STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],

Petitioner,

vs. Case No. 15-1223E

RENAISSANCE CHARTER SCHOOL, INC.; RENAISSANCE CHARTER SCHOOL AT TRADITION; CHARTER SCHOOL USA; AND ST. LUCIE COUNTY SCHOOL BOARD,

Respondents.
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FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on August 11 through 13, 2015, in Port St. Lucie Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this proceeding are: whether Respondents deprived Petitioner ("the Student") of a free, appropriate public education ("FAPE") within the meaning of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq.; and whether Respondents violated Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and, if so, to what remedy is Petitioner entitled.

PRELIMINARY STATEMENT

On March 10, 2015, the parents of the Student, Petitioner in this cause, filed a Request for Due Process Hearing. Respondent School Board of St. Lucie County, Florida ("School Board") promptly forwarded the same to DOAH for further proceedings.

The allegations of the Complaint, as amended, stem from the Student's attendance at a charter school in the St. Lucie County

School District ("Charter School") during the latter half of the [redacted] school year.

The Complaint, as construed by the undersigned at the joint request of the parties, sets forth the following claims: (1) that the Student's March 6, 2015, Individual Educational Plan ("IEP") is inappropriate in that the proposed placement seeks to place the minor child in a more restrictive setting; (2) that the proposed placement as contained in the March 6, 2015, IEP was the result of predetermination; (3) that Petitioner was precluded from meaningfully participating in the IEP meeting which resulted in the March 6, 2015, IEP as a result of Respondents' alleged failure to provide educational records and the alleged preclusion of the Student's parents, counsel, and other individuals from participating in the IEP team meeting; (4) that the March 6, 2015, Behavior Intervention Plan ("BIP") is inappropriate in that said BIP permits the Student to be restrained at the sole discretion of school personnel; and (5) that the proposed placement of the Student to a more restrictive setting (as noted in the March 6, 2015, IEP) was in contravention of Section 504.

The final hearing was initially scheduled for April 28, 2015. On March 25, 2015, Respondents filed a Notice of Insufficiency of Petitioner's Complaint. On March 30, 2015, the undersigned issued an Order of Insufficiency. On April 7, 2015, Petitioner filed an Amended Due Process Complaint ("Complaint").

Thereafter, the final hearing was scheduled for June 2, 2015. On May 26, 2015, the undersigned issued an order granting Petitioner's motion for continuance, and the hearing was rescheduled to begin on August 11, 2015.

The final hearing proceeded as scheduled. At the conclusion of the final hearing, the parties and the undersigned agreed to set the deadline for the filing of proposed final orders to 21 days after the filing of the Transcript.

The final hearing Transcript was filed on September 16, 2015, and a Notice of Filing Transcript was issued on September 17, 2015. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

The parties timely filed Proposed Final Orders, which were considered in preparing this Final Order. Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations.

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

FINDINGS OF FACT

1. The Student is currently [redacted] years old. [redacted] is a student who qualifies for exceptional student education ("ESE")

and has been eligible since [redacted]. The Student's documented primary exceptionality is [redacted], with additional exceptionalities of [redacted].

2. On April 4, 2014, an IEP was developed for the Student at the Charter School. Said IEP included a future review date of April 4, 2015. This IEP provided that the Student would receive [redacted] "Classroom/Instructional Accommodations" in the general education classroom. The Student further received weekly support facilitation for math and weekly consultation for all academics in the general education classroom. Additionally, the IEP documents a "[c]lassroom aide to provide classroom support to the classroom teacher and assist with instruction."

3. The April 4, 2014, IEP documented that the following special education services were provided to the Student in a separate "ESE Setting": (1) 30 minutes per week of speech therapy in a small group setting; (2) 60 minutes per week of language therapy in a small group setting; (3) 120 minutes per week of occupational therapy; and (4) 30 minutes daily of specialized instruction for reading and math.

4. Pursuant to the April 4, 2014, IEP, the Student's total time in the school week was 1,950 minutes, and [redacted] time with nondisabled peers was 1,440 minutes. Accordingly, the IEP noted,

"73% Resource-inside the regular class no more than 79% of the day and no less than 40% of the day."[1/]

5. A review of the Student's [redacted] academic performance in the resource room setting is a necessary exercise. The Student's report cards provide the following grades through the end of the first semester:

[redacted]

6. A review of the Student's third quarter ("Q3") progress report documents the Students grades as of February 12, 2015, and provides as follows:

[redacted]

7. The record provides additional information concerning the Student's performance on other assessments. The first assessment is the [redacted].[2] The undisputed evidence provides that the Student obtained the following scores:

[redacted]

8. Second, the record establishes that, pursuant to the results of the [redacted] the Student is in the [redacted]. Notwithstanding the [redacted]. Finally, when tested on the St. Lucie School District "second grade sight words quarters: 1, 2, and 3, [the Student] [redacted]."

