STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs.

VOLUSIA COUNTY SCHOOL BOARD,

Respondent.
_____/

Case No. 22-3181E

*AMENDED AS TO PETITIONER'S ADMITTED EXHIBITS

*AMENDED FINAL ORDER

A due process hearing was held in this matter before Brittany O. Finkbeiner, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on December 8 and 9, 2022, via Zoom video conference.

APPEARANCES

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

For Respondent: Barbara Joanne Myrick, Esquire
621 Kensington Place
Wilton Manors, Florida 33305

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent: (1) modified Petitioner's placement from the least restrictive environment ("LRE") to a more restrictive environment; (2) incorrectly marked behaviors in Petitioner's individualized education program ("IEP"); (3) failed to implement the February 3, 2022, IEP; and (4) retaliated against Petitioner's [redacted] for [redacted] advocacy on behalf of other students.

PRELIMINARY STATEMENT

Petitioner, through his [redacted], filed a request for due process hearing ("Complaint") on October 19, 2022.

The due process hearing took place on December 8 and 9, 2022. Petitioner called the following witnesses: [redacted], [redacted] for Volusia County Schools; Petitioner's [redacted]; [redacted], [redacted]; [redacted], Choral Director at School A; [redacted], ESE Assistant Principal at School A; [redacted], [redacted] for Transition Programs; [redacted], parent of Petitioner's friend; and Petitioner's [redacted]. Petitioner's Exhibits A, B-1 through B-9, C, D, and G through N were admitted into evidence.

Respondent called the following witnesses: [redacted], District Placement Specialist; [redacted], Esquire, Americans with Disabilities Act Compliance Officer; and [redacted], [redacted] Program Teacher at School A. Respondent's Exhibits 1 through 8 were admitted into evidence.

The due process hearing Transcript was filed with DOAH on December 13, 2022. The parties timely filed proposed orders, which were 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 meets eligibility requirements to receive services under the Individuals with Disabilities Education Act ("IDEA") as a student with an intellectual disability and language impairment. He has Down syndrome. Petitioner met all requirements for graduation with a standard diploma as of June [redacted]. Thereafter, he deferred his diploma to return to School A to participate in a transition program. The transition program is designed to prepare students with disabilities for employment and independent living.

2. Petitioner turned [redacted] years old in [redacted]. Entitlement to a free and appropriate public education ("FAPE") under the IDEA ends when a student turns 22. In accordance with Respondent's practice, Petitioner will be allowed to remain at School A to complete the remainder of the semester following his [redacted] birthday.

Least Restrictive Environment

3. Petitioner's February 3, [redacted], IEP reflects his goal to become employed as a stock clerk.

4. IEP goals are written to be applicable across settings, meaning that the intent is for the student to learn generalized skills that are applicable regardless of where the student receives instruction, or where he is employed.

5. Respondent believes that it is best practice for any student to learn employment skills in the real-world environment of actual job sites.

6. Inclusion for students in the transition program is achieved by giving students the opportunity to go out into the community and practice employment skills at worksites among non-disabled peers.

7. Petitioner's [redacted] disagrees with Respondent, and instead believes that Petitioner will be better prepared for employment by participating in elective classes and on-campus jobs at School A.

8. Respondent presented testimony of a witness who authored a report on Petitioner's inclusion at School A. During [redacted] testimony, the witness described Petitioner's relationship with general education students in a

highly insensitive manner. Specifically, the witness stated, "[s]o we can't have him on campus where the students who are much younger than him are using him as a play thing and a toy and a pet." The statement significantly diminished the credibility of the witness; as a result, both [redacted] testimony and the report [redacted] authored are not persuasive.

Incorrectly Marked Behaviors

9. In Petitioner's IEP, 13 of 20 behavioral factors were checked as applying to Petitioner. Petitioner's [redacted] believed that some of the factors did not apply to Petitioner and should not have been checked. Petitioner's [redacted] voiced [redacted] concern to Respondent, and Respondent offered to have an amended IEP meeting to discuss whether a change should be made.

10. Petitioner's [redacted] refused to agree to a meeting to amend the IEP and instead insisted that the IEP should be fixed without a meeting.

Failure to Implement the IEP

11. Petitioner's operative IEP at the time of the hearing was completed on February 3, [redacted]. The IEP remained unchanged after that date.

12. Based on Petitioner's measurable career goal of becoming a stock clerk, Respondent looked for job training in the community to directly prepare him for that career. Although Petitioner had trained in on-campus jobs such as helping in the library and the cafeteria, those tasks did not align with any jobs that Petitioner planned to pursue after leaving the school environment.

13. Petitioner's IEP mentions in several places that Petitioner was enrolled in elective classes at the time it was drafted. Notably, however, the IEP does not identify continued enrollment in electives as a priority educational need.

14. Petitioner's schedule included elective classes during the [redacted] school year. However, his schedule was changed to exclude electives and instead focus on more direct development of skills for employment for his final semester during the [redacted] school year.

15. At School A, it is typical for a student's class schedule to change from year to year. Respondent changed Petitioner's class schedule to exclude electives in furtherance of his IEP goal of becoming employed as a stock clerk.

16. Petitioner's [redacted] could not definitively recall receiving a copy of Petitioner's IEP. Although the parties' recollections of the meeting differ in this respect, the school-based witnesses were more consistent with the remainder of the record in their contention that Petitioner's [redacted] did receive a copy of the IEP.

