STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs. Case No. 20-0974E

SEMINOLE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was conducted via Zoom Conference on [redacted], before Administrative Law Judge (ALJ) Todd P. Resavage of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Petitioner, pro se
(Address of Record)

For Respondent: [redacted], Esquire
School Board of Seminole County, Florida
400 East Lake Mary Boulevard
Sanford, Florida 32773

STATEMENT OF THE ISSUES

Whether Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq*., by failing to appropriately evaluate and identify Petitioner as eligible for exceptional student education (ESE) services under the eligibility category o [redacted]; and failing to appropriately design and implement an individualized educational program (IEP) with respect to Petitioner's alleged [redacted]. 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], and forwarded the Complaint to DOAH on the same date. Thereafter, Petitioner filed a series of amended complaints, the last being filed on [redacted] (Amended Complaint).

On [redacted], Respondent filed a Notice of Insufficiency with respect to Petitioner's Amended Complaint. On [redacted], the undersigned issued an Order of Sufficiency concluding that Petitioner's Amended Complaint complied with Florida Administrative Code Rule 6A-6.0331(9)(d), and construed the issues of the Amended Complaint as set forth in the above Statement of the Issues.

The final hearing was scheduled for [redacted] through [redacted], and proceeded as scheduled. The hearing concluded [redacted]. Upon the conclusion of the hearing, the parties stipulated to submission of proposed final orders within 20 days of the filing of the final hearing Transcript and to the issuance of the undersigned's Final Order on or before 40 days from the date of the Transcript. The Transcript was filed [redacted]. Accordingly, the parties' proposed final orders were to be submitted on or before [redacted]; and the undersigned's Final Order deadline [redacted] By agreement and stipulation of parties, the Final Order deadline was extended to [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 the preparation of this Final Order.

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

For stylistic convenience, the undersigned will use [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 Amended Complaint was filed, Petitioner was [redacted], and attended [redacted], a [redacted] in Respondent's school district.

2. In December [redacted], Respondent determined that Petitioner was eligible for and began receiving ESE services under the eligibility category of [redacted], and an IEP was designed and implemented to address the same.

3. In March [redacted], an IEP team meeting occurred wherein it was determined that Petitioner was eligible for [redacted] services and [redacted] IEP was updated accordingly.

4. For the [redacted] school year, Petitioner was [redacted] student attending [redacted], a public [redacted] school in Respondent's school district. During the [redacted] school year, Petitioner did not experience any [redacted] issues; [redacted] staff did not have any concerns regarding [redacted]; and Petitioner's parent did not express any concerns regarding [redacted].

5. While Petitioner did have [redacted] issues during the [redacted] school year, a social worker from the school attempted to go to Petitioner's home to assist with offering services to facilitate attendance.

6. Petitioner received [redacted] grades throughout the [redacted] school year, earning [redacted].

7. On [redacted], an IEP team meeting was conducted, with [redacted] participating by telephone. At that time, it was determined that Petitioner satisfied the criteria for dismissal from [redacted] services. [redacted] was in agreement with [redacted] dismissal from [redacted] services. Accordingly, on the same date, [redacted] IEP was terminated, and an educational plan (EP) was developed for Petitioner related to [redacted] services.

8. Petitioner began the [redacted] school year, at [redacted], as a [redacted] grade student, but transferred to [redacted], a public [redacted] school in Respondent's school district on or around October [redacted], due to Petitioner's family relocating.

9. Prior to [redacted] transfer to [redacted], the evidence establishes that Petitioner did not present with [redacted] concerns; [redacted] was able to develop and maintain [redacted] with teachers and staff; and Respondent did not receive any concerns from Petitioner or [redacted] regarding [redacted]

10. On [redacted], [redacted], an intermediate school guidance counselor at [redacted], contacted [redacted] via email to welcome Petitioner to the school and to request a meeting on [redacted], to update Petitioner's [redacted] to align with [redacted]. Petitioner's [redacted] accepted the invitation and issued subsequent email correspondence advising that Petitioner was not handling the transition well.