9. [redacted], the Student's general education teacher, addressing his academic progress, testified that "[a]t first [the Student] was progressing pretty well, however . . . as February approached, the progress slowed almost to a standstill." While acknowledging that the Student had [redacted],

[redacted] explained that the Student was not on grade level as of [redacted].

10. [redacted] also testified that the Student's behavior changed over the course of the [redacted] school year. Specifically, [redacted] testified that at the beginning of the school year, things were "very smooth" and that the Student's behaviors, with the use of behavioral interventions, were "easily redirected." [redacted] recalled, however, that [redacted] behaviors began to "spike" around January or February 2015.[4/]

11. According to [redacted], when the Student's problem behavior was at its peak, [redacted] was removed from [redacted] classroom one to two times per day. It was further noted that in the January-February 2015 timeframe, the Student was removed from the classroom on average three times per week, with the Student being absent from the classroom at 15 to 30 minutes intervals and sometimes for the balance of the day. Accordingly, the Student would miss significant portions of the academic content that [redacted] was providing to the class. The frequent interruptions would also impact the class as a whole as [redacted] would often have to "stop a lesson and then go back, and then stop and go back." Notwithstanding, [redacted] never believed that [redacted] could not "control or handle" the Student in her classroom.

12. During this time, the Student's [redacted] addressed several target behaviors including: (1) screaming, derogatory, inappropriate comments; (2) out of area; (3) non-compliance; (4) physical aggression; (5) throwing objects; and (6) property disruption. Consistent with [redacted] testimony, the proposed IEP documents the following:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

13. On February 12, 2015, the Student's behavior rose to a level which necessitated clearing the other students from the classroom. The incident, as reported, is set forth in pertinent part as follows:

[The Student] had already completed the math work but had to turn it in to [his/her] teacher. [redacted] described that [the Student] came back into the classroom and the class needed to complete an exit ticket related to the math activity that had been completed earlier. [The Student] was walking around the classroom and touching desks. [redacted] teacher and the classroom para prompted [redacted] to return to [redacted] area. [The Student] reached over to take the iPad from the para and when the para told [redacted] that [redacted] couldn't have it at that moment [redacted] swatted/hit the para in [redacted] arm. The para called for assistance using the radio in the classroom. [The Student] then got loud and motioned as if [redacted] was going to dump out hand sanitizer. [redacted] said that it was not okay, then [redacted] swatted at [redacted], made a shooting/gun gesture with [redacted] fingers and remarked that [redacted] was going to shoot [redacted] in the face. [redacted], [redacted] and [redacted] walked in to the room. When asked to take a break [the Student] started screaming. [redacted] used an intervention that has worked with [the Student] in the past but it [sic] not help [redacted] to calm down and [redacted] started kicking the wall and beating [redacted] fist against the white board. [redacted] removed the other students from the class at that time for safety. [redacted], and the para remained in the room with [the Student]. When [sic] team would individually try to physically get [the Student] out of the room to allow other students to return to the classroom, [redacted] would become more agitated and threatened staff. [redacted] then started to hit [redacted] [redacted] has never done before in [redacted] 1 1/2 years of working with [[redacted]]. [redacted] backed up but [[redacted]] continued to hit [redacted]. [[redacted]] then started kicking and kicked the para. [The Student] motioned to flip the desk and [redacted] stopped [[redacted]. [The

> Student] threatened to hurt the AP's baby so [redacted] did not come in the classroom.

14. Following the above-referenced incident on February 12, 2015, the Student did not return to the [redacted] School. On February 3, 2015, Petitioner, via email correspondence, advised Respondents that, as Respondents "appear to be unwilling or unable to address the needs of this student, the parents are hereby providing this 10 day notice to cure or they will be withdrawing [the Student] from public school and will be seeking reimbursement for private school tuition at public expense." Although lacking in specificity, it appears the stated concerns included discipline, bullying investigations, and behavioral issues.

