

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs.

Case No. 20-1021E

BROWARD COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

A due process hearing was held in this matter before [REDACTED], an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on [REDACTED], in Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: [REDACTED], Esquire
Legal Aid Service of Broward County, Inc.
491 North State Road 7
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For Respondent: [REDACTED], Esquire
School Board of Broward County
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STATEMENT OF THE ISSUES

Whether the School Board designed an Individualized Education Plan (IEP) which provided a free and appropriate public education (FAPE) to the student.

Whether the School Board failed to implement the student's IEP; thereby denying the student FAPE.

Whether the student is entitled to compensatory education hours that were set forth in a Notice of Proposal dated [REDACTED].¹

PRELIMINARY STATEMENT

The request for a due process hearing (Complaint) in this matter was filed at the School Board on [REDACTED]; on the next day, the School Board referred the Complaint to DOAH. Due to the COVID-19 pandemic, both parties sought extensions of time to attend the mandatory resolution session. The undersigned granted those requests for extensions of time and ordered the parties to file a status report no later than [REDACTED].

A status report was filed by the School Board on [REDACTED], indicating that the parties were ready to schedule a due process hearing. On [REDACTED], the School Board filed Defendant's Motion to Dismiss with Prejudice or in the Alternative, Motion for Summary Judgment and Incorporated Memorandum of Law (Motion to Dismiss), arguing that the sole issue left to be resolved was the number of hours of compensatory education the student was due to receive as a result of a Local Conflict Resolution process that had occurred in the Spring of [REDACTED]. The School Board alleged that all required hours had been delivered, and that to the extent any compensatory education hours were due to be delivered, Petitioner had forfeited those hours. Lastly, the School Board argued that the case was moot

¹ In Petitioner's Proposed Order, issues are raised that were not raised in the Complaint or the due process hearing. First, Petitioner argues that the School Board predetermined the student's need for specialized instruction. Second, Petitioner argues that the School Board committed a procedural error by failing to include all relevant school staff at the resolution session. Third, Petitioner vaguely raises an issue with eligibility categories, stating that the student should have been considered for other possible eligibilities. This Final Order will not address these three issues because they were not raised in the Complaint.

because the School Board was willing to provide the compensatory hours that Petitioner was seeking, and there was no longer any need for a hearing. Petitioner filed a Motion to Strike the Motion to Dismiss on [REDACTED], and the parties participated in a telephonic motion hearing on [REDACTED]. Both parties were invited to file memorandums of law to further their arguments; and, on [REDACTED], after reviewing both parties' briefs, the undersigned entered an Order Denying Respondent's Motion to Dismiss. By agreement of the parties, the due process hearing was scheduled for [REDACTED] and [REDACTED].

On [REDACTED], the parties filed a Joint Statement of Undisputed Facts. The due process hearing was held live in Lauderdale Lakes, Florida; and a few witnesses who preferred to testify by Zoom videoconferencing were accommodated as requested. Petitioner's Exhibits 1, 4, 6 through 8, 11, 12, 16, 18, 20, 21, 23, 24, 27, 28, 30 through 32, 34, 35, 37 through 40, 42 through 45, 48 through 50, 55, and 56 were admitted into the record. School Board Exhibits 1, 3, 4, 6 through 12, 14, 16, and 20 were admitted into the record. Testimony was heard from: [REDACTED], Exceptional Student Education (ESE) specialist; [REDACTED], teacher and [REDACTED] () provider; [REDACTED], due process coordinator; [REDACTED], nurse; [REDACTED], support facilitator; [REDACTED], pediatrician; [REDACTED], pediatric rheumatologist; the student's mother; [REDACTED], school/parent [REDACTED], ESE support facilitator; [REDACTED], reading teacher; [REDACTED], math teacher; [REDACTED], ESE specialist for [REDACTED] program; and [REDACTED], occupational therapist.

At the conclusion of the due process hearing, the parties agreed to file proposed final orders 14 business days after the filing of the transcript with DOAH. The due process hearing Transcript was filed on [REDACTED]; accordingly, the parties had the opportunity to file proposed final orders no later than [REDACTED], and the Final Order would issue no later than

██████████. Both parties timely filed proposed orders, which were considered in the preparation of this Final Order. The parties were also required to mail all admitted exhibits to the undersigned for preparation of the Final Order. Petitioner's marked exhibits were received on ██████████; therefore, the parties agreed to extend the deadline for the filing of the Final Order to ██████████.

