STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs. Case Nos. 17-4191E
17-4982E

PALM BEACH COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on October 17 through 20, 2017, in West Palm Beach, Florida; and concluded on December 5 through 7, 2017, in Boca Raton, Florida.

APPEARANCES

For Petitioner: Kathryn Rose Dutton-Mitchell, Esquire
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For Respondent: Laura E. Pincus, Esquire
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STATEMENT OF THE ISSUES

The issues in this proceeding are: whether Respondent deprived Petitioner of a free, appropriate public education (FAPE) within the meaning of the Individuals with Disabilities

Education Act (IDEA), 20 U.S.C. § 1400, et seq.; whether Respondent violated Section 504 of the Rehabilitation Act of 1973 (Section 504); and, if so, to what remedy is Petitioner entitled.

PRELIMINARY STATEMENT

On July 21, 2017, Respondent received Petitioner's due process complaint. On July 24, 2017, the complaint was forwarded to DOAH and assigned (as DOAH Case No. 17-4191E) to the undersigned for all further proceedings.

On July 31, 2017, Respondent filed a motion to dismiss Petitioner's Section 504 claims. By Order of August 8, 2017, said motion was denied. On August 21, 2017, Respondent notified this tribunal of its request to schedule an IDEA due process hearing to include Petitioner's Section 504 allegations, which are directly related to the IDEA allegations. Thereafter, the final hearing was scheduled for September 26 through 28, 2017.

On September 5, 2017, Petitioner moved to extend the hearing dates. Said motion was granted on September 6, 2017, and the final hearing was rescheduled for September 26 through 29, 2017.

On September 6, 2017, Respondent received Petitioner's second due process complaint. On the same day, Respondent forwarded the second complaint to DOAH and assigned (as DOAH Case No. 17-4982E) to the undersigned for all further proceedings. On September 18, 2017, Respondent filed an unopposed motion to consolidate the two complaints. On September 18, 2017, a

telephonic pre-hearing conference was held. During said conference, Petitioner made an ore tenus motion to continue the final hearing. Said motion was granted.

On September 19, 2017, it was ordered that DOAH Case Nos. 17-4191E and 17-4982E were consolidated pursuant to Florida Administrative Code Rule 28-106.108. On the same date, the final hearing was rescheduled to October 17 through 20, 2017. The final hearing proceeded, as scheduled; however, was not concluded. Thereafter, the conclusion of the final hearing was scheduled for December 5 through 8, 2017. The hearing proceeded as scheduled and concluded on December 7, 2017.

The final hearing Transcript was filed on January 9, 2018. 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 January 19, 2018, and the undersigned's final order would issue on or before February 2, 2018. On January 17, 2018, an Order was issued granting Respondent's motion for extension of time to submit proposed final orders. Consistent with the Order, the parties timely filed proposed final orders on January 26, 2018, which were considered in preparing 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

1. Petitioner is currently [redacted] years old. [redacted] was born with [redacted].[1/] [redacted] is a student who has been deemed eligible for exceptional student education (ESE) and has had an individual education plan (IEP) since [redacted]. [redacted] attends School A, a public high school in Palm Beach County, Florida.

2. Petitioner's primary exceptionality category is [redacted]. [redacted] is defined as "significantly [redacted] average general [redacted] and [redacted] functioning manifested during the developmental period, with significant [redacted] in academic skills."[2/]

3. To be eligible for ESE services due to an [redacted], among other criteria, it must be determined that the measured level of the student's [redacted] functioning is [redacted] than [redacted] ([redacted]) standard deviations [redacted] the mean on an individually measured, standardized test of [redacted]; and the level of the student's [redacted] is [redacted] than [redacted] ([redacted]) standard deviations [redacted] the mean on the [redacted] composite or on [redacted] ([redacted])

out of [redacted] ([redacted]) domains on a standardized test of [redacted].[3/]

4. The only standardized test of Petitioner's [redacted] contained in the record was obtained in [redacted]. At that time, [redacted] Full Scale I.Q. was determined to be [redacted], placing [redacted] in the [redacted] percent.

5. It is undisputed that Petitioner has a [redacted]. It is further undisputed that Petitioner participates in the [redacted] ([redacted]). To participate in the [redacted], a student must meet the following criteria: (1) with appropriate and allowable instructional accommodations, assistive technology, or accessible instructional materials, the student requires [redacted] to the grade-level general state content standards; and (2) the student requires [redacted] in academic areas of English, language arts, math, social studies, and science, based on [redacted], in order to acquire, generalize, and transfer skills across settings.[4/] Accordingly, [redacted] participates in a curriculum based on State [redacted] ([redacted]) for all academic areas.

6. Petitioner is also eligible for ESE under the eligibility categories of [redacted] ([redacted]).

7. In 2008, Petitioner was diagnosed with [redacted] ([redacted]). [redacted] is a [redacted]. In essence, it is a disorder of the [redacted] that [redacted].

8. Petitioner also has [redacted] ([redacted]) requiring the use of [redacted] that must be appropriately [redacted] on [redacted] face.

2015-2016 School Year

9. Petitioner was a [redacted]-grade student at School A during the 2015-2016 school year. On September 8, 2015, an IEP meeting was properly convened with all [redacted] required members in [redacted], including Petitioner's mother and Petitioner's legal counsel. At that meeting, Petitioner's present levels of [redacted] and [redacted] were considered and documented.

10. At that time, [redacted] reading teacher's comments were documented as providing that Petitioner, [redacted], could "[redacted]," and "[redacted]." Petitioner's English teacher's comments were documented as providing that Petitioner "[redacted]." Petitioner's educational therapist noted that [redacted] was able to form "[redacted]," and "[redacted]." It was further documented that [redacted] was working on [redacted],

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

11. At this time, Petitioner required adult supervision throughout the entire day and for all transitions; required prompting, at times, to utilize the [redacted]; and required prompting to [redacted]. The IEP further documented that, "[redacted], [redacted] has difficulty in the general [redacted]."

