [REDACTED] areas assessed. [REDACTED] also administered a [REDACTED] [REDACTED]. The assessment has 28 subsections. The Student mastered a total of [REDACTED] of the 28 subsections. The assessment is given in order from easiest to most difficult. The [REDACTED] subsections that the Student did not master were the [REDACTED] and are the most difficult of the areas assessed. However, the

evidence showed that the [REDACTED] subsections assessed skills that the Student should have mastered by [REDACTED] grade. The evidence demonstrated that there was a significant [REDACTED] in the Student's performance between February 2013, when [REDACTED] first tested [REDACTED], and January 2016 when [REDACTED] was assessed again. Such improvement was expected given the Student's [REDACTED]. However, the Student's [REDACTED] on the [REDACTED] [REDACTED] was at the [REDACTED] percentile. [REDACTED] [REDACTED] issues affected reading comprehension. [REDACTED] listening comprehension was at the [REDACTED] percentile. [REDACTED] oral reading was at the [REDACTED] percentile, which during the middle of [REDACTED] grade reflected a middle of [REDACTED]-grade level, at least [REDACTED] [REDACTED] expectations.

49. Importantly, the assessments also showed continued deficits in [REDACTED] that were related to the Student's [REDACTED]. The private tutor provided the results of [REDACTED] testing, the observations from [REDACTED] tutoring, and [REDACTED] expert opinion on the Student's educational needs to the school team.

50. Around January 28, 2016, the school drafted a Tier 2 plan for reading and thereafter began implementing it in the area of reading comprehension utilizing the [REDACTED] [REDACTED] ([REDACTED]) program. [REDACTED] is a research-based, small-group, supplementary intervention designed for students who perform below grade-level expectations in reading and writing. As with

similar interventions in the past, the plan was to provide [REDACTED] instruction for 30 minutes a day five days a week.

51. The Student's goal was to achieve [REDACTED] percent correct answers on [REDACTED] out of 10 assessments. The evidence demonstrated this was an appropriate goal for the Student. Instruction was to be provided by a Supplemental Academic Instruction (SAI) teacher who was not an ESE teacher. The evidence did not demonstrate that the use of a non-ESE teacher violated FAPE.

52. There was no evidence that the "team agreed" that an III intervention plan for [REDACTED] was drafted or implemented. The absence of such a plan and service denied FAPE to the Student and violated IDEA.

53. Moreover, as with earlier plans, the plans in at this point in the school year did not encompass all of the Student's disabilities. Given this failure it cannot be determined that the services provided under these plans were appropriate for the Student. As such, they failed to provide FAPE to the Student in violation of IDEA.

54. [REDACTED], a school psychology intern under the indirect supervision of school psychologist [REDACTED], performed a psycho-educational evaluation of the Student on February 25 and 26; and March 1 and 2 of 2016. During the evaluation, [REDACTED] administered the [REDACTED] for [REDACTED] ([REDACTED]), [REDACTED]. The test is a normed test of

intelligence that assesses a student's verbal comprehension, visual spatial abilities, fluid reasoning, working memory, and processing speed. The Student scored a Full Scale IQ of [REDACTED] and was in the [REDACTED] range on that measure. This score was [REDACTED] from the Student's previous Full Scale score of [REDACTED]. As indicated earlier the impacts of [REDACTED] on a student can cause a suppression of IQ scores and likely caused the [REDACTED] score in this case. Working memory was in the [REDACTED] range. Fluid Reasoning was in the [REDACTED]-[REDACTED] range, with the remainder of the tests in the [REDACTED]-[REDACTED] range.

55. The [REDACTED] ([REDACTED]) and [REDACTED] [REDACTED] ([REDACTED]) also yielded [REDACTED] results in the area of fluid reasoning and processing of information. In particular, the [REDACTED] test showed considerable cognitive [REDACTED] of the Student in "[REDACTED] [REDACTED]" and [REDACTED]. All of these assessments indicated the Student was weak in [REDACTED] [REDACTED], but that [REDACTED] was a strength for [REDACTED]. The Student's ability to [REDACTED] likely helped [REDACTED] progress through school with [REDACTED] to [REDACTED]-[REDACTED] performance in the early grades.

56. Because of the parent's suspicion about [REDACTED] difficulties underlying the Student's educational problems at school, [REDACTED] administered the [REDACTED]

██████ (██████). The Student's overall ██████████  
██████ fell within the ██████████ range, with a standard score of  
██████. The composite score in ██████████ was in the ████████-  
██████████ range. However, scaled scores in the subtests were  
scattered from ████████ to ████████-███████, with Number Memory-  
Forward, Word Memory, and Sentence Memory ████████ ████████ ████████.  
Such scattering is not unusual for a student with an ████████ due to  
██████. The ████████████████████ portion of the ██████████  
assessed the Student's ██████████ skills. The test measures a  
student's ability to segment and blend words, as well as their  
ability to discriminate between words. The Student, "██████  
██████ difficulty with these subtests," and performed in the  
██████████ range, with a standard score of ████████.

57. The ██████████ (██████) part of the ██████████  
██████████, ██████████ (██████) was also administered to the  
Student. The ████████ measures overall academic performance in the  
areas of reading, math, and writing. On the ████████, the Student's  
overall reading skills fell within the ██████████ range when compared  
to ████████ same-aged peers, with a standard score of ████████.  
Specifically, ████████ ability to read words on the Letter and Word  
Recognition subtest fell within the ██████████ range. However, ████████  
performance on the Reading Comprehension subtest fell within the  
██████████-average range. ████████ demonstrated a stronger ability to  
██████████ than to ██████████.

58. The Student's overall mathematics skills fell within the [REDACTED]-[REDACTED] range with a score of [REDACTED]. Skills required for performing basic math calculations were in the [REDACTED] range, although multistep math calculations were [REDACTED] for [REDACTED]. However, skills required for performing math word problems were in the [REDACTED]-[REDACTED] range and it is likely that the Student's [REDACTED]-[REDACTED] [REDACTED] impacts [REDACTED] math skills.