15. Thereafter, Petitioner and Respondents ultimately agreed to conduct an IEP meeting on February 13, 2015, to address the stated concerns raised in the February 3, 2015, correspondence. The meeting notice described the purpose of the meeting as "Annual Review, Other, BIP Review, Consideration of Evaluation of Student, Consideration of Change of Placement for the Student."

16. Prior to the scheduled meeting, Respondents provided Petitioner with a draft IEP. The same did not include the proposed specialized instruction, supplemental aides, services, accommodations, or a reference to placement. The meeting

proceeded as scheduled, with legal counsel for the parties in attendance. Petitioner was also accompanied by a private psychologist. Petitioner objected to the presence [redacted], the [redacted] School principal. Petitioner also objected to the failure of [redacted] to attend the meeting.

17. The evidence established that Petitioner was provided with hundreds of pages of requested documents prior to the February 13, 2015, IEP meeting. Said records included, but were not limited to, annual goal progress reports, speech and language documents, behavioral monitoring sheets, behavioral data graphs, occupational therapy documents, student work samples, and a draft of the proposed IEP.

18. During the meeting, Petitioner requested a new Functional Behavioral Assessment and an Assistive Technology Assessment. The requests for the evaluations were granted; however, Petitioner did not provide written consent for the same until April 24, 2015.

19. Due to the schedules of various participants, including Petitioner, the IEP meeting was not concluded on February 13, 2015. It was agreed that the meeting would be continued. In the interim, Respondents agreed to assign a paraprofessional exclusively to the Student until such time as the IEP could be completed.

20. On February 13, 2015, following the adjourned IEP meeting, Petitioner's father signed a Florida Department of Education document entitled, District Verification Form, certifying that, as of February 17, 2015, the Student will be withdrawn from the St. Lucie County School District and that his first date of attendance at a private school would also be February 17, 2015.

21. On February 27, 2015, Petitioner received correspondence from the School Board requesting that an attached student withdrawal form be completed by Petitioner. The undersigned is unable to discern from the record whether said form was ever completed by Petitioner. On March 6, 2015, Bill Tomlinson, the School Board's executive director of Student Services and Exceptional Education, completed a [redacted] School Student Withdrawal Form indicating that the Student was withdrawn on February 23, 2015.

22. On March 6, 2015, the IEP meeting was reconvened. Counsel for both parties attended. Petitioner again objected to the presence of [redacted] and the absence of [redacted].

23. The meeting concluded with a proposed IEP that included a change of placement for the Student. Specifically, the March 6, 2015, IEP proposed that the Student would receive the following in an ESE classroom: (1) daily specialized instruction in all core academics; (2) daily intensive behavior intervention following

a BIP; (3) daily social skills instruction; (4) 30 minutes per week of speech therapy in a small group setting; (5) 60 minutes per week of language therapy in a small group setting; (6) 90 minutes per week of occupational therapy; and (7) and occupational therapy (pushed into ESE classroom). Additionally, the Student would receive in the ESE classroom supplemental aids and services on a daily basis via graphic organizers, visual aids, and a communication book. Finally, the Student would receive counseling services weekly in a location documented as "All Environments."

24. As documented in the March 6, 2015, IEP, the Student would participate in all core academic areas in a specialized education setting. The student's time in the total school week is 1,950 minutes with 680 of those minutes with nondisabled peers. Accordingly, the IEP noted,"34% Separate-inside the regular class less than 40% of the day."[5/] On March 6, 2015, Petitioner objected to the proposed change in placement.

25. Relevant members of the IEP team credibly and universally testified that the placement determination was not the product of predetermination. Petitioner failed to present any sufficient evidence to rebut the same. Similarly, Respondents' witnesses credibly and uniformly testified that the placement decision was not the product of any intentional scheme

or motive to remove or displace the Student from [redacted] School.

26. Respondents contend that the IEP team's determination to change the student's placement to a more restrictive setting was necessitated by several factors. First, and foremost, the Student's behavior, even with supplementary aids and services, continued to negatively impact [redacted] education. As noted in the subject IEP's conference notes:

> [The Student's] behavior is having a significant impact on [[redacted]] ability to progress in the general education setting. The interventions that the school has been trying for [[redacted]] have not been effective enough to bring about the desired change. Consistent intervention over a period of time is important for [the Student] as well as intensive individualized instruction.

27. Second, the Student's educators credibly testified that when the Student is in a one-to-one setting or a small group setting, the Student's behaviors manifest less frequently and the Student can be redirected with relative ease.

