

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

Case No. 21-3073E

vs.

DUVAL COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

Pursuant to notice, a due process hearing was conducted in this case on February 22 and 23 and March 9, 2022, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Beverly Oviatt Brown, Esquire
Three Rivers Legal Services, Inc.
3225 University Boulevard South, Suite 220
Jacksonville, Florida 32216

For Respondent: Kelly Hebden Papa, Esquire
James Everett Millard, Esquire
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STATEMENT OF THE ISSUES

1. Whether the Duval County School Board (“School Board” or “District”) failed to provide a free appropriate public education (“FAPE”) from September 2019 until the present day, by failing to ensure that Petitioner was provided instruction specially designed for his specific circumstances.

2. Whether the District failed to provide FAPE from September 2019 until the present day, by failing to adequately support Petitioner as a student with a disability under the Individuals with Disabilities Education Act (“IDEA”) and by failing to provide special education and related services that would yield progress according to Petitioner’s special circumstances.

3. Whether the District failed to provide procedural safeguards by failing to invite the parent to the 2021 extended school year (“ESY”) Individualized Education Program (“IEP”) meeting.

4. Whether the District failed to convene an IEP team at the culmination of ESY 2021, thereby causing Petitioner to miss months of mitigating services.

5. Whether the District failed to provide assistive technology, although it was warranted.

6. Whether the District failed to provide speech services for articulation and fluency, although Petitioner has needed them.

7. Whether the District staff created a hostile working environment in which Petitioner became unwilling to attempt work without prompting.

8. Whether the District ignored Petitioner's health concerns during the COVID-19 pandemic and did not provide services to compensate.

PRELIMINARY STATEMENT

On or about October 7, 2021, Petitioner filed a request for due process hearing (“Complaint”). The School Board timely filed its Initial Response to the Complaint on October 14, 2021. On October 15, 2021, the School Board filed an Unopposed Request for Extension of Time to Convene Resolution Session, which was granted by an Order giving the parties until October 22, 2021, to hold a resolution session.

The parties were not able to resolve the matter and requested more time to continue exploring the possibility of settlement. Two Orders granting

extensions of time were entered, on October 27, 2021, and on December 2, 2021. On December 20, 2021, Petitioner filed an Unopposed Motion to Set the case for hearing. Per the parties' agreement, the case was set for hearing on February 22 and 23, 2022.

The hearing was convened as scheduled. At the conclusion of the two-day hearing, the parties' presentation of evidence was not completed. On February 28, 2022, an Order was entered continuing the hearing and setting a third hearing day on March 9, 2022. The hearing was reconvened and completed on March 9, 2022.

At the outset of the hearing, the parties stipulated to the admission of all their exhibits. Petitioner's Exhibits 1 through 31 and the School Board's Exhibits 1 through 13 were admitted into evidence.

At the hearing, Petitioner presented the testimony of: [REDACTED], Petitioner's [REDACTED] and guardian; [REDACTED], a physical education teacher at [REDACTED]; [REDACTED], a speech language pathologist working for [REDACTED]; [REDACTED], a transition exceptional student education ("ESE") teacher at [REDACTED]; [REDACTED], a career experiences teacher at [REDACTED]; [REDACTED], school nurse at [REDACTED]; [REDACTED], an occupational therapist for the School Board; [REDACTED], a guidance specialist at [REDACTED]; [REDACTED], a school psychologist working for the School Board; [REDACTED], a career experience teacher at [REDACTED]; [REDACTED], an occupational therapist at [REDACTED]; [REDACTED], a job developer for the School Board; [REDACTED], a transition teacher at [REDACTED]; [REDACTED], a music teacher at [REDACTED]; and [REDACTED], a student-focused paraprofessional at [REDACTED]. [REDACTED] returned to testify in rebuttal.

The School Board presented the testimony of [REDACTED], the principal of [REDACTED]; [REDACTED], an occupational therapist at [REDACTED]; [REDACTED]; [REDACTED], a speech/language pathologist at [REDACTED]; and [REDACTED], [REDACTED] of ESE support services for the School Board.

The three-volume Transcript of the final hearing was filed with DOAH on March 30, 2022. Two extensions of time to submit proposed final orders were granted, by Orders dated March 31, 2022, and April 27, 2022. In accordance with the second Order granting extension, the parties timely filed their Proposed Final Orders on May 6, 2022.

On April 1, 2022, Petitioner filed a “Motion to Amend Pleadings to Conform with Evidence to Extend the Time Frame to Address Regression.” On April 4, 2022, the District filed a written response in opposition. The Motion is denied as untimely under Florida Administrative Code Rule 6A-6.03311(9)(h). The substance of the Motion, which involves allowing Petitioner to attend a school other than [REDACTED], is treated in the Findings of Fact below.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use male pronouns in this Final Order when referring to Petitioner. The male pronouns are neither intended, nor should be interpreted, as a reference to Petitioner’s actual gender.

FINDINGS OF FACT

I. Stipulated Facts

The parties stipulated to the following undisputed facts:

1. As of the hearing date, Petitioner was [REDACTED] years old.

2. Petitioner resided in Georgia until [REDACTED]. In [REDACTED], he entered the District's schools with an eligibility of "Language Impairment" under Georgia's terminology.

3. Petitioner entered the District with Occupational Therapy ("OT") eligibility.

4. An assistive technology evaluation conducted on November 6, [REDACTED], found that Petitioner would benefit from the use of a word processor for writing tasks.

5. Petitioner's April 22, [REDACTED], Individual Distance Learning Plan ("IDLP") increased his language service from 30 minutes per week to 30 minutes twice per week.

6. Petitioner's September [REDACTED] IEP provided 15 minutes per month of OT as a related service.

7. Petitioner's May [REDACTED] IEP provided 15 minutes per month of OT as a consultative service.

8. Petitioner attended school during the 2020-2021 school year through Duval [REDACTED], a virtual learning service provided by the District.

9. No functional behavior assessment has been conducted on Petitioner.

10. A [REDACTED] school was determined to be the least restrictive educational placement for Petitioner for the two years preceding the filing of the Complaint.

11. An IEP meeting was held on September 30, [REDACTED]. The resulting IEP provided Petitioner with an additional year of transition services though he had reached the age of [REDACTED].

12. On April 30, [REDACTED], a communication evaluation was conducted by Speech Language Pathologist [REDACTED]. Among [REDACTED] recommendations was: "Utilizing Augmentative and Alternative Communication (AAC) devices paired with verbal utterances to increase functional and effective communication. Trial AAC with a speech language pathologist or assistive technology specialist."

II. Background Information

13. Petitioner was born in Georgia and lived there until [REDACTED], when he moved to Duval County under the guardianship of his [REDACTED], [REDACTED]. Petitioner has been cared for by [REDACTED] and [REDACTED] parents since his enrollment in District schools in [REDACTED].

14. Petitioner attended [REDACTED] from [REDACTED] until [REDACTED], when he went to [REDACTED].

15. Petitioner started high school at [REDACTED] in [REDACTED], then moved to [REDACTED], a [REDACTED] school, in [REDACTED].

16. Petitioner receives ESE services under the primary classification of autism spectrum disorder (“ASD”) in a [REDACTED], supported level of academic setting. Secondary and/or related programs through ESE include OT and language impaired (“LI”).

17. Petitioner has an [REDACTED] disability, with a General Development Score of [REDACTED] based on the parent report on a Developmental Profile—4th Edition (“DP-4”) administered by a District school psychologist on or about April 27, [REDACTED]. This score indicates overall functioning in the delayed range and at the [REDACTED] percentile relative to other individuals his age.

18. Petitioner has been diagnosed with asthma and sickle cell anemia.

19. [REDACTED], currently a job developer for the District, taught Petitioner math when he was a high school student prior to his move into the transition program. [REDACTED] described him as a student who needed a lot of visual cueing and verbal prompting. [REDACTED] remembered him as having medical issues that required him to drink a lot of water and made him fall asleep in class frequently. [REDACTED] stated that falling asleep was not unusual for students in [REDACTED] class. Petitioner was relatively compliant with classroom rules.

20. Occupational Therapist [REDACTED] said that [REDACTED] could not rule out that some of Petitioner’s lack of attention was from fatigue caused by his sickle cell anemia. However, [REDACTED] said that multiple factors go into a person’s

not being able to pay attention and stay awake. In this case, ■ did not believe that Petitioner's sleeping in class was caused by sensory overload as had been suggested by ■. ■ found it far more likely that Petitioner's cognitive and intellectual deficits, coupled with his auditory processing difficulties, made it hard for him to understand what was going on in the classroom. If Petitioner does not understand and is not engaged, he finds it hard to stay awake.

21. Guidance Specialist ■ testified that speech fluency was always an issue because of Petitioner's echolalia. He spoke clearly, without omissions or errors, but his total communication was a concern that ■ persistently raised with the District.

22. ■ testified that Petitioner mostly takes care of his own activities of daily living ("ADLs"). He takes a shower and brushes his teeth on his own. ■ will make sure ■ puts out fresh clothes because he is prone to wearing the same thing he wore the day before. Petitioner makes his own bed without prompting. ■ states that he is very neat and does things in a specific order, the same way every time. He has pill containers for each day of the week. He uses the same bowl, plate, and cup every day. He can make his own bowl of cereal and can cook popcorn and pizza in the microwave. ■ testified that ■ is working with him on making scrambled eggs.

23. After breakfast, Petitioner and ■ go into a work routine. ■ stated that ■ is in and out during the day but is there most of the time. Petitioner's cousins help out. They take him with them when they go out to play basketball. He listens to music on his earphones and walks the court while they play. They help him onto a treadmill for his exercise. Petitioner watches a little television, but especially loves music. He sings his favorite songs on a karaoke microphone.

