STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

Case No. 23-2575E

vs.

BROWARD COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A due process hearing was held before Jessica E. Varn, an administrative law judge with Florida's Division of Administrative Hearings (DOAH), from September 26 through 28, 2023. The hearing was held, by agreement of the parties, via Zoom conference.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
Langer Law, P.A.
15715 South Dixie Highway, Suite 205
Palmetto Bay, Florida 33157

For Respondent: Hudson Carter Gill, Esquire
Johnson Anselmo Murdoch Burke
Piper & Hochman, P.A.
2455 East Sunrise Boulevard, Suite 1000
Fort Lauderdale, Florida 33304

Susan Jane Hofstetter, Esquire
School Board of Broward County, Florida
K.C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

Whether Broward County School Board (School Board) failed to design individualized education plans (IEPs) that would provide the student with a free and appropriate public education (FAPE);

Whether the School Board's actions violated the parents' right to meaningfully participate in educational decision-making; and

Whether the School Board discriminated based on the student's disability, in violation of the Rehabilitation Act of 1973, Section 504.[1]

PRELIMINARY STATEMENT

The request for a due process hearing was filed on July 10, 2023. A scheduling conference was held on August 10, 2023, in which the parties agreed to schedule the due process hearing for September 22, 2023, and September 26 through 29, 2023. On September 5, 2023, the School Board filed a Stipulation Regarding Issues Framed in Due Process Complaint, conceding that during the student's second and third grade years, the student's IEPs were not implemented with fidelity, and agreeing to reimburse the student's parents for up to $2,000 in tutoring costs incurred and documented during those school years. The School Board also agreed to provide compensatory education for two full school years, which were the student's second and third grade years.

Based on this stipulation, Petitioner moved to change the hearing start date. The next day, an Amended Notice of Hearing by Zoom conference was issued, setting the hearing for September 26 through 29, 2023.

[1] The Rehabilitation Act of 1973, 29 U.S.C. § 795, *et seq.* (Section 504).

The hearing was held as scheduled. Petitioner offered the testimony of [redacted], a friend of Petitioner; [redacted], an expert in special education and reading; [redacted], Exceptional Student Education (ESE) Specialist; the student's mother; [redacted], an expert in special education; and [redacted], Principal. Petitioner's Exhibits 1 through 3, 5, 7, 9 through 13, 15 through 19, 23, 24, 29, pages 186 through 190 of 32, pages 192 through 199 of 33, 35, and pages 206, 209, and 211 through 218 of 36, were admitted into evidence.

The School Board offered the testimony of [redacted], Specific Learning Disability (SLD) Curriculum Supervisor; and [redacted], Curriculum Supervisor, ELA/Literacy, Elementary Learning Department. School Board Exhibits 1 through 45 were stipulated into evidence.

The Transcript of the due process hearing was filed on October 10, 2023. At the end of the due process hearing, the parties agreed to file proposed final orders within ten days of the filing of the Transcript, and agreed to extend the deadline for this Final Order to ten additional days after the proposed orders were filed. On October 20, 2023, the date that proposed orders were due, the parties agreed to extend the deadline for proposed orders to October 23, 2023. Accordingly, the deadline for this Final Order was extended to November 2, 2023.

Both parties timely filed proposed final orders, which were considered in preparing this Final Order. Unless otherwise indicated, all rules and statutory references are to the version in effect at the time of the alleged violations.

FINDINGS OF FACT[2]

1. The student is a [redacted]-old [redacted] with a twin [redacted] and a younger [redacted]. All three kids began attending a [redacted]-based elementary school in Broward County in the [redacted] school year, which was substantially affected by a global pandemic. The students only attended school virtually for the entire Fall semester, and did not attend brick and mortar school until January [redacted]. The youngest [redacted] entered [redacted], and the twins were in [redacted] grade. Their mother was a [redacted] and [redacted] teacher at that same school.

2. In late February [redacted], the student was found eligible for ESE services under the eligibility of SLD, and an IEP was developed. Everyone describes the student as smart, polite, a pleasure to have in class, and a struggling reader. This case centers around her reading abilities, those fundamental skills that this student, although capable, has yet to master.