59. The Student's overall writing skills fell in the [REDACTED]-[REDACTED] range with a score of [REDACTED]. [REDACTED] phonological skills, as measured by the [REDACTED], fell within the [REDACTED]-[REDACTED] range with a score of [REDACTED]. However, [REDACTED] skills on the [REDACTED] subtest were within the [REDACTED] range, as well as [REDACTED] skills on the [REDACTED] subtest. The Student's overall decoding composite score was in the [REDACTED] range and indicated [REDACTED] had [REDACTED] [REDACTED] skills in these fundamental reading areas. None of the Student's scores fell within the [REDACTED] or [REDACTED] [REDACTED] ranges.

60. At the time of the psychoeducational evaluation, the Student was struggling in [REDACTED] and [REDACTED] and [REDACTED] grades were [REDACTED] level in either subject, but were at the "approaching" level for [REDACTED] and the "needs development" level for [REDACTED].

61. At some point the parent's private reading specialist observed the Student during reading in the general classroom

setting. The specialist was not allowed to observe the small group class due to concerns over disrupting the small group. The evidence did not demonstrate that denial of observation violated IDEA or impacted the provision of FAPE to the Student.

62. By March 7, 2016, the Student had not met [REDACTED] Tier 2 goal, achieving only a [REDACTED] percent baseline score on that date. [REDACTED] still had not met [REDACTED] goal by March 31, 2016, and was more than [REDACTED] grade level in [REDACTED]. A Tier 3 intervention plan was created by educational staff around March 31 and implemented around April 4, 2016. The parent was informed shortly after the Tier 3 plan was developed about the change to Tier 3 services.

63. The Tier 3 RtI intervention plan only listed small group strategy instruction as the research based intervention. The plan did not mention [REDACTED]. However, the evidence showed that a Tier 3 intervention utilizing the [REDACTED] program began in April because the Student exhibited ongoing difficulties in [REDACTED], as well as [REDACTED] about texts [REDACTED] had read.

64. The evidence did not demonstrate a significant difference between the Tier 2 [REDACTED] intervention and the Tier 3 [REDACTED] intervention except that such instruction was to occur three times a week for 15 to 20 minutes a session and appeared to provide much of the same type of instruction that had not

achieved ██████████ in the past for a student who should have received now late RtI services in ██████-grade. Immediate intensive intervention was continued for ██████ and ██████.

65. Further, the evidence showed that there continued to be reluctance by the educational staff to recognize ██████ as the underlying cause of the Student's difficulty in ██████████, ██████████, ██████, and ██████. The delay in services, in evaluating the Student for all ██████ disabilities, in determining eligibility, and in continuing to deny FAPE to the Student, was a violation of IDEA.

66. Additionally, the evidence showed that Tier 2 RtI services in ██████ were provided from April 4 through May 30, 2016. ██████ percent of ██████ services, or ██████ out of 45 sessions, were provided. Tier 3 RtI services in ██████ were provided from April 4 through May 30, 2016. ██████████ percent of ██████ services, or ██████ out of 27 sessions, were provided. The short-fall in service totaled about ██████ hours.

67. Given the protracted failure to evaluate in this case, the short fall in the provision of needed ██████ services to the Student at this time was a denial of FAPE and violated IDEA. Further, the plans as developed by the team cannot be determined to be appropriate because they did not encompass all of the Student's disabilities.

68. On April 18, 2016, there was also a Speech and Language evaluation completed. On the [REDACTED] and [REDACTED] [REDACTED] ([REDACTED]), a standardized assessment of speech and language, the Student obtained a standard score of [REDACTED], which is [REDACTED] [REDACTED], but still [REDACTED], standardized/norm referenced expectations.

69. Finally, on May 4, 2016, 106 calendar days and 69 school days after the parent consented to evaluate, the team, including the parent and the parent's attorney, met and determined eligibility for [REDACTED], based upon a Medical Examination Report, dated January 25, 2016, from [REDACTED], the Student's private psychologist. The record was clear that Respondent was informed about the Student's diagnosis of [REDACTED] in [REDACTED] and was aware that the Student was on medication for [REDACTED].

70. At the May 4 meeting, an IEP was developed. The parent's attorney discussed that additional eligibilities in the area of [REDACTED] and [REDACTED] should be included. The school only wanted to continue to collect data through RtI for those areas even though it already had sufficient data in the form of III and RtI data to determine eligibility. Notably, these were areas that should have been evaluated in [REDACTED] grade and, failing such evaluation, should have been evaluated in [REDACTED] grade based on the two years of data, including III and RtI data that the school already had. Such failure to determine eligibility in

the area of [REDACTED] and [REDACTED] was a violation of IDEA and failed to provide FAPE to the Student.

71. At the IEP meeting, where [REDACTED] eligibility was determined, the team consensus was to continue with the [REDACTED] intervention through the remainder of the school year. The parents objected to the school's plan to not determine eligibility for [REDACTED] and [REDACTED]. The team agreed to meet at the start of the school year to review RtI and determine any additional eligibility.

72. Services on the May 4, 2016, IEP included [REDACTED] of direct instruction in [REDACTED], for a minimum of two times per week in an ESE class; support facilitation<sup>6/</sup> in [REDACTED], for a minimum of two times per week in a general education class; and support facilitation in [REDACTED], for a minimum of three times per week in a general education class. The IEP also included [REDACTED] as a related service for 60 minutes per week, in class direct or pull out. Additionally, the IEP team offered the Student four weeks of Extended School Year (ESY) to take place from June 20 through July 21, 2016. The Student did not attend ESY because [REDACTED] was rewarded by [REDACTED] parents for passing [REDACTED] Florida Standards Assessments. The evidence did not demonstrate that the ESY services offered by Respondent violated IDEA. Again, because the IEP did not encompass all of the Student's disabilities, it cannot be determined that the IEP and services

were appropriate for this Student. However, the failure of the IEP to identify all of the Student's eligibilities causes the IEP to be inappropriate for the Student, not provide FAPE to the Student, and violate the IDEA.