24. ■ testified that Petitioner has not completely mastered the ADL of wiping after toileting and thus has to wear pullups. ■ believes that this should have been an element of his OT at school. Neither of the District's

occupational therapists who worked on Petitioner's case, [REDACTED] and [REDACTED], was aware that wiping was an issue with Petitioner. The evidence was insufficient to establish that the District was ever put on notice that Petitioner required services related to toileting.

III. Chronology

[REDACTED] School Year and ESY

25. The [REDACTED] school year was Petitioner's first year of receiving transition services under a deferred standard diploma. Transition services are intended to help Petitioner with employability and daily living skills, moving away from academics and toward practical skills for incorporation into the larger community. At [REDACTED], each transition class has a classroom curriculum, but each class also has an "enterprise," such as gardening, woodshop, and nutrition, to teach skills that will help the students after they age out of school.

26. ESE transition teacher [REDACTED] testified that families come to meetings or open houses and are surprised to learn that their child knows how to use a broom or a vacuum cleaner, or how to wash dishes or fold clothes, because those skills are taught at the school.

27. On September 12, [REDACTED], an IEP was created for Petitioner that established six measurable annual goals, which included independent functioning, curriculum & learning, social/emotional, transition, and two communication goals.

28. The IEP included two services related to communication: specialized instruction in communication skills for functional living, to be taught in the ESE self-contained classroom, four times per week; and language therapy once per week.

29. The September 12, [REDACTED] IEP also included a transition plan for the development of measurable postsecondary and career goals. [REDACTED] [REDACTED], the principal at [REDACTED], testified that the school has specific learning programs to assist students with transitions. The school uses

TeachTown, which is the District's core program, as well as a web-based program called Unique Learning Systems and a paper program with visuals called Attainment.

30. Petitioner's IEP also contained OT services via the "consultation delivery" model, meaning that the therapist observes Petitioner and consults with his teachers rather than performing hands-on work with Petitioner.

31. [REDACTED], the OT, testified that [REDACTED] provided the amount of service time called for by the September 12, [REDACTED] IEP. [REDACTED] described the consultation model as a team approach. The therapist works with the teachers and paraprofessionals on the identified educational priorities and gives them strategies and tools for meeting Petitioner's needs. [REDACTED] testified that [REDACTED] did not need to offer many suggestions to the teachers at [REDACTED] because they were already using best practices to support students with autism and intellectual disabilities.

32. [REDACTED] was Petitioner's transition teacher during the [REDACTED] school year. In Petitioner's October [REDACTED] progress report, [REDACTED] documented that Petitioner was "progressing with prompts" in his communication objectives, curriculum & learning objectives, social/emotional objectives, and transition objectives. As to his independent functioning objectives, Petitioner was either "progressing with verbal cues and pictures" or "progressing with close proximity of teacher."

33. Petitioner's January [REDACTED] progress report showed him making progress on every objective for every domain in his IEP except for one out of two objectives for curriculum & learning. In that domain, Petitioner required verbal prompts and close proximity to the teacher in order to make progress.

34. [REDACTED] testified that [REDACTED] recalled no problematic behaviors with Petitioner. Petitioner had no school friends and communicated with [REDACTED] only when prompted. Petitioner also had persistent echolalia. If [REDACTED] said, "Good morning, [Petitioner]," he would respond, "Good

morning, [Petitioner],” and have to be reminded that the correct response was, “Good morning, [REDACTED].”

35. [REDACTED] testified that Petitioner could perform tasks if given direct verbal instruction. [REDACTED] used picture cues and modeling, walking him step by step through the task. Petitioner needed constant prompting to stay with the task. [REDACTED] believed that Petitioner would have had less need for prompting if he had been in school more often.

36. [REDACTED] testified that [REDACTED] told her Petitioner could type very well. At [REDACTED] suggestion, [REDACTED] had Petitioner type a daily sheet describing his activities, such as what he ate for breakfast. [REDACTED] testified that [REDACTED] did not observe the typing skills claimed by [REDACTED] Petitioner typed slowly with one finger.

37. [REDACTED] testified that [REDACTED] visited the classroom one day. [REDACTED] noticed that Petitioner’s engagement increased when [REDACTED] was there. He sat up straight and focused his attention on the teacher, which was unusual for him.

38. At [REDACTED] suggestion, [REDACTED] moved Petitioner closer to the front of the classroom. [REDACTED] believed that moving Petitioner closer to the front of the room helped him pay better attention and fall asleep less. [REDACTED] disagreed, testifying that it was only [REDACTED] presence in the classroom that made a difference in Petitioner’s typical behavior. [REDACTED] testimony is credited on this point because [REDACTED] was in the classroom with Petitioner every day.

39. Transition teacher [REDACTED] taught Petitioner during the [REDACTED] school year. [REDACTED] testified that Petitioner did not have a communication device and did not carry pictures to assist with communication. He did not initiate conversations and spoke little. He answered questions “yes” or “no” with no elaboration. He would go to [REDACTED] and softly say “restroom” if he needed to use the restroom. Because

█ was not his homeroom teacher, █ was unaware of the reasons for Petitioner's many absences.

40. In early █, the COVID-19 pandemic struck and Duval County schools were closed for in-person teaching. On about March 20, █, the District introduced Duval █, a virtual learning application.

█ testified that students used Microsoft Teams ("Teams") to log into Duval █ and greet █. █ would review the assignments and answer any questions, then students would do their work at home.

█ was available all day to students and parents through Teams as well as █ personal cellphone.

41. The record indicates that █ had difficulty contacting █ to give █ the information about Duval █ and how Petitioner could access his school work from home. █ finally made contact on March 25, █, after several attempts.

42. █ testified that once █ got in touch with the school, █ complained that █ was still waiting for the District to provide a computer for Duval █. The District's initial method for distributing computers was confusing. Instead of issuing them from Petitioner's home school, the District was issuing the computers from the high school nearest Petitioner's home. █ acknowledged the confusion and stated that, as a result, the District instructed teachers not to further stress parents by counting their children absent. If the teacher was able to contact the parent, a student would be counted as present.

43. Petitioner's April 6, █ progress report showed that he was making some progress in all domains of his IEP: independent functioning, communication, curriculum & learning, social/emotional, and transition. However, the only overall goal he was expected to meet by the end of the IEP was the independent functioning goal of recognizing potentially dangerous situations and providing at least one solution using picture cues in 3 out of 5 opportunities.

44. Despite his documented progress, Petitioner had a high rate of absenteeism. During the [REDACTED] school year, he was absent 368 periods, or about 57 days. He was absent for at least one period in 107 out of a possible 175 days of school. 336 of the absences were excused and 32 were unexcused.

45. [REDACTED] testified that there were several reasons for Petitioner's many absences. His sickle cell anemia kept him home frequently. [REDACTED] testified that [REDACTED] incurred a debilitating illness in 2018 that required [REDACTED] to keep Petitioner at home to help [REDACTED] get to [REDACTED] doctors' appointments. [REDACTED] stated that [REDACTED] would schedule appointments on days when Petitioner's class was going on [REDACTED] field trips. Because these field trips were similar to activities that the family already engaged in, [REDACTED] saw no harm in keeping Petitioner out of school for them. [REDACTED] testified that [REDACTED] was very conscious not to keep Petitioner out of school in a way that would interfere with his learning and that [REDACTED] made sure he was in school four days per week.

46. Every professional involved in Petitioner's program agreed on the importance of repetition to his learning. His poor attendance affected his progress. [REDACTED] testified:

[His] attendance was not very good. The attendance was, in fact, an issue, because I'd have to almost start over completely with [him]. We do something called repeated teaching, but when a student is out, when they're absent a lot, it's hard for them to catch up to where everyone else is. Attendance was an issue with [Petitioner].

47. The teachers and therapists involved with Petitioner agreed that repetition is generally important to all ESE students, but that it was especially important for this student. Transition ESE teacher [REDACTED] testified that [REDACTED] would work with Petitioner on a task and think that he had

learned it, but when [REDACTED] returned to the task five minutes later, he would have forgotten it.

48. There was also general agreement that frequent absences undermined the repetition necessary for Petitioner to learn. The teachers also agreed that the impact of absence on a student's learning is the same whether the absence is excused or unexcused.

49. A new IEP was developed on May 13, [REDACTED], to address ESY for summer [REDACTED] and establish the program for the [REDACTED] school year. This IEP included goals in curriculum & learning, healthcare, independent functioning, social/emotional, and communication. The IEP retained language therapy and communication related services; however, language therapy was decreased from 30 minutes per week to 15 minutes per week for the duration of ESY only.

50. Petitioner attended ESY online in the summer of [REDACTED] and was mostly successful. His July [REDACTED] progress report showed that he was making progress on his independent functioning goals "with maximum assistance." It also indicated that Petitioner did not participate in his communication goals during ESY.

[REDACTED]

51. The [REDACTED] school year began on August 20, [REDACTED]. Families were given the option of in-person attendance at the brick and mortar school or to continue virtual learning through Duval [REDACTED]. Because of Petitioner's health issues and the continuing COVID-19 pandemic, [REDACTED] chose to have Petitioner attend classes virtually. [REDACTED] decision was endorsed by a letter, dated November 11, [REDACTED], from [REDACTED], Petitioner's physician at [REDACTED].

52. The District developed an IDLP for students whose parents or guardians elected to have them attend through Duval [REDACTED]. [REDACTED] testified that the District had come to realize that the level of supervised, hand-over-hand instruction outlined in the services of the

students' IEPs was not transferable to the online platform. The IDLP was a tool created by the District to explain to a parent how the direct services of a teacher or therapist would be provided online. Petitioner's OT services were consultative between the therapist and the teacher and thus should not have been affected by the change to Duval [REDACTED].

53. [REDACTED] also testified that in the Fall of 2020, teachers and parents were acclimating to the fact the Duval [REDACTED] was now providing live instruction. When the pandemic closed the schools and Duval [REDACTED] was first implemented in the Spring of 2020, teachers were simply taping their lessons and placing them online. Parents and students were able to access the lessons at their convenience. Now, students who opted for online instruction were expected to adhere to the same schedule as their classmates who were attending school in person.