12. The September 2015 IEP documented Petitioner's need for [redacted], [redacted], [redacted], and [redacted]. Regarding special education services, [redacted] received [redacted] in [redacted] and [redacted] [redacted] in a [redacted] classroom, [redacted], [redacted] instruction in [redacted] and [redacted] in an [redacted] classroom, [redacted], and [redacted] week. The evidence established that, on a daily basis, Petitioner was removed from [redacted] [redacted] [redacted] class to receive [redacted] [redacted] instruction through a [redacted] program entitled "[redacted]."

13. The documented IEP reading goals for Petitioner included: (1) [redacted] area of [redacted] to a "[redacted]"; and

(2) [redacted].” The IEP goals included [redacted].

14. The IEP recommended training for all staff working with Petitioner in the areas of [redacted] and [redacted] to assist with the implementation of the IEP. The training was to be provided by District staff and a [redacted], respectively. The projected date of said training was September 4, 2015.

15. The IEP team determined that Petitioner’s IEP would be implemented in a [redacted], wherein [redacted] would spend [redacted] percent of the school day with nondisabled peers.

16. The IEP team met again on December 8, 2015. The meeting was properly convened with all [redacted] required members in [redacted], including Petitioner’s mother and Petitioner’s legal counsel. The purpose of the meeting was to review and discuss Petitioner’s [redacted] and the current [redacted].

17. Based on the final hearing testimony, the [redacted] requires [redacted] in [redacted], [redacted], and [redacted] the student to have the [redacted] to [redacted].

Respondent's witnesses credibly testified that implementing this program successfully with Petitioner was [redacted] due to [redacted], and the [redacted].

18. Petitioner's ESE teacher reported that Petitioner had [redacted] the [redacted], and despite having been pulled out of class in a [redacted] setting for [redacted] to work on the [redacted] program, [redacted] had [redacted]. The ESE curriculum specialist opined that the [redacted] program was [redacted] to be implemented with fidelity due to [redacted]. The school-based members of the team made the determination to change [redacted] "[redacted]."

19. The record evidence is in [redacted]. Although one witness opined that it addresses the [redacted] essential elements of [redacted], the better evidence is that [redacted] is not necessarily a [redacted], but rather, an [redacted] or [redacted], [redacted], [redacted], and [redacted].

20. In the course of discussion, Petitioner's mother shared a chart with the IEP team, wherein [redacted] contended that Petitioner had [redacted]. [redacted] had previously declared the same in correspondence leading up to the meeting and had requested information regarding the program. Aside from

these assertions, no other evidence was presented to establish the validity of the missed days. [redacted], Petitioner's ESE support facilitator, who was providing the [redacted] reading instruction, credibly testified that [redacted] provided "[redacted]" and [redacted] data concerning the program, as well as [redacted] notes and reading log that went home on a weekly basis.

21. Ultimately, Petitioner's ESE services remained essentially unchanged, with the exception of [redacted] services. In lieu of being removed daily from [redacted] classroom to work on the [redacted] program, the IEP provided that [redacted] would receive daily direct instruction in the [redacted] class and would receive [redacted] support in [redacted], [redacted] times per [redacted]. Petitioner objected to the amendment in [redacted] services.

22. On December 9, 2015, Respondent issued a Prior Written Notice addressing this issue. Said notice provides that continuing daily reading instruction was rejected as it was "[redacted]." As set forth above, the notice provided that [redacted] would receive support [redacted] for [redacted], [redacted] times per [redacted] in the [redacted] class, and [redacted] instruction in the [redacted] class, [redacted] times per [redacted].

23. Respondent issued another Prior Written Notice on December 11, 2015. In this document, Respondent advised that "[redacted]

[redacted]

[redacted]

[redacted]." The document further provides that, "[redacted]

[redacted]

[redacted]." Said notice concluded that, "[redacted]

[redacted]

[redacted]."

24. After several meetings, the IEP team reconvened and completed the drafting of an IEP for Petitioner on May 25, 2016. The meeting was properly convened with all [redacted] required members in [redacted], including Petitioner's mother and Petitioner's legal counsel. At that time, Petitioner's present levels of performance were reviewed. The record evidence established that "[redacted]" had been made on Petitioner's [redacted] of [redacted] [redacted] [redacted] skills in the area of [redacted]; and had made "[redacted]" regarding [redacted] goal of [redacted] skills in the area of [redacted] [redacted]. Specifically, it was documented that [redacted] had "[redacted]," the [redacted]-term [redacted] of locating the [redacted], [redacted], and making a prediction with assistance; that [redacted] needed [redacted] with [redacted], [redacted], [redacted], and [redacted] with [redacted]; and had [redacted] in texts to assist in [redacted].

25. With the exception of Petitioner's [redacted] goals, the May 2016 IEP set forth measurable goals that were appropriately ambitious in light of Petitioner's present level of [redacted], [redacted], and previous [redacted]. Petitioner's [redacted] goals now only addressed [redacted]. Specifically, they provided that Petitioner "[redacted]," and that [redacted] would "[redacted]." Petitioner's [redacted], [redacted], [redacted], and [redacted].

26. Petitioner's mother testified that a records request had been made on April 18, 2016, for "[redacted]" to be provided at Petitioner's annual IEP meeting. While Petitioner's mother testified that [redacted] only received a draft IEP and some therapy records, the record is unclear as to what records were specifically requested by Petitioner that Respondent allegedly failed to produce. Petitioner's mother further testified that, at a meeting on April 28, 2016, [redacted] "pointed out" that there were computer-based records that "[redacted] believed" contained data of the [redacted] program; however, [redacted] did not receive the same prior to the

annual IEP meeting in May 2016. A review of the record fails to establish that such records existed and were not produced.