11. In email correspondence dated [redacted], [redacted] advised that [redacted] had a difficult experience on the first day of school and became overwhelmed at the bus drop location. As reported by [redacted] Petitioner declared "[redacted]." This declaration resulted in the school resource officer speaking with Petitioner to determine if [redacted] was a danger to [redacted] or others. [redacted] further reported that Petitioner was [redacted] and [redacted] and that [redacted] had obtained a referral for counseling from an outside provider.

12. [redacted] advised that [redacted] would perform periodic checks on Petitioner over the course of the next few days. Additionally, [redacted] informed [redacted] that [redacted] has a [redacted] counselor, [redacted], and that if requested [redacted] would make a referral. [redacted] requested the referral, and [redacted] made the referral.[1]

13. [redacted] continued to check on Petitioner [redacted] times per [redacted] for the balance of the first semester; however, ceased the periodic checks in the second semester, as Petitioner had settled into school and was [redacted].

14. Based on the evidentiary presentation, it appears that the [redacted] meeting occurred on [redacted], with [redacted] participating by phone; however, a copy of the [redacted] developed on that date was not introduced as evidence.

15. At [redacted], Petitioner was placed in a [redacted] class, which is an accelerated advanced class, primarily composed of [redacted] and [redacted] students. The teacher [redacted], provided all the instruction on core content.

16. [redacted] credibly testified that, on one occasion, Petitioner had an [redacted] episode where [redacted] and [redacted] under [redacted] desk. [redacted] testified that this [redacted] was resolved by a common classroom intervention and that they worked it out. At no point did Petitioner require or request to go to the [redacted], which is a designated [redacted] that has two assigned [redacted] to address [redacted] conceded that, at times, Petitioner would demonstrate [redacted] if [redacted] was not working directly with Petitioner; however, [redacted] became more motivated to work independently as the year progressed.

17. Both [redacted] and [redacted] credibly testified that Petitioner was able [redacted] with peers; make and maintain friendships, and

[1] It is unclear from the evidentiary presentation whether Petitioner ever met with [redacted]

build [redacted] with teachers and staff. [redacted] observed that, as the year progressed, [redacted] became more engaged in the class and with [redacted] friends.

18. During the first semester of the [redacted] school year, Petitioner did not receive any [redacted] referrals and obtained all [redacted] grades.

19. Towards the latter part of the second semester, on [redacted], [redacted] sent an email to [redacted], [redacted], explaining that Petitioner had been exposed to [redacted], and that [redacted] suffered from [redacted]. The next day, [redacted] sent another email to [redacted] "formally requesting ESE eval immediately."

20. [redacted] wrote back on the same day, explaining that Petitioner did not presently have an IEP and [redacted] was not receiving ESE services for an exceptionality under the IDEA; however, Petitioner did have an [redacted]. Inter alia, [redacted] advised that the ESE team would be "happy to meet with you . . . to discuss possible ESE testing."

21. On [redacted], Respondent issued a Notice of Meeting for [redacted], to discuss evaluations for ESE services eligibility. [redacted] was advised that if [redacted] could not attend in person, [redacted] would be able to transport [redacted] to and from school, or to hold the meeting via phone.

22. On [redacted], [redacted] issued email correspondence advising that [redacted] was not ready for the meeting and was awaiting "[redacted]" at this time. [redacted] did, however, provide consent for the team to initiate [redacted] screenings. Accordingly, [redacted] responded confirming [redacted] desire to postpone the meeting, and advising that the team would postpone until [redacted] expressed the desire to reschedule and was willing to provide [redacted]

23. [redacted] filed a Complaint with the Florida Department of Education (DOE)-Bureau of Exceptional Education and Student Services (State Complaint), pursuant to rule 6A-6.03311(5). The gravamen of the State Complaint was that Respondent failed to timely evaluate Petitioner "for the past six months," in violation of 34 C.F.R. § 300.301, and rule 6A-6.0331. Ultimately, after conducting its investigation and review of relevant information, DOE issued its Report of Inquiry.[2] DOE concluded that Respondent did not commit the alleged violations as Respondent did not receive parental consent to initiate evaluations; and that [redacted] had requested a postponement of evaluations "until the conclusion of the DCF and FDOE investigations."[3]

24. Notwithstanding the State Complaint, on [redacted], Respondent issued a meeting notice for [redacted], to address parental concerns and requests; however, [redacted] documented on the meeting notice that [redacted] would not be able to attend and would like to reschedule "after DOE/DCF Investigation have concluded in consideration of recent crimes committed by SCPS."

