STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 17-1626E

BROWARD COUNTY SCHOOL BOARD,

Respondent.
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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 May 9, 2017, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Sneha V. Barve, Esquire
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For Respondent: Susan Jane Hofstetter, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent failed to provide a Free Appropriate Public Education (FAPE) by adding a [redacted]

[redacted] program to Petitioner's Individualized Education Plan (IEP), 20 U.S.C. § 1400, et seq.

PRELIMINARY STATEMENT

On March 17, 2017, Respondent Broward County School Board received Petitioner's due process complaint. Petitioner's complaint was forwarded to DOAH shortly thereafter for final hearing.

The final hearing was held May 9, 2017. Prior to the final hearing, the parties filed a Joint Statement of Undisputed Facts and stipulated to certain facts contained therein. To the extent relevant, those facts have been incorporated in this Final Order.

At the final hearing, Petitioner presented the testimony of three witnesses and offered 28 exhibits into evidence. Respondent presented the testimony of four witnesses and offered 19 exhibits into evidence.

At the conclusion of the final hearing, the post-hearing schedule was discussed. Based on that discussion, it was determined that proposed final orders would be filed on or before June 14, 2017. Further, the undersigned's final order would be issued on or before July 24, 2017. The schedule was memorialized by the undersigned's May 10, 2017, Order Memorializing Deadlines for Proposed Orders and the Final Order and July 17, 2017, Order of Specific Extension of Time for Final Order.

After the hearing, Petitioner filed a Proposed Final Order on June 14, 2017. Likewise, Respondent filed a Proposed Final Order on June 14, 2017. Both parties' proposed orders were accepted and considered in preparing this Final Order. Additionally, unless otherwise indicated, all rule and statutory references contained in this Final Order are to the version in effect at the time the subject IEP was drafted. Finally, for stylistic convenience, [redacted] pronouns are used in the Final Order when referring to the Student. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to the Student's actual gender.

FINDINGS OF FACT

1. [redacted] ([redacted]) is a well-studied and peer-reviewed behavior modification program or system that incorporates various behavior modification strategies and accommodations, including the use of hands-on restraints, aimed at preventing and/or modifying dangerous and disruptive behaviors that can result in harm to the actor or others. The program is not simply a crisis management procedure, but as the expert evidence demonstrated, offers services and/or accommodations to the academic environment to promote modification of extremely dangerous and disruptive behavior to socially acceptable behaviors in a given setting, i.e. an academic environment.

2. The bulk of the [redacted] program involves prevention

strategies. These strategies are generally instructional strategies or accommodations that teach communication and various replacement and self-calming skills for aggressive behavior. Such strategies are often found in IEPs. The program also encompasses de-escalation strategies that focus on when a student engages in aggressive behavior or precursor behaviors which might lead to aggression. For example, the "[redacted]" strategy involves trained staff placing a hand behind the student without touching the student and placing a hand in front of the student along with vocal instructions from the staff to "[redacted]." The hand placement provides the student visual geographic direction to where the staff wants the student to walk and the vocal instructions reinforce the behavior being sought by the staff. Again, such de-escalation strategies or accommodations are often included in IEPs. More restrictive crisis intervention, involving physical restraint techniques, is a last resort and only used if a student exhibits continuous aggression and other extreme or dangerous behaviors. The last step in the [redacted] program involves after-crisis strategies, therapies, or accommodations that get a student back on track in class. As with other [redacted] strategies, after-crisis strategies, therapies or accommodations are often included in IEPs.

3. Practitioners of [redacted] are taught strategies and/or techniques for de-escalating behaviors other than physical

touching or restraining and, as indicated, physical interventions can be used only when non-physical interventions are exhausted or the behavior escalates quickly to physically dangerous levels.

4. In Broward County, approval for use of [redacted] requires consultation with a program specialist for behavior prior to being included in an IEP. In this case, the better evidence demonstrated that following the School Board's policy, and consulting with a program specialist on whether [redacted] was appropriate for a student in preparation for an IEP meeting with the parent to discuss behavior strategies or programs which might help the student learn to manage their behavior or to protect the student and others from harm, were not indicative of predetermination of a student's IEP, but only preparation for such meeting and the items to be addressed therein. Additionally, when a physical restraint is used, there are a series of reporting requirements that are required by the State which includes notifying the parents of a student and the Florida Department of Education. Given such notification, the parent is quickly made aware that the student has been physically touched by school staff. Moreover, the evidence was clear that the [redacted] program or system can be included in the language of an IEP when appropriate for an individual student.