54. Petitioner's IDLP was developed by [REDACTED], who would be Petitioner's teacher in Duval [REDACTED]. The IDLP explained the accommodations and services provided in the virtual setting. [REDACTED] explained that the class would have three live meetings per day with supporting activities to reinforce the concepts that were being taught. [REDACTED] described the various learning platforms that would be used (TeachTown, Unique Learning, Vizzle, Explore Work, and Attainment), but also noted the importance of "live modeling" of the concepts being taught: "Constant contact with parent or guardian will allow for individual revisions in classroom activities." [REDACTED] described the three daily meetings as follows:

1. Morning Meeting will emphasize obtaining information from a variety of mediums. Organizational Planning to teach self-awareness and self-determination concepts. Live meeting will be followed by supporting activity on one of the learning platforms.
2. This live meeting will emphasize employment research concentrating on preferences and skills. Different Job Clusters will be explored with

students matching their preferences and skills. Measurement concepts will be taught and connected to job clusters discussed.

3. The third session each day will deal with Social/Emotional concepts, coping skills, attending behaviors, communication skills and one day each week we will discuss, research and practice health care concepts. We will relate these concepts to real work place situations. All live sessions will be supported by learning platform activities and student parent guardian feedback will help instructor revise content and delivery.

55. In early August, [REDACTED] had problems submitting the application for Petitioner to attend virtually. [REDACTED] missed the deadline but with the assistance of [REDACTED] was able to enroll Petitioner in Duval [REDACTED].¹ At the start of the school year on August 20, [REDACTED], Petitioner was not in class. [REDACTED] was unable to contact [REDACTED] On August 25, [REDACTED], [REDACTED] emailed [REDACTED] to say that a family emergency was preventing Petitioner from starting school and that [REDACTED] expected him to start no later than the next week.

56. [REDACTED] testified that Petitioner “was great with virtual education because he looks forward to learning.” He knew when and how to log into [REDACTED] class and did so eagerly every day. “He didn't miss anything. He was there all the time, and [REDACTED] spoke to him. It was great.”

57. While Petitioner was able to log on to Duval [REDACTED] through Teams, [REDACTED] was having trouble logging onto accessory virtual programs such as Vizzle or TeachTown.

58. A constant problem was that even when Petitioner was logged in and present for class, the teacher could not see him. [REDACTED] testified that there was initially a problem with the computer equipment and it had to be switched

¹ [REDACTED] testified that [REDACTED] was not the only parent who had technical problems with the District's online application.

out. However, [REDACTED] also stated [REDACTED] was unaware that Petitioner did not have his computer camera on for most of the school year. [REDACTED] blamed [REDACTED] for not raising the video issue with [REDACTED].

59. [REDACTED] testimony as to the camera situation was inconsistent and thus not credible. On cross examination, [REDACTED] testified that [REDACTED] was unaware that Petitioner's camera and microphone were turned off for most of the year. This testimony was difficult to credit in light of [REDACTED] claim that [REDACTED] was present for many of Petitioner's class sessions.

60. Further, when [REDACTED] testified in rebuttal at the close of the hearing, [REDACTED] stated [REDACTED] was aware that the laptop issued by the District "was unable to consistently get video; so, therefore, [Petitioner] was not able to be viewed by the class the way the other students were interacting." [REDACTED] went on to say that [REDACTED] did not find the lack of video to be "a main issue" because Petitioner and [REDACTED] were able to hear and speak to each other.

61. [REDACTED], the principal of [REDACTED], testified that [REDACTED] frequently logged on to the Duval [REDACTED] platform to observe classes. [REDACTED] noted that most of the [REDACTED] students require a parent or guardian present to assist them with the instructional aspects of the online program. [REDACTED] testified that there were times that Petitioner had no one assisting [REDACTED].

62. [REDACTED] was the [REDACTED] occupational therapist assigned to Petitioner's case for the [REDACTED] school year. As in the previous year, Petitioner's OT services were delivered through the consultation model. [REDACTED] recalled the main OT IEP goal as being safety in the school environment. [REDACTED] communicated with [REDACTED] about safety topics and provided him with techniques for teaching Petitioner to recognize what is and is not safe.

63. [REDACTED] testified that part of the occupational therapy consultation involves observing the student in the classroom setting. [REDACTED] would log into Duval HomeRoom and attempt to observe Petitioner, but he

never had his laptop's video on. All [REDACTED] could see on the screen was Petitioner's name. [REDACTED] would consult with [REDACTED] about Petitioner's follow-up services, but the process was difficult.

64. [REDACTED] testified that [REDACTED] spoke with [REDACTED] a few times about Petitioner not being on camera. [REDACTED] told [REDACTED] was trying to get that addressed. [REDACTED] tried to call [REDACTED] a couple of times to ask how things were going and to answer any questions [REDACTED] might have. [REDACTED] testified that [REDACTED] was never prompt in responding and did not express any concerns.

65. [REDACTED] stated that the IEP required consultative therapy for 15 minutes per month and that [REDACTED] provided that service as best [REDACTED] could. Observation of the child is part of the consultation, but the therapist can work around it if need be. The therapist talks with the teacher, finds out what they are doing, and formulates strategies around the lesson plan. [REDACTED] did that. [REDACTED] never saw Petitioner in person, but from speaking with his teachers [REDACTED] believed that his OT requirements were appropriate and tailored to his unique circumstances.

66. Petitioner's first progress report on October 15, [REDACTED], showed that he was not making progress in most areas of his IEP goals and objectives. In the curriculum & learning domain, Petitioner was shown as making progress. In the social/emotional domain, Petitioner was shown as not making progress because he participated in only 4 of the 10 learning opportunities offered in a three-week period. In the transition domain, he was shown as not making sufficient progress because he completed none of the three health assignments in a three-week period.

67. In the independent functioning domain, Petitioner's goals included recognizing potentially dangerous situations and providing a solution using picture cues in 3 out of 5 opportunities. For this goal, he was shown as not making sufficient progress, with "12% completion of assigned tasks but 63% attendance in virtual classes."

68. In the communication domain, the report stated that Petitioner did not participate in the virtual sessions. A notation by [REDACTED], the speech language pathologist assigned to Petitioner, stated: “Due to COVID 19, therapy services have been provided in a virtual format. Petitioner has not participated in virtual sessions for progress to be measured. However, home learning packets were uploaded to therapist's Teams page to target goals.”

69. Petitioner did not receive direct communication services for the bulk of the [REDACTED] school year. [REDACTED] made eight separate attempts to contact [REDACTED] to schedule virtual speech language services for Petitioner but was unsuccessful. [REDACTED] noted on August 31, [REDACTED], that the guardian had requested “asynchronous lessons as opposed to direct teletherapy due to scheduling conflicts.” [REDACTED] posted the activities and materials to the relevant Teams page every week but had no other contact with Petitioner.

70. [REDACTED] noted that most of the time Petitioner did not log in to [REDACTED] sessions. On occasions, when [REDACTED] participated in [REDACTED] live virtual sessions, Petitioner would remain muted during the session and make no contribution to the class unless called on by the teacher.

71. Finally, on April 22, [REDACTED], [REDACTED] responded to [REDACTED] and they established a date and time to meet and provide services. Even then, [REDACTED] had a great deal of difficulty in providing services because Petitioner would either not pick up [REDACTED] call or would hang up on [REDACTED] when [REDACTED] attempted to initiate the virtual sessions.

72. Petitioner’s lack of participation was a problem across the board, not only with [REDACTED]. His progress reports indicate that his participation improved somewhat between October and December [REDACTED]. The December 31, [REDACTED], progress report indicates that Petitioner “attends virtual sessions but has not completed all safety activities” under his independent functioning goal. Similarly, under the domain of transition, the report states that Petitioner “attends virtual sessions but has not completed all Health Care activities.”

73. As confirmed by [REDACTED] testimony, the communication goal in the December progress report states that Petitioner did not attend virtual sessions. Under the domain of curriculum & learning, Petitioner is shown to have participated in 87 percent of the virtual learning activities for the second nine weeks of the school year and was expected to meet his goal of staying “focused on a task until its completion using picture cues, close proximity of Teacher and verbal prompts in 3 out of 5 opportunities.” Petitioner showed 90 percent participation in his social/emotional group activities.

74. The District sent a letter to [REDACTED] on December 12, [REDACTED], stating:

The Florida Department of Education (FDOE) recently extended the Executive Order that allows us to continue Duval [REDACTED] for the remainder of the school year. However, we are required to submit a Spring Reopening Plan approved by FDOE. The Executive Order and the Spring Reopening Plan require that the district contact families of students who are failing to make adequate progress to notify them of their child’s academic status and to require them to return to face-to-face instruction.

Your child, listed above, has been identified as being scheduled into at least one Duval [REDACTED] course and is not making adequate progress. You will need to log into your parent Focus account, review the form titled Spring Reopening Plan Letter, and select one of the available options on the form by December 17th....

75. A similar lack of progress warning letter was sent to [REDACTED] on February 26, [REDACTED]:

Our Spring Reopening Plan requires that the district contact families of students who are failing to make adequate progress to notify them of their child’s academic status, and to require them to return to face-to-face instruction.

Your child, listed above, has been identified as being scheduled into at least one Duval [REDACTED] course and is not making adequate progress. You will need to log in to your parent Focus account, review the form titled Fourth Quarter Plan Letter, and select one of the available options on the form by March 12, [REDACTED]. More details on the process are listed below. Thank you for working with us to ensure the academic success of your child....

76. The record is silent as to whether [REDACTED] completed the forms requested in response to either letter or whether the District followed up on these letters in any way.

77. The March [REDACTED] progress report indicates that Petitioner was at best present but not participating in classes and not submitting work. The District had no way to assess his progress.

