

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

\*\* ,

Petitioner,

vs.

Case No. 18-1607E

BROWARD COUNTY SCHOOL BOARD,

Respondent.

\_\_\_\_\_/

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), on [REDACTED], [REDACTED], by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

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

For Respondent: [REDACTED], Esquire  
School Board of Broward County  
K. C. Wright Administrative Building  
600 Southeast Third Avenue, 11th Floor  
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether Respondent failed to properly convene an Individual Education Plan (IEP) meeting and provide Petitioner a free appropriate public education (FAPE) from [REDACTED], [REDACTED],

through [REDACTED], [REDACTED], as required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.; and, if so, to what remedy is Petitioner entitled.

PRELIMINARY STATEMENT

On [REDACTED], [REDACTED], Respondent received Petitioner's Request for Expedited Due Process (Complaint).<sup>1/</sup> The same day, the Complaint was forwarded to DOAH and assigned to the undersigned for all further proceedings.

On [REDACTED], [REDACTED], Respondent timely filed its Response to Petitioner's Complaint and Motion to Strike, which the undersigned construed as a Notice of Insufficiency. On [REDACTED], [REDACTED], an Order of Sufficiency was issued, finding Petitioner's Complaint sufficient with respect to the above-referenced issue.

On [REDACTED], [REDACTED], the final hearing was scheduled for [REDACTED], [REDACTED]. Despite the undersigned's Order of Pre-hearing Instructions requiring the parties to, inter alia, provide a concise statement of those facts which are admitted and those issues of law which remain for determination and final hearing, the parties failed to successfully complete that task.

The hearing proceeded as scheduled. The final hearing Transcript was filed on [REDACTED], [REDACTED]. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

Based upon the parties' stipulation at the conclusion of the hearing, the parties' proposed final orders were to be submitted on or before [REDACTED], [REDACTED], and the undersigned's final order would issue on or before [REDACTED], [REDACTED]. The parties timely submitted their proposed final orders, which have been considered in issuing this Final Order.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use [REDACTED] pronouns in the 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

##### Procedural Background Facts

1. Prior to the filing of the instant Complaint, Petitioner filed, on [REDACTED], [REDACTED], a complaint challenging the design of an IEP that was developed in [REDACTED] of [REDACTED]. That case was designated as DOAH Case No. 17-0705E, and was heard by ALJ Jessica E. Varn. In [REDACTED] of [REDACTED], a Final Order was issued by ALJ Varn in that matter wherein Petitioner was awarded [REDACTED] years of compensatory education, which was intended to compensate Petitioner for Respondent's failure to provide FAPE during [REDACTED] years of [REDACTED] school. Said Final Order was not appealed.

2. Shortly thereafter, on [REDACTED], [REDACTED] (and amended on [REDACTED], [REDACTED]), Petitioner filed another complaint against Respondent. That case was designated as DOAH Case No. 17-5948E and was also heard by ALJ Varn. A number of issues were presented, including whether Respondent's failure to develop a [REDACTED] ([REDACTED]) denied Petitioner FAPE; and whether the IEP goals developed on [REDACTED], [REDACTED], were too general, vague, and not tailored to meet Petitioner's needs.

3. The final hearing in DOAH Case No. 17-5948E was heard on [REDACTED] through [REDACTED], [REDACTED], and the Final Order issued on [REDACTED], [REDACTED]. That Final Order, which was not appealed, concluded that Respondent had denied Petitioner FAPE because [REDACTED] behavioral needs had not been properly addressed, thereby impeding [REDACTED] ability to access [REDACTED] education, and because the [REDACTED], [REDACTED], IEP goals for [REDACTED] and [REDACTED] were not calculated to enable the student to progress in light of [REDACTED] circumstances. The Final Order further concluded that "the IEP is deficient in its design because it does not incorporate a [REDACTED] or [REDACTED] that are necessary for the student to receive a FAPE." <sup>2/</sup>

4. The Final Order in DOAH Case No. 17-5948E ordered Respondent to reconvene the IEP team to address the deficiencies. It was further ordered that Respondent provide seven weeks of compensatory education, representing the time period from

approximately [REDACTED], [REDACTED] (when Broward County schools reopened following Hurricane Irma), to November 9, 2018 (the date of filing the amended Complaint).

