

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs.

Case No. 19-4588E

DUVAL COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

Pursuant to notice, a final hearing was conducted in Jacksonville, Florida, on [REDACTED] and [REDACTED], before Administrative Law Judge (ALJ) Todd P. Resavage of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: [REDACTED], Esquire
Three Rivers Legal Services, Inc.
3225 University Boulevard South, Suite 220
Jacksonville, Florida 32216

For Respondent: [REDACTED], Esquire
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Office of General Counsel
117 West Duval Street, Suite 480
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STATEMENT OF THE ISSUES

Whether Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, by (1) failing to develop appropriate individualized educational programs (IEPs) that were reasonably calculated to enable Petitioner to make progress appropriate in light of Petitioner's circumstances; (2) failing to materially implement Petitioner's IEPs;

(3) inappropriately restraining and secluding Petitioner; and (4) failing to appropriately report incidents of restraint and seclusion. If it is concluded that Respondent substantially violated the IDEA, Petitioner's remedy must be determined.

PRELIMINARY STATEMENT

Respondent received Petitioner's Request for Due Process Hearing (Complaint) on [REDACTED]. Respondent forwarded the Complaint to DOAH on [REDACTED], and the matter was initially assigned to ALJ Jessica E. Varn.

Due to the threat of Hurricane Dorian, the timeline for responding to the Complaint was extended by Order dated [REDACTED]. Following a telephonic scheduling conference on [REDACTED], the final hearing was scheduled for [REDACTED] through [REDACTED].

On [REDACTED], a telephonic status conference was held, wherein the parties jointly requested an extension of time to conduct further discovery. On [REDACTED], ALJ Varn issued an order granting the continuance and rescheduling the final hearing to [REDACTED] through [REDACTED].

On [REDACTED], this matter was transferred to the undersigned for all further proceedings. On the same day, the undersigned issued an Order on Pre-hearing Instructions, which required the parties to file a joint pre-hearing stipulation. The parties, in compliance with the Order on Pre-hearing Instructions, timely filed a Joint Pre-Hearing Stipulation. The stipulation includes, *inter alia*, the parties' position on the specific legal issues to be determined, and a concise statement of facts, which are admitted and required no additional proof at final hearing. To the extent relevant, those facts have been adopted and incorporated herein in the Finding of Facts as set forth below.

The final hearing proceeded, as scheduled, on [REDACTED], and concluded on [REDACTED]. Upon the conclusion of the final hearing, the parties stipulated to the submission of proposed final orders on or before [REDACTED], and to the issuance of the undersigned's Final Order on or before [REDACTED]. On [REDACTED], Respondent filed an Unopposed Motion for Extension of Time to File Proposed Final Order, wherein Respondent requested a two-day extension of time to file proposed final orders. Said motion was granted on [REDACTED]. Accordingly, the undersigned's Final Order deadline was extended to [REDACTED].

The final hearing Transcript was filed on [REDACTED]. The identity of the witnesses and exhibits and rulings regarding each are as set forth in the Transcript. The parties timely filed Proposed Final Orders, which have been considered in this Final Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violations.

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

FINDINGS OF FACT

1. At the time Petitioner's Complaint was filed, Petitioner was nine-years-old, and attending a public elementary school in Clay County, Florida.

2. Petitioner, while living in [REDACTED], was identified at the age of [REDACTED] as having a [REDACTED]. [REDACTED] was referred to a school district in [REDACTED] for a psychoeducational evaluation and, at the age of [REDACTED], had a [REDACTED] evaluation. In [REDACTED], [REDACTED] was determined eligible for

and began receiving exceptional student education (ESE) services under the eligibility category of [REDACTED] and [REDACTED].

3. On or about [REDACTED], Petitioner's [REDACTED], who serves in the United States Marine Corps, was transferred from [REDACTED] to Duval County, Florida. Petitioner thereafter enrolled as a student in Respondent's school district on [REDACTED], and was assigned to School A, a public elementary school.

4. Petitioner's prior IEP from [REDACTED] was operative until an IEP team meeting could be held on [REDACTED]. At that meeting, it was documented that Petitioner "exhibit[s] [REDACTED] that impact [REDACTED] learning or that of others." Accordingly, a [REDACTED] was drafted to help mitigate the [REDACTED] concerns.