3. Fortunately, the school's staff included reading endorsed teachers and a reading curriculum specialist. Oddly, the February [redacted] IEP team and all future IEP teams for the student did not include the reading curriculum specialist. Absent from this record is any explanation for that decision.

4. The February [redacted] IEP was written after a long period of virtual schooling and did address the student's weaknesses in reading, math, and independent functioning. After the IEP was developed, the [redacted] report grade reflected that [redacted] was working below grade level in phonics, word analysis skills, spelling strategies, fluency, and accuracy. According to the teacher, the student needed assistance with a majority of [redacted] foundational reading, writing, listening, and language skills. [redacted] had mastered social studies, science, most math skills, and [redacted] elective classes.

[2] The Findings of Fact that follow do not incorporate references to every witness who testified, but all testimony was considered in the preparation of this Final Order.

5. The student passed the [redacted] standardized test, with help from [redacted] teacher, who, according to the student's mother, read the test to [redacted].

6. The summer of [redacted] is the beginning of the relevant period for purposes of this matter, given the two-year statute of limitations. No persuasive evidence was presented to qualify for an exception to the statute of limitations.[3]

7. The February IEP was in place at the start of [redacted] grade, and despite the student's struggles with reading, no changes were made to the February [redacted] IEP during most of the year. The team never met again until March [redacted]. During this time, the School Board concedes that the IEP was not implemented, which resulted in a denial of FAPE. As a result of this failure, the student made very little progress in [redacted] grade.

8. The next IEP was developed in March [redacted], with only one quarter of [redacted] grade left to finish the school year. At this IEP meeting, a good friend of the family, [redacted], was in attendance. [redacted] is a reading specialist in Massachusetts who works for a company that develops and implements a reading program for dyslexic children. [redacted] believes that the student has dyslexia, and [redacted] advocated for a reading curriculum that would be administered by a certified teacher who could remediate the student's reading deficiencies. As it turned out, since the school staff at the IEP meeting did not include their reading specialist, [redacted] was the only reading specialist in attendance.

9. [redacted] recalled that when [redacted] and the parents requested a new reading curriculum, given the student's lack of progress, they were met with a lukewarm response. The school staff would not commit to any changes, stating that they would take [redacted] recommendations under advisement and look into other options.

[3] *See* 20 U.S.C. §§ 1415(b)(6)(B) & 1415(f)(3)(C) & (D); 34 C.F.R. § 330.507.

10. Standardized testing at this point reflected that the student was performing at a [redacted] level, and had made less than 22 percent progress over seven months. [redacted] had made no progress in phonics, high frequency words, vocabulary, or reading comprehension in literature. [redacted] parents reported that the student's struggles with reading caused frustration and [redacted] would sometimes shut down. [redacted] compared [redacted] to [redacted] [redacted], feeling pressure to catch up. The Present Levels of Performance (PLOPs) identified weaknesses in reading, writing, spelling, math, and independent functioning. The IEP team noted that the student has trouble following multi-step verbal directions, and requires close proximity to [redacted] teacher to attend to [redacted] tasks.

11. Both experts persuasively testified that the March [redacted] IEP did not, but should have, included goals for writing, spelling, and independent functioning. As to the reading goals, both experts also agreed that the goals were not designed to have the student make reasonable progress because they were too simplistic. The reading goals required only 80 percent proficiency of fundamental reading skills, and they focused on specific skills that should be able to be mastered within weeks, not over the course of an entire year. The IEP included specialized instruction in math and reading with an ESE teacher. Tragically, it is now known that the deficient IEP, as written and missing essential components, was not implemented with fidelity.

12. At the end of second grade, the parents were informed that the student had failed the standardized measures for advancing to [redacted] grade, but that they could choose to defer retainment to [redacted] grade. They chose to defer.

13. [redacted] grade began with the March [redacted] IEP in place, and despite [redacted] lack of progress, and the fact that [redacted] had failed [redacted] grade, the IEP team never met again, until March [redacted]. An entire year went by without any suggestion that the team should address the reading curriculum, check on its implementation, or check on [redacted] progress.

