STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 17-6478E

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A due process hearing was held before Administrative Law Judge Jessica Enciso Varn on March 20 through 22, 2018, in Miami, Florida.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
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For Respondent: Mary C. Lawson, Esquire
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STATEMENT OF THE ISSUES

Whether the School Board failed to properly implement the student's Individualized Education Plan (IEP) by failing to have appropriate back-up paraprofessionals who could meet all of the [redacted].

Whether the School Board denied the student a free and appropriate public education (FAPE) by not providing transportation for school field trips.

Whether the School Board violated Section 504 of the Rehabilitation Act of 1973 (Section 504) by [redacted] against the student on the [redacted].

PRELIMINARY STATEMENT

A request for a due process hearing was filed on December 1, 2017. A Case Management Order was issued on the same day, establishing deadlines for a sufficiency review, as well as for the [redacted]. On December 8, 2017, the School Board filed a Motion of Insufficiency, arguing that Petitioner's due process complaint did not sufficiently place the School Board on notice of what issues would be addressed in this case, and moved for a determination of insufficiency. An Order finding the request for a due process hearing sufficient was entered on December 13, 2017. On January 9, 2018, the parties were ordered to file a status report by January 15, 2018. The due process hearing was subsequently scheduled for March 20 through 22, 2018.

During the hearing, testimony was heard from the student; the [redacted] A; [redacted]

[redacted]; [redacted], [redacted]; [redacted], [redacted]; [redacted], [redacted]; [redacted], [redacted]; [redacted], [redacted] School B; [redacted], [redacted]; and [redacted] [redacted], principal of Middle School B. School Board Exhibits 8 and 10 were admitted as Joint Exhibits. Petitioner Exhibits 2 through 8; 9 (pages 124 through 137);
10 (pages 160 through 178, pages 182 and 183, pages 186 and 187, pages 191 through 195, pages 198 and 199, pages 200 through 204, pages 206 through 208, pages 210 and 211, page 217);
11 (pages 218 through 246, pages 249 through 251, pages 254 and 255, pages 257 through 259, pages 269 through 276, pages 285 and 286); and 14 were admitted into evidence. School Board Exhibits 9, 11 through 13, 18, 20, 21, 23, 26, 28, 29, 31 through 37, 39, 40, and 43 were admitted into evidence.

The Transcript was filed on May 1, 2018. On May 3, 2018, an Order was entered whereby the deadlines for the proposed orders were extended to May 16, 2018. Additionally, the deadline for the final order was extended to May 31, 2018. On May 14, 2018, the parties jointly requested a five-day extension of time for filing the proposed final orders, which was granted. The parties timely filed proposed final orders on May 21, 2018, which were duly considered in the preparation of this Final Order. The deadline for this Final Order was extended to June 5, 2018.

Unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations are to the current codifications. For stylistic convenience, the undersigned will use [redacted] pronouns in this Final Order when referring to Petitioner. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. The student is a [redacted] at [redacted] School B, eligible for ESE in the categories of [redacted] ([redacted]) and [redacted] ([redacted]). [redacted] is [redacted] with [redacted] of [redacted]; and, [redacted] and [redacted], [redacted].

2. The student's placement is in [redacted], with a [redacted] to [redacted]. The [redacted] is necessary for the student because [redacted], [redacted] an [redacted]. [redacted], as was evident to the undersigned during the three-day due process hearing.[1/]

3. The job of the [redacted]; it [redacted] student, but also the ability to ([redacted]): [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted] a [redacted]. At every IEP meeting, the tasks assigned to the [redacted].

4. The IEPs placed into evidence all [redacted], [redacted], [redacted], and [redacted], during the [redacted], and [redacted]. No IEP, either in [redacted], provided for the student to be given a [redacted] ([redacted] student uses). As it relates to [redacted], it was well documented that the student [redacted] with [redacted].