5. The [REDACTED] documented Petitioner's most concerning [REDACTED] as follows: "[Petitioner] becomes very upset when asked to complete [REDACTED] tasks or stop engaging in [REDACTED] and will destroy classroom materials, kick, and hit adults requesting that [REDACTED] cooperate." The severity of this target [REDACTED] was classified as "severe," which the [REDACTED] defined as a "significant threat to self, others, or to property." The [REDACTED] set forth the perceived antecedent to the [REDACTED], described the target [REDACTED], the consequence of the [REDACTED], and function or purpose of the [REDACTED]. Additionally, the [REDACTED] set forth proposed replacement [REDACTED], interventions and strategies, prompts to use for replacement [REDACTED], and rewards or reinforcers to be used to increase replacement [REDACTED]. The [REDACTED] also documented that Petitioner's [REDACTED] would be monitored daily with [REDACTED] sheets, and set forth goals that were to align with the IEP.

6. The IEP team ultimately determined the need to conduct a [REDACTED] and to develop a [REDACTED] ([REDACTED]) to address [REDACTED] behavioral needs. Petitioner's parent provided consent to conduct and draft the same on [REDACTED]. On the same date, the IEP team began the first step of conducting the [REDACTED], drafting a plan for [REDACTED] data collecting.

7. The [REDACTED] process was not completed at School A, however, as Petitioner's parents removed [REDACTED] from School A following accusations that on [REDACTED], a School A teacher grabbed [REDACTED] by the shirt, lifted [REDACTED] into the air, and dropped [REDACTED] in the bathroom. The accusations were not substantiated.

8. For the [REDACTED] school year, Petitioner was in [REDACTED] grade and enrolled at School B, a public elementary school in Respondent's school district. At School B, Petitioner was placed in the [REDACTED] and [REDACTED] [REDACTED] program. School B's [REDACTED] program is comprised of [REDACTED] classrooms, each with approximately [REDACTED] to [REDACTED]. The average student to teacher ratio is [REDACTED]. The classrooms are [REDACTED], wherein the students remain with their teacher for the majority of day. All [REDACTED] classes are supported by a paraprofessional. School B has a board [REDACTED] [REDACTED] available to the school, should assistance be requested.

9. Petitioner's IEP from March [REDACTED] remained in effect until [REDACTED] [REDACTED], when the IEP team met for its annual review. At that time, the IEP team again determined that Petitioner exhibited behaviors that impacted [REDACTED] learning or that of others. When reviewing [REDACTED] present level of performance in the domains of reading, communication, math, and social/emotional, the IEP team documented that Petitioner needed additional support staying on-topic and focusing on academic tasks; continued to act in an impulsive manner in group activities and speak out of turn; and that [REDACTED] needed small group instruction with a highly motivating object to complete a task.

10. On [REDACTED], the IEP team revised Petitioner's [REDACTED]. As compared to the prior [REDACTED], [REDACTED] targeted behaviors had been downgraded from "[REDACTED]" to "[REDACTED]," which was defined as property damage or minor injury. [REDACTED] "behavior of most concern" was documented as follows:

When directed to engage in a [REDACTED] activity or not given an item of preference [REDACTED] will scream

“I am mad”[sic] “I am angry” [sic] “I am upset” [sic] “You broke my heart.” [REDACTED] will throw books, push down shelves, hit, kick, bite staff and try to leave the area. [REDACTED] inconsistently removes [REDACTED] clothing and shoes when this happen [sic].

11. The [REDACTED] set forth the perceived antecedent to the behavior, described the target behavior, the consequence of the behavior, and function or purpose of the behavior. The [REDACTED] documented the “possible reason[s] for the behavior” as to obtain attention; to obtain objects, privileges, and activities; and to escape or avoid. Additionally, the [REDACTED] set forth proposed replacement behaviors, interventions and strategies, prompts to use for replacement behaviors, and rewards or reinforcers to be used to increase replacement behaviors. The [REDACTED] also documented that Petitioner’s behavior would be monitored daily with a scatter plot chart, and that the [REDACTED] would be aligned with the social/emotional goals on [REDACTED] IEP.

12. The [REDACTED], [REDACTED] [REDACTED], IEP provided two social/emotional goals:

By the IEP review date, will attend to [REDACTED] classroom activities until it is finished, up to [REDACTED] minutes in length with no [REDACTED] behaviors ([REDACTED] [REDACTED]) in 4 out of 5 opportunities measured by ESE teacher data.