14. At the March [redacted] IEP meeting, the parents brought with them [redacted] again, and their attorney. Once again, the reading specialist at the school did not attend the IEP meeting, and [redacted] was the only reading specialist in attendance. [redacted] again advocated for a change in the reading curriculum, and was once again told that they would look into the possibility, but would not commit to anything. Now the reading deficiencies were even more pronounced, as the gap between the student and [redacted] peers widened. Here is the description found in the March [redacted] IEP:

> [**] was presented the following subtests demonstrating no mastery: silent /e/, digraphs, dipthongs, vowels with /r/. Overall, during the DAR, [**] reverted in her skills: spelling words reflected were sit/site, cute/cute, grass/gase, train/chane, she demonstrates a frequency of visual letter confusion with b/d as well as inserting and deleting letters. During word meaning she required prompting to elaborate as well as redirecting to tend to task. During digraphs, she demonstrated reversion with the following from last year to this year- way/away, jeep/jep, heal/hill, fail/if, bay/day.
>
> She can answer "W" questions when a passage is presented orally or at an instructional level, and listens during discussion but demonstrates listening to others and their responses versus attempting. [**] does refer to passages trying to locate details but demonstrates uncertainty in her facial expression if she does not see the explicit response, she utilizes the illustrations to support comprehension and answer explicitly.

15. As to her writing skills, the March [redacted] IEP has the identical wording as the March [redacted] IEP, apparently making no progress. In math, [redacted] had made some improvements, but was inconsistent when adding and subtracting numbers below 100, and only mastered single digit addition and subtraction.

16. In the area of social and emotional behavior, the IEP reflects that the student would shut down sometimes, covering [redacted] face with [redacted] hair or

claiming that [redacted] did not feel well. [redacted] also needed verbal encouragement to "keep [redacted] self-esteem up." [redacted] and the student's mother's testimony corroborate this narrative—both recalled that the student got upset and thought that [redacted] peers believed [redacted] was dumb. Naturally, [redacted] also compared [redacted] to [redacted] twin [redacted], who does not struggle with reading and is advancing from grade to grade.

17. As to independent functioning, the IEP once again mentions that the student requires close proximity to the teacher to attend to [redacted] work, as [redacted] gets easily distracted. [redacted] had yet to become more independent after an entire year had gone by.

18. The IEP included specialized instruction and goals in reading and math, but no goals for writing, spelling, independent functioning, or social and emotional behavior. All of these areas were detailed in the IEP as needs, but none were addressed with IEP goals. The goals that were developed for reading and math, just as had occurred a year before, were not designed to have the student make reasonable progress. Both experts persuasively testified that the March [redacted] IEP goals for reading were too simplistic again—focused on specific goals that should be mastered in a much shorter time than an entire year, and not requiring mastery of fundamental reading skills.

19. The School Board has conceded that during the student's third grade year, just as her second grade year, the School Board failed to implement [redacted] IEP with fidelity. Everyone is left to wonder if the reading curriculum utilized during those two school years would have worked to remediate [redacted] reading deficiencies, and what she could have mastered if even the paltry IEPs had been implemented. There was also no persuasive evidence establishing that the reading curriculum utilized during those two school years was inappropriate.

20. By the end of [redacted] grade, the parents were informed that the student had once again failed the state standardized test. As a result, [redacted] could not

advance to [redacted] grade. [redacted] would be placed, for the [redacted] school year, in a class with [redacted] and [redacted] graders—the same class level that [redacted] younger brother would be placed in. [redacted] twin brother would move on to [redacted] grade.

21. Understandably, the parents opted to place the student at a private school for [redacted] [redacted] grade year, and the mother testified that the student seems to be enjoying [redacted] new school. No persuasive and direct evidence, though, was presented to establish the appropriateness of this placement.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the subject matter of this proceeding and of the parties. *See* § 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

23. Petitioner bears the burden of proof on each of the issues raised. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

24. In enacting the Individuals with Disabilities Education Act (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); *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 hinges on each 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).

