STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 21-1431E

SEMINOLE COUNTY SCHOOL BOARD,

Respondent.
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SEMINOLE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 21-1665E

**,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was conducted via Zoom conference on June 16, 17, and August 3 through 6, [redacted], before Administrative Law Judge (ALJ) Todd P. Resavage of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For School Board: Stephanie K. Stewart, Esquire
Seminole County School Board
400 East Lake Mary Boulevard
Sanford, Florida 32773-7121

STATEMENT OF THE ISSUES

The issues for determination in this proceeding are whether Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, by: (1) failing to appropriately evaluate Petitioner with respect to his proficiency in reading, writing, and mathematics; (2) failing to design an individualized education program (IEP) for Petitioner to appropriately address speech and language issues; (3) failing to design an IEP for Petitioner to appropriately address the behavioral, academic, or emotional manifestations of [redacted] and [redacted]; (4) failing to implement Petitioner's IEPs; (5) denying Petitioner's parents meaningful input and participation in the development of Petitioner's IEPs; (6) failing to educate Petitioner in the least restrictive environment (LRE); and (7) whether Petitioner's parents' request for an Independent Educational Evaluation (IEE) should be denied.

PRELIMINARY STATEMENT

Respondent received Petitioner's Request for Due Process Hearing (Complaint) on April 29, [redacted]. Respondent forwarded the Complaint to DOAH on the same day, and the matter (DOAH Case No. 21-1431E) was assigned to the undersigned. On May 24, 2021, the hearing was scheduled for June 16 and 17, 2021.

On May 24, [redacted], Respondent herein filed a separate due process complaint that sought a determination of the appropriateness of its comprehensive psychological evaluation conducted by its school psychologist in November [redacted]. This complaint was necessitated by Respondent's decision to deny the request of Petitioner's parents to provide an IEE, with respect to the evaluation, at public expense. This matter (DOAH Case No. 21-1665E) was also assigned to the undersigned.

On June 3, 2021, Respondent's Motion to Consolidate was filed. On June 7, 2021, an Order of Consolidation was entered whereby DOAH Case Nos. 21-1431E and 21-1665E were consolidated pursuant to Florida Administrative Code Rule 28-106.108.

The hearing proceeded, as scheduled, on June 16 and 17, [redacted]. The hearing did not conclude. Accordingly, a telephonic scheduling conference was conducted thereafter, and the hearing was continued and rescheduled for August 3 through 6, [redacted]. Again, the hearing proceeded as scheduled. Upon the conclusion of the hearing, the parties stipulated to the submission of proposed final orders on or before 30 days from the filing of the hearing transcript and to the issuance of the undersigned's Final Order on or before 60 days from the filing of the hearing transcript.

The hearing Transcript was filed on October 12, 2021. The identity of the witnesses and exhibits and rulings regarding each are as set forth in the Transcript. Both parties filed untimely proposed final orders, which have been considered in the preparation of this Final Order. The timing of this Order has been extended commensurately with the filing of Petitioner's proposed 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.

2. Prior to the relevant time frame,[1] Petitioner had been found eligible for and had begun receiving exceptional student education (ESE) services under the eligibility categories of Specific Learning Disability (SLD) and Language Impairment (LI). It is undisputed that Petitioner's underlying learning disability is dyslexia.[2]

3. For the [redacted] school year, Petitioner was in [redacted] grade and attended School A (a public elementary school in Respondent's school district). His educational placement was in a regular classroom, where he participated with nondisabled peers for 80% or more of the day.

4. On March 29, 2019, Petitioner's IEP team (including Petitioner's mother) conducted an IEP meeting to develop an annual IEP. At that time, it was noted that, as a result of his disabilities, Petitioner had needs to be addressed in the domains of curriculum and learning environment, independent functioning, and communication. It was also noted that Petitioner needed assistive technology devices or services.

5. During the meeting, the IEP team discussed the recent evaluations conducted by Respondent's lead speech and language pathologist (SLP) and subsequent testing for [redacted] As a result of the evaluations and testing, Petitioner was found eligible for ESE services under another eligibility category, Speech Impaired (SI). [redacted], an SLP who works primarily at School A, credibly testified that the disability category of SI

[1] Petitioner's Complaint was filed on April 29, 2021, and, therefore, the relevant time period is the two years preceding the filing of the Complaint. *See* 20 U.S.C. § 1415(b)(6)(A)-(B).