25. Petitioner concluded the second semester of [redacted] [redacted]grade year with [redacted] grades. [redacted] report card reflects that for the [redacted] school year [redacted] earned [redacted], [redacted], and [redacted].

26. Petitioner was academically promoted to the [redacted]-grade. For the [redacted] school year, Petitioner was assigned to [redacted], a public [redacted] school in Respondent's school district.

27. On [redacted], [redacted], the [redacted] student case manager at [redacted], issued email correspondence to [redacted] advising that a

[2] It is unclear from the evidentiary presentation when the Report of Inquiry was issued; however, based on the report's Findings of Fact which include a reference to a document dated [redacted], it would appear that the report was issued sometime thereafter.

[3] Respondent does not argue in its Proposed Final Order that Petitioner's claims in the present proceeding are precluded by the prior resolution of the State Complaint process.

meeting had been scheduled for [redacted].[4] [redacted] responded that due to various [redacted] reasons, [redacted] could not attend in-person meetings. On the same date, [redacted] advised that the meeting could be conducted telephonically and [redacted] could ultimately sign the [redacted] virtually.

28. [redacted] questioned why [redacted] had not been contacted with regard to an IEP. [redacted] forwarded the query to [redacted], [redacted] whose duties cover ESE. [redacted] in turn, on [redacted], issued email correspondence to [redacted] advising that [redacted] would like to schedule a meeting to address [redacted] concerns. [redacted] responded that "[a] meeting isn't necessary I just need the release form emailed so I can send you the IEE thanks so much!!"

29. Petitioner began [redacted]-grade year on [redacted]. [redacted] was placed in the [redacted] curriculum. It is undisputed that, unlike prior years, Petitioner's academic performance declined. After the [redacted], [redacted] had earned [redacted].

30. In an email dated [redacted], [redacted] represented to [redacted] staff that Petitioner is a child with [redacted]," and requested that [redacted] "IEP replaced [sic] as mandated." [redacted] included numerous derogatory allegations regarding DOE and various members of [redacted] staff.

31. Petitioner had a [redacted] issue on [redacted], resulting in a [redacted]. On [redacted], [redacted] issued email correspondence to [redacted] requesting a meeting, to which [redacted] agreed. Thereafter, a meeting was held on [redacted], with [redacted] appearing telephonically. The

[4] On [redacted], the team at [redacted] attempted to update [redacted] EP; however, the system "crashed." It appears that the [redacted] was created, but not formally entered into the system until a subsequent meeting on [redacted].

team suspected that an exceptionality may be impacting [redacted] performance and requested consent to conduct various evaluations to determine if [redacted] was eligible for ESE services under the eligibility categories of [redacted] On the same date, [redacted] staff went to Petitioner's home and obtained consent from [redacted] to evaluate.[5]

32. As part of the evaluative process, on [redacted], a [redacted] evaluation of Petitioner was conducted by [redacted]. On [redacted], a meeting was held to review the [redacted] evaluation, additional documentation (including documentation submitted by [redacted]), and to determine potential eligibility under the categories of [redacted]. [redacted] participated in the meeting by phone. At that meeting, [redacted] advised that a medical appointment had been scheduled for Petitioner in [redacted], and the team agreed to reconvene subsequent to the appointment to review any relevant medical information. Subsequently, [redacted] was able to obtain a medical appointment on [redacted].

33. On [redacted], [redacted] emailed [redacted] staff advising that the pediatrician was unwilling to sign the requisite form for [redacted], and that [redacted] was now requesting that [redacted] be found eligible under the category of [redacted]. [redacted] was also requesting a Section 504 plan.