27. During the meeting, Petitioner had, and took advantage of, the opportunity to meaningfully participate in the development of the IEP. The majority of the school-based members of the IEP team did not, over the parent's disagreement, recommend an [redacted] for Petitioner. Instead, said members advocated for Petitioner working towards a [redacted] goal that would make [redacted] "more [redacted]." Additionally, the record reflects that the majority of the IEP team opined that [redacted] facilitation in the [redacted] environment for Petitioner's academic courses was [redacted].

28. During the May 2016 IEP meeting discussions, Petitioner's mother further averred that Respondent had failed to provide the requisite minutes of [redacted] and/or [redacted] services. Specifically, pursuant to Petitioner's mother's calculations, [redacted] advised that [redacted] of [redacted] had not been provided in the 2015-2016 year. At that time, Respondent advised that it would review and advise Petitioner's legal counsel "of the hours that need to be made up."

29. The discrepancy concerned the documentation of hours provided independently for [redacted]. For all that appears, the parties reached an amicable resolution concerning the discrepancy.[5/] [redacted], a [redacted] pathologist

at School A, credibly testified that, after the resolution, [redacted] was instructed to provide the additional compensatory services and, in fact, did so. Petitioner failed to present sufficient evidence to rebut [redacted].

30. During the May 2016 IEP meeting, the IEP team again recommended certain training to be provided to the staff working with Petitioner to assist with the implementation of the IEP. Specifically, the IEP recommended that [redacted] training be provided by a [redacted], and [redacted] strategies training be provided to Petitioner's [redacted] by an [redacted] teacher. The projected date of training for the same was September 2, 2016.

31. Although not specifically documented on the IEP, the conference/staffing record from the IEP meeting documents that "[redacted] teacher is recommending that [Petitioner] needs to be assessed using the [redacted] to see [redacted] current [redacted] with skills." Accordingly, it was concluded that Petitioner would be assessed using the [redacted] at the beginning of the school year.

32. Ultimately, the May 2016 IEP amended the special education services to be provided for Petitioner in the upcoming 2016-2017 school year. Specifically, the IEP provided that as of August 15, 2016, Petitioner would receive direct instruction in the [redacted] classroom for [redacted].

33. Additionally, Petitioner was no longer going to receive support facilitation in [redacted], as set forth in the previous IEP. At the May 2016 IEP meeting, Respondent made the decision to provide essentially no [redacted] to a student who remained [redacted] in [redacted] and still desired the opportunity to continue to improve [redacted] reading skills. Respondent was not simply denying a specific program or methodology or "the best program" requested by Petitioner, but denying the provision of any [redacted] program. Indeed, from the evidence presented, the [redacted] [redacted] curriculum for [redacted] school students neither teaches [redacted] nor [redacted] awareness. As [redacted], Respondent's [redacted] resource teacher, testified:

> Q. All right. Does the [redacted] [redacted] [redacted] [redacted] school curriculum teach [redacted] awareness?
>
> A. No.
>
> Q. All right. Are there - -
>
> A. It's [redacted], not [redacted].
>
> Q. All right. And are there [redacted] [redacted] for [redacted] school [redacted] targeting [redacted] awareness?
>
> A. No.
>
> Q. All right.
>
> A. Because by the time the kids reach [redacted] school except--by the time the kids reach [redacted] school, let's assume that they've

already got that if they're going to get it. So they're not concentrating on [redacted] awareness at that point.

Q. All right.

A. And, like I said, this is a [redacted] course, not a [redacted] course.

34. Additionally, [redacted] was amended from [redacted] per [redacted] in the [redacted] setting, to providing individual [redacted] per [redacted] in the [redacted] room setting, and providing additional [redacted] per [redacted]. Finally, individual [redacted] was [redacted] to [redacted] per [redacted] in the [redacted] setting. Petitioner's mother disagreed with the amendments. Respondent issued a Prior Written Notice concerning the amendments, wherein Respondent [redacted] maintaining the prior services on the grounds that the same "[redacted] meet student's current needs."

35. The May 2016 IEP documented that Petitioner's placement remained that of a [redacted] class, wherein [redacted] would spend [redacted] to [redacted] percent of [redacted] school day with nondisabled peers.

36. The parties also discussed extended school year (ESY) services for Petitioner during the 2016 summer. Respondent proposed academics in an [redacted] classroom, as well as [redacted], [redacted], and [redacted]. The majority of the IEP team proposed and recommended utilizing the [redacted] curriculum.

Again, no [redacted] methodology was offered to address Petitioner's [redacted] deficits.

37. In response, Petitioner requested that Respondent pay for Petitioner to attend a [redacted] instructional program, [redacted] ([redacted]), during the summer. Said request was denied. Petitioner thereafter issued a proper notice of unilateral placement at [redacted]. Over the summer, Petitioner attended the [redacted] center and received [redacted] of [redacted] instruction.

38. [redacted] provided Petitioner an [redacted], [redacted], [redacted] program focusing on [redacted] awareness. While the evidence established that Petitioner made [redacted] progress on the various assessments provided during [redacted] 2016 [redacted] with [redacted], it would be disingenuous to ascribe the [redacted] to the program. Petitioner's progress is not inconsistent with [redacted] advancement or growth while enrolled in Respondent's [redacted] schools. The undersigned finds that the parental placement at [redacted] for the 2016 summer was appropriate.

2016-2017 School Year

39. At the inception of the 2016-2017 school year, Petitioner again advised Respondent of its intent to seek [redacted] instruction from [redacted]. Specifically, Petitioner requested instruction for [redacted] per [redacted], [redacted] per [redacted]. Respondent timely responded that it was denying the request for

reimbursement and that the same was unnecessary for Petitioner to receive FAPE, as Respondent was providing other reading programs to meet [redacted] needs. Petitioner ultimately did not pay for any [redacted] services for the 2016-2017 school year.