Retaliation

17. Petitioner's [redacted] is an energetic and compassionate person who takes pride in advocating for Petitioner as well as other students with disabilities.

18. Petitioner's [redacted] believed that Petitioner's schedule was changed to exclude electives for the [redacted] school year in retaliation for [redacted] advocacy.

19. The record evidence does not show that Respondent viewed Petitioner's [redacted] as an advocate for other students during the timeframe relevant to the Complaint or that it retaliated against [redacted] as a result of [redacted] advocacy.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 1003.57(1)(a) and 1003.5715(5), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u); § 504 of the Rehab. Act of 1973 ("Section 504"); and 29 U.S.C. § 794.

21. Petitioner bears the burden of proof with respect to each of the issues raised herein. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

22. Respondent is a local educational agency ("LEA"), as defined under 20 U.S.C. § 1401(19)(A). By virtue of receipt of federal funding, Respondent is required to comply with certain provisions of the IDEA, 20 U.S.C. § 1401, *et seq*. As an LEA, under the IDEA, Respondent was required to make FAPE

available to Petitioner. *Sch. Bd. of Lee Cnty. v. E.S.*, 561 F. Supp. 2d 1282, 1291 (M.D. Fla. 2008)(citing *M.M. v. Sch. Bd. of Miami-Dade Cnty.*, 437 F. 3d 1085, 1095 (11th Cir. 2006)); *M.H. v. Nassau Cnty. Sch. Bd.*, 918 So. 2d 316, 318 (Fla. 1st DCA 2005).

23. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education 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); *See 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); *See also Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

24. Local school systems must also satisfy the IDEA's substantive requirements by providing all eligible students with FAPE, which is defined as:

> Special education and related 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).

25. "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).

26. "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).

Least Restrictive Environment

27. In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on students' placements or education environment in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A) provides, as follows:

> Least restrictive environment.
>
> (A) In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational

> environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

28. Pursuant to the IDEA's implementing regulations, states must have policies and procedures to ensure that public agencies in the state meet the LRE requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the above-referenced mandates concerning LREs and providing a continuum of alternative placements. *See* Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

29. With the LRE directive, Congress created a statutory preference for educating handicapped children with children who are not handicapped to the maximum extent appropriate. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 181 n.4 (1982). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the [IDEA], 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).

30. 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.

Id. at 1048.

31. The record established that Petitioner has been mainstreamed to the maximum extent appropriate. In furtherance of Petitioner's IEP goal of becoming employed as a stock clerk, Respondent provided opportunities for Petitioner to go out into the community to learn job skills, thus enhancing his future ability to be integrated into a workplace and the larger community alongside non-disabled peers.

The IEP

32. 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.

33. "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*, 108 S. Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Id.* (quoting *Rowley*, 458 U.S. at 181).

34. 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. In this case, although Petitioner's [redacted] alleged that [redacted] was not provided with a copy of Petitioner's IEP, [redacted] did not prove the same. Additionally, the record does not show any procedural defect with Respondent's attempts to

convene an amended IEP meeting to address Petitioner's [redacted] concerns with portions of the IEP, all of which were refused by the [redacted].

35. 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. In *Endrew F.*, the Supreme 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." 137 S. Ct. 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.*

36. In this case, Petitioner's [redacted] argued for what [redacted] perceived to be an ideal IEP, which would have included a directive for Petitioner to hone various skills through his elective classes. The IEP, although perhaps not ideal, does meet the threshold of being reasonable. The undersigned, based on a full review of the record, finds no defect with the design of the IEP and finds that the IEP afforded Petitioner FAPE. Based on Petitioner's measurable career goal of becoming a stock clerk, Respondent provided job training in the community to directly prepare him for that career. Deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. *Id.* at 1001. In the present case, the professional educators who testified did so reasonably and credibly as to why Petitioner is currently best served through the real-world jobsite provided by Respondent.

37. Turning to the issue of implementation, in *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit Court of Appeals articulated 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.

38. Here, the record does not reflect a material failure to implement Petitioner's IEP. The IEP reflected Petitioner's goal of becoming a stock clerk, and Respondent provided job training in the community to directly prepare him for that career.

Retaliation

39. Section 504's implementing regulations include an anti-retaliation provision, which prohibits acts that "intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any [rights he or she has under Section 504]." 34 C.F.R. § 100.7(e). In addition, acts of intimidation, or retaliation, taken against an individual because he or she has filed a complaint, testified, or otherwise participated in an Office for Civil Rights investigation, are prohibited. Encompassed within this provision are retaliatory acts against people who complain of unlawful discrimination in violation of Section 504 on behalf of an individual with a disability. *Id.* The record in this case is devoid of any evidence of a causal relationship between advocacy on the part of Petitioner's [redacted] and any action taken by Respondent that would indicate unlawful retaliation.

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 22nd day of December, 2022, in Tallahassee, Leon County, Florida.

BRITTANY O. FINKBEINER
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2022.

COPIES FURNISHED:

Amanda W. Gay, Esquire
(eServed)

Barbara Joanne Myrick, Esquire
(eServed)

Michael Newsome, M.Ed.
(eServed)

Petitioner
(eServed)

Dr. Carmen J. Balgobin, Superintendent
(eServed)

James Richmond, Acting General Counsel
(eServed)

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).