STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 20-5097EDM

MARTIN COUNTY SCHOOL BOARD,

Respondent.
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FINAL ORDER

A final hearing was held in this case before Diane Cleavinger, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on March 11 and 12, 2021, by Zoom in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues for determination in this proceeding are whether the Student's conduct during the summer of [redacted], that constitutes a violation of the Student Code of Conduct, was a manifestation of his disability and whether Respondent in that review and disciplinary action discriminated against Petitioner by denying Petitioner equal access to its programs, benefits and services.[1]

PRELIMINARY STATEMENT

On September 26, [redacted], Respondent conducted an MDR, at the conclusion of which, the MDR team determined that Petitioner's act of misconduct did not constitute a manifestation of his disability. Petitioner's parent was dissatisfied with the MDR team's decision and on November 16, [redacted], filed a request for an expedited due process hearing. The request for hearing was forwarded to DOAH for hearing. On December 2, [redacted], an amended request for hearing was filed.[2] By agreement of the parties, the final hearing was scheduled for March 11 and 12, [redacted].

The final hearing was held, as scheduled. At the hearing, Petitioner presented the testimony of the parent and called 11 additional witnesses.

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[1] Petitioner also alleged violations of sections 1001.212, 1006.07, and 1012.584, Florida Statutes, as well as School Board Policy 5350. None of these issues involved the Individuals with Disabilities Education Act (IDEA). In general, the purpose of a manifestation of determination review (MDR) hearing is to review the manifestation decision made by the MDR team. The purpose of the hearing is not to challenge the accuracy of the specific act for which a student is being disciplined. Challenges to the specific act for which a student is being disciplined, whether that act occurred, and the penalty imposed for such conduct can only be made in a disciplinary hearing provided for in the school's Student Code of Conduct or Board rules. DOAH is not a super-disciplinary board and does not have jurisdiction under IDEA to determine disciplinary matters beyond the manifestation determination challenge.

[2] The parties engaged in lengthy mediation, which delayed the filing of this action. The amended request reflected that this case was not a request for expedited hearing under the disciplinary timelines for hearing manifestation determination challenges. The School Board agreed that the timelines for determination of a challenge to a manifestation determination did not apply to this case.

Petitioner also introduced Petitioner's Exhibits numbered 1 through 30, which were admitted into evidence. Respondent presented the testimony of two witnesses and introduced Respondent's Exhibits numbered 1 through 34, which were admitted into evidence.

At the conclusion of the final hearing, a discussion regarding the post-hearing schedule for filing proposed final orders was held. Based on that discussion, an Order was issued establishing the deadline for proposed final orders as March 31, 2021, with the final order to be entered on or before April 30, 2021.

In regard to this Final Order, unless otherwise indicated, all rule and statutory references contained in this Final Order are to the version in effect at the time of the alleged violation.

Additionally, for stylistic convenience, the undersigned will use male pronouns in this Final Order when referring to the Student. The male pronouns are neither intended, nor should be interpreted, as a reference to the Student's actual gender.

FINDINGS OF FACT

1. During the [redacted]-[redacted] school year, the Student was in [redacted] grade and attended School A, a public high school in Martin County, Florida. Currently, the Student is [redacted] years old and is identified as a [redacted] grader. The Student is currently being home-schooled, having withdrawn from public school around September or November [redacted].

2. At present, the Student is formally diagnosed with [redacted], and [redacted]. He has been on a number of medications over the years, including [redacted], [redacted], [redacted],

[redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted]. Over the past five years, the Student has received and continues to receive private counseling therapy.

3. At all times material to this action, the Student had an Individual Educational Plan (IEP) that was consented to by the Student's parent. Additionally, at all times material to this action, the Student was placed in a general education setting.

4. In [redacted], the Student first became eligible to receive exceptional student education (ESE) services under the eligibility category of [redacted].

5. On September 17, [redacted], when the Student was in [redacted] grade, the District completed a Functional Behavior Assessment (FBA) and Positive Behavior Intervention Plan (BIP). The BIP was written to address the Student's behaviors related to avoidance of school work.

