STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 20-2849E

ALACHUA COUNTY SCHOOL BOARD,

Respondent.
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FINAL ORDER

Pursuant to notice, a final hearing was conducted via Zoom Conference on June 9 and 10, 2021, before Administrative Law Judge (ALJ) Todd P. Resavage of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Beverly Oviatt Brown, Esquire
Three Rivers Legal Services, Inc.
Suite 220
3225 University Boulevard South
Jacksonville, Florida 32216

For Respondent: David M. Delaney, Esquire
Dell Graham, P.A.
Suite B
2631 Northwest 41st Street
Gainesville, Florida 32606

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 design an individualized education program (IEP) for Petitioner to provide appropriate behavioral supports; (2) failing to implement Petitioner's IEP; (3) failing to appropriately educate Petitioner in the least restrictive environment (LRE);

(4) improperly restraining Petitioner and failing to document any such restraints; and (5) revoking Petitioner's homeschool exemption in retaliation for asserting Petitioner's rights under the IDEA.

PRELIMINARY STATEMENT

Respondent received Petitioner's Request for Due Process Hearing (Complaint) on June 17, 2020. Respondent forwarded the Complaint to DOAH on June 18, 2020, and the matter was assigned to the undersigned.

On July 7, 2020, a telephonic scheduling conference was conducted with counsel for all parties in attendance. The parties requested a hearing date in November 2020. The parties represented and acknowledged that they were requesting an extension of the time to conduct the hearing beyond the time requirements set forth in the IDEA. The hearing was scheduled for November 17 and 18, 2020.

At the joint request of the parties, the hearing was continued on three occasions. Ultimately, the hearing was scheduled for June 9 and 10, 2021. On June 3, 2021, in partial response to the undersigned's Order of Pre-hearing Instructions, the parties filed their Joint Pre-hearing Stipulation, which included a statement of facts which were admitted and required no additional proof at hearing. To the extend relevant, the admitted facts are adopted and incorporated in the Findings of Fact below.

The hearing proceeded as scheduled on June 9 and 10, 2021. Upon the conclusion of the hearing, the parties stipulated to the submission of proposed final orders on or before July 12, 2021, and to the issuance of the undersigned's final order on or before August 12, 2021.

The hearing Transcript was filed on July 9, 2021. 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 male pronouns in this Final Order when referring to Petitioner. The male pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. Petitioner is currently [redacted] years old and not attending school, but rather,is homeschooled by his mother.

2. Prior to the relevant time frame, Petitioner had been found eligible for and had begun receiving exceptional student education (ESE) services under the eligibility categories of Autism Spectrum Disorder (ASD) and Language Impairment (LI). Petitioner is nonverbal in his communication.

3. For the 2018-2019 school year, Petitioner was in [redacted] grade and attended School A (a public elementary school in Respondent's school district). His educational placement was that of an ESE self-contained classroom.

4. Previously, Petitioner's IEP team (including Petitioner's mother) had determined that, due to his disabilities, he required a specialized curriculum based on access points. This curriculum provided "access to the general education curriculum for students with significant cognitive disabilities."[1]

[1] Fla. Admin. Code R. 6A-1.09401(1). The standards, benchmarks, and access points are contained in publications incorporated by reference and made a part of rule 6A-1.09401.

5. On or about August 23, 2018, at the inception of the fall semester, Petitioner was playing on the school playground slide, and when he reached the bottom of the slide, the slide scratched his back. His back was observed that day by his teacher, [redacted], and at least one paraprofessional. The minor scrape was not believed to warrant consultation with the school nurse or any further action.

6. Petitioner's mother, however, appeared at School A the following day and proceeded to make accusations of abuse. Several days later, on August 28, 2018, Petitioner's mother sent an email to [redacted] wherein she stated that, "I hope u don't take this the wrong way, but I will seriously hurt someone over my son." She further advised that, "[w]hen I saw that on him I wanted to wrap my hands around who evers [sic] throat that did that to him. I don't put up with NO kind of ABUSE when it comes to my boy."