40. As noted above, pursuant to the operative IEP, Petitioner was to be accessed using the [redacted] at the beginning of the school year. The record evidence provides that the same was administered on the following dates: December 12 through 16, 19 through 22, 2016, and January 9 through 12, 2017. No evidence was presented to explain why the significant delay.

41. [redacted] has been an [redacted] for [redacted]. [redacted] has been Petitioner's [redacted] at School A since [redacted] was in [redacted] grade. [redacted] did not participate in a formal training regarding [redacted]. [redacted] has used some of the [redacted] activities with Petitioner that [redacted] gleaned from reviewing the documentation from [redacted] prior [redacted], the supervising therapist, and upon review of certain notes. [redacted] credibly testified that [redacted] participated in [redacted] training via a video presentation, however, [redacted] could not recall the date. Petitioner failed to present any evidence that [redacted] was utilizing incorrect techniques in [redacted] provision of [redacted] services to Petitioner.

42. [redacted] has been Petitioner's [redacted] for [redacted] years. [redacted] has, at times, documented data concerning how

many prompts [redacted] is required to provide Petitioner, however, [redacted] is not currently doing so. [redacted] testified that [redacted] is required to assist Petitioner in becoming more independent; however, [redacted] could not recall receiving formal training in fading [redacted] or facilitating independence. [redacted] opined that Petitioner's level of independence has changed "very little" in the last year. [redacted] has attended [redacted] training for Petitioner on [redacted] occasions.

43. [redacted], a [redacted] teacher for students with [redacted], credibly testified that [redacted] did provide the requisite training to [redacted] concerning fading [redacted] and [redacted]. [redacted] testimony was [redacted] and credited by [redacted] correspondence of September 2, 2016, wherein [redacted] confirmed that, on that date, [redacted] met with [redacted] and trained [redacted] in both [redacted] and [redacted].

44. [redacted], Petitioner's [redacted] for the 2016-2017 school year, [redacted] receive formal [redacted] training. [redacted], one of Petitioner's [redacted] teachers, received [redacted] and [redacted].

45. On June 30, 2017, Petitioner properly provided notice of intent to seek private [redacted]. Specifically, Petitioner sought [redacted] of [redacted] [redacted] services prior to the start of the 2017-2018 school year. On July 10, 2017, an IEP team meeting was conducted to address Petitioner's ESY services. At that time, Respondent

agreed to provide direct reading instruction on a [redacted] basis [redacted] per [redacted]. Respondent proposed utilizing the [redacted] and [redacted] reading methodology. Respondent denied Petitioner's request for reimbursement for [redacted]. Petitioner attended the [redacted] program for an additional [redacted] during the 2017 summer.

2017-2018 School Year

46. On or about August 14, 2017, Petitioner began classes for the 2017-2018 school year. Shortly thereafter, Petitioner determined that [redacted] had been assigned to an [redacted] science class, in lieu of a [redacted] class with support facilitation as was indicated on the May 2016 IEP. Petitioner advised Respondent of the discrepancy, and in lieu of placing Petitioner in a [redacted] science class with facilitative support, Petitioner's course was changed to an [redacted] elective entrepreneurship class.

47. On August 23, 2017, an IEP meeting was conducted as scheduled, with all the statutorily required members in attendance, including Petitioner and [redacted] legal counsel. The IEP team discussed the course selection issue. The school-based members of the team explained that the course selection had been made due to the fact that "Petitioner has met [redacted] science requirements so [redacted] has an entrepreneurial class." When Petitioner's counsel requested that [redacted] be placed in a [redacted]

[redacted] science class, the record reflects that the school-based members of the team again opined that [redacted] does not need a [redacted] class, but rather, a [redacted] class. Specifically, Petitioner was requesting to be placed in the [redacted] chemistry class. Ultimately, Respondent's assertion that Petitioner required an additional [redacted] class was determined to be incorrect.

48. During the August 2017 meeting, it was also determined that Petitioner had been placed in an [redacted] personal fitness class, as opposed to general education personal fitness.

49. The August 23, 2017, IEP documents that Petitioner was to receive [redacted] in all academics in an [redacted] setting. As a result of this change from the prior IEP, Petitioner's placement was changed from a [redacted] class setting to that of a [redacted] class, wherein [redacted] would spend [redacted] or [redacted] of [redacted] school day with nondisabled peers.

50. On September 6, 2017, Petitioner filed DOAH Case No. 17-4191E. At the resolution session conducted on September 26, 2017, the parties agreed to place Petitioner in a [redacted] education class for [redacted]. Accordingly, [redacted] placement again reverted to that of a [redacted] setting.

51. The evidence presented establishes that Petitioner made [redacted] grades, typically [redacted], in the [redacted]

[redacted] in both the [redacted] and [redacted] environment, and [redacted] to be [redacted] from grade to grade. No evidence was presented that Petitioner's presence in the [redacted] classroom was [redacted] or otherwise had a [redacted] effect on the balance of the pupils in the room.

52. The evidence presented, however, also establishes that Petitioner receives benefits in the [redacted] environment that [redacted] does not receive in the [redacted] classroom. [redacted] has been assigned as Petitioner's one-to-one [redacted] for [redacted]. [redacted] is with Petitioner throughout the entirety of the school day. [redacted] credibly testified that, based on [redacted] observations, Petitioner "does not flourish" in the [redacted] classes. [redacted] has observed Petitioner [redacted] to understand the classwork the [redacted] classroom students are working on, even when the curriculum is [redacted] for [redacted] curriculum by the [redacted] [redacted] teacher. [redacted] credibly testified that an increased level of prompting is required to keep Petitioner's [redacted] in the [redacted] classes.