5. In this case, the Student was born on [redacted], in [redacted] County, Florida.

6. An initial determination of eligibility for Exceptional Student Education (ESE) for the Student was made on October 11, [redacted], and [redacted] was found eligible for special education under the eligibility criteria for [redacted] ([redacted]) and [redacted] ([redacted]). On the same date, the first IEP was finalized. The Student's eligibility has remained the same throughout [redacted] educational career.

7. The Student started public school [redacted] at School A in Broward County on October 14, [redacted], as a [redacted]-year-old and remained at School A through August 9, 2013. From September 2013 through February 2014, the Student was enrolled at another school in [redacted] where a Positive Behavioral Intervention Plan (PBIP) was developed for the Student.

8. On February 20, 2014, the Student returned to Broward County Public Schools as a [redacted] at School B. [redacted] remained at School B for the school year ending June 6, 2014. The Student's earlier PBIP remained in effect and was implemented at School B.

9. An interim IEP meeting for the Student was held on April 14, 2014, for the purpose of determining the Student's need for Extended School Year Services. The Student was enrolled in and received Extended School Year services at School C for the summer of 2014.

10. The Student [redacted] at School B for the

2014-2015 school year. While there, on February 13, 2015, an IEP meeting was held because the Student was [redacted] or [redacted] to [redacted] objects, [redacted] and others, as well as eloping. The behavior of [redacted] also occurred at home when the Student was [redacted] or when [redacted] was [redacted]. Such behavior at home occurred even though the Student did not work on school work while at home. As a result of these behaviors, a second PBIP was developed and implemented to address the Student's behaviors.

11. On March 3, 2015, a Functional Behavior Assessment (FBA) was created based on baseline data collected from January 5 through February 6, 2015. The data demonstrated that the Student [redacted] or others approximately [redacted] to [redacted] times a day. The Student [redacted], leaving the [redacted], with [redacted] marks. [redacted] also [redacted] and [redacted] on the floor. These behaviors occurred across settings. Additionally, these behaviors were more pronounced when [redacted] demands were placed on the Student or when there were [redacted] imposed on [redacted].

12. The FBA targeted the Student's behavior of [redacted] or others and indicated that "[the Student] displays [redacted] behavior towards [redacted] and the staff ([redacted])." The FBA identified that the cause of the Student's behaviors occurred after [redacted] became [redacted] or [redacted], and, once [redacted], [redacted] would [redacted]. The FBA further indicated that when the Student was redirected to stop, [redacted] would then [redacted] the staff or

other students in close proximity. Such behavior clearly placed [redacted] or others at [redacted] and the reduction or extinction of such behaviors would likely increase participation in inclusive settings, increase the Student's ability to [redacted] transition to and from activities, improve the [redacted], improve [redacted] performance, and improve completion of [redacted] tasks.

13. On March 3, 2015, an Interim IEP meeting was held. During the March 3 meeting, the results of the FBA and a PBIP were discussed. Additionally, the IEP team discussed and considered a more [redacted] placement and/or [redacted] services due to behavioral concerns. As a result of the FBA, input from school staff and input from the parent, the Student's PBIP was updated to include [redacted], [redacted] strategies and [redacted] strategies.

14. On August 25, 2015, the Student started [redacted] grade at School B in a [redacted] classroom for [redacted] containing [redacted] students and [redacted] adults. Petitioner remained at School B until the end of the year, June 10, 2016. Throughout the school year the parent was advised of Petitioner's continued [redacted], [redacted], [redacted], and [redacted]. The PBIP was also reviewed and updated four times with a variety of behavior interventions ([redacted]) being used in an effort to

modify Petitioner's behavior. While the Student did not have a one-to-one adult accommodation in [redacted] IEP, an adult was assigned to [redacted] at [redacted] to [redacted] behaviors.

15. Additionally, the IEP team met on February 17, 2016, and determined that the Student's eligibilities remained [redacted] and [redacted] and that an appropriate [redacted] was being implemented and updated to address the Student's continued behaviors of [redacted], [redacted], [redacted], [redacted] and [redacted] others, as well as [redacted].