73. Even after the IEP was written in May, the parents, on May 25, 2016, continued to have the Student assessed in the area of [REDACTED] by [REDACTED], an evaluation specialist and employee of [REDACTED] County Schools.

74. [REDACTED] administered the [REDACTED] and [REDACTED] ([REDACTED]). The [REDACTED] is a standardized tool for assessing the fundamental literacy skills of word identification, spelling, and sound-symbol knowledge. The [REDACTED] is not intended to be a diagnostic tool and it should be used in conjunction with other tests. [REDACTED] also acknowledged that the [REDACTED] is used to assist with selecting an appropriate [REDACTED] [REDACTED]. The [REDACTED] reading program is a research based, sequential, structured, and multisensory literacy program based on phonological-coding research and the [REDACTED] approach that emphasizes the structure of the English language, decoding and encoding word skills, and phonics. The Student performed in the [REDACTED] range on the word identification subtest, [REDACTED] on the spelling and sound-symbol knowledge tests, and [REDACTED]-[REDACTED] on the [REDACTED]. [REDACTED] also administered the [REDACTED], [REDACTED] ([REDACTED]).

The [REDACTED] is a research-based, normed method of assessing the silent reading ability of students and is primarily a measure of word identification, word comprehension, and reading speed. It is often used as one of the assessments for [REDACTED]. On the [REDACTED] the Student did [REDACTED] on the subtest with sentences, which tends to support the theory that [REDACTED] uses [REDACTED] to fill in [REDACTED] [REDACTED] [REDACTED]. Otherwise, the Student's scores were [REDACTED] [REDACTED] grade level on the [REDACTED], in the [REDACTED] range, and indicative of a student with an [REDACTED] based on [REDACTED].

75. Prior to the school year, [REDACTED], ESE Reading Specialist, was asked to recommend a program for the Student. Based upon the information [REDACTED] reviewed, [REDACTED] recommended [REDACTED]. [REDACTED] is a phonics-based, multisensory, systematic, explicit program that works on multisyllabic words and teaches procedures for decoding longer multisyllabic words. [REDACTED] made this recommendation having reviewed work samples from [REDACTED] grade, testing data, the [REDACTED] data, and [REDACTED] data.<sup>77</sup> This data showed that the Student was [REDACTED] to read the words on a page, but had a [REDACTED] related to the end of words and suffixes. It is also [REDACTED]'s opinion that the Student does not require an actual program in order to progress toward [REDACTED] IEP goals. Instead, [REDACTED] would analyze patterns of words the Student [REDACTED] on the [REDACTED] and

specifically teach to remediate those [REDACTED] rather than utilizing a program where a teacher teaches based upon what the program dictates. The better evidence did not support this conclusion, but did show the Student now requires a specific multisensory and flexibly sequenced program for students with [REDACTED].

76. The IEP team met on August 15, 2016, at the beginning of the Student's [REDACTED]-grade year, 2016-2017. At the August 15 meeting, the parent provided the [REDACTED] evaluation summary completed by [REDACTED]. The team also reviewed the [REDACTED] evaluation completed in April, as well as other data from earlier educational evaluations. The team added [REDACTED] as an eligibility category and modified the IEP to remove [REDACTED] as a related service and move such services as a special education service for the same [REDACTED] minutes a week. The evidence demonstrated that based on the information the school had at the time, the extent of the [REDACTED] services included on the IEP provided FAPE to the Student.

77. The IEP team also increased services to include direct instruction in [REDACTED] to [REDACTED] minute sessions a minimum of three times per week in a small group ESE class. The [REDACTED] class occurred during the half hour before the start of school. While the IEP did not reflect that the Student would have an extended school day in order for the reading instruction to occur, the

evidence did not demonstrate that the lack of that reference in the IEP was material.

78. Further, the evidence did not demonstrate that the extended school day or the lack of reference to it in the IEP impacted the provision of FAPE to the Student. Indeed, the evidence demonstrated that an extended school day was likely necessary to provide FAPE to the Student, since the Student's regular school day was filled with the Student's required core curriculum in the general education environment. Additionally, the team concluded that an ESE Reading Specialist would work with the team at the Student's school to assist with reading programming.

79. The team did not add [REDACTED] as an eligibility for the Student or include transportation as a service. However, the evidence did not demonstrate any IDEA transportation issues related to this Student and [REDACTED] parents got [REDACTED] to school on time. The evidence did show that, after the August 15 IEP was written, the Student engaged in [REDACTED] regarding getting to [REDACTED] ESE reading sessions after [REDACTED] was dropped off in a timely manner. However, such [REDACTED] issues are not transportation issues.

80. The team agreed to reconvene on August 30 to discuss eligibility for [REDACTED], review the IEP and the Student's [REDACTED] needs.

81. On August 18, 2016, the Student's [REDACTED]-grade teacher assessed [REDACTED] with [REDACTED]. [REDACTED] is a research based spelling, phonics, and vocabulary program. On the assessment the Student read [REDACTED] out of 5 common long vowels, [REDACTED] out of 7 other vowels, [REDACTED] out of 5 inflected endings, [REDACTED] out of 5 syllable junctures, [REDACTED] out of 5 harder suffixes, [REDACTED] out of 5 roots, [REDACTED] out of 62 feature points, and spelled 13 out of 25 words correctly. Remarkably, testimony at the hearing was that spelling was not directly "taught" in Respondent's schools, but seemed to be only indirectly taught as a skill or "pinpointed" as a "[REDACTED]." For spelling on the [REDACTED] assessment, the Student was at the [REDACTED] Spelling Stage, a [REDACTED] stage in reading where a student has learned [REDACTED] phonics rules, but not all, and still [REDACTED] to spell words correctly when they write.

82. That same day, the Student's [REDACTED]-grade teacher also administered an assessment on the [REDACTED]-grade [REDACTED] [REDACTED]. The Student read [REDACTED] out of 81 total words. The assessment's expectation is that students are able to read these words by the end of the school year. All of these assessments, as well as the better evidence in this case, demonstrated that the Student had some basic [REDACTED] and [REDACTED] skills, but was [REDACTED] in the development and generalization of those skills.

