

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

Case No. 21-3213E

vs.

DUVAL COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

A due process hearing was held on April 21 and 22, 2022, by Zoom conference, before Todd P. Resavage, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Kelly Hebden Papa, Esquire
James Everett Millard, Esquire
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City of Jacksonville
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STATEMENT OF THE ISSUES

Whether, as alleged, Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, by failing: 1) to evaluate Petitioner due to escalating behaviors, and 2) to consider a functional behavior assessment (FBA), behavior intervention plan (BIP), and safety

plan; and whether, as alleged, Respondent violated Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, by: 1) discriminating against Petitioner with knowledge of Petitioner's diagnosis and allowing students and staff to single out and ridicule Petitioner, and 2) retaliating against Petitioner by threatening Petitioner's mother with law enforcement when Petitioner's mother attempted to schedule a meeting.

PRELIMINARY STATEMENT

Respondent received Petitioner's Request for Due Process Hearing (Complaint) on October 14, 2021. Respondent forwarded the Complaint to DOAH on October 21, 2021, and the matter was assigned to the undersigned.

On October 29, 2021, Petitioner's Unopposed Motion to Continue was filed. An Order of Specific Extension of Time was entered on November 1, 2021, extending the resolution period to December 1, 2021. Two additional motions for extension of time were subsequently filed and granted, resulting in the hearing ultimately being scheduled for April 21 and 22, 2022.

On March 4, 2022, counsel for River City Science Academy filed a Notice of Appearance. On April 20, 2022, pursuant to the undersigned's April 1, 2022, Order of Pre-hearing Instructions, the parties filed a Joint Pre-Hearing Stipulation. Pursuant to paragraph 8 of the stipulation, the parties agreed to certain facts which are deemed admitted and required no further proof at hearing. To the extent relevant, the same are adopted and incorporated in the Findings of Fact section below.

The hearing proceeded, as scheduled, on April 21 and 22, 2022. Upon the conclusion of the hearing, the parties agreed to the submission of proposed final orders on or before 21 days from the filing of the hearing transcript and

to the issuance of the undersigned's Final Order on or before 42 days from the filing of the hearing transcript.

The hearing Transcript was filed on May 9, 2021. The identity of the witnesses and exhibits and rulings regarding each are as set forth in the Transcript. Both 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.
2. In the 2018-2019 school year, Petitioner was a [REDACTED]-grade student at a public elementary school in Nassau County, Florida. On April 19, 2019, an individualized education program (IEP) meeting was held wherein Petitioner was found and determined to be eligible for exceptional student education (ESE) under the eligibility categories of Other Health Impaired, Autism Spectrum Disorder, and for the related service of Occupational Therapy.
3. At that time, an IEP was designed and developed to address Petitioner's educational needs. Of relevance to the issues in this proceeding, the IEP documented and attempted to address Petitioner's behavioral issues. The IEP documented that Petitioner exhibited behaviors that impeded his

learning or that of others. The IEP further documented that previously, on February 19, 2019, a positive BIP had been developed.¹

4. Under the Present Level of Educational and Functional Performance section of the IEP, it was documented that Petitioner's disability affected his involvement and progress in the general curriculum and further noted his priority educational need for academic achievement as follows:

[Petitioner's] behaviors impede [his] ability to successfully participate in the general curriculum. These behaviors manifest into forms of verbal aggression (screaming, yelling and crying) which disturb the learning environment and prevent [himself] and [his] peers from learning. [He] would benefit from visual cues and verbal encouragement to follow teacher directives and cueing to stay on task. [He] requires extended time and breaks in order to complete academic tasks. In order to fully participate [he] would benefit from small group instruction and an environment with reduced stimuli. [He] requires more opportunities for movement and preferential seating.

* * *

[Petitioner's] priority educational need for academic achievement requires highly structured, individualized behavioral intervention plan infused throughout the school day. [He] also requires daily specific instruction on social or emotional behaviors to develop self regulatory skills.

5. It appears from the record, that on or shortly before the date the IEP was developed, Petitioner pulled the fire alarm at school which ultimately resulted in Petitioner being physically restrained. The IEP determined that, "[d]ue to the student's current level of function, [he] requires a home setting." Accordingly, his educational placement was a hospital/homebound placement.