6. Additionally, in [redacted] during [redacted] grade, the District, with the consent of the parent, referred the Student for reevaluation because of poor social interactions, an inability to read social situations, and continued non-compliant behaviors. As a result of the [redacted] reevaluation, the Student was determined to be eligible for ESE services under the eligibility categories of [redacted] and [redacted]. He also remained eligible for ESE services under the eligibility category of [redacted].

7. The [redacted] evaluation included reports from the Student's teacher and parent. The evaluation noted that the Student had already suffered through significant losses in his life [redacted], [redacted], and [redacted]. Among other things, the Student's parent reported clinically significant difficulties with depression, aggression, social skills, withdrawal, and externalizing and internalizing problems. The Student's teacher reported clinically significant difficulty with depression and borderline or at-risk difficulties with aggression, withdrawal, social skills, and externalizing problems. Both

parent and teacher indicated that the Student sometimes bullied and hit others, and sometimes said "I want to die" or "I wish I were dead." He also was reported as being easily annoyed by others. In addition, the Student's teacher indicated that he sometimes threatened others.

8. The Student's parent and teacher also noted in the [redacted] evaluation, among other things, that the Student was emotionally distant, did not show his feelings well, had difficulty making friends, and difficulty relating to adults and peers. The evaluator also noted evidence of feelings of sadness and a loss of interest in friends and schoolwork. Notably, the behavior directly related to Petitioner's disabilities was non-compliance by refusing to comply. While some aggression was reported, the Student did not significantly manifest aggressive or threatening behavior.

9. On May 11, [redacted], at the end of [redacted] grade, an IEP was completed for the Student. The IEP noted that the Student's interaction with peers had improved but that his behaviors still impeded his learning or the learning of others. Due to the Student's behaviors, a BIP for the Student continued to be implemented. The Student was promoted to [redacted] grade.

10. On October 20, [redacted], during the [redacted]-grade year, a meeting was held to address the Student's progress. Staff noted the Student was noncompliant and would tell adults "no" when faced with nonpreferred tasks. The team addressed methods to assist in redirecting and improving the Student's noncompliant behavior. Again, on December 18, [redacted], a meeting was held to address the Student's progress. Staff reported issues with noncompliant and unsafe behaviors such as throwing pencils and leaving class without permission. The team again addressed methods to assist in redirecting and improving the Student's behavior.

11. Similarly, the Student's IEP from January 5, [redacted], continued to note an improvement in the Student's interactions with his peers. However, teachers continued to raise concerns about the Student's noncompliance with

adult requests for both academic and nonacademic demands. There was also a BIP implemented to address those concerns.

12. On April 18, [redacted], near the end of [redacted] grade, an IEP was developed for the Student. The April IEP was later amended on May 20, [redacted], to address transition to [redacted]. Both IEPs noted that the Student's behaviors still impeded his learning or the learning of others and continued a BIP to address those concerns. Goals were also written to address, among other things, the Student's interactions with peers and adults and the potential for the Student's behavior to interfere with his academic progress. Significantly, both IEPs noted that the Student demonstrated a "marked" improvement in his willingness to comply with teacher requests. The Student was also completing assignments, working cooperatively within peer groups, generally exhibiting appropriate behavior at school, had a positive self-image and was friendlier with peers. There was also positive behavior at home. At the end of the [redacted]-[redacted] school year, the Student was promoted to [redacted] grade [redacted] school.

13. On March 28, [redacted], toward the end of [redacted] grade, an IEP was developed for the Student. The IEP noted that the Student's noncompliant behaviors continued to impede his learning or the learning of others. Likewise, a BIP was implemented for the Student. However, staff did not see any of the behaviors described in the Student's BIP in [redacted] grade.

14. In fact, during the school year, the Student's behavior continued to improve socially with increased abilities to interact with peers. He also demonstrated "great" progress recognizing his own behaviors, understanding the relationship his behavior had on social and academic situations, and using language to effectively express his frustration, problems, or disagreements." Additionally, during the school year, the Student worked well independently, got along with his peers, and advocated for himself." Goals were written to address the Student's interactions with peers and adults and the potential for its interference with his academic progress. In

short, the Student was maturing. At the end of the school year, the Student was promoted to [redacted] grade.