[2] Petitioner avers in his Complaint that, in addition to [redacted], Petitioner also has [redacted], and his [redacted] testified at hearing that Petitioner also has [redacted]. The evidentiary presentation, however, was insufficient for the undersigned to make a finding of fact confirming the same. [redacted] and [redacted], like [redacted], would be categorized under the SLD eligibility category.

[3] [redacted] is a fluency disorder marked by speech that sounds rapid, unclear, and/or disorganized.

encompasses articulation, fluency, and voice; however, she explained that Petitioner's primary deficit is in the area of [redacted] and, specifically, [redacted].

6. With respect to the domain of curriculum and learning environment, the IEP documented three separate goals, each with corresponding short-term objectives or benchmarks. The goals primarily corresponded to Petitioner's deficiencies in reading. The goals are set forth as follows:

> When presented with a list of 20 multi-syllabic words, [Petitioner] will apply grade level phonics and word analysis skills in decoding words to accurately read 17 out of the 20 words and be able to encode with 80% accuracy in 4 out of 5 attempts by the end of the IEP year.[4]
>
> When reading grade level text, [Petitioner] will demonstrate proficiency in reading comprehension abilities, earning a minimum 70% accuracy on given questions.
>
> When given a [redacted] grade level passage, [Petitioner] will be able to accurately read 75 words per minute in 3 out of 4 attempts, by the end of the IEP year.

7. In the domain of independent functioning, it was documented that his functional communication skills were age-appropriate, and that he was able to communicate his wants and needs. It was determined, however, that he benefits from certain accommodations, such as oral presentation, written notes, response options, access to materials that are available online with read aloud features, and assistive technology for writing and reading. Accordingly, two goals were drafted under this domain that also incorporated his documented need for assistive technology, which provides as follows:

> [Petitioner] will be able to open an appropriate program and use typing, word prediction, speech to

[4] The IEP year would conclude on March 29, [redacted].

> text, and text to speech to participate in classroom assignments in 3 out of 5 attempts.
>
> By the end of the IEP year, [Petitioner] will create a short "all about me" presentation for his teachers to show how he learns best and what accommodations are necessary to support his learning.

8. Under the domain of communication, the IEP documented that Petitioner's deficits in speech and language were impacting his reading comprehension and fluency. Further, due to his difficulties with expressive language, it was documented that he would benefit from scaffolding, sentence stems, written notes, response option, chunking, pre-teaching of vocabulary words, and oral and visual presentation.

9. Six goals were developed to assist Petitioner with his communication concerns. The goals were accompanied by a total of 15 separate short-term objectives or benchmarks. The first goal, set forth below, and corresponding short-term objectives, is representative:

> Goal: When reading aloud at grade level, [Petitioner] will improve reading fluency abilities for academic and social purposes with 80% accuracy.
>
> Short-term objectives or benchmarks: [Petitioner] will improve his/her morphological awareness abilities by identifying morphological endings (ex: tenses, plurals) in words and providing the correct meaning and spelling with 80% accuracy over 3 data collections.
>
> [Petitioner] will improve his awareness of irregular past tense verbs and pronouns when reading aloud by identifying irregular past tense verbs and pronouns and describing the correct meaning and spelling with 80% accuracy over 3 data collections.
>
> [Petitioner] will demonstrate appropriate lexical and syntactic stress during reading tasks by using

> appropriate prosody, inflection and tone with 80% accuracy over 3 data collections.

10. The IEP documented the specially designed instruction, related services, and supplementary aids and services Petitioner was to receive. Specifically, Petitioner was to receive 120 minutes-per-week (mpw) of direct instruction in phonics; 60 mpw of direct instruction in reading comprehension, fluency, and reading strategies; 60 mpw of support facilitation in reading comprehension and independent functioning; 60 mpw of language therapy; and 40 minutes-per-month (mpm) of speech therapy. Additionally, Petitioner was to receive the related service of assistive technology (AT) with the trialing of an AT device for written output and reading support on a daily basis; and a supplementary aid/service of an FM tower system.

11. In addition to the instruction and services noted immediately above, the IEP documented 39 classroom and instructional accommodations at Petitioner's disposal. The accommodations included "presentation" accommodations such as oral presentation of directions and note taking assistance; "responding" accommodations such as periodic checks by an administrator to be sure Petitioner was entering answer choices correctly; "scheduling" accommodations like assignments administered over several brief sessions and allowing frequent breaks and established timelines and predictable routines; and "setting" accommodations such as increased opportunity for movement, preferential seating, and assignments or tests administered by a familiar person who has been appropriately trained.