5. Slightly more than one month following the Final Order in DOAH Case Number 17-5948E, Petitioner filed the instant Complaint. The allegations of Petitioner's Complaint found sufficient in this matter are set forth, in full, as follows:

**Issue:**

Failure to provide FAPE from [REDACTED] to [REDACTED]:

(School A) failed to provide Free and appropriate public education from [REDACTED] to [REDACTED]. During this period (School A) failed to provide Free and appropriate public education by enforcing an IEP deemed inappropriate as per case No. 2017-5948E.

(School A) failed to schedule IEP meeting to address the inappropriate IEP and waited for the outcome of the pending hearing scheduled [REDACTED], [REDACTED]. As a result the School failed to address the inappropriate IEP and failed to provide (Petitioner) with FAPE during the period from the school started till the new IEP conducted.

The Judge in case No. 2017-5948E did reward (Petitioner) a compensatory education for 7 weeks which represent the time from (Petitioner) attended at (School A) till the time case No. 2017-5948E filed on [REDACTED].

**Resolution:**

The School Board of Broward County to agree to provide (Petitioner) compensatory education for a total of [REDACTED] hours to compensate not providing (Petitioner) with

FAPE for the period of [REDACTED] to [REDACTED] in addition to the compensatory education granted on Case No. 2017-0705E and Case No. 2017-5948E.

Facts Relevant to Pertinent Time Period

A. IEP Implementation

6. At the time the Complaint was filed, Petitioner was [REDACTED] years old, and in [REDACTED] grade at School A, a public school in Respondent's school district. Petitioner had previously been determined eligible for special education services due to [REDACTED], [REDACTED], and [REDACTED].

7. It is undisputed that Petitioner attended School A during the time period pertinent to Petitioner's Complaint, from [REDACTED], [REDACTED], through [REDACTED], [REDACTED].

8. It is further undisputed that the operative IEP for this time period was the same found to be deficient by the Final Order in DOAH Case No. 17-5948E. There was no evidence presented that the IEP was amended during the pertinent time period.

9. While Respondent presented some behavioral data from the pertinent time period to demonstrate that Petitioner engaged in a limited number of problem targeted [REDACTED], Respondent failed to present sufficient evidence to establish what, if anything, was done by Respondent to address [REDACTED] targeted behaviors. As Respondent concedes, a [REDACTED] ([REDACTED]) was not

completed until [REDACTED], [REDACTED], and Petitioner did not receive a [REDACTED] until [REDACTED], [REDACTED].

10. The undersigned finds that there was insufficient evidence presented to establish that, despite the deficiencies in the document (the IEP), Respondent's implementation of special education and related services to Petitioner during the pertinent time period ameliorated those deficiencies. Stated differently, there was insufficient evidence for the undersigned to find that Petitioner made reasonable academic progress in light of [REDACTED] circumstances during this time period notwithstanding the deficient IEP.

11. Respondent appears to concede in its Proposed Final Order that it failed to provide FAPE to Petitioner during the relevant time period.<sup>3/</sup> Petitioner and Respondent, however, disagree as to the appropriate calculation of time, in any given school day, that Petitioner may be entitled to compensatory education.

12. Respondent presented credible evidence that Petitioner receives [REDACTED] periods of academic instruction per day, with each period lasting [REDACTED] minutes. One of those periods is an elective wherein Petitioner is not receiving [REDACTED]. Accordingly, Respondent contends that Petitioner, if entitled to compensatory education, the same should be limited to [REDACTED] hours per day.

13. Petitioner contends that [REDACTED] is entitled to [REDACTED] hours of compensatory education per day. Petitioner presented credible evidence, via a sensory diet schedule, to establish that [REDACTED] school day begins at [REDACTED] and ends at [REDACTED]. Pursuant to Petitioner's own exhibit, the undersigned finds that [REDACTED] hours and [REDACTED] minutes per school day are reasonably attributable to special education and related services that Respondent should have, but failed to appropriately provide during the relevant time period.