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 ██████████ pronouns in this Final Order when referring to Petitioner. The ██████████ pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. The student is a ██████████ who has been diagnosed with psoriatic arthritis, asthma, seizure disorder, and gastrointestinal issues. In March ██████████, when ██████████ was in ██████████ grade, ██████████ was found eligible for ESE in the category of ██████████ (██████████).

2. According to school staff, the student is bright and capable of producing grade-level work. ██████████ is educated in the general education setting and does not require specialized instruction.

3. In the first IEP developed for the student, the IEP team identified two priority educational needs in the areas of reading comprehension and math skills. Along with goals developed for those two academic areas, the IEP also developed two goals focused on task completion and following directions. The IEP team also included the following list of supplementary aids and services:

- 1) Flexible scheduling – additional time allotted for tasks;
- 2) Flexible setting – allow movement as needed;
- 3) Flexible setting – close proximity;

- 4) Flexible setting – small group testing;
- 5) Flexible responding – dictation of answers;
- 6) Flexible presentation – repeat, clarify, summarize directions;
- 7) Flexible presentation – repeat/paraphrase directions;
- 8) Flexible presentation – verbal encouragement.

4. The IEP team also documented the student's healthcare needs in the IEP, noting that the student used a walker on an as-needed basis, due to [REDACTED] inability to walk, fatigue, and significant joint pain.

5. A month later, the parent requested that the student receive [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]) in the school setting, in addition to the OT and PT therapies the student was receiving outside of the school setting.

6. Over the summer break of [REDACTED], the IEP team met to update the student's medical information. The student's psoriatic arthritis diagnosis was added to the IEP, and the team noted that the student also had episodes of abdominal pain and pseudo seizures. The team added the following 7 supplementary aids and services, and retained all of the 8 supplementary aids and services listed in Finding of Fact #3 above:

- 9) Make available access to the elevator;
- 10) Flexible setting- preferential seating;
- 11) Flexible Scheduling/Timing- extra time for processing information (written);
- 12) Use of a walker;
- 13) Adult assistance for extra-curricular activities;
- 14) Time for stretching;
- 15) Extra time for movement while transitioning to classes

7. In [REDACTED] of [REDACTED], an Interim IEP was developed, retaining the 15 supplementary aids and services and updating the medical information on the student, noting that medications taken by the student could cause mood swings.

8. The IEP team gathered again in November to address the student's inconsistent school attendance, which was a result of her medical conditions. The team proposed HH services.

9. In [REDACTED] of [REDACTED], the student underwent [REDACTED] and [REDACTED] evaluations. The [REDACTED] report indicated that the student was independent with educationally relevant self-help skills, and demonstrated appropriate functional mobility within the educational setting. The report recommended extended time during campus transitions, wheelchair accessibility as needed, use of a personal assistive device as needed during times of limited functional mobility, energy conservation and rest periods during the school day, elevator access as needed, and a plan in place to allow for accommodations as needed.

10. The [REDACTED] evaluation began on [REDACTED], but was not completed until [REDACTED]. The occupational therapist noted that the student would go to the front office when feeling tired, that [REDACTED] took all of [REDACTED] classes on the first floor of the school building, and that [REDACTED] had a rolling backpack but refused to use it. The student was also exempt from taking a physical education course and did not take any classes that required [REDACTED] to put strain on her joints. The occupational therapist also noted that the student transitioned independently throughout the day and that the student had recently received a laptop for academic work. The evaluator recommended a rolling backpack, pencil grips, and more time for writing or typing assignments. Ultimately, the evaluator did not see the need for direct [REDACTED] services in the school setting.

11. In [REDACTED], the IEP team gathered for the annual review of the IEP. The goals for reading, math, task completion, and following directions were all retained; and the 15 supplementary services and aids were identical to the previous IEP. The team added intermittent HH services, finding them necessary due to the student's medical condition. For every two full days of absences, the student would receive one hour of HH instruction. The team

also added collaboration in all academic subjects, in the general education setting, and during HH service hours.