15. The Student's maturity and behavioral improvements continued into [redacted] grade with staff reporting the Student was attentive, worked independently, cooperative, friendly, polite, and interacted favorably with peers and teachers.

16. On February 21, [redacted], in the middle of the [redacted]-grade year, an IEP was developed and implemented for the Student. The evidence showed that the Student's behavior had improved to the point that it was no longer interfering in his education or the education of others. As a result, a BIP was no longer required and was not developed for the Student. Additionally, present level statements and goals for social/emotional behavior were no longer required and were not addressed in the IEP. The IEP noted that the Student sometimes needed prompting to participate in group and class discussion and that he sometimes struggled with group work. Under the IEP, he received support facilitation in reading and writing several times per week, speech and language therapy weekly, and counseling several times per month.

17. Not unusual at the Student's age, in May of [redacted], the Student began to associate with a group of [redacted] that had behavior issues. From that relationship, the Student became somewhat disrespectful and rude.

18. The evidence showed that prior to September [redacted], the Student's disabilities were manifested through noncompliance and hyperactivity. The better evidence also showed that the Student had learned appropriate behavior and coping skills and no longer manifested significant antisocial, aggressive, or threatening behavior, although he sometimes would be disrespectful, talk back, and mumble to himself. In fact, the Student in the past has been a good student with adequate grades. In that time, he had only one serious disciplinary referral at school.

19. Relative to discipline, the evidence showed that from [redacted] to September [redacted], the Student received four minor and one serious separate disciplinary referrals (March [redacted], May [redacted], October [redacted], March [redacted], and August [redacted]). The minor referrals (March 2018, May 2018, March 2019, and August 2019) were for being rude to a teacher, being rowdy and silly or noncompliant. The serious referral on October 2, [redacted], involved the Student immediately retaliating for another student tripping him by stabbing the student with a pencil. The retaliation resulted in a five-day suspension from school. The better evidence demonstrated that the incident was unusual for the Student and a onetime reaction to an assault by another student. More importantly, the evidence did not demonstrate that the Student's behavior was related to his disabilities. As noted, until September [redacted], the Student received no other discipline. During that time period, he did engage in rude, recalcitrant behavior with one teacher he clearly did not like, but otherwise the Student behaved appropriately and acted like a typical student, laughing and talking with his peers and friends.

20. The Student's progress was sufficient to be promoted to [redacted] grade high school. On March 26, [redacted], and in anticipation of the Student's transition to [redacted], a transition meeting between [redacted] school and [redacted] school staff, the parent, and the Student was held at the [redacted] school. Prior to the Student joining the meeting, the parent reported to staff that the parent was having problems at home with the Student and was fearful of being with him because he may be aggressive towards the parent. The parent did not provide detail regarding the basis for the parent's concern but described it as "new behavior this school year" and that the parent felt the Student was depressed. The District had not seen any significant behavior in school that would indicate the Student was aggressive or depressed. Indeed, the better evidence showed that the Student's behavior towards his parent was related to his relationship with his parent involving the parent's attention to a

romantic interest and perceived inattention to the Student. The behavior was not related to the Student's disability.

21. The Student began [redacted] grade on August 12, [redacted]. During the first several weeks of school, the Student behaved appropriately towards teachers and peers. He sometimes was rude and disrespectful to one teacher he clearly did not like. He sometimes was disruptive in that teacher's class by engaging in attention seeking behavior. The Student had friends and interacted in a friendly manner with peers. As in years past, the Student expressed his feelings and emotions and recognized the impact his expressions could have. He routinely used both a cell phone and computer in a social manner through gaming and social media websites. The evidence did not demonstrate that the Student was aggressive or threatening towards anyone at school.

22. On [redacted], September 1, [redacted], around 10:30 p.m., the Student made a threat on social media in the form of an [redacted] post which violated section 1006.13(3)(b) establishing a zero-tolerance policy for threats made by students involving a school.[3] The post expressed distress and anger over perceived rejection by peers and a romantic interest who repeatedly would lead the Student on only to reject him.