12. The IEP documented that Petitioner's educational environment was that of a [redacted] wherein he would be with nondisabled peers [redacted] of the school day.

13. Petitioner completed the balance of his [redacted]-grade year with passing grades and was promoted to the [redacted] grade.

14. Petitioner remained at School A for the [redacted] (his [redacted] grade) school year. During the fall semester of [redacted], Petitioner's ESE services were provided by [redacted], until she resigned in December [redacted]. While [redacted] did not testify, her lesson plans and logs of direct instruction were admitted into evidence. The better evidence supports a finding that she provided the ESE specialized instruction as set forth in the IEP during her tenure with Petitioner.

15. An IEP meeting was held on October 22, [redacted], to review Petitioner's progress. The purpose of the meeting was to address Petitioner's parents' request for a reevaluation to determine progress made within the last year and to identify any gaps between his present levels of academic achievement and functional performance and [redacted]-grade level expectations. Among other items and data shared, the IEP team provided Petitioner's iReady[5] diagnostic scores which were documented as follows: "PA: tested out; Phonics: grade K; High Frequency Words: grade K; Vocab: grade 1; Comprehension Literature: grade 1; Comprehension Informational Text: grade K."

16. At this meeting, Petitioner's mother requested that he be "opted out" of iReady diagnostic assessments and would like an alternative. The team also discussed teacher observations that Petitioner was having difficulty focusing. Petitioner's mother advised that Petitioner, who has [redacted], has not been taking his prescribed [redacted] medication due to side effects.[6]

17. At the conclusion of the meeting, the IEP team recommended a reevaluation of his language skills; a follow up with [redacted] (AT teacher) regarding an assessment for a keyboarding device; and rescheduling

[5] Respondent uses "iReady," an online program for reading and mathematics with personalized instruction and diagnostic assessments, as a district assessment for elementary students to monitor progress throughout the school year with diagnostic assessments in English/language arts and math.

[6] All of the IEPs designed during the relevant time period document that Petitioner's mother reported Petitioner to have a medical diagnosis of [redacted].

an IEP meeting to update Petitioner's goals following the results of the reevaluation.

18. Starting on November 22, [redacted],[7] at Petitioner's parents' request, Petitioner was reevaluated to assess his current language skills and to compare test results from his prior evaluation to determine if progress had been made and if other services would be beneficial to his communication and academic success. [redacted] administered several assessment instruments, including the Comprehensive Test of Phonological Processing (CTOPP-2), the Test of Integrated Language and Literacy Skills (TILLS), and the Test of Narrative Language-2nd Edition (TNL-2). Additional information was obtained from his current IEP, classroom observations, classwork, formalized evaluations, and input from his parents and teachers.

19. On the TILLS assessment, Petitioner was scored as "profoundly impaired" in written expression; "severely impaired" in phonemic awareness, nonword repetition, and nonword reading; "moderately impaired" in reading comprehension and written expression; "below average" in nonword spelling, reading fluency, and written expression discourse; "average" in listening comprehension and social communication; and "superior" in vocabulary awareness.[8] Administration of the CTOPP-2 produced the following results: "average" in phonological awareness and phonological memory and "poor" in rapid naming. Finally, in the TNL-2, Petitioner's scores were interpreted as "above average" in comprehension and the narrative language ability index and "average" in production.

20. Petitioner's grades as of March [redacted] were documented as follows: English/language arts (A), math (A), science (A), and social studies (A). The

[7] Based on the evidentiary presentation, it appears that the evaluation and testing occurred over several dates between November 22, [redacted], and January 29, [redacted].

[8] These terms correlate to the following percentile ranks: 0% profoundly impaired, 1-2% severely impaired, 3-4% moderately impaired, 5-14% below average, 15-16% borderline, 17-20% low average, 21-82% average, and 83-84% high average, 85%+ superior.

record evidence provides the following results from his math and reading comprehension assessments/tests throughout the [redacted] school year:

> Unit 1 Math Assessment: 90%
> Unit 2 Math Assessment: 90%
> Unit 3 Math Assessment: 91%
> Reading Comprehension Test1: 85% with test corrections (originally 70%)
> Reading Comprehension Test 2: 72% with test corrections (originally 65%)
> Reading Comprehension Test 3: 69% with test corrections (originally 56%)

21. On or about March 30, [redacted], due to the COVID-19 pandemic, School A transitioned to distance learning. During this time, Petitioner was serviced remotely via Google classroom and videoconferencing.