53. [redacted] also credibly testified that Petitioner's level of communication with [redacted] [redacted] classroom peers is primarily [redacted] to greetings and [redacted] does not engage in conversations with those peers. [redacted] has observed this lack of communication regardless of the [redacted] student that is

placed near [redacted]. By contrast, [redacted] credibly testified that, in the [redacted] classroom, Petitioner will engage in conversation with any peer who is in [redacted] close proximity. Additionally, Petitioner chooses to sit with [redacted] typical [redacted] peers during lunch.

54. Petitioner presented the testimony of [redacted], a [redacted]. [redacted] was admitted as an expert in the area of [redacted], [redacted], and as a [redacted]. [redacted] credibly opined that students with [redacted] require [redacted], [redacted] instruction at a high [redacted] to have the opportunity to improve in [redacted]. [redacted] acknowledges that Petitioner is a student with [redacted]. [redacted] further opines that "neither of these conditions [redacted] [Petitioner] from learning to [redacted] or [redacted] [[redacted]] from participating in [redacted] interventions supported by evidence-based best practices." This opinion is likewise credited. [redacted] also opined that Petitioner did not derive any meaningful educational benefit or [redacted] a [redacted] benefit from the [redacted] services provided by Respondent to Petitioner.

55. Petitioner also presented the testimony of [redacted], who has a [redacted] in [redacted] from the [redacted], and a Ph.D. in [redacted] and [redacted] from [redacted]. [redacted] was admitted as an expert in [redacted], [redacted], and [redacted]

[redacted]. [redacted] similarly testified that, based upon [redacted] record review, "[redacted]."

56. Neither of the aforementioned experts, however, provided an opinion as to how "meaningful progress or benefit" would manifest when assessed in the specific context of this [redacted] student--an [redacted], [redacted], student with [redacted], who possesses a constellation of other circumstances, including, but not limited to, [redacted]. Indeed, the undersigned is unaware of any evidence presented on this point.

CONCLUSIONS OF LAW

IDEA Claims

57. 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).

58. 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).

59. 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).

60. 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).

61. 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).

62. "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).

63. 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).

64. "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).

65. 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).

66. Petitioner's consolidated complaints set forth two procedural violations. First, Petitioner alleges that Respondent failed to provide Petitioner with requested educational records such that [redacted] could not meaningfully participate in the IEP process.

67. The IDEA's implementing regulations provide that school districts "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by [the school district]." 34 C.F.R. § 300.613(a). This opportunity applies to records concerning the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. 34 C.F.R. § 300.501(a). Section 300.613(b), Florida Statutes, provides that the right to inspect and review education records includes:

> (1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
>
> (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

34 C.F.R. § 300.613(b)(1)-(3).

68. The school district must comply with a request "without unnecessary delay" and before any meeting regarding an IEP, any due process hearing, or resolution session, and in no case more than 45 days after the request has been made. 34 C.F.R. § 300.613(a). Florida Administrative Code Rule 6A-1.0955(6)(b), entitled "Education Records," provides that a school district shall comply with a request within a reasonable period of time, but in no case more than 30 days after it has been made.

69. As discussed in the Findings of Fact, the lack of specificity of the evidence presented on this topic precludes the undersigned from finding a procedural violation against Respondent on the issue of educational records.

70. Secondly, Petitioner alleges that Respondent improperly and unilaterally made a change in Petitioner's course selection, which resulted in a change of Petitioner's placement, outside the procedural protections of the IDEA. This contention is well-founded. Pursuant to Florida Administrative Code Rule 6A-6.03028(3)(i)4., in determining the educational placement of a student with a disability, each school district must ensure that, inter alia, the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the

student, the meaning of the evaluation data, and the placement options. Here, the evidence clearly established that School A staff, outside of the IEP process, assigned Petitioner to certain [redacted] classes, resulting in a change of [redacted] placement. This procedural violation rises to the level of a FAPE denial in that Respondent's conduct in this regard significantly infringed Petitioner's parents' opportunity to participate in the decision-making process.

71. 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 "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.

72. 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.

73. The assessment of an IEP's substantive propriety is further 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).

74. Third, 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."

75. 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. 200 F.3d at 348-49.

76. 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.

77. Petitioner alleges a multitude of substantive violations. Petitioner alleges that Respondent failed to implement the September 2015 IEP in its alleged failure to provide 22 days of [redacted] instruction. Petitioner failed to present sufficient evidence to support this allegation.

78. Petitioner's primary allegations concern the reading services offered and provided. Petitioner alleges that, during the relevant time period, Respondent failed to offer Petitioner an appropriate IEP related to [redacted] reading deficits. Petitioner also alleges that, during the relevant time period, Respondent failed to implement an appropriate IEP related to an appropriate reading program, resulting in no meaningful progress on [redacted] reading goals and no remediation of [redacted] reading deficit. These allegations are addressed in order below.

79. Petitioner avers that the December 2015 IEP was inappropriate in that it provided for a reduction in [redacted] reading services and that the new reading program methodology was unsatisfactory. Petitioner's reading services were amended in the December 2015 IEP after consideration of [redacted] present level of achievement, [redacted] disabilities, and potential for growth. Indeed, the evidence established that despite ten years of education, and [redacted] reading instruction, Petitioner remained at a [redacted]-[redacted] level due to [redacted] disabilities. The evidence further established that the same hindered [redacted] ability to matriculate through the most recent program, [redacted]. The evidence further established that the very purpose of the December 2015 IEP meeting was to consider and reevaluate Petitioner's IEP as [redacted] was not progressing in [redacted] reading.

80. The undersigned concludes that the December 2015 IEP was appropriately designed to address Petitioner's reading needs and that the educational methodology employed by Respondent to address Petitioner's reading was appropriate, given Petitioner's unique circumstances. Petitioner continued to receive [redacted] [redacted] in the [redacted] English curriculum and was provided the supplemental resource of the [redacted] program. It is well-established that the choice of educational methodology falls within the discretion of the school district. See Rowley, 458 U.S. at 207 (holding that once a court determines that the

requirements of the act have been met, questions of methodology are for resolution by the states); M.M. v. School Bd. of Miami-Dade Cty., Fla., 437 F.3d 1085, 1099 (11th Cir. 2006)(quoting Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988))("Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.").