78. [REDACTED], who has since retired, did not testify at the hearing. [REDACTED] recalled [REDACTED] telling [REDACTED] that Petitioner was generally physically present for the classes but that they could not get any work from him. [REDACTED] also told [REDACTED] that [REDACTED] was having difficulty accessing some of the online platforms such as TeachTown and Vizzle.

79. [REDACTED] testified that in the spring of [REDACTED], Petitioner was aging out of the ESE program, as he had reached his [REDACTED] birthday in January. [REDACTED] stated that as this milestone approaches, the District tries to make sure the student has applied for services to the Agency for Persons with Disabilities, has their referrals to the Division of Vocational Rehabilitation (“DVR”), and that their Medicaid waivers and guardianship documentation are in place.

80. [REDACTED] testified that at about the time the District was beginning the planning for Petitioner’s transition out of ESE services in April [REDACTED], [REDACTED] began raising concerns about the impact of COVID-19 on Petitioner’s services. [REDACTED] contacted the District about an executive order the Governor had issued. [REDACTED] asked whether the order could extend Petitioner’s services.

██████████ told ██████ that ██████ did not think it applied to Petitioner because the order seemed directed to students who were trying to get their standard diploma. Petitioner already had enough credits to graduate high school and was already receiving post-secondary services. ██████████ conceded ██████ was not certain ██████ opinion was correct.²

81. ██████ was making it clear that ██████ wanted services for Petitioner beyond the usual limitation of his ██████ birthday. ██████████ told ██████ that ██████████ could not unilaterally agree to extend services in that fashion; the decision would have to come at the District level. ██████████ testified that ██████ discussions with the District led to an agreement to offer ESY services to Petitioner in ██████.

82. ██████████ testified that in April ██████ the District was also trying to schedule Petitioner's final annual IEP meeting, which was required to close out his academic career with the District. ██████████, a career experience teacher at ██████████, was working to schedule the meeting but ██████ made several requests to reschedule it. ██████████ got involved once it became clear that ██████ was asking to reschedule the meeting for after the date the current IEP expired. The parties agreed to a continuation of services until the IEP meeting could be scheduled.

83. At ██████ insistence, the District agreed to perform updated evaluations to assess Petitioner's cognitive, academic, and communication skills. ██████ believed that Petitioner's abilities exceeded his performance testing. ██████████ noted that M.J. would often talk about how well Petitioner performed with her at home and that this claimed performance seemed not to carry over to the school setting.

84. A psychoeducational evaluation of Petitioner was conducted on April 27, ██████, by ██████████, a District school psychologist. To assess

² ██████████ later confirmed that ██████████ opinion was essentially correct. ██████████ testified that ██████ nevertheless persisted in arguing that the Governor's order would allow Petitioner to remain in school after his ██████ birthday. The order itself was not placed in the record.

Petitioner's cognitive and academic levels, ██████ attempted to administer the Woodcock-Johnson IV Tests of Cognitive Ability and Achievement.

██████ testified that the Woodcock-Johnson tests are designed to evaluate persons two years of age and up. Seven cognitive ability subtests were attempted but ██████ ultimately deemed the tests invalid because the testing instrument did not have a floor sufficient to capture what Petitioner was able to do. ██████ noted that Petitioner had difficulty understanding the tasks that he was asked to perform despite frequent repetition of instructions and modeling and despite the fact that the tests were not timed.

85. As to the achievement tests, Petitioner was able to produce a valid standard score in the reading cluster of below ██████, the lowest standard score that can be reported on this testing instrument. The score fell within the very ██████ range of ability for a student of his age. Petitioner was able to automatically recognize sight words at an approximate grade level of ██████. He was able to match individual words with corresponding pictures and verbally label objects, but was unable to provide missing words in basic passages without picture cues. ██████ did not attempt to measure reading fluency because Petitioner was unable to perform the prerequisite sample items, which required Petitioner to read a simple sentence and decide if the answer is "yes" or "no," e.g., "a wheel is round" or "a man has two legs."

86. As to the math cluster, a valid score could not be generated due to the difficulties observed with Petitioner's understanding of the tasks he was asked to perform. ██████ noted that Petitioner was unable to consistently demonstrate an ability to perform single digit addition and subtraction calculations in isolation.

87. ██████ testified that for informational purposes ██████ administered the Bracken Basic Concept Scale—Third Edition: Receptive, which assesses knowledge of school readiness concepts. ██████ stated that this test is not ordinarily given to students of Petitioner's age, but ██████ was hoping to obtain some information about Petitioner's knowledge of colors, shapes, sizes, and

letters. The test required Petitioner to point to items to demonstrate their knowledge of basic concepts. Petitioner was unable to clearly indicate his selections, which rendered the test invalid.

88. Because of the testing difficulties, ██████ resorted to another method of assessing Petitioner's abilities: the DP-4, which is based on a questionnaire completed by the parent, in this case ██████. The DP-4 generated a general development score of ██████. ██████ stated that ██████ falls at the ██████ percentile and is considered delayed in general development. ██████ found that this score was consistent with the small amount of direct testing he was able to perform. ██████ noted that prior testing in ██████ had yielded similar standard scores, at or below the ██████ percentile.

89. ██████ evaluation concluded with the following recommendations:

Overall, a review of school records, current evaluative data, including scales of development, an assessment of adaptive behavior, and examiner observations suggest a presence of a significant cognitive impairment and global developmental delay. In addition, behaviors associated with [Petitioner's] ASD classification were observed throughout the course testing (i.e., poorly modulated eye contact, limited joint attention, echolalia, limited social reciprocity, etc.).

Results of this current assessment suggest that [Petitioner] would benefit from a functional curriculum and community-based instruction with the ultimate goal of promoting growth in adaptive functioning and life skills. [Petitioner] presents as a compliant and eager participant who would benefit greatly [from] this type of instruction. It is recommended that the Eligibility Determination Team review these evaluation results in conjunction with the measure of adaptive behavior, language evaluation, and any other pertinent information in order to determine [Petitioner's] eligibility for specialized services and to assist with transition.

90. On May 24, [REDACTED], speech language pathologist [REDACTED] [REDACTED] completed a communication evaluation report on Petitioner. The report found that Petitioner “presents with a moderate to severe fluency disorder characterized by significant and persistent dysfluent speech.” His overall speech intelligibility was rated as good.

91. In May [REDACTED], Petitioner began receiving private speech therapy and OT services at [REDACTED] in [REDACTED]. These were uncompensated charity care services provided by [REDACTED].

92. [REDACTED] was the speech language pathologist who provided services to Petitioner for five months at [REDACTED]. [REDACTED] provided services in person at [REDACTED] office. The sessions lasted for one hour. [REDACTED] stated that the evaluating therapist had requested sessions once per week for six months, but the fact that Petitioner’s was a charity case limited the sessions.

93. [REDACTED] stated that the first long-term goal established for Petitioner was to increase his expressive language by six months, with his previous test scores establishing the base line. A series of short-term goals was established under the long-term goal. One such short-term goal was for Petitioner to name objects either by verbal communication or by a device with 70 percent accuracy. [REDACTED] employed an AAC device in addition to verbal responses. Thus, if [REDACTED] asked Petitioner to identify a ball, he could either say “ball” or touch the picture on the device. Petitioner quickly met this short-term goal.

94. The next short-term goal was to provide three members in a category. For example, if [REDACTED] said “clothes,” Petitioner tried to name three kinds of clothes, either orally or using his AAC device. [REDACTED] was allowed to use cues for this goal, for instance naming five items and having Petitioner tell [REDACTED] which ones were clothes. Petitioner did well with this goal.

95. The next short-term goal was responding to simple who, what, when, and where questions. Petitioner was not able to do this orally. He did a little

better if [REDACTED] typed the question, but was only ever able to manage between 40 and 50 percent accuracy on this goal.

96. [REDACTED] testified that after working with Petitioner for a couple of months, [REDACTED] concluded that he was best able to communicate with a picture board or a communication device. However, [REDACTED] discontinued the goal of testing AAC devices because of Petitioner's distractibility. He would get stuck on looking at the pictures and reading the words on the device and become disengaged from what they were working on. [REDACTED] concluded that an AAC device was not really functional for his communication and decided to work on oral speech instead.

97. Another long-term goal was to demonstrate appropriate social interaction skills. The short-term goal of taking turns in conversation had to be abandoned because Petitioner struggled with it. He could answer questions, but was unable to keep a conversation going. [REDACTED] decided to discontinue this goal in order to focus on goals that were achievable for Petitioner.

98. The short-term goal of identifying facial expressions, such as an angry or happy face, was also difficult for Petitioner. He succeeded only about half of the time. Petitioner also met with 50 percent success on the goal of using polite forms of speech, such as "thank you" and "excuse me." He was only able to use the correct form of speech if he was directly cued by [REDACTED].

99. [REDACTED] noted that if [REDACTED] asked Petitioner a question such as "How are you?" he would repeat the question back to [REDACTED]. [REDACTED] stated that this habit is very common in autism. [REDACTED] noticed that if [REDACTED] typed the question "How are you?" Petitioner would respond, "Good."

100. Petitioner was given the goal of sequencing pictures. [REDACTED] would give him three pictures of the steps in making a peanut butter sandwich, for example, and ask Petitioner to put the pictures in the correct order. Petitioner required total assistance with this activity and then was accurate only 40 to 50 percent of the time.

101. Petitioner's final goal was to use and understand superlatives and comparatives. His success rate on this goal was only 25 percent at the time his services were discontinued. [REDACTED] testified that Petitioner could understand the concept of something being small, but struggled with the comparative idea of something being "smaller."

102. [REDACTED] testified that Petitioner made good strides in the five months she worked with him, following the trajectory [REDACTED] would expect most persons with autism to have in that time span. He progressed more quickly once [REDACTED] was able to narrow down the type of assistance he needed. For example, in answering questions, he did much better when he could read the questions than when they were stated to him face to face. [REDACTED] believed that continuing therapy would be beneficial "to help figure out ways to help [Petitioner] function in the world."

