

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

vs.

Case No. 23-0969E

ST. JOHNS COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on April 5 through 7, 14, and 20, 2023, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
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 Palmetto Bay, Florida 33157

For Respondent: Kristine Shrode, Esquire
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STATEMENT OF THE ISSUES

Whether the St. Johns County School Board (“Respondent” or “School Board”) failed to provide a free appropriate public education (“FAPE”) to Petitioner during the 2022-2023 school year; whether the decision to place Petitioner in a more restrictive setting violated the least restrictive environment (“LRE”) requirements of the Individuals With Disabilities

Education Act (“IDEA”); whether the decision to remove Petitioner from the general education program in Petitioner’s neighborhood school was predetermined; whether the School Board violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 795, *et seq.* (“Section 504”); and, if any or all of the alleged violations are proven, what is the appropriate relief.

PRELIMINARY STATEMENT

On March 9, 2023, a Request for Due Process Hearing (“due process complaint”) was filed with the School Board by the parents of an exceptional education (“ESE”) student in the St. Johns County School District. The student is in second grade and has a primary exceptionality of Autism Spectrum Disorder (“ASD”). The student was receiving services in a general education classroom with supports, in the student’s neighborhood school. The due process complaint contested the February 24, 2023, decision of the Individualized Educational Plan (“IEP”) team to change the student’s placement to a self-contained ESE classroom in a different school.

On the form provided, the parents checked “Yes” to the question, “Is this a request for an expedited due process hearing related to discipline issues?” However, the text of the due process complaint raised multiple issues regarding the alleged failures of the school to provide the child with FAPE over the course of the 2022-2023 school year, culminating in a predetermined IEP meeting designed to place the child in a self-contained ESE classroom against the wishes of the parents and without consideration of ways to amend the IEP to provide the supports needed to keep the child in a general education setting. The due process complaint was forwarded to DOAH on March 10, 2023, and assigned Case No. 23-0969EDM.¹

¹ In DOAH parlance, the “EDM” suffix stands for “Education Disciplinary Manifestation.” The undersigned has determined that this was not a manifestation case and the EDM suffix is inappropriate. The suffix has been amended to “E,” which stands for “Exceptional Education.”

On March 15, 2023, the parents filed a Motion to Determine Stay-Put Placement, stating that the School Board's unilateral removal of the student from the student's neighborhood school was a change of placement that invoked the stay-put provisions of 20 U.S.C. § 1415(j) and arguing that the child should remain in the neighborhood school until the FAPE issues of the due process complaint were resolved.

Also, on March 15, 2023, the School Board filed a Request for Expedited Due Process, citing Florida Administrative Code Rule 6A-6.03312(7)(a), which provides:

(a) An expedited hearing may be requested:

1. By the student's parent if the parent disagrees with a manifestation determination or with any decision not made by an administrative law judge (ALJ) regarding a change of placement under this rule; or
2. By the school district if it believes that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

The School Board argued that maintaining the child in the neighborhood school placement placed the child and other students in danger and that the stay-put placement should be the self-contained ESE classroom called for by the February 24, [REDACTED] IEP revision. The School Board's pleading was assigned Case No. 23-1044EDM.

By Order dated March 20, 2023, the ALJ then assigned to the cases granted the School Board's motion to consolidate the cases. The ALJ also ruled, under authority of rule 6A-6.03312(9), that "the student's stay-put placement *during the pendency of this disciplinary matter* is the placement determined by school officials, which is a self-contained ESE classroom with a

low student-teacher ratio and behavior support.” (emphasis added). By Order dated March 20, 2023, the ALJ denied Petitioner’s motion to reconsider the stay-put ruling and ruled that the consolidated cases would go forward on the expedited schedule set forth in rule 6A-6.03312(7)(c).

On March 29, 2023, the consolidated cases were reassigned to the undersigned, who presided over the hearing on the dates set forth above. By Order dated April 24, 2023, the undersigned severed the consolidated cases, based on the conclusion that, in light of all the evidence presented at the hearing, the February 24, [REDACTED] IEP amendment was not a change of placement because of disciplinary removals. This led to the further conclusion that the School Board inappropriately invoked the expedited hearing procedure of rule 6A-6.03312(7). Case No. 23-1044EDM was dismissed by Final Order dated April 25, 2023. That Final Order directed that the child’s stay-put placement be restored to the general education classroom in the neighborhood school.

As noted above, the five-day final hearing was completed on April 20, 2023.

At the hearing, Petitioner presented the testimony of [REDACTED], a special education advocate; [REDACTED], a certified school psychologist; [REDACTED], owner of an advocacy company called IEP Partner, LLC, and a special education advocate; [REDACTED], Ph.D., a private practitioner with a doctorate in school psychology and special education, accepted as an expert in school psychology and autism; [REDACTED], assistant principal at [REDACTED]; [REDACTED], an ESE program specialist for the School Board; and the student’s father.

Petitioner's Exhibits 1 through 6, 8 through 14, 15 (pages 54, and 56 through 60 only), 16 through 19, 21, 22 (pages 90 through 97, 100, 101, 104, 105, 108, 128, and 129 only), 24 (pages 119, 120, 122 through 125, 128 through 131, and 134 only), 25 through 27, 29 (pages 145, 147 through 149, 155 through 157, 161, 162, 165 through 169, 175, 176, 178 through 182, 190, 191, and 202 through 204 only), 30 through 32, 34 through 40, 43 through 45, 47, 48, 52 through 57, 63, 64, 68, 70 through 72, 75, and 84 were admitted into evidence.

The School Board presented the testimony of [REDACTED], the student's second grade general education teacher; [REDACTED], the student's second grade ESE teacher; [REDACTED], an ESE program specialist for the School Board; [REDACTED], the School Board's Coordinator for Student Success and Accountability; [REDACTED], principal at the school proposed for the student's placement by the February 24, [REDACTED] IEP amendment; [REDACTED], a behavior specialist for the School Board; [REDACTED], assistant principal at the student's neighborhood school; [REDACTED], principal at the student's neighborhood school; and [REDACTED], Ph.D., director of ESE Services for the School Board.

The School Board's Exhibits 1 through 16 and 18 through 22 were admitted into evidence.

The final volume of the five-volume Transcript was filed with DOAH on May 22, 2023. The parties filed their Proposed Final Orders on May 26, 2023.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the proposed placement. For stylistic convenience, the undersigned will use male pronouns in this Final Order when referring to the student. The male pronouns are neither intended, nor

should be interpreted, as a reference to the student’s actual gender. The school at which the student started and spent most of the 2022-2023 school year will be referenced as the “neighborhood school.”

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

1. The student is [REDACTED] years old with a primary exceptionality of ASD. The student has been in the St. Johns County School District since [REDACTED], though the [REDACTED]-[REDACTED] school year has been his first at this neighborhood school. The student entered the neighborhood school in August [REDACTED] with an IEP and a behavior intervention plan (“BIP”) that the student’s previous school created on December 6, [REDACTED].

2. The December 6, [REDACTED] IEP (“IEP 1”) provided that the student would be in a general education classroom with one-on-one assistance for safety upon arrival, dismissal, transitions, lunch, and “resource” class (e.g., art, physical education, music, and foreign language). It provided one hour per week of language therapy, ten minutes per week of speech therapy, and 30 minutes per week of small group social skills instruction in self-regulation, all in an ESE setting. It provided 20 minutes per week of individual assistance in daily self-management skills, and 80 minutes per week of direct specialized instruction in reading with a focus on fluency and comprehension, both in the general education classroom. It provided 20 minutes per week of direct occupational therapy services in the ESE setting. It provided a number of classroom accommodations including preferential seating, increased opportunity for movement, repeated directions, extended time to complete assignments, established timelines and predictable routines, verbal encouragement, access to predetermined calming tools such as plush toys or a

blanket, frequent breaks from school work, and a verbal five-minute warning before any transition.

3. The Behavior Intervention Plan (“BIP 1”) that accompanied IEP 1 targeted the following behaviors: physical aggression (biting, hitting, pinching, and pulling of peers and/or staff); property destruction (dumping bins of school supplies, turning over desks and/or chairs, writing on school furniture, throwing school supplies, flushing items in the toilet, and ripping school supplies); class disruption (talking during instruction, crawling under tables, and refusing to follow directions); and elopement (leaving designated area without permission). BIP 1 included prevention strategies, positive behaviors to be taught as replacements for the targeted behaviors, response strategies for school staff to use when the targeted behaviors occur, reintegration strategies to be used when the student has de-escalated, and daily progress monitoring with data compiled by the ESE case manager and the general education teacher.

4. ██████████ was an assistant principal at the student’s prior school, which at the time was the student’s neighborhood school. The student attended the prior school for ██████████ and for the first half of the ██████████-██████████ school year when he was in ██████████ grade. ██████████ testified that the student demonstrated no significant behavior problems in ██████████. However, starting in October of his ██████████ year, the student began exhibiting behaviors such as wrecking the classroom, hiding under desks, eloping, and attacking adults. His parents withdrew him from school in about February ██████████ and home-schooled him for the remainder of the school year.

5. ██████████ testified that the school was aware that the student’s family was moving and that his neighborhood school would change. In an email to the parents, dated March 1, ██████████, ██████████ outlined the IEP team’s transition plan for the student’s return to public school, whether at ██████████ school or the new neighborhood school at which ██████████ was the principal. The plan included the following:

Upon reenrollment into the home zone school (whether next month, next year, or even beyond), the team agreed to a 3-week data collection period to assess [present] levels and [his] current progress (at time of re-enrolling) before reconvening as an IEP Team. [His] current BIP (Behavior Plan) will carry over as if no time was missed, the data collection process will look similar and will stay focused on the same behaviors as before. After this 3-week period, the team will then come together as we would have today, to discuss current progress, present levels, review the collected data and proceed with the discussion of the District's Continuum of Learning model, to include, but not limit to placement. The team felt this was consistent and gives [the student] the best chance and support to succeed when [he] returns.