5. In IEPs created in June 2016 and April 2017, the following was recorded:

> [**] [redacted]. This can cause [redacted] to feel [redacted] or [redacted]. [redacted] sometimes chooses [redacted] needs when [redacted] [redacted]. [redacted] does sometimes [redacted] [redacted] an [redacted] questions such as, "[redacted]?" because [redacted] [redacted] and [redacted]. [redacted] sometimes has [redacted]

[redacted] and [redacted] needs. [redacted]

6. On IEPs created in June 2016 and May 2017, the [redacted] of the IEPs included this statement:

[redacted] and [**] [redacted]

7. In the May 2017 IEP, the following language was added in the area of [redacted]:

[redacted] on a [redacted] also sometimes requires [redacted] in [redacted] for [redacted] to use the [redacted] a [redacted] for [redacted], [redacted]

8. On a [redacted], done on August 18, 2017, it was noted:

If [**] needs to go the [redacted], [redacted]

9. Lastly, in an IEP created in October 2017, the following was noted:

[redacted] [**] if [redacted] needs [redacted]

10. The evidence in the record reflects that due to [redacted], the student [redacted]; [redacted] also [redacted]. A [redacted], and [redacted], the [redacted] "[redacted]" [redacted]. It is quite likely that given these circumstances, there would be occasions where the [redacted]. It is also understandable [redacted], [redacted], [redacted].

11. Ultimately, the last IEP iteration as to [redacted].

[redacted]

12. During the [redacted] ([redacted]), the student was [redacted]. [redacted] started school [redacted], and [redacted] as well. During [redacted], [redacted] which offered [redacted] [redacted]. [redacted] was also a [redacted], which offered [redacted] even [redacted] to [redacted] on a [redacted].

13. [redacted] of the [redacted] testified that the student was [redacted], and [redacted] was [redacted].

14. [redacted] in [redacted] came later in the [redacted] and [redacted] than [redacted], given the student's [redacted]; thus, [redacted] that they were [redacted] to take were "[redacted]" for the [redacted], and [redacted]. Since the student often had [redacted] (during that time [redacted] to be present), and the student could [redacted] with a [redacted] or in the front office, the [redacted] generally took [redacted] during the student's [redacted] session or [redacted].

15. The [redacted] also accepted the [redacted] input when selecting the student's [redacted]—this was done as an [redacted], as it is not required by law.

16. [redacted] were only needed when the [redacted] was [redacted] other reason not able to [redacted]. Understandably, the hiring of the [redacted] than the [redacted], since the amount of time spent with the student was [redacted].

17. The student testified that [redacted] spent approximately

[redacted], and that halfway through the year, the [redacted]. [redacted] days, and when the student knew [redacted] would [redacted], the student also [redacted]. The [redacted] credibly testified that had the student attended school on those days when the [redacted], there would have been a [redacted] assigned to the student for the [redacted].

18. During [redacted], the student testified that [redacted] on a [redacted].

19. The student and [redacted] testified that [redacted] "[redacted]" times during [redacted], and that it occurred because the [redacted] student asked to [redacted], or because [redacted].

20. The school staff credibly testified that during [redacted] school, the student had a [redacted] total—and [redacted]. The educators provided details on the [redacted]

[redacted], and made [redacted].

21. There is no dispute that one of the [redacted], was described by all as [redacted]. [redacted]. Accordingly, during the [redacted] (approximately [redacted]) that the student was being [redacted], there was yet another [redacted] ([redacted]) on call in the event the student had to use the [redacted].

22. As to the [redacted], the undersigned finds the testimony of the educators to be credible to the extent it conflicts with the testimony provided by the student and [redacted]. [redacted] testimony is not based on [redacted], since [redacted], and the student's testimony was [redacted].

23. As to field trips, the best evidence established that the student participated in most field trips and [redacted] chose to provide the transportation. There was simply insufficient

evidence establishing that the student was excluded from field trips during [redacted], or that the [redacted] was [redacted].

24. Another allegation pertaining to [redacted] was regarding [redacted]: [redacted] and [redacted] were reviewing and [redacted]. The use of a [redacted] ([redacted]) was being demonstrated, and the student was placed in the [redacted]. The student testified that [redacted].

[redacted]. [redacted], [redacted].

25. The adults present during the [redacted] in much the same manner——with one major distinction: the student's [redacted]. The undersigned finds the testimony of the school staff credible, and rejects the student's [redacted].[2/]

26. Lastly, the student alleges that [redacted]. [redacted]

this [redacted], and that the [redacted] the [redacted].

27. [redacted] and [redacted] all the [redacted].

28. The evidence as a whole leads the undersigned to [redacted], and find the school staff testimony credible. There was no evidence, documentary or witness testimony, to corroborate the student's [redacted]. It is also highly [redacted] that the student, [redacted] the [redacted], [redacted], and [redacted]. Given the [redacted] staff, [redacted], coupled with the amount of [redacted], [redacted], [redacted].