¹ The referenced BIP is not attached to the IEP and is not otherwise included in the admitted exhibits.

Following the fire alarm incident, he did not physically return to school in Nassau County.

6. Petitioner was not promoted to [REDACTED] grade, primarily, because he did not take and score a Level 2 or above on the statewide Florida Standards Assessment, which is required for promotion.

7. Petitioner's mother relocated to Duval County prior to the start of the 2019-2020 school year. Petitioner's mother enrolled him in School A, a [REDACTED] school within Respondent's school district. The school year began on or about August 12, 2019. He remained a [REDACTED]-grade student.

8. An initial IEP meeting at School A was held on September 11, 2019. The IEP documented that Petitioner exhibits behaviors that impact his learning or the learning of others. His primary behavioral concerns were noted as follows:

Student will get in others' personal space and will not stop even when teacher/and or student has made the request for [him] to move away from the students.

Student will invade personal space of [his] classmates and continue even when requested to stop (either by teacher or student).

Student becomes defiant when redirected by teacher, particularly when student is redirected from being off task. For example, [Petitioner] will continue to draw after directions to begin work has been given. If teacher does not prompt [Petitioner] to stop drawing, [he] will continue to draw.

9. Two appropriate goals and objectives were developed to address his behavioral concerns. Additionally, during the meeting, a Positive Behavior Support Plan (PBSP) was developed. The PBSP appropriately identified Petitioner's primary behavioral concerns at the time; listed his schedule and noted how likely the behavior was occurring during a particular activity or subject; set forth the antecedents to the behaviors; provided the

[He] also has trouble making friends. Other students call [him] weird which is hurtful and [he] cries at home."

15. To address the parental concerns, this IEP provided for independent functioning goals that included self-regulation strategies and objectives; and a goal and related objectives for handling social interaction problems. His off-task behavior was also documented in the educational placement section of the IEP, and it was determined that he would be removed from the general education classroom one time per week, for 30 minutes, for writing and social skills instruction.

16. Unfortunately, the optimism concerning Petitioner's behavior progress was short-lived. The running record, referenced above, documented his behaviors as observed throughout the school day. Twenty-six entries are documented from September 20 through November 30, 2020. The incidents include verbal aggression, profane or vulgar language, sexual comments, physical aggression, refusal to follow directives, and elopement. The following entries from the running record are representative:

[Petitioner] admitted to saying inappropriate words after a student reported that [he] told her that she had the lesbian stare, [him] going through puberty and about [his] private parts.

[Petitioner] ran out of the classroom, used inappropriate language; kicking and hitting the Dean's office door; attempted to grab phone from [REDACTED] hand by bending [REDACTED] arm to grab the phone.

[Petitioner] was upset that [he] did not get free time because [he] did not finish [his] checklist when [he] said [he] did (forged teachers initials) [He] then told another student that [he] would get a gun and shoot her.

[Petitioner] was making threats, saying [he] was going to kill people so I started recording on my phone. [He] said [he] would "destroy my phone."

[He] told [student's name]" Do you want to die?" and kept saying "Fight me" to him. Then [he] held up a sign [he] wrote in [his] reading book that said "Die [student's name]."

17. On October 7, 2020, [REDACTED], School Security Monitor, sent an email to School A's Principal, [REDACTED], and Administrative Assistant [REDACTED], describing several disturbing incidents he had witnessed regarding Petitioner's behavior. The correspondence documented Petitioner running down a hallway (during class) and repeatedly saying "die, die, die" and "kill, kill, kill" while holding a stuffed animal character from a horror video game. The second concerned Petitioner flipping chairs and knocking down dividers in a classroom. According to [REDACTED] email, when Petitioner's mother was contacted to help deescalate the situation, Petitioner repeatedly stated "just admit you hate me" and asked at one point "do you just want me to kill myself." [REDACTED] further advised that "I do not wish that the child be in trouble, but I fear this is only going to get worse. I have seen over the past few weeks that it is indeed getting worse. I fear he may do harm to himself or worse to another student."