6. The new neighborhood school did not follow through with this transition plan when the student started second grade in August [REDACTED]. The neighborhood school simply implemented IEP 1 and BIP 1 without implementing the three-week data collection period that the student's former school believed gave him "the best chance and support to succeed." No IEP team was convened at the new neighborhood school in August [REDACTED].

7. The student enrolled in the neighborhood school in August [REDACTED]. [REDACTED] reviewed the student's school file and scheduled a meeting with the student's parents prior to the commencement of the [REDACTED]-[REDACTED] school year. In an August 7, [REDACTED] email to the student's parents, [REDACTED] noted that the school had as of yet been unable to hire a paraprofessional to work with the student, so the entire team would be providing the relevant supports.²

8. Assistant Principal [REDACTED] also reviewed the student's file and decided that [REDACTED] classroom would be a good fit. [REDACTED] characterized [REDACTED] as highly structured, calm, and experienced in working with a variety of students.

² No evidence was presented that the school ever hired the promised paraprofessional.

9. ██████ arranged to meet with the student and his mother the week before school started so that he could become familiar with the new school and his new classroom. ██████ reviewed IEP 1 and BIP 1. She noted that the student's previous testing indicated he was entering second grade with math and reading scores at the kindergarten level.

10. After reviewing IEP 1 and BIP 1, ██████ began to think about how she could design ██████ classroom and routines to best support the student. When the student and ██████ mother met with ██████ the week before classes started, ██████ allowed the student to choose his desk. ██████ altered the structures and routines in ██████ classroom to ensure that ██████ expectations were clear and explicit to all the students.

11. ██████ spoke with the behavior specialist assigned to the school, ██████. They reviewed the student's BIP and the data collection process, and discussed prevention strategies that could be utilized if the student exhibited any negative behaviors in the classroom. ██████, the ESE teacher assigned to the student for ██████ grade, also worked with ██████ on classroom strategies and behavior management for the student.

12. ██████ testified that the student seemed a little shy when school started in August ██████, but that he began to open up and be more comfortable with her within the first week. ██████ worked to develop a rapport with the student and to ensure he had structure and routines in ██████ classroom. ██████ stated that he exhibited some negative behaviors but they were mostly minor classroom disruptions such as banging a water bottle on the desk, tipping a chair, or breaking materials. There were 17 students in ██████ classroom.

13. Like ██████, ██████ found the student to be somewhat hesitant and shy when ██████ first met him. ██████ and ██████ agreed that the student's ESE services should be provided in the general education classroom to minimize the number of transitions that he had to go through.

██████████ implemented IEP 1's academic and social/emotional goals in the general education classroom, where she could pull the student into a small group setting, work with him one-on-one, and support ██████████.

14. ██████████ testified that at an August ██████ meeting, the student's mother noted that the previous school year had been challenging for the student and that she did not wish for the student to feel pressured to go out to related services such as speech therapy and occupational therapy. She wanted the school to respect the student's requests to "respectfully decline" these services outside the classroom. ██████████ agreed with this request because "his comfort level was inside the classroom and we wanted to continue to build that trust with him."

15. ██████████ testified that the student made academic progress during the first few months of the ██████-█████ school year and was also meeting behavioral expectations. The student was able to line up with his class, transition appropriately to other classes, participate during large and small group instruction, and complete nonpreferred tasks with prompting. ██████████ noted that the student worked best in a small group or one-on-one setting when completing more difficult or frustrating tasks.

16. ██████████ testified that she collected data on BIP 1, noting behavior such as tipping chairs, throwing materials on the floor, breaking objects, and banging objects, as well as "elopement" from his designated areas in the classroom. However, the School Board did not provide ██████████ data collection sheets to the student's representatives during the discovery phase of this case. When the School Board belatedly attempted to introduce the data sheets of ██████████ and other staff members near the conclusion of the hearing, the undersigned disallowed their admission as prejudicial to the student.

17. The only admitted documents regarding data collection on Respondent's behavior were three summary graphic compilations of the staff data sheets that were prepared by ██████████. The graphs in these

documents merely note “physical aggression,” “property destruction,” “classroom disruption,” and “elopement” by date and number of instances. The documents include no description of the nature or severity of the “physical aggression” or “property destruction” nor of the circumstances leading up to and following each instance. There is no indication of the time of day when these behaviors occurred. The documents compile the data sheets without any apparent verification of the consistency of reporting from person to person. The reader can only derive, for example, that one or more staff persons noted that the student engaged in some form of “property destruction” behavior four times on August 23, [REDACTED].

18. [REDACTED] testimony is accepted insofar as it describes her personal classroom observations. However, her testimony and that of other staff members who took data on BIP 1 and the subsequent BIPs in this case cannot form the basis of any statistical conclusions about the student’s behavior, given the School Board’s failure to disclose its supporting data during discovery.

19. This failure is part of a larger failure of proof. The School Board generally failed to provide data to support the anecdotal, subjective observations of its witnesses as to the student’s negative behaviors and their antecedents and consequences. [REDACTED] testified, for example, that the student often exhibited negative behaviors when he was upset, but that [REDACTED] often did not notice any sort of external trigger causing him to become upset. Again, [REDACTED] testimony can be credited as [REDACTED] subjective observation but cannot substitute for the collection—and provision to the student and this tribunal—of “ABC” data, i.e., antecedent, behavior, and consequence, in the systematic manner called for by IEP 1 and BIP 1. The record is bereft of data as to the time and place of each behavioral incident or of what was happening before or after the student’s behaviors occurred, and thus there is no way to ascertain whether there were patterns or consistent triggers that might have allowed the IEP team to adjust the BIP with fidelity.

20. ██████ testified that the student's behaviors visibly distracted the other students in the classroom and disrupted ██████ teaching. ██████ was mostly able to manage things by redirecting the student or ignoring his behavior. ██████ provided positive reinforcement and praise. ██████ stayed close to the student during transitions. ██████ was also able to provide adult assistance to the student during transitions and resource classes.

21. ██████ testified that from August ██████ through November 30, ██████, the student's behavior was entirely manageable in the classroom. Most of her communications with the student's parents were upbeat and positive about the student's performance.

22. The overall evidence established that the student did well in school from August through November ██████. His behavior was occasionally problematic but manageable and his standardized reading and math test scores improved, from ██████ level upon entry in August ██████ to ██████ grade levels by early December ██████. Without question, the student presented a behavior challenge to school staff. Also, without question, the student was succeeding in the general education classroom with the supports provided by IEP 1 and BIP 1. ██████, the assistant principal, testified that the student "was having a beautiful school year at that point."

23. On November 30, ██████, the neighborhood school's IEP team convened to perform the annual review of the student's IEP. School personnel believed that the student was doing so well that some supports could be reduced or eliminated. The November 30, ██████ IEP ("IEP 2") reduced language therapy from 60 minutes per week to 20 minutes per week. IEP 1 had provided "small group social skills instruction in self-regulation" for 30 minutes per week; IEP 2 reduced this to five minutes per week of "consultation between ESE teacher and student to address social emotional skills," eliminating small group self-regulation instruction altogether. "Individual assistance in self-management skills" in the general education classroom for 20 minutes per week was also removed in IEP 2. For reasons unexplained, IEP 2 removed

“access to predetermined calming tool (i.e., plush toy, blanket)” from the student’s accommodations.

24. IEP 2 eliminated the student’s direct occupational therapy services, providing instead for a “monthly consultation to monitor fine motor/visual skills and sensory strategies within the school setting.” IEP 2 also eliminated the student’s one-on-one assistance for safety during arrivals, dismissal, transitions, lunch, and resource period.

25. The record provides no evidence that the school performed a new speech or language evaluation before reducing the student’s services. No evaluation was presented to justify the elimination of the student’s occupational therapy services. An October ██████ progress report indicated that in the domain of “independent functioning,” the student had made “no progress” on IEP 1’s occupational therapy goal of participation in an “adult guided fine motor or visual motor task.” Despite the lack of progress, IEP 2 eliminated direct occupational therapy services and did not address the domain of “independent functioning.”

26. It was generally acknowledged that the student did not like to write. The IEP team notes for November 30, ██████, state that “The team discusses adding a goal for [the student] to encourage him to write more in class at a ██████ level.” However, IEP 2 itself appears to move in the opposite direction, adding a classroom accommodation allowing the student to “provide verbal responses in place of written” to a scribe.

27. The student’s witness Lenora Link, a special education advocate,³ noted that there must be a reason why a student does not like to write but

³ It is noted parenthetically that the School Board’s counsel, both during the hearing and in the School Board’s proposed final order, belabored the point that the student’s specialists and experts were paid for their work, the implication being that they were mercenaries whose testimony was inherently less reliable than that of the School Board’s staff. This implication is unpersuasive. The undersigned notes that the School Board’s witnesses were also paid for their time, by their employer. When the School Board’s counsel raised the issue during his testimony, ██████ cogently observed, “[W]hat bothers me in these cases is, everybody is being paid here except the parents.” The undersigned prefers to believe that

the school provided no explanation. ██████ stated that if fine motor skills were still a problem for the student, then it made no sense to eliminate occupational therapy from the IEP. ██████ noted that the documentation does not describe the interventions that had been attempted to encourage the student to write. “They just more or less started writing for him, and I think ... that’s a big disservice to him, because that’s not going to be real life.”

28. ██████, the neighborhood school’s assistant principal, testified that the occupational therapist reported that the student’s problem was an aversion to writing, not any mechanical difficulty. ██████ stated that the team drafted a writing goal “that would work on his punctuation, his capitalization, his proper spacing, and his writing because that would be really the next logical step for a student who is not wanting to write.” However, the writing goal as drafted states: “*When provided a written task [the student] will write complete sentences using proper punctuation, capitalization and spacing with 80% accuracy in 4/5 opportunities.*” (emphasis added).