83. On August 29, 2016, the ESE reading teacher assessed the Student with the [REDACTED] produced by [REDACTED] [REDACTED] ([REDACTED]). [REDACTED] mastered the beginning decoding survey [REDACTED] out of 50. On the advanced decoding survey [REDACTED] read [REDACTED] out of 30 words correctly. The test clearly reflected that the Student had [REDACTED] early decoding skills, but had [REDACTED] [REDACTED] advanced decoding skills sufficient to become a fluent and comprehending reader at the [REDACTED]-grade level. In fact, the better evidence demonstrated that the Student's actual reading level in August 2016 was around the mid-to-late [REDACTED] grade level and [REDACTED] [REDACTED] current grade as a beginning [REDACTED]-grader. Further, the evidence demonstrated that the Student did not need to begin a reading program, like [REDACTED], that required sequential training that began with skills the Student had already mastered.

84. On August 30, 2016, Psychologist [REDACTED] drafted an RtI Summary. Based upon graphed data obtained during the prior school year in January 2016, [REDACTED] concluded that the Student had not met [REDACTED] goal for [REDACTED] [REDACTED]. As indicated, the data that the graph was based on had been known by Respondent's educational staff since about the middle of January 2016. The evidence was unclear as to why it took so long to be analyzed by Respondent's staff.

85. The IEP team met again on August 30, 2016, to review the Student's evaluations, data, and eligibility for [REDACTED]. More specifically, the IEP team drafted an extensive Reading Present Level of Performance Addendum, which included strengths and weaknesses. The evidence did not demonstrate that the present level of performance was finalized by the IEP team, since the August 30 IEP was not completed on that date.

86. At the August 30, 2016, meeting, there was discussion about writing a goal regarding [REDACTED] [REDACTED] because the Student had difficulty with [REDACTED] [REDACTED]. There was also discussion about writing a goal including [REDACTED]. The parents asked for a [REDACTED] goal. [REDACTED], Respondent's reading specialist and a member of the IEP team, testified [REDACTED] did not agree with the need for a specific [REDACTED] goal because the Student had some [REDACTED] skills. These discussions were only preliminary and were not concluded by the IEP team, since the time allotted for the IEP meeting ran over.

87. The meeting was rescheduled for September 19, 2016, but did not occur because the parents canceled the meeting and elected to file this due process complaint. Given the fact that the August 30, 2016, IEP was not finalized, it cannot be determined whether this IEP would have been appropriate for the Student. Thus, only the August 15 IEP, which did not contain all the Student's eligibilities and did not provide FAPE for

failing to recognize all the Student's eligibilities, can be assessed.

88. The evidence showed that after August 30, 2016, and even though there was no [REDACTED] goal written for the Student, the Student received individualized instruction in [REDACTED] from [REDACTED] ESE teacher utilizing the scope and sequence of a reading program called [REDACTED], which [REDACTED] supplemented and modified to meet the needs of the Student. Within this program, the Student's ESE teacher reviewed short vowels, long vowels, blends, and digraphs, and noted that the Student had [REDACTED] those skills. [REDACTED] was able to then begin the program where the Student demonstrated a need.

89. The ESE teacher also utilized multisensory strategies working with the Student such as, [REDACTED] and [REDACTED]. The ESE teacher did not use the [REDACTED] [REDACTED] program recommended by [REDACTED] earlier in the year. The evidence was not clear why the teacher did not use the recommended program. However, the evidence showed that the program used by the ESE teacher was individualized for the Student to target [REDACTED] weaknesses in [REDACTED]. Additionally, the evidence showed that the Student's [REDACTED]-grade regular education teacher provided the Student with iii two times per week and utilized the [REDACTED] program. The teacher has also

observed the Student reading a [REDACTED]-grade level text that [REDACTED] chose.

90. On November 29, 2016, the ESE teacher completed an IEP Goal report, outlining progress towards each of the Student's annual goals:

a. On the goal [the Student] "will formulate sentences in [REDACTED] writing using the appropriate syntactical markers (ed, t) and conjunctions," [the Student] was at 65% of meeting [REDACTED] goal.

b. On the goal [the Student] "will independently provide a response when answering figurative language/idiomatic questions," [the Student] was at 88% of meeting [REDACTED] goal.

c. On the goal "after reading an Independent level text, [the Student] will answer comprehension questions that require [REDACTED] to think 'beyond the text' (Inferring, Synthesizing, Making Connections, Predicting)," [the Student] was at 90% of meeting [REDACTED] goal.

d. On the goal [the Student] "will identify cause and effect relationships within text details and explain cause and effect relationships across subject areas," [the Student] was at 50% of meeting [REDACTED] goal.

e. On the goal [the Student] "will differentiate between all mathematical operations (addition, subtraction, multiplication, and division) real life scenarios (word problems)," [the Student] was at 46% of meeting [REDACTED] goal.

f. On the goal [the Student] "will use taught strategies to solve two step word problems," [the Student] was at 64% of meeting [REDACTED] goal.

g. On the goal "given a reward system, [the Student] will maintain focus for thirty minutes with no more than one prompt," [the Student] was at 100% of meeting [ ] goal.

As such, the better evidence showed the Student made [ ], but [ ] progress using the modified [ ] program and III support. By this time in the Student's education, the evidence demonstrated that the Student required a more intense [ ] and [ ] program.

91. During the hearing, there was evidence presented by Petitioner regarding the [ ] [ ] Program and the [ ] [ ] Program by [ ]. However, neither of these programs is appropriate for Petitioner since both programs require students to start at the beginning and do not allow a student to skip sections. This would require the Student to spend extensive time on skills [ ] has already [ ] before working on [ ] identified area of [ ]. For example, the Student tends to [ ] " " at the end of the word. However, in the [ ] or [ ] programs there is no entry point where the Student would be able to jump in and work on remediating this deficit. [ ] " " at the end of a word is different from knowing the [ ] that an " " makes. Before the Student would begin to remediate this known deficit in the [ ] [ ] Program, [ ] would first need to complete remediation sections on what [ ] an " " makes, a skill in which [ ] has

already demonstrated mastery. The [REDACTED] program typically takes three years to complete. The [REDACTED] Program takes a minimum of one school year and a maximum of two school years to complete, depending on the number of days the student utilizes the program.