18. On October 21, 2020, ESE Coordinator, [REDACTED], sent an email to Petitioner's mother to schedule an IEP meeting to update the IEP and reinstitute the PBSP. After receiving no response, on November 5, 2020, Petitioner's mother was contacted by phone, wherein Petitioner's mother advised she did not wish to be contacted during work hours via phone, requested communication instead via Class Dojo,² and ended the call. A follow up email was also sent to Petitioner's mother on November 5, 2020, scheduling the meeting for November 10, 2020. A hard copy of the IEP meeting notice was also sent home with Petitioner.

² Class Dojo is a messaging application that allows instant communication between the school and parents.

19. On November 9, 2020, Petitioner's mother responded via email that she had not received the prior emails. Ultimately, the meeting was rescheduled for November 19, 2020. At the IEP meeting, the teachers' main behavioral concerns were work completion and following directions. The meeting notes reflect the following:

[Petitioner's] teachers have made observations and have tried various interventions such as incentives, consequences, and replacement behavior instruction; however, [Petitioner's] responses to these interventions are inconsistent. On one day, [he] may respond easily to any or all of these interventions with no issues. The next day, [Petitioner] does not respond to any of the interventions and will not do any work. [He] has spent time in the Dean's Office and has received 1 Out of School Suspension and 2 Referrals. Additionally, [he] has conduct points for vulgar language, inappropriate language, physical aggression and disrespect.

20. The November 2020 Addendum IEP added back in the social and emotional domain. In this domain, the IEP documented Petitioner's present level of performance as follows:

The effects of [Petitioner's] behavior manifest in the area of compliance & work completion. When [Petitioner] feels that another student has done something wrong to [him] (calling names, bothers [him] in some way), [he] will become very agitated. [He] will refuse to calm down, makes threats to teachers and student(s). [He] says "My mom says I can punch him in the face" and perseverates on attacking the other student that allegedly wronged [him]. [He] refuses to complete work by playing on [his] Chrome Book or playing with cards/toys, making loud grunting noises. Recently [he] has been leaving the classroom without permission to find other teachers or support staff in the school (ESE teacher, School Counselor, Dean of Students or Assistant Dean of Students). [He] has been found wandering the halls of the school. When [he]

is presented with what the consequences of what will happen if [he] punches or hurts another student physically, [he] says [he] doesn't care that [his] mom gave [him] permission. At time [sic] [he] becomes defiant when [he] is followed or asked to sit in the assistant dean's office. [He] replies with "no what are you going to do about it?" and continues to leave the designated area.

[His] teachers are concerned that this behavior is affecting academic growth. [He] is not completing work which affects [his] grades. [His] teachers report that [Petitioner] often misses class(s) due to things happening at resource, or behavior complications. [He] will be with the school counselor/dean's assistant or Dean for whole class periods. Because [he] misses class, [he] is missing instruction and therefore not on the same track as other students in class. [He] often will call other students names, or make threats towards them which affects [his] ability to make friends. [He] also talks very negatively about [himself]. When [he] gets in [his] agitated moods, [he] is very hard to control and calm down.

21. Two social/emotion goals concerning his behavior (and respective objectives) were added back to the IEP. This Addendum IEP further added direct instruction in replacement behaviors via support facilitation (for 15 minutes) twice daily. Pursuant to the IEP, he was also to receive direct instruction in replacement behaviors via a weekly consultation.

22. At the November 2020 meeting, the IEP team further agreed that a PBSP needed to be put in place again. Although it is unclear from the record, it appears that the PBSP was completed on or before November 30, 2020. Similar to the prior PBSP, the new PBSP appropriately identified Petitioner's primary behavioral concerns at the time; listed the student's schedule and noted how likely the behavior was to occurring during a particular activity or subject; set forth the antecedents to the behaviors; provided the consequences-what the adult should do or say immediately after the behavior

arises; described the function and hypothesis of why the behavior was occurring; and set forth antecedent, teaching, and consequential interventions to be employed. The PBSP also noted that it would be assessed by the respective teacher via the running record and disciplinary records.

23. Following this meeting and up until school recessed for Winter Break, Petitioner had only one incident documented on the running record. On that occasion, he had an argument with his teacher regarding logging off a website wherein it was documented that he said "I don't care if I break the computer" and that "when people mess with me, I will kill them."