29. The problem with this goal is that the overall thrust of IEP 2 is to discourage “providing written tasks” to the student. It repeatedly emphasizes that the student “responds best when he is able to answer questions orally.” ██████ stated that ██████ would write the words the student dictated when he asked questions. IEP 2 codified ██████ practice into the provision of a scribe as an accommodation for the student.

30. The revised behavior intervention plan adopted on November 30, ██████ (“BIP 2”), targeted the same behaviors as did BIP 1: physical aggression (biting, hitting, pinching, and pulling of peers and/or staff); property destruction (dumping bins of school supplies, turning over desks and/or chairs, writing on school furniture, throwing school supplies, flushing items in the toilet, and ripping school supplies); class disruption (talking during

every witness in this case testified based on their own honest observations and sincere convictions, not based on who signed their paycheck.

instruction, crawling under tables, and refusing to follow directions); and elopement (leaving designated area without permission). It was accurately described by ██████████ as providing more strategies to support the student than were included in BIP 1. ██████████ described these as things that had been shown to work in the classroom, such as providing the student with a personal space in the classroom, away from peers; giving him jobs to do in the classroom; shortened work periods; frequent breaks; and repeated directions.

31. ██████████, a certified school psychologist testifying for the student, agreed that BIP 2 added more strategies but disagreed as to their merit. ██████████ correctly noted that there was no data presented to support the efficacy of the new strategies. ██████████ also noted that BIP 2 included no replacement behaviors for the targeted negative behaviors that the BIP was meant to decrease. ██████████ was critical of the fact that the school did not perform a functional behavior analysis (“FBA”) with antecedent behaviors and consequences prior to designing BIP 2. ██████████ stated:

You would want to look at the behaviors in the context of schedule so that you can see when things might be happening and to what extent, how long they're happening, what were the interventions used before or what were the antecedents before so you can get a real sense of what the child is trying to communicate with this behavior....

You'd want to see what the antecedent was, what was happening in the environment, what might be some of the triggers. Then you'd want to define the behavior. Then you'd want to find out what the consequence was, what was reinforced or what was—what happened post, because that is what's reinforcing the behavior continuum.

32. As noted above, the School Board failed to provide evidence of any systematic data collection, instead relying on anecdotal classroom observations as the bases for changes to the IEP and BIP. ██████████, who drafted BIP 2, testified, “I didn’t rely on data. I relied on the teacher and the

support facilitator saying that these things they were trialing were successful.” ■■■ received no data from the teacher or the support facilitator prior to drafting the BIP, and collected no data subsequently on whether the new interventions were working.

33. Immediately after IEP 2 was put in place on November 30, ■■■, the student’s behaviors escalated in frequency and intensity. The next day, December 1, ■■■, the school called the parents to pick up the student because of a disciplinary episode. At first, the behaviors were seen most frequently in resource classes, which convened between 11:50 a.m. and 12:30 p.m., relatively late in the neighborhood school’s day.⁴

34. ■■■ and ■■■ testified as to the student’s disruptions in the general education classroom. He exhibited behavior such as ripping pages out of other student’s books and throwing them across the room, screaming and yelling, taking writing materials out of student’s hands, running around the classroom, throwing objects, and disrupting students while working.

35. ■■■ testified that during her ESE sessions, the student became less responsive in December and began engaging in behaviors that included hitting ■■■ with a metal water bottle and a dry erase board and biting her on the leg. He disrupted the class and destroyed the work of other children, who at times had to be moved out of the classroom for their own protection.

36. ■■■ testified that ■■■ had multiple conversations with the student’s parents regarding what could have led to the changes in behavior, but there was nothing they could pinpoint that would have triggered the change aside from an incident in art class. The parents noted that the student was upset that the teacher could not find a bowl he had made the

⁴ ■■■ testified that the students arrived between 7:40 and 8:00 a.m., classes began at 8:05 a.m., and school was dismissed at 1:50 p.m. ■■■ testified that math class was held from 12:45 to 1:50 p.m., meaning that the student missed math class on days he was sent home early.

previous week. ██████ stated that the only other thing that the student could verbalize was that he was bored.

37. ██████ testified that the student's struggles in resource class led to a plan to allow the student to choose whether he would go to resource or spend time in ██████ office doing preferred tasks:

I said we could set up a plan where either [the student could] come to resource with me, bring a friend, and do all the fun things that I have in my office, including LEGOs and things like that, or I could transition to resource with him and try to create -- present him a different activity or maybe a little bit more stimulation in the activity so that he wasn't -- if he was -- if boredom was part of his frustration, then I could help to kind of keep him more engaged in the classroom setting. And so after a conversation and an email to mom, she'd email me back that [the student] was excited to spend time with me in my office, the following Monday I believe, and she said I'm going to send a couple of fun things with him.

* * *

I would categorize it as generally successful. On a couple of occasions, [the student] chose to go to resource and that was fine. I would travel with him on those dates. But for the most part, he really enjoyed coming to my space and spending time playing, inviting a friend.... On a lot of days he could finish out his day very positively from there.

38. Despite the general success, ██████ recounted several resource class incidents in December ██████. In a STEM resource class, the student began taking classroom materials, moving them around, and throwing them around the classroom. ██████ attempted to redirect the student, but he proceeded to walk around the groups of students and destroy their projects. He grabbed chalk off the floor and drew all over another student's pants. At length, the student was able to re-regulate and participate in the class.

39. In art resource class, the student began throwing other students' clay bowls around the classroom, into the trash can, and onto the floor. The art teacher was unable to continue with the lesson and so directed the students to play with other items in the room. The student proceeded to walk around the room and knock over blocks that another student was playing with. He moved to an area in the back of the art room, climbed on a table, and continually pressed buttons on a washer and dryer. ██████ stated that the school finally called the student's mother because they were not able to get the student regulated. When the student's mother arrived, she had to restrain him physically until he became calm enough to be carried out of the school.

40. On or around December 15, █████, █████ contacted █████, █████, an ESE program specialist for the School Board, to seek additional support and input on addressing the student's increasing negative behaviors. On December 16, █████, █████ came to the neighborhood school to observe the student in █████ classroom.

41. In her testimony, █████ described the ideal way for a school psychologist to conduct an observation:

The data builds the behavior plan. So if the observation is not giving you clean data, you're not going to be able to build a behavior plan that functions and that can be used with fidelity for everybody.... [B]est practice would be looking at antecedents, documenting antecedents, behaviors, and consequences. I would want to do a whole day and document when certain behaviors are happening.... I'm trying to really tease out what in the environment we can change to make this child more successful, because that's really what a behavior plan is for.

* * *

[In response to the question, "Should the observer be invisible to the student?"] Yes. I believe that's

best practice, because you don't want to impact the behavior. You don't want to impact what that child is demonstrating in the classroom, so you just kind of spill in, and you sneak in the back, and you observe so that you can get a real clean view of what's going to unfold.

* * *

[In response to the question, "If the observer ends up interacting with the student, could that impact the behavior of that student?"] Sure. Of course, yes, especially if the child doesn't do well when there's any kind of change in his schedule or change with people. Things like that can be triggers, and then your data and your observation is really moot at that point.

42. By her own testimony, ██████████ made little effort to be inconspicuous or avoid interacting with the student during ██████ observation. ██████ stated that ██████ observed the student get out of his seat and elope to another area of the classroom to look in his bag. ██████ followed him to watch where he was going and he said to ██████, "Hey, you don't get to look in my backpack, you jerk." At this point, ██████ observation was compromised. ██████ attempted to retreat and observe the student from afar while interacting with the other students in the class, but ██████ now had the student's full attention. He came over to where ██████████ was sitting, opened a drawer from a nearby cart, and dumped out the contents of the drawer all over the floor. ██████████ tried to redirect the student, eventually sitting down next to him. The student began to hit ██████████ with a stuffed Pikachu doll but she eventually managed to redirect him.

43. ██████████ testified that ██████ was impressed at the level of classroom management ██████████ demonstrated in managing the student's behaviors. ██████ described the student's behavior as "distracting and disruptive" without acknowledging ██████ own role in triggering the behavior that required

██████████ to execute the strategies listed in BIP 2 to manage him. The value of █████ observation was dubious at best.⁵

44. Prior to the winter vacation in mid-December, the student was sent home early five more times: on December 8 at 12:40 p.m.; on December 9 at 1:44 p.m.; on December 13 at 12:03 p.m.; on December 15 at 1:18 p.m.; and on December 16 at 9:00 a.m.

45. The neighborhood school's principal, ██████████, testified that she began looking more closely at the student's records from his previous school. █████ noted that the student had demonstrated the same pattern during his █████-grade year as he was starting to demonstrate at █████ school, with problematic behaviors increasing in December. He was also demonstrating the same types of behaviors, including property destruction, physical aggression, eloping, and classroom disruption. █████ did not explain why █████ school was not already aware of the student's behavior patterns at his previous school.

46. █████ testified that the school was in frequent contact with the student's mother about his behavior. The student's mother would be called in to the school when staff was unable to de-escalate his behavior. █████ noted there were times when even his mother could not de-escalate the student. He would hit and kick his mother.

47. Despite all the behaviors described above, no formal discipline was imposed on the student prior to the winter break. No manifestation

⁵ █████ testified as to a second observation █████ undertook on February 3, █████. Again, she was obtrusive, persistently attempting to interact with the student rather than simply observing his behavior with █████ in the classroom. The student was known to have problems with novel situations and new people.

These findings are not meant to question █████ qualifications, competence, integrity, or her sincerity in attempting to help draft behavioral and crisis plans for the student. At the February 15, █████ IEP meeting, █████ and █████ made tentative plans to work together on developing adequate data to support a revised BIP for the student, but were unable to begin this work prior to the commencement of litigation.

determination was contemplated by the school. No FBA was conducted by the school.