28. Bill Tomlinson succinctly and credibly testified that the separate ESE classroom placement was determined the appropriate placement for the following reasons:

> There are ESE services that are pushed into the general education classroom, or they're in a pull out service, but for more restrictive setting it was determined that a separate class for [the Student] would be the most appropriate way for [[redacted]] to receive educational services. And it was based upon

> the need for behavioral intervention, the need to try to close the gaps with [[redacted]] academic performance. [[redacted]] had--[redacted] were times in some of these documents I believe that we've read that [the Student] was making progress, and that that was a good thing in our opinion, that [[redacted]] was making progress, but there [redacted]
>
> [[redacted]] was not on grade level, and the behavioral concerns that were evident at that point in time warranted stronger intervention, and we had to make a decision as a team as to what's best for [[redacted]]-- and I'll state it again about [[redacted]] FAPE.

29. Respondent School Board offers a full continuum of ESE services, from general education to the most restrictive placement of one-to-one instruction in a homebound or hospital setting. In the St. Lucie County School District, every school offers placement up through a resource room, including the [redacted] School. The [redacted] School does not, however, provide a separate ESE classroom.

30. The notes from the March 6, 2015, IEP meeting memorialize that the IEP team considered several placement options. Bill Tomlinson question the team as to whether the Student could be successful in the general education setting without ESE services and it was determined that the same would not be appropriate. The IEP team further discussed whether resource room services or "pull out" services would be appropriate.

31. Because the majority of the IEP team proposed placement in a separate ESE setting, the suggested placement was another public K-8 school ("School A") in the St. Lucie County School District in the Student's attendance zone.

32. The March 6, 2015, IEP incorporated a November 18, 2014, BIP. Among other components, the BIP included an "Emergency Procedures" section which provides as follows:

> The purpose of this Behavior Intervention Plan is to reduce the occurrence of inappropriate target behavior and teach more adaptive behaviors. However, if the student demonstrates a behavior (whether previously identified or not) that is assaultive, self-injurious, likely to result in significant property damage, potentially criminal, or otherwise considered a serious behavior problem, then the regular school or district procedures for serious behavior will be implemented, [he/she] will be removed from the classroom or specific setting, [his/her] parent(s) will be contacted immediately by phone, and physical restraint consistent with school and district policy will be implemented if necessary. If CPI Physical Restrain Procedures have to be used as a last resort, Parent will be notified within 24 hours and Department of Education Restrain Reporting Form will be completed by staff.

33. Petitioner objects to the use of any form of restraint concerning the Student and the inclusion of the same in the BIP. It is undisputed that the Student does not prefer touching with the exception that physical contact may be beneficial when requested by the Student vis-à-vis "deep pressure," hugs or "high-fives."

34. Bill Tomlinson credibly testified that restraint is not a strategy or an intervention to be utilized on a daily basis to address the Student's demonstrated behaviors, but rather, an emergency procedure in the Student's BIP. The same emergency procedure is included in all safety and BIP plans. As Mr. Tomlinson credibly testified, "[i]t is listed as an emergency in the rarest circumstances or instance that a child would ever be a harm to themselves or someone else, it would be imperative for us to keep that from happening . . . ."

35. Petitioner failed to present any evidence to establish that the emergency restraint protocol contained in the Student's BIP was inappropriate or that Respondent's implementation of restraint in an emergency, if at all, was improper.

36. It is undisputed that the Student last attended the Charter School on February 12, 2015. Due to the evidentiary presentation, the record is unclear on the exact date that the Student actually enrolled in the private school. [redacted], a payment specialist with the school choice office at the Florida Department of Education, credibly testified that the Student received $2,287.50 in tuition reimbursement funding for the 2014-2015 school year via the McKay scholarship program. The payment covered 100 percent of the private school tuition for the pay period of March 1, 2015, through June 30, 2015.

CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 1003.57(1)(b) and 1003.5715(5), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

38. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

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

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

41. Local school systems must also satisfy the IDEA's substantive requirements by providing all eligible students with FAPE, which is defined as:

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

20 U.S.C. § 1401(9).

42. "Special education," as that term is used in the IDEA, is defined as:

> [S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--
>
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings . . . .

20 U.S.C. § 1401(29).

43. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance," establishes measurable annual goals, addresses the services and accommodations to be provided to the child and whether the child will attend mainstream classes, and specifies the measurement tools and periodic reports that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

44. In Rowley, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Id. at 206-07.

A procedural error does not automatically result in a denial of FAPE. See G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to a 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).