34. Upon return from the winter break, on [redacted], [redacted] advised [redacted] that [redacted] was attempting to schedule a meeting to finalize the eligibility paperwork. [redacted] responded that [redacted] did not need to speak with anyone and to "just send the paperwork home."

35. A meeting was scheduled for [redacted], and two meeting notices were issued to ensure [redacted] was aware of the meeting. On [redacted], [redacted] returned the meeting notice via

[5] The document signed was titled "Notice and Consent for Exceptional Student Education (ESE) Reevaluation." At the time consent was signed, the requested procedures were not

facsimile and indicated that [redacted] would not be able to attend the meeting. [redacted] wrote on the notice that the "[meeting] already held on [redacted] just need my copy of 504 (or IEP) sent to me at this time."

36. The team, due to alleged technical issues with the facsimile machine, was unaware of [redacted] response and continued with the meeting in [redacted] absence. Ultimately, the team determined that Petitioner met the criteria for [redacted] and an IEP was designed to address the same. The initiation date noted on the IEP was [redacted], to allow [redacted] time to review and sign consent for the provision of ESE services.

37. Although the IEP and consent form were sent to [redacted] via certified mail, there was an issue with delivery.[6] On [redacted], [redacted], the ESE Compliance Coordinator, offered to bring the documents to Petitioner's home for signature. Ultimately, after Petitioner filed the original due process hearing request in this matter, on [redacted], [redacted] signed consent for the initiation of ESE services. [redacted], [redacted] staff began implementing the IEP.

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,

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part of a reevaluation, as Petitioner was not currently receiving ESE services.

[6] It is unclear from the evidentiary presentation whether delivery of the package was attempted by the carrier and [redacted] not home or whether there was an internal issue with the delivery carrier.

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 IDEA also contains "an affirmative obligation of every public school system to identify students who might be disabled and evaluate those students to determine whether they are indeed eligible." *N.G. v. D.C.*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008)(citing 20 U.S.C. § 1412(a)(3)(A)). This

obligation is referred to as "Child Find," and a local school system's "[f]ailure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." *Id*. Thus, each state must put policies and procedures in place to ensure that all children with disabilities residing in the state, regardless of the severity of their disability, and who need special education and related services, are identified, located, and evaluated. 34 C.F.R. § 300.111(a).

44. Rule 6A-6.0331 sets forth the school districts responsibilities regarding students suspected of having a disability. This rule provides that school districts have the responsibility to ensure that students suspected of having a disability are subject to general education intervention procedures. As an initial matter, the school district has the "responsibility to develop and implement a multi-tiered system of support which integrates a continuum of academic and behavioral interventions for students who need additional support to succeed in the general education environment." Fla. Admin. Code R. 6A-6.0331(1).

45. The general education intervention requirements include parental involvement, observations of the student, review of existing data, vision and hearing screenings, and evidence-based interventions. Fla. Admin. Code R. 6A-6.0331(1)(a)-(e). Rule 6A-6.0331(1)(f) cautions, however, that nothing in this section should be construed to either limit or create a right to FAPE or to delay appropriate evaluations of a student suspected of having a disability.

46. Rule 6A-6.0331(3), entitled "Initial evaluation," provides, in pertinent part, as follows:

> (3) Initial evaluation. Each school district must conduct a full and individual initial evaluation before the initial provision of ESE. Either a parent of a kindergarten through grade 12 student or child age three (3) to kindergarten entry age, or a school district may initiate a request for initial evaluation to determine if the student is a student with a disability. Either a parent of a kindergarten through grade 12 student or a school district may

initiate a request for initial evaluation to determine if a student is gifted.

