

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,

Petitioner,

vs.

Case No. 12-3636E

PALM BEACH COUNTY SCHOOL BOARD,

Respondent.

\_\_\_\_\_ /

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH") by video teleconference on July 18, 2013, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Jamison Jessup  
Qualified Representative  
557 Noremac Avenue  
Deltona, Florida 32738

██████████, parent  
(Address of record)

For Respondent: Laura Pincus, Esquire  
Office of General Counsel  
Palm Beach County School Board  
Post Office Box 19239  
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STATEMENT OF THE ISSUES

The issues in the proceeding are: whether Respondent, the Palm Beach County School Board ("School Board") failed to implement certain provisions of Petitioner ██████'s February 22, 2012, individualized educational plan ("IEP"), that was in effect at the beginning of the 2012-2013 school year, thereby depriving the child of a free, appropriate public education ("FAPE") within the meaning of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq.; whether the IEP of October 18, 2012, is reasonably calculated to confer some educational benefit to ██████; and whether Petitioner is entitled to an award of compensatory education in connection with the 2012-2013 school year.

PRELIMINARY STATEMENT

On November 8, 2012, the parents of ██████, Petitioner in this cause, filed a Request for Due Process Hearing ("Complaint") that raised various claims pursuant to the IDEA. The School Board promptly forwarded the parents' request to DOAH for further proceedings.

The Complaint included the following claims: (1) an allegation that the IEP of October 18, 2012, was not reasonably expected to provide ██████ with a basic floor of opportunity for a meaningful educational benefit in that it does not provide the same level of support facilitation as contained in ██████'s

previous IEP of February 22, 2012, and failed to provide one-on-one instruction; and (2) an allegation that Respondent failed to implement the required support facilitation contained in the IEP of February 22, 2012, which was the controlling IEP prior to the IEP of October 18, 2012.

On November 14, 2012, Petitioner filed a Motion for Jamison Jessup to be recognized as Petitioner's Qualified Representative, and an Order granting same was issued on November 26, 2012. On November 16, 2012, Respondent filed a Notice of Insufficiency. The undersigned issued an Order of Sufficiency on November 26, 2012.

Prior to the setting of a final hearing date, on November 28, 2012, the parties filed a Joint Motion for Continuance. The continuance was granted and the final hearing was scheduled for January 31 and February 1, 2013. Thereafter, on two separate occasions, Petitioner filed Unopposed Motions for Continuance, which the undersigned granted, resulting in the final hearing being scheduled for May 9 and 10, 2013.

The hearing proceeded, as scheduled. As the proceedings could not be completed in the time allotted, the final hearing was reconvened on July 18, 2013. During the final hearing, Petitioner presented the testimony of 11 witnesses: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] (the child's mother), [REDACTED],

██████████, ██████████, and ██████████. Judicial notice was taken of Petitioner's exhibit number 53. Petitioner introduced exhibits into evidence, numbers 1, 3, 9-16, 22-23, 42, 49-52, 54-60, 64, 72, 74, and 78.

Respondent presented the testimony of six witnesses:

██████████, ██████████, ██████████, ██████████, ██████████, ██████████, ██████████, and ██████████. Respondent introduced exhibits into evidence, numbers 5, 22, 25, 28, 32, 34, and 36. At the conclusion of the final hearing, the parties were ordered to comply with a 10-day deadline for the submission of proposed final orders upon the filing of the hearing transcript.

The court reporter filed the Transcript on July 24, 2013. On July 25, 2013, the undersigned convened a telephonic conference with the parties, wherein the undersigned was advised of concerns regarding errors and irregularities contained in the Transcript. On July 30, 2013, the court reporter filed an Amended Transcript.

On July 31, 2013, Petitioner filed a Motion to Extend the Deadlines for submitting proposed final orders. On August 2, 2013, the undersigned issued an order granting the extension and ordered that the deadline for submitting proposed final orders would be extended, as requested by Petitioner, to August 15, 2013. Thereafter, both parties timely submitted proposed final

orders, which the undersigned has considered in the preparation of this Final Order.

