STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs. Case No. 20-0025E

DUVAL COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A due process hearing was held in this matter before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on November 3 through 5, 2020, via Zoom video conference.

APPEARANCES

For Petitioner: Beverly Oviatt Brown, Esquire
Three Rivers Legal Services, Inc.
3225 University Boulevard South, Suite 220
Jacksonville, Florida 32216

Abigail Adkins, Esquire
Chelsea Dunn, Esquire
Southern Legal Counsel, Inc.
1229 Northwest 12th Avenue
Gainesville, Florida 32601

Betsy Dobbins, Esquire
Center for Children's Rights
2159 Featherwood Drive West
Jacksonville, Florida 32233

For Respondent: Ashley Benson Rutherford, Esquire
Kelly Hebden Papa, Esquire
Trisha Bowles, Esquire
Rita Marie Mairs, Esquire
Stanley M. Weston, Esquire
Office of General Counsel
City of Jacksonville
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

STATEMENT OF THE ISSUES[1]

Whether the School Board failed to provide a free and appropriate public education (FAPE) by failing to properly develop and implement an individualized education plan (IEP) designed to achieve meaningful progress from August to October [redacted]; and

Whether the School Board violated the Individuals with Disabilities Education Act (IDEA) by relying on the availability of transportation to guide its placement decision, thereby denying the student a FAPE; and

Whether the School Board failed to materially implement the student's Fall [redacted] IEP; the student's behavior intervention plan (BIP); and the student's safety plan, resulting in a failure to provide the student a FAPE.

PRELIMINARY STATEMENT

Petitioner filed a request for a due process hearing (Complaint) on January 2, [redacted]. The case was assigned to Judge Diane Cleavinger when it was received by DOAH. The parties jointly requested that the case be held in abeyance until June 30, 2020, when a telephonic scheduling conference was

[1] Two other issues were raised in the request for due process hearing: whether the School Board committed procedural violations by failing to give written notice of its alleged refusal to provide language services, and by not giving proper notice of a change in the student's location of services. According to Petitioner's Proposed Final Order, dated January 8, 2021, these notice issues were not argued because they were "no longer being pursued." The undersigned interprets this statement as a voluntary dismissal of the issues, with prejudice; therefore, this Final Order will not address these procedural issues.

held. The case was scheduled to be heard November 3 through 6, 2020. On August 20, 2020, the case was transferred to the undersigned for further proceedings.

On October 15, 2020, Petitioner filed a Motion to Compel Discovery, stating that Petitioner had served the School Board with Petitioner's Request for Production of Documents and Interrogatories on August 27, 2020. The School Board had produced documents, but had also responded to the request for discovery by stating that without a court order, the School Board would not participate in discovery. Also, on October 15, 2020, the School Board filed "DCSB's Objections to Petitioner's First Set of Interrogatories" asserting this objection:

> Respondent objects to these interrogatories as a response is not required in ESE due process cases, and administrative law judges are not authorized to order such discovery. *See S.T. v. School Board, 783 So. 2d 1231* (Fla. 5th DCA 2001); *see also* Letter from Department of Education's General Counsel to Chief Judge Bob Cohen, dated February 8, 2016.

On October 16, 2020, the School Board filed Respondent's Response in Opposition to Petitioner's Motion to Compel, arguing that there is no general right to pre-trial discovery in due process hearings. On October 19, 2020, the undersigned entered an Order Granting Motion to Compel, citing to Florida Administrative Code Rule 6A-6.03311(9)(v).

With agreement from both parties, the due process hearing was held as scheduled, by Zoom video conference. Petitioner's Exhibits 1 through 59 and Respondent's Exhibits 1 through 13 were stipulated into evidence, as well as

Joint Exhibit A. Official Recognition was taken of a Department of Education letter, dated June 23, 2020.[2]

Testimony was heard from the following witnesses: student's [redacted]; [redacted], an assistant principal; [redacted], an exceptional student education (ESE) teacher; [redacted], an ESE teacher; [redacted]; [redacted], a general education teacher; [redacted], an ESE supervisor; [redacted], a school psychologist; [redacted], a behavioral interventionist; [redacted], an ESE teacher; [redacted], a hospital homebound (HH) teacher; and [redacted], an ESE Support Services employee.