By the IEP review date, [Petitioner] will resolve problems/conflict with peers in a [REDACTED] manner during associative play in 3 out of 5 opportunities as measured and implemented by the ESE teacher.

13. The IEP also provided benchmarks or short-term objectives related to the above-quoted goals. The benchmarks provided that after a social skills story, Petitioner would utilize the break area when given a break card and use self-calming strategies; and that Petitioner would resolve problems or conflicts with peers in a nonaggressive manner.

14. Among other goals, the [REDACTED], IEP provided the following reading goal: “By the IEP Review date, when given a Level B book, [Petitioner] will receptively/expressively [sic] 20 sight words in 4 out of 5 opportunities as measured and implemented by the ESE teacher.” This goal was accompanied by two benchmark or short-term objectives:

When given a Level A book, [Petitioner] will receptively/expressively [sic] 10 sight words in 2 out of 5 opportunities as measured and implemented by the ESE Teach.

When given a Level B book, [Petitioner] will receptively/expressively [sic] 15 sight words in 3 out of 5 opportunities as measured and implemented by the ESE Teach.

15. With respect to the domain of communication, the IEP team established the following goal:

By the IEP review date, during structured and unstructured language activities that include visual and verbal prompts, [Petitioner] will independently produce age appropriate grammatically correct sentences with [REDACTED] accuracy over three consecutive sessions measured by therapist documentation and observation and implemented by speech-language pathologist.

16. To help accomplish this goal, the IEP provided that Petitioner was to receive “Group and/or Individual Language Therapy 30 min.,” twice per week. Petitioner was to receive the [REDACTED] service in the therapy lab or office.

17. At the [REDACTED], meeting, the team documented that it was undetermined whether Petitioner required extended school year (ESY) services and that the IEP team would reconvene by the “end of April.” It is unclear from the record whether the IEP team reconvened.

18. Petitioner remained at School B for the [REDACTED] school year. As noted above, Petitioner was to receive language therapy twice per week;

however, from August through [REDACTED], the evidence establishes that Petitioner only participated in five sessions. It is undisputed that, during this time, School B was understaffed with respect to a language therapist. Thereafter, a new therapist, [REDACTED], was assigned to work with Petitioner, and the therapy sessions increased. During the period of [REDACTED] through [REDACTED], Petitioner received approximately [REDACTED] language therapy sessions of [REDACTED] minutes in duration.

19. During the [REDACTED] school year, in addition to days [REDACTED] left school early for appointments, Petitioner was absent from school for [REDACTED] days. During these absences, Petitioner missed a total of nine therapy sessions.

20. Notwithstanding the undisputed shortcomings in therapy sessions, the record evidence establishes that Petitioner performed well in the domain of communication. Indeed, Petitioner concedes in [REDACTED] Proposed Final Order that [REDACTED] “largest gains were made in communication” and that [REDACTED] goals for communication indicate mastery. [REDACTED] credibly testified that [REDACTED] designed a new communication goal for the [REDACTED] IEP, because Petitioner “mastered the previous one.” Petitioner met [REDACTED] IEP communication goals for the [REDACTED] school year.

21. Petitioner’s annual IEP review occurred on [REDACTED]. At that time, [REDACTED] progress reports indicated that [REDACTED] was making progress on [REDACTED] IEP goals with respect to reading, math, social/emotional, independent functioning, and communication. Petitioner’s targeted behaviors were still occurring, however, and [REDACTED] required teacher prompting; modeling to begin self-calming strategies; verbal and proximity control to complete work tasks; and the continued need for staying focused.

22. At the [REDACTED], meeting, it was again documented that [REDACTED] behaviors impacted [REDACTED] learning or that of others. Petitioner’s prior [REDACTED] was updated to include [REDACTED] current behaviors of concern. [REDACTED] present social/emotional level of performance was documented as follows:

Currently, due to the effects of [REDACTED] disability, [Petitioner] needs extensive support and instruction in social skills and self management and anger control behaviors. When [Petitioner] becomes upset [REDACTED] will clutch [REDACTED] [REDACTED] [REDACTED] [REDACTED] personal items and try to leave the area. [Petitioner] requires daily modifications to meet social expectations. [Petitioner] needs additional supports in social skills with [REDACTED] peers, when friends or adults hurt [REDACTED] feelings [REDACTED] needs them to apologize to feel better. [Petitioner] can be very disrespectful in [REDACTED] efforts to make the person who upset [REDACTED] apologize. [REDACTED] can also manipulate situations to give [REDACTED] wanted outcome. At this time [REDACTED] has an Applied Behavioral Analyst who comes into class twice a week for 2 hours to assist [Petitioner] in making smart choices.