45. 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." 458 U.S. at 206-07 (1982). The Eleventh Circuit Court of Appeals has clarified that the IDEA does not require the local school system to maximize a child's potential; rather, the educational services need provide "only a 'basic floor of opportunity,' i.e., education which confers some benefit." Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991); C.P. v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1153 (11th Cir. 2007)("This standard, that the local school system must provide the child 'some educational benefit,' has become known as the Rowley 'basic floor of opportunity standard.'")(internal citations omitted); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001)("[A] student is only entitled to some educational benefit; the benefit need not be maximized to be adequate."); see also Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1313

(10th Cir. 2008)("[W]e apply the 'some benefit' standard the Supreme Court adopted in Rowley.").

46. The assessment of an IEP's substantive propriety is guided by several principles, the first of which is that it must be analyzed in light of circumstances as they existed at the time of the IEP's formulation; in other words, an IEP is not to be judged in hindsight. M.B. v. Hamilton Se. Sch., 668 F.3d 851, 863 (7th Cir. 2011)(holding that an IEP can only be evaluated by examining what was objectively reasonable at the time of its creation); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990)("An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."). Second, an assessment of an IEP must be limited to the terms of the document itself. Knable v. Bexley Cty. Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001); Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1315-16 (8th Cir. 2008)(holding that an IEP must be evaluated as written). Third, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See Sch. Dist. of Wisc. Dells v. Z.S. ex real. Littlegeorge, 295 F.3d 671, 676-677 (7th Cir. 2002).

47. In the instant matter, Petitioner's Complaint may properly be construed as advancing three procedural errors.

First, Petitioner avers that Petitioner was precluded from meaningfully participating in the IEP meetings as a result of Respondents' alleged failure to produce or preclude certain individuals from participating. As indicated in the Findings of Fact, at both meetings, Petitioner objected to the presence of [redacted] and the absence of [redacted].

48. The required members of an IEP team are set forth in the IDEA and its implementing regulations. See 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(2) & (a)(3); Fla. Admin. Code R. 6A-6.03028(3)(c)(2),(3). Specifically, 34 C.F.R. § 300.321(a) provides as follows:

> General. The public agency must ensure that the IEP Team for each child with a disability includes—
>
> (1) The parents of the child;
>
> (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
>
> (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
>
> (4) A representative of the public agency who—
>
> (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

> (ii) Is knowledgeable about the general education curriculum; and
>
> (iii) Is knowledgeable about the availability of resources of the public agency.
>
> (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
>
> (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
>
> (7) Whenever appropriate, the child with a disability.

49. The evidence fails to establish that Respondents violated 34 C.F.R. § 300.321(a) in any respect. As noted above, the Student's parents and counsel attended both meetings. For the first meeting, Petitioner also brought a private psychologist. There is no evidence to indicate that Respondents affirmatively precluded anyone of Petitioner's choosing from attending either meeting.

50. Petitioner next avers that Petitioner was precluded from meaningfully participating in the IEP meetings as a result of Respondents' alleged failure to provide educational records. As indicted in the Findings of Fact, Respondents provided Petitioner with a significant level of documentation concerning the Student prior to the scheduled IEP meetings. The evidence

fails to establish that Respondents committed any procedural violation in this respect. Moreover, the evidence fails to establish that even if there was a procedural violation, the same impeded the child's right to a FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits.

51. Finally, Petitioner alleges that the March 6, 2015, IEP was the product of predetermination by the IEP team. Based on the Findings of Fact above, Petitioner failed to establish this alleged violation.

52. Turning to the substantive claims, Petitioner avers that the March 6, 2015, IEP which incorporates the November 2014 BIP is inappropriate in that said BIP permits the Student to be restrained at the sole discretion of school personnel, over Petitioner's objection. Petitioner essentially argues that Respondents failed to modify the BIP in accordance with the parents' specific wishes. It is well settled that although parents are "equal participants" in the IEP formulation process, they do not enjoy a veto power over any particular provision of an IEP or any incorporated plans or documents. Buser v. Corpus Christi Indep. Sch. Dist., 20 IDELR 981 (S.D. Tex. 1994), aff'd, 22 IDELR 626 (5th Cir. 1995). Moreover, Petitioner failed to supply any legal authority to support the proposition that school personnel are powerless to physically intervene with a student,

under any circumstance, when it is known that the Student prefers noncontact. Accordingly, Petitioner's claim must fail.