29. The student was on [redacted] school, [redacted].

30. Before a meeting with the school principal that was scheduled for May 22, 2017, the student's [redacted] notified the principal that [redacted] would be bringing [redacted] attorney to the meeting. When the meeting time arrived, the principal notified the

student's [redacted] that because the meeting was not an IEP meeting, [redacted] with the [redacted] and [redacted] attorney. The principal credibly testified that [redacted] felt [redacted] Board ([redacted]) and [redacted] wanted to reschedule the meeting. The meeting was therefore [redacted].

[redacted]

31. During the [redacted], up to and including the date on which the instant due process complaint was filed, [redacted].

32. [redacted] credibly testified that this one [redacted] occurred because the [redacted]. Once the principal was made [redacted], [redacted] sent the [redacted], and [redacted] assigned a different [redacted] to the student.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings (DOAH) has jurisdiction over the subject matter of this proceeding and of the parties thereto. See §§ 120.65(6) and 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

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

35. 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 each agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Ala. State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

36. Parents and students with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. Bd. of Educ. 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).

37. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

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

20 U.S.C. § 1401(9).

38. The central mechanism by which the IDEA ensures a FAPE for each child is the development and implementation of an IEP. 20 U.S.C. § 1401(9)(D); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985)("The modus operandi of the [IDEA] is the . . . IEP.")(internal quotation marks omitted). The IEP must be developed in accordance with the procedures laid out in the IDEA, and must be reasonably calculated to enable a child to

make progress appropriate in light of the child's circumstances. Endrew F. v. Douglas Cnty. Sch. Dist., RE-1, 13 S. Ct. 988, 999 (2017).

39. In the instant case, the parent alleges that the School Board failed to properly implement the student's IEP by [redacted], and [redacted] who [redacted]. The parent also alleges that the School Board [redacted] for [redacted].

40. Because these claims challenge the School Board's implementation of Petitioner's educational programming——rather than its substance——a different standard of review applies. L.J. v. Sch. Bd. of Broward Cnty., 850 F. Supp. 2d 1315, 1319 (S.D. Fla. 2012). In particular, a parent raising a failure-to-implement claim must present evidence of a "material" shortfall, which occurs when there is "more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 (9th Cir. 2007). Notably, this standard does not require that the student suffer demonstrable educational harm in order to prevail. Id. at 822; Colon-Vazquez v. Dep't of Educ., 46 F. Supp. 3d 132, 143-44 (D.P.R. 2014); Turner v. Dist. of Columbia, 952 F. Supp. 2d 31, 40 (D.D.C. 2013). Rather, the

materiality standard focuses on "the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." Wilson v. Dist. of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

41. Here, the allegations surround the alleged [redacted] and [redacted] executing—that is, [redacted]. The [redacted], out of the [redacted]. [redacted], this [redacted] in the [redacted], which [redacted], [redacted]. The claim of a denial of FAPE due to the [redacted] who could always, [redacted], [redacted].[3/]

42. The general allegations of the [redacted], [redacted], [redacted] in doing [redacted] assignments, [redacted], or [redacted] the student are [redacted], and [redacted]. Accordingly, they are also rejected.

43. Lastly, the allegation regarding school field trips is also rejected. The best evidence in the record establishes that the student attended most field trips, and that [redacted] mother chose to provide the student's transportation. The School Board provided credible evidence that it was always ready, willing and able to provide transportation for school-sponsored field trips during the school year. Thus, this allegation is also rejected.

44. Applying the materiality standard detailed above, the credible evidence in the record leads to the conclusion that the School Board has properly implemented the student's IEP.

Section 504 Claim

45. Section 504 of the Rehabilitation Act of 1973 forbids organizations that receive federal funding, including public schools, from discriminating against people with disabilities. 29 U.S.C. § 794(b)(2)(B). In relevant part, Section 504 provides that no otherwise qualified individual with a disability shall, "solely by reason of [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. 29 U.S.C. § 794(a).