(a) The school district must seek consent from the parent or guardian to conduct an evaluation whenever the district suspects that a kindergarten through grade 12 student, or a child age three (3) to kindergarten entry age, is a student with a disability and needs special education and related services. Circumstances which would indicate that a student may be a student with a disability who needs special education and related services include, but are not limited to, the following:

1. When a school-based team determines that the kindergarten through grade 12 student's response to intervention data indicate that intensive interventions implemented in accordance with subsection (1) of this rule, are effective but require a level of intensity and resources to sustain growth or performance that is beyond that which is accessible through general education resources; or

2. When a school-based team determines that the kindergarten through grade 12 student's response to interventions implemented in accordance with subsection (1) of this rule, indicates that the student does not make adequate growth given effective core instruction and intensive, individualized, evidence-based interventions; or

3. When a child age three (3) to kindergarten entry age receives a developmental screening through the school district or the Florida Diagnostic and Learning Resource Center and based on the results of the screening it is suspected that the child may be a child with a disability in need of special education and related services; or

4. When a parent requests an evaluation and there is documentation or evidence that the kindergarten through grade 12 student or child age three (3) to kindergarten entry age who is enrolled in a school

> district operated preschool program may be a student with a disability and needs special education and related services.

47. A student with an [redacted] "has persistent (is not sufficiently responsive to implemented evidence based interventions) and consistent emotional or behavioral responses that adversely affect performance in the educational environment that cannot be attributed to age, culture, gender, or ethnicity." Fla. Admin. Code R. 6A-6.03016(1). The criteria for eligibility for [redacted] is set forth in rule 6A-6.03016(4) as follows:

> A student with an [redacted] must demonstrate an inability to maintain adequate performance in the educational environment that cannot be explained by physical, sensory, socio-cultural, developmental, medical, or health (with the exception of mental health) factors; and must demonstrate one or more of the following characteristics described in paragraphs (4)(a) or (4)(b) of this rule and meet the requirements of paragraphs (4)(c) and (4)(d) of this rule:
>
> (a) Internal factors characterized by:
>
> 1. Feelings of sadness, or frequent crying, or restlessness, or loss of interest in friends and/or school work, or mood swings, or erratic behavior; or
>
> 2. The presence of symptoms such as fears, phobias, or excessive worrying and anxiety regarding personal or school problems; or
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> 3. Behaviors that result from thoughts and feelings that are inconsistent with actual events or circumstances, or difficulty maintaining normal
>
> thought processes, or excessive levels of withdrawal from persons or events; or

(b) External factors characterized by:

1. An inability to build or maintain satisfactory interpersonal relationships with peers, teachers, and other adults in the school setting; or

2. Behaviors that are chronic and disruptive such as noncompliance, verbal and/or physical aggression, and/or poorly developed social skills that are manifestations of feelings, symptoms, or behaviors as specified in subparagraphs (4)(a)1.-3. of this rule.

(c) The characteristics described in paragraph (4)(a) or (b) of this rule, must be present for a minimum of six (6) months duration and in two (2) or more settings, including but not limited to, school, educational environment, transition to and/or from school, or home/community settings. At least one (1) setting must include school.

(d) The student needs special education as defined in paragraph 6A-6.03411(1)(kk), F.A.C.

(e) In extraordinary circumstances, general education interventions and activities as described in subsection (2) of this rule, and criteria for eligibility described in paragraph (4)(c) of this rule, may be waived when immediate intervention is required to address an acute onset of an internal emotional/behavioral characteristic as listed in paragraph (4)(a) of this rule.

48. Here, Petitioner has failed to meet [redacted] burden of establishing that Respondent failed to appropriately and timely evaluate and identify Petitioner as eligible for ESE services under the eligibility category of [redacted]. The undersigned concludes that, based on the Findings of Fact above, prior to [redacted], when [redacted] made a request for an initial evaluation, there was no indication to Respondent that Petitioner may be a student with [redacted] who requires special education.

49. To the contrary, during the [redacted] and [redacted] school years, Petitioner performed well academically in an accelerated [redacted] curriculum; committed no [redacted]; and exhibited no [redacted] concerns outside the norm for a similar situated student that were not resolved by standard classroom interventions.

50. After [redacted] made the evaluation request, Respondent was required to request, within thirty (30) days, consent from [redacted] to conduct an evaluation. Fla. Admin. Code R. 6A-6.0331(3)(b). Once parental consent is obtained, Respondent is required to ensure that the necessary evaluations are completed within sixty (60) calendar days.