At the conclusion of the due process hearing, the parties agreed to file proposed final orders 30 days after the filing of the transcript, and for the undersigned to enter the Final Order 60 days after the filing of the transcript. The Transcript was filed with DOAH on December 9, 2020. On December 30, 2020, the parties agreed to extend the proposed final order deadline to January 8, 2021. The deadline for this Final Order was extended to February 8, 2021. The parties timely filed proposed final orders, which were considered in the preparation of 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 female pronouns in this Final Order

[2] After a review of the entire record, the undersigned placed no weight on the officially recognized letter from the Department of Education, as it had no relevance to the issues presented in this case.

when referring to Petitioner. The female pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. The student is [redacted] years old. She is one of six children, and lives with her [redacted], who is employed as an [redacted]. When the student was two, she was present when her father was killed during a home invasion.

Stipulated Facts

2. The student was attending Duval County public schools at the time of filing the Complaint. At that time, she was an [redacted] grader.

3. The student was found eligible for a Section 504[3] plan on January 24, [redacted], based on Petitioner's social functioning in an elementary classroom.

4. [redacted] started [redacted] grade, which was during the [redacted]-[redacted] school year, at [redacted] School X.

5. The student transferred to [redacted] School A in a general education setting on September 28, [redacted].

6. On November 1, [redacted], step 1 of a Functional Behavior Analysis (FBA) was conducted with the consent of the student's [redacted].

7. The student attended school at the Duval Detention Center (DDC) from December 8, [redacted], to January 8, [redacted]. On January 10, [redacted], she returned to [redacted] School A following her release from DDC.

8. On January 24, [redacted], a Section 504 Plan meeting was held.

9. On February 16, [redacted], a Section 504 Manifestation Determination Review (MDR) meeting was held; it was found that the student's behavior was a manifestation of her social difficulties.

10. On February 26, [redacted], an IEP meeting was held, and the student was found to be eligible for ESE in the category of Emotional Behavioral

[3] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794

Disability (EBD). The IEP contained a Positive Behavior Support Plan (PBSP), and initiation of the IEP began on March 8, [redacted].

11. An FBA of the student was developed between January 31, [redacted], and April 3, [redacted].

12. On April 12, [redacted], a meeting occurred with the student's parent. The parties discussed appropriate placement and re-evaluation plans.

13. On June 1, [redacted], an IEP meeting was held and end-of-school year (ESY) services were initiated for the summer.

14. On August 9, [redacted], the student was placed in [redacted], a self-contained unit located at [redacted] School A.

15. The student's [redacted] enrolled her at [redacted] School K for the period of August 13, [redacted], through August 22, [redacted].

16. On August 21, [redacted], an IEP meeting was held to discuss the student's appropriate placement in light of her behaviors, and to create an IEP addendum. The IEP team determined that the appropriate placement was the [redacted] program located at [redacted] School A.

17. On September 26, [redacted], the IEP team met to discuss the student's needs, including the need to re-evaluate the student's eligibility. Specifically, the team chose to evaluate the student for eligibility in the Autism Spectrum Disorder (ASD) category. The student's [redacted] was seeking residential treatment for the student.

18. The student is diagnosed with [redacted], [redacted], and [redacted].

19. On October 18, [redacted], a teacher at [redacted] School A filed a temporary injunction against the student; as a result, the student was moved to the [redacted] unit located at [redacted] School D.

20. The student remained at [redacted] School D until November [redacted]. From November [redacted] through May [redacted], the student was in a residential program and received HH services.

21. When the student returned from the [redacted] placement, she was placed back in the [redacted] unit located at [redacted] School A.

[redacted] school

22. The record evidence leading up to January [redacted], which marks the 2-year period before the Complaint was filed, reflects a child with emotional outbursts and maladaptive behaviors which surfaced in [redacted] grade. The maladaptive behaviors were present at home and at school, and are documented in the school records. The record also reflects that the student was [redacted] talented; [redacted].