25. Parents and children with disabilities are given substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *Bd. of*

Educ. v. Rowley, 458 U.S. 176, 205-06 (1982). Among other protections, parents can examine their child's records and participate in meetings concerning their child's education; receive written notice before any proposed change in the educational placement of their child; and file an administrative due process complaint about any matter relating to the identification, evaluation, or educational placement of their child, or the provision of FAPE. 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

26. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a student with FAPE. First, it is necessary to examine whether the school district has complied with the IDEA's procedural requirements. *Rowley*, 458 U.S. at 206-07. A procedural error does not automatically result in a denial of FAPE. *See G.C. v. Muscogee Cnty. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the student's right to FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007).

27. In this case, Petitioner's Complaint contained one alleged procedural violation: that the IEP team created the IEPs without parent input, denying them meaningful participation in the creation of the IEPs. The more persuasive and credible evidence established that the parents were involved in the creation of the IEPs, brought with them [redacted] for two of the IEP meetings, and for the last one, brought their attorney. The testimony was consistent that the parents' concerns were heard and considered, but their suggestions were not implemented. Apparently, everyone focused on which reading program to use, when in reality the focus should have been on whether the ESE teacher was implementing the IEP. The record as a whole established that the parents were given a chance to meaningfully participate

in the decision-making process. Stated another way, there was no persuasive evidence of predetermination.

28. Petitioner also alleges a substantive violation; that is, that the IEP was flawed in its design and did not provide FAPE. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

> [S]pecial education services that —
>
> (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

29. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's present levels of academic achievement and functional performance; establishes measurable annual goals; addresses the services and accommodations to be provided to the child, and whether the child will attend mainstream classes; and specifies the measurement tools and periodic reports to be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017)(quoting *Honig v. Doe*, 108 S. Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Id*. (quoting *Rowley*, 458 U.S. at 181).

30. Under the second step of the *Rowley* test, it must be determined whether the IEP developed under the IDEA is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07.

31. In *Endrew F.*, the Supreme Court held that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999. As discussed in *Endrew F.*, "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Id*.

32. Whether an IEP meets this standard differs according to the individual circumstances of each student. For a student who is fully integrated in the regular classroom, an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id*. For a student, like Petitioner here, not fully integrated in the regular classroom, an IEP must aim for progress that is "appropriately ambitious in light of [the student's] circumstances." *Id*. at 1000.

33. Most importantly, the IDEA provides that an IEP must be individualized to the student and include measurable annual goals and services designed to meet *each* of the educational needs that result from the child's disability. 20 U.S.C. § 1414(d)(1)(A)(i)(II); *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 375 F.3d 603, 613 (7th Cir. 2004)(explaining that an IEP must respond to all significant facets of the student's disability, both academic and behavioral); *CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 642 (8th Cir. 2003)("We believe, as the district court did, that the student's IEP must be responsive to the student's specific disabilities").

34. Here, the more persuasive evidence establishes that the IEPs were not appropriately ambitious in light of the student's circumstances in all areas. The IEPs did properly identify the student's levels of performance and academic achievement, but they failed to address the student's specific reading deficiencies, established no reasonable annual goals on reading, and

were not tailored to meet her reading needs. They also failed to address her writing, spelling, independent functioning, and social and emotional behavior needs. The record as a whole established that the March [redacted] and March [redacted] IEPs were not designed to provide this student FAPE.

35. Because the School Board denied the student FAPE by failing to design adequate IEPs, the student is entitled to an appropriate remedy.

36. In that regard, if a district court or administrative hearing officer determines that a school district has violated the IDEA by denying that student FAPE, then the court shall "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). In so doing, the court or administrative hearing officer has broad discretion. *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).

37. Such "appropriate" relief may include reimbursing parents for the cost of private replacement therapy; transportation expenses; credit card transaction fees and interest; and, when a trained service provider is unavailable, reimbursement for the time a parent spent in providing therapy personally. *See Bucks Cnty. Dep't of Mental Health v. Pa.*, 379 F.3d 61, 63 (3d Cir. 2004)("[W]e hold that under the particular circumstances of this case, where a trained service provider was not available and the parent stepped in to learn and performed the duties of a trained service provider, reimbursing the parent for her time spent in providing therapy is 'appropriate' relief'"); *D.C. ex rel. E.B. v. N.Y.C. Dep't of Educ.*, 950 F. Supp. 2d 494, 516 (S.D.N.Y. 2013)(awarding reimbursement for transportation costs); *JP v. Cnty. Sch. Bd.*, 641 F. Supp. 2d 499, 506-07 (E.D. Va. 2009) (awarding parents a reasonable rate of interest to compensate them for tuition payments made on their credit cards, as well as credit card processing fees). Appropriate relief

depends on equitable considerations, so that the ultimate award provides the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Reid v. Dist. of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005).