22. On April 15, [redacted], an annual IEP meeting was conducted, and an IEP was developed. The IEP was subsequently amended on May 6, [redacted], and then again on May 21, [redacted]. Ultimately, several of Petitioner's goals were changed. Of note, his speech therapy was amended from 40 mpm to ten mpw of "tag" therapy, wherein Petitioner is removed from class and provided targeted therapy in a one-on-one setting. His writing and phonics goals were also amended, as were his short-term objectives to the phonics goals.

23. During the May 21, [redacted], meeting, the IEP team also addressed Petitioner's need for extended school year (ESY) services, and it was determined he met the criteria. It was determined that he would receive instruction from June 2 through 25, [redacted], and receive 240 mpw, via virtual learning.

24. Conference notes from the meeting documented the following:

> [Petitioner] is receiving tier 3 intervention. The intervention is in the area of phonics. Research based materials are being used. The materials are SIPPs.[9] [redacted] is meeting virtually with

[9] Systematic Instruction in Phonological Awareness, Phonics, and Sight Words is a research-based foundational skills program to help struggling readers in grades K-12, including students with [redacted].

> [Petitioner] 4 days per week for 15 minutes each to meet his intervention needs as part of Multi-Tiered System of Support. Through Distance [L]earning [Petitioner] is receiving additional hours to assist with closing the gap. This tutoring time is 45 minutes per day, 4 times per week through the last week of school. Beginning June 2, [redacted] [Petitioner] will receive additional hours 4 times per week, 1 hour each using SIPPs. At the end of June, the team will reassess progress and determine next steps.

25. [redacted], Respondent's compliance coordinator, explained that, during the [redacted] school year, Petitioner had not received all of his *general education* services during the time the specially designed ESE instruction was being provided. Accordingly, Respondent and Petitioner's parents determined and agreed that compensatory education time was required. As noted in the preceding paragraph, during the four-week period he received 240 mpw of phonics using SIPPS, 240 mpw in grammar, and 50 mpw in language therapy.

26. Petitioner completed the balance of his [redacted]-grade year with passing grades and was promoted to the [redacted] grade.

27. On July 7, [redacted], a meeting was conducted to review Petitioner's progress over the summer. A review of the SIPPS assessments demonstrated mastery (80% or more), and his ESY goal had been achieved. The IEP team determined that Petitioner would benefit from continued services and recommended 60 mpw of language therapy and 480 mpw of ESY services.

28. The [redacted] school year began at School A on August 17, [redacted].[10] On August 28, [redacted], Petitioner's mother decided to home school Petitioner and provided Respondent with a form entitled "Notice of Intent to Establish & Maintain a Home Education Program." Approximately three weeks later, on September 23, [redacted], Petitioner's mother provided Respondent with a form

[10] During this time, Petitioner was a hybrid student of virtual school and attending "face-to-face" for English/language arts and some of his ESE support.

entitled "Notice of Termination Home Education Program," thus ending Petitioner's brief separation from School A.

29. On September 25, [redacted], an IEP meeting was conducted wherein the team discussed Petitioner's progress, curriculum, goals, diagnostic results, and scheduling. The school-based members of the team discussed his progress in the SIPPS program, his level within the program, and the progress to date. The team also discussed the use of the "95% Group, Inc.," curriculum.

30. The IEP team met again on November 17, [redacted], for the purpose of drafting another IEP. At this time, Petitioner's mother reported that Petitioner had [redacted]; however, no medical documentation was provided. Recent diagnostic test results were discussed and documented in the IEP. The documentation, in pertinent part, is set forth as follows:

> Parent has requested that student not participate in iReady diagnostic assessments or instruction.
>
> The Diagnostic Assessment of Reading-2 (DAR-2) was administered to provide an alternate method of diagnostic assessment in English/Language Arts sills.
>
> DAR 2: 9/14/[redacted]
> Word Recognition: Level 1-2 (second half of 1st grade)
> Oral Reading (Accuracy): Level 2 (2nd grade)
> Silent Reading Comprehension: Level 4 (4th grade)
> Spelling: Level 1-1 (first half of 1st grade)
> Word Meaning: Level 5 (5th grade)
>
> easyCBM.com Data Probes: 9/14/[redacted]
> Additional data probes were completed in [Petitioner's'] areas of need based on the results of the DAR-2 using easyCBM.com. These data probes will be repeated for the purpose of progress monitoring skill growth in these specific area:
> Word Reading Fluency: late 1st grade
> Passage Reading Fluency: 2nd grade level