23. Due to her behaviors during [redacted] school, the student was referred to [redacted], a program which provides counseling and tutoring. She received those services throughout the remainder of her [redacted] school years.

24. In January of [redacted], a 504 plan was created for the student. The student was a [redacted] grader at that point. The 504 plan provided the following accommodations for [redacted] impairments in the area of social functioning: (1) proximity control; (2) private cues to manage behavior; (3) separate seating; (4) extended time for testing; (5) appropriate opportunities for movement; (6) opportunity to go to a non-punitive place to calm down in or outside the classroom; (7) provide stress relieving objects before student has a "melt-down."

[redacted] grade

25. The student was accepted into [redacted] School K, which is a magnet school focused on the [redacted], due to [redacted]. At the outset of the semester, [redacted] was exhibiting maladaptive behaviors. The student's [redacted] was frequently called to pick up the student because the student reported not feeling well. Twice during the first month, the student was taken to the hospital by ambulance after complaining that she could not breathe. Both times were false alarms.

26. The student's [redacted] transferred the student to her neighborhood school, [redacted] School A, so that the [redacted] could better manage the constant calls to pick up the student early in the school day. The student at this point was in a general education setting, with only a Section 504 plan in place.

27. The move to a different school did not improve the student's behaviors. Her maladaptive behaviors, included difficulty with peers, aggressiveness and violence toward peers and adults, and defiance of rules. These behaviors resulted in a series of out-of-school suspensions, restraints, arrests, and [redacted] (known as being "[redacted]") throughout the Fall of [redacted]. She was so often removed from class that her social studies teacher, who taught an afternoon class, rarely saw the student.

28. Despite the severity of the student's behaviors, it was the parent's request that finally resulted, on November 1, [redacted], in a referral to the Multidisciplinary Referral Team (MRT) for the purposes of evaluating the student's eligibility for ESE services. By this point, the student was under the care of a psychiatrist, had been diagnosed as suffering from [redacted], and was prescribed three daily medications.

29. The student brought a knife to school on two occasions—once on November 13, [redacted], and then after her 10-day suspension for the offense, she once again did so. As a result of [redacted], she was placed in the Duval Detention Center until January [redacted].

30. The facts relevant to the scope of this hearing begin at this point, in the student's Spring semester of [redacted], while she was still in [redacted] grade and exiting the detention center.

31. At this juncture, the School Board was conducting its first FBA of the student. The maladaptive behaviors identified in the FBA were: physical aggression, profanity, verbal aggression, inappropriate touching, threats, being out of the assigned area, property destruction, and non-compliance. Oddly, the only [redacted] behavior identified was that "[**] does not stay in class for a period of longer than [redacted] minutes."

32. The student's maladaptive behaviors are well documented in the referral log. The following is only one of multiple entries made by various teachers, dated February 5, [redacted], reflecting [redacted] very unstable and aggressive student, who consistently threatened and injured adults and peers:

> The student refuses to comply with any directions whenever [redacted] is not present. EVERYDAY after lunch [she] refuses to enter the class and holds the door open with [her] foot or hand so that I cannot close it. Today [she] was doing the same as [redacted] walked by. It wasn't until I asked [redacted] to get Officer [redacted] that [she] finally entered the room. Once inside [she] continued to walk around, get out of [her] seat, open my door, look out the curtain. I told [her] repeatedly to sit down and [she] would not. I was standing near the table at the front of the room and [she] walked up to me (in my face) several times in an effort to get around me. [She] then continued to walk around the room. I am uncomfortable with these daily confrontations and feel unsafe with [her] in my room. [She] completely disrupts the learning environment. As I am writing this, [she] just knocked on my door at [redacted] p.m. after security removed [her] from my class. I will not be harassed by this student.

33. On February 16, [redacted], an MDR meeting was held because the student had served over 10 days of out-of-school suspensions. The team determined that the Section 504 plan accommodations had not been implemented consistently across settings, which resulted in an escalation of behaviors.

34. Finally, on February 26, [redacted], the student was found eligible for ESE services as a student, under the [redacted] eligibility category. The student's IEP, which had the student placed in the general education setting for 79 percent of the time, was not actually implemented in the general education setting. Instead, the student was placed on a modified schedule where she only came to campus one to two days a week and worked independently with an ESE teacher, [redacted].