12. The reading and math goals on the [REDACTED] IEP remained the same as the [REDACTED] IEP because the goals were drafted based on reaching state standards. Since the student had not attained passing scores on the Florida Standards Assessment (FSA), [REDACTED] continued to need goals addressing reading comprehension. In math, [REDACTED] below average math score was specifically in the area of word problems, which involves reading comprehension. The reading and math goals remained the same because [REDACTED] had not yet mastered the skills and [REDACTED] was not demonstrating grade level proficiency on the FSA. A writing goal was added to the goals in the IEP to also address a weakness the student demonstrated on the FSA.

13. In late [REDACTED], the parent, through an attorney, requested the initiation of Local Conflict Resolution, a process to resolve disputes prior to, or in lieu of, filing a request for a due process hearing. The request included allegations of a long delay in providing the [REDACTED] and [REDACTED] evaluations, a failure to collect data on the IEP goals, and a failure to implement the IEP with fidelity.

14. In response to this request, the School Board agreed to provide the student with a total of 119 hours of compensatory education. According to testimony from the Due Process Coordinator, the method of delivering the 119 compensatory education hours in Broward County is to apportion the hours according to the school responsible for the admitted violations. Rather than simply awarding the student a total of 119 hours, the hours were separated into 95 hours that the [REDACTED] school was responsible for providing (violations occurring in the [REDACTED] school year) and 24 hours that the [REDACTED] school was tasked with providing (violations occurring in the [REDACTED] school year).

15. In a Notice of Proposal dated [REDACTED], the School Board agreed to provide the 95 “[REDACTED] school” hours during the student’s study hall and

elective classes during the [REDACTED] school year and 24 “[REDACTED] school” hours in June and [REDACTED], to be completed by [REDACTED]. This agreement was contingent upon the parent making the student available for compensatory hours during the summer months.

16. On [REDACTED], the School Board issued an amended Notice of Proposal noting that on [REDACTED], the parent had requested that no compensatory hours be provided during the summer due to a family emergency. Honoring that request, the amended Notice of Proposal offered to provide the 24 “elementary school” compensatory hours after school during the [REDACTED] school year, rather than during the summer, and would be forfeited if not completed by [REDACTED]. The plan was once again contingent upon the parent making the student available for the compensatory hours.

17. The parent, due to issues that had arisen with a different child of [REDACTED], was unable to bring the student to receive the compensatory hours during the summers of [REDACTED] or [REDACTED], and [REDACTED] also refused to have the school deliver the hours at [REDACTED] home. At the time of the due process hearing, the student had received all of the 95 “[REDACTED] school” hours and 3 of the 24 “[REDACTED] school” hours.

18. In [REDACTED], the student’s physician filled out paperwork to apprise the School Board of the student’s [REDACTED] conditions, and paperwork was completed for continued intermittent [REDACTED] services.

19. Based on the medical information, a [REDACTED] management plan was also created for the student and housed in the nurse’s office.

20. In [REDACTED], the IEP team met for the annual review of the student’s IEP. The IEP team developed four academic goals to address [REDACTED] priority educational needs: two in reading, one in math and one in writing. The IEP also included two employment goals: one to assist her completing homework assignments and one to help [REDACTED] advocate for [REDACTED]. The IEP continued to have collaboration and consultation services in all academic areas and consultation in occupational therapy. The 15 supplementary aids and

services detailed on the [REDACTED] IEP were retained and two additional supplementary aids and services were added: flexible scheduling – reduced assignments, and a second set of textbooks sent home. Because the textbooks were all online, the student also had access to virtual textbooks.

21. The academic goals were more advanced than the ones contained in the [REDACTED] IEP. In the [REDACTED] IEP, as a [REDACTED] grader, the student was expected to read and write on grade level by March [REDACTED]. The IEP team added a second reading goal which required the student to answer inferential questions, in alignment with the team’s priority educational goal of increasing [REDACTED] reading comprehension. The math goal in the [REDACTED] IEP required the student to identify the correct operation to solve basic word problems. In the [REDACTED] IEP, [REDACTED] was expected to solve multiple-step word problems.