48. It appears never to have occurred to school personnel to convene an IEP meeting to reinstate the supports that had worked so well before November 30, [REDACTED], even though the notes from the November 30 IEP meeting state that “if [the student] shows a need for additional support we will reconvene to discuss.”⁶ At the hearing, school personnel testified that they saw no connection between the new IEP and the student’s behavior, but they had no other explanation for the student’s sudden turnabout aside from [REDACTED] implication that the month of December had something to do with it.

49. When classes resumed in January [REDACTED], the school embarked on a series of improvised responses to the student’s increasingly disruptive behavior, some of which may well have exacerbated the situation.

50. [REDACTED] was in the student’s classroom almost every day in January [REDACTED], and also allowed the student to take breaks with [REDACTED] outside of the classroom. [REDACTED] effectively became the student’s full time, one-on-one assistant because of [REDACTED] rapport with the child.⁷ [REDACTED] was with the student all day, every day from February 3, [REDACTED], through spring break. If the student came to [REDACTED] office, [REDACTED] would take his classwork with [REDACTED] so the student had the option of working. [REDACTED] believed the general education classroom was overstimulating for the student. [REDACTED] would work with him on classwork in [REDACTED] office and give him a chosen reward for cooperating.

51. [REDACTED] testified that in [REDACTED] opinion the school was unintentionally giving the student incentives to misbehave:

One of the biggest concerns I had when I looked at these behavior plans from the start was that we

⁶ The quoted note specifically referenced the decision to remove direct occupational therapy services, but common sense would expand it to any service area where additional support was needed.

⁷ [REDACTED] duties as assistant principal were not reduced.

were intermittently reinforcing [the student's] maladaptive behavior, because what was happening, just from statements from the teachers and from what I could see in the behavior plan is that when he got to a heightened level, he would get his preferred person, or he would get to sit with his preferred person and play a game.

So all we're doing at that point is reinforcing the behavior that we're trying to reduce. And intermittent reinforcement is even more powerful, because it's almost like when you gamble: Every now and then you win, and then it becomes even more powerful.

* * *

[A]ggressive behavior became the most immediate path to getting what he needed at that point. And that's what the data, the ABC analysis would give us. We would see that every time [the student] escalates here, or every time you ask him to do this or something happens here, then he gets [REDACTED]. All we're doing is reinforcing that maladaptive behavior.

52. As noted above, nothing like ABC data was provided by the School Board. The graphic summaries provided in evidence for the period of November 30, [REDACTED], through January 24, [REDACTED], simply log instances of “physical aggression,” “property destruction,” and “classroom disruption” without further explanation. The School Board insisted on emphasizing the “average per day” of each form of misbehavior. For example, the summary states that the student engaged in 152 instances (otherwise undescribed) of “property destruction,” an “average of 8 per day.”

53. Averages are at best meaningless in this context and very possibly misleading because they leave the impression that the child was consistently misbehaving every day, which was not the case. The student's behavior would be highly escalated on one day and unexceptional the next. Even in December

█████, when the student's overall negative behaviors greatly increased, ██████ sent several reports to Respondent's parents describing good days the child had at school.

54. The more useful information would have been to document what happened on the six days where the school logged 10, 11, 13, 14, 22, and 36 instances of property destruction and what happened on the seven days when there were only one or two instances. This inquiry might have been the start of an explanation for the student's behavior. The school's "data" explained nothing.

55. These findings should not be read as minimizing the student's behavior. The school's catalogue of discipline referrals is replete with incidents of the student hitting, kicking, biting, throwing rocks, spitting at teachers, crawling on the floor to unplug computers in a classroom, and repeatedly destroying the classwork of other students. The criticism is of the school's reaction to the student's behaviors. Instead of reinstating the supports that had worked during the first half of the school year, conducting a manifestation determination and/or an FBA to ascertain the causes of the student's behavior, or convening a proper IEP meeting in December or January, the school chose isolation with ██████, disciplinary referrals, suspensions, and a shortened school day. It appears that the school began to see the student as a discipline problem rather than as an autistic child whose disability was manifesting in these behaviors.

56. Even at the hearing, the School Board's overwhelming emphasis was on the effect the student was having on other students and the school staff, not on efforts to help the student succeed in the general education setting. The chief concern was the student's destructive and disruptive behavior. Rather than ask themselves why the BIPs were not working, developing data as to antecedents and consequences to the student's behavior, and sitting down with the parents and their advocates to revise the plans and devise new

strategies, the school district took the expedient course of getting the student out of the general education classroom altogether.

57. The student's parents cooperated with the school. They dutifully came to the school every time they were called. ██████ testified that the school was not requiring the parents to pick up the student when it called them. The student's father more credibly testified that there seemed nothing voluntary about the school's phoning him and telling him to come pick up his child.

58. In January ██████, the school began giving the student formal out-of-school suspensions for misbehavior. There was a total of five suspensions between January 17 and February 17, ██████. Whether by design or happenstance, the school stopped the suspensions when the total number of official suspension days reached ten. Thus, the manifestation determination threshold of rule 6A-6.03312(3) was never formally crossed.

59. In January ██████, the parents reluctantly agreed to a shorter school day for the student on a trial basis. On January 25, ██████, ██████ drafted an amendment to BIP 2 to make permanent the shortened school day.⁸ ██████ testified that only she and her supervisor were present when the BIP amendment was written. She forwarded the amended BIP to ██████ after drafting it. ██████ believed that ██████ discussed the amendment on a phone call with the student's father.

60. ██████ testified that the idea of a shortened school day was the result of discussions between ██████ and the student's parents the week before January 25, ██████.⁹ ██████ discussed the revised BIP with the

⁸ In her testimony, ██████ pointed out that the U.S. Office of Special Education Programs ("OSEP") has stated that subjecting a student to a shortened school day to address his problematic behavior, if done on a repeated basis, could amount to a disciplinary removal from the child's current placement for purposes of the IDEA's discipline procedures. *See* Letter to Mason, 72 IDELR 192 (OSEP July 27, 2018). ██████ observed that if the shortened school days were considered exclusionary discipline, then the student was subjected to more than ten days of disciplinary removals and should have received a manifestation determination and an FBA.

⁹ ██████ recalled having such a discussion with the student's father in "mid-January," which concurs with ██████ recollection.

student's father on a phone call the evening of January 27, [REDACTED]. "I read through with him the changes to the behavior plan and discussed those with him and then followed up with an email with the behavior plan that same evening and said in the email something to the effect of let me know if you have any questions, this is always a working document." [REDACTED] testified that the parents never gave any indication that they disagreed with the amendment and that she received an email from the student's father agreeing to a trial plan of picking up the student at 11:15 a.m. every day.¹⁰

61. The student's father testified that [REDACTED] phoned him after 7:00 p.m. on Friday, January 27, [REDACTED], while he was at a birthday party with the student's younger brother. He was playing in a "parents versus kids" game of dodgeball. Balls were whizzing past him as he tried to speak with [REDACTED]. His recollection of [REDACTED] statement was, "Hey, I just wanted to talk to you about some things we wanted to try for [the student]. We would like you guys to start picking him up early and I just wanted you -- I just wanted to ask you, do you want to try picking him up before lunch or after lunch?" His impression was that the only choice offered was to pick up the student before lunch or to pick him up after lunch; no option of declining a shorter day altogether appeared to be offered.

62. The student's father replied by email on Sunday that he wished for the student to be in school for as long as possible each day, which meant picking him up at 11:15 a.m., after lunch. By the following Wednesday, he had thought matters over and emailed [REDACTED] that he and his wife were not agreeing to a permanently reduced school day.

63. The student's father testified that it was this episode that made him consider hiring an advocate:

To answer your question, it changed right around the 25th when I got this e-mail from [REDACTED]

¹⁰ [REDACTED] testified that "we knew the afternoons were absolutely the hardest for [the student]." [REDACTED] conceded that, in practice, sending the student home early every day proved ineffective to reduce the frequency or magnitude of his behaviors.

where ■ said, "Hey, stop by my office real quick just for a few minutes and just sign this thing to make it permanent." And that didn't feel very good to me. That felt sneaky. It felt uncollaborative. Okay. We were stressed out, upset, angry. This was just the start.

64. No meeting was ever convened to formalize the January 25, ■ BIP amendment. At the final hearing, ■ admitted ■ was aware that the parents never participated in any meeting that made the shortened school day an intervention in the behavior plan. Nonetheless, the "Dates & Notes" statement appended to the revised BIP falsely states that on January 25, ■, "The team met to make some adjustments to the Behavior Plan based on recent behavior changes and concerns."

65. There is no record evidence that the school made any provision for how the student was to make up the school work missed due to suspensions, early dismissals, and the permanently shortened school day, aside from ■ and ■ occasionally sending work home with the child at the parents' request. ■ testified that the shortened school day meant that the student missed phonics, resource, snack, and math every day. ■, the ESE teacher, testified that ■ was unable to make contact with the student after the January 25, ■ BIP was implemented.

66. It became clear to the student's parents that the school was moving toward changing their child's placement. On January 31, ■, the parents received a voice message from ■ stating, in relevant part, "I wanted to call and follow up on the request for support for [the student] and what are our options for alternative placement." The student's father immediately responded with an email stating:

I received your voicemail today at 5:40 p.m. You mentioned discussing alternative placement. I want to clarify that this is not something that we have asked to discuss, nor is it something we feel is appropriate to discuss at this time.

What we are [and] have been requesting, and still have not received from you, is how the school will educate [the student] during the suspension. Please provide information ASAP - we are continuing to experience learning loss.

Will you be setting up a zoom for [him] to attend class tomorrow?