103. [REDACTED] was asked about the possible effect of Petitioner's having missed language services for about one year just before he started at [REDACTED]. [REDACTED] stated that it could have caused regression, given the importance of repetition in Petitioner's learning.

104. [REDACTED] was the occupational therapist who served Petitioner at [REDACTED]. [REDACTED] first evaluated Petitioner on May 17, [REDACTED], noting that [REDACTED] main concerns were function and typing. He developed initial goals: Petitioner will become independent in a home activity exercise program; Petitioner will perform simple chores such as cleaning windows and wiping tables; Petitioner will perform moderate to complex chores such as vacuuming and sweeping; Petitioner will use visual cues and strategies to improve independence to sort personal items such as putting dirty clothes in the laundry and cleaning up toys; Petitioner will complete simple meal prep with minimal assistance and visual support; Petitioner will type a three word or more sentence with fewer than two errors with eight words per minute or better and without signs of frustration, demonstrating his readiness to transition to a long-term typing home exercise program.

105. ██████ stated that he saw Petitioner in one-hour sessions from May 17, ██████, through October 25, ██████. ██████ testified that Petitioner became very good at typing. He was able to type about 20 words per minute if he was allowed to use his own hunt and peck method and was not restricted to touch-typing hand placement. ██████ success with typing stands in contrast to the District's failures, and indicates that more face-to-face OT might prove fruitful in helping Petitioner master this manual skill.

106. By the end of the sessions, Petitioner was able to sort items and clean up toys with minimal assistance. He could perform simple chores 100 percent of the time and achieved 75 percent for moderately complex chores such as folding laundry. ██████ noted that Petitioner needed demonstrations before each session and then moderate verbal cues as he worked on the tasks.

107. Petitioner was very compliant and engaged throughout the sessions, which were in a clinical environment with no distractions. ██████ discussed vocational options with ██████ and testified that Petitioner has the potential to learn a vocational skill. At the end of the session, ██████ recommended an additional 12 weeks of one-hour sessions per week.

June 4, ██████ IEP

108. As noted above, ██████ was requesting services beyond the end of the school year even though Petitioner had already turned █. The staff at ██████ had never received such a request and were not sure how to respond without guidance from the District. ██████ eventually contacted District Administrator ██████ regarding compensatory services due to COVID-19.

109. ██████ testified that the District had developed a COVID regression form that the team could apply to determine whether a student had regressed due to COVID. The team would then make a recommendation as to remediating any losses that occurred between March and June ██████. ██████ explained that the District was only offering remediation services for the period during which the schools were closed and parents had

no option to send their children to school for face-to-face learning. The District distinguished that situation from the [REDACTED] school year, when the choice to keep the student at home and use Duval [REDACTED] was made by the parent.³

110. [REDACTED] testified that [REDACTED] told the District that [REDACTED] would be happy to keep Petitioner enrolled and provide him services beyond his [REDACTED] birthday. The school's main concern was trying to determine Petitioner's present levels and whether he had regressed. No one at [REDACTED] [REDACTED] had seen Petitioner in person since March [REDACTED], he had missed most of the year's speech language services from [REDACTED], and his overall virtual class participation had been poor.

111. [REDACTED] testified that, based on the special circumstances, the District was willing to allow Petitioner to stay in school through the summer of [REDACTED] provided he was in face-to-face classes. The District authorized [REDACTED] [REDACTED] to offer ESY services to Petitioner "to continue instruction in functional academics, social skills, communication skills and independent functioning, language and speech therapy."

112. The IEP team met on June 4, [REDACTED], to discuss the possibility of extending instruction through ESY to address some of the regression Petitioner may have experienced. Present at the meeting were: [REDACTED]; [REDACTED] as the local education agency ("LEA") representative; [REDACTED], the [REDACTED] teacher; [REDACTED]; Petitioner's advocate, [REDACTED] of Disability Rights Florida; attorney [REDACTED] for the District; and [REDACTED], the principal of [REDACTED].

[REDACTED] testified that the meeting lasted for nearly five hours and included a lot of positive input from [REDACTED] and the advocate.

113. [REDACTED] testified that the school's perspective going into the meeting was to address as many of [REDACTED] concerns as possible. [REDACTED]

³ It was unclear whether this distinction originated with the District or was handed down from the Department of Education and/or the Governor's office.

stated that staff at ██████████ always tried to work and partner with ██████ in Petitioner's education. They knew she wanted what was best for him and they always accepted ██████ input as valid.

114. ██████████ testified that ██████ and ██████████ had specific concerns about what "mastery" should mean in the draft IEP's curriculum & learning domain. ██████████ suggested increasing the criterion from 65 to 75 percent to correlate to traditional mastery in the form of a passing grade in a regular classroom. ██████████ recalled that the team settled on a number somewhere between 65 and 75 percent.

115. ██████████ testified, and ██████████ confirmed, that ██████ wanted the achievement standards to be based on what ██████ saw Petitioner doing at home. ██████████ explained that the goals had to be based on what the team observed Petitioner doing at school. ██████████ noted that it is common that children may not transfer skills across environments. A student may exhibit skills at home that he may not show at school. There are people and distractions at school that Petitioner does not experience at home. The team agreed to ██████ request to "push" Petitioner, but not so hard that he failed to meet his goals.

116. ██████ had questions about how the school day would work in ESY, specifically whether Petitioner would have a visual schedule. ██████████ assured ██████ that the school was already using a visual schedule and would continue to do so.

117. ██████ wanted Petitioner to learn money skills and the team agreed to teach him about money. ██████ wanted the school to work on Petitioner's keyboarding skills and the team agreed. ██████ showed the team ██████ method of getting Petitioner to properly greet ██████ and the team agreed to use ██████ method. The team agreed that ██████ could send in current magazines to use as a performance incentive for Petitioner. Both ██████████ and ██████████ testified that the team tried to incorporate anything that ██████ or the advocate suggested or expressed concern about.

118. The draft IEP included a social emotional goal that Petitioner would seek attention five times per day. [REDACTED] stated that this was an area of concern that may require applied behavior analysis therapy. [REDACTED] told the team that [REDACTED] has difficulty with Petitioner's inability to let [REDACTED] know when he is finished with something.

119. In the discussion of independent functioning goals, [REDACTED] requested that the verbal prompts included in the draft IEP be changed to written instruction due to Petitioner's hearing impairment. This request led to further discussion of [REDACTED] expectations as to mastery for Petitioner, with [REDACTED] asserting that his standards should be higher than the school seemed to believe he was capable of achieving.

120. The team discussed assistive technology. [REDACTED] testified that the District has a procedure for trialing assistive technology devices, which involves being with a student while they are using it. The team wanted to look hard at assistive technology during ESY. [REDACTED] did not recall that [REDACTED] asked for a specific device, though [REDACTED] did mention that Petitioner used an AAC device called a BigMack at home. [REDACTED] mentioned a couple of other AACs that the school would let Petitioner try out.

121. [REDACTED] testified that everyone at the meeting agreed it was important to get Petitioner back into school so that his information could be updated. The school agreed to update the summary of performance, the document that would close out Petitioner's career with the District, to make sure it reflected his status accurately. The team decided to reconvene to discuss the updated information after the school did curriculum assessments and teacher observations to update the summary of performance. The meeting was tentatively set for July 16, [REDACTED].

Summer [REDACTED] ESY

122. [REDACTED], who had been Petitioner's English Language Arts teacher for three years in high school, taught Petitioner during the summer [REDACTED] ESY. [REDACTED] testified that [REDACTED] used the Unique Learning System, a

proprietary ESE program, for Petitioner's classroom work. There were approximately ten students in the class. There was a classroom paraprofessional, but Petitioner did not have a one-on-one paraprofessional.

123. ██████ testified that when ██████ taught Petitioner in high school, ██████ would sometimes sleep in class. ██████ did not see this problem during ESY. ██████ stated that Petitioner seemed to enjoy being back in school and was more engaged than ██████ recalled. ██████ still had to do a lot of prompting to get him to work but he seemed to enjoy participating in the activities they were doing.

124. ██████ stated that Petitioner reads at about a ██████-grade level but does not comprehend a lot of what he is reading. ██████ stated that he had always preferred speaking to using AAC devices to communicate and that this was still the case during ██████ ESY.

125. As requested by ██████, they worked on teaching Petitioner to recognize different coins. ██████ showed ██████ a flash card method ██████ was using at home and ██████ incorporated the flash cards into ██████ teaching.

126. As also requested by ██████, ██████ worked with Petitioner on typing. ██████ recalled encouraging Petitioner to type during high school but that it would take 10 to 15 minutes for him to type one sentence because ██████ had to sit with him one on one and point out each letter.

127. ██████ testified that Petitioner did better with the touch-typing program used during ESY. He had a problem with speed but did very well learning to position his fingers and which letters to pick. ██████ stated that he still became frustrated when asked to type a whole sentence because it took him longer to type it than it would to write it longhand.

128. ██████ testified that they worked on employability skills and tried to ascertain where Petitioner needed more help becoming independent. They worked on life skills such as ordering in a restaurant and tipping. They worked on the proper way to greet people and making eye contact. The school

offered vocational training at Goodwill but [REDACTED] did not complete the paperwork because [REDACTED] believed Petitioner was not ready.