Phonics Screening Inventory (PSI): May [redacted]
Skill 6 – vowel teams (mastery of Skill 10 is considered proficient)

Phonological Awareness Screening Inventory (PASI): November [redacted]
Mastered all Skills 1-10 (proficient)

SIPPS Placement Assessment: 9/9/[redacted]
Section H (placement in SIPPS Challenge Level 1 Lesson 1)

Developmental Reading Assessment (DRA): March [redacted]
Level 40 (4th grade)

31. At this time, concerns were discussed regarding his performance in math. A review of his classroom data revealed he was struggling with tests and quizzes (his current average was a 62.5%) and that he needed to improve toward the [redacted]-grade standard of demonstrating knowledge of double-digit multiplication and division.

32. In summary, it was noted that Petitioner has strengths in auditory comprehension, word knowledge/vocabulary, creative thinking, silent reading comprehension, and, with accommodations, can read [redacted]-grade level materials aloud and pass comprehension assessments with 80% accuracy and above. His phonological awareness, vocabulary, and comprehension were determined to be within normal limits and were not impacting his performance in the general curriculum. His deficits, however, in the areas of phonics, fluency, writing, and math did impact his performance in the general curriculum, and he required the use of multi-sensory instruction that was explicit, direct, cumulative, and intensive to target his areas of deficit.

33. His IEP was amended to include, *inter alia*, an increase of direct instruction in reading to 90 mpw, an increase in language therapy to 60 mpw, and now direct instruction in math for 60 mpw. Additionally, a new IEP math

goal was developed. The IEP documented approximately 40 classroom and instructional accommodations.

34. For all that appears, based on the percentage of ESE instruction Petitioner was to receive in a resource room setting, his educational setting was changed from a regular setting to that of a "resource" setting. Accordingly, in the resource setting, he would be in the regular class setting no more than 79% of the day and no less than 40% of the day.

35. Yet another IEP meeting was conducted on January 15, [redacted]. At this meeting, the IEP team addressed concerns regarding Petitioner's emotional status. A counseling referral was completed, and the IEP team discussed completing a functional behavioral assessment (FBA) and, potentially, the drafting of a behavior intervention plan (BIP). School A's psychologist, [redacted], agreed to begin collecting data to determine target behaviors.

36. On February 8, [redacted], an FBA was completed. Thereafter, on February 16, [redacted], [redacted] completed a social-emotional evaluation which revealed Petitioner was experiencing difficulties. Accordingly, a BIP was drafted.

37. On April 16, [redacted], the IEP team met and drafted an IEP for the last time preceding the filing of Petitioner's Complaint. A review of the most current data provided that Petitioner was showing proficiency in phonological awareness; his fluency was on a [redacted]-grade level; he was demonstrating average or above-average grades in reading vocabulary; and he was comprehending grade-level material successfully, with his teachers reporting no concerns in this area. Conference notes drafted contemporaneous with the IEP meeting, however, document that Petitioner was reading, overall, at a [redacted]-grade level. It was noted that he needed to continue targeting his reading fluency.

38. The draft IEP documented that his math grade on March 12, 2021, was a 59%; however, his grade as of April 26, 2021, was a 90.6%. Both the

IEP and the conference notes documented that he was still showing specific deficits in multiplication and division that he needed to improve upon towards the fifth-grade standard.

39. The draft IEP, for the first time, documented that Petitioner's behavior impeded his learning or the learning of others. It was reported that he had a short attention span, difficulty initiating tasks, being off task, and was resting his head when he appeared bored.[11] In addition to various accommodations addressing the lack of attention and off-task behavior, the draft IEP documented the need for direct instruction in social-emotional skills and maintaining relationships. Accordingly, the IEP was drafted to provide direct instruction in social/personal skills and independent functioning skills for 230 mpw, as well as weekly counseling services.

40. It was further documented that Petitioner has an auditory processing disorder. Pursuant to an auditory processing evaluation conducted by [redacted], on November 16, [redacted], the findings suggested he has difficulties with dichotic listening tasks such as binaural separation tasks. According to the report, "[b]inaural separation refers to the ability of the listener to process an auditory message coming into one ear while ignoring a disparate message being presented to the opposite ear at the same time." Recommended accommodations related to the disorder were adopted and incorporated into the draft IEP.

