STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 22-0103E

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.
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FINAL ORDER

A due process hearing was held on November 7, 2022, before Administrative Law Judge Jessica E. Varn, with the Division of Administrative Hearings (DOAH). The hearing was conducted, by agreement of the parties, via video-teleconferencing.

APPEARANCES

For Petitioner: Tiffany Alexis Rousso, Esquire
Brain Injury Rights Group, Ltd
399 West Camino Real, Apartment 11
Boca Raton, Florida 33432

For Respondent: Sara M. Marken, Esquire
The School Board of Miami-Dade County
1450 Northeast 2nd Avenue, Suite 400
Miami, Florida 33132

STATEMENT OF THE ISSUES

Whether the School Board, from March 2020 to September 2021, failed to provide the student with a free and appropriate public education (FAPE), by failing to implement the student's individualized education program (IEP), in violation of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA); and

Whether the School Board changed the student's educational placement in March of 2020 without proper notice or consent from the parent; and

Whether the student is entitled to the remedy of compensatory education based on the denial of FAPE; and if so, what services should be provided to the student.

PRELIMINARY STATEMENT

The request for a due process hearing was filed on or about January 7, 2022. A resolution session was held, wherein the School Board agreed to provide an independent psychoeducational evaluation (IEE). On February 2, 2022, the parties jointly requested that the case be abated for four weeks pending the outcome of the IEE.

In March of 2022, the parties requested that the abeyance be continued for another four weeks, because the IEE had not yet been completed. The same request was made, and granted, in April of 2022.

In May of 2022, the School Board filed a status report indicating that the School Board had agreed to provide two more IEEs, in the areas of speech and language, and in occupational therapy. Once again, the parties requested, and were granted, a four-week abeyance.

In July of 2022, the School Board filed a status report indicating that a hearing was necessary, and providing available dates for the hearing. On July 19, 2022, a Notice of Zoom Hearing was issued for September 15 and 16, 2022.

On September 7, 2022, Petitioner filed a Motion to Adjourn and Reschedule Hearing Date, stating that Petitioner was in the process of switching to different legal counsel, and the incoming attorneys required

some time to prepare for the hearing. The School Board raised no objection to the request. Two Notices of Appearance were then filed by two additional attorneys, but Ms. Ruosso did not withdraw as counsel. The hearing was rescheduled for November 7 and 8, 2022.

During the due process hearing, Ms. Sherry, who is licensed to practice law in California but not Florida, filed a motion to be recognized as a Qualified Representative, pursuant to Florida Administrative Code Rule 28-106.106. The motion was denied, but Ms. Sherry was permitted to serve as an educational advocate during the due process hearing.

At the due process hearing, Petitioner presented the testimony of the student's parent and [redacted], a psychologist. Petitioner Exhibits B, H, F, and E were admitted into evidence. The School Board presented the testimony of [redacted], an exceptional student education (ESE) teacher; and [redacted], a school psychologist. School Board Exhibits 15 and 6 were admitted into evidence.

At the conclusion of the due process hearing, the parties agreed to file proposed final orders ten days after the transcript was filed with DOAH. The parties also agreed to extend the deadline for the final order, allowing for the final order to be issued 20 days after the transcript was filed with DOAH. The Transcript was filed with DOAH on December 12, 2022. Accordingly, proposed final orders were due on December 22, 2022, and the deadline for the final order was extended to January 3, 2023. Both parties filed timely Proposed Final Orders, which were considered in the preparation of the Final Order.

Unless otherwise indicated, all rules 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. The student is a [redacted]-year-old boy who has been eligible for ESE in the categories of Intellectual Disability and Language Impaired since he entered school. He has a medical history of autism spectrum disorder, developmental delay, intellectual delay, apraxia of speech, and receptive-expressive language disorder. He receives his education on a modified curriculum, receives one-to-one paraprofessional support, occupational therapy, speech and language therapy, and ESE classroom instruction in core academic areas. The student's speech is frequently unintelligible.

2. As a result of the COVID-19 pandemic, all schools, including [redacted], were forced to shut down in March 2020 and immediately pivot to virtual instruction. All students, including this student, were given access to online learning because of the forced closures.

3. From March 2020 through the reopening of schools on October 5, 2020, the student received specialized instruction and related services virtually. He participated in his classes and received the one-to-one services of his paraprofessional in small breakout rooms and in the large classroom setting, remotely. In October of 2020, when the schools reopened, the student returned to in-person instruction.

4. During the COVID-19 closures (March 2020 through June 2020 and August 2020 through October 2020), the student encountered some difficulty logging in to access his courses independently. Due to the parent's work obligations, at times he was left home alone or with his older [redacted], which created difficulty for the student to independently join his online classes. [redacted], the student's ESE teacher, and the student's [redacted], both credibly testified that on several occasions school staff reached out to the

[redacted] to advise that the student needed to be logging in consistently to access his education.

5. According to the student's [redacted], the student received no instruction, no paraprofessional support, and no therapies during the entire school closure period.

6. [redacted], however, testified that when the student attended school virtually, he received instruction from [redacted], and that [redacted] would also place the student in a virtual break-out room for support from the paraprofessional. [redacted] was available for any questions or trouble with accessing the virtual work.

7. The record also established that during the forced school closure period, the student received virtual occupational and speech and language services when he logged into the sessions.

8. Overall, given the student's needs, which include one-to-one paraprofessional support for all types of academic and non-academic tasks, virtual schooling was largely unsuccessful, particularly when he was left alone or unsupervised.