23. The Instagram post stated:

[3] The statute was passed by the legislature in response to the Broward County, Florida, Margery Stoneman Douglas school shooting on February 14, 2018. The shooting resulted in the deaths of 17 students and traumatized students, parents, teachers, and the region.

24. The post was made outside of school hours. The evidence showed that the Student had not made similar posts or threats prior to this post. The evidence also showed that the Student did not have the immediate ability to carry out his alleged threats.

25. Additionally, the evidence showed that at the time of the post, the Student had been off his medication for [redacted] and [redacted] for several weeks prior to the post due to insurance issues. The evidence did not show that the lack of medication was related to the Student posting a threat on social media on September 1. Additionally, the evidence showed that he was sheltering with his parent at the parent's place of work due to an approaching hurricane. As noted above, the evidence showed that the Student and his parent were having some inter-relational difficulties regarding the parent seeing another person and a perceived lack of attention to the Student by the parent. However, the evidence did not show that the parent and the Student were having relationship difficulties on the evening of September 1st. More importantly, the evidence did not show that the Student's act in posting the threat was related to the Student's disabilities.

26. A fellow student took a screen shot of the post and reported it to their parent who then reported it to the Martin County Sherriff's Office (MCSO) on September 2, [redacted]. Before the Student returned to school, MCSO arrested the Student, charged him with "written threats to kill or injure," and placed him in secure detention for 21 days.

27. In relation to the school, the Student's conduct resulted in a disciplinary referral on September 6, [redacted], for a Level 4 violation of the Student Code of Conduct.

28. That same date, the Principal and Assistant Principal notified the parent that the Student was immediately suspended for 10 days for "written threats to kill or injure." The Principal and Assistant Principal also notified the parent on September 6, [redacted], that they would be recommending to the School Board that the Student be expelled from school.

29. On September 10, [redacted], a non-IDEA threat assessment team meeting was held. The evidence demonstrated that the meeting was not specifically convened to discuss the Student's actions or to conduct a formal threat assessment of the Student. It was an informational meeting during which the Student's threatening post and the MCSO's actions were discussed. It was the first time the team had discussed a social media threat. The threat assessment team took no further action because the Student was not an immediate threat to the school since he was in detention and was being recommended for expulsion.

30. The evidence showed that no formal threat assessment of the Student under section 1006.13, using a threat assessment tool, was conducted by the District. There was no need for such an assessment by the District since the Student was withdrawn from school. A formal threat assessment of the Student was conducted for the juvenile court proceeding. However, relevant to this action, there was no evidence that the District's lack of a formal threat assessment was deliberately indifferent to the Student's civil rights or

otherwise violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 795, *et seq*. (Section 504).

31. An MDR meeting was held on September 26, [redacted]. There were no procedural challenges raised to the process followed by the School Board in setting the meeting.

32. The meeting was attended by appropriate and knowledgeable school staff, including a licensed school psychologist and the parent. The school's resource officer sat in on the meeting for training purposes because he was new at the school. The evidence showed that, prior to the start of the meeting, the officer sought permission from the meeting participants, including the parent. At the time, the parent raised no objections to the officer observing the meeting. The evidence also showed that the officer did not participate in the meeting and did not stay for the entire meeting. The evidence did not demonstrate that the officer's presence created an intimidating atmosphere, impacted the fairness of the review, or prevented the parent from providing relevant information to the team. In fact, the parent presented considerable information regarding the Student and his disabilities to the team. In short, the District did not violate IDEA or Section 504 by permitting the school resource officer to observe the MDR meeting.

33. As indicated above, during the MDR meeting the parent asked many questions and shared considerable information about how the parent believed the Student's disability might manifest. The better evidence demonstrated that the team meaningfully considered this information. The better evidence showed that the parent had ample opportunity to provide input to the manifestation decision and, among other things, explained to the team that the Student had been off his medication and without counseling immediately prior to and at the time of the incident due to insurance issues and delays due to a hurricane. The evidence showed that the team also reviewed all relevant school records including the Student's cumulative educational

record, disciplinary record, middle school records, school grades, staff input from both middle and high school, IEPs, and implementation of those IEPs and evaluations.