67. On February 1, [REDACTED], at 6:15 p.m., [REDACTED] sent the parents an email stating, in relevant part, “I would like to set up a quick meeting to amend [his] IEP to include the current half day schedule that we included in [his] Behavior plan. I can send you the draft to review tomorrow if whoever picks [the student] up Friday would be willing to take a couple of minutes to go over it with me. Let me know if that would work.”

68. The student’s father testified that the unilateral amendment to the BIP, the direct suggestion by [REDACTED] that changing the student’s placement should be discussed, and [REDACTED] “sneaky” attempt to get the parents to sign off on the half-day schedule without a formal meeting, combined to cause his family to retain the services of an advocate, [REDACTED], [REDACTED], the owner of an advocacy company called IEP Partner, LLC.

69. In response to [REDACTED] email about a “quick meeting,” the student’s father wrote on February 2, [REDACTED], that he was “in agreement we need an emergency meeting. We will be bringing our advocate, [REDACTED], with IEP Partner.” He asked for a two-hour meeting and for the following:

We also need the psychologist and all evaluators to be in attendance at this meeting as the explanation of the evaluation was not done properly and did not allow for our meaningful parent participation.

We will need [the student’s] general education teacher, ESE teacher, and SLP to be in our meeting. Please ensure there is adequate coverage as our permission to excuse or dismiss any IEP team members will not be given.

At this time, we believe our [son] needs 1:1 adult support full day so [he] can attend school and fully participate in [his] education. Before working with [the student], please be sure all staff have been trained on [his] IEP and [his] BIP. We will need a copy of the training attendance log.

* * *

In addition to the psychologist, we are requesting a BCBA [Board Certified Behavior Analyst], social worker, counselor, and an OT to be in attendance. We believe a team approach is what is needed.

We are also formally requesting an FBA to be completed by a BCBA, a social emotional evaluation, and an occupational therapy evaluation to look at sensory processing. We believe a sensory diet is needed to help [the student] regulate. We will discuss our requests in the IEP meeting.

70. With [REDACTED] guidance, the parents were able to make informed requests such as that set forth above. The parents also began requesting documents from the school and otherwise asserting their rights under the IDEA. School administrators complained about the changed “tone” of their relationship with the parents after the advocate became involved.

71. [REDACTED] assembled a team to assist in advocating for the child’s rights under the IDEA. [REDACTED] testified that the parents reported the student is not allowed to go to school after 11:15 a.m., has been suspended for unclear reasons, and the school had failed to call a meeting to deal with these issues. [REDACTED] was alarmed that the school did not have a crisis plan in place for when the student’s behavior escalated to the point of danger. [REDACTED] testified that, at the February 15, [REDACTED] IEP meeting, it became apparent that no one at the school had considered a crisis plan and that no adjustments to the BIP had been made in reaction to the student’s escalated behaviors, aside from sending the student home early every day.

72. Shortly after hiring [REDACTED], the parents requested an IEP team meeting. At the hearing, School Board personnel unconvincingly claimed that the IEP team meeting had been their idea. The record is clear that the student's parents and their advocate were the ones pushing for a meeting after the school tried to foist the January 25, [REDACTED] BIP amendment on the parents without a real meeting to discuss it.

73. When asked about the fact that the school did not ask for an IEP meeting between November 30, [REDACTED], and February [REDACTED], [REDACTED] responded:

When you see an escalation in behavior, that's their duty, is to call an IEP meeting, look at getting a new FBA, because the behaviors are changed, and write a new behavior intervention plan based on the FBA data. The parents need to be part of that.

And it's really ridiculous that the parents were the ones that had to request this meeting. It was a parent requested IEP meeting as of February 15th. It was not a school requested IEP meeting.

The school should have requested one December 1st. They should have requested one January 1st. They should have requested one February 1st.... [T]heir job is to make sure that all areas of need are addressed.

And, obviously, there was something not going well and certainly not going right, to the extent that you're not allowed to go to public school. And no meeting -- not one was offered between when they basically kicked [him] out of [his] second grade classroom for half a day and when the parents called for a meeting on February 2nd.

74. [REDACTED] testified that, in keeping with her usual practice, she reached out to School Board staff to share the parents' concerns and attempt to facilitate the delivery of documents they had requested. [REDACTED] testified as to the information requested:

I asked for a copy of the latest FBA. I asked for a copy of the most recent behavior intervention plan. I asked for a copy of the staff training as well as a copy of the fidelity checks. I asked for the attendance logs with a reason that [he] was sent home each and every single day. I asked for a list of all suspensions, referrals, discipline problems, and notes. I asked for [his] report card. I asked for all team meetings that were discussed about [the student] with the District or with the school staff, those copies to be sent home to the parents. I asked for the behavior data, the daily behavior data, and I specifically asked for it by hour. We asked for the classroom schedule. We asked for the service logs, and the service logs were to include who was providing the service, what scientifically researched, peer reviewed program was being used, when did they meet, what was the time, what was the duration, where was the location, what goal was worked on specifically during that service time.

75. ██████ testified that she and the parents put their request in writing and sent it to the School Board at least four times. A draft IEP and some of the missing documents were provided on the evening of February 13, ██████. ██████ orally asked for the missing documents at the start of the February 15, ██████ IEP meeting. The requested documents were never provided.

76. ██████ scheduled a phone conference with ██████, Ph.D., the School Board's Director of ESE Services. The conversation occurred on February 9 or 10, ██████, a few days prior to the scheduled February 15, ██████ IEP meeting. ██████ described the meeting as follows:

I was very clear that the parents do not believe that we are ready to make any kind of school placement change because the IEP and the behavior intervention plan are not solid, they have a lot of questions about it, they have a lot of questions about what is happening with [the student].

And in that conversation, [REDACTED] very clearly stated to me, "If your parents will not get on board, we will file suit against them." And that's a direct quote.

77. It was very clear to [REDACTED] that "getting on board" meant agreeing to move the student to a more restrictive placement at another school. [REDACTED] asked [REDACTED] what the school had tried and failed before entertaining such a drastic change in placement. [REDACTED] was not able to explain what had been done. [REDACTED] stated that it was "absolutely" plain to [REDACTED] that the school had predetermined the outcome of the upcoming IEP meeting.

78. In her own testimony, [REDACTED] confirmed the essence of [REDACTED] description of their meeting:

When [REDACTED] called me, at the time I did not have the signed release of information from [REDACTED], so I did not speak regarding the student specifically to [REDACTED].

We spoke about children with this high magnitude, disruptive kind of behaviors, the elopement and in general what the District would do.

And I said to [REDACTED] that, you know, we would typically have -- our behavior plans would be implemented; we would rewrite behavior plans if things aren't working; we would come back together, problem-solving teams, and all those steps were being done.

And then [REDACTED] said, "I'm surprised the District hasn't filed due process."

And I said to [REDACTED], "The District wouldn't need to file due process if the parents agree to a more restrictive setting."

79. The IEP team meeting notice, issued on February 7, [REDACTED], set forth the following as the purposes of the meeting: "IEP interim

review/amendment, Consider evaluation/reevaluation, Discussion of possible change of placement.”

80. [REDACTED] and [REDACTED] attended the IEP meeting with the parents on February 15, [REDACTED]. [REDACTED] testified that the School Board did not provide all the requested information until the day before the meeting. “[W]e were really behind the eight ball in knowing how to assess the behavior plans and things like that, because we didn’t have all the information.” As her focus was primarily on the BIPs, [REDACTED] noted that the behavior data provided by the school “just had numbers. It didn’t tell us a story. It didn’t tell us what happened before, what happened after.” No data was provided on the behavioral strategies being employed by the school. No raw data, i.e., the actual check sheets that school personnel used to document the student’s negative behaviors, was provided. No data was provided to show whether the shortened school day had any positive effect on the student’s behaviors.

81. [REDACTED] stated, “I felt like it was a collaborative meeting and that people were wanting to talk about the behavior and wanting to jump in to make some changes so that he would be successful.” [REDACTED] was especially impressed by [REDACTED]. [REDACTED] and [REDACTED] discussed collaborating to draft a more effective BIP. Both agreed that the lack of ABC data made it difficult to have substantive conversations about the student’s behavior.

82. [REDACTED] testified that it would be impossible to draft a new BIP without the behavioral data and that the School Board never came forward with it. Nonetheless, she came away from the meeting with some optimism about working with [REDACTED] to create a BIP that could make a difference for the student in his current placement.

83. [REDACTED] testified that [REDACTED] misgivings about predetermination were confirmed at the outset of the February 15, [REDACTED] IEP meeting when the discussion at the meeting commenced with placement:

[W]hen a school starts with the placement of an IEP, which is page 12, 13, then we know it's bad,

because (1) they skipped over parent input; (2) we didn't go page by page. We didn't address the goals that don't make sense. We didn't address that all areas of need, including [his] social/emotional needs, were being addressed. We didn't talk about communication needs that weren't being addressed. We didn't discuss the behavior intervention plan and how that was being implemented and what it looked like. We didn't even know what it looked like.

So when we started the meeting, I actually had to stop and say, "Wait a minute. We are not talking about placement at the start of the meeting. I know that's what you guys" -- and I do remember, I think I said this: "We are not starting with a change of placement, because we don't even agree that this IEP has been calculated for [the student]. This was not written for [the student], so we need to start back on page 1."

84. [REDACTED] and the student's father testified that the notes of the meeting produced by the School Board were riddled with errors. The parents asked that their written corrections be appended to the notes but the School Board declined to do so. The February 15, [REDACTED] IEP meeting did not really resolve any of the issues separating the student's parents and the School Board, aside from the School Board's agreement to develop a crisis plan to be implemented when the student's behaviors escalated to the point of creating a danger to himself or others and to open a re-evaluation for an FBA. It was agreed that a second meeting would be scheduled soon.