92. On the other hand, based upon additional information available by the time of the hearing in this matter, [REDACTED] now recommends the [REDACTED] program. The [REDACTED] program is a workbook series based curriculum that, unlike [REDACTED], allows a student to start in various places in the sequence of the program, depending on the skills on which the student needs to work. [REDACTED] does provide very explicit instruction on phonetic patterns, particularly multisyllabic patterns that the Student [REDACTED]. The program is appropriate for students in the [REDACTED] and [REDACTED] grades. [REDACTED] also provides writing and spelling support. It is a recommended program for [REDACTED] students who, like the Student in this case, have an underlying disability of [REDACTED]. It would be an appropriate program for the Student and any future IEP should include a program similar to [REDACTED] with appropriate goals in [REDACTED], [REDACTED], and [REDACTED].

93. Further, the evidence demonstrated that [REDACTED] is a significant weakness for the Student. [REDACTED] struggled in the beginning of the year with [REDACTED] [REDACTED], but has improved

somewhat on those [REDACTED]. Any future IEP should include appropriate goals in [REDACTED].

94. In this case, the evidence was clear that the parent incurred the cost of a private reading tutor and the cost of hiring multiple expert specialists to evaluate the Student when the school failed to evaluate for several years. Petitioner is entitled to reimbursement for providing the reading education to the Student that should have been provided by the school. Petitioner is also entitled to reimbursement for the private assessments and expert fees incurred for evaluating the Student. Finally, Petitioner is entitled to compensatory education for the amount of time [REDACTED] did not receive RtI services during the period from April 4 through May 30, 2016. The evidence did not demonstrate a need for additional compensatory education for the Student.

#### CONCLUSIONS OF LAW

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

96. 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).

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

98. The IDEA contains "an affirmative obligation of every [local] public school system to identify students who might be disabled and evaluate those students to determine whether they are indeed eligible." L.C. V. Tuscaloosa Cnty. Bd. of Educ., 2016 U.S. Dist. LEXIS 52059 at \*12 (N.D. Ala. 2016) quoting N.G. v. D.C., 556 F. Supp. 2d 11, 16 (D.D.C. 2008)(citing 20 U.S.C. § 1412(a)(3)(A)). This obligation is referred to as "Child Find," and a local school system's "[f]ailure to locate and

evaluate a potentially disabled child constitutes a denial of FAPE." Id. Thus, each state must put policies and procedures in place to ensure that all children with disabilities residing in the state, regardless of the severity of their disability, and who need special education and related services, are identified, located, and evaluated. 34 C.F.R. § 300.111(a). Notably, Child Find is an identification and evaluation issue and not an issue about eligibility for ESE services. The two issues should not be confused. Importantly, the appropriateness of an IEP and ESE services, should such be required under IDEA, often rests on proper Child Find identification and evaluation.

99. However, "Child Find does not demand that schools conduct a formal evaluation of every struggling student." D.K. v. Abington School Dist., 696 F.3d 233 (3rd Cir. 2012) quoting J.S. v. Scarsdale Union Free Sch. Dist., 826 F.Supp.2d 635, 661 (S.D.N.Y.2011) ("The IDEA's child find provisions do not require district courts to evaluate as potentially 'disabled' any child who is having academic difficulties.")(internal quotation marks omitted). Further, a school's failure to diagnose a disability at the earliest possible moment is not per se actionable, in part because some disabilities "are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all." D.K. at 249 quoting A.P. ex

rel. Powers v. Woodstock Bd. of Educ., 572 F.Supp.2d 221, 226  
Page 30 of 42 (D.Conn.2008)(internal quotation marks omitted).

100. Rule 6A-6.0331 sets forth the school districts responsibilities regarding students suspected of having a disability. This rule provides that school districts have the responsibility to ensure that students suspected of having a disability are subject to general education intervention procedures. As an initial matter, the school district has the "responsibility to develop and implement a multi-tiered system of support (MTSS) which integrates a continuum of academic and behavioral interventions for students who need additional support to succeed in the general education environment." Fla. Admin. Code R. 6A-6.0331(1).

101. The general education intervention requirements include parental involvement, observations of the student, review of existing data, vision and hearing screenings, and evidence-based interventions. Fla. Admin. Code R. 6A-6.0331(1)(a)-(e). Rule 6A-6.0331(1)(f) cautions, however, that nothing in this section should be construed to either limit or create a right to FAPE or to delay appropriate evaluations of a student suspected of having a disability.

102. Rule 6A-6.0331(2)(a) then sets forth a non-exhaustive set of circumstances which would indicate to a school district that a student may be a student with a disability who needs

special education and related services. As applicable to this case, those circumstances include the following:

1. When a school-based team determines that the kindergarten through grade 12 student's response to intervention data indicate that intensive interventions implemented in accordance with subsection (1) of this rule are effective but require a level of intensity and resources to sustain growth or performance that is beyond that which is accessible through general education resources; or
2. When a school-based team determines that the kindergarten through grade 12 student's response to interventions implemented in accordance with subsection (1) of this rule indicates that the student does not make adequate growth given effective core instruction and intensive, individualized, evidence-based interventions; . . .

103. Under the rule, a parent may also initiate a request for initial evaluation to determine if the student is a student with a disability. Fla. Admin. Code R. 6A-6.0331(3)(a)4. and 6A-6.03018(3)(a)2. Thereafter, the school district is mandated to obtain consent for the evaluation or provide the parent with a written Notice of Refusal. Fla. Admin. Code R. 6A-6.0331(3)(c). After receiving consent, the school district must complete the initial evaluation within 60 calendar days. Fla. Admin. Code R. 6A-6.0331(g).