For stylistic convenience, the undersigned will use male pronouns in this Final Order when referring to [REDACTED]. The male pronouns are neither intended, or should be interpreted, as a reference to [REDACTED]'s actual gender.<sup>1/</sup>

#### FINDINGS OF FACT

##### A. Background

1. [REDACTED], born [REDACTED], has been diagnosed with

[REDACTED], [REDACTED], [REDACTED], and [REDACTED].

At all times relevant to this proceeding, [REDACTED] received special education services pursuant to the following eligibility

categories: [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; and most recently, [REDACTED].

2. [REDACTED] presently attends a public high school in Palm Beach County and is dual-enrolled in a special program therein. As part of the dual-enrollment program, [REDACTED] is simultaneously enrolled in college courses through an affiliated university. Although the college courses occur on the high school campus, they are taught by the university's professors. Acceptance into the college program is contingent upon a minimum grade point average ("GPA") and certain other parameters.

3. Respondent provided extensive modifications, accommodations, and services to ██████ in the 2011-2012 school year as part of a focused effort to raise ██████'s GPA to an acceptable level to gain admittance to the dual-enrollment program. As such, a review of ██████'s 2011-2012 academic year is necessary to understanding the claims and defenses at issue.

B. 2011-2012 School Year

4. During the 2011-2012 school year, ██████ was an eighth-grade student. On December 6, 2011, ██████ advised the IEP team that ██████ needed to obtain a ██████ GPA to gain entrance into the dual-enrollment program. ██████, the ESE case manager for ██████'s middle school, testified that ██████'s support facilitation teachers, paraprofessionals, and regular education teachers went "above and beyond what we do for normal students" in providing services to ██████ in an attempt to improve ██████ GPA. As a specific example, ██████ recalled that ██████ was pulled out of ██████ reading class by a paraprofessional to work on homework assignments that ██████ was not completing at home. ██████ characterized the additional assistance provided to ██████ as "unofficial services."

5. On February 22, 2012, at the parents' request, the IEP team met to discuss ██████'s progress and plan/revise ██████ IEP. The ensuing February IEP documented that ██████'s primary

exceptionality was SLD with additional exceptionalities of LI and OT.

6. Pursuant to the terms of the February IEP, █████ continued to receive instruction in the general education setting with the provision of numerous modifications and accommodations. Additionally, the February IEP provided that █████ would receive the following "Special Education Services": (1) daily facilitated support for language arts, math, and science; (2) social studies consultation one time per week; (3) language impaired services for 90 minutes per week; and (4) reading instruction for 170 minutes per week.

7. █████ conceded that, while █████ did not necessarily "appreciate" the additional efforts of the middle school faculty, those efforts were a factor in the improvement of █████ academic performance during the 2011-2012 school year.

#### C. Traumatic Brain Injury and Hospital/Homebound Services

8. On April 14, 2012, █████ was involved in a dirt biking accident. As documented in the May 7, 2012, Traumatic Brain Injury Physician's Report, █████ sustained a contusion to █████ left temporal lobe. As of May 7, 2012, █████ was "suffering from post-concussion symptoms including severe memory, attention, language, visuo-motor and reaction time deficits, in addition to problems with balance, frequent headaches, and fatigue."

9. █████ confirmed that as a result of the accident █████ was hospitalized, and was "largely unconscious for three days." █████ further confirmed that, following the accident, █████ found █████ to be severely impaired with severe memory problems, and that █████ had difficulty answering common questions, remembering common things, and recalling tasks performed earlier the same day.

10. Less than three weeks following the accident, on May 2, 2012, the IEP team met to consider █████ for eligibility for Hospital/Homebound services and for an interim review of █████ IEP. The meeting resulted in the following: (1) █████ was deemed eligible for Hospital/Homebound services; (2) consent was obtained for reevaluation for physical and occupational therapy, as well as a psychological evaluation; (3) the speech language pathologist working with █████ would informally assess █████ needs and adjust the plan of care/therapy minutes, as deemed appropriate; (4) the IEP team disagreed with the parents' request for a neuropsychological evaluation, as a psychological exam was necessary for TBI eligibility; and (5) █████ was recommended for ESY (Extended School Year Services).

11. In the homebound setting, █████ received language impaired services for 90 minutes per week, occupational therapy for 60 minutes per week, and direct academic instruction for 300 minutes per week.