51. Rule 6A-6.0331(4) entitled "Parental consent for initial evaluation," provides, in pertinent part, as follows:

> (a) The school district must provide the parent written notice that describes any evaluation procedures the school district proposes to conduct. In addition, the school district proposing to conduct an initial evaluation to determine if a student is a student with a disability and needs special education and related services or is gifted and needs ESE must obtain informed consent from the parent of the student before conducting the evaluation.
>
> (b) Parental consent for initial evaluation must not be construed as consent for initial provision of ESE.
>
> (c) The school district must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the student is a student with a disability or is gifted.
>
> (d) In the event that the parent fails to respond to the district's request to obtain informed written consent, the district must maintain documentation of attempts made to obtain consent.

* * *

> (f) If the parent of a student suspected of having a disability who is enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation or the parent fails to respond to a request to provide consent, the school district may, but is not required to, pursue initial evaluation of the student by using the mediation or due process procedures contained in rule 6A-6.03311, F.A.C. The school district does not violate its child find obligations if it declines to pursue the evaluation.

52. The federal regulations implementing the IDEA provide that "consent" means that "the parent understands and agrees in writing to the carrying out of the activity for which his or consent is sought, . . ." 34 C.F.R. § 300.9(b).

53. Here, although [redacted] made a request for evaluation on [redacted], it is concluded that [redacted] did not provide written consent for the recommended evaluations until [redacted]. Thereafter, Petitioner failed to present sufficient evidence to establish that the recommended evaluations were not conducted within 60 days, as required. Petitioner presented no evidence that the evaluations conducted by Respondent were inadequate. Indeed, such an assertion would be odd as the evaluations and subsequent decision by the IEP team determined that Petitioner did, in fact, meet the criteria for [redacted]. Accordingly, Petitioner has failed to meet the burden of proof with respect to the allegation that Respondent failed to timely and appropriately evaluate Petitioner for [redacted] eligibility.

54. As discussed below, Petitioner's allegation that Respondent failed to appropriately design and implement an IEP with respect to Petitioner's [redacted] eligibility is without merit. 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." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017)(quoting *Honig v. Doe*, 108 S. Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Id.* (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982)).

55. 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's Amended Complaint does not allege any procedural violations.[7]

[7] Although not alleged in Petitioner's Complaint, the undersigned acknowledges that under the circumstances set forth in the Findings of Fact, Respondent's proceeding with an IEP meeting without Petitioner would typically constitute a procedural violation. The undersigned concludes, however, that the violation here did not impede Petitioner's right to FAPE, significantly infringe Petitioner's parent's opportunity to participate in the decision-making process, or cause an actual deprivation of educational benefits. Indeed, the IEP developed in [redacted] absence resulted in granting [redacted] request--eligibility of [redacted] and an IEP designed to address the same.

56. 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.

57. Against this legal backdrop, Petitioner failed to present any evidence to support a contention that the January [redacted] IEP developed for Petitioner was not reasonably calculated to enable Petitioner to make progress in light of [redacted] circumstances. Accordingly, the undersigned concludes that Petitioner did not meet its burden of proof regarding this allegation.

58. Petitioner's Amended Complaint is also construed as alleging that Respondent did not properly implement Petitioner's IEP. 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.

59. 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.*

60. 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.

61. Here, Petitioner failed to present any evidence that Respondent failed to implement the [redacted] IEP. The undisputed evidence establishes that Petitioner did not provide consent for the initial provision of services until [redacted]. Thereafter, the unrefuted evidence established that the IEP was timely implemented. Thus, Petitioner's failure to implement claim is not substantiated.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner failed to satisfy [redacted] burden of proof with respect to the claims asserted in Petitioner's Amended Complaint. Petitioner's Amended Complaint is denied in all aspects.

DONE AND ORDERED this [redacted] day of [redacted], [redacted], in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 29th day of July, 2020.

COPIES FURNISHED:

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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).