104. Rule 6A-6.0331(3)(e) sets forth the requisite qualifications of those conducting the necessary evaluations and rule 6A-6.0331(5) sets forth the procedures for conducting the

evaluations. In conducting the evaluation, the school district "must not use any single measure or assessment as the sole criterion for determining whether a student is eligible for ESE." Fla. Admin. Code R. 6A-6.0331(5)(a)(2). To the contrary, the school district "must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student." Fla. Admin. Code R. 6A-6.0331(5)(a)(1). The student shall be assessed in "all areas related to a suspected disability" and an evaluation "shall be sufficiently comprehensive to identify all of a student's ESE needs, whether or not commonly linked to the suspected disability." Fla. Admin. Code R. 6A-6.0331(5)(f), (g).

105. In this case, the evidence demonstrated that the Student [REDACTED] [REDACTED] [REDACTED] grade level peers in reading which pattern would be repeated throughout [REDACTED] educational career and required a level of intensity beyond the general education resources to sustain such growth. By April 29, 2014, the school had sufficient information, in the form of III data, report cards, progress monitoring in [REDACTED], and private expert evaluations, that Petitioner was a child with a disability and should have evaluated [REDACTED] in all areas of suspected disability, including [REDACTED], at that time. With each following school year, Respondent failed to evaluate Petitioner in all areas of suspected disabilities until the beginning of

█ █-grade year. The result was that the Student increasingly continued to significantly struggle in school into █ grade and was denied FAPE in █, █ and the part of █ █-grade year addressed in this case. During that time, the parent was forced to provide private tutoring to Petitioner to aid and obtain the Student's progress in school. Further, the parents were forced to obtain private evaluations to supply the evaluation data the school should have obtained under its Child Find duties and possible eligibility for ESE services once appropriate evaluations had been conducted.

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

107. Local school systems must also satisfy the IDEA's substantive requirements by providing all eligible students with 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).

108. "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).

109. 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).

110. Indeed, "the IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 13 S. Ct. 988, 994 (2017)(quoting Honig v. Doe, 108 S. Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." Id. (quoting Rowley, 102 S. Ct. at 3034) and where the provision of such special education services and accommodations are recorded.

111. In Rowley, the Supreme Court held that a two-part inquiry or analysis of the facts must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Rowley, 458 U.S. at 206-207. A procedural error does not automatically result in a denial of FAPE. See G.C. 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 a free appropriate public education, 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. 5-16, 525-26 (2007).

112. 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 determining a standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." Endrew F., 13 S. Ct. at 993. In doing so, the Court held that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 999. As discussed in Endrew F., "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." Id.

113. The determination of whether an IEP is sufficient to meet this standard differs according to the individual circumstances of each student. For a student, like Petitioner

in this case, 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. (quoting Rowley, 102 S. Ct. at 3034). 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, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." Id. at 1000. This standard is "markedly more demanding" than the one the Court rejected in Endrew F., under which an IEP was adequate so long as it was calculated to confer "some educational benefit," that is, an educational benefit that was "merely" more than "de minimis." Id. at 1000-1001.

114. The assessment of an IEP's substantive propriety is guided by several principles, the first of which is that it must be analyzed in light of circumstances as they existed at the time of the IEP's formulation; in other words, an IEP is not to be judged in hindsight. M.B. v. Hamilton Se. Sch., 668 F.3d 851, 863 (7th Cir. 2011)(holding that an IEP can only be evaluated by examining what was objectively reasonable at the time of its creation); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990)("An IEP is a snapshot, not a

retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."). Second, an assessment of an IEP must be limited to the terms of the document itself. Knable v. Bexley Cty. Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001); Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1315-16 (8th Cir. 2008)(holding that an IEP must be evaluated as written).

115. Third, great deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See Endrew F., 13 S. Ct. 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."); A.K. v. Gwinnett Cnty. v. Sch. Dist., 556 Fed. Appx. 790, 792 (11th Cir. 2014)("In determining whether the IEP is substantively adequate, we 'pay great deference to the educators who develop the IEP.'")(quoting Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991)). As noted in Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989), "[the undersigned's] task is not to second guess state and local

policy decisions; rather, it is the narrow one of determining whether state and local officials have complied with the Act."

116. Further, the IEP is not required to provide a maximum educational benefit, but only need provide a basic educational opportunity. Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991); C.P. v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1153 (11th Cir. 2007); and Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).

117. The statute guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents." Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 (2d Cir. 1989)(internal citation omitted); see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-534 (3d Cir. 1995); Kerkam v. McKenzie, 862 F.2d 884, 886 (D.C. Cir. 1988)("proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act"). Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998); and Doe v. Bd. of Educ., 9 F.3d 455, 459-460 (6th Cir. 1993)("The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. . . . Be that as it may, we hold that the Board is not required to provide a Cadillac

. . . .").

118. To be eligible for special education, a student must be determined as:

having [REDACTED], a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

34 C.F.R. § 300.8 (a).

119. Under Florida law, OHI is defined in Florida Administrative Code Rule 6A-6.030152:

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, asthma, attention deficit disorder or attention deficit hyperactivity disorder, Tourette syndrome, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and acquired brain injury.

120. In Florida, an SLD is defined in Florida Administrative Code Rule 6A-6.03018 as:

a disorder in one or more of the basic learning processes involved in understanding or in using language, spoken or written, that may manifest in significant

difficulties affecting the ability to listen, speak, read, write, spell, or do mathematics. Associated conditions may include, but are not limited to, dyslexia, dyscalculia, dysgraphia, or developmental aphasia.

121. Under Florida law, LI is defined in Florida Administrative Code Rule 6A-6.030121 as:

disorders of language that interfere with communication, adversely affect performance and/or functioning in the student's typical learning environment, and result in the need for exceptional student education.