12. [REDACTED] was referred to [REDACTED] Ed.S., NCSP, on May 24, 2012, for a psycho-educational re-evaluation as a necessary component for consideration of TBI eligibility.

[REDACTED] summary and recommendations are set forth, in pertinent part, as follows:

Previous measures of intellectual functioning revealed overall ability ranging within the Average to High Average range, with nonverbal performance historically evidencing higher than verbal reasoning skills. The current assessment of intellectual functioning yielded lower scores. The current measure of [REDACTED] intellectual functioning finds overall ability with the Below Average range with a Composite Intelligence Index score of 88 on the *RIAS*. Comparison of scores on this current and the previous administrations of the *RIAS* reveals a decline on all subtest and index scores.

Results of the current measure of academic achievement also revealed a decline in overall academic ability. When compared to others at [REDACTED] age level, [REDACTED]'s overall reading ability evidenced within the Very Low range; [REDACTED] overall math ability evidenced within the Low range; and [REDACTED] overall writing ability ranged from the Low Average to Average range. [REDACTED]'s academic skills fell within the Low range. [REDACTED] fluency with academic tasks fell within the Very Low range. [REDACTED] ability to apply those skills fell within the Low Average range. Comparison with [REDACTED]'s previous measures of academic achievement reveals a drop in reading and math scores, but an increase in writing scores.

The current assessment of [REDACTED]'s informative processing abilities also revealed a significant decline in performance on measures of long-term retrieval, short-

term memory and processing speed. [REDACTED]'s performance on these measures suggest [REDACTED] may have difficulty learning and recalling information through association, pairing and retaining visual with auditory information, difficulty memorizing facts for later retrieval and difficulty efficiently retrieving specific words. Further, [REDACTED]'s performance on processing speed and cognitive efficiency tasks suggest [REDACTED] is likely to have difficulty performing simple and automatic cognitive tasks rapidly, particularly when under pressure to maintain focused attention.

\* \* \*

Based upon the results of this assessment, it is likely [REDACTED] will continue to need academic support. More so than ever, [REDACTED] will require additional time to process information and frequent redirection to maintain focus. Staff working with [REDACTED] also need to be cognizant of the retrieval issues [REDACTED] is currently exhibiting and allow ample time for verbal and written responses. To help compensate for [REDACTED]'s reduced auditory memory storage and retrieval, assist [REDACTED] with organizing the information and/or associating the information with prior knowledge. Mentally organizing information helps both in understanding and in memorizing because it usually arranges the information in a relevant, efficient way. Continued use of a multi-sensory approach to teaching is also encouraged. The Child Study Team at [the middle school] should consider the results of this evaluation in combination with previous test data and the opinions of school personnel, when making educational decisions for [REDACTED].

13. [REDACTED] acknowledged, however, that the above evaluation was not necessarily an accurate reflection of [REDACTED]

overall capabilities. [REDACTED] credibly testified that when, as here, a student is not well enough to come to school, one would make the assumption that the student is not well enough to participate in an evaluation. Additionally, [REDACTED] had concerns regarding conducting the evaluation so close in time to the accident. Finally, [REDACTED] explained that the examination, which was conducted at home, was conducted in an environment with more noise and potential distractions than is typical.

14. [REDACTED] was discharged from Hospital/Homebound services on or about July 31, 2012. An Observation Report authored by [REDACTED], Med., CCC-SLP, dated August 1, 2012, noted that [REDACTED] had 17 sessions of language therapy during [REDACTED] Hospital/Homebound tenure. [REDACTED] observed that during the sessions, [REDACTED] needed to be strongly encouraged to perform tasks. [REDACTED] noted the following recommendations:

Overall, [REDACTED] was very capable of performing well in therapy tasks. It is recommended that [REDACTED]'s academic performance be closely monitored. If difficulties emerge, an analysis of what is required to complete a given task or acquire given information should be done and appropriate strategies be implemented. Hopefully, [REDACTED] will demonstrate self-motivation to contribute to [REDACTED] own success and will advocate for [REDACTED] if [REDACTED] experiences difficulty in [REDACTED] schoolwork.

D. 2012-2013 School Year

15. █████ enrolled in high school for the 2012-2013 school year, which started on August 20, 2012. At the inception of the school year, the February IEP remained in effect. As such, and as noted above, █████ was to have daily facilitated support for language arts, math, and science.