35. Despite having a one-on-one teacher during a modified schedule, another MDR meeting was necessary, and was held on April 24, [redacted]. The student had accrued 26 referrals and 20 days of out-of-school suspensions. As a result of another [redacted], she had also spent approximately two weeks in [redacted]. The infractions most often involved threats to peers and staff; physical aggression toward peers and staff, including punching, pushing, and inappropriate touching; throwing objects and furniture; consistent non-compliance; total disregard for all rules; and elopement.

36. The student passed all her [redacted]-grade classes, [redacted].

[redacted] grade

37. The IEP team changed the student's placement during an August [redacted] IEP meeting. The new, more restricted, placement was in the [redacted] program, a self-contained unit for students with EBD eligibility. The [redacted] program was housed in two different [redacted] schools, [redacted] School A and D.

38. The August [redacted] IEP addendum required that the student receive instruction in self-management and anger control in every single class, on a daily basis. The IEP also required that school personnel receive training in Professional Crisis Management (PCM) and in techniques for classroom and behavior management. PCM certification involves multiple levels of training in de-escalation from verbal to physical interventions.

39. The time period between August and October [redacted] is best understood through the testimony of [redacted], who spent most of [redacted] day managing the student, despite the fact that [redacted] was not trained in PCM.

> Q And during your time, because you were -- kind of acted as a one-on-one with [**] during that first year –
>
> A Yeah.
>
> Q -- did teachers generally–

A Yes.

Q -- call you to assist?

A Yes. Security even would call me to assist with [**] because we could talk. [She] would—[She] would respond to me, and I -- we just -- we had -- we were together so much that -- and like I told [redacted], I mean, I love [her]. [She] -- I spent -- most of my days were spent with [her] as a teacher. As a student, I mean, [She] was with me constantly. I made sure [She] got her lunch. I made sure [She]got – [She] got breakfast.

Even when [redacted] or whatever would change [her] meds or anything, you know, I would keep an eye out and make sure [She] was okay. Sometimes the -- whatever the medicine was that [She] was changing like would whatever, would make [her] sleepy. I would make sure to let the teachers know, you know, just leave [her]. We'll get the work done. Don't disturb [her]. It's better not to because I would try to avoid anything that cause [her] a trigger.

But when [She] would get tunnel vision with the situation or something or someone or think someone had maybe disrespected [her] or said something about [her] or anything like that, [She] would just -- it was just full speed ahead. There was no like deterring [her]. So we spent a lot of times sometimes sitting outside in front of the school, and then if [She] walked off campus, I'm not allowed to chase after [her], so I would have to get the SRO.

If [She] would elope, the first thing I would do is -- my thing was I would call [redacted] to let her know, you know, what was going on not to harass [redacted] or anything, but to make [redacted] aware what was going on at school. But then it got to be a point where [redacted] stopped answering my -- the school calls, so I would start having to use someone's cell phone to call to let [redacted] know or [**] would run because [**] didn't want to go with [redacted].

40. During this period of time, August [redacted] through October [redacted], the student was suspended for 17 days, sent home early at least twice due to her behavior, and [redacted] twice. A behavior specialist observed the student for over a week during this period, and point sheets were utilized to keep track of the student's behaviors.

41. The most persuasive evidence, which correlates with the stack of referrals and point sheets that provide very little information about the progress the student made on her IEP goals, establishes that the student was essentially assigned a one-on-one teacher who managed everything for the student--her diet, her mood, if and when the student would be asked to do schoolwork, if and when the student was required to enter and stay in a class, and how and when others interacted with the student.

42. The scant data collection does not reflect an implementation of the IEP requirements of daily instruction in anger management, replacement behaviors and self-management in class, with staff members who were trained in PCM. Instead, the record reflects that [redacted] managed, to the best of her ability and with great personal risk, to keep the student's mood stable and act as a buffer to any possible trigger that might result in explosive and dangerous behaviors. The more persuasive evidence establishes that during this three-month period, the IEP goals were not implemented.