81. Petitioner alleges that Respondent [redacted] to implement the operative IEP in that the [redacted] did not start in the [redacted] class until March 2015. To the extent the allegation is not a scrivener's error, said allegation is barred by the two-year statute of limitations under the IDEA. To the extent that the allegation was intended to reference March "2016," Petitioner failed to present sufficient evidence to support said claim, and, therefore, the same is denied.

82. Petitioner further alleges that Respondent failed to provide more than [redacted] of the required [redacted] during the 2015-2016 school year, and that Respondent failed to provide compensatory services, as agreed. It is unclear from the record if the compensatory services were the result of a written settlement agreement. If so, this proceeding is not the proper forum to seek enforcement. If not, as indicated in the Findings

of Fact, Petitioner failed to present sufficient evidence to establish that the compensatory services were not provided.

83. Concerning the May 2016 IEP, Petitioner advances the same IEP design claims with respect to [redacted]. The analysis here is different from the December 2015 IEP. The undersigned concludes that Petitioner's complete removal of a reading program from Petitioner's [redacted] services resulted in an IEP that was not reasonably calculated to enable Petitioner to make progress appropriate in light of [redacted] circumstances.

84. Petitioner avers that Respondent failed to implement the May 2016 IEP in several respects. First, it is alleged that Respondent failed to implement the [redacted] services, as the [redacted] did not receive [redacted] or [redacted], as recommended on the IEP. Petitioner established that the [redacted], [redacted], did not participate in formal training regarding [redacted]. The evidence did establish that [redacted] participated in [redacted] training. Petitioner, however, failed to present any evidence that [redacted] was utilizing incorrect [redacted] techniques in the provision of [redacted] services. Similarly, Petitioner failed to present any evidence concerning what particular [redacted] services [redacted] failed to provide. Accordingly, the undersigned concludes that [redacted] to attend training did not result in a substantial, significant, or material failure to implement [redacted] [redacted].

85. Petitioner contends that Respondent failed to implement the May 2016 IEP in failing to have Petitioner assessed with the [redacted] of [redacted] at the beginning of the 2016-2017 school year. The undersigned finds that the four-month delay in initiating the [redacted] assessment was unreasonable. The delay resulted in an entire school semester transpiring prior to obtaining the results. Although the evidence does not support a conclusion that Petitioner [redacted] any [redacted] as a result of the delay, the undersigned concludes that this was a material failure to implement the May 2016 IEP.

86. Petitioner alleges that Respondent otherwise failed to implement training in [redacted], [redacted], and [redacted] that were recommended to assist with implementation of the pertinent IEPs. Although the evidence established that not all staff working with Petitioner received the respective trainings, the undersigned concludes that any such omission was de minimis and not material. Concerning [redacted] strategies to be provided to [redacted], [redacted], although the evidence is in conflict, the undersigned finds the testimony of [redacted] is due to be given more weight. [redacted] credibly testified that, on September 2, 2016, [redacted] provided the requisite training to [redacted] concerning [redacted] strategies and independence.

87. Petitioner contends that the May 2016 and August 2017 IEPs are inappropriate in that Respondent failed to make a placement recommendation in the [redacted] ([redacted]). Specifically, Petitioner contends Respondent failed to respect [redacted] request to remain in a [redacted] setting to receive [redacted] academic [redacted] curriculum.

88. In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on students' placements or education environment in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A) provides as follows:

> Least restrictive environment.
>
> (A) In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

89. Pursuant to the IDEA's implementing regulations, states must have in effect policies and procedures to ensure that public agencies in the state meet the [redacted] requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to

meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the above-referenced mandates concerning the [redacted] and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) & 6A-6.0311(1).

90. In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1). Additionally, the child's placement must be determined at least annually, based on the child's IEP, and as close as possible to the child's home. 34 C.F.R. § 300.116(b).

91. With the [redacted] directive, "Congress created a statutory preference for educating handicapped children with nonhandicapped children." Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act, School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to [redacted] special needs." Daniel, 874 F.2d at 1036, 1044.

92. In Daniel, the Fifth Circuit set forth a two-part test for determining compliance with the mainstreaming requirement:

> First, we ask whether education in the [redacted] classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. See § 1412(5)(B). If it cannot and the school intends to provide [redacted] education or to remove the child from [redacted] education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Daniel, 874 F.2d at 1048.

93. In Greer, infra, the Eleventh Circuit adopted the Daniel two-part inquiry. In determining the first step, whether a school district can satisfactorily educate a student in the [redacted] classroom, several factors are to be considered: (1) a comparison of the educational benefits the student would receive in a [redacted] classroom, supplemented by aids and services, with the benefits [redacted] will receive in a [redacted] education environment; (2) what effect the presence of the student in a [redacted] classroom would have on the education of other students in that classroom; and (3) the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the student in a [redacted] classroom. Greer, 950 F.2d at 697.

94. As indicated above, a student's educational placement must be determined on an individual case-by-case basis depending

on each student's unique educational needs and circumstances, rather than by the student's eligibility category. Petitioner participates in [redacted], which, as a student with significant [redacted], provides [redacted] access to the [redacted] education curriculum. The [redacted] are contained in publications incorporated by reference and made a part of Florida Administrative Code Rule 6A-1.09401(k) through (o). The introductory comments to the publications provide, in part, as follows:

> [redacted] courses] are setting neutral, which means a student working on [redacted] can attend classes with non-disabled peers in [redacted] education courses. Students with a significant [redacted] work on a "[redacted]" that is aligned to the [redacted] education content but delivered at the individual level of complexity needed for the student to be successful.