16. Petitioner contends that Respondent failed to provide the required daily facilitation during the time period of August 20, 2012, through October 18, 2012. Concerning language arts and math, Petitioner has adduced no direct proof that Respondent failed to meet these obligations. Petitioner draws the undersigned's attention to handwritten notes produced during the October IEP creation process. Contrary to Petitioner's suggestions, the undersigned does not interpret said handwritten notations to reflect the services Respondent had been providing █████ prior to October 18, 2012; rather, the notes describe the services Respondent intended to provide prospectively.

17. The evidence is clear, however, that the science support facilitator was not in █████'s classroom from September 18 through October 18, 2012, and, therefore, the duty to provide daily support facilitation to █████ in science was not met.

18. Principal █████ explained that, at the beginning of the 2012-2013 school year, all of the support

facilitation positions had not been filled; however, [REDACTED] believed all positions were staffed by October or November 2012.

[REDACTED] testified that to ensure students' IEP needs were fulfilled, despite the staffing omissions, the following actions were taken:

We did the very best we could with scheduling. We made sure that there was a support facilitation teacher that touched based with the students. Everybody's IEP is different. If they needed support facilitation daily, there was a place where the teacher could touch the student daily. Maybe not in every single class, every single period, but they would have contact with the support facilitation teacher daily.

19. As the February IEP had an "Anticipated Duration Date" of September 21, 2012, the IEP team proceeded with several meetings for the purpose of reviewing and creating a new IEP. Specifically, those meetings occurred on September 14, October 2, October 10, and October 18, 2012.

20. On September 14, 2012, the IEP team met for the purpose of reviewing evaluations and developing an IEP. At that time, the team determined that [REDACTED] was eligible for ESE services under the category of TBI.

21. On October 2, 2012, the team reconvened, and determined that [REDACTED]'s primary disability was now TBI. It was further noted at that time that the team could not determine if [REDACTED] would have met [REDACTED] goals at the middle school due to the accident and

resulting TBI. The team reconvened on October 10, 2012, to continue the IEP development and consider postsecondary goals and transition services. The IEP was completed "up to accommodations."

22. The IEP was finalized on October 18, 2012, ("October IEP"). The document provides for the following special education services: (1) facilitated support twice per week in math and science; (2) facilitated support three times per week in English and reading; and (3) language therapy facilitated support twice weekly in English (120 minutes per week).

23. Additionally, the October IEP provides █████ with 40 separate accommodations, modifications, aids, and services. Indeed, pursuant to the October IEP, █████ is to receive 18 such accommodations, modifications, aids, and services on a daily basis<sup>2/</sup>; 3 on a weekly basis<sup>3/</sup>; 16 as needed<sup>4/</sup>; and 3 as appropriate.<sup>5/</sup>

24. Further exposition of the entire contents of the October IEP is unnecessary, as the parents specifically challenge only two aspects of the document: the reduction in the level of support facilitation; and the failure to provide one-to-one instruction in all of █████'s academic classes.

25. As to the first issue, Petitioner presented credible evidence that the support facilitation provided to █████ in math, science, and language arts decreased in frequency from the

February IEP to the October IEP. Petitioner further established that [REDACTED] sustained a TBI prior to the creation of the October IEP. It is undisputed that the TBI did not enhance [REDACTED]'s academic performance capabilities.

26. Petitioner's strongest evidence came from expert witness [REDACTED], who opined that, in general (not specific to [REDACTED]), [REDACTED] "would assume" a student with certain deficits that subsequently sustains a TBI would need more services, and further that, if an intervention had helped a child in a particular area, that intervention should be continued. Respondent's lack of explanation for the reduction in support facilitation notwithstanding, Petitioner's evidentiary presentation failed to demonstrate that [REDACTED] could not receive a basic floor of opportunity with the level of support facilitation contemplated by the October IEP.

27. Likewise, Petitioner's remaining substantive concern regarding the lack of one-to-one instruction must similarly fail as Petitioner's evidentiary presentation failed to demonstrate that [REDACTED] cannot receive a basic floor of opportunity with the level of instruction contemplated by the October IEP.

#### CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 1003.57(1)(b) and

120.57(1), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

29. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. See Schaffer v. Weast, 546 U.S. 49, 62 (2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief"); L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 392 (3d Cir. 2006) ("Appellants would also have us limit the holding in Schaffer to the FAPE aspect of the analysis. Although, to be sure, the facts in Schaffer implicated only the FAPE analysis, the Supreme Court made it quite clear that its holding applied to the appropriateness of the IEP as a whole.").

30. 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); 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. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

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

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

special 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).

33. "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).

34. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance," establishes measurable annual goals, addresses the services and accommodations to be provided to the child and whether the child will attend mainstream classes, and specifies the measurement tools and periodic reports that will be used to evaluate the child's progress. Id. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. The team that develops an IEP must consist of, at a minimum, the parents, at least one of the child's regular education teachers, at least one special education teacher, and a qualified representative of the local educational agency. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a). "Not less frequently than

annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

35. In Rowley, the Supreme Court held that a two part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. First, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Id. at 206-07. A procedural error does not automatically result in a denial of FAPE. See G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to a free appropriate public education, 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).

36. In the instant matter, Petitioner's Complaint does not advance any procedural errors.

37. Pursuant to the second step of the Rowley test, the undersigned must determine if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive "educational benefits." 458 U.S. at 206-07. (1982). The Eleventh Circuit Court of Appeals has clarified that the IDEA does not require the local school system to maximize a child's potential; rather, the educational services need provide "only a

'basic floor of opportunity,' i.e., education which confers some benefit." Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991); C.P. v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1153 (11th Cir. 2007)("This standard, that the local school system must provide the child 'some educational benefit,' has become known as the Rowley 'basic floor of opportunity standard')(internal citations omitted); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001)("[A] student is only entitled to some educational benefit; the benefit need not be maximized to be adequate"); see also Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1313 (10th Cir. 2008)("[W]e apply the 'some benefit' standard the Supreme Court adopted in Rowley").

38. The assessment of an IEP's substantive propriety is guided by several principles, the first of which is that it must be analyzed in light of circumstances as they existed at the time of the IEP's formulation; in other words, an IEP is not to be judged in hindsight. M.B. v. Hamilton Se. Sch., 668 F.3d 851, 863 (7th Cir. 2011)(holding that an IEP can only be evaluated by examining what was objectively reasonable at the time of its creation); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990)("An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.").

Second, an assessment of an IEP must be limited to the terms of the document itself. Knable v. Bexley Cty. Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001). As the court observed in Knable:

[W]e must limit our evaluation of Bexley's proposed IEP to the terms of the document itself, as presented in writing to the Knables. The IDEA specifically requires school districts to provide parents a formal written offer before either initiating a placement for a disabled child or otherwise providing a FAPE to the child. . . . The district court erred in relying on the IHO's finding that Bexley had the capacity to offer Justin an appropriate program. The district court should have limited its assessment to the terms of the document itself. Although there was evidence in the record indicating what could have been provided . . . only those services identified or described in the draft IEP should have been considered in evaluating the appropriateness of the program offered.

238 F.3d at 768; Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1315-16 (8th Cir. 2008)(holding that an IEP must be evaluated as written); County Sch. Bd. v. Z.P., 399 F.3d 298, 306 n.5 (4th Cir. 2005)("The School District complains that the hearing officer ignored the fact that an aide was hired for Z.P. after the IEP was written. We believe that the hearing officer properly focused on what was actually contained in the written IEP when determining the appropriateness of that IEP."). Third, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See Sch. Dist.

of Wisc. Dells v. Z.S. ex real. Littlegeorge, 295 F.3d 671, 676-677 (7th Cir. 2002).

39. As referenced earlier, Petitioner raises three substantive challenges relating to events of the 2012-2013 school year and the October IEP: (1) the failure to implement certain provisions of Petitioner ██████'s February IEP that was in effect at the beginning of the 2012-2013 school year; (2) the IEP team's decision to reduce the level of support facilitation; and (3) the IEP team's decision to decline Petitioner's request for one-to-one instruction in all of ██████'s academic classes.

40. With respect to the first challenge, it is argued that ██████ was denied FAPE during the time period of August 20, 2012, through October 18, 2012, due to Respondent's failure to provide the facilitated support set forth in the February IEP. As detailed in the findings of fact, however, Petitioner has demonstrated that only ██████'s science facilitator failed to provide the requisite services from September 18 through October 18, 2012.