24. Prior to the November 2020 meeting, on November 18, 2020, Petitioner's mother had filed a bullying investigation regarding Petitioner and another student. On November 23, 2020, the other student's parent had, in turn, filed a bullying investigation against Petitioner. The bullying investigations were conducted by [REDACTED], Dean of Students. On December 4, 2020, the investigation was concluded with both claims being unsubstantiated; however, due to inappropriate actions towards each other, the students were requested to sign a "Stay Away Agreement," whereby the students were not to approach, talk to, sit by, or have any contact with each other.

25. Upon return from the break, on January 6, 2021, a running record notation from his teacher documents the following:

[Petitioner] said [he] wants to kill [himself], because [he] is mad at [his] mom. [He] said that [his] mom lies to [him] all the time, and will not be shocked if she puts [him] for adoption. [He] said [he] is gonna cut [his] ears so [he] doesn't have to listen to anyone. Then [he] pretended that [he] was deaf, and started shouting. 5 minutes later [he] hold [sic] up pencils to [his] eyes and said that [he] was going to poke [himself] in the eye and die. [He] kept talking in class none [sic] stop. [His] friends were trying to comfort [him], [he] did not listen to anyone.

26. On or about January 11, 2021, a behavior tracking sheet was developed for the use of Petitioner's teachers [REDACTED], [REDACTED]. The four behaviors tracked were: completing all work, paying attention and participating, being polite, and following directions. The purpose of this document was to provide data to determine whether the interventions were being successful and to incentivize Petitioner. If Petitioner obtained sufficient positive points he was entitled to a small or large prize. The results were intermittent, with Petitioner obtaining his goals on several occasions from January 11 through February 19, 2021.

27. Petitioner engaged in a cluster of code of conduct violations between February 17 and February 23, 2021. On February 17, 2021, when requested to provide the teacher with a ball that had become the source of an argument with another student, the disciplinary referral documents that Petitioner said "f**k you and f**k this school. She's lucky I don't f***ing punch her in the face," and further informed the teacher that "I don't have to f***ing do anything." Petitioner further received a disciplinary referral on February 23, 2021, for writing on the restroom wall, threatening the class, and using vulgar language. For all that appears, as a result of these incidents, collectively, Petitioner's discipline was to serve a one-day in-school-suspension (ISS).

28. Petitioner's mother disagreed with the discipline on the grounds that another student was also writing on the wall and, from her perspective, was not appropriately punished. Petitioner's mother then voluntarily removed him from in-person attendance at School A. For the balance of the school year, he attended school via the virtual platform. He successfully completed his [REDACTED]-grade year, earning passing grades.

29. [REDACTED] has been a school counselor for 23 years. She worked fulltime on School A's campus during the 2020-2021 school year. [REDACTED] first became familiar with Petitioner when he was having a crisis during the 2020-2021 school year, and she was one of the staff members that Petitioner

preferred to see if he was having behavioral issues. Petitioner's mother testified that, "it's not documented in [his] IEP, but [he] spent a lot of time working with [REDACTED] in her office working with her because [he] built a really good rapport with her."

30. In late October or early November 2020, Petitioner's mother chose to pick up Petitioner when she was notified that he was having a behavior issue. On one such occasion, [REDACTED] spoke to Petitioner's mother regarding Full Service School (FSS) counseling and Petitioner's mother indicated an interest. Petitioner's mother, however, ultimately didn't follow through with the referral.

31. During February 2021, prior to his removal from in-person learning, [REDACTED] began conducting "check-ins" with Petitioner every morning. Even after Petitioner began attending virtually, [REDACTED] continued to be a point of contact. On March 3, 2021, Petitioner's mother contacted [REDACTED] to now request an FFS referral. In response, [REDACTED] sent a referral to FSS that same day and followed up on March 15, 2021. When [REDACTED] learned that Petitioner's mother had still not received contact, she sent an expedited referral to FSS and inquired as to the status. Ultimately, an intake appointment was made with a therapist; however, the referral was closed out for non-compliance.