16. The Student was enrolled at School E for Extended School Year services for the summer of 2016.

17. At the beginning of the 2016-2017 school year in August, the Petitioner was slated to return to School B. However, during an interim IEP meeting on August 24, 2016, the IEP team, including the parent, determined that the Student should be placed in a [redacted] and receive [redacted] instruction there. At that time, [redacted] was discussed, but not included in the [redacted].

18. Thereafter, the Student attended, as a [redacted]-grader, School D, a [redacted], where [redacted] remained until October 31, 2016.

19. The Student's classroom at School D was a [redacted]-[redacted] classroom, containing [redacted] children and [redacted] adults. While at School D, the Student's [redacted] and [redacted] and attempts of the same occurred [redacted] to [redacted] times a day for an

average of [redacted] times per day. The school provided an intense [redacted] program to the Student. [redacted] was not used as a program for the Student during [redacted] time at School D. The Student's behavior did improve somewhat in the [redacted] setting at School D.

20. While at School D, an interim IEP meeting was held on October 21, 2016. In large part based on the parent's input and reduction of the Student's [redacted] to [redacted] episode, the IEP team recommended that the Student's time in a [redacted] be changed from [redacted] percent to [redacted] percent. The meeting resulted in a change of placement back to School B where [redacted]-grade instruction in [redacted], [redacted], and [redacted] curriculum was provided in a class of approximately 10 students and [redacted] adults. The Student also had [redacted] with [redacted] at [redacted] times during the day as a classroom management strategy even though a one-to-one aide was not assigned as an accommodation. The [redacted] was also revised with input from the parent. [redacted] was discussed at the meeting, but at the time was not deemed necessary by the parent and the rest of the IEP team. Additionally, the team recommended a revised [redacted] be developed and implemented. As a result of the meeting, the Student was enrolled as a [redacted]-grader at School B on October 31, 2016, where [redacted] remained until kept away from school by the parent around March 9, 2017, and where [redacted] received [redacted] instruction in a

[redacted] class for [redacted]-eligible students. The October 21, 2016, interim IEP meeting also resulted in a revision to the [redacted] and the collection of behavioral data from November 2016 through February 2017.

21. Because of ongoing behavior concerns, an IEP meeting at School B was held on February 10, 2017, to discuss the [redacted] and the Student's [redacted]. Progress in [redacted] was being made. The addition of the [redacted] program was discussed, but the parent wanted to see the underlying data that had been collected by school staff. The meeting was not completed and additional meetings occurred on February 16 and March 9, 2017.

22. During these meetings the [redacted] program was discussed and explained in detail to the parent on three separate occasions. Specifically, with regard to Petitioner, [redacted] strategies would first involve nonphysical strategies to stop the behavior, and if the behavior continued to escalate, nonphysical strategies would be followed by blocking procedures, then transportation procedures, and then immobilization procedures. Once Petitioner became calmer, post-crisis procedures would be used.

23. Data collected by the Student's teacher demonstrated that from November 1, 2016, through January 23, 2017, the Student exhibited [redacted] or attempting to [redacted] every [redacted] day school was in session, with the exception of [redacted] days. The Progress

Report of January 31, 2017, regarding the Student's Annual Measurable Goal 4——dealing with [redacted] or [redacted] in a safe and constructive way——indicated that some progress had been made, but that it was not anticipated the Student would meet the [redacted] management goal by IEP end. ABC behavior data collected by the teacher was provided to the Student's parent during these meetings. The data showed that the Student was [redacted] or attempting to [redacted] during indoor [redacted], during [redacted], and at [redacted]. School staff recommended adding the [redacted] program to the Student's IEP because [redacted] was continuing to [redacted], [redacted], and [redacted], even though PBIP approved behavior management strategies ([redacted]) were being implemented by school staff. Additionally, approved behavior management strategies were not controlling or de-escalating the student's [redacted] behaviors, which were more intense. Indeed, the evidence demonstrated that these behaviors would escalate to the point where they were continuous, requiring the classroom to be cleared to protect the other students from Petitioner, and allow trained therapists to attempt to calm Petitioner's behavior to a level conducive to learning in an educational environment.

24. Such room clearings are highly disruptive to the class and interfere with the learning of others. Use of [redacted] would enable the other students to remain in the classroom so academics

could continue and would help to de-escalate Petitioner's behaviors in a more quiet, controlled and safe area.