43. On October 18, [redacted], [redacted] filed a request for a temporary restraining order against the student, which was granted by a circuit judge. Due to the restraining order, the student's placement remained the same, but the location of the services was changed to [redacted] School D, which also contained a [redacted] unit.

44. A report from an MDR meeting at School D, held in late November [redacted], contains this summary:

> [**] has been transferred and enrolled at [[redacted] School D] as a result of a court injunction.

> **[She] has found rapport with the [School D] staff and is viewed as being comfortable.**
>
> [**] has been hospitalized on multiple occasions.
>
> Academic reports and teachers indicate that [**] is more than capable student making As, Bs, Cs.
>
> [She] has a .96 G.P.A.
>
> The MRT has recommended re-evaluation.
>
> [ ] diagnosed with and and takes medicine for her symptoms.
>
> The FBA/BIP will be updated to reflect current interventions and behavioral strategies.
>
> The school will review the IEP.

(emphasis added)

45. The day after this meeting, the student entered a program ( ) for eight months. She received instruction through HH services, and was dismissed from the program at the end of May .

46. The IEP team met on May 23, . The student's diagnoses were then listed as , , and . She was prescribed medications to help manage her symptoms. Unfortunately, the student was dismissed from the program despite the conclusion that she had not successfully completed her therapeutic and behavior treatment goals.

47. The IEP team decided that due to the nature and severity of the student's behaviors, she needed ESY services. As a justification for ESY services, the IEP team stated:

> [**] is a student with an Emotional/Behavioral Disability who is being discharged from [redacted] and will be dismissed from Hospital/Homebound. The nature/severity of the student's disability presents with interfering behaviors, such that services beyond the 180-day school year are necessary in order for [**] to progress. [**]'s interfering behaviors have made academic progress difficult. [She] would benefit from an opportunity to participate in a school- based setting, receiving Extended School Year services at a self-contained site, specifically a site that can assist with the monitoring and instructional techniques needed to address [her] interfering behaviors, ESY services will begin 7/2/[redacted] and end 7/26/[redacted] and will be provided at [F] [redacted] School**. [She] will return to [her] district assigned [redacted] school ([redacted] School D) with services provided in a self-contained setting, specifically [redacted] on 8/12/[redacted].** (emphasis added)

48. In the social/emotional domain of the student's IEP, the IEP team summarized the student's present level of performance, echoing the justification for ESY services, and specifically listing a location, [redacted] School D, as the upcoming placement for [redacted] grade:

> As a result of [her] disability, [**] continues to need a highly structured, lower teacher to student ratio. [She] continues to display non-adherence to physical boundaries, and walking off from [her] setting when [she] is angered. Though this is a coping mechanism that is preferred to physical aggression, [she] needs constant supervision for [her] safety concerns. [She] has improved in [her] level of time being able to participate in instruction. [She] has had less cottage restriction than [she] had at the beginning of [her] [redacted] treatment, and [she] has reduced [her] pattern of

> unsafe behavior and aggression, however [she] lacks consistency and hasn't mastered the skills to prevent [her] from reverting to aggression or escape when [she] is denied something. [She] continues to display attention seeking behavior from [her] peers and being involved in conflicts and "drama." [**] is a student with an Emotional/Behavioral Disability who is being discharged from [redacted] and will be dismissed from Hospital/Homebound. The nature/severity of the student's disability presents with interfering behaviors such that services beyond the 180-day school year are necessary in order for [**] to progress. [**]'s interfering behaviors have made academic progress difficult. [She] would benefit from an opportunity to participate in a school-based setting, receiving Extended School Year service at a self-contained site, specifically a site that can assist with the monitoring and instructional techniques needed to address [her] interfering behaviors. ESY services will begin 7/2/[redacted] and end 7/26/[redacted] and will be provided at [F] [redacted] School. **[She] will return to [her] district assigned [redacted] school ([redacted] School D) with services provided in a self-contained setting, specifically [redacted] on 8/12/[redacted].** (emphasis added)

49. Notably, the IEP team identified the student's priority educational need as:

> [**] will benefit from continuing to develop and utilize [her] coping and calming strategies and skills [she] has implemented while at the [redacted]. [She] needs to reduce [her] negative interactions with peers and teachers.