129. On July 28, [REDACTED], a comprehensive vocational evaluation of Petitioner was conducted by [REDACTED] of Innovative Evaluations in Orange Park. Petitioner was referred for this evaluation by DVR. [REDACTED] reported that [REDACTED] described Petitioner as struggling with visual cues. [REDACTED] stated that Petitioner communicates better by being able to read what is being requested. When [REDACTED] would ask a question, [REDACTED] would type it out for Petitioner to read. [REDACTED] wrote:

Evaluator found it extremely difficult to communicate with [Petitioner] and solicit information from [him]. It is not felt [he] would do well in an interview setting and may not make a favorable impression with perspective [sic] employers. Without significant support and assistance from others [Petitioner] is not considered employable. Even with services from Vocational Rehabilitation evaluator is unsure if [he] is currently suited for employment in any capacity.⁴

130. [REDACTED] noted that Petitioner was cooperative throughout the testing. He followed oral directions after they were repeated several times. He required constant redirection to stay on task.

131. [REDACTED] wrote that [REDACTED] “may need education on the diagnosis of Autism and how it affects individuals and their employability. Although [his] [REDACTED] is a very positive role model and extremely supportive, evaluator is unsure how realistic [REDACTED] expectations are for [Petitioner].”

132. [REDACTED] administered the Wide Range Achievement Test, 4th Edition (“WRAT4”). The WRAT4 showed Petitioner’s word reading (word recognition only) at a [REDACTED] grade equivalent and his spelling at a [REDACTED] grade

⁴ At the hearing, [REDACTED] disputed some of [REDACTED] account of the meeting, but [REDACTED] dispute was less with the substance of what was said than with [REDACTED] phrasing. For example, [REDACTED] denied saying that Petitioner “struggles with visual cues” but [REDACTED] acknowledged telling [REDACTED] that Petitioner prefers “captioning and reading.”

equivalent. These scores were significantly higher than those found by [REDACTED] when he administered the Woodcock-Johnson Achievement tests. [REDACTED] was asked about this difference and commented that he did not know what the examiner actually did, whether standardization was adhered to, or whether accommodations were provided in the administration of the WRAT4. [REDACTED] did not testify at the hearing.

133. [REDACTED] noted that the only skill that he assessed that was also assessed by the WRAT4 was word reading, i.e., a person's ability to automatically read a word. Everyone who observed Petitioner noted that he was a "good reader" in the sense of his ability to identify words by sight whether or not he understood them.

134. [REDACTED] recommended as follows:

Currently I do not feel [Petitioner] is employable in any capacity and as VR's outcome is employment I am unsure if [he] can benefit from VR services at this time. I feel [he] may be best served from participation in a Day Habilitation program for six months to a year, participation in a volunteer experience for 6 months to a year to build social and work skills and also participation in counseling for social skills building and developing strategies for concentration and following directions.

135. [REDACTED] recommended an array of DVR services should [REDACTED] and Petitioner decide to pursue immediate vocational rehabilitation, including guidance and counseling, job placement, transportation, mental restoration, appropriate clothing for interviews, and assistive technology.

136. As noted above, the IEP update meeting was scheduled for July 16, [REDACTED]. However, July 16 was a Friday and the District's offices are closed on Fridays during the summer, meaning that not all of the IEP team would be available. While working with [REDACTED] on dates to reschedule the meeting, the District received a letter from Disability Rights Florida demanding that the District pay for two years of private school for Petitioner. [REDACTED] was

surprised by the demand. ■ testified that the District pulled back from trying to schedule the IEP meeting in order to discuss the matter with its legal team.

137. ■ agreed that there was a halt to resetting the IEP meeting. ■ testified that it was ■ understanding the District was trying to work out a solution with Disability Rights Florida and that the parties “were really not wanting us to do the IEP because our IEP was going to close him out, and so I guess they were still looking at whether or not he would still be eligible for more services. Because the IEP that we were intending to do was to end his services.”

138. ■ testified that the negotiations led to an apparent agreement with Disability Rights Florida to extend Petitioner’s services for one additional year:

[This] was something we had not done before, but just really in an effort to mitigate any type of regression that may have occurred due to COVID and then also due to the fact that they may have elected that virtual model...

We weren't offering to make that year up. I think we were just really looking at the big picture trying to get, you know, more adequate information, but, you know, we had offered face-to-face instruction the preceding year, and, you know, everybody was within their rights to select what they wanted. But even after selecting that, that's --you know, [Petitioner] just struggled in coming to class and actively participating through that virtual model. So it just overall was not a good fit for [him]. But based on the demand for two years of private school, we came back together and said, you know, "Why don't" -- "Why don't we try one additional year in the public school system?" And at that point, I think, you know, we were under the impression that that was being discussed with ■, and we didn't hear any complaints about that at that time.

██████████ School Year

139. ██████████ testified that the District worked on setting up a meeting to finalize the agreement, but ██████████ changed attorneys, dismissing Disability Rights Florida and retaining ██████████ of Three Rivers Legal Services, Inc. They were finally able to schedule the meeting for September 30, ██████████.

140. During the September 30 meeting, all parties agreed to an additional year of service. ██████████ was not the only school that was discussed. ██████████ had raised concerns that the staff at ██████████ did not see the same things that ██████████ saw with Petitioner in the home. ██████████ was concerned that the school had a “certain perception” of his abilities. ██████████ wanted to make sure that he was being taught in a manner that addressed his communication and sensory issues. The IEP team discussed ██████████ ██████████, another center school with many of the same programs and community-based vocational educational opportunities as ██████████ ██████████.⁵ ██████████ testified that ██████████ and ██████████ are heavy with transition and employment opportunities because they have job developers and job coaches to support the transition program.

141. The IEP team was able to develop an IEP that all persons present, including ██████████, agreed to at the meeting. The IEP stated that its transitional emphasis would be on “vocational training, work experience and employment skills. Instruction will take place in a center school setting. He will receive instruction in social skills, communication, self-determination and health care in the course Unique Skills Independent Functioning.” The IEP called for speech and language services including language therapy once per week for 30 minutes and speech therapy once per week for 20 minutes.

⁵ ██████████ testified that they discussed only center schools because the IEP team had decided, even before Petitioner graduated into the transition program, that the best setting for him would be a center school because of the closed environment, amount of supervision, and the services and support that are available there.

142. ██████ testified that the staff at ██████ were happy to have Petitioner back for another year despite the fact that the school would receive no funding for him because of his age. ██████ confirmed that ██████ was happy Petitioner was returning.

143. Petitioner did not start back at ██████ on October 4, ██████, as ██████ had told the school he would. He did not return to school until October 13, ██████. As of the hearing date, Petitioner had attended school for no more than 15 days during the ██████ school year.

144. On October 4, ██████, ██████ filed the instant due process case. ██████ attended the resolution meeting and tried to address ██████ continuing concerns. ██████ testified that shortly after the meeting, ██████ heard that ██████ had requested to have Petitioner attend the ██████ ██████, a magnet school focusing on technical career education. ██████ stated that the District was willing to consider the suggestion and proposed having Petitioner “spend maybe two days with support with ██████ and other days at ██████ to see how he would integrate into another... less intensive program at ██████ with fewer natural built-in supports.” ██████ understanding was that ██████ had brought Petitioner to ██████ for a day or two and believed it was a good fit. ██████ emphasized that the District was open to ██████ idea, but ██████ pulled Petitioner out of school altogether.

145. ██████ testified that ██████ pulled Petitioner out of school because the District gave ██████ no option other than ██████ and when the school year began ██████ saw it was just “the same old.” On a visit to the school, ██████ observed that Petitioner was not engaging in the classroom and no

interaction was occurring.⁶ All parties had agreed that communication was the key for Petitioner's successful transition but ██████ said that ██████ saw nothing new being done in the classroom.

146. Contrary to ██████ testimony, there was no insistence on the District's part that Petitioner attend ██████. As noted above, the District was open to ██████. ██████ testified that ██████ would have supported a move to another school if ██████ had requested it. ██████ testified that the September 30, ██████ IEP could be implemented at any school with a setting similar to ██████, such as ██████. ██████ agreed that ██████ or any other center school with a transition program could be an appropriate setting for Petitioner.

IV. Specific Issues Raised in the Complaint

Assistive Technology

147. Numerous teachers and staff at ██████ testified to the types of assistive technology being utilized by the school to assist Petitioner. ██████ emphasized that the entire staff at ██████ is trained in the use of assistive technology and is very good at implementing it.

148. ██████, the physical education teacher who worked with Petitioner during ██████ ESY, testified that ██████ used picture cards and a "talk box" to assist Petitioner in communicating. Occupational Therapist ██████ and ██████, the school psychologist, testified that the teachers used picture cards and other "low tech assistive technology." Occupational Therapist ██████ testified that the use of low-tech assistive technology constitutes a best practice in terms of providing the least restrictive environment to Petitioner. ██████, the speech language pathologist who worked with Petitioner at ██████, decided that

⁶ ██████ testified that the incident in which ██████ visited ██████ class and suggested that Petitioner be moved to the front of the room occurred at this time. ██████ testified that this incident occurred during the ██████ school year. ██████ version of events is credited because ██████ testimony was presented in a clear chronological fashion. ██████ testimony tended to skip back and forth in time, leaving the listener unsure of specific dates and times.

using an AAC device was not functional for Petitioner's communication because the device tended to distract him from the task at hand.

149. ██████ noted that Petitioner's September 12, ██████ IEP included an objective that Petitioner would "communicate using picture cues, technology and gestures to convey wants and needs." ██████ stated that the referenced technology was an AAC device called Go Talk. The device had pictures. Staff would prerecord the words represented by the picture, which then allowed Petitioner to touch the picture and have the device speak the word aloud. ██████ testified that they also used laptops in the classroom, as well as simple paper pictures that Petitioner could hold up. She stated that the simple pictures worked best with Petitioner.

150. As noted above, ██████ testified that Petitioner preferred speaking to using the Go Talk. ██████ stated that ██████ uses pictures and written words in the classroom, giving Petitioner the option to use either for communication.

151. ██████ listed several forms of assistive technology utilized to assist Petitioner, including tablets, dynamic and static communication devices, computer programs such as SymboStix and Boardmaker, iPads, computers, core boards, and an FM receiver. ██████ also testified that although Petitioner used a BigMack at home, ██████ would not allow him to bring it to school. ██████ stated that having the BigMack in the classroom would have been optimal because having him use the same device at school and at home would help him retain his lessons.