53. Petitioner next contends that the IEP team's proposed placement in a separate ESE classroom violates the IDEA's mandate that the Student be educated in the least restrictive environment ("LRE"). In addition to requiring that school districts provide students with a FAPE, the IDEA further gives directives on students' placements or education environment in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A), provides as follows:

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

54. Pursuant to the IDEA's implementing regulations, states must have in effect policies and procedures to ensure that public agencies in the state meet the LRE requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and

related services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the above-referenced mandates concerning LRE and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

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

56. With the LRE directive, "Congress created a statutory preference for educating handicapped children with nonhandicapped children." Greer v. Rome City School Dist., 950 F.2d 688, 695 (11th Cir. 1991). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act, School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs." Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

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

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

Daniel, 874 F.2d at 1048.

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

59. With the above-noted factors in mind, the undersigned turns to the facts of this proceeding to determine whether

Respondents properly determined the Student's placement in the LRE. Addressing the first factor, Petitioner established that under the Student's resource placement, the Student was making academic progress as demonstrated by the Student's passing grades, as well as average [redacted] grade scores on certain standardized testing. See M.M. v. Lancaster Cnty. Sch., 702 F.3d 479, 486 (8th Cir. 2012)("Academic progress is an important factor in deciding whether a disabled student's IEP was reasonably calculated to provide educational benefit."); Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 810 (5th Cir. 2003)("Clearly, evidence of an academic benefit militates in favor of a finding that [the] IEPs were appropriate."). Indeed, the record reveals that the Student was making above-average grades in art, computers, music, science, and social studies—courses in which the Student was in the general education classroom.

60. It is important to emphasize, however, that the Student's prior placement was not in a "regular class."[6/] To the contrary, Respondents had previously modified the regular education program to include the Student receiving speech therapy, language therapy, occupational therapy, and daily specialized instruction for reading and math in an "ESE Setting."

61. Due to the evidentiary presentation, the record is largely undeveloped regarding what educational benefits (or lack

thereof) the Student would receive in the proposed separate ESE classroom at School A. A review of the proposed IEP reveals that if the IEP were implemented at School A, the Student would be mainstreamed with nondisabled peers 34 percent of the day. Additionally, the IEP indicates that paraprofessionals are located in each classroom at School A, and the Student would have access to on-site counselors.

62. Regarding the second factor, the undersigned concludes that, due to the Student's demonstrated behavioral issues, and the amount of time the general education teacher would have to devote to the Student, the presence of the Student in a regular classroom would result in a significant impairment to the other students, including, perhaps, other, equally deserving, disabled students who also may require extra attention.

63. Addressing the financial factor, no evidence was presented to support the contention that the cost of educating the Student in a resource placement was so great as to significantly impact the education of other students in the St. Lucie County School District.

64. The second factor, coupled with the fact that the Student's prior placement was not in a regular classroom, and with due deference to the educators who develop the IEP, tips the balance in favor of concluding that the Student cannot be

satisfactorily educated in the regular classroom, with the use of supplemental aids and services.

65. Having so concluded, it must be determined whether the Student has been mainstreamed to the maximum extent appropriate. In determining this issue, the Daniel court provided the following general guidance:

> The [IDEA] and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation under the [IDEA].

Daniel, 874 F.2d at 1050 (internal citations omitted).

66. As discussed above, during the [redacted] school year, the Student received the majority of his academics in a general education environment, while receiving various therapies and specialized daily specialized instruction for reading and math in an ESE setting, a resource room.

67. The majority of the Student's IEP team comprised individuals knowledgeable about the Student, the meaning of the evaluation data, and the placement options, opine that a FAPE cannot be provided to the Student absent placement in a separate ESE classroom. The undersigned is mindful that great deference should be paid to the educators who developed the IEP. A.K. v. Gwinnett Cnty. Sch. Dist., 556 Fed. Appx. 790, 792 (11th Cir. 2014)("In determining whether the IEP is substantively adequate, we 'pay great deference to the educators who develop the IEP.'")(quoting Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991)). As noted in Daniel, "[the undersigned's] task is not to second-guess state and local policy decisions; rather, it is the narrow one of determining whether state and local officials have complied with the Act." Daniel, 874 F.2d at 1048.