7. Petitioner's mother became upset again in October 2018 when she observed a teacher-parent communication affixed to Petitioner's backpack. An IEP meeting had been scheduled for October 11, 2018. On the day preceding the meeting, Petitioner's mother sent the following email communication to [redacted]:

> Tomorrow is [Petitioner's] IEP meeting I will speak to u how u speak to me so PLEASE this is for my son.. Lets keep it respectful..I see u don't answer emails maybe I should come staple a BIG bright sign to ur back..Please learn to answer parents emails..Now ur showing ur hack of communication.. Have a very blessed day..

8. The IEP meeting was conducted, as scheduled, and Petitioner's IEP documented Petitioner's exceptionality and how it affected his involvement and progress in the general curriculum as follows:

> Due to [Petitioner's] disabilities he requires specialized curriculum based on Access Points to make progress. [Petitioner's] delay in expressive

> and receptive communication skills and cognition impede his ability to comprehend instructions and ask clarifying questions related to the learning tasks. He requires one-on-one instruction using an intensive, specialized curriculum based on Florida Access Points along with the following accommodations (as needed) to make progress: oral presentation of directions, items and answer choices, directions repeated and clarified, verbal encouragement, fewer items per page, increased space between items, answers entered directly into work booklet if separate answer sheet used, assessments administered over several brief sessions in a familiar place by a familiar person who has been appropriately trained in an individual or small group setting with increased opportunity for movement, reduced stimuli, preferential seating, and allowing for frequent breaks. He requires additional one-on-one assistance for education needs and safety and elopement concerns including but not limited to supervision, facilitating and explaining reading and mathematical work problems, fine motor skills, redirection, coping mechanisms, guidance with transitioning from activity to activity and around campus.

9. The October 2018 IEP documented, as a special consideration, that Petitioner's behavior impeded his learning or the learning of others. Specifically, it was noted that, "due to [Petitioner's] significant unacceptable behaviors he requires an increased level of supervision and needs assistance from a one-on-one paraprofessional to prevent harm to himself and others the entire school day. [Petitioner] cannot recognize danger or verbalize if he is hurt."

10. The "unacceptable behaviors" appear to be memorialized in an October 11, 2018, memorandum authored by Paraprofessional [redacted]. [redacted] documented the following:

> When [Petitioner] is asked to perform a "non-preferred" activity [he] will refuse as evidenced by [him] throwing a tantrum, hitting [himself], throwing [himself] on the ground, screaming uncontrollably, making gestures as if [he] is going to bite [himself].
>
> When an educational video is being played in the Smartboard for the class, if [Petitioner] doesn't like what is being played [he] will go to the Smartboard and touch the board to change the activity to something [he] likes. [He] will not take verbal cues or requests to stop changing the educational video. [Petitioner] engages in constant repetitive watching of videos on the iPad which has resulted in [him] losing [his] privilege of having the iPad as a preferred activity. [He] refuses to use the academic applications instead using [his] own preferred videos and games.
>
> At lunch time [he] is subject to having severe tantrums if [he] doesn't get to make [his] food choices as to what [he] wants to eat first. Mom has instructed us to feed [him] [his] chicken first, however, [Petitioner] wants [his] cheese or gummies first and if [he] doesn't get to do this, [he] has a severe temper tantrum which results in [him] throwing [his] food, shoving chairs, hitting [himself], running away from the table, and yelling uncontrollably. These tantrums have lasted as little as 1 minute and as long as 5 minutes with [him] not settling down with any kind of routine.

11. The October 2018 IEP, in the domain of social or emotional behavior, set forth the following goal: "[g]iven direct instruction, practice, visual supports and modeling, [Petitioner] will successfully demonstrate two new skills per 9 weeks including recognizing, expressing and regulating emotions and recognizing verbal cues at a level of 80% accuracy in 4 out of 5 occasions." It is undisputed that, at this time, a functional behavioral assessment (FBA) was not discussed by either party.