85. At the February 15, [REDACTED] IEP meeting, [REDACTED] repeatedly stated that the student could return to a full school day the next day, February 16, [REDACTED]. [REDACTED] and [REDACTED] insisted on developing a transition plan for the student to come back full time. [REDACTED] noted that a child with autism such as the student could be triggered by a sudden change in schedule. It was very important to have a "very slow transition that was very well orchestrated," to help the child understand and feel safe in his environment. [REDACTED],

██████████, and the student's parents all left the February 15, ██████ IEP meeting with the understanding that the school would develop a transition plan for the student's return to a full school day.

86. ██████████ testified that a "huge portion" of the IEP meeting was a discussion between her and ██████████ on the need for a transition plan. ██████████ only concession in that regard was to state that ██████████ would continue to accompany the student throughout the day.¹¹ School personnel came away from the meeting with the understanding that the student would start a full school day on February 16, ██████.

87. On February 16, ██████, the student had a serious behavioral event at school. ██████████ wrote a report that adequately summarized the antecedent events to the student's meltdown:

The class was prompted by ██████████ to begin cleaning up and preparing for the transition to lunch. ██████████ leaned in toward [the student] and prompted [him] to get [his] lunchbox so [he] could prepare for lunch. ██████ stated that the class was getting ready for lunch, and [he] needed to join them. [The student] began picking up all [his] items and put them in [his] backpack. ██████████ asked [him] why [he] was packing [his] backpack because they would be coming back after lunch. [The student] then said, "wait, no recess?" ██████████ told [him] they would have recess and then come to the class, but [he] didn't need [his] backpack for that, and it would be safe in the classroom. [The student] did not respond to ██████ and decreased eye contact while [he] continued packing [his] bag. ██████████ asked [the student] if [he] understood and [he] said, "So am I staying for a full day?" ██████████ stated that ██████ thought so and

¹¹ In an email to ██████████ dated February 21, ██████, ██████████ flatly refused the family's reiterated request for a transition plan. In the same email, ██████████ misrepresented ██████████ opinion of the draft BIP, stating, "██████████ actually indicated that ██████ believed that this was a well written BIP." This caused ██████████ to write a lengthy response denying ██████████ statement and detailing the reasons why ██████ did not think the BIP was "well written," including the fact that the School Board's behavior specialist had no data to support the reinforcers used, no data on the times that the student's misbehaviors occurred, and no data on antecedents and consequences.

reminded [him] that [he] only needed [his] lunchbox. [REDACTED] told [him] that [he] should bring [his] lunchbox, and to remember that [REDACTED] never tells [him] that [he] must eat, but [he] does need to transition with the class.

88. The student walked to the door of the classroom. [REDACTED] insisted that he leave his backpack before he left the classroom for lunch. Without putting down the backpack, the student left the classroom and began playing with a stick, banging it on classroom windows as he walked by. [REDACTED] followed him, continuing to instruct him to return to the classroom and put down his backpack. After a feint toward the classroom, the student continued walking with his class toward the lunchroom in the school's main building. [REDACTED] blocked his access to the lunchroom, which led to a full blown 30-minute meltdown that included biting, kicking, cursing, slapping, scratching, and elopement to various areas of the school grounds. The student's father ultimately was called to take the student home.

89. At the February 24, [REDACTED] IEP meeting, the student's parents pointed out that the backpack contained the student's stuffed animals and comfort items. They believed with some justification that it was inappropriate for [REDACTED] and [REDACTED] to insist that he put down the backpack in a situation where he was obviously confused about what was happening to him. Later during the student's meltdown, [REDACTED] took away his stuffed animal and stated [REDACTED] would not return it until he picked up some of [REDACTED] items that the student had knocked to the floor. This led to more aggressive behavior.

90. [REDACTED] testified that if the student wore his backpack to lunch, he would believe he was leaving at 11:15 a.m. [REDACTED] was trying "to help him with his mindset moving forward in the afternoon." Counsel for the student asked [REDACTED] the reasonable question, why wasn't the student simply allowed to wear his backpack to lunch that day, given the mismatch in expectations as to the afternoon? [REDACTED] responded: "The reason was he was given a

direction to leave it in the classroom.” ██████████ said something similar to the student’s father in a phone conversation that evening, that the student was expected to obey directions from teachers. The student was suspended from school for one day.

91. ██████████ is a private school psychologist retained by the student’s parents shortly after the February 24, ████████ IEP meeting to conduct a comprehensive psychoeducational evaluation of the student. He has many years of experience in his field and was accepted as an expert in school psychology and special education. ██████████ opined that for a child such as the student, the most important things are to establish trust, consistency, and predictability. The BIP was ineffective “psychobabble” that should be rewritten to clarify the reinforcers for the student’s behavior, i.e., what the school is doing proactively to prevent the child’s aggressive behaviors. The lack of concreteness in the BIP was problematic. It called for “emotional counseling” but did not state what the goals were or how they would be developed. It stated that the student would receive “specified educational interventions” but did not state what those interventions were or how they would be taught.

92. ██████████ was critical of the adults’ behavior during the student’s February 16, ████████ meltdown. He pointed out the absurdity of attempting to reason with the student when he was in a highly dysregulated state:

No matter what the diagnosis of a person is, if you have an ████████-year-old who has no diagnosis and he or ████████ is having a major meltdown, as kids do, you don't counsel them or try to talk to them during this meltdown. You stop the negative behavior. You don't talk to them.

* * *

[I]f what they're doing is not decreasing negative behavior, but in fact making the behavior increase, they're actually rewarding, reinforcing negative behavior by talking to him.

* * *

[H]e would benefit from [holding his stuffed animal], and just giving [him] time to calm down. But we don't talk to [him]. We don't counsel [him]. We just give [him] time to calm down. Like if your husband is upset or your wife is upset and is screaming or whatever, you give them time to calm down. It's kind of a normal thing. You don't need a Ph.D. in psychology to figure that out, or at least I don't think you do.

93. ██████████ testified that when a child's behavior escalates to the point where they present an imminent danger to themselves or others, the most effective technique may be for a trusted adult to physically restrain them until they relax and calm down. If the trusted adult works with the child beforehand, practices the restraint technique with the child, and the child is prepared and understands that being held securely will be the consequence of out-of-control behavior, then the child will often better regulate their behavior to avoid that consequence.¹²

94. On February 17, ██████████, the School Board issued a notice for the follow-up IEP meeting that was ultimately held on February 24, ██████████. The sole purpose of the meeting was listed as: "Continuation Discussion of possible change of placement."

95. The proposed IEP for the February 24, ██████████ meeting included the contents of the February 15 draft IEP, adding the change of placement, starting March 30, ██████████, to an ESE classroom for all activities other than

¹² During cross-examination, counsel for the School Board pointedly asked ██████████ if he was aware of Florida Department of Education rules regarding restraint, the clear implication being that ██████████ method would be disallowed under those rules. However, counsel never provided this tribunal with any citation to a rule prohibiting the restraint method described by ██████████. Section 1003.575(3)(b), Florida Statutes, permits authorized school personnel to use physical restraint "when all positive behavior interventions and supports have been exhausted" and only when there is imminent risk of serious injury, which is precisely the situation described by ██████████.

recess and lunch. The new draft also added “continuous supervision to ensure physical safety and also to support social interactions,” and specialized transportation to and from school. The proposed IEP contained present levels of achievement and goals as to phonics and writing but was silent as to math, a significant omission given the number of math classes the student had missed since early January.

96. At the February 24, [REDACTED] IEP meeting, the IEP team approved the IEP amendment to place the student in a self-contained ESE classroom in a different school. The principal of that school, [REDACTED], was invited by the School Board to attend the IEP meeting, along with her assistant principal, [REDACTED]. No other schools were represented. No other placement options were considered, aside from the efforts of the student’s team to persuade School Board staff to try the new supports outlined in the draft IEP in the general education setting before consigning the student to a self-contained ESE classroom.

97. At the outset of the meeting, the student’s father stated his position that it was inappropriate to discuss alternative placement before the IEP team made every effort to collaborate with the parents in drafting an IEP and BIP that would allow the student to transition back to a full day in the general education setting.

98. The meeting notes reflect that [REDACTED] explained the differences between the self-contained and general education classroom:

The self-contained classroom currently has 4 students with one teacher and one paraprofessional. A behavior specialist is on campus and behaviors can be [addressed] immediately. A positive behavior plan is infused throughout the day with click cards to receive preferred activities. Visual schedules are provided. Social skills are infused throughout the day as well. A mental health counselor is also on campus who [provides] 120 minutes per month to students. The least restrictive environment is always the goal.

Trials occur during transition back into the general education curriculum, typically in a preferred area. The paraprofessional will join the student in the general education setting and will be gradually faded during a 4 week period, while data is acquired.

99. The parents and their attorney requested general information about the other students in the classroom and how long it typically takes for a student in the ESE classroom to be mainstreamed back into general education. The school district staff provided no answers to either question, aside from vague assurances that the majority of students are eventually mainstreamed. ██████████ agreed to allow the student's parents to tour ██████████ school.

100. ██████████, the School Board's Senior Director for ESE Services, stated that the parents had 10 days to contest the new placement. The starting date for the new placement was set for March 20, ██████████. The student would attend full days at the neighborhood school until the new placement took effect.

101. ██████████, the principal of the school with the self-contained ESE classroom, testified that ██████████ school has five self-contained ESE classrooms of varying exceptionalities. The school's self-contained ESE classes typically consist of between five and ten students with one teacher and one paraprofessional. The student would have been the fifth student in the class had he attended. The classroom was for students in grades K-5.¹³ ██████████ testified that students in the self-contained class must earn their way back into the general education setting by complying with the goals of their BIPs.