(a) Language impairment is defined as a disorder in one or more of the basic learning processes involved in understanding or in using spoken or written language. These include:

1. Phonology - Phonology is defined as the sound system of a language and the linguistic conventions of a language that guide the sound selection and sound combinations used to convey meaning;
2. Morphology - Morphology is defined as the system that governs the internal structure of words and the construction of word forms;
3. Syntax - Syntax is defined as the system governing the order and combination of words to form sentences, and the relationships among the elements within a sentence;
4. Semantics - Semantics is defined as the system that governs the meanings of words and sentences; and
5. Pragmatics - Pragmatics is defined as the system that combines language components in functional and socially appropriate communication.

(b) The language impairment may manifest in significant difficulties affecting listening comprehension, oral expression, social interaction, reading, writing, or spelling. A language impairment is not primarily the result of factors related to chronological age, gender, culture, ethnicity, or limited English proficiency.

122. Students with [REDACTED] often are eligible under the [REDACTED] category if their [REDACTED] impedes their education to the point where special education services are needed. Additionally, students with [REDACTED] often are categorized in the [REDACTED] and [REDACTED] categories if, as with [REDACTED], their [REDACTED] impedes their education to the point where special education services are needed.

123. In this case, the evidence demonstrated that all of the IEPs, with the exception of the uncompleted August 30, 2016, IEP, failed to identify the Student in all areas of [REDACTED] disabilities and failed to recognize the Student in all [REDACTED] eligibility categories. In particular, the IEPs failed to identify the Student as eligible in the category of [REDACTED] until the uncompleted IEP of August 30, 2016. As such, the IEPs failed to provide FAPE to the Student. However, in this case the evidence showed that the Student was able to progress from [REDACTED], but only with considerable private tutoring and the help of concerned parents. Such private help was necessary due to Respondent's failure to evaluate and determine eligibility in

a timely manner. The failure was a violation of IDEA and denied FAPE to the Student.

124. On the other hand, because of this progress, the record does not demonstrate a need for compensatory education except for the 13 hours in services that were not provided in this case. Further, Petitioner is entitled to reimbursement for the expenses of private tutoring and evaluations that the parent had to provide in order to obtain the minimal progress of the Student reflected in this record and ultimately [REDACTED] recognition as eligible for ESE services in the categories of [REDACTED], [REDACTED], and [REDACTED]. Ultimately, the evidence demonstrated that the August 30th IEP, which was the only IEP to address all the Student's eligibilities, was not completed by the IEP team. Therefore, the adequacy of that IEP cannot be determined and the parties should immediately convene an IEP meeting to complete an IEP in line with the guidance in this Final Order.

125. Finally, Petitioner contends that the delays in evaluation demonstrated in this case and alleged inappropriate IEPs constituted violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 795, et seq. (Section 504). Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides in pertinent part as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], shall,

solely by reason of [REDACTED] or [REDACTED] 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 . . . .

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

127. The U.S. Department of Education has promulgated regulations governing preschools, elementary schools, and secondary schools. 34 C.F.R. part 104, subpart D. The K-12 regulations are at sections 103.31-39. Sections 104.33-.36 enlarge upon the specific provisions of Section 504 by substantially tracking the requirements of IDEA.

128. Section 104.33 requires that Respondent provide FAPE to "each qualified handicapped person who is in the recipient's jurisdiction." For purposes of Section 504, an "appropriate education" is the provision of regular or special education and related aids and services that (1) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and

(2) are based upon adherence to procedures that satisfy the requirements of sections 104.34, 104.35, and 104.36 and § 104.33(b)(1). An "appropriate education" can also be provided by implementing an IEP that is compliant with the IDEA. 34 C.F.R. § 104.33(b)(2).

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

130. Assuming a petitioner has established a prima facie case, the respondent must present a legitimate, non-discriminatory reason for the adverse actions it took. Lewellyn v. Sarasota Cnty. Sch. Bd., 2009 U.S. Dist. LEXIS 120786, at \*29 (M.D. Fla. Dec. 29, 2009)(citing Wascura v. City of S. Miami, 257 F.3d 1238, 1242 (11th Cir. 2001)). The Eleventh Circuit has stated that the respondent's burden, at this state, is "exceedingly light and easily established." Id. quoting Perryman v. Johnson Prods. Co. Inc., 698 F.2d 1138, 1142 (11th

Cir. 1983). Once the defendant has articulated a non-discriminatory reason for the actions it took, the petitioner must show that the respondent's stated reason is pretextual. "Specifically, to discharge their burden, Plaintiffs must show that Defendant possessed a discriminatory intent or that the Defendant's espoused non-discriminatory reason is a mere pretext for discrimination." Id. See also Daubert v. Lindsay Unified Sch. Dist., 760 F. 3d 982, 985 (9th Cir. 2014); and Timothy H. v. Cedar Rapids Cnty. Sch. Dist., 178 F.3d 968 (8th Cir. 1999).

131. Here, the evidence demonstrated that Petitioner meets the first, second, and fourth factors for establishing a prima facie case. Thus, the remaining issue is whether Respondent discriminated against Petitioner solely by reason of [REDACTED] disability.

132. As noted in J.P.M., the definition of "intentional discrimination" in the Section 504 special education context is unclear. J.P.M., 916 F. Supp. 2d at 1320 n.7. In T.W. ex rel. Wilson v. School Board of Seminole County, 610 F.3d 588, 604 (11th Cir. 2010), the Eleventh Circuit stated that it "has not decided whether to evaluate claims of intentional discrimination under Section 504 under a standard of deliberate indifference or a more stringent standard of discriminatory animus." However, in Liese v. Indian River County Hospital District, 701 F.3d 334, 345 (11th Cir. 2012), the Eleventh Circuit, in a case involving

a Section 504 claim for compensatory damages, concluded that proof of discrimination requires a showing, by a preponderance of the evidence, that the respondent acted or failed to act with deliberate indifference.

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

134. In Ms. H. v. Montgomery County Board of Education, 784 F. Supp. 2d 1247, 1263 (M.D. Ala. 2011), comparing failure-to-accommodate claims under Section 504 and the IDEA, the district court noted that:

To state a claim under § 504, "either bad faith or gross misjudgment should be shown." Monahan v. Nebraska, 687 F.2s 1164, 1171 (8th Cir. 1982)]. As a result, a school does not violate §504 merely by failing to provide a FAPE, . . . Id. Rather, [s]o long as the [school] officials involved have exercised professional judgment, in such a way not to depart grossly from accepted standards among education professionals," the school is not liable under §504. Id. . . . The courts agree that "[t]he 'bad faith or gross misjudgment' standard is extremely difficult to meet."