9. Both the [redacted] and [redacted] recalled the difficulties the student faced when needing to log into a classroom and remain focused and on task while at home. On the issue of the quantity and quality of instruction during that closure period; however, [redacted] testimony differs from the [redacted] recollection. [redacted] testimony is supported by the record as a whole; therefore, [redacted] is found to be more persuasive.

10. Moreover, Petitioner provided no persuasive evidence establishing the amount of specialized instruction, paraprofessional support, and therapies that the student did not receive during the school closure period, or for the period between October 2020 and September 2021, when the student was attending school in person.

11. On the issue of possible regression during the relevant time period, psychoeducational evaluations provide some reliable data. During a

November 2019 psychoeducational evaluation, the student was administered the Kaufman Assessment Battery for Children-II (KABC-II), which tests intellectual functioning. In 2019, the student's non-verbal intellectual functioning score was a 48, which demonstrated an extremely low level of general intellectual ability.

12. Three years later, in October 2022, a private psychoeducational evaluation was conducted by [redacted], who also administered the same KABC-II. The student's nonverbal index score was a 61. While still in the low range as expected for a student with an intellectual disability, there was an increase of 13 points and evidence of intellectual growth since his prior evaluation.

13. Further, [redacted] saw no areas of regression during the COVID-19 closures and into the 2019-2020 and 2020-2021 school years. Instead, [redacted] found evidence that the student had been academically progressing in most areas including reading and language arts, and remaining stable in mathematics.

14. [redacted], who also analyzed the student's 2019 and 2022 psychoeducational evaluations, further confirmed [redacted] statements that the student had made significant academic progress during the time period at issue in this case.

15. Both expert opinions were corroborated by [redacted], who testified that [redacted] saw no academic regression in the student from 2019 through 2021. [redacted] also recalled that on the Florida State Alternative Assessment, which is administered to students on a modified curriculum, and which [redacted] administered for both the 2019-2020 and 2021-2022 school years, the student's test scores had increased in all subject areas.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to section 1003.57(1)(a), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

17. The burden of proof is on Petitioner, as the party seeking relief, to prove his claims by a preponderance of the evidence. *See Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

18. The School Board is a local education authority (LEA) as defined under 20 U.S.C. § 1401(19)(A). By virtue of receipt of federal funding, the School Board is required to comply with certain provisions of the IDEA, 20 U.S.C. § 1401, *et seq*.

19. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint with respect to any matter relating to the identification, evaluation, educational placement of their child, or the provision of FAPE. 20 U.S.C. § 1415(b)(1), (b)(3), and (b)(6).

20. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a student with FAPE. As an initial matter, it is necessary to examine whether the school district has complied with the IDEA's procedural requirements. *Rowley*, 458 U.S. at 206-07. A procedural error does not automatically result in a denial of FAPE. *See G.C. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the students 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).

21. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

> [S]pecial 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).

22. 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. "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 137 S. Ct. 988, 994 (2017)(quoting *Honig v. Doe*, 484 U.S. 305, 311 (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. v. Rowley*, 458 U.S. at 181).

23. Here, Petitioner alleged that the School Board changed the student's educational placement in March of 2020 without proper notice or consent from the parent, but no persuasive evidence was presented to prove the allegation. Further, the School Board's mandated pivot to virtual instruction

did not constitute a change of educational placement. Providing children with disabilities with online instruction that is the same as the remote instruction that their peers without disabilities receive is not in and of itself a removal of children with disabilities from the regular educational environment, because children with disabilities receive access to the same virtual instruction and materials as their peers without disabilities. 20 U.S.C. § 1412(5)(A); *see Hernandez v. Grisham*, 508 F. Supp. 3d 893, 1000 (D.N.M. 2020), *aff'd in part, appeal dismissed in part*, 20-2176, 2022 WL 16941735 (10th Cir. Nov. 15, 2022). *See also, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elem. and Secondary Schs. While Serving Children with Disabilities*, 76 IDELR 104 (OSERS/OCR 2020) (In a fact sheet, the Office of Special Education and Rehabilitative Services and the Office for Civil Rights reminded districts seeking ways to deliver instruction during the coronavirus pandemic that efforts to shift school online should not stop due to IDEA or Section 504 worries. The agencies explained that the determination of how FAPE is to be provided might need to be different in a time of unprecedented national emergency).

24. Petitioner also alleges that the School Board failed to implement the IEP from March 2020 to September 2021.

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

> Confronting this issue for the first time ourselves, we concluded that to prevail in a failure-to-implement case, a plaintiff must demonstrate that the school has materially failed to implement a child's IEP. And to do that, the plaintiff must prove more than a minor or technical gap between the plan and reality; de minimis shortfalls are not enough. A material implementation failure occurs

> only when a school has failed to implement substantial or significant provisions of a child's IEP.

Id. at 1211.

26. While declining to map out every detail of the implementation standard, the court provided a few principles to guide the analysis. *Id*. at 1214. To begin, the court stated 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. In other words, the task 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*.

27. 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.

28. Guided by these principles, the record in this case establishes that although there were shortfalls in the implementation of the IEP during the mandated school closures, the failures were not substantial or significant. The School Board, facing unprecedented challenges during the mandated school closure period, materially implemented the student's IEP. This is the

only reasonable conclusion that can be drawn from the record as a whole, which fortunately reflects academic progress during the relevant time period, achieving the overall goal of this student's IEP.

29. In sum, Petitioner failed to prove, by a preponderance of the evidence, that the School Board denied the student FAPE from March 2020 to September 2021.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that all requests for relief are DENIED.

DONE AND ORDERED this 29th day of December, 2022, in Tallahassee, Leon County, Florida.

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
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this 29th day of December, 2022.

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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).