34. After extensive review and discussion, the MDR team determined that the Student's threat was not caused by, or had a direct and substantial relationship to, the Student's disabilities and that the conduct in question was not the direct result of Respondent's failure to implement the IEP.[4]

35. After the MDR team determination, District staff, in discussing potential scenarios regarding any discipline the School Board might impose, made multiple references to the fact that the Principal felt the Student was a threat to the school and did not want him to return to the school he had been attending. The statements did not preclude the Student returning to another District [redacted] school and did not demonstrate that the team predetermined the manifestation decision. Indeed, the better evidence demonstrated that the MDR team did not predetermine its decision and that it considered the available data and input regarding the Student's disability. In fact, the better evidence showed that the team's manifestation determination decision was not in error.

36. The school recommended the Student for expulsion. On November 5, [redacted], and after an expulsion hearing before the School Board, during which the Student was represented by legal counsel, the District expelled the Student for the remainder of the [redacted]-[redacted] school year and the [redacted]-[redacted] school year. The action of the School Board was authorized by Florida law. The evidence did not demonstrate that the School Board's action was

[4] The only issue shown by the evidence regarding implementation of the Student's IEP related to the provision of counselling services listed on the current IEP. The evidence showed that the service was support for curriculum and classroom behavior. Given the limited context of the counselling, the evidence did not demonstrate that such support had been necessary prior to the Student's withdrawal from school since the Student was generally meeting the demands of the curriculum and behaving appropriately. Thus, the lack of such support was not material to the Student's education during the first weeks of high school and did not violate IDEA or Section 504.

discriminatory towards the Student, deliberately indifferent to the Student's civil rights, or violated Section 504.

37. Finally, Petitioner contends that the MDR process and decision, as well as the disciplinary hearing and discipline imposed, were in contravention of Section 504.

38. In this case, the evidence demonstrated that the Student was not excluded, denied benefits, or discriminated against by reason of his disability. Various school and district staff testified, and the evidence showed that the manifestation review process was appropriate, was not predetermined, and reviewed all relevant evidence necessary to make a manifestation determination. There was no evidence that the manifestation review did not consider the Student's disabilities or was grossly indifferent to those disabilities. Similarly, there was no evidence that the failure to conduct a threat assessment under section 1006.13 was required given the juvenile justice process or that the lack of a threat assessment was grossly indifferent to the Student's disabilities.

39. As related to the School Board's disciplinary hearing and the discipline imposed, the evidence showed that while there were discussions and/or comments regarding the Student's disabilities and behaviors by Board members, those discussions/comments during a disciplinary hearing, which by its nature necessarily involved facts related to an ESE student and his behavior, did not demonstrate that the Board based its decision on the Student's disabilities, was grossly or deliberately indifferent to the Student's civil rights, or violated Section 504. The evidence was insufficient to demonstrate that the School Board violated Section 504 in conducting the disciplinary hearing. Finally, there was no evidence that the discipline imposed was beyond the discipline imposed for similar behavior by nondisabled peers.

40. As such, Petitioner has failed to establish that Respondent intended to discriminate against him on the basis of his disability or knew that it was

substantially likely that a violation of his federally protected rights would occur. Accordingly, Petitioner's Section 504 claim fails.

CONCLUSIONS OF LAW

41. 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) and 6A-6.03312(7).

42. Petitioner bears the burden of proof with respect to each of the claims raised in the due process complaint. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); Dep't of Educ., Assistance to States for the Educ. of Child. with Disab., 71 Fed. Reg. 46724 (Aug. 14, 2006)(explaining that the parent bears the burden of proof in a proceeding challenging a school district's manifestation determination).

43. In enacting 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 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).

44. 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), and (b)(6).

45. School districts have certain limitations on their ability to remove disabled children from their educational placement following a behavioral transgression. Specifically, the IDEA provides that where a school district intends to place a disabled child in an alternative educational setting for a period of more than 10 school days, it must first determine that the child's behavior was not a manifestation of his disability. 20 U.S.C. § 1415(k)(1)(C). Pursuant to the IDEA's implementing regulations, "[o]n the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504." 34 C.F.R. § 300.530(h).

