STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 22-3348E

HILLSBOROUGH COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A due process hearing was held on January 30, 2023, before Administrative Law Judge Brittany O. Finkbeiner of the Division of Administrative Hearings ("DOAH") via Zoom conference.

APPEARANCES

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

For Respondent: LaKisha M. Kinsey-Sallis, Esquire
Fisher & Phillips, LLP
101 East Kennedy Boulevard, Suite 2350
Tampa, Florida 33602

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated the law with respect to reevaluating Petitioner; and whether Petitioner's individualized education plan ("IEP") was reasonably calculated to provide Petitioner with a free appropriate public education ("FAPE").

PRELIMINARY STATEMENT

This matter is before DOAH on Petitioner's Request for Due Process Hearing, filed on October 26, 2022. At the final hearing, Petitioner presented the testimony of his parent and [redacted]. Petitioner's Exhibits 1 through 24 were admitted into evidence. Petitioner was also permitted to file supplemental exhibits, which were filed on March 14 and 15, 2023, and are considered as part of the record. Respondent presented the testimony of [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted]. Respondent's Exhibits 7, 9, 14, 17, and 18 were admitted into evidence. Respondent also filed a supplemental exhibit on February 24, 2023, to provide a complete copy of a previously-admitted document that was missing a page, which is considered as part of the record. Both parties submitted proposed final orders, which were duly considered in the preparation of this Final Order.

Statutory references are to the codification in place at the time this cause arose. 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 a [redacted]-grade student at School A in Respondent's school district. He is a student with a disability and is receiving Exceptional Student Education ("ESE") services under the Language Impaired ("LI") eligibility category.

2. Petitioner was evaluated in [redacted] for initial eligibility for ESE services.

3. On May 13, [redacted], when Petitioner was a rising [redacted], Petitioner's IEP team met to revise his IEP. The IEP team considered new

evaluative data in the form of an updated Batelle Developmental Inventory-2, which showed that Petitioner passed in all areas except Communication. The IEP team also considered data contained within a Preschool Child Developmental Checklist completed by Petitioner's teacher, which indicated that Petitioner:

> (1) continues to meet and exceed appropriate age levels for all pre-readiness skills;
> (2) had age appropriate independent functioning skills;
> (3) displayed age appropriate skills with respect to play, following routines and classroom rules, and transitions, sharing, and engaging in nonpreferred tasks;
> (4) had emerging skills in the areas of greeting others, stating his full name, sharing toys and materials, recognizing the feelings of others and expressing a wide range of emotions; and
> (5) could answer yes/no questions, use at least 50 words, answer wh- questions, and follow two-step directions.

4. Petitioner's next annual IEP review meeting was held on December 6, [redacted]. According to the resulting IEP, Petitioner's iReady scores from September [redacted] reflected that Petitioner was in the emerging [redacted] range in the areas of reading and math, which meant he was on grade level. However, the same IEP reflects that Petitioner had deficits in the areas of communication and self-advocacy. The IEP was appropriately updated to address those deficits.

5. On January 26, [redacted], Petitioner's IEP team removed Petitioner's then-existing disability category of Developmentally Delayed, and the primary exceptionality was listed as LI. Petitioner was [redacted] years old at that time.

6. On May 2, [redacted], an IEP meeting was held to discuss reevaluation needs for Petitioner, to engage in educational planning, and to review/revise his IEP. The notes from that meeting indicate that Petitioner had increased his iReady score by 25 points from September [redacted] to January [redacted] in reading

and by 8 points from September [redacted] to January [redacted] in math. The revised IEP also includes the following:

> a. [Petitioner] has recently read 119 words out of 136 and is able to read grade level texts and comprehend the information although he requires time to process information he reads;
> b. [Petitioner] can write full sentences;
> c. [Petitioner] easily grasps mathematic concepts and has received 100% on math tests;
> d. [Petitioner] is on level in all subject areas; and
> e. [Petitioner] consistently advocates for himself in the classroom.

7. In terms of his reevaluation needs, the IEP Team agreed to conduct a full comprehensive reevaluation. Petitioner's parent signed a Respondent-provided document entitled "Informed Parental Consent for Reevaluation" on May 2, [redacted], giving permission for the Respondent to perform the agreed-upon reevaluation.