23. The [REDACTED], IEP provided the following social/emotional goal: Petitioner “will attend to preferred/non-preferred classroom activities until it is finished, up to 7 minutes in length with less repetitive asking and/or off task conversation in 4 out of 5 opportunities measured by ESE teacher data.”

24. As on prior IEP reviews, Petitioner’s need for ESY services was documented as “undetermined” and, therefore, the IEP provided that the IEP team would reconvene by [REDACTED]. It is unclear from the record, however, whether the IEP team did, in fact, reconvene to determine [REDACTED] ESY needs.

25. At this meeting, Petitioner’s reading goal was amended to reflect [REDACTED] ability in reading coupled with [REDACTED] behavioral [REDACTED]. With respect to reading, the Present Level of Performance section documented the following:

Due to the effects of [Petitioner’s] disability, [REDACTED] is unable to read a Level A book. Level A books have 4-5 words per page to give an understanding of the depth of this level. [REDACTED] is unable to recognize high frequency words independently or within a text. [Petitioner] will not stay on topic when there is a discussion about books. [REDACTED] often drifts to topics [REDACTED] prefers in effort to divert the attention to [REDACTED] topic of choice. [REDACTED] is unable to remember words

that are taught to [REDACTED] on a regular basis. When the student is asked a question or to identify a word [REDACTED] will often begin [sic] screaming or yelling so that [REDACTED] will not have to answer any questions. [Petitioner] needs constant breaks to calm [REDACTED] tantrums while working. [Petitioner] needs small group instruction for all subjects. [REDACTED] requires a self-contained classroom that focuses on communication as it relates to social skills and academics.

26. [REDACTED], Petitioner's [REDACTED] grade teacher, credibly testified that, at the time the [REDACTED] [REDACTED] IEP was drafted, [REDACTED] prior goal of identifying sight words in a Level B book proved to be too ambitious given [REDACTED] skill set. [REDACTED] further testified that when, as Petitioner here, a student is demonstrating negative behaviors, an overly ambitious goal can result in frustration to the student, and thereby exacerbate those behaviors. Accordingly, [REDACTED] reading goal was revised to provide that Petitioner "will receptively/expressively identify 15 high frequency words in 4 out of 5 opportunities as measured by work samples, teacher created data as implemented by the ESE teacher."

27. At the end of the [REDACTED] school year, Petitioner's behaviors were described as hindering progress in some, but not all, areas. Petitioner returned to School B as a [REDACTED] grader for the [REDACTED]-[REDACTED] school year. [REDACTED] negative behavior unfortunately continued and intensified in the fall of the [REDACTED] school year. [REDACTED] testified that when Petitioner would have behaviors, "sometimes you could ignore it. Sometimes you could redirect it and take the focus off of the negative behavior. . . . but just go to token economy. Or sometimes you could just focus on something that [REDACTED] did that was really, really positive to distract [REDACTED] from the behavior."

28. To address the escalating behaviors, the IEP team decided to conduct a [REDACTED] and, on [REDACTED], held the first meeting. The IEP team discussed Petitioner's behaviors in the classroom and at home, and defined

the behaviors that were believed to be hindering [REDACTED] educational progress. Meghan Weiss, the [REDACTED] for School B, aggregated [REDACTED] targeted [REDACTED] into the term, “episodes.”

29. [REDACTED] began tracking the episodes, however, it was determined that the charts did not “paint the picture” of Petitioner’s behavior, and, therefore, were slightly modified. [REDACTED] graphed the data provided by [REDACTED], and later presented the findings at the second [REDACTED] meeting held on [REDACTED]. The final [REDACTED] meeting was held on [REDACTED], and involved drafting and finalizing the [REDACTED]. Intervention strategies included task-based praise, providing choices, visuals to help self-regulate, and a “calm down area.” The [REDACTED] process and resulting [REDACTED] appeared to be largely successful (for a period of time) in reducing Petitioner’s targeted negative behaviors.