12. On or about October 26, 2018, Petitioner's mother inquired about changing schools on the grounds that she did not believe he was receiving an appropriate education and that his teacher, [redacted], was not properly equipped to instruct a student with his level of disability. On November 30, 2018, [redacted], Respondent's Student Services/ESE Director, advised [redacted], School A's Principal, that Petitioner's mother was interested in a fresh start for her child at another school.

13. On December 18, 2018, Petitioner hit his chin on the playground slide, which was observed by Petitioner's paraprofessional. Petitioner's mother subsequently contacted School A, refused to speak with Principal [redacted], and voiced threats concerning Principal Russell and Ms. Shaw.

14. From the beginning of the 2018-2019 school year, until January 8, 2019, when he transferred to School B (Petitioner's home or zoned school in Respondent's district), Petitioner was absent from school 22 out of 64 days.

15. At School B, Petitioner was placed again in a separate class placement, wherein he was with nondisabled peers less than 40 percent of the school day. While a certified ESE teacher had been retained at the start of the year, the teacher relocated with her husband at the end of the fall semester. Respondent advertised for the vacant position; however, no certified ESE teachers applied. [redacted], the principal at School B during this time, credibly testified that the best available applicant, and who was ultimately hired, was a certified school counselor from [redacted] County, Florida.[2] The evidence establishes that in addition to the teacher, in this setting, the students were assisted by three long-serving paraprofessionals.

16. On February 4, 2019, an IEP meeting was conducted (with Petitioner's mother attending by phone). At that time, it was noted that Petitioner's school day was now longer and the IEP was amended to reflect the same. At

[2] It is unclear from the record when the individual was hired.

this meeting, Petitioner's mother raised concerns, including the possibility of occupational therapy screening and assistive technology screening. A review of the IEP reveals that his social and emotional goal remained unchanged. A follow up meeting was scheduled for March 19, 2019; however, the meeting was cancelled at the request of Petitioner's mother.

17. During his brief tenure at School B, redness under Petitioner's eyes was observed, as well as some scratches on his arm. Petitioner's mother was concerned as to the nature of these conditions occurring at school. The credible evidence established that the same was properly investigated by School B staff. No evidence was presented to support a finding that the physical marks on Petitioner were due to the actions or inactions of School B staff, or other students. On April 11, 2019, an IEP meeting was conducted and it was hypothesized by the school staff that the redness under his eyes may be the result of Petitioner's frequent crying and rubbing of his eyes. No evidence to the contrary was presented.

18. During this meeting, Petitioner's mother expressed her dissatisfaction with School B. Among other concerns, she believed that: (1) Petitioner was too smart for his current placement; (2) the class lacked sufficient structure; (3) the paraprofessional was unkind; (4) Petitioner was sleeping all day in class; and (5) the class was too loud and chaotic resulting in stress to Petitioner. She also remained concerned about the marks on his eyes and body.

19. Petitioner's mother expressed an interest in potentially transferring Petitioner to another school location, including one that is more restrictive. During the meeting, [redacted], Respondent's ESE and Student Services Supervisor, attempted to assist Petitioner's mother with a tour of the more restrictive school setting. At the meeting, Petitioner's mother advised the IEP team that Petitioner would not be returning to School B.

20. Petitioner did not return to School B after April 11, 2019, or attend another school in Respondent's district for the balance of the year. The

attendance records document that while at School B, Petitioner attended school for 44 days and was absent for 14.

21. Despite the prior dissatisfaction with School A, Petitioner's mother was able to obtain a zoning exemption and re-enrolled Petitioner in School A for the 2019-2020 school year. Petitioner had been promoted to third grade and was again placed in a separate class placement, wherein he was in a regular class less than 40 percent of the day.

22. Petitioner's teacher at this time was [redacted], who possesses extensive experience teaching ESE and ASD students, in particular. [redacted] credibly testified that [redacted] classroom was composed of [redacted]self, four paraprofessionals and nine students. Petitioner had a one-on-one paraprofessional assigned specifically to him throughout the day.