(citations omitted).

135. The Ms. H. opinion further noted that, "if a school system simply ignores the needs of special education students, this may constitute deliberate indifference."

136. In this case, the evidence demonstrated that the Student was not excluded, denied benefits, or discriminated against by reason of [REDACTED] disability. Various school and district staff testified that their rationale for providing the Student with a variety of educational interventions was to help [REDACTED] progress in school and to work on the areas [REDACTED] was struggling in. [REDACTED] disabilities were not ignored. The evidence was clear that Respondent's staff cared greatly about the Student. There was no evidence that the evaluation inadequacies in this case were based on the Student's disabilities or gross indifference to those disabilities. As such, Petitioner has failed to establish that Respondent intended to discriminate against [REDACTED] on the basis of [REDACTED] disability, or knew that it was substantially likely that a violation of [REDACTED] federally protected rights would occur. Accordingly, Petitioner's Section 504 claim fails.

138. Further, Petitioner is the prevailing party in this action. As such, Petitioner is entitled to recover reasonable

attorneys' fees and costs in an amount to be determined by the undersigned Administrative Law Judge should the parties fail to agree on said amount. Fla. Admin. Code R. 6A-6.03311(9)(x).

ORDER

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

1. Immediately convene an IEP meeting to draft an appropriate IEP for the Student;
2. Reimburse Petitioner for the cost of private tutoring during the time period relevant to this case;
3. Reimburse Petitioner for the private evaluations provided by the parents to identify and establish the Student's eligibility and need for ESE services;
4. Provide Petitioner with 13 hours of compensatory education in the areas where a short-fall in service occurred;  
and
5. Petitioner is also entitled to recover reasonable attorneys' fees and costs. Jurisdiction is reserved to determine such amount should the parties fail to agree.  
Petitioner shall have 45 days from the date of this Final Order within which to file a motion for attorneys' fees and costs (under this case number), to which motion (if filed) Petitioner shall attach appropriate affidavits (e.g., attesting to the

reasonableness of the fees) and essential documentation in support of the claim such as timesheets, bills, and receipts.

DONE AND ORDERED this 20th day of October, 2017, in Tallahassee, Leon County, Florida.

**S**

---

DIANE CLEAVINGER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of October, 2017.

ENDNOTES

<sup>1/</sup> Core Instruction is instruction provided to all students in the class, and it is usually guided by a comprehensive core educational curriculum. Core curriculum in Florida is defined by the Florida State Standards. Instruction in the core curriculum is usually provided to the class as a whole. However, part of the instruction can be provided during the small group, differentiated instruction period utilized in schools. Although instruction is differentiated by student need during the small group period, materials and lesson procedures from the core program can frequently be used to provide re-teaching, or additional teaching to students according to their needs. The evidence showed that the Student's school utilized whole class and small group instruction in teaching regular education students the regular core curriculum.

<sup>2/</sup> High frequency or site words are those words which occur most frequently in written material, for example, "and", "the", "as" and "it". Some of the high frequency words can be sounded out using basic phonics rules. However, some high frequency words

cannot be easily sounded out and must be recognized on sight and are often referred to as "site" words.

3/ The evidence showed that the schools in Respondent's district have a multitude of multidisciplinary teams known by a variety of names, such as school base or child study. The team name appears to change relative to the point in the multi-tiered system of supports/Response to Intervention (MTSS/RtI) process the school believes it is in. The teams in this case appear to include the same people. The evidence was confusing as to which team was meeting in regards to the Student at any given time. However, the particular name or designation of a team under the facts of this case relative to the duty of the school to evaluate is immaterial.

4/ The evidence showed that the report card used by Respondent for [REDACTED] school kids is not based on the assignment of letter grades to general areas of study like reading or math. The report card used by Respondent lists a variety of skills allegedly aligned with and reflecting the Florida State Standards. The Student's advancement toward meeting the listed skills is reflected with various levels of progress: exemplary (EX), proficient (PR), approaching (AP), and needs development (ND). A student receives either an "X" for meeting standards or a "#" for area of concern under the level of progress towards the skill for that student.

5 Diphthongs are similar to digraphs but are blends of vowels instead of consonants.

6/ Support facilitation occurs where one general education teacher provides instruction for both the general education courses and ESE courses and an ESE teacher provides services via "in class one-on-one" teaching. In class one-on-one teaching includes both meeting with an individual student or meeting with a small group of students on an individualized basis within a traditional classroom. Support facilitation is not co-teaching.

7/ [REDACTED] data is Respondent's school-wide data system to predict a student's possible future success in school. This data showed that the Student in this case was [REDACTED] with [REDACTED] peers in the core curriculum and was predicted to [REDACTED] the core curriculum standards. However, this data, as well as other school-wide progress monitoring, missed the Student's underlying difficulties in [REDACTED] education and that the record in this case reflected a student eventually falling further behind in [REDACTED] and ability to advance in [REDACTED].

COPIES FURNISHED:

Leanne Grillot, Dispute Resolution  
Program Director  
Bureau of Exceptional Education  
and Student Services  
Department of Education  
Turlington Building, Suite 614  
325 West Gaines Street  
Tallahassee, Florida 32399-0400  
(eServed)

Laura E. Pincus, Esquire  
Palm Beach County School Board  
Post Office Box 19239  
West Palm Beach, Florida 33416-9239  
(eServed)

Rochelle Marcus, Esquire  
Marcus Ed Law  
5550 Glades Road, Suite 500  
Boca Raton, Florida 33431

Alice K. Nelson  
Nelson Law Group  
14043 Shady Shores Drive  
Tampa, Florida 33613

Matthew Mears, General Counsel  
Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400  
(eServed)

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).