8. Petitioner's parent submitted a request to Respondent for a "complete" reevaluation of Petitioner, dated September 23, [redacted]. The request further specifies that the parent does not "agree with the past evaluations and want[s] a more extensive evaluation done." The parent's request contained a great deal of extraneous and confusing information, making its exact intent difficult to discern. The undersigned, however, finds that it is most accurately categorized as a request for reevaluation.

9. Following the reevaluation request, Respondent attempted to work with Petitioner to discuss the matter. To that end, a meeting was scheduled for October 24, [redacted], to discuss the reevaluation request. At that meeting, Petitioner's parent chose to end the meeting while reevaluation discussions were pending. Respondent offered to continue the meeting at another time. Petitioner, however, opted to move forward with the present case instead.

CONCLUSIONS OF LAW

10. 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).

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

12. 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 Individuals with Disabilities Education Act ("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).

13. Petitioner's eligibility category of Developmentally Delayed was removed by operation of law when he turned six, pursuant to section 1003.21(1)(e), Florida Statutes (2021).

14. 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).

15. 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).

16. 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.

17. "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F.*, 137 S. Ct. at 994 (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. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181(1982)).

18. 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. Petitioner's parent alleges a procedural violation with respect to Respondent's failure to reevaluate Petitioner. The undersigned finds that Petitioner did not prove that any procedural violation occurred, as Respondent attempted to follow the proper protocols to work with the parent with respect to the request for reevaluation.

19. Turning 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.*

20. The undersigned, based on a full review of the record, finds no defect with the design of Petitioner's IEP and that the IEP afforded Petitioner FAPE. Deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. *Id.* at 1001. In the present case, Petitioner's classroom teacher testified, reasonably and credibly, as to how Petitioner is excelling academically and even stands out as especially capable among his peers. Further, Petitioner's standardized assessments show that he is performing at grade level in all areas tested, and is receiving appropriate services to meet his educational needs.

21. Turning to the issue of implementation, in *L.J. v. School Board of Broward County*, 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.

Id. At 1211.

22. Here, the record does not reflect a material failure to implement Petitioner's IEP.

23. A student'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 student 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. 20 U.S.C. § 1414(a)(1). The student is further entitled to a "reevaluation" at least once every three years for the purpose of updating his IEP. 20 U.S.C. § 1414(a)(2), (d)(4)(a).

24. The IDEA requires that a student's initial evaluation and reevaluations be comprehensive, meaning the evaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information," 20 U.S.C. § 1414(b)(2)(A), and the

school must assess the student in "all areas of suspected disability." 20 U.S.C. § 1414(b)(3)(B). The student'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 his education. *See* 20 U.S.C. § 1414(d)(4)(A).

25. At issue here is not the initial evaluation, but rather, reevaluation. Reevaluation requirements are set forth in Florida Administrative Code Rule 6A-6.0331(7), which provides, in pertinent part, as follows:

> (7) Reevaluation Requirements.
>
> (a) A school district must ensure that a reevaluation of each student with a disability is conducted in accordance with rules 6A-6.03011-.0361, F.A.C., if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reevaluation or if the student's parent or teacher requests a reevaluation.
>
> (b) A reevaluation may occur not more than once a year, unless the parent and the school district agree otherwise and must occur at least once every three (3) years, unless the parent and the school district agree that a reevaluation is unnecessary.
>
> (c) Each school district must obtain informed parental consent prior to conducting any reevaluation of a student with a disability.

26. "Consent" for purposes of a reevaluation means:

> (a) the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;
>
> (b) the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

> (c)(1) the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

34 C.F.R. § 300.9.

27. Throughout the hearing, it was apparent that Petitioner was conflating the request for reevaluation with "consent" as defined above. Although it is clear that the request for reevaluation was made, Petitioner did not show that consent, as defined by law, was ever provided, making it impossible for Respondent to move forward with reevaluation procedures. In other words, Respondent never had the opportunity to complete its meeting with the parent to provide the required information as to how a potential reevaluation would be conducted so that legally sufficient consent could be provided.

28. Here, Petitioner contends that Respondent failed to appropriately evaluate him. However, the undersigned concludes that Petitioner failed to meet his burden of proof in establishing the same. Although Petitioner requested to be reevaluated, the evidence in this case established that the parent never provided consent for the reevaluation.

ORDER

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

DONE AND ORDERED this 3rd day of April, 2023, in Tallahassee, Leon County, Florida.

BRITTANY O. FINKBEINER
Administrative Law Judge
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Filed with the Clerk of the
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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).