102. ██████████ described an "alternative room" or "sensory room" located between two self-contained classrooms. The room was used for

¹³ Because the classroom was K-5, there was no guarantee that the student would have a peer at his grade level in the classroom. ██████████ conceded that all of the children in the classroom had been unsuccessful in the general education setting. The student's parents worried that he would have no peers modeling appropriate behaviors in this classroom.

sensory breaks and de-escalation. When she led the student's parents on a tour of the school, she cautioned them that the room "looks scary at first."

103. The student's father described it as a windowless, empty, 10 foot by 10 foot cinderblock room with ripped blue padding rising about six feet up the walls and doors. He called it a "padded cell that has bite marks and scratch marks inside of it" and cited it as a major reason he did not want his child to attend the school.

104. ██████ testified that the School Board was closing the behavior unit at her school at the end of the ██████-█████ school year and relocating the current students to another school. Thus, if the student started at ██████ school in March ██████, he would have to relocate to yet another school at the start of the ██████-█████ school year.

105. The student's parents did not enroll him in ██████ school. The student's father testified that the student stayed in the neighborhood school until the effective date of the proposed placement in ██████ school. The neighborhood school's disciplinary records indicate no incidents involving the student after February 17, ██████. The student's father testified that the student was not sent home early between February 17 and March 20, ██████.

106. The parents timely filed their request for due process on March 9, ██████.

107. On March 15, ██████, the parents filed a Motion to Determine Stay-Put Placement, stating that the School Board's unilateral removal of the student from his home school was a change of placement that invoked the stay-put provisions of 20 U.S.C. § 1415(j) and arguing that the child should remain in the neighborhood school until the FAPE issues of the due process complaint were resolved.

108. Also on March 15, ██████, the School Board filed a Request for Expedited Due Process, arguing that maintaining the child in the neighborhood school placement placed the child and other students in danger

and that the stay-put placement should be the self-contained ESE classroom called for by the February 24, [REDACTED] IEP revision.

109. In the Final Order issued in Case No. 23-1044EDM, the undersigned concluded that the School Board had inappropriately invoked rule 6A-6.03312(7)(b) in its Request for Expedited Due Process. The cited rule is designed to maintain the status quo following a *disciplinary* change of placement. Nothing in the record of this case established that the student's placement was changed because of disciplinary removals.

110. In fact, the record indicates that the School Board went out of its way at the time to indicate that this change of placement was *not* disciplinary but was focused on the student's performance and behaviors. The IEP team discussions *assumed* that the behaviors were a manifestation of the student's disability and that the neighborhood school was simply not equipped to handle his increased levels of misbehavior. No witness for the School Board suggested that the behaviors were not a manifestation of the student's disability. The School Board's witnesses emphasized that the early dismissals and shortened school days were not considered disciplinary.

111. [REDACTED] succinctly described the School Board's actions as "going from A to Z, and all the letters in between were just skipped over." In the context of describing the critical impact of going into the IEP meeting without all of the documentation the parents had requested, [REDACTED] listed some of the intermediate steps that the School Board declined to take before changing the student's placement:

[The documentation] was also critical in understanding how the School District went from a general education classroom to a self-contained classroom in another school, when we hadn't explored mental health services, we hadn't explored guidance counseling, we hadn't explored adding social skills training, we hadn't explored resource classroom in the school, we hadn't explored pull-out services. There was a lot that was jumped over and was missed.

112. The student's father examined every incident report, every sign-out sheet, meeting notes, phone logs and every note that he received from the school to calculate that the student had missed 166 hours of instruction due to reductions in the school days and suspensions. The School Board challenged this calculation but offered no alternative number, taking the position that the student was not entitled to compensatory education at all for failure to plead it in the due process complaint.

CONCLUSIONS OF LAW

113. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 1003.57(1)(a) and 1003.5715(5), Fla. Stat., and Fla. Admin. Code R. 6A-6.03311(9)(u).

114. The student bears the burden of proof with respect to each of the issues raised in the Petition. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

115. At all times relevant to the Complaint, Petitioner was a student with a disability as defined under 34 C.F.R. § 300.8(a)(1); 20 U.S.C. § 1401(3)(A)(i); and rule 6A-6.03411(1)(f).

116. 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.* As an LEA, the School Board is required to make FAPE available to the student under the IDEA. *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).

117. 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 also 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).

118. 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).

119. “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).

120. 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, 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.

121. "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, 311 592 (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 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 181 n.4 (1982)). The IEP must be developed in accordance with the procedures laid out in the IDEA, and must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S. Ct. at 999.

122. The inquiry, per *Rowley* and *Endrew F.*, is a two-step process. First, the court should examine whether the School Board has complied with the procedural requirements of the IDEA. Second, the court must determine whether the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. *Rowley*, 458 U.S. at 206, 207; *Endrew F.*, 137 S. Ct. at 999.

123. As to compliance with the procedural requirements of the IDEA, the foregoing Findings of Fact established that the School Board denied the student's parents the ability to fully participate in the creation of the February 24, [REDACTED] IEP in violation of the procedural protections of the IDEA.

Courts have long held that parents are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized, specifically the right to participate in the creation of their own child's IEP. 20 U.S.C. § 1415(b)(1); *Rowley*, 458 U.S. at 205-206. During the IEP developmental process, parental involvement is critical. "Indeed, full parental involvement is the purpose of many of the IDEA's procedural requirements." *M.M. v. Sch. Bd. of Miami-Dade Cnty*, 437 F.3d 1085, 1095-96 (11th Cir. 2006) (citing *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 661 (11th Cir. 1990)); *see also* 34 C.F.R. § 300.501(b); Fla. Admin. Code R. 6A-6.03311(4)(d).

124. The chief procedural violation in this case was the School Board's predetermination of the outcome of the February 24, [REDACTED] IEP meeting, which resulted in the placement of the student in a more restrictive environment over the objection of the parents. Predetermination occurs when a district has made its determination prior to the ESE meeting. *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed. App'x 342, 344 (9th Cir. 2007)(explaining that in finding predetermination, a trier of fact must include findings as to the school district's predetermined plan and make findings as to the school district's unwillingness to consider other options).

125. In *R.L. v. Miami-Dade County School Board*, 757 F.3d 1173, 1188-89 (11th Cir. 2014), the court stated the standard as follows:

To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child. *See [Deal v. Hamilton Cnty. Bd. Of Educ.*, 392 F.3d 840, 858] ("Despite the protestations of the Deals, the School System never even treated a one-on-one ABA program as a viable option. Where there was no way that anything the Deals said, or any data the Deals produced, could have changed the School System's determination of appropriate services, their participation was no more than after the fact involvement."). A state can make this showing by,

for example, evidence that it “was receptive and responsive at all stages” to the parents' position, even if it was ultimately rejected. *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F.Supp. 1253, 1262 (E.D.Va.1992), *aff'd* 39 F.3d 1176 (4th Cir.1994) (unpublished per curiam). But those responses should be meaningful responses that make it clear that the state had an open mind about and actually considered the parents' points. See [*N.L. v. Knox County Schools*, 315 F.3d 688, 695 (6th Cir. 2003)]. This inquiry is inherently fact-intensive, but should identify those cases where parental participation is meaningful and those cases where it is a mere formality

See also, Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1056 (9th Cir. 2012) (stating that the school district’s “take it or leave it” approach contravened the purposes of the IDEA).

126. The evidence was clear that the School Board’s decision to place the student in a self-contained ESE classroom in a different school had been made well in advance of the February 24, [REDACTED] IEP meeting and that the School Board’s representatives in the February IEP meetings did not have an open mind. The most obvious and direct evidence is the statement made by [REDACTED], the School Board’s Director of ESE Services, to [REDACTED] in advance of the February 15, [REDACTED] IEP meeting. By her own admission, [REDACTED] directly threatened to file a due process complaint against the parents if they would not agree to a more restrictive setting for their child.

127. Nothing else in the record contradicts [REDACTED] plain statement of intent. On January 31, [REDACTED], the student’s parents received a voice mail from the school’s principal referencing a request to discuss alternative placement that the parents never made. The parents were not provided the draft IEP until near the eve of the February 15, [REDACTED] IEP meeting. The notice for the February 24, [REDACTED] IEP meeting listed the sole subject of the meeting as discussion of possible change of placement. The only program discussed at the meeting was that of [REDACTED] school. No other option was on the

table. At the February 15, [REDACTED] IEP meeting, [REDACTED] had to stop the proceedings to insist that the student's parent input, present levels, goals, services, and supports be discussed before the School Board jumped to the subject of placement. Despite the input from the student's advocates, the draft IEP was changed very little over the course of two lengthy meetings.

128. The School Board's repeated and ongoing failure to provide the parents with the documents they requested unnecessarily hamstrung the parents and their advocates as they attempted to participate meaningfully at the meetings. The child's behavior was the main driver of the decision to place him in the self-contained classroom, but the data offered by the School Board as to his behavior was of little to no value in terms of antecedents or consequences. The anecdotal observations of [REDACTED], [REDACTED], [REDACTED], and other school personnel were thus the only data available as to the student's behavior. The School Board consistently dragged its feet in providing documents to the parents, a practice that continued up to, and even during, the final hearing.

129. On January 25, [REDACTED], the school unilaterally amended the BIP to make permanent the student's shortened school day. The parents were excluded from the decision. No meeting was held. The amended BIP was presented to the parents as a *fait accompli*, their only choice being whether to pick up the student before or after the lunch period.

130. Procedural errors do not automatically result in a denial of FAPE. *See, G.C. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Procedural violations must either: (i) impede the student's right to a FAPE; (ii) impede the parents' opportunity to participate in the decision-making process; or (iii) cause a deprivation of educational benefit to the student. 20 U.S.C. § 1415(f)(3)(E)(ii); Fla. Admin. Code R. 6A-3.03311(9)(v)4; *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007). In this case, the procedural errors by the School Board undoubtedly impeded the parents' opportunity to participate in the decision-making process. The parents were

shut out of the decision to shorten the school day and were not timely provided the data that might have helped them more fully participate as partners at the February 15 and 24, [REDACTED] IEP meetings. The procedural errors denied FAPE to the student.