50. Lastly, in the section of the IEP where the student's placement is specified, the IEP team, once again, specifically stated the placement *and* location that is necessary for the student to receive FAPE:

> [She] will return to [her] district assigned [redacted] school **([redacted] School D)** with services provided in a self-contained setting, on 8/12/[redacted].
> (emphasis added)

51. Despite the specific directive of the IEP team, that is, that in light of the student's circumstances, the student needed to attend the [redacted] program at [redacted] School D, the School Board informed the parent that due to transportation issues, the student would not be attending [redacted] School D in [redacted] grade. Rather, the student was to begin the year at [redacted] School A, where the injunction had been sought and obtained.

52. On the first day of school in [redacted] grade at [redacted] School A, the student was arrested and taken into custody as a result of an alleged battery on a teacher, [redacted]. This resulted in a restraining order, requested by [redacted], who had no PCM training, was in [redacted] first year of teaching, and who had received no information about the student prior to the first day of school.

53. During the pendency of the restraining order, the student was placed again at [redacted] School D, and the School Board provided transportation.

54. Due to the felony charge, and escalating behaviors at home, the student was placed in therapeutic foster care.

55. In October [redacted], the student was expected to return to [redacted] School A, once again in direct contradiction of the IEP team's recommendation. Upon hearing that the student was soon returning to [redacted] School A, [redacted], on October 7, [redacted], requested another temporary injunction.

56. In an email dated October 14, [redacted], an educational advocate for the student wrote:

> Since [**] discharge from [redacted], **I have made repeated requests to DCPS for [her] to be placed at [redacted] School D based on the history at [redacted] School A. The school**

> **district indicated to me on Friday that there is no DCPS-provided transportation available.** If there is an injunction in place, that may change. (emphasis added)

57. During the pendency of the October [redacted] injunction, the student was, once again, placed at [redacted] School D, and the School Board provided transportation.

58. On October 16, [redacted], in email correspondence, the assistant public defender representing the student wrote:

> The injunction petition was denied this afternoon. I've attached a copy for everyone to this e-mail. Therefore, [She] has two options – [[redacted] School A and [redacted] School D]. **At this time, due to the information discussed in court, [**] and [her] [redacted] are both requesting that [she] attend [[redacted] School D]. Judge [redacted], while denying the injunction, stated on the record [redacted] is willing to help make [[redacted] School D] a reality in whatever way [redacted] can.** [redacted] indicated transportation will be an issue at [[redacted] School D] at this time, so I will defer to her educational advocate, [redacted] and her AAL, [redacted] as to how to proceed. (emphasis added)

59. During her time at [redacted] School D, despite the student's many referrals stemming from maladaptive behaviors, no faculty members requested injunctions from the judicial system.

60. In an email dated December 16, [redacted], the program director for the therapeutic foster care program wrote:

> Good Morning,
>
> The foster parent contacted me this morning and is indicating that this child does not have a way to attend [[redacted] School D]. Community school placement and attendance are requirements of being in the [redacted] program. It is my understanding

> that [**] is allowed to go back to [School A] as the injunction has expired. **However, informed me that several members of [**]'s team are against [**] attending [School A]. Unless we can come up with reliable transportation or a solution to this child's educational setting we will have no other option but to discharge [**] from our program.**
> Please advise. (emphasis added)

61. The record makes it abundantly clear that despite the IEP team's directive, which detailed the student's need to be placed specifically at School D, the School Board refused to provide transportation to School D. If, however, a court ordered injunction was in place, transportation became feasible, and the student was provided transportation to School D.

62. From the beginning of grade, the School Board failed to implement arguably the most important IEP directive: that [**] needed to attend School D in order to receive a FAPE. This material implementation failure resulted in tragic events that might have been avoided had the IEP team's directive been implemented.

CONCLUSIONS OF LAW

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

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

65. In enacting the Individuals with Disabilities Education Act (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 Cty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public-school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on each agency's compliance with the IDEA's procedural and substantive requirements. *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

66. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint with respect to any matter relating to the identification, evaluation, or educational placement of their child, or the provision of FAPE. 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

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

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

20 U.S.C. § 1401(9).

68. 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. "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 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 *Bd. of Educ. v. Rowley*, 458 U.S. at 181).

69. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a student with FAPE. As an initial matter, it is necessary to examine whether the school district has complied with the IDEA's procedural requirements. *Rowley*, 458 U.S. at 206, 207. In this case, there are no alleged procedural violations.

70. 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, 207. In *Endrew F.*, the Supreme 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." 137 S. Ct. 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.*

71. 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.* For a student, like Petitioner here, not fully integrated in the regular classroom, an IEP must aim for progress that is "appropriately ambitious in light of [the student's] circumstances." *Id.* at 1000.

72. Additionally, as is highlighted in this case, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. *Id.* 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.").

73. In this case, Petitioner alleged that the IEP in effect from August to October [redacted] did not provide the student with a FAPE and that the IEP was not implemented. The undersigned, based on a full review of the record, finds no defect with the design of the IEP. The IEP team incorporated the need for properly trained personnel to implement an IEP that contained behavior goals, as well as academic goals, that were appropriately ambitious in light of the student's circumstances.

74. Turning to the issue of implementation, in *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit Court of Appeals confronted, for the first time, the standard for claimants to prevail in a "failure-to-implement case." The court concluded that "a material deviation from the plan violates the [IDEA]." *L.J.*, 927 F.3d at 1206. The *L.J.* court expanded upon this conclusion as follows:

> Confronting this issue for the first time ourselves, we concluded that to prevail in a failure-to-implement case, a plaintiff must demonstrate that the school has materially failed to implement a

> child's IEP. And to do that, the plaintiff must prove more than a minor or technical gap between the plan and reality; de minimis shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child's IEP.

Id. at 1211.

75. While declining to map out every detail of the implementation standard, the court provided a few principles to guide the analysis. *Id*. at 1214. To begin, the court stated that the focus in implementation cases should be on the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld. In other words, the task is to compare the services that are actually delivered to the services described in the IEP itself. In turn, "courts must consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole." *Id*.

76. Additionally, the *L.J.* court noted that the analysis must consider implementation as a whole:

> We also note that courts should consider implementation as a whole in light of the IEP's overall goals. That means that reviewing courts must consider the cumulative impact of multiple implementation failures when those failures, though minor in isolation, conspire to amount to something more. In an implementation case, the question is not whether the school has materially failed to implement an individual provision in isolation, but rather whether the school has materially failed to implement the IEP as a whole.

Id. at 1215.

77. Here, the record reflects a material failure to implement portions of the student's IEP in the Fall of [redacted]. During the relevant months, the student spent almost all of her school time with [redacted], who was not trained in PCM, and who managed the student's interactions, assignments, and mood. The remainder of the time, she was suspended or [redacted]. There is no competent, substantial evidence establishing that the student attended her classes and received instruction in anger management, replacement behaviors, and self-management, as was detailed in the IEP. The cumulative effect of this material deviation resulted in the student's escalating maladaptive behaviors.

78. The student is, therefore, entitled to compensatory education for the entirety of the two months of August [redacted] through October [redacted].

79. Turning to the issue of whether the School Board violated the IDEA by allowing transportation issues to dictate the student's placement, it's important to first examine the relationship between placement and location of services. In *Board of Education of Community High School District Number 218, Cook County, Illinois v. Illinois State Board of Education*, 103 F.3d 545, 548 (7th Cir. 1996), the Seventh Circuit acknowledged that the relationship is intensely fact-driven. The *Cook County* court observed that, since "the term 'educational placement' is not statutorily defined . . . identifying a change in this placement is something of an inexact science." *Id.* The Seventh Circuit held that "the meaning of 'educational placement' falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Id.* The court found that the term "educational placement" in the IDEA can include both the physical location of educational services and the services required by the student's IEP. *Id.*