23. On August 20, 2019, Petitioner's mother emailed [redacted] advising that Petitioner "keeps coming home with these marks or bruises on him," and inquired as to whether a student on the playground or in class was being rough with him. On the same day, [redacted] responded and advised that the students are never left alone with an adult or other student, that no other student had been rough with Petitioner, and that when [redacted] changed his diaper at lunch, no marks were observed.

24. On September 6, 2019, Petitioner's mother sent the following correspondence to Principal [redacted]:

> So I'm just wondering why [Petitioner's] first week he came home with the same bruises as last year and they were from a child in [redacted]'s class and now that it is being brought to y'alls attention and I've said I will take it to a higher authority the bruises have stopped? Something is not right who is trying to cover up what happed to [Petitioner] the first week? I'm glad it has stopped because I have eyes and ears everywhere and if it happens again I will take it to higher authority my son does not harm himself.

25. Principal [redacted] responded to her inquiry the same day and advised that there is only one student in common from last year's class and the student is very gentle with no history of aggressiveness. No evidence was presented to establish that any actions or inactions of School A staff or any conduct by other students resulted in any marking or bruising of Petitioner.

26. On September 23, 2019, an IEP meeting was held to develop a new annual IEP. As reported in the document, Petitioner's mother's primary concern was Petitioner's lack of desire to attend school and questioned the school-based members of the team why this was so. Naturally, the IEP team could not answer that question specifically; however, it was suggested that the programming had become more rigorous in third-grade and that Petitioner appeared frustrated when working on nonpreferred academic tasks.

27. As in his prior IEPs, it was documented that his behavior impeded his learning or the learning of others; however, an FBA had not been conducted and a behavior intervention plan (BIP) had not been drafted. The IEP documented that the use of positive behavioral supports and strategies would be addressed by a visual schedule; first/then cards (with choices for reinforcement: iPad, toys or songs); frequent praise; acknowledgement of feelings (upset for loud noises, frustration); and reminders to use his communication device.

28. In the domain of social or emotional behavior, the IEP documented that, "[d]ue to [Petitioner's] disability [he] requires individual and very small group instruction to make progress in [his] social skills. [Petitioner] requires specific, repetitive instruction in social skills." In this area, his present level of performance was documented as follows:

> [Petitioner] is able to enter the classroom, take out his folder and communication device, get his morning work and begin working with minimal prompts (no more than 2 prompts per task). He is

> able to complete repetitive tasks (sorting, matching, etc), with no more than 1 prompt and seems to enjoy these tasks. He is able to stay in his assigned area during whole group instruction for 30 minutes with no more than 5 reminders to stay in his seat/area. He likes to hold things in his hands (fidget toys, dvds, sensory items) and will sometimes get up to hold these items. We are working on expressing interest in items and asking to get them. During small group/individual instruction, he is very reluctant to work. He uses his communication device to type "I want headphones" repeatedly during instruction (meaning that he wants to play on the class iPad). When he is told "work first, then headphones," he frequently screams, throws himself on the ground, bites his fingers, and hits (himself and others). He has been offered headphone to block out noises repeatedly to make sure that he isn't bothered by other noises, but he continues to type "I want headphones" and points to the iPad. We are working on teaching him choice boards (first work, then choice).

29. The annual goal for social and emotional behavior provided that, "[b]y the end of this IEP, when given a task, a visual request, words of encouragement and prompts as needed, [Petitioner] will comply with the request and complete the task without protesting, in 4 out of 5 opportunities." As short-term objectives or benchmarks, it was documented that Petitioner would use his communication device to express frustration, ask for help, or request more time to complete a task on four out of five opportunities. Additionally, Petitioner was to comply with requests and complete a task without protesting, in three out of five opportunities.

30. [redacted] credibly testified that, at times, Petitioner demonstrated maladaptive behaviors such as throwing items to the ground, screaming, biting his fingers or hands, and hitting. [redacted] recalled three occasions where Petitioner attempted to elope. [redacted] opined that the frequency of his unwanted

behaviors was variable, and more problematic following periods when he was absent from school for multiple days.