95. While the student requires "[redacted]" in the academic areas of [redacted], based on [redacted], the undersigned does not construe the term "[redacted]" as limited to instruction in an [redacted] classroom setting.

96. The undersigned, applying the above factors to the facts of this matter, concludes that Petitioner can be satisfactorily educated in a [redacted] classroom, with the use of [redacted]. The evidence established that Petitioner has used a [redacted] [redacted] curriculum in the [redacted]

education and [redacted] classroom settings and received comparable grades in both settings. There was no evidence presented that Petitioner's presence creates a negative effect on the education of students in that classroom. While credible evidence was presented that Petitioner is [redacted] with [redacted] and prefers their company when given free will, this factor is not dispositive in light of Petitioner's previous requests to attend in the general education setting. No evidence was presented that would suggest that the costs of the necessary [redacted] would be prohibitive. Accordingly, Petitioner established that Respondent failed to educate Petitioner in the [redacted], as alleged. While Petitioner established a [redacted] violation, Petitioner failed to establish any negative educational effects of the same.

97. Petitioner's complaint seeks tuition reimbursement for [redacted] placement at [redacted]. In Sch. Comm. of Burlington v. Dep't of Educ. of Mass, 471 U.S. 359 (1985), the Supreme Court held that the IDEA's grant of equitable authority authorizes reimbursement for parental expenditures on [redacted] education. Subsequent to Burlington, Congress amended the IDEA to codify the remedy of [redacted] reimbursement. See 20 U.S.C. § 1412(a)(10)(C)(ii). The IDEA provides for parental reimbursement for [redacted] placements if (1) the school district fails to provide a FAPE, and (2) the parental placement

is appropriate. Burlington, 471 U.S. at 369. Like an IEP, a parental placement is appropriate if it is reasonably calculated to enable a child to make progress in light of the child's circumstances.

98. In this matter, the undersigned concludes that the May 2016 IEP failed to provide FAPE to Petitioner in the provision of reading services. Having thus concluded, an examination of the appropriateness of the [redacted] placement must be undertaken. A parental placement is appropriate if it is "reasonably calculated to enable the child to receive educational benefits." Sumter Cnty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 488 (4th Cir. 2011). Significantly, the parental placement need not satisfy every last one of the child's special education needs. Frank G. v. Bd. of Educ., 459 F.3d 356, 365 (2d Cir. 2006). Rather, the placement must "provide only some element of the [redacted] education services missing from the public school [redacted] in order to qualify." Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 25 (1st Cir. 2007); see also Frank G., 459 F.3d at 364 ("An appropriate [redacted] placement need not meet state education standards or requirements. For example, a [redacted] placement need not provide certified special education teachers or an IEP for the disabled student") (internal citations and quotation marks omitted); Warren G. v. Cumberland Cnty. Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999) (holding that the "test for

the parents' [redacted] placement is that it is appropriate, and not that it is perfect.").

99. As [redacted] is clearly a for-profit enterprise, it is important to note that a unilateral placement is not rendered inappropriate by virtue of its for-profit status. N.Y.C. Dep't of Educ. v. V.S., 2011 U.S. Dist. LEXIS 83309, *47-53 (E.D.N.Y. July 29, 2011); A.D. & M.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 215 n.16 (S.D.N.Y. 2010).

100. As set forth in the Findings of Fact, the undersigned concludes that [redacted] was an appropriate [redacted] placement for Petitioner for the [redacted] provided during the 2016 summer. As Petitioner did not have any expenditures for attending [redacted] throughout the 2016-2017 school year, the undersigned concludes that reimbursement for said time period would not be appropriate. Additionally, the undersigned concludes that reimbursement would not be appropriate for Petitioner's attendance at [redacted] for [redacted] during the 2017 summer. At that time, Respondent had offered to provide Petitioner an [redacted] methodology designed to address Petitioner's reading deficits.

Section 504 Claims

101. Section 504's statutory text, succinctly 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 her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

29 U.S.C. § 794(a).

102. In contrast to the IDEA, Section 504's text does not create a number of different procedures that a school district must follow to comply with the statute. The U.S. Department of Education, however, has promulgated regulations under Section 504 addressing, inter alia, identification, evaluation, and educational placement of disabled preschool, elementary, secondary, and adult education students. See 34 C.F.R. § 104.32-35.

103. Pursuant to Section 504's implementing regulations, participating school districts are required to establish procedural safeguards with respect to actions regarding the "identification, evaluation, or educational placement" of students with disabilities who "need or are believed to need special instruction or related services." 34 C.F.R. § 104.36. The procedural safeguards must include "notice, an opportunity for the parents or guardian of the [student] to examine relevant

records, an impartial hearing with opportunity for participation by the [student's] parents or guardian and representation by counsel, and a review procedure." 34 C.F.R. § 104.36. An "impartial hearing" as contemplated in section 104.36 may not be conducted by an employee of the subject school district or a school board member. See, e.g., Leon Cnty. (FL) Sch. Dist., 50 IDELR 172 (OCR 2007).

104. In addition to the impartial hearing right with respect to identification, evaluation, or educational placement, an individual may file a complaint with the U.S. Department of Education Office for Civil Rights (OCR) alleging discrimination based on disability or retaliation. See 34 C.F.R. § 104.61; OCR Case Processing Manual (revised Feb. 2015). Moreover, under 34 C.F.R. § 104.7, any school district that employs 15 or more persons must designate an individual responsible for coordinating its compliance efforts and to "adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part." Thus, any person who believes he or she has been subjected to discrimination on the basis of disability may file a grievance with the school district under this procedure.