46. The necessary inquiry is set forth in 20 U.S.C. § 1415(k)(1)(E), as follows:

> Manifestation determination.
>
> (i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations,

> and any relevant information provided by the parents to determine—
>
> (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

47. If the local educational agency, the parent, and relevant members of the IEP team determine that either subclause (I) or (II) of clause (i) is applicable, the conduct shall be determined a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E)(ii). If the conduct is deemed a manifestation of the child's disability, the student must be returned to the educational placement from which he or she was removed. 20 U.S.C. § 1415(k)(1)(F)(iii). Additionally, if no BIP was in place at the time of the misconduct, the school district is obligated to "conduct a functional behavioral assessment, and implement a [BIP] for such child." 20 U.S.C. § 1415(k)(1)(F)(i).

48. If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the school district may apply the relevant disciplinary procedures in the same manner and duration as would be applied to children without disabilities. 34 C.F.R. § 300.530(c). The child, however, must continue to receive education services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. Additionally, the child must receive, as appropriate, an FBA and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(i) and (ii).

49. In this case, the better evidence demonstrated that the MDR team was properly constituted. The better evidence also demonstrated that the team did not predetermine its decision, but meaningfully considered all relevant information and school records regarding the Student. Additionally, the better evidence showed that the parent had ample opportunity and did provide input to the manifestation decision. In short, the evidence did not demonstrate that the composition or decision of the MDR team denied a free appropriate public education (FAPE) to the Student or violated IDEA.

50. Petitioner also contends that the MDR process and decision, as well as the discipline imposed, were in contravention of 29 U.S.C. § 795 *et seq*. and constituted violations of Section 504. Section 504, 29 U.S.C. § 794(a), 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 oractivity receiving Federal financial assistance. . . .

51. 29 U.S.C. § 794(b)(2)(B) defines a "program or activity" to include a "local education agency .....or other school system." 29 U.S.C. § 794(a) requires the head of each executive federal agency to promulgate such regulations as may be necessary to carry out its responsibilities under the nondiscrimination provisions of Section 504.

52. The U.S. Department of Education has promulgated regulations governing preschools, elementary schools, and secondary schools. 34 C.F.R. part 104, subpart D. The K-12 regulations are at sections 104.31-.39. 34 C.F.R § 104.33-.36 enlarge upon the specific provisions of Section 504 by substantially tracking the requirements of IDEA.

53. 34 C.F.R § 104.33 requires that Respondent provide FAPE to "each qualified handicapped person who is in the recipient's jurisdiction." For

purposes of Section 504, an "appropriate education" is the provision of regular or special education and related aids and services that: (1) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met; and (2) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R §§ 104.33(b)(1), 104.34, 104.35, and 104.36. An "appropriate education" can also be provided by implementing an IEP that is compliant with IDEA. 34 C.F.R. § 104.33(b)(2).

54. To establish a prima facie case under Section 504, Petitioner must prove that he: (1) had an actual or perceived disability, (2) qualified for participation in the subject program, (3) was discriminated against solely because of his disability, and (4) the relevant program is receiving federal financial assistance. *Moore v. Chilton Cty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1313 (M.D. Ala. 2013)(citing *L.M.P. v. Sch. Bd. of Broward Cty.*, 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007)); *see also J.P.M. v. Palm Beach Cty. Sch. Bd.*, 916 F. Supp. 2d 1314, 1320 (S.D. Fla. 2013).

55. Assuming a petitioner has established a prima facie case, the respondent must present a legitimate, nondiscriminatory reason for the adverse actions it took. *Lewellyn v. Sarasota Cty. Sch. Bd.*, 2009 U.S. Dist. LEXIS 120786, at *29 (M.D. Fla. Dec. 29, 2009)(citing *Wascura v. City of S. Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001)). The Eleventh Circuit has stated that the respondent's burden, at this state, is "exceedingly light and easily established." *Id.* quoting *Perryman v. Johnson Prods. Co. Inc.*, 698 F.2d 1138, 1142 (11th Cir. 1983). Once the defendant has articulated a nondiscriminatory reason for the actions it took, the petitioner must show that the respondent's stated reason is pretextual. "Specifically, to discharge their burden, Plaintiffs must show that Defendant possessed a discriminatory intent or that the Defendant's espoused non-discriminatory reason is a mere pretext for discrimination." *Id. See also Daubert v. Lindsay Unified Sch.*

Dist., 760 F. 3d 982, 985 (9th Cir. 2014); and *Timothy H. v. Cedar Rapids Cty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999).