41. At this final meeting, among other concerns, Petitioner's mother expressed disapproval with the SIPPS and "Go Math" curriculum utilized by Respondent and requested others be employed. Respondent declined. Dissatisfied with the IEP draft, Petitioner's mother left the IEP meeting and did not agree to the final draft. Petitioner's Complaint was filed three days later.

[11] The evidence established that Petitioner received no disciplinary referrals at any time during the relevant period. There was no evidence presented that an eligibility determination should have been conducted to determine if Petitioner was eligible for ESE services under the category of Other Health Impairment, due to his [redacted] diagnosis.

42. The undersigned finds that the IEPs designed by Respondent during the relevant time period: (1) contained an appropriate statement of Petitioner's present levels of academic achievement and functional performance; (2) provided appropriate statements of measurable goals; (3) satisfactorily described how Petitioner's progress towards meeting the goals would be measured and when periodic reports on Petitioner's progress toward meeting the annual goals would be provided; (4) appropriately stated the ESE, related services, supplementary aids and services, and accommodations to be provided to Petitioner; and (5) provided an explanation of the extent, if any, to which Petitioner would not participate with nondisabled children in the regular class.

43. The undersigned finds that the IEP meetings during the relevant time period were properly convened with the mandatory and permitted members of Petitioner's IEP team.

44. The undersigned finds that Petitioner's parents were provided extensive opportunities to participate in Petitioner's educational decision-making process.

45. Petitioner provided competent and unrefuted evidence that, as of the filing of the Complaint, he was not reading overall at [redacted]-grade level despite multiple years of specially designed instruction and accommodations.

46. Notwithstanding, Respondent presented competent evidence that Respondent made growth on his IEP goals. Specifically, the undersigned finds most persuasive the testimony of [redacted], Petitioner's ESE teacher.

47. [redacted] began working as Petitioner's ESE teacher in January [redacted]. [redacted] is a Florida ESE certified teacher with 20 years of ESE experience. She provided specially designed instruction in phonics, reading comprehension, fluency, reading strategies, support facilitations, and independent functioning. [redacted] testimony provided multiple examples

of demonstrable growth that Petitioner made on his IEPs' goals, including his newly-established math goal.

48. Petitioner contends that the curriculum used by Respondent, particularly the reading curriculum, was unsatisfactory and proposes, as a resolution, the use of another reading program, Orton-Gillingham. The undersigned finds, however, that Respondent's chosen curriculum and materials were reviewed and approved for each area of instruction under the applicable standards through a state process coordinated by the Florida Department of Education (DOE), and were appropriate. The undersigned further finds that the curriculum and materials were provided with fidelity to Petitioner through its licensed teachers.

49. The undersigned finds that the IEPs that were designed for Petitioner during the relevant time period were materially implemented.

50. On May 17, [redacted], the parties met for a resolution session in DOAH Case No. 21-1431E. At that time, Petitioner requested a neuropsychological IEE. Respondent declined and issued a prior written notice contending that Petitioner had not had a similar evaluation since November [redacted]. Respondent advised Petitioner that, upon receipt of parental consent, Respondent would complete a new evaluation that included academic and cognitive functioning.

CONCLUSIONS OF LAW

51. 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).

52. 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).

53. 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 Cnty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

54. Local school systems must satisfy the IDEA's substantive requirements by providing all eligible students with an 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).

55. "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).

56. 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 Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017)(quoting *Honig v. Doe*, 484 U.S. 305 (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:

57. Petitioner's Complaint alleges that Respondent failed to design an appropriate IEP by failing to appropriately address his [redacted]. Specifically, Petitioner's Complaint avers that the IEPs designed by Respondent fail to provide adequate speech and language therapy to address his cluttering and articulation issues, as well as to address his auditory processing disability. Petitioner further alleges that Respondent failed to design an IEP to provide or include appropriate behavioral supports for Petitioner's diagnoses of [redacted] and [redacted].

58. 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.

59. 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.J. v. Muscogee Cnty. 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).

60. Here, Petitioner advances a procedural argument. Petitioner contends that Respondent "denied meaningful input and participation in the process of developing our [son's] educational program and all other rights associated with participation, including the mode of communication needed for parent with disability." This argument is quickly resolved. It is found and concluded based upon a review of the voluminous evidentiary record that Petitioner's parents were afforded extensive and meaningful input and participation in the development of Petitioner's IEP and educational programming. Petitioner failed to met his burden with respect to this procedural allegation.