31. The undisputed evidence indeed established that Petitioner was frequently absent during the Fall 2019 semester. From the start of school on August 12 through October 23, 2019, at which time the zoning exemption to School A was revoked, he had 13 excused absences, two unexcused absences, and was otherwise absent for part of the school day on five other occasions. In sum, he was present or partially present for 34 days and absent for 15 days.

32. Respondent's witnesses uniformly and credibly testified that all students, and students with autism, in particular, benefit from consistent attendance and routine. Petitioner's teachers and speech language pathologist all credibly testified that Petitioner's frequent absences had a negative impact on his behavior, ability to progress, and overall school performance. Specifically, the record supports a finding that Petitioner's frequent absences and resulting interruption of routine made it difficult for staff to determine whether the positive behavioral interventions being implemented in the classroom and overall classroom management were sufficient for success or progress.

33. To the extent Petitioner had behavioral concerns, the same were not limited to the classroom setting. The evidence supports a finding that Petitioner experienced similar behaviors at home and in the clinical setting (as more fully described below). Petitioner's mother testified that his behaviors seemed to increase during third grade. Specifically, she testified that:

> He started to engage in self-injurious behaviors. He started to want to destroy everything in my home. I had to take pictures off walls. Anything that could hurt him, just take it away from him, because it's like he did a 360. He changed into a totally different person.

34. As noted above, Petitioner attended School A during the 2019 Fall semester on a zoning exemption. During this time, the evidence established that Petitioner's mother engaged in disruptive and inappropriate communication with School A staff. Her communications included unsubstantiated allegations or insinuations of neglect or abuse;[3] threats of spying and using secret recording devices; threats to the professional careers of staff working with Petitioner; and implied threats of violence in the event Petitioner was abused or neglected in some fashion.

35. The record is devoid of any evidence that Petitioner was ever restrained while attending School A or B or otherwise in Respondent's care. The record is also devoid of any evidence that any alleged marks or bruising or skin tears or any other bodily imperfection was due to any action or failure to act on the part of any school personnel or other student.

36. Due to concerns for staff, the deterioration of the school-parent relationship, and Petitioner's frequent absenteeism, on October 24, 2019, Principal [redacted] notified Petitioner's mother that the zoning exemption for Petitioner to attend School A was revoked. The content of the letter, in pertinent part, is set forth as follows:

> The purpose of this letter is to inform you that [Petitioner's] Zoning Exception to attend [School A] is being revoked. The District Program that [he] currently attends at Littlewood is offered at [his] home zoned school, which is [School B]. Please register [Petitioner] at [School B] on or before Monday, October 29, 2019. [Petitioner] will be dropped from enrollment at [School A] after the close of business on October 25, 2019. If you have any questions regarding this matter or would like to discuss other options, please contact [redacted] at the District Administrative Office, [redacted].

[3] An investigation conducted by the Florida Department of Children and Families resulted in no findings of abuse or neglect.

37. Petitioner's mother did not enroll Petitioner in another school within Respondent's district, but rather, elected to homeschool Petitioner.

38. Petitioner presented the testimony of [redacted], who is employedas a private speech language pathologist. [redacted] began working with Petitioner on or about June 1, 2018. As Petitioner is nonverbal, in October 2018, [redacted] began working with him on an augmentative and alternative communication device. The specific device is an iPad installed with a program called Proloquo2Go.

39. [redacted] credibly testified that, initially, Petitioner resisted using the device when it was presented. He would engage in "some pretty extreme tantrums," and would throw the device against the wall or drop it on the floor. With the passage of time (over the last few years) [redacted] credibly testified that he has improved with his usage of the device and will sit and answer questions using the device.

40. In this private setting with no other students present, [redacted] has observed, on occasion, Petitioner engage in self-injurious behaviors such as hitting himself or dropping to the floor in a very sudden and forceful manner. [redacted] also described several occasions where Petitioner attempted, without success, to elope from the therapy session.

41. [redacted] has never observed Petitioner in the school environment, has not assisted in developing any of Petitioner's IEPs, and has had no communication with Respondent's personnel. [redacted] offered no criticism or opinion of the Petitioner's communication goals as set forth in his IEPs nor whether the same were properly implemented.