46. In the educational context, a disabled student can prove disability discrimination under three distinct approaches. First, a school board violates Section 504 by intentionally discriminating against a student on the basis of [redacted]

disability. T.W. v. Sch. Bd. of Seminole Cnty., 610 F.3d 588, 603-04 (11th Cir. 2010). The second approach, which does not require evidence of intentional discrimination and not alleged in this case, examines whether a school board has "reasonably accommodated the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits." Ridley Sch. Dist. v. M.R., 680 F.3d 260, 18 280 (3d Cir. 2012). Finally, and also of no relevance here, a school board violates Section 504 where it applies a rule that disproportionally impacts disabled students. Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840, 847 (7th Cir. 1999).

47. The due process complaint in this case raises one theory under Section 504: that the School Board committed acts of intentional discrimination against the student.

48. To prove a claim of intentional discrimination, Petitioner must demonstrate by a preponderance of the evidence that the School Board subjected the student to an act of discrimination solely by reason of [redacted] disability. T.W. v. Sch. Bd. of Seminole Cnty., 610 F.3d 588, 603-04 (11th Cir. 2010). Notably, a claim of intentional discrimination need not be supported by proof of discriminatory animus——for example, prejudice, spite, or ill will. Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 344-45 (11th Cir. 2012). Instead,

Petitioner must supply proof of "deliberate indifference," which occurs when a "defendant knew that harm to a federally protected right was substantially likely and . . . failed to act on that likelihood." Id. at 344-45; Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001)("Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood.").

49. Here, Petitioner alleges five different allegations. The first is that the School Board [redacted]. As detailed in the findings of fact, the undersigned finds that during [redacted], the time spent with a [redacted] was limited to [redacted]; that while with [redacted], [redacted] had [redacted]; and that since the student has [redacted], the IEP included a goal designed to remind the student to [redacted]. Given the [redacted], [redacted], [redacted], and [redacted], it stands to reason that [redacted]. The [redacted] felt by the student when those accidents occurred, and the [redacted] are [redacted];

however, the totality of the evidence falls short of the legal standard required to prove intentional discrimination. The best evidence as to the student's [redacted], and that the student had [redacted], which was [redacted], but not evidence of deliberate indifference.

50. Second, Petitioner alleges that during a [redacted], [redacted] presence of several adults. As fully explained in the findings of fact, the undersigned rejects the student's rendition of the training session, and finds the testimony of the School Board witnesses to be credible.

51. Third, Petitioner alleges that [redacted]. As detailed in the findings of fact, these allegations are also not found credible.

52. Fourth, Petitioner claims that by delaying a meeting with the [redacted] because [redacted] was accompanied by legal counsel (and had given notice that [redacted] would be [redacted]), the School Board acted in a discriminatory fashion. This delay in the meeting does not rise to the legal standard of "deliberate indifference"——the Principal testified that [redacted] had simply felt intimidated by the presence of counsel, understandably feeling

unprepared to go forward without counsel for the School Board also being present. This claim is also unpersuasive.

53. Lastly, Petitioner claims that the [redacted] to provide the student with [redacted]. The School Board had a [redacted] with the student at all times, [redacted]. There was also no credible evidence establishing that the absence of a [redacted] caused [redacted]; thus, this claim also fails. Even if some of the [redacted], the evidence establishes that school staff went to great lengths to [redacted], and was successful in doing so, with few exceptions.

54. For these reasons, Petitioner's claims of intentional discrimination under Section 504 are rejected.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is DISMISSED in its entirety.

DONE AND ORDERED this 1st day of June, 2018, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2018.

ENDNOTES

[1/] The student was present for the entire due process hearing. [redacted] often [redacted]. [redacted] also [redacted] to all the testimony provided, and all the arguments presented.

[2/] Once the student told [redacted]. The [redacted] immediately reported this allegation to [redacted], who in turn reported the incident to the principal. An independent investigation was done by the Miami-Dade County Public Schools Office of Civil Rights Compliance. The investigator testified at the hearing and [redacted] report was entered into evidence. Among other things investigated, the investigator found no evidence to support the student's allegations.

[3/] Programming and services that are found appropriate under the IDEA standard of appropriateness cannot be successfully challenged as not meeting the individual needs of a student with a disability under the Section 504 regulations concerning FAPE. See 34 C.F.R. § 104.33(b)(2); and see, e.g, Kasprzyk v. Banaszak, 24 IDELR 735 (N.D. Ill. 1996)(stating that a decision concerning what constitutes FAPE is not res judicata with respect to a claim of discrimination on the basis of disability under Section 504).

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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).