30. During the [REDACTED] process, Petitioner’s sleeping in class was also discussed. [REDACTED] testified that, at times, [REDACTED] would sleep between 1 to 1.5 hours at a time. When awoken, Petitioner would not be ready to learn and [REDACTED] awakening would lead to further [REDACTED] behaviors. For all that appears from the evidentiary record, Petitioner’s sleeping was attributed to the side effects of allergy medication and Petitioner’s sleeping habits at home.

31. The IEP team again convened on [REDACTED]. At that time, [REDACTED] [REDACTED] was amended to include information concerning [REDACTED] sleeping. The [REDACTED] documented that Petitioner frequently falls asleep, and that when awoken, [REDACTED] begins the behaviors of screaming and crying. The [REDACTED] further documented the aspirational replacement behavior as follows:

To stay awake the entire the [sic] day. When [REDACTED] is fully awake the behaviors are not as evident. When [REDACTED] comes in tired or sick [REDACTED] is grouchy. The desired behavior would be to ask for a break to rest for a given amount of time.

32. Although the [REDACTED] does not define “a given amount of time,” [REDACTED] [REDACTED], Petitioner’s private [REDACTED], testified that the IEP team ultimately

agreed to allow Petitioner to sleep for 30 minutes in class. [REDACTED] owns [REDACTED]. At all times relevant to this proceeding, [REDACTED] supervised a registered behavior technician, [REDACTED]. Upon approval by Petitioner's insurance company and completing the requisite application process, [REDACTED] was granted private provider status with School B. Thereafter, either [REDACTED] or a registered behavioral technician, [REDACTED], was authorized to provide Petitioner, in class, bi-weekly two hour sessions.¹ Based upon the documentary evidence, it appears that [REDACTED] conducted [REDACTED] first school observation of Petitioner on or about [REDACTED].

33. [REDACTED] attended and provided input during the [REDACTED] meeting; the [REDACTED], [REDACTED] meeting; and the [REDACTED], [REDACTED] meeting. While [REDACTED] testified that [REDACTED] role at the meeting was merely to provide information, [REDACTED] opined that the data collection and charting of Petitioner's behavior by Respondent's staff were of limited value as [REDACTED] behaviors were combined, it was difficult to discern when the behaviors occurred, and it was unclear for what duration the behavior was being measured. [REDACTED] was also critical of the determined "function" of Petitioner's behavior, as documented in the [REDACTED]. Specifically, [REDACTED] opined that the determined function was unclear given the noted behaviors. While [REDACTED] criticisms of the behavioral data collection and graphing are credible, [REDACTED] did not, however, testify that Petitioner's IEPs, [REDACTED], [REDACTED], or [REDACTED] were inadequately designed or improperly implemented.

34. Petitioner last attended School B on [REDACTED]. On [REDACTED] the day prior to spring break, Petitioner reported to [REDACTED] [REDACTED] that [REDACTED] was "tossed by a teacher, and [REDACTED] was locked in the bathroom with the lights off." Petitioner's [REDACTED] was at School B at the time of the alleged incident on another matter, and received a text from Petitioner's teacher that there had

¹ The record is unclear as to when said services began and concluded. The private [REDACTED] services were dependent upon authorization from Petitioner's private insurance.

been an incident, however, Petitioner was now calm. Petitioner's [REDACTED] reported the allegation to law enforcement; however, the claim was not substantiated.

35. Upon returning to school after spring break, on [REDACTED], Petitioner's [REDACTED], attempting to further investigate the alleged incident, had a verbal altercation with another teacher. Petitioner did not return to School B after [REDACTED], and was officially withdrawn on [REDACTED]. Thereafter, Petitioner enrolled in School C, a public elementary school in [REDACTED] County, Florida.

36. Petitioner presented sufficient evidence to establish that [REDACTED] was restrained on several occasions. Petitioner, however, failed to present sufficient evidence to support a finding that the methodology of restraint was inappropriate or that Respondent failed to properly report said restraint. Petitioner failed to present sufficient evidence to support a finding that Petitioner was improperly secluded or that Respondent failed to properly report the same.