41. In determining whether this failure to comply with the terms of the IEP constitutes a denial of FAPE, the following standard applies:

[A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to

implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failure and for providing the disabled child a meaningful educational benefit.

Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000). Utilizing the foregoing standard, which requires proof of "substantial or significant" implementation failures, the court in Bobby R. held that the school district's failure to provide speech services for four months—among other implementation deficiencies—did not constitute a denial of FAPE. 200 F.3d at 348-49.

42. Applying Bobby R. to the facts at hand, it is evident that Respondent's failure to provide █████ facilitated support in science for approximately one month, although not to be condoned, does not rise to the level of a material or substantial deviation from █████'s February IEP. See Melissa S. v. Sch. Dist. of Pittsburgh, 183 Fed. Appx. 184, 187 (3d Cir. 2006) (holding that school district's alleged failure to provide a 1:1 aide on several occasions did not constitute "the kind of substantial or significant failure to implement an IEP that constitutes a violation of the IDEA"); Savoy v. Dist. of Columbia, 844 F. Supp. 2d 23, 33-35 (D.D.C. 2012) (holding that school district's provision of 50 fewer minutes of instructional time per week than required by the child's IEP did not constitute a significant

implementation failure); Corpus Christi Indep. Sch. Dist. v. C.C., 2012 U.S. Dist. LEXIS 79181 \*20-21 (S.D. Tex. June 7, 2012)(holding loss of "44 minutes of general education time two days per week" was not a material deviation from the IEP).

43. With respect to the second and third challenges, Petitioner has failed to demonstrate that ██████ could not receive a basic floor of opportunity with the level of support facilitation and instruction contemplated by the October IEP. Although skeptical of the reduction, the undersigned is obligated, particularly in light of the evidentiary presentation, to "pay great deference to the educators who develop the IEP." Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001); Sch. Dist. of Wisc. Dells v. Z.S., 295 F.3d 671, 677 (7th Cir. 2002)("The administrative law judge substituted his opinion for that of the school administrators. He thought them mistaken, and they may have been; but they were not unreasonable.").

#### CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that:

Petitioner's Complaint is denied in all respects.



DONE AND ORDERED this 26th day of August, 2013, in  
Tallahassee, Leon County, Florida.

**S**

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TODD P. RESAVAGE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of August, 2013.

ENDNOTES

<sup>1/</sup> Unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations are to the current codifications.

<sup>2/</sup> The following accommodations, modifications, aids, and services are set forth in the document: allow time for processing before giving expected verbal response; teacher will accept verbal response after written response is attempted; check for comprehension/clarification of content and directions; cue to remain on task; provide verbal encouragement and positive praise; instructional amplification; use of visuals; prompt to perform routine tasks; multi-strategy approach to reading instruction; encourage student to review assignments prior to turning in; provide a variety of extra examples when re-teaching; frequent summarization of instruction to ensure comprehension; connect new information to old information; agenda check by teacher; provide a numbered list of steps to a task; preferential seating near front of classroom; allow for short breaks; and prepare for instruction by providing visual outline, with oral presentation of lesson content.

3/ [REDACTED] is to receive the following on a weekly basis: behavior contract; instruction in organizational strategies; and review progress weekly (10 to 20 minutes).

4/ As-needed accommodations, modifications, aids, and services include: study guides for tests; allow extra time for material to be reviewed prior to test; review of skills prior to assessment; use of grid paper and a multiplication guide in math; show mastery of failed test in an alternative presentation; oral/written; allow extra time for testing (classroom and standardized) 100%; oral presentation of all non-reading items and directions; reduce length of classroom assignments and homework; spelling and handwriting errors not counted unless area being assessed; prompt to record daily assignments and maintain binder; set of books for home; reteach and provide repetition of skills/main points; allow to see nurse immediately for medications as requested; allow computer generated assignments-class and homework; use of manipulatives; and provide written directions for homework assignments.

5/ The October IEP provides the following "as appropriate": provide hands on activities; small group instruction; and up to two additional days to complete assignments.

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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)(b), Florida Statutes (2011), 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).