38. In addition, 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).

39. Guided by the above stated principles, Petitioner is entitled to compensatory reading, writing, spelling, independent functioning, and social and emotion behavior services, designed specifically for [redacted] multiple needs, for all of [redacted] and [redacted] grade years. The School Board must reimburse the parents for all of the tutoring they provided in that same period, which has already been stipulated to and established to be $1,625.00.

40. As to reimbursement for private school tuition, the U.S. Supreme Court first recognized and laid the groundwork for the parent's right to private school tuition reimbursement in *Burlington School Committee v. Massachusetts Department of Education*, 556 IDELR 389 (U.S. 1985). The IDEA later codified the tuition reimbursement remedy expressed in *Burlington*. The IDEA provides:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary

> school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

34 C.F.R. § 300.148 (c).

41. In *Forest Grove*, the United States Supreme Court ruled that a child's lack of previous enrollment in special education is not a categorical bar to tuition reimbursement; instead, it is one of the various equitable forms of relief that the IDEA calls for. 557 U.S. 233.

42. Notably, for purposes of the IDEA, a parental placement is appropriate if it is "reasonably calculated to enable the child to receive educational benefits." *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 488 (4th Cir. 2011). The parental placement need not satisfy every last one of the child's special education needs. *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006). Rather, the placement must "provide only some element of the special education services missing from the public school alternative in order to qualify as reasonably calculated to enable the child to receive educational benefit." *Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 25 (1st Cir. 2007); *see also Frank G.*, 459 F.3d at 364 ("An appropriate private placement need not meet state education standards or requirements. For example, a private placement need not provide certified special education teachers or an IEP for the disabled student.")(internal citations and quotation marks omitted); *Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999)(holding that the test for the parents' private placement is that it is appropriate, and not that it is perfect).

43. Here, Petitioner failed to establish, with credible and direct evidence, that the private school is appropriate for the student. Thus, the request for private school tuition reimbursement is denied.

44. Lastly, Petitioner also alleges that the alleged procedural and substantive IDEA violations also constitute violations of Section 504; that is, the School Board discriminated against the student due to her disability. In that regard, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides:

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

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

46. The U.S. Department of Education has promulgated regulations governing preschools, elementary schools, and secondary schools. 34 C.F.R. § 104, subpart D. The K-12 regulations are at 34 C.F.R. § 103.31-39. Title 34 C.F.R. § 104.33-.36 enlarge upon the specific provisions of Section 504 by substantially tracking the requirements of IDEA. Title 34 U.S.C. § 104.33 requires that School Boards provide FAPE to "each qualified handicapped person who is in the recipient's jurisdiction." For purposes of Section 504, an "appropriate education" is the provision of regular or special education and related aids and services that: (1) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met; and (2) are based on adherence to

procedures that satisfy the requirements of 34 U.S.C. §§ 104.33(b)(1), 104.34, 104.35, and 104.36. An "appropriate education" can also be provided by implementing an IEP that complies with the IDEA. 34 C.F.R. § 104.33(b)(2).

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

48. Assuming Petitioner has established a prima facie case, the School Board must present a legitimate, nondiscriminatory reason for the adverse actions it took. *Lewellyn v. Sarasota Cnty. Sch. Bd.*, 2009 WL 5214983, at *10 (M.D. Fla. Dec. 29, 2009)(citing *Wascura v. City of S. Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001)). The 11th Circuit has stated that the respondent's burden, at this state, is "exceedingly light and easily established." *Id.* (quoting *Perryman v. Johnson Prods. Co. Inc.*, 698 F.2d 1138, 1142 (11th Cir. 1983)). Once the School Board has articulated a nondiscriminatory reason for the actions it took, Petitioner must show that the School Board's stated reason was pretextual. "Specifically, to discharge their burden, Plaintiffs must show that Defendant possessed a discriminatory intent or that the Defendant's espoused nondiscriminatory reason is a mere pretext for discrimination." *Id.; see also Daubert v. Lindsay Unified Sch. Dist.*, 760 F.3d 982, 985 (9th Cir. 2014).