32. Petitioner returned to School A, in-person, for the 2021-2022 school year, which began on or about August 10, 2021. The following day, Petitioner's mother messaged one of his teachers, [REDACTED], advising that "[Petitioner] is having some kid named [student's name] constantly touching [him today]. I want to remind you that if someone puts their hands on [Petitioner] [he] does have my full permission to put [his] on them. Other students need to keep their hands to themselves." Petitioner's mother further admonished "[p]lease don't start this school year off on my bad side. [Petitioner] was excited to have you as a teacher again, don't ruin it."

33. Several days later, on August 17, 2021, while playing a card game with another student, Petitioner said "I hope you get blown up by a terrorist," and told another student that "I hope you die." When Petitioner's mother was advised of these comments, she responded that "I've already come to you with MULTIPLE issues of children singling out [Petitioner], being rude to [him], harassing [him], and calling [him] names." On August 20, 2021, Petitioner cursed at and threatened to punch another student while inadvertently hitting his teacher, [REDACTED], in the arm.

34. On or about August 24, 2021, Petitioner contracted COVID-19, and was therefore required to quarantine at home for the next 14 days.

35. On September 3, 2021, while Petitioner was out of school, his annual IEP meeting was held. During the meeting, the PBSP was reviewed, and his primary behaviors of concern were documented, as follows:

The primary concern of [Petitioner's] teachers is [his] inability to follow directions and [his] interactions with other students. When [Petitioner] is asked to begin a classroom assignment, [he] will say "ok ok ok" but never start the task. [He] will continue drawing or whatever preferred activity [he] is currently engaged on. [Petitioner] often has issues with students in [his] class. When [Petitioner] feels another student has wronged [him] [he] stays fixated on this for an extended amount of time and will not complete work.

36. The PBSP documented that the likelihood of his problem behaviors to occur in Math, English/Language Arts, Science, and Writing was a 5 out of 6 (with 6 being the highest). The type of activities documented where his behavior was likely to occur included: independent work, small group, transition, whole/large group, and activity with peers. The IEP developed on September 3, 2021, also appropriately documented his behavioral present level of performance and noted he had met a behavioral goal of being able to

verbalize appropriate behaviors when discussing "If . . . Than . . ." scenarios in social situations.

37. The September 3, 2021, IEP included two social/emotional goals and respective objectives. Pursuant to the IEP, he was to receive guided practice for replacement behaviors in the general education classroom via support facilitation three times per week; and direct instruction in replacement behaviors in the ESE resource classroom via resource pullout two times per week.

38. Petitioner returned to school on September 7, 2021. The following day, Petitioner told his math teacher, [REDACTED], that he was very depressed. When [REDACTED] encouraged him to remain on task or face the consequence of contacting his mother, Petitioner stated, "I don't care, I f***king hate her. . . I'll kill myself, and if I kill myself, then it'll be her fault, and then she's going to have to live with that." Due to his statements of potential self-harm and depression, [REDACTED] was concerned and contacted [REDACTED], who, in turn, contacted the District's Rapid Response Team (RRT). The RRT counselor, [REDACTED], arrived at School A and met with Petitioner. Ultimately, Petitioner admitted that he said that he was going to kill himself, but that he did not mean it. [REDACTED] and [REDACTED] contacted Petitioner's mother. No further action was deemed necessary by [REDACTED].

39. On September 10, 2021, [REDACTED] issued an email to [REDACTED], wherein she summarized the September 7, 2021, events, from her perspective. In this correspondence, she concluded by setting forth her candid global concerns as follows:

[Petitioner] is a difficult child to have in class. [His] mother has clearly stated that any work sent home will not be completed and to have everything done in class. In class, [Petitioner] refuses directions, plays with toys, ignores requests to complete assignments, cusses with vulgar language, insults and bullies other students, distracts by talking about other topics. [He] is aggressive at times, even

swinging at another student and I inadvertently got hit in the arm. [He] is a distraction to all students and needs a one on one aide in order to get work completed. [REDACTED] is amazing at redirecting [Petitioner] however there are never consequences for the behavior. Yes there is a behavior plan in place to track [his] behavior but then what? A stern talking to then right back to class? It's not working for mom, it's not working for the teachers and it's especially not working for [Petitioner]. Yes we are tracking behaviors for Petitioner but honestly it is so constant that I would need a second person in the room just to track [Petitioner's] behaviors full time while I try to teach.