22. The IEP noted that the student functions independently in every aspect within the school setting and is capable of maneuvering around the school campus independently. Teacher observations documented on the IEP stated:

[**] is able to complete [REDACTED] work independently and follow classroom routines; however...[REDACTED] is absent quite frequently and forgets [REDACTED] supplies...does not complete all homework assignments, [REDACTED] will often choose appropriate behavior, demonstrate age-appropriate social skills; however, [REDACTED] does not respond to redirection appropriately, accept responsibility for [REDACTED] actions, respect authority, nor handle frustration appropriately.

23. The IEP also indicated that the student sat properly in [REDACTED] seat without issue, [REDACTED] could get in and out of [REDACTED] seat, and [REDACTED] was able to write legibly with a functional grasp. [REDACTED] was provided with a laptop for ease in submitting assignments, but [REDACTED] had failed to turn in assignments

that could have been done on the laptop. The student was chronically tardy, skipped classes, and often failed to turn in homework assignments.

24. The IEP included consultation in OT once a month. Consultation does not require direct engagement with the student, but the occupational therapist nonetheless worked directly with the student at times. The occupational therapist provided training at the beginning of the school year for the student's teachers regarding implementation of accommodations, and credibly testified that [REDACTED] provided all of the OT services as detailed in the IEP.

25. The student's teachers, support facilitators, and the occupational therapist persuasively testified that the IEP was implemented, and each provided logs of the implementation and the student's progress. The HH services were also provided as required by the IEP. Petitioner provided no persuasive evidence establishing that the list of supplementary aids and services were not provided.

26. While it is undisputed that 21 hours of compensatory education have not yet been provided to the student, the student has nonetheless received FAPE.

27. The greater weight of the evidence established that the IEPs were all designed to provide FAPE to the student, and addressed all her priority educational needs.

28. The greater weight of the evidence established that the student achieved passing marks and advanced from grade to grade, making appropriate progress in light of [REDACTED] circumstances.

CONCLUSIONS OF LAW

29. 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).

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

31. 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).

32. 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), and (b)(6).

33. 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).

34. 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.” *Andrew 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. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982)).

35. 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. A procedural error does not automatically

result in a denial of FAPE. *See G.C. v. Muscogee Cty. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the students 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).

36. In this case, Petitioner's Complaint contained one alleged procedural violation: that the School Board failed to timely evaluate the student for OT and PT needs. While there was a long delay in conducting the evaluations, the record is devoid of any credible evidence establishing that the delay impeded the student's right to FAPE, significantly infringed the parent's opportunity to participate in the decision-making process, or that it caused an actual deprivation of educational rights. The result of the evaluations did not alter the student's IEP in any significant manner; therefore, the delay was unfortunate but resulted in no deprivation of necessary services.

37. 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.*

38. 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.*

39. Additionally, 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.”).

40. The Complaint in this matter alleges that the IEPs during the relevant period were poorly crafted, and did not provide FAPE to the student because they failed to address the student’s weaknesses and failed to address her need for occupational and physical therapy. No persuasive evidence was presented to prove these alleged deficiencies. The greater weight of the record evidence established that the IEPs were all appropriately ambitious in light of the student’s circumstances in all identified areas of need. And, as detailed in the Findings of Fact, the student made progress in all academic areas and on all IEP goals.

41. As to the implementation of the IEP, Petitioner’s Complaint alleges that portions of the IEP were not implemented; in particular, that most of the supplementary aids and services were not properly implemented in all classes.

42. 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.

43. 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.*

44. 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.

45. Here, Petitioner failed to establish any failure to implement the IEP. The overwhelming weight of the evidence established that the school staff

implemented the IEP faithfully and regularly documented that implementation.

46. As to the 21 “[REDACTED] school” compensatory education hours that have yet to be completed, which are not found in any IEP, but were a result of a Local Conflict Resolution process, Petitioner failed to provide persuasive evidence that the missing hours resulted in a denial of FAPE.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that all requests for relief are DENIED.

DONE AND ORDERED this [REDACTED] October [REDACTED], in Tallahassee, Leon County, Florida.

S

[REDACTED]
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Filed with the Clerk of the
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this 9th day of October, 2020.

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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).