Speech and Language Services

152. Findings of Fact 69 through 71 above detail the problems that Speech Language Therapist ██████ encountered in attempting to contact ██████ and in providing services to Petitioner during the ██████ school year.

153. ██████, the guidance specialist at ██████, was aware of the situation and testified that the communication problem with ██████ was not confined to ██████ Other parents reached out to ██████ to inquire

about their services. [REDACTED] stated that [REDACTED] may not have been clearly communicating to parents as to the services on offer in Duval [REDACTED].

154. [REDACTED] testified that Petitioner's schedule for language therapy called for support facilitation, in which the therapist joins the regular classroom and works with Petitioner in a more natural setting, as opposed to pulling Petitioner out of class for one-on-one therapy. [REDACTED] was signing into classes in Duval HomeRoom on Mondays. [REDACTED] concluded by stating:

I did reach out to [REDACTED] to make sure that she was explaining that to parents, that they may not actually understand that she was actually providing that model because now that was their -- their classroom, was that online platform. So that they may not understand that they weren't being pulled to do some therapy with her one on one, but they didn't realize they were getting those services. So I did ask her to be -- to clarify that with the parents.

155. It is undisputed that, whoever bears the blame for the situation, Petitioner missed almost a full year of speech and language services provided by his IEP.

156. The District emphasizes that the Complaint does not complain generally about the provision of speech language services but narrowly focuses on "speech services for articulation and fluency." The District cites multiple witnesses who testified that Petitioner's speech intelligibility was good. No one who worked with Petitioner on a daily basis testified that his articulation was a concern. Videos of Petitioner working at various tasks were entered into the record, and his speech could be clearly understood.

157. The record demonstrates, however, that fluency was another matter. While finding that Petitioner's intelligibility in speech was good, [REDACTED] evaluation of April 29, [REDACTED], also found that Petitioner presented with:

a moderate to severe fluency disorder characterized by significant and persistent dysfluent speech. [He] exhibits repetition of phrases, repetition of whole words, and blocks. Echolalic may impact repetitions and no secondary behaviors such as eye blinking or neck muscle tension was observed. [He] did show struggle during word and phrase repetitions. These disfluencies are not related to chronological age, gender, culture, ethnicity, or limited English proficiency. **Severe disfluent episodes may negatively impact the learning environment as student's communication message can be difficult to follow when participating and answering comprehension questions impeding the flow and quality of instruction as well as a reliable way to assess what Petitioner knows.**

158. [REDACTED] evaluation of April 29, [REDACTED], recommended "Utilizing Augmentative and Alternative Communication (AAC) devices paired with verbal utterances to increase functional and effective communication. Trial AAC with a speech language pathologist or assistive technology specialist."

159. The District attempts to minimize [REDACTED] findings and recommendations by pointing out that at the time of the evaluation, Petitioner had not attended school in person since early March [REDACTED] and had only recently commenced logging into the language services offered by [REDACTED].

160. The District also points out that Petitioner's focus throughout his educational career has been functional language, which [REDACTED] described as the "ability to be able to express himself in a way that will be most useful for him in his everyday life." [REDACTED] testified that functional language "could include potentially verbal speech, but it can also include alternative use, so something like using a communication board, or an iPad, or some other type of device basically being Petitioner's voice."

161. [REDACTED], the [REDACTED] ESY teacher at [REDACTED], confirmed that working on communication is an integral part of the educational setting

at the school, stating that it is “an all-day-long situation with our students, because we want to do it in working with them at the appropriate time. So, we want to infuse it throughout our program so our kids know throughout the day what appropriate communication to be using.” This testimony is credited, but the classroom teacher’s good work is not a substitute for the specialty speech language services that Petitioner missed during the [REDACTED] school year.

School Environment

162. The basis for Petitioner’s allegations of a hostile school environment is a single incident that occurred during a visit to Petitioner’s classroom by [REDACTED] during the first week of [REDACTED] ESY.

163. [REDACTED] testified that Petitioner was very uncomfortable in the classroom even though it was a familiar environment. One paraprofessional’s presence “was extremely intimidating and frightening to him, and it distracted the whole visit.” Petitioner could not function because this paraprofessional, whom Petitioner identified to [REDACTED] as “[REDACTED],” was constantly in his space as [REDACTED] worked with other children. [REDACTED] observed Petitioner following the paraprofessional with his eyes. He could not relax unless he knew where [REDACTED] was in the room. “[W]hen the person went behind or past him to go to the back of the classroom and help someone else, he would follow the person and stay in this frightened state until they were out of his face. It was quite unreal.”

164. [REDACTED], the principal of [REDACTED], testified that [REDACTED] never expressed concerns about the school being a hostile environment but that [REDACTED] did complain about the paraprofessional. [REDACTED] immediately switched the paraprofessional to a classroom that Petitioner did not go to. [REDACTED] testified that the paraprofessional, [REDACTED], did nothing wrong, but [REDACTED] reassigned [REDACTED] to keep the peace with [REDACTED]

165. [REDACTED] stated that after the incident [REDACTED] spoke to several teachers who told [REDACTED] that Petitioner tends to jump when people pass by

him. They just accept it as a “normal reaction” that he startles when people pass.

166. ██████ confirmed that Petitioner “flinched all the time. It did not matter who it was.” ██████ said that he flinched when anyone, even other students, walked near him. The reaction had nothing to do with aggression by the other person. ██████ said that the flinching made ██████ own classroom paraprofessional so uncomfortable that ██████ asked not to have one-on-one activities with Petitioner.

167. ██████, the paraprofessional involved in the incident, testified at the final hearing. ██████ has worked for the District for 28 years, always as a student-focused paraprofessional. ██████ testified that ██████ has never met Petitioner. ██████ testified that on the day in question, ██████ was working one-on-one with a student in a wheelchair in the same classroom with Petitioner. ██████ walked past Petitioner and he jumped. ██████ had no interaction with Petitioner. ██████ was focused on ██████ duties and did not pay a lot of attention to Petitioner. ██████ could not say why he jumped. ██████ testified that ██████ changed ██████ classroom placement for the comfort of Petitioner’s guardian.

168. ██████ testified that ██████ has worked with ██████ and that ██████ is a very caring paraprofessional. ██████ has requested that ██████ be assigned as the student-focused paraprofessional for ██████ own daughter.

V. Ultimate Findings of Fact

169. Based on the foregoing Findings of Fact, it is found that the District failed to provide FAPE to Petitioner during the ██████ school year by failing to ensure that he was provided instruction specially designed for his specific circumstances.

170. This finding is based on the fact that Petitioner was essentially a non-participant in his own education for the entirety of the ██████ school year. ██████ decided to place Petitioner in a virtual learning environment for

health reasons but then appeared to leave him alone much of the time to cope with the vagaries of computer instruction without parental assistance.

171. Whether because of faulty computer equipment or Petitioner's inability or unwillingness to turn on the camera, Petitioner could not be seen during his virtual classes and at times kept his microphone muted as well.

█████ made light of this problem, insisting that Petitioner and ██████ were able to hear and speak to each other and "It was great." Even accepting ██████ rosy view of the classroom teacher's ability to work with Petitioner and assess his performance sight unseen, ██████ was not the only professional attempting to work with Petitioner.

172. ██████, the occupational therapist, was unable to perform an essential part of her services by observing Petitioner in the classroom. ██████ testified as to the work-arounds that a therapist can do when unable to observe the student, but second-hand descriptions from the classroom teacher—especially where the teacher also cannot see the student—are no substitute for the therapist's own observations.

173. More significantly, Petitioner received no direct communication services from the start of the school year until late April ██████ because the speech language therapist, ██████, was unable to establish communication with ██████. ██████ was unable to observe Petitioner in the classroom with ██████ because he remained muted and did not participate in class. Even after direct sessions were scheduled, it again appears that ██████ left it to Petitioner to deal with the computer link. ██████ reported that Petitioner would either not pick up ██████ calls or would hang up on ██████ when she attempted to initiate the sessions.

174. While much of the blame for Petitioner's lost year lies with ██████, the District was also at fault for too conscientiously deferring to ██████ wishes even when the effect was detrimental to Petitioner's education, such as when ██████ agreed to "asynchronous lessons" as opposed to direct therapy because of ██████ claimed scheduling problems. ██████ posted the

activities and materials to the Teams page but had no way of knowing whether Petitioner ever accessed them.

175. The District was also derelict in allowing the situation with Petitioner's computer camera to go on for more than a few days, let alone the entire school year. Regardless of whether [REDACTED] found the lack of visual contact acceptable, [REDACTED] professionals were unable to observe and provide services to Petitioner. It was incumbent on the school to remedy the situation, either by repairing/replacing the computer, tutoring [REDACTED] and Petitioner on how to activate the camera, or insisting that Petitioner resume classes in person.

176. Camera issues aside, there were progress reports, warning letters, and reports of individual educators that should have made it apparent to [REDACTED] that virtual learning was not working for Petitioner. The District's passivity as Petitioner was left to fritter away his final year of transition services is inexplicable. It allowed [REDACTED] choice of virtual schooling to override Petitioner's best interests. [REDACTED] personnel dutifully documented Petitioner's failure to participate or progress over the course of an entire school year but no one seems to have taken the initiative to put a stop to the situation that was causing his failures. The District waited until the negotiations over affording Petitioner ESY in the summer of [REDACTED] to finally insist on face-to-face instruction.

177. To the District's credit, it offered Petitioner an additional year of services in the [REDACTED] school year, albeit without conceding that these services were remedial for anything other than the short period in the [REDACTED] school year when virtual learning was mandatory. [REDACTED] agreed to the IEP for the extra year, then pulled Petitioner out of school based on the erroneous idea that the District was unwilling to place Petitioner in any school other than [REDACTED], coupled with [REDACTED] notion that staff at [REDACTED] had a "certain perception" of Petitioner's abilities that underrated his abilities.