61. 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.*, 137 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*.

62. 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 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.

63. 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.").

64. As discussed in the Findings of Fact, while Petitioner was not reading overall at his grade level, this failure is not tantamount to a determination that the IEPs designed for Petitioner were inadequate. To the contrary, the better evidence demonstrated that the IEPs designed for Petitioner over the relevant time period were reasonably calculated to enable Petitioner to achieve passing marks and advance from grade to grade and were appropriately ambitious in light of his circumstances.

65. The real gravamen of Petitioner's Complaint concerns the reading curriculum utilized by Respondent with Petitioner. Petitioner contends that another program, such as Orton-Gillingham, should be employed.

66. In order to effectuate its duties, Respondent was required to, and continues to be required to, provide instruction that meets the requirements of the state educational standards. *See* §§ 1001.10(6) and 1006.28-.38, Fla.

Stat. These standards are peer-reviewed and researched sets of criteria for student achievement in core subject areas that were developed by DOE. *See* § 1003.41, Fla. Stat.

67. Towards that end, Respondent was required to, and does, provide instruction from curriculum, materials, and texts, which were reviewed and approved for each area of instruction under the applicable standards through a state process coordinated by DOE. In particular, reading and language arts instruction is provided through a District-based framework developed to comply with state statutes and aligned with state standards. *See* § 1001.215, Fla. Stat. The specifications for these materials and curriculum were based on criteria developed from scientific research on effective educational strategies and materials. Further, these curriculum materials were peer-reviewed for compliance with state specifications. *See* §§ 1001.10 and 1001.215, Fla. Stat.

68. Petitioner failed to present sufficient evidence that the curriculum chosen and employed by Respondent's certified teachers to educate Petitioner failed to comply with the above-referenced state educational standards. As such, Respondent's chosen curriculum and materials complied with the requirements of the IDEA.

69. In summary, Petitioner failed to present sufficient evidence to meet its burden that Respondent failed to design an IEP to adequately address his speech and language, auditory processing, and behavioral concerns related to [redacted] and [redacted].

IEP Implementation:

70. Petitioner's Complaint further broadly alleges that "[t]he material aspects of our [son's] IEP are not being followed."

71. In *L.J. v. School Board of Broward County*, 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]." *Id.* 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.

72. 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.*

73. 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.

74. Here, Petitioner failed to meet his burden in establishing that Respondent failed to properly implement his IEPs. As discussed in the Findings of Fact, Respondent determined that in the [redacted] school year, Petitioner had not received all of his general education services during the time the specially designed ESE instruction (as set forth in the IEP) was being provided to Petitioner. The evidence further established that the parties agreed to an amount of compensatory education to account for the lost general education services, and compensatory education was provided.

75. The evidence supports the determination that Respondent did materially implement Petitioner's IEPs over the relevant time period.

Educational Placement:

76. Petitioner's Complaint alleges that "[o]ur [child] is not being educated in the least restrictive environment." The evidence, however, does not support Petitioner's argument.

77. The IDEA provides directives on students' placements or education environments 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.

78. 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, DOE 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).

79. 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).

80. 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).

81. 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.

82. 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.

83. Succinctly, Petitioner failed to present any evidence that his educational placement was contrary to the LRE directives.

Evaluations:

84. A child's IEP is based, in significant part, on the results of statutorily mandated evaluations of the child. *See, e.g.*, 20 U.S.C. § 1414(b)(2)(A)(ii), (c)(1)–(2), (d)(3)(A), (d)(4)(A). Under the IDEA, a child with a suspected disability must receive a "full and individual initial evaluation" to determine the existence and extent of his disability and whether he are entitled to special education and related services under the Act. *Id.* § 1414(a)(1). The child is further entitled to a "reevaluation" at least once every three years for the purpose of updating his IEP. *Id.* § 1414(a)(2), (d)(4)(a). Because it occurs by default every three years, this is generally referred to as a triennial reevaluation.

85. The IDEA requires that a child's initial evaluation and triennial reevaluations be comprehensive. In conducting these evaluations, a school must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information," *id.* § 1414(b)(2)(A), and the school must assess the child in "all areas of suspected disability," *id.* § 1414(b)(3)(B). The child's IEP team takes the results of these evaluations and regularly collaborates to develop, maintain, and update the child's IEP over the course of their education. *See id.* § 1414(d)(4)(A) (a child's IEP team must review their IEP "periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved").

