

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

vs.

Case No. 22-2489E

DUVAL COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

Administrative Law Judge Jessica E. Varn held a due process hearing on August 30 and 31, 2022, utilizing a hybrid format. The undersigned, all attorneys, and some witnesses appeared live in Jacksonville, Florida; some witnesses appeared via video-conferencing.

APPEARANCES

For Petitioner: Beverly Oviatt Brown, Esquire
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For Respondent: Kelly Hebden Papa, Esquire
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STATEMENT OF THE ISSUES

Whether the Duval County School Board (School Board) failed to provide a free and appropriate public education (FAPE) from January 2020 to January

2022 by failing to provide the necessary accommodations required by Petitioner's 504 plan.

Whether the School Board failed to determine that Petitioner's behavior was a manifestation of Petitioner's disabling condition.

Whether the School Board discriminated against Petitioner by failing to provide Petitioner with behavioral accommodations.

Whether the School Board discriminated against Petitioner by failing to provide Petitioner with adequate accommodations for her anxiety to allow Petitioner to fully participate in general education classes.

Whether the School Board discriminated against Petitioner by failing to implement the 504 plan in all classes.

PRELIMINARY STATEMENT

On August 19, 2022, Petitioner filed a request for a due process hearing (Complaint) with the School Board, which promptly forwarded the Complaint to the Division of Administrative Hearings (DOAH). The referral letter indicated that the parties had agreed to keep the hearing dates that had been scheduled for a prior Complaint that had been filed by Petitioner, which Petitioner had voluntarily withdrawn on the same day. The hearing dates were August 30 and 31, 2022. Accordingly, a Notice of Hearing was issued on August 23, 2022, setting the case for a hearing as the parties requested.

On August 26, 2022, a Joint Statement of Agreed Upon Facts was filed, and the due process hearing was held as scheduled. The parties agreed to enter into evidence a binder of Joint Exhibits. The parties called 18 witnesses to testify at the hearing, whose identities and roles are memorialized in the

Transcript. The Transcript was filed with DOAH on October 4, 2022, the same day on which the parties had agreed to file their proposed final orders. On that same date, the parties jointly requested a five-day extension of time to file proposed final orders. In an Order Granting Extension of Time, the undersigned granted the extension of time, and extended the final order deadline to October 24, 2022.

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

FINDINGS OF FACT

1. Petitioner is currently █ years old, and attends █, where she is enjoying school and performing well.

2. When Petitioner was in █ grade, she was found eligible for a 504 plan, due to her Attention Deficit Hyperactivity Disorder (ADHD). She has remained eligible for a 504 plan since then.

3. Petitioner's █ has █ daughters with disabilities, and █ has been actively involved in their education, often advocating on their behalf. During the course of managing Petitioner's █ Exceptional Student Education (ESE) services, the █ had become comfortable with █, an █ for the School Board. In fact, █ routinely asked █ to be present for meetings with the school staff, and █ honored that request.

4. Unfortunately, according to school staff and █, some interactions with the █ became counterproductive due to the █ behavior. █ requests on behalf of █ daughter were often a moving target, causing the staff to often redirect their attention to the latest parental

concern. [REDACTED] recalled that the [REDACTED] pattern of behavior was to threaten a lawsuit immediately, and then after some discussions, a resolution would be reached. During [REDACTED] testimony, the [REDACTED] was sometimes confused; for example, the [REDACTED] testified that Petitioner was diagnosed with ADHD in [REDACTED] grade, rather than [REDACTED] grade.

5. Petitioner's Complaint focuses on the time period between January 2020 and January 2022. From January 2020 to the end of that school year, Petitioner was attending [REDACTED], and she was in [REDACTED] grade.

6. Petitioner's annual 504 meeting was first scheduled for September 24, [REDACTED], but was rescheduled when her parents did not attend the meeting. The meeting was reset for November 13, [REDACTED], with no confirmation from Petitioner's parents. The annual meeting was eventually held on November 26, [REDACTED]. Petitioner's accommodations were listed as follows: provide proximity control; use positive cues and praise to promote student's on-task time; repeat/clarify and/or summarize directions; teacher will explain conduct/behavior expectations to the student prior to transitions; and, allow 50 percent extended time to finish classwork/homework. The meeting notes reflect that teachers for science, pre-algebra, and civics all attended the meeting. Nothing in the minutes or the communication between the school and parents indicates additional accommodations were discussed or needed.

7. The school counselor for the [REDACTED] school year documented the following from that annual meeting:

Parent requested a meeting with all teachers due to concern regarding the student's grades. Teachers: [REDACTED] and [REDACTED] met and discussed student's behavior, social emotional, and academics. Also present was [REDACTED] and [REDACTED] and 504 Designee/School counselor, [REDACTED]. Student was noted per teachers to be well-behaved and a helper. Student was stated to struggle with Civics and Pre-algebra and stated to become disengaged

when math problems becomes more difficult. Student also is slow about turning in work and maybe skipping classes. Teachers were to give parent/student packages of work to complete/study. Parent will be given vocabulary list for Civics. Parents were advised that EOC for Civics counts 30% of final grade as well as civics is a requirement for promotion to █ grade.

8. Petitioner's █ handwrote a request for a due process hearing on February 11, █. In response to this request, the team met on March 2, █. The parents, the science teacher, the school counselor, and █ were present. There were some conversations about recovery paperwork for science; however, there was no mention that Petitioner's accommodations were not being followed, or that tutoring needed to be added.¹ A handwritten accommodation was added to the 504 plan, by █, indicating that teachers would respond to the parent's emails requesting progress updates within two school days. The parent agreed to voluntarily withdraw █ request for a hearing

9. Shortly after the March 2, █, schools were shut down for in-person learning due to the global pandemic. During this challenging time for everyone, the record reflects that teachers and school staff communicated with the parents regarding missing work, Petitioner's failure to attend virtual classes consistently, and academics in general. Petitioner passed all her classes in █ grade and was promoted to █ grade.