68. The March 6, 2015, IEP proposes a change of the Student's placement to the next point (in terms of escalating restrictiveness) on the continuum of possible placements. While it is undisputed that the proposed placement offers less potential for interaction with non-disabled peers, the undersigned concludes that the same sets forth the appropriate mix for this specific student. Accordingly, the undersigned concludes that Respondent's proposed placement of the Student in an ESE classroom mainstreams the Student to the maximum extent

appropriate. Thus, Petitioner failed to establish that the proposed placement violates the LRE mandate.

69. Finally, Petitioner contends that the proposed placement of the Student to a more restrictive setting (as noted in the March 6, 2015, IEP) was in contravention of 29 U.S.C. § 795, et seq. (Section 504). Section 504 of the Rehabilitation Act of 1973, 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 or activity receiving Federal financial assistance . . . .

70. Section 794(b)(2)(B) defines a "program or activity" to include a "local education agency . . . or other school system." Section 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.

71. 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 103.31 through 39. Sections 104.33

through 36 enlarge upon the specific provisions of Section 504 by substantially tracking the requirements of IDEA.

72. Section 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 (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

34 C.F.R. § 104.33(b)(1). An "appropriate education" can also be provided by implementing an IEP that is compliant with IDEA. 34 C.F.R. § 104.33(b)(2).

73. 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 Cnty. Bd. of Educ., 936 F. Supp. 2d 1300, 1313 (M.D. Ala. 2013) (citing L.M.P. v. Sch. Bd. of Broward Cnty., 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007)); see also J.P.M. v. Palm Beach Cnty. Sch. Bd., 916 F. Supp. 2d 1314, 1320 (S.D. Fla. 2013).

74. Assuming a petitioner has established a prima facie case, the respondent must present a legitimate, non-discriminatory reason for the adverse actions it took. Lewellyn v. Sarasota Cnty. 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 stage, is "exceedingly light and easily established." Id. (quoting Perryman v. Johnson Prods. Co. Inc., 698 F.2d 1138, 1142 (11th Cir. 1983)). Once the respondent has articulated a non-discriminatory 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.

75. Here, it appears undisputed that Petitioner meets the first, second, and fourth factors for establishing a prima facie case. Thus, the remaining issue is whether Respondents discriminated against Petitioner solely by reason of his disability.

76. 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. Sch. Bd. of Seminole Cnty., 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 § 504 under a standard of deliberate indifference or a more stringent standard of discriminatory animus." In Liese v. Ind. R. Cnty. Hosp. Dist., 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.

77. In this case, neither party argues in their respective proposed final orders that the discriminatory animus standard applies. Accordingly, the undersigned has analyzed Petitioner's claim under the deliberate indifference standard, which is a more lenient standard than discriminatory animus. 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.

78. 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 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.2d 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 educations 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).

79. The [redacted] opinion further noted that, "if a school system simply ignores the needs of special education students, this may constitute deliberate indifference." Id.

80. In the instant case, Petitioner failed to present sufficient evidence to support his claim 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.

ORDER

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

Petitioner's Amended Request for Due Process Hearing is denied in all respects.

DONE AND ORDERED this 6th day of November, 2015, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
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Filed with the Clerk of the
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this 6th day of November, 2015.

ENDNOTES

1/ Section 1003.57(1)(a)1.d., Florida Statutes, defines "resource room" as "a classroom in which a student spends between 40 percent to 80 percent of the school week with nondisabled peers." Florida Administrative Code Rule 6A-6.0311 defines "resource room" as "supplemental instruction to exceptional students who receive their major educational program in other basic, vocational or exceptional classes."

2/ From the evidentiary presentation, all that can be determined is that the NWEA is a nationwide test administered to all students and that the norm data is based on all second grade students.

3/ Although the above-referenced numbers would appear to be below average, and there is some evidence suggested that an "average" score would fall between 25 and 75 percent, based on the evidentiary presentation, the undersigned cannot make a finding of fact concerning the same.

4/ The record also establishes that, in the areas of compliance and inappropriate comments, the Student's behavior increased in October 2014.

[5/] Section 1003.57(1)(a)1.e. defines "separate class" as a class in which a student spends less than 40 percent of the school week with nondisabled peers. Rule 6A-6.0311(1)(c) defines "separate class" as "the provision of instruction to exceptional students who receive the major portion of their educational program in special classes located in a regular school."

[6/] Section 1003.57(1)(a)1.e. defines "regular class" as "a class in which a student spends 80 percent or more of the school week with nondisabled peers."

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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).