86. As another procedural safeguard, the parents of a child with a disability has an absolute right to obtain an IEE of their child, 34 C.F.R. § 300.502(a)(1), and the school must consider that IEE "in any decision made with respect to the provision of FAPE to the child," *id.* § 300.502(c)(1). An IEE is defined in the IDEA's implementing regulations as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." *Id.* § 300.502(a)(3)(i).

87. Though this IEE right is unrestricted by statute, it is practically constrained by the parent's ability or desire to pay for an IEE. Nevertheless, there is a limited circumstance in which a parent may seek an IEE at public expense. A parent is entitled to a publicly funded IEE "if the parent disagrees with an evaluation obtained by the public agency." *Id.* § 300.502(b)(1). If a parent disagrees with an evaluation and requests an IEE at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense. *Id.* § 300.502(b)(2).

88. Petitioner's Complaint contends that "[o]ur son has never been fully evaluated to identify his disabilities that are affecting his problems in reading, writing and math." The better evidence establishes that Petitioner was properly evaluated and identified throughout the relevant time period.

This allegation is construed by the undersigned as referring to Petitioner's request for a neuropsychological IEE, which forms the basis of Respondent's due process complaint in DOAH Case No. 21-1665E.

89. In *D.S. v. Trumbull Board of Education*, 975 F.3d 152 (2d Cir. 2020), the circuit court of appeals considered, *inter alia*, the timing limitations of an IEE request. The court's analysis of this issue is instructive here and set forth as follows:

> The IDEA does not provide a statute of limitations for a parent's right to disagree with an evaluation for the purpose of obtaining an IEE at public expense. But that does not mean that a parent will be able to abuse the process to obtain a publicly funded IEE based on their disagreement with an old evaluation. *See* Appellee Br. 7 (highlighting the Board's fears that a parent might request an IEE "even 100 years after the underlying evaluation" is conducted). As a practical matter, a parent's right to disagree with an evaluation and obtain an IEE at public expense is tethered to the frequency with which the child is evaluated. And the IDEA establishes a logical timeframe in which a parent's right to request an IEE is actionable.
>
> "A parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees." 34 C.F.R. § 300.502(b)(5). Because the only evaluations that trigger a parent's right to an IEE at public expense are the initial evaluation and triennial reevaluations discussed in Section 1414 of the Act, a parent's right to an IEE at public expense ripens each time a new evaluation is conducted. The time within which a parent must express their disagreement with an evaluation and request an IEE depends on how frequently the child is evaluated.
>
> By default, triennial reevaluations must occur at least once every three years. 20 U.S.C. § 1414(a)(2)(B)(ii). Where, as here, a child is evaluated according to the default evaluation

> timeline, the parent must disagree with an evaluation within that three-year timeframe. By contrast, should a parent and school agree that the child be evaluated on a more frequent basis, *see id.* § 1414(a)(2)(A), (a)(2)(B)(i), the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs. For example, if a child is reevaluated each year, the logical time frame within which to contest the evaluation is one year. Otherwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation.

D.S., 975 F.3d at 169-70.

90. Here, Respondent is ostensibly operating on the three-year default evaluation timeline as it contends Petitioner was last evaluated in the requested area of assessment in November [redacted]. Pursuant to the legal authority cited above, Petitioner is still within his right to request an IEE of the November [redacted] evaluation.

91. Concluding that Petitioner had the ability to request an IEE concerning the November [redacted] evaluation, it was Respondent's burden to present evidence that the evaluation obtained was appropriate. Respondent did not address the appropriateness of the prior evaluation, but rather, contended merely that Respondent has not had the opportunity to reevaluate and advocates for consent to reevaluate. Respondent failed to satisfy its burden.

92. Accordingly, Petitioner is entitled to a comprehensive psychological IEE at public expense.[12]

[12] While merely suggestive, given the passage of time since the 2018 evaluation, although Petitioner is entitled to the IEE, it would appear to be more beneficial to Petitioner to proceed with Respondent conducting a comprehensive psychoeducational reevaluation (assuming parental consent), and, then, if the parents disagree with that evaluation, request an IEE at public expense.

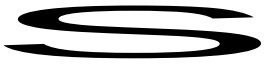
ORDER

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

1. Petitioner's Complaint in DOAH Case No. 21-1431E is DISMISSED in its entirety.

2. Petitioner's request for a comprehensive psychological IEE that forms the basis of DOAH Case No. 21-1665E is GRANTED.

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



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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).