B. Convening IEP Team Meeting

14. Petitioner's Complaint is construed as alleging that Respondent committed a procedural violation of the IDEA resulting in a denial of FAPE due to Respondent's failure to schedule an IEP meeting from [REDACTED], [REDACTED], until [REDACTED], [REDACTED].

15. On [REDACTED], [REDACTED], an interim IEP meeting was conducted which resulted in an interim IEP. As set forth above, the following day Petitioner filed an amended complaint (in DOAH Case No. 17-5948E) challenging, inter alia, that IEP.

16. Petitioner's annual IEP review was scheduled to occur on [REDACTED], [REDACTED]. On [REDACTED], [REDACTED], Respondent issued a Parent Participation Notice (PPN) advising Petitioner's parents of a meeting scheduled for [REDACTED], [REDACTED], to develop a new IEP and review a [REDACTED] and [REDACTED]. Respondent issued another PPN setting forth the same information on [REDACTED], [REDACTED].



17. The undersigned finds that Respondent took reasonable steps and fully complied with the procedural safeguards necessary to secure Petitioner's parents at the IEP meeting and to conduct the annual IEP review on or before [REDACTED], [REDACTED]. Ultimately, the IEP meeting was not held on [REDACTED], [REDACTED], but rather, on [REDACTED], [REDACTED]. The negligible time delay was not due to any shortcomings of Respondent or Petitioner's parents. To the contrary, the slight delay was due to the unavailability of a Florida Department of Education state facilitator, which both parties desired and requested, to conduct a facilitated IEP meeting. Once the facilitator's availability was secured, the meeting was promptly conducted. The IEP meeting was not concluded on [REDACTED], [REDACTED], and, therefore, was convened again and completed on [REDACTED], [REDACTED].

#### CONCLUSIONS OF LAW

18. 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).

19. 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).

20. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a [FAPE]

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

21. 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).

22. Local school systems must 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).

23. "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).

24. 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).

25. "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).

26. 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).

27. In Rowley, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it

is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Rowley, 458 U.S. at 206-207. 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 FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 (2007).

28. Here, Petitioner advances one procedural claim. As noted above, Petitioner contends that Respondent committed a procedural violation of the IDEA that resulted in a denial of FAPE due to Respondent's failure to schedule an IEP meeting from [REDACTED], [REDACTED], until [REDACTED], [REDACTED].

29. The IDEA has a long-standing provision requiring districts to conduct a periodic review of each student's IEP. Specifically, the IDEA provides the following:

(4) Review and revision of IEP.

(A) In general. The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team--

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address--

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

20 U.S.C. § 1414(d)(4)(A). See also 34 C.F.R 300.324(b)(1)(i); and Fla. Admin. Code R. 6A-6.03028(3)(f).

30. School districts, such as Respondent, must conduct annual reviews in a timely manner regardless of whether the IEP is being challenged in administrative or judicial proceedings. See Anchorage Sch. Dist. v. M.P., 689 F.3d 1047 (9th Cir. 2012). Petitioner failed to present sufficient evidence to meet [REDACTED] burden of establishing a procedural violation of the IDEA with respect to convening an IEP meeting during the relevant time period. The evidence establishes that, despite the ongoing administrative proceedings, Respondent complied with its requirements to attempt to secure parental participation and timely conduct the annual IEP review meeting. As noted in the Findings of Fact above, the trivial delay in conducting the meeting was not due to Respondent, but rather, the availability

of a facilitator (whom both parties requested), who could not schedule the meeting at a mutually convenient time on or before [REDACTED], [REDACTED]. Accordingly, this claim must fail.

31. 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.

32. 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. 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.

33. As set forth in the Final Order in DOAH Case No. 17-5948E, the [REDACTED], [REDACTED], IEP goals for reading and math were not calculated to enable the student to progress in light of [REDACTED] circumstances. The IEP was further found deficient in that it did not incorporate a [REDACTED] or [REDACTED] [REDACTED] that are necessary for the student to receive FAPE.