40. From September 13 through 20, 2021, the running record documents 11 incidents of problematic behavior, including failing to follow directions, failing to perform classwork, and vulgar language directed towards students and faculty. On several occasions, he was removed from the class, and on one occasion, he received a disciplinary referral.

41. An IEP Addendum meeting was scheduled and conducted on September 22, 2021. Among other agenda items, the IEP team was meeting in response to Petitioner's escalating behavior that had been observed in the short time since his return to school. The IEP team agreed that the priority at that time was controlling his classroom behaviors. At that meeting, verbal consent was obtained from Petitioner's mother to begin the FBA and BIP process; however, written consent was still necessary to begin formal observations.

42. On the same date as the IEP meeting, Petitioner had a behavioral incident which ultimately resulted in him being admitted to [REDACTED] [REDACTED] under the Baker Act for indicating that he would stab one of his teachers and himself. On this occasion, Petitioner was in class and, after being given a break to draw, Petitioner did not want to transition to classwork. When his teacher, [REDACTED], reached for the markers and told

Petitioner he needed to give them to her, he picked up a pencil as if to stab her with it and said, "You better let go or I'm going to f***ing stab you." When ██████ told Petitioner that he was a good kid and that he wouldn't do that, he took the pencil and stabbed it towards his chest saying, "then I'll stab myself."

43. ██████ did not construe the comments as an actual threat of harm or self-harm; however, she notified Dean ██████ of the conduct because Petitioner did threaten her. ██████ wrote a note to the parent advising that there would be a referral. Unbeknownst to ██████, because of the threat, the Jacksonville Sheriff's Office (JSO) was contacted to take a report and provide a case number to the school. ██████ was subsequently called from her classroom to talk to a law enforcement officer (LEO). When ██████ explained what happened, the LEO wanted to talk to Petitioner, as they realized Petitioner had also threatened to hurt himself. The situation unfortunately escalated with Petitioner yelling, cursing, and trying to fight the LEO. The LEO, who is not employed by Respondent, made the decision to civilly commit Petitioner and he was taken to ██████.

44. Following an overnight stay, Petitioner underwent a psychiatric evaluation where it was determined that he did not meet the criteria for continuation of involuntary hospitalization and he was discharged.

45. Petitioner did not return to in-person learning at School A. Petitioner's Complaint was received by Respondent on October 14, 2021.

CONCLUSIONS OF LAW

46. 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).

47. 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).

48. 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).

49. 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).

50. "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).

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

52. 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.

53. 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 is entitled to special education and related services under the IDEA. *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.

54. 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").

55. Here, Petitioner contends that Respondent failed to appropriately evaluate Petitioner as his behaviors escalated. Specifically, Petitioner contends that Respondent should have conducted an FBA, and based on that evaluation, drafted and implemented a BIP and a safety plan. The undersigned concludes, however, that Respondent complied with its duty under the IDEA to properly evaluate Petitioner. Upon enrolling in School A as a [REDACTED]-grade student, the school timely conducted an IEP meeting and developed a thorough PBSP. Petitioner's Complaint concedes that his [REDACTED]-grade year at School A "appears to have been successful."

56. When Petitioner returned to in-person learning in the [REDACTED]-grade, School A timely conducted an IEP meeting wherein School A staff appropriately provided input and observations and opined that based on his performance over the last year, his behaviors were manageable and that he no longer required a PBSP. As his behaviors escalated during the fall semester, School A appropriately and timely convened another IEP meeting in a reasonable time and reinstated his social and emotional goals and the PBSP. School A staff further employed additional behavioral monitoring in a variety of forms. When Petitioner was ultimately faced with a disciplinary

consequence, a one-day ISS, his mother voluntarily removed him from in-person learning.

57. When Petitioner returned to school for his [REDACTED]-grade year, after approximately six months away from the in-person school environment, his behaviors escalated quickly. The undersigned concludes that Respondent timely conducted an IEP meeting where his behaviors were evaluated and considered. Again, when Petitioner's behavioral episodes began to crescendo, Respondent timely convened yet another IEP meeting, and, at that time, began the process of conducting an FBA. Following the Baker Act incident, however, Petitioner's mother again removed him from School A, and the FBA process was halted.