42. Petitioner contends in his PROPOSED FINAL ORDER that Respondent did not provide the speech services set forth in his IEP during the Fall 2019 semester. In support of this position, Petitioner contends that he was to receive 30 minutes per week; however, he had only six sessions prior to January 2020.

43. As an initial matter, Petitioner ceased attending School A on October 25, 2019, and was not re-enrolled in Respondent's school district. While it would appear that there were nine school weeks during his brief stint at School A, due to the evidentiary presentation, the undersigned cannot conclude that Petitioner was not offered speech therapy on three occasions.

CONCLUSIONS OF LAW

44. 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).

45. 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).

46. 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).

47. Local school systems must satisfy the IDEA's substantive requirements by providing all eligible students with a free appropriate public education (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).

48. "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).

49. 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)).

Inadequate IEP Design:

50. Petitioner's Complaint alleges that Respondent failed to design an appropriate IEP by failing to provide or include appropriate behavioral supports. The IDEA provides that, in developing each child's IEP, the IEP team must, "[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Fla. Admin. Code R. 6A-6.03028(3)(g)5.

51. 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 206-07. 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 advance a procedural argument.

52. 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 206-07. 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*.

53. 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, 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.

54. 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.").

55. Here, the undersigned finds and concludes that Petitioner failed to present sufficient evidence to establish that Respondent violated the IDEA in designing an IEP without sufficient behavioral support. Although it is undisputed that Respondent did not propose or conduct an FBA or create a BIP, that, without more, is not outcome determinative. *See J.B. b/n/f Lauren B. v. Frisco Indep. Sch. Dist.*, 2021 WL 790641, at *4 (E.D. Tex. Mar. 2, 2021)("J.B. points to no authority indicating failure to provide a Functional Behavior Assessment within a certain time period warrants concluding J.B. was denied a FAPE. To the contrary, courts have routinely found that failure to conduct a Functional Behavior Assessment does not necessarily result in the denial of a FAPE").

56. Here, the better evidence supports a finding and conclusion that Petitioner's negative behaviors were adequately addressed in his IEPs and managed by positive behavioral supports and interventions in the self-contained classroom setting with significant adult support. To the extent that an FBA or BIP would have been beneficial, which is speculative, the ability to conduct an FBA (and subsequently draft a BIP) was hampered by Petitioner's chronic absenteeism. Indeed, the evidence established that consistent attendance is a prerequisite for collecting meaningful data and determining the efficacy of positive behavioral supports and strategies being implemented in the classroom.

IEP Implementation:

57. Petitioner's Complaint further alleges that Respondent failed to properly implement Petitioner's IEPs. With respect to this broad allegation, the only evidence presented to support this allegation concerns Respondent's alleged failure to provide the requisite sessions of speech therapy.

58. 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 sufficient evidence that Respondent failed to properly implement his IEPs. Even assuming, *arguendo,* that the failure to provide speech therapy to Petitioner on three occasions was entirely attributable to Respondent, it is concluded that, under the facts of this case, the same does not constitute a material deviation from the IEP sufficient to violate the IDEA. When viewing the therapy sessions that were not conducted in the context of the IEP as a whole, it is concluded that the same did not result in a material implementation failure.

Educational Placement:

62. Petitioner's Complaint alleges that Respondent failed to appropriately educate Petitioner in the LRE. Petitioner's Proposed Final Order does not address this claim; however, out of an abundance of caution, the claim is addressed below.

63. The IDEA provides 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.

64. 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).

65. 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 parent(s), 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).

66. With the LRE directive, "Congress created a statutory preference for educating handicapped children with nonhandicapped children." *Greer v. Rome City Sch. 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).

67. 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.

68. In *Greer*, 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 are to 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 he 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.

69. Succinctly, Petitioner failed to present any evidence that his educational placement was contrary to the LRE directives or that Petitioner's educational placement was, at any time, contrary to Petitioner's wishes.