34. The undersigned concludes that the deficient IEP and its implementation, without modification, during the subject time period resulted in a denial of FAPE to Petitioner.

35. As discussed above, Respondent denied this student FAPE from [REDACTED], [REDACTED], through [REDACTED], [REDACTED], to which the student is entitled to compensatory education. In calculating an award of compensatory education, the undersigned is guided by Reid v. District of Columbia, 401 F.3d 516, 523



(D.C. Cir. 2005), wherein the D.C. Circuit emphasized that IDEA relief depends on equitable considerations, stating, "in every case . . . the inquiry must be fact specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Id. at 524. The court further observed that its "flexible approach will produce different results in different cases depending on the child's needs." Id. at 524.

36. This qualitative approach has been adopted by the Sixth Circuit and a number of federal district courts. See Bd. of Educ. v. L.M., 478 F.3d 307, 316 (6th Cir. 2007) ("We agree with the district court . . . that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the child's] educational problems successfully."); Petrina W. v. City of Chicago Pub. Sch. Dist., 2009 U.S. Dist. LEXIS 116223, at \*11 (N.D. Ill. Dec. 10, 2009) ("Because a flexible, individualized approach is more consonant with the aim of the IDEA . . . this Court finds such an approach more persuasive than the Third Circuit's formulaic method."); Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1352-53 (N.D. Ga. 2007) (holding that, in formulating a compensatory education award, "the Court must consider all relevant factors and use a flexible approach to

address the individual child's needs with a qualitative, rather than quantitative focus"), aff'd, 518 F.3d 1275 (11th Cir. 2008); Barr-Rhoderick v. Bd. of Educ., 2006 U.S. Dist. LEXIS 72526, at \*83-84 (D.N.M. Apr. 3, 2006) (holding that an award of compensatory education "must be specifically tailored" and "cannot be reduced to a simple, hour-for-hour formula"); Sammons v. Polk Cnty. Sch. Bd., 2005 U.S. Dist. LEXIS 45838, at \*21-22 (M.D. Fla. Oct. 7, 2005) (adopting Reid's qualitative approach).

37. Against this legal backdrop, the evidence establishes that Petitioner is entitled to [REDACTED] compensatory education from [REDACTED], [REDACTED], through [REDACTED], [REDACTED] (excluding weekends and school holidays).

#### ORDER

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

ORDERED that:

1. Respondent denied Petitioner FAPE from [REDACTED], [REDACTED], through [REDACTED], [REDACTED], by implementing an IEP that was not reasonably calculated to enable Petitioner to make progress appropriate in light of [REDACTED] circumstances coupled with the corresponding lack of evidence to establish that, notwithstanding the inappropriate IEP, [REDACTED] did, in fact, make progress appropriate in light of [REDACTED] circumstances.

2. Petitioner is entitled to [REDACTED] of compensatory education from [REDACTED], [REDACTED], through [REDACTED], [REDACTED] (excluding weekends and school holidays).

DONE AND ORDERED this 10th day of July, 2018, in Tallahassee, Leon County, Florida.

**S**

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TODD P. RESAVAGE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of July, 2018.

ENDNOTES

<sup>1/</sup> Although Petitioner requested an expedited hearing, the Complaint does not raise any issue relating to a manifestation determination or a decision not made by an ALJ regarding a discipline-related change of placement. See Fla. Admin. Code R. 6A-6.03312(7)(a). Accordingly, this matter proceeded in accordance with the standard timelines enumerated in Florida Administrative Code Rule 6A-6.03311.

<sup>2/</sup> Under the doctrine of decisional finality, said Final Order is dispositive of the rights and issues involved therein. See Florida Power Corp. v. Garcia, 780 So. 2d 34, 44 (Fla. 2001)(discussing that "[t]he doctrine of decisional finality provides that there must be a 'terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein.'").

3/ Respondent's Proposed Final Order notes that Respondent "offered 4.5 hours of compensatory education for a day for each day a FAPE was denied in its proposed resolution for the instant case."

COPIES FURNISHED:

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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).