56. Here, the evidence demonstrated that Petitioner meets the first, second, and fourth factors for establishing a prima facie case. Thus, the remaining issue is whether Respondent discriminated against Petitioner solely by reason of his disability.

57. As noted in *J.P.M.,* the definition of "intentional discrimination" in the Section 504 special education context is unclear. *J.P.M.*, 916 F. Supp. 2d at 1320 n.7. In *T.W. ex rel. Wilson v. School Board of Seminole County*, 610 F.3d 588, 604 (11th Cir. 2010), the Eleventh Circuit stated that it "has not decided whether to evaluate claims of intentional discrimination under Section 504 under a standard of deliberate indifference or a more stringent standard of discriminatory animus." However, in *Liese v. Indian River County Hospital District*, 701 F.3d 334, 345 (11th Cir. 2012), the Eleventh Circuit, in a case involving a Section 504 claim for compensatory damages, concluded that proof of discrimination requires a showing, by a preponderance of the evidence, that the respondent acted or failed to act with deliberate indifference.

58. Under the deliberate indifference standard, a petitioner must prove that the respondent knew that harm to a federally protected right was substantially likely and that the respondent failed to act on that likelihood. *Id.* at 344. As discussed in *Liese*, "deliberate indifference plainly requires more than gross negligence," and "requires that the indifference be a 'deliberate choice.'" *Id.*

59. In *Ms. H. v. Montgomery County Board of Education*, 784 F. Supp. 2d 1247, 1263 (M.D. Ala. 2011), comparing failure-to-accommodate claims under Section 504 and the IDEA, the district court noted that:

> To state a claim under § 504, "either bad faith or gross misjudgment should be shown." Monahan v. Nebraska, 687 F.2s 1164, 1171 (8th Cir. 1982)]. As

> a result, a school does not violate § 504 merely by failing to provide a FAPE, . . . Id. Rather, [s]o long as the [school] officials involved have exercised professional judgment, in such a way not to depart grossly from accepted standards among education professionals," the school is not liable under §504. Id. . . . The courts agree that "[t]he 'bad faith or gross misjudgment' standard is extremely difficult to meet."

(citations omitted).

60. The *Ms. H.* opinion further noted that, "if a school system simply ignores the needs of special education students, this may constitute deliberate indifference."

61. In this case, the evidence demonstrated that the Student was not excluded, denied benefits, or discriminated against by reason of his disability. Various school and district staff testified and the evidence showed that the manifestation review process was appropriate, was not predetermined, and reviewed all relevant evidence necessary to make a manifestation determination. There was no evidence that the manifestation review did not consider the Student's disabilities or was grossly indifferent to those disabilities. Similarly, the evidence was insufficient to demonstrate that the School Board violated Section 504 in conducting the disciplinary hearing or that discipline imposed was beyond the discipline imposed for similar behavior on nondisabled peers. As such, Petitioner has failed to establish that Respondent intended to discriminate against him on the basis of his disability or knew that it was substantially likely that a violation of his federally protected rights would occur. Accordingly, Petitioner's Section 504 claim fails.

62. Finally, the balance of Petitioner's claims as asserted in the due process complaint were not supported by the evidence, and, therefore, are denied.

ORDER

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

1. The manifestation determination decision that Petitioner's conduct on September 1, [redacted], was not a manifestation of the Student's disability was correct and is approved.

2. Respondent may apply the relevant disciplinary procedures in the same manner and duration as would be applied to children without disabilities. The Student, however, must continue to receive education services so as to enable the Student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the Student's IEP.

3. All other requests for relief, including Section 504, are denied.

DONE AND ORDERED this 29th day of April, 2021, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 2021.

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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).