Restraint/Seclusion:

70. Petitioner's Complaint contends that he was improperly restrained and that the restraints were not properly reported; however, this claim is not addressed in Petitioner's Proposed Final Order.

71. 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.

72. 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).

73. Here Petitioner failed to present any evidence that he was, at any time, restrained or secluded. To the contrary, all of Respondent's witnesses credibly testified that Petitioner was never restrained or secluded. Accordingly, there is also insufficient evidence for the undersigned to conclude that Respondent failed to properly report such restraint or seclusion.

Retaliation:

74. Petitioner's Complaint alleges that his zoning exemption to attend School A was revoked in retaliation for asserting his rights under the IDEA. Petitioner did not raise a claim for retaliation under Section 504 of the Rehabilitation Act of 1973 (Section 504), and does not address this claim in his Proposed Final Order; however, for the sake of administrative exhaustion, the undersigned will address said claim.

75. A parent has a private right of action to sue a school system for violating Section 504. *Ms. H v. Montgomery County Board of Education*, 784 F. Supp. 2d 1247, 1261 (M.D. Ala. 2011). To prevail on a Section 504 claim, a plaintiff must show "(1) the plaintiff is an individual with a disability under the Rehabilitation Act; 2) the plaintiff is otherwise qualified for participation in the program; (3) the plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reasons of his or her disability; and (4) the relevant

program or activity is receiving federal financial assistance." *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cty., Fla.*, 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007). As the Middle District of Alabama has explained:

> To prove discrimination in the education context, courts have held that something more than a simple failure to provide a FAPE under the IDEA must be shown. A plaintiff must also demonstrate some bad faith or gross misjudgment by the school or that he was discriminated against solely because of his disability. A plaintiff must prove that he or she has either been subjected to discrimination or excluded from a program or denied benefits by reason of their disability. A school does not violate § 504 by merely failing to provide a FAPE, by providing an incorrect evaluation, by providing a substantially faulty individualized education plan, or merely because the court would have evaluated a child differently. The deliberate indifference standard is a very high standard to meet.

J.S. v. Houston Cty. Bd. of Educ., 120 F. Supp. 3d 1287, 1295 (M.D. Ala. 2015)(internal citations omitted).

76. The Eleventh Circuit has defined deliberate indifference in the Section 504 context as occurring when "the defendant knew that harm to a federal protected right was substantially likely and failed to act on that likelihood." *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012). This standard "plainly requires more than gross negligence," and "requires that the indifference be a deliberate choice, which is an exacting standard." *Id.* (internal and external citations omitted).

77. Here, Petitioner failed to present sufficient evidence to establish that Respondent's revocation of the zoning exemption supports a finding of deliberate indifference. To the contrary, the evidence established that the zoning exemption was revoked due to Petitioner's mother's inappropriate conduct towards faculty and staff resulting in a breakdown of the school/student relationship and Petitioner's chronic absenteeism, which

Respondent believed may be ameliorated by Petitioner attending a school closer to his home. Accordingly, Petitioner's retaliation claim is denied.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is denied in all respects.

DONE AND ORDERED this 10th day of August, 2021, in Tallahassee, Leon County, Florida.

TODD P. RESAVAGE
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of August, 2021.

COPIES FURNISHED:

Beverly Oviatt Brown, Esquire
Three Rivers Legal Services, Inc.
Suite 220
3225 University Boulevard South
Jacksonville, Florida 32216

Amanda W. Gay, Esquire
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399

David M. Delaney, Esquire
Dell Graham, P.A.
Suite B
2631 Northwest 41st Street
Gainesville, Florida 32606

Victoria Sears Gaitanis, Dispute Resolution
Program Director
Department of Education
325 West Gaines Street
Tallahassee, Florida 32312

Julian Moreira
Educational Program Director
Florida Department of Education
325 West Gaines Street
Tallahassee, Florida 32399-0400

Francine Turney, Esquire
Alachua County Public Schools
620 East University Avenue
Gainesville, Florida 32601

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399

Dr. Carlee Simon, Superintendent
620 East University Avenue
Gainesville, Florida 32601-5448

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).