37. A review of Petitioner's IEP progress reports at the time of [REDACTED] withdrawal from School B yields mixed results. With respect to reading, Petitioner was making progress towards meeting [REDACTED] goal, and had mastered two benchmark or short-term objectives. In math, Petitioner was making progress and was expected to complete [REDACTED] goal. It was reported that [REDACTED] was not making sufficient progress on [REDACTED] social/emotional goal as [REDACTED] was not following directions, which was hindering [REDACTED] progression. Concerning [REDACTED] goal for independent functioning, it was documented that, although [REDACTED] had the capability to meet [REDACTED] goal, [REDACTED] was not making sufficient progress as [REDACTED] was exhibiting [REDACTED] that hindered goal attainment.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the subject matter of this proceeding and 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).

39. 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).

40. In enacting the IDEA, Congress sought to “ensure that all children with disabilities have available to them a free appropriate public education [FAPE] 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. Ala. State Dep’t of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

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

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

20 U.S.C. § 1401(9).

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). “The IEP is the centerpiece of the statute’s education delivery system for disabled children.” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017)(quoting *Honig v. Doe*, 108 S. Ct. 592 (1988)). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Id.* (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982)).

IEP Design/Content:

44. In a light most favorable to Petitioner, Petitioner’s Complaint is construed as alleging that Respondent failed to develop appropriate IEPs while attending school in Respondent’s district. Petitioner’s Complaint vaguely alleges that Petitioner “has an IEP that addresses some of these needs, but the educational program was not reasonably calculated to allow [REDACTED] to make academic progress in light of [REDACTED] circumstances.” In support of this allegation, Petitioner’s Complaint alleges that Petitioner did not meet all of [REDACTED] respective IEP goals and that some goals and benchmarks are repeated from year to year.

45. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a

child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. *Rowley*, 458 U.S. at 206, 207. A procedural error does not automatically result in a denial of FAPE. See *G.C. v. Muscogee Cty. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007). Here, Petitioner does not allege any procedural violations.

46. Pursuant to the second step of the *Rowley* test, it must be determined if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive "educational benefits." *Rowley*, 458 U.S. at 206, 207. Recently, in *Endrew F.*, the Supreme Court addressed the "more difficult problem" of determining a standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Endrew F.*, 13 S. Ct. at 993. In doing so, the Court held that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. As discussed in *Endrew F.*, "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Id.*

47. Whether an IEP is sufficient to meet this standard differs according to the individual circumstances of each student. For a student who is "fully integrated in the regular classroom," an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* For a student, like Petitioner here, not fully integrated in the

regular classroom, an IEP must aim for progress that is “appropriately ambitious in light of [the student’s] circumstances.” *Id.* at 1000.

48. Additionally, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. *Id.* at 1001 (“This absence of a bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review” and explaining that “deference is based on the application of expertise and the exercise of judgment by school authorities.”).

49. While not specifically alleged in Petitioner’s Complaint, Petitioner contends in his Proposed Final Order that Respondent failed to design an appropriate IEP, by its failure to timely conduct a [REDACTED] and draft a [REDACTED] to address his targeted negative behavior. The undersigned concludes that Petitioner did not meet its burden of proof regarding this allegation.

50. As noted in the Findings of Fact above, at all times pertinent to the allegations in Petitioner’s Complaint, Petitioner was placed in a small class setting, with an extremely low student-to-teacher ratio, with paraprofessional support. At all times relevant, positive behavior support was included in [REDACTED] educational programming, with either a [REDACTED] and/or a [REDACTED]. Petitioner’s [REDACTED] was modified throughout [REDACTED] tenure, with complimenting goals on [REDACTED] respective IEPs. Petitioner failed to present sufficient evidence to establish that Respondent’s approach to Petitioner’s behavioral concerns through the utilization of a [REDACTED] until the fall of the [REDACTED] school year was improper or violated the IDEA.

51. The evidence established that Respondent, upon observing the escalation in Petitioner’s behaviors (even with the existing [REDACTED] in place), conducted a [REDACTED] and drafted a [REDACTED], which became part of [REDACTED] IEP. While it is undisputed that Petitioner continued to have some degree of behavioral issues at School B, Petitioner failed to present sufficient evidence that the same was a result of an inadequately designed IEP.