58. Petitioner failed to satisfy his burden of demonstrating that Respondent failed to properly consider the use of positive behavioral interventions and supports, and other strategies, to address his targeted behavior. Petitioner further failed to present sufficient evidence to establish that Respondent committed a substantive violation of the IDEA by failing to appropriately evaluate Petitioner by not conducting an FBA, and failing to draft a BIP or safety plan.

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). Here, Petitioner does not advance any claims related to the IDEA's procedural requirements.

60. 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.*

61. 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.

62. 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.")).

63. Although not labeled as such, to the extent Petitioner's Complaint may be construed as alleging a failure by Respondent to design an appropriate IEP, the same is addressed. The analysis here is similar to that set forth in the preceding paragraphs. The gravamen of Petitioner's Complaint is that Respondent failed this student with respect to his behavioral concerns. As previously concluded, the better evidence established that Respondent appropriately evaluated, considered, and set forth appropriate positive behavioral interventions, supports, and other strategies, in an attempt to ameliorate Petitioner's targeted behaviors. It is concluded that Respondent designed appropriate IEPs for Petitioner throughout his tenure at School A that were reasonably calculated to enable Petitioner to make progress appropriate in light of his circumstances with respect to behavior.

64. Finally, Petitioner's Complaint contends that Respondent discriminated against Petitioner in contravention of Section 504. Petitioner's proposed final order does not address this claim; however, it is briefly addressed herein. 29 U.S.C. § 794(a), provides, in pertinent part, as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

65. 29 U.S.C. § 794(b)(2)(B) defines a "program or activity" to include a "local education agency ... or other school system." 29 U.S.C. § 794(a) requires the head of each executive federal agency to promulgate such regulations as may be necessary to carry out its responsibilities under the nondiscrimination provisions of Section 504.

66. The U.S. Department of Education has promulgated regulations governing preschools, elementary schools, and secondary schools. 34 C.F.R. § 104, (D). The K-12 regulations are at sections 103.31 through .39. Sections

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

67. 34 C.F.R. § 104.33 requires that Respondent provide FAPE to "each qualified handicapped person who is in the recipient's jurisdiction." For purposes of Section 504, an "appropriate education" is the

provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

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

68. To establish a prima facie case under Section 504, Petitioner must prove that he: (1) had an actual or perceived disability, (2) qualified for participation in the subject program, (3) was discriminated against solely because of his disability, and (4) the relevant program is receiving federal financial assistance. *Moore v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1313 (M.D. Ala. 2013) (citing *L.M.P. v. Sch. Bd. of Broward Cnty.*, 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007)); see also *J.P.M. v. Palm Beach Cnty. Sch. Bd.*, 916 F. Supp. 2d 1314, 1320 (S.D. Fla. 2013).

69. Assuming a petitioner has established a prima facie case, the respondent must present a legitimate, nondiscriminatory reason for the adverse actions it took. *Lewellyn v. Sarasota Cnty. Sch. Bd.*, 2009 W.L. 5214983 at *10 (M.D. Fla. Dec. 29, 2009) (citing *Wascura v. City of S. Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001)). The Eleventh Circuit has stated that the respondent's burden, at this stage, is "exceedingly light and easily established." *Id.* (quoting *Perryman v. Johnson Prods. Co. Inc.*, 698 F.2d 1138, 1142 (11th Cir. 1983)). Once the respondent has articulated a nondiscriminatory reason for the actions it took, the petitioner must show

that the respondent's stated reason is pretextual. "Specifically, to discharge their burden, Plaintiffs must show that Defendant possessed a discriminatory intent or that the Defendant's espoused non-discriminatory reason is a mere pretext for discrimination." *Id.*

70. Here, it appears undisputed that Petitioner meets the first, second, and fourth factors for establishing a prima facie case. Thus, the remaining issue is whether Respondents discriminated against Petitioner solely by reason of his disability. Succinctly, it is concluded that Petitioner failed to present sufficient evidence to support his claim that Respondent intended to discriminate against him solely on the basis of his disability. Accordingly, Petitioner's Section 504 claim fails.

ORDER

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

DONE AND ORDERED this 20th day of June, 2022, 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).