49. Here, the evidence demonstrated that Petitioner meets the first, second, and fourth factors for establishing a prima facie case. Thus, the remaining issue is whether the School Board discriminated against Petitioner solely by reason of her disability. As noted in *J.P.M.*, the definition of

"intentional discrimination" in the Section 504 special education context is unclear. *J.P.M.*, 916 F. Supp. 2d at 1320 n.7. In *T.W. ex rel. Wilson v. School Board of Seminole County*, 610 F.3d 588, 604 (11th Cir. 2010), the 11th Circuit stated that it "has not decided whether to evaluate claims of intentional discrimination under Section 504 under a standard of deliberate indifference or a more stringent standard of discriminatory animus." But in *Liese v. Indian River County Hospital District*, 701 F.3d 334, 345 (11th Cir. 2012), the 11th Circuit, in a case involving a Section 504 claim for compensatory damages, concluded that proof of discrimination requires a showing, by a preponderance of the evidence, that the School Board acted or failed to act with deliberate indifference. *Id.*

50. Under the deliberate indifference standard, Petitioner must prove that the School Board knew that harm to a federally protected right was substantially likely and that the School Board failed to act on that likelihood. *Id.* at 344. As discussed in *Liese*, "deliberate indifference plainly requires more than gross negligence," and "requires that the indifference be a 'deliberate choice.'" *Id.*

51. Here, the school staff could have and should have been diligent in monitoring the implementation of the IEPs, and should have required much more data from the ESE teacher who was responsible for implementing the reading program. The school staff also could have included reading specialists in the IEP meetings, and used its resources and skills to draft adequate IEPs which addressed every area of need. The resulting failures have robbed this student of a chance to become a proficient reader, and have no doubt affected [redacted] mental health. Once it was recognized that the reading program had not been faithfully implemented, the school did offer to complete a full evaluation, offered to reconvene the IEP team, and hired a new ESE teacher to implement the reading program. On balance, the record establishes gross negligence, as well as indifference, but not indifference that was a deliberate choice. Thus, Petitioner has failed to establish a violation of Section 504.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board did violate the IDEA by failing to design appropriate IEPs, and is ORDERED to:

1. Fully evaluate the student, within 45 days of this Order, in all areas of need, including reading, math, writing, spelling, independent functioning, and emotional and social behavior.

2. Reconvene the IEP team, including reading specialists from the school and district level, as well as current teachers from the private school, to help develop an IEP that addresses all of the student's needs in reading, writing, spelling, math, independent functioning, social and emotional behavior, and any other areas the team identifies as an area of need.

3. Include in the IEP a robust monitoring plan for data collection, and give the parents weekly data on the student's progress, in a format that is easily understood by the parents, particularly in reading.

4. Include counseling services in the IEP.

5. Include in the compensatory education package, which has already been stipulated to, 1:1 reading, writing, and spelling instruction by a reading endorsed teacher, at a rate of five days a week, for 60-minute sessions.

6. All other forms of relief are denied.

DONE AND ORDERED this 1st day of November, 2023, in Tallahassee, Leon County, Florida.

JESSICA E. VARN
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of November, 2023.

COPIES FURNISHED:

Amanda W. Gay, Esquire
(eServed)

Stephanie Langer, Esquire
(eServed)

Hudson Carter Gill, Esquire
(eServed)

Susan Jane Hofstetter, Esquire
(eServed)

Bryce D. Milton, Educational Program Director
(eServed)

Dr. Peter B. Lincata, Superintendent
(eServed)

Andrew King, General Counsel
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

> a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
> b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida

Administrative Code Rule 6A-6.03311(9)(w).