52. Petitioner further contends that Respondent's alleged failure to adequately update or revise Petitioner's IEP goals resulted in a violation of the IDEA. The evidence, however, fails to provide support for this allegation. To the contrary, the evidentiary presentation supports the conclusion that Respondent aimed to design IEPs for Petitioner that were appropriately ambitious in light of his circumstances. The evidence established that when certain goals were mastered, they were amended, and when Petitioner failed to reach others, they were modified consistent with [REDACTED] circumstances. While lack of progress can certainly be a factor to consider in determining whether an IEP was appropriately designed, it is not outcome determinative. Here, the better evidence supports the conclusion that Petitioner's lack of progress was due to [REDACTED] behavioral issues, as set forth above in the Findings of Fact.

53. Finally, Petitioner contends in [REDACTED] Proposed Final Order that Respondent's failure to schedule meetings to consider ESY services amounts to an IDEA violation. This allegation was not contained in Petitioner's Complaint (nor referenced in the parties' Joint Pre-Hearing Stipulation), and, therefore, is not properly before this tribunal. Accordingly, said claim lends no support to Petitioner's contention that Respondent failed to properly design Petitioner's IEPs.

IEP Implementation:

54. Petitioner's Complaint is construed as alleging that Respondent did not properly implement Petitioner's IEPs from [REDACTED] through [REDACTED].

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

Confronting this issue for the first time ourselves, we concluded that to prevail in a failure-to-

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

Id. at 1211.

56. While declining to map out every detail of the implementation standard, the court did “lay down a few principles to guide the analysis.” *Id.* at 1214. To begin, the court provided that the focus in implementation cases should be on “the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld.” *Id.* (external citations omitted). “The task for reviewing courts is to compare the services that are actually delivered to the services described in the IEP itself.” In turn, “courts must consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole.” *Id.* (emphasis in original).

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

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

Id. at 1215.

58. Here, it is undisputed that Respondent failed to implement the prescribed language therapy as delineated on Petitioner's IEP during the [REDACTED] school year. The failure far exceeds a "de minimis shortfall." Had Petitioner established that the language therapy implementation failure resulted in a failure of Petitioner to progress in [REDACTED] communication goals, there would be no hesitancy in determining that Respondent committed a material deviation from the plan, and, therefore an IDEA violation.

59. The evidence, however, established that notwithstanding the failure to deliver the language therapy, Petitioner progressed appropriately in communication given [REDACTED] circumstances. Indeed, the evidence established that Petitioner mastered [REDACTED] communication goal at the end of the year. When viewing the therapy sessions withheld in context of the IEP as a whole, it is concluded that the failure to implement the language therapy did not result in a material implementation failure.

60. Petitioner otherwise failed to present sufficient evidence that Respondent failed to implement any other provision of Petitioner's IEPs during the relevant time period. Accordingly, Petitioner's failure to implement claims are not substantiated.

Restraint/Seclusion

61. Petitioner's Complaint contends that [REDACTED] was improperly restrained and secluded, and that the same were not properly reported.

62. State law and regulations generally determine the legality of using aversives, such as restraint and seclusion. In Florida, the use of restraint and seclusion on students with disabilities is addressed in section 1003.573. This section provides, in pertinent part, as follows:

(4) PROHIBITED RESTRAINT.--School personnel may not use a mechanical restraint or a manual or physical restraint that restricts a student's breathing.

(5) SECLUSION.--School personnel may not close, lock, or physically block a student in a room that is

unlit and does not meet the rules of the State Fire Marshal for seclusion time-out rooms.

63. Section 1003.573 does not define the term restraint. The U.S. Department of Education, however, has provided the following definition of physical and mechanical restraint:

[A physical restraint is defined as a] personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location.

[A mechanical restraint is defined as] the use of any device or equipment to restrict a student's freedom of movement. This term does not include devices implement by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed.

Restraint and Seclusion: Resource Document (U.S. Dept. of Ed. 2012).

64. It is undisputed that, on several instances, Petitioner was restrained or required the use of a quiet or calming room. Outside of the unsubstantiated allegations by Petitioner to ■■■ parents, Petitioner failed to present sufficient evidence to establish that the utilization of restraint or placing Petitioner in the quiet room violated section 1003.573(4) and (5). Petitioner failed to present sufficient evidence for the undersigned to also conclude that Respondent failed to properly report such restraint or seclusion. Accordingly, such claims are dismissed.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner failed to satisfy ■■■ burden of proof with respect to

the claims asserted in Petitioner's Complaint. Petitioner's Complaint is denied in all aspects.

DONE AND ORDERED this 13th day of May, 2020, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
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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).