131. The procedural errors inevitably led to other substantive violations of the student's right to FAPE. The evidence established that the student made academic progress and met behavioral expectations from August [REDACTED] through the end of November [REDACTED] under IEP 1 and BIP 1. On November 30, [REDACTED], IEP 2 and BIP 2 were adopted, removing many of the supports present in IEP 1 and BIP 1. The School Board's behavior specialist, [REDACTED], frankly testified that she did not base BIP 2 on data. The student's behaviors immediately regressed. The behaviors observed were the same behaviors documented at the student's previous school during the [REDACTED]-[REDACTED] school year and were understood by all concerned to be a manifestation of his disability. The school nonetheless was caught flat-footed by the student's regression.

132. The school had before it the legitimate option of convening an IEP meeting at which it could have considered reinstating some or all of the supports that worked for the student during the first half of the school year. The IEP team also had the discretion to conduct an FBA in order to develop an effective IEP and BIP for the behaviors the student was displaying. The team could have tried any number of the intermediate steps suggested by [REDACTED]: mental health services, guidance counseling, social skills training, and/or pull-out services. No crisis plan was in place.

133. The school instead embarked on a series of impromptu actions that prioritized order in the classroom over any consideration of the student's educational and behavioral needs. It issued disciplinary referrals and suspensions, then unilaterally amended the BIP to shorten the student's school day. The disciplinary suspensions were stopped just short of the threshold at which a manifestation determination and FBA would be

required. The school made no provision for the student to make up the class work he was missing. The school made no effort to convene an IEP meeting or otherwise engage in a concerted effort to get to the bottom of the sudden and drastic change in the student's behavior.

134. The greater weight of the evidence established that the school's principal and the School Board's ESE director had decided by late January that the student's placement should be changed to a self-contained behavior unit. Because the neighborhood school did not have a self-contained behavior unit, this change in placement would move the student out of the neighborhood school. It would also entail a second move in the Fall of [REDACTED], when the self-contained unit in [REDACTED] school would be closed.

135. The student's father credibly calculated that the student missed 166 hours of classroom instruction due to suspensions and shortened school days. [REDACTED] testified that the child missed phonics and math instruction every day once his school day was shortened. Despite the lack of math classes, the February 24, [REDACTED], IEP was silent as to math instruction. The ESE teacher, [REDACTED], testified that she delivered no services to the student after January 25, [REDACTED]. Again, the school made no provision for making up the class time that the student missed due to behaviors that were concededly manifestations of his disability.

136. In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on student placements or educational 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.

137. With the LRE directive, Congress created a statutory preference for educating handicapped children with children who are not handicapped to the maximum extent appropriate. *See 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 Act, school districts must both seek to mainstream handicapped children and, at the same time, must tailor each child’s educational placement and program to his special needs.” *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989).

138. Courts have long held that mainstreaming is the starting point and presumption. *Bd. of Educ. v. Holland*, 786 F. Supp. 874, 882 (E.D. Cal. 1992) (“A placement in other than a regular class is a fall-back choice made only after it is determined that placement in regular classes will be unsuccessful.”). Removal from the general education setting can occur 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. *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 448 (9th Cir. 2010); *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., Id., Oberti v. Board of Educ.*, 995 F.2d 1204, 1214 (3d Cir. 1993); *Daniel*, 874 F.2d at 1044-45. Rules implementing the IDEA define supplementary aids and services as “aids, services and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.” 34 C.F.R. § 300.42.

139. 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.

140. The *Daniel* court provided the following general guidance:

The [IDEA] and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation under the [IDEA].

Daniel, 874 F.2d at 1050 (internal citations omitted).

141. As of November 30, [REDACTED], the student was making progress academically and as to his IEP goals. While the student did not definitively prove that the IEP team's precipitous decision to remove his supports caused the regression in his behavior that commenced the very next day, the evidence was more than sufficient to establish that the school should have at least attempted to reinstate the supports before moving on to punitive

measures. Within roughly 30 school days of IEP 2's adoption, the principal and the School Board's ESE director had made the decision to move the student out of the neighborhood school. The school attempted none of the intermediate behavioral measures advocated by ██████████, and the interventions the school did employ seemed at times provocative to the student. The School Board's failure to try supplemental aids and services or at least to keep the student partially mainstreamed in the general education setting before packing him off to the self-contained ESE classroom violated the LRE requirement.¹⁴

142. The student also claims that the School Board's actions constituted a violation of Section 504 of the Rehabilitation Act. The Eleventh Circuit has held that proof of discrimination requires a showing, by a preponderance of the evidence, that the respondent acted or failed to act with deliberate indifference. *Liese v. Ind. R. Cnty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012). As discussed by the court in the *Liese* case, "deliberate indifference plainly requires more than gross negligence," and "requires that the indifference be a 'deliberate choice.'" *Id. See also Ms. H. v. Montgomery Cnty. Bd. of Educ.*, 784 F. Supp. 2d 1247, 1263 (M.D. Ala. 2011) (when a school system simply ignores the needs of special education students, this may constitute deliberate indifference). The undersigned concludes that, no matter how misguided or even negligent the School Board's actions were, they did not rise to the level of "deliberate indifference" to the needs of the student.

143. The student has a right to appropriate remedies for the procedural and substantive violations of the IDEA established at hearing. If a district court or administrative hearing officer determines that a school district has violated the IDEA by denying the student FAPE, then the court shall "grant

¹⁴ The fact that the student attended the neighborhood school from February 17 to March 20, ██████████, without further disciplinary citations might have caused the school and the IEP team to revisit the decision to change the student's placement, or at least to think about what had changed.

such relief as the court determines is appropriate.” 20 U.S.C.

§ 1415(i)(2)(C)(iii). The court or administrative hearing officer has broad discretion as the relief granted. *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009)(observing that 20 U.S.C.

§ 1415(i)(2)(C)(iii) authorizes courts and hearing officers to award appropriate relief, despite the provision’s silence in relation to hearing officers).

144. Appropriate relief depends on equitable considerations. The ultimate award should provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Reid v. D.C.*, 401 F.3d 516, 523 (D.C. Cir. 2005). One type of relief that a court may provide is an award of compensatory education. *Sch. Comm. of Town of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369 (1985) (quoting 20 U.S.C. § 1415(e)(2)). Compensatory education is an award “that simply reimburses a parent for the cost of obtaining educational services that ought to have been provided free.” *Hall v. Knott Cnty. Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *see also Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1352-53 (N.D. Ga. 2007) (holding that, in formulating a compensatory education award, “the Court must consider all relevant factors and use a flexible approach to address the individual child’s needs with a qualitative, rather than quantitative focus”), *aff’d*, 518 F.3d 1275 (11th Cir. 2008).

145. The student seeks: a new IEP meeting, to include review of the BIP, that includes the parents, [REDACTED], and the student’s other advocates as members of the team; compensatory education from December [REDACTED] to the present; placement in a private school or the creation of an educational fund so that instruction and therapies can be brought into the home, paid for by the district, until such time as the student is ready to return to a traditional public-school program; payment of \$7,725.00 for the private

psychoeducational evaluation conducted by [REDACTED], which was shared with the School Board; the cost of having the advocates attend the February [REDACTED] IEP meetings of \$4,095.00; and the reimbursement of all costs, including a reasonable attorney's fee, as the prevailing party in this proceeding.

146. Guided by the principles stated above, the undersigned concludes that the student is entitled to a new IEP meeting, to include review of the BIP, that includes the parents, [REDACTED], and the student's other advocates as members of the team; compensatory education from December [REDACTED] to the present; payment of \$7,725.00 for the private psychoeducational evaluation conducted by [REDACTED]; the cost of having the advocates attend the February [REDACTED] IEP meetings of \$4,095.00; and the reimbursement of all costs, including a reasonable attorney's fee, as the prevailing party in this proceeding.

147. While sympathetic to the claim for private school placement, the undersigned is mindful that FAPE envisions *public* education. Ideally, the child will obtain his education in a public school setting, with the proper supports in place to keep him in a general education classroom, and proceed consistently through the grades with his age-group cohort. The undersigned also notes that the student was successful in the general education setting at his neighborhood public school when the proper supports were in place.

148. The undersigned concludes that it is premature to give up on the student's ability to progress in the public school setting. However, it is incumbent on the School Board to accept its educational responsibility to this child and to enter into a genuinely collaborative relationship with his parents and advocates. The School Board is on thin ice and must tread thoughtfully and carefully.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the St. Johns County School Board committed procedural and substantive violations of the IDEA; and is

ORDERED to:

1. Provide compensatory education for the period of December 1, 2022, to the date of this Final Order;
2. Within 30 days of this Final Order, conduct a comprehensive evaluation of the student, including a functional behavior assessment, in order to design an IEP tailored to the unique needs of this student;
3. Within 45 days of this Final Order, reconvene the IEP team, which must include at minimum the parents, their advocates, a behavior specialist, a social worker, an occupational therapist, and a mental health professional, to address all of this student's academic, emotional, and behavioral needs, to devise an appropriate IEP and BIP for this student, and to determine the details of the compensatory education to be provided by the School Board;
4. Pay the student's parents the amount of \$7,725.00 to compensate them for the private psychoeducational evaluation conducted by Dr. Sisbarro;
5. Pay the student's parents the amount of \$4,095.00 to compensate for the advocates' participation at the February [REDACTED] IEP meetings; and
6. Pay the student's parents their litigation costs, including a reasonable attorney's fee, to be determined by mutual agreement of the parties or, failing agreement, by this tribunal upon motion by the student.
7. All other requested relief is denied.

DONE AND ORDERED this 31st day of July, 2023, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of July, 2023.

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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).