105. With respect to IDEA claims, sections 1003.571 and 1003.57 provide this tribunal with jurisdiction over the subject

matter and the parties, and rule 6A-6.03311 sets forth how an IDEA due process hearing shall be conducted and the scope of the administrative law judge's (ALJ) hearing decisions. By contrast, with respect to Section 504, Florida does not have a statute adopting or mandating compliance with Section 504. Concomitantly, the Florida Department of Education has not promulgated any regulations addressing compliance with Section 504, how an impartial Section 504 hearing should be conducted, or the scope of the decision to be determined.

106. Pursuant to section 120.65(6), Florida Statutes, however, DOAH "is authorized to provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by [section 120]." Thus, if such a contract exists, DOAH may assign an ALJ to preside over an impartial hearing regarding Section 504 claims concerning the student's "identification, evaluation, or educational placement."

107. If a student with a disability qualifies for services under the IDEA, as Petitioner here does, Respondent can satisfy Section 504's standard of FAPE by developing and implementing an appropriate IEP. See 34 C.F.R. § 104.33(b)(2). To the extent Petitioner's consolidated complaints can be construed as contending Respondent violated Section 504's FAPE requirements, the undersigned concludes that Petitioner succeeded or failed to satisfy [redacted] burden regarding said claims based on the facts and

analysis of those claims as set forth in the preceding IDEA claims section of this Order.

108. Petitioner's consolidated complaints further contend that Respondent engaged in acts of: deliberate indifference, intentional segregation, discrimination, and retaliation. While the undersigned's authority to make a determination concerning Petitioner's "non-FAPE" claims is dubious, the exercise will be undertaken for the purposes of administrative exhaustion.

109. A parent has a private right of action to sue a school system for violation of Section 504. Ms. H v. Montgomery Cnty. Bd. of Educ., 784 F. Supp. 2d 1247, 1261 (M.D. Ala. 2011). To prevail on a Section 504 claim, a plaintiff must show "(1) the plaintiff is an individual with a disability under the Rehabilitation Act; (2) the plaintiff is otherwise qualified for participation in the program; (3) the plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reasons of his or her disability; and (4) the relevant program or activity is receiving federal financial assistance." L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cnty., Fla., 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007). As the Middle District of Alabama has explained:

> To prove discrimination in the education context, courts have held that something more than a simple failure to provide a FAPE under

> the IDEA must be shown. A plaintiff must also demonstrate some bad faith or gross misjudgment by the school or that [redacted] was discriminated against solely because of [redacted] disability. A plaintiff must prove that he or she has either been subjected to discrimination or excluded from a program or denied benefits by reason of their disability. A school does not violate § 504 by merely failing to provide a FAPE, by providing an incorrect evaluation, by providing a substantially faulty individualized education plan, or merely because the court would have evaluated a child differently. The deliberate indifference standard is a very high standard to meet.

J.S. v. Houston Cnty. Bd. of Educ., 120 F. Supp. 3d 1287, 1295 (M.D. Ala. 2015)(internal citations omitted).

110. The Eleventh Circuit has defined deliberate indifference in the Section 504 context as occurring when "the defendant knew that harm to a federal protected right was substantially likely and failed to act on that likelihood." Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 344 (11th Cir. 2012). This standard "plainly requires more than gross negligence," and "requires that the indifference be a deliberate choice, which is an exacting standard." Id. (internal and external citations omitted).

111. Succinctly, Petitioner has failed to provide the requisite level of evidence to support any of [redacted] "non-FAPE" claims. As said claims are not supported by the evidence, they are therefore denied.

ORDER

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

1. Respondent improperly and unilaterally made a change in Petitioner's course selection, which resulted in a change of Petitioner's placement, outside the procedural protections of the IDEA. This procedural violation rises to the level of a FAPE denial in that Respondent's conduct in this regard significantly infringed Petitioner's parents' opportunity to participate in the decision-making process.

2. Respondent's removal of a reading program that specifically addresses [redacted] deficits from Petitioner's May 2016 IEP resulted in an IEP that was not reasonably calculated to enable Petitioner to make progress appropriate in light of [redacted] circumstances. [redacted] was an appropriate [redacted] placement for Petitioner during the 2016 summer. Respondent shall reimburse Petitioner for the [redacted] at [redacted] during the program. The reimbursement shall be made to Petitioner within a reasonable time not to exceed thirty (30) days from the date of this Order. Respondent shall further provide compensatory education for the hours of reading instruction that Respondent failed to provide to Petitioner during the 2016-2017 school year. Said hours shall be calculated at three (3) hours per week for those weeks in which School A was in session. It is further ordered that an IEP

meeting will be held as soon as practicable for the IEP team to determine the appropriate educational methodology to address Petitioner's reading deficits.

3. The delay in initiating the Brigance assessment was a material failure to implement the May 2016 IEP.

4. Petitioner established that Respondent failed to educate Petitioner in the [redacted], as alleged. While Petitioner established a [redacted] violation, Petitioner failed to establish any negative educational effects of the same. At the IEP meeting previously ordered, the IEP team shall discuss and design an IEP addressing Petitioner's appropriate educational placement consistent with this Final Order.

5. The balance of Petitioner's IDEA claims and Section 504 claims fails as a matter of fact or law, and, therefore are dismissed.

6. Petitioner is entitled to attorney's fees and costs. Petitioner shall have 45 days from the date of this Final Order within which to file a motion for attorney's fees and costs (under the lower consolidated 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 time sheets, bills, and receipts.

7. Petitioner's remaining requests for relief are denied.

DONE AND ORDERED this 9th day of February, 2018, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of February, 2018.

ENDNOTES

[1/] No evidence was presented concerning the definition of [redacted], the types of [redacted], or Petitioner's specific diagnosis of [redacted].

[2/] See Fla. Admin. Code R. [redacted].

[3/] See Fla. Admin. Code R. [redacted].

[4/] See Fla. Admin. Code R. [redacted].

[5/] The resolution, in whatever form, was not made part of the record.

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).