178. [REDACTED] is entirely responsible for Petitioner's failure to avail himself of the services agreed to between [REDACTED] and the District for the [REDACTED] school year. From this, it would be easy enough to conclude that FAPE was offered and declined by [REDACTED], and that the District's labors as to Petitioner are therefore at an end. However, the undersigned finds that such would be to visit the failures of the guardian upon the blameless Petitioner. The better solution is to provide Petitioner the extra year of transition services that the District has already proposed and to provide it in the [REDACTED] school year.

179. Based on the foregoing Findings of Fact, it is found that the District did not fail to provide procedural safeguards by failing to invite the parent to the [REDACTED] ESY IEP meeting. The evidence established that [REDACTED] was invited to and attended the ESY IEP meeting held on June 4, [REDACTED].

180. Based on the foregoing Findings of Fact, it is found that the District did not fail to convene an IEP team at the culmination of the 2021 ESY, causing Petitioner to miss nine months of mitigating services. Any delays in convening an IEP team for the [REDACTED] school year was attributable to [REDACTED] demand letter and the ensuing negotiations. Any loss of mitigating services was attributable to [REDACTED] pulling Petitioner out of school in October [REDACTED].

181. Based on the foregoing Findings of Fact, it is found that the District did not fail to provide assistive technology although it was warranted. The record is replete with instances of the District's personnel working with AAC devices and, more effectively, with low-tech instruments such as pictures to assist in Petitioner's communication.

182. Based on the foregoing Findings of Fact, it is found that the District failed to provide speech services for articulation and fluency during the [REDACTED] school year. The direct provision of speech language services by a certified speech language pathologist should be made a part of the IEP that the District and [REDACTED] agree upon for the [REDACTED] school year.

183. Based on the foregoing Findings of Fact, it is found that District staff did not create a hostile working environment in which Petitioner became unwilling to attempt work without prompting. Petitioner provided zero evidence of a hostile working environment. The one incident cited by [REDACTED], that involved the paraprofessional [REDACTED], was nothing more than a misunderstanding on the part of [REDACTED].

184. Based on the foregoing Findings of Fact, it is found that the District did not ignore Petitioner's health concerns during the pandemic. To the contrary, the District catered to Petitioner's health concerns, or at least to [REDACTED] representation of those concerns, to the point of hurting his educational opportunities during the [REDACTED] school year.

CONCLUSIONS OF LAW

185. 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).

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

187. At all times relevant to the Due Process 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).

188. The District is an LEA as defined under 20 U.S.C. § 1401(19)(A). By virtue of receipt of federal funding, Respondent is required to comply with certain provisions of the IDEA, 20 U.S.C. § 1401, et seq. As an LEA, the District was required to make FAPE available to Petitioner 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).

189. 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. Alabama 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).

190. 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).

191. “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).

192. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's present levels of academic achievement and functional performance; establishes measurable annual goals, addresses the services and accommodations to be provided to the child, and whether the child will attend mainstream classes; and specifies the measurement tools, and periodic reports, that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320.26. “The IEP is the centerpiece of the statute’s education delivery system for disabled children.” *Andrew 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)).

193. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a student with FAPE. As an initial matter, it is necessary to examine whether the school district has complied with the IDEA's procedural requirements.

194. In this case, Petitioner alleged that the District failed to convene an IEP team at the culmination of ESY [REDACTED] and that [REDACTED] was not invited to the [REDACTED] ESY IEP meeting. The evidence established that [REDACTED] was invited to, and attended, every IEP meeting held in 2021. As noted in the Findings of Fact above, any delays in convening an IEP team for the [REDACTED] school

year was attributable to [REDACTED] demand letter and the ensuing negotiations. There was no persuasive evidence that the District failed to comply with the procedural requirements of the IDEA.

195. Pursuant to the second step of the *Rowley* test, it must be determined whether the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-7. In *Endrew F.*, the Supreme Court held that, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 999. As discussed in *Endrew F.*, “[t]he ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials,” and that “[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Id.*

196. The IEPs relevant to this case involved transition services. The term “transition services” is defined as follows:

(a) *Transition services* means a coordinated set of activities for a child with a disability that—

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and includes—

- (i) Instruction;
 - (ii) Related services;
 - (iii) Community experiences;
 - (iv) The development of employment and other post-school adult living objectives; and
 - (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.
- (b) *Transition services* for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

34 C.F.R. § 300.43.

197. Petitioner alleged that since [REDACTED], Petitioner's IEPs did not provide him with FAPE and that the IEPs were not properly implemented.

198. Petitioner's IEPs were tailored to his unique needs, including attempting to facilitate his movement from school to post-school activities. The IEPs were developed by a group of professionals from various disciplines. Each IEP included a series of measurable annual goals and benchmarks which were tailored to Petitioner's level of academic performance. The IEPs changed each year to reflect Petitioner's evolving needs. The District considered Petitioner's individual characteristics, abilities, and needs in developing his IEPs and provided him access to specialized instruction and related services. Based on a review of the complete record, the undersigned finds no defect with the design of the IEPs. Properly implemented, the IEPs would have afforded Petitioner FAPE.

199. Turning to the issue of implementation, the court in *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019), articulated the standard for claimants to prevail in a "failure-to-implement case." The court concluded that "a

material deviation from the plan violates the [IDEA].” *L.J.*, 927 F.3d at 1206.

The *L.J.* court expanded upon this conclusion as follows:

Confronting this issue for the first time ourselves, we concluded that to prevail in a failure-to-implement case, a plaintiff must demonstrate that the school has materially failed to implement a child’s IEP. And to do that, the plaintiff must prove more than a minor or technical gap between the plan and reality; de minimis shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child’s IEP.

200. In *L.J.*, the court provided principles to guide the analysis of the implementation standard. *Id.* at 1214. The court stated at the outset that the focus in implementation cases should be on the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld. In other words, the task is to compare the services that are actually delivered to the services described in the IEP. In turn, “courts must consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole.” *Id.*

201. The *L.J.* court also noted that the analysis must consider implementation as a whole:

We also note that courts should consider implementation as a whole in light of the IEP’s overall goals. That means that reviewing courts must consider the cumulative impact of multiple implementation failures when those failures, though minor in isolation, conspire to amount to something more. In an implementation case, the question is not whether the school has materially failed to implement an individual provision in isolation, but rather whether the school has materially failed to implement the IEP as a whole.

Id. at 1215.

202. It is concluded, based on the Findings of Fact made above and all relevant implementation criteria, that the District failed to implement Petitioner's IEP during the [REDACTED] school year and thereby denied him FAPE. Petitioner was literally invisible to the staff of [REDACTED] during an entire year of virtual schooling. Teachers and therapists could not observe him, which fatally handicapped the efforts of staff to provide appropriate services. Regardless of [REDACTED] share of responsibility, the District was fully aware of the situation and duty bound to at least attempt to remedy it. A parent or guardian's wishes are always important, but in this case the District seems to have forgotten that its first duty is to the student.

203. A specific aspect of this failure to implement the IEP is the District's failure to provide speech services for articulation and fluency during the [REDACTED] school year. While the undersigned defers in all other respects to the IEP team to make the appropriate decisions as to Petitioner's transition program in light of his unique circumstances, it is concluded that the program must include the direct provision of speech language services.

204. Based on the foregoing Findings of Fact, particularly the testimony of [REDACTED] as to the success Petitioner enjoyed when provided direct OT services at [REDACTED], it is concluded that the IEP team should explore whether the consultative OT services called for under Petitioner's previous IEPs are adequate to his needs.

205. Petitioner's allegations regarding a hostile working environment and the District's ignoring his health concerns during the pandemic were not supported by evidence and will be dismissed.

206. The undersigned concludes Respondent denied Petitioner FAPE by failing to materially implement his IEP during the 2020-2021 school year and that Petitioner is entitled to compensatory education. In calculating an award of compensatory education, the undersigned is guided by *Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005), wherein the court emphasized that relief under the IDEA depends on equitable considerations, stating, "in

every case . . . the inquiry must be fact specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id.* at 524. The court further observed that its "flexible approach will produce different results in different cases depending on the child's needs." *Id.*

207. This qualitative approach has been adopted by the Sixth Circuit and a number of federal district courts. *See Bd. of Educ. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007) ("We agree with the district court . . . that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the child's] educational problems successfully."); *Petrina W. v. City of Chicago Pub. Sch. Dist.*, 2009 WL 5066651, at *4 (N.D. Ill. Dec. 10, 2009) ("Because a flexible, individualized approach is more consonant with the aim of the IDEA . . . this Court finds such an approach more persuasive than the Third Circuit's formulaic method."); *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); *Barr-Rhoderick v. Bd. of Educ.*, 2006 WL 8444268, at *23 (D.N.M. Apr. 3, 2006) (holding that an award of compensatory education "must be specifically tailored" and "cannot be reduced to a simple, hour-for-hour formula"); *Sammons v. Polk Cnty. Sch. Bd.*, 2005 WL 2484640, at *7-8 (M.D. Fla. Oct. 7, 2005) (adopting *Reid's* qualitative approach).

208. The evidence establishes that Petitioner is entitled to one full school year of face-to-face transition services, including speech language and OT services, during the upcoming 2022-2023 school year. The details of the program to be adopted for the 2022-2023 school year is left to the sound discretion of the IEP team.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Petitioner presented sufficient evidence to establish that the District failed to materially implement Petitioner's IEP during the 2020-2021 school year, including the provision of speech language and OT services, and that Petitioner is entitled to compensatory education as set forth above; and

2. Petitioner failed to present sufficient evidence to support the balance of claims asserted in the Complaint, which are therefore dismissed.

DONE AND ORDERED this 26th day of May, 2022, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
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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).