25. At each meeting, the parent had meaningful input into the decision to add [redacted] to the Student's IEP and had, in fact, had such input in prior year's IEP meetings where [redacted] was not added. The evidence demonstrated that the parent clearly was a full participant in the process of developing an educational program for the Student.

26. Even though aware [redacted] restraint techniques could be used in emergency situations caused by the Student's extreme behavior, the parent did not agree to [redacted] being added to the Student's IEP at the February and March 2017 IEP meetings. The parent felt that [redacted] measures were inappropriate because [redacted] is not used at home; the Student did not like to be [redacted], did not like to be [redacted], and could not [redacted] to the parent when [redacted] was [redacted] by staff because [redacted] is [redacted]. However, the better evidence did not establish that any of these parental concerns caused Respondent's [redacted] program to be inappropriate for the Student while at school. Indeed, the evidence demonstrated that Petitioner was not resistant to being [redacted] and liked to be [redacted]. The evidence also demonstrated that Petitioner's current private behavior therapist uses [redacted] to interact with and provide direction to Petitioner. The parent also felt that [redacted] was not appropriate because the school "should have

tried other strategies or some other tools, to be able to help out with [redacted] behavior . . . . [[redacted]] was having such a bad behavior at school so I don't think they tried, or exhausted enough strategies before jumping into something so extreme that I didn't feel comfortable with." However, the better evidence demonstrated that the school has appropriately attempted a variety of behavior management strategies with varying results and continued ineffective results. Moreover, the evidence was insufficient to show other behavior strategies that the school could try. Finally, the parent felt that the Student's private [redacted] therapist, with whom the Student appears to have a good relationship, should be allowed to help the Student while in school.

27. In that regard, the evidence demonstrated that the Student receives private FBA therapy at home, that the Student has been receiving these services for the past [redacted] months, and that there was a [redacted] in services during these [redacted] months because the parent was looking for an appropriate [redacted] therapist to work with the Student. Currently, the private registered behavior technician for the Student has been working with the Student for the past [redacted] months for [redacted] hours a week, [redacted] hours a day. The private technician has not observed or worked with the Student in school but has been with the Student in a variety of other settings outside school. The only [redacted] demands the

technician places on the Student are [redacted] words. Unlike school, no other [redacted] demands are placed on the Student outside of school. The private technician primarily uses [redacted] voice to command the Student, who at times [redacted] such commands. [redacted] also [redacted] the Student with [redacted] hand to redirect the Student or prevent [redacted] from engaging in undesired behavior. The Student has not [redacted] [redacted] or others in the presence of the private technician. However, the Student does attempt to [redacted].

28. The evidence demonstrated that the Student's private behavior technician is available to work with Petitioner at school for [redacted] hours per day. However, the private technician is not qualified to provide behavior services to a student in Broward County public schools, since the school requires that such behavioral assistants be certified behavior analysts. The Student's private behavioral technician is only a registered behavior assistant. As such, the evidence demonstrated that the private technician does not meet the School Board's qualifications to provide behavioral services within the school system. More importantly, given that Broward County provides highly qualified and trained staff in special education and behavior management, the evidence did not demonstrate that the provision of such services by the Student's private provider were necessary to provide Petitioner with FAPE.

29. In sum, the better evidence demonstrated that the

Student has received [redacted] education during the last two school years in an [redacted] classroom, spending time with non-disabled peers during [redacted] and [redacted]. The Student has documented [redacted] behaviors, which include [redacted] and [redacted]. The [redacted] behavior of [redacted] has become continuous. The school staff have observed and attempted to counter the Student's behavior of continuous [redacted] during the school year. The strategies implemented have not been successful and therefore [redacted] was recommended to de-escalate these behaviors and to ensure the safety of the Student and [redacted] classmates. In addition, these behaviors have interfered with the Student receiving [redacted] education, as well as interfered with the education of the other students in [redacted] classroom. Given these facts, it is appropriate that a [redacted] program be added to Petitioner's IEP in order to continue to provide FAPE to Petitioner.

CONCLUSIONS OF LAW

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

31. 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).

32. 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).

33. 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).

34. 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).

35. "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).

36. 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).

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

38. 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. In that regard, the

evidence was clear that the [redacted] program or system is an appropriate program to be included in the language of an IEP.

39. 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).