80. In *Hill v. School Board for Pinellas County*, the district court observed that "[i]n the typical case, educational placement means a child's educational program and not the particular institution where that program is implemented." 954 F. Supp. 251, 253 (M.D. Fla. 1997) (citations

omitted), *aff'd* 137 F.3d 1355 (11th Cir. 1998). Nonetheless, the district court in *Hill* recognized the plausibility of circumstances under which attributes of an institution, a location, a teacher-student relationship, or the like, might become so pronounced and valuable to the student and her IEP, that a change in the school is tantamount to a change in the IEP. *Id.*; *see also A.L. by & through C.L. v. Sch. Bd. of Miami-Dade Cty., Fla.*, No. 10-24415-CIV, 2014 WL 12857913, at *22 (S.D. Fla. Jan. 6, 2014), *report and recommendation adopted*, No. 10-24415-CIV, 2014 WL 12857912 (S.D. Fla. Jan. 28, 2014)(finding that the change in the student's location was not a change in placement, but recognizing that such fact-specific situations may exist); *L.M. v. Pinellas Cty. Sch. Bd.*, 2010 U.S. Dist. LEXIS 46796 (M.D. Fla. Apr. 11, 2010)(noting that then-current educational placement more generally refers to the educational program and not the particular institution or building where the program is limited, but acknowledging that moving the location of the student's services may in some circumstances be a change in the educational placement).

81. Applying these principles to these specific facts, the decision to place the student at [redacted] School A at the start of [redacted] grade was tantamount to a change in placement. The IEP team understood the entirety of the student's disabilities, the consistency of maladaptive behaviors, the multiple suspensions from school, the rocky transitions from one place to another caused by judicial injunctions, the effect of the student's time in a juvenile detention center and an [redacted], the effect of multiple [redacted], and the family's history. Armed with this knowledge, the IEP team determined that the student needed to be in a particular school, [redacted] School D, to receive FAPE. Tragically, the IEP team's directive was ignored, and the student did not begin her [redacted]-grade year at [redacted] School D because the School Board would not transport the student to [redacted] School D. Transportation to [redacted] School D was in fact feasible, as it was provided each time an injunction was filed by a [redacted] School A teacher.

82. The School Board failed to materially implement the IEP when it chose to disregard the IEP team's directive on the appropriate location for the ESE services; therefore, the student is entitled to receive compensatory education.

83. In calculating an award of compensatory education, the undersigned is guided by *Reid ex rel. 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. 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) (agreeing with the district court that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address the student'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) (noting that a flexible, individualized approach is more consonant with the aim of the IDEA, the Court found such an approach more persuasive than the Third Circuit's formulaic method); *Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1352-3 (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).

84. Guided by these principles, the student is entitled to receive compensatory education for the number of school days between August and the end of October [redacted], and for the entirety of [redacted] grade up to the date when the Complaint was filed.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board shall provide compensatory education to the student for its failure to materially implement the student's IEP from August [redacted] through October [redacted], and from August [redacted] through January 2, [redacted].

DONE AND ORDERED this 8th day of February, 2021, in Tallahassee, Leon County, Florida.

JESSICA E. VARN
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2021.

COPIES FURNISHED:

Beverly Oviatt Brown, Esquire
Three Rivers Legal Services, Inc.
Suite 220
3225 University Boulevard South
Jacksonville, Florida 32216

Victoria Sears Gaitanis, Bureau Chief
Department of Education
325 West Gaines Street
Tallahassee, Florida 32312

Julian Moreira, Educational Program Director
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399

Ashley Benson Rutherford, Esquire
Kelly Hebden Papa, Esquire
Trisha Bowles, Esquire
Rita Marie Mairs, Esquire
Stanley M. Weston, Esquire
Office of General Counsel
Suite 480
117 West Duval Street
Jacksonville, Florida 32202

Betsy Dobbins, Esquire
Center for Children's Rights
2159 Featherwood Drive West
Jacksonville, Florida 32233

Amanda W. Gay, Esquire
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399

Abigail Adkins, Esquire
Chelsea Dunn, Esquire
Southern Legal Counsel
1229 Northwest 12th Avenue
Gainesville, Florida 32601

Dr. Diana Greene, Superintendent
Duval County School Board
1701 Prudential Drive
Jacksonville, Florida 32207-8152

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).