40. In this matter, Petitioner contends that the addition of the [redacted] program to Petitioner's IEP was unilateral and predetermined by the School Board. The IDEA requires that each public agency must ensure that a parent of a child with a disability is a member of any group that makes decisions on the educational placement, services, and program of the parent's child. 34 C.F.R. § 300.501(c). Predetermination occurs when district members of the IEP team unilaterally decide a student's

placement in advance of an IEP meeting. Here, Petitioner failed to present sufficient evidence to support such a claim. To the contrary, the evidence established that the parent had considerable input and a meaningful opportunity to participate in the development of the Student's IEP and the addition of the [redacted] program to the IEP. Further, the evidence demonstrated that the parent was fully informed about the Student's behavior at school and the [redacted] program itself. In fact, Petitioner's parent was provided with the monitoring data and behavior frequency charts maintained on Petitioner and such information was sufficient to inform the parent of Petitioner's behavioral issues. There was no substantive evidence that the provided behavioral information and reports from teachers were deficient to the level of impeding Petitioner's right to FAPE, significantly infringe the parent's opportunity to participate in the decision-making process, or cause an actual deprivation of educational benefits.

41. 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.

42. The determination of whether an IEP is sufficient to meet this standard differs according to the individual circumstances of each student. For a student who is "fully integrated in the regular classroom," an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Id. (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.

43. 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). 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." 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). 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 . . . .").

44. Here, Petitioner does not raise any claims regarding the propriety of the Student's IEP, except that the parent does not agree to the addition of the [redacted] program to the IEP and feels that the school either did not comply with the PBIP or should have done more interventions before adding [redacted]. In determining whether the failure to comply with the terms of the IEP constitutes a denial of FAPE, two primary standards have been articulated. In Houston Independent School District v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000), the following standard was set forth:

> [A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords

> local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failure and for providing the disabled child a meaningful educational benefit.

Utilizing the foregoing standard, which requires proof of "substantial or significant" implementation failures, the court in Bobby R. held that the school district's failure to provide speech services for four months——among other implementation deficiencies——did not constitute a denial of FAPE. Id. at 348-49.

45. A competing standard was set forth in Van Duyn v. Baker School District 5J, 502 F.3d 811, 822 (9th Cir. 2007). In Van Duyn, the Ninth Circuit articulated a standard that, similar to Bobby R., requires proof of a material failure to implement the child's IEP—that is, something more than a "minor discrepancy" between the services a school district provides and the services required by the IEP. However, in contrast to Bobby R., the court in Van Duyn held that its materiality standard "does *not* require that the child suffer demonstrable educational harm in order to prevail." Id. at 822 (emphasis added). Thus, under the Van Duyn standard, a material failure to implement an IEP could constitute a FAPE denial even if, despite the failure, the child received non-trivial educational benefits.

46. In this case, there was no substantive evidence that the school did not comply with the IEP or the PBIP.

47. Next, Petitioner avers that Respondent failed to or should have permitted the private behavior technician to provide services to Petitioner in the classroom. As noted in the Findings of Fact, Petitioner's private behaviorist was not qualified to provide behavioral services in the Broward County school system. Additionally, the evidence did not demonstrate that provision of such services by the private behavior technician was necessary to provide FAPE to Petitioner. Moreover, neither the IEP nor PBIP provided that Respondent was obligated to permit a private behaviorist to provide services in the classroom to Petitioner. Thus, Respondent did not materially fail to implement or add services to Petitioner's IEP.

48. As indicated in the Findings of Fact, the better evidence demonstrated that the Student has received [redacted] education during the last two school years in an [redacted] classroom, spending time with non-disabled peers during [redacted] and [redacted]. The Student has documented [redacted] behaviors, which include [redacted] and [redacted] and which have become more intense, and reach a continuous point where the Student cannot be redirected. School staff have observed and attempted to counter the Student's behavior of continuous [redacted] during the school year through the use of appropriate PBIPs. The strategies implemented have not been successful and, therefore, [redacted] was recommended to de-escalate these behaviors and to ensure the safety of the Student

and [redacted] classmates. In addition, these behaviors have interfered with the Student receiving [redacted] education, as well as interfered with the education of the other students in [redacted] classroom. Given these facts, it is appropriate that a [redacted] program be added to Petitioner's IEP in order to continue to provide FAPE to Petitioner.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is denied in all respects.

DONE AND ORDERED this 24th day of July, 2017, in Tallahassee, Leon County, Florida.

S

Diane Cleavinger
Administrative Law Judge
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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

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

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