10. Petitioner next chose to enroll at █, because she was interested in the cosmetology program offered there. Her family moved to a home █ from the high school.

11. On October 8, █, a 504 meeting was held with the school psychologist assigned to █. This meeting occurred at the end of the

¹ Having reviewed the entire record and the Transcript, the undersigned finds the testimony of the school staff more persuasive than the parents' testimony. Where there are discrepancies between the school staff's recollections and those of the █, the undersigned finds that the documentary evidence corroborates the school staff testimony.

first nine-week period, and the 504 Team agreed that no changes to the 504 plan were necessary. The team discussed that Petitioner needed to complete assignments that had not yet been turned in, and that she could stay after school to complete the work.

12. The record establishes that the [REDACTED] staff accommodated the student all year; in fact, Petitioner passed all her [REDACTED]-grade classes. Her lowest grade was one D for one semester of science. In that class, the teacher's notes reflect that Petitioner received the accommodations and ultimately, given much more than 50 percent extra time to complete assignments, passed the class. The science teacher also communicated with Petitioner's [REDACTED] on a few occasions, letting her know that Petitioner was more interested in socializing during science class, and would opt to complete work at home rather than during class. The science teacher documented those communications and noted that Petitioner's [REDACTED] was very supportive.

13. At the start of her [REDACTED]-grade year, on August 24, [REDACTED], the 504 team came together for an annual 504 review meeting. This meeting included counsel for Petitioner and the School Board. At the meeting, the parent requested extra tutoring in the subjects that Petitioner was struggling in, particularly science. Petitioner's parents also requested consistent communication when the student's grades dropped below a C, and wanted the teachers to email them in a timely matter. At that meeting, the team agreed to discuss evaluating Petitioner for ESE eligibility, and did not refer the student for ESE evaluation.

14. On September 13, [REDACTED], a meeting was held to once again discuss a referral for ESE eligibility evaluation. At this meeting, the parents were concerned that the 504 accommodations were not being implemented, and that the student was falling behind in math. The parents were informed that the geometry teacher offered all of [REDACTED] students tutoring times at lunch and

after school every day. The parents agreed that the student would attend the math tutoring. The team agreed to reconvene on November 8, [REDACTED].

15. Two days later, on September 15, [REDACTED], the student was involved in a fight at school, and received a one-day suspension. Petitioner's [REDACTED] was notified and understood the discipline measure.

16. At the November 8, [REDACTED] meeting, the school staff team members were prepared to refer the student for evaluation for ESE eligibility.

Unfortunately, the meeting was chaotic. The meeting notes describe the meeting as follows:

The [REDACTED] was incredibly upset and began speaking before anyone else. [REDACTED] was angry because the science teacher had retired and [REDACTED] stated he should be present for this meeting. [REDACTED] stated there hasn't been a cosmetology teacher for 2 years and [REDACTED] was not receiving the instruction [she] needed to pass the licensing test. [REDACTED] also stated that the school would always change the grades prior to a meeting, the student had 3 Fs. Before we were able to address the possibility of evaluation for ESE, the [REDACTED] declared [REDACTED] was not in the mood today and [REDACTED] wanted to move forward with due process. Other members of the team were not able to speak to [REDACTED] concerns. [REDACTED] hung up, the meeting was concluded.

17. The record as a whole, supported by the persuasive testimony of the teachers, established that the 504 accommodations were implemented by the staff. Through January of 2022, Petitioner passed all of her classes, and every teacher implemented the 504 accommodations.

18. In February of 2022, Petitioner was involved in a major fight with other students while at school, which resulted in the Principal suspending the entire group of students. After this altercation, Petitioner transferred to [REDACTED], where she is doing well.

19. Due to another Complaint that was filed by Petitioner, which was eventually voluntarily dismissed by Petitioner, the parties attended a

resolution session in March of 2022. At this meeting, the parties agreed to proceed with an ESE evaluation. The evaluations, as explained at the meeting, would include academic and cognitive testing, as well as behavior checklists, with a focus on eligibility in the category of Other Health Impaired (OHI).

20. In regard to the behavior checklists, which targeted the maladaptive behavior of refusal to complete non-preferred tasks, Petitioner's [REDACTED] refused to complete them, stating that [REDACTED] believed they were irrelevant. The teachers did complete the checklists.

21. Ultimately, the team met in May of 2022, and determined that Petitioner was not eligible for ESE.

22. Petitioner passed all her classes in [REDACTED] grade, and is now in [REDACTED] grade.

23. Petitioner presented no persuasive evidence establishing that Petitioner suffered from anxiety or behavioral issues that resulted in a need for any accommodations to be added to the 504 plan.

24. To the contrary, every teacher found the student to be capable of doing grade-level work with no discernable anxiety or behaviors that constituted a disability.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. *See* § 120.65(6), Fla. Stat.

26. As the party asserting the affirmative of the issue, Petitioner has the burden of proof in the proceeding. *Dep't of Transp. v. J.W.C., Inc.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

27. Section 504 of the Rehabilitation Act of 1973 forbids organizations that receive federal funding, including public schools, from discriminating against people with disabilities. 29 U.S.C. § 794(b)(2)(B). In relevant part, Section 504 provides that no otherwise qualified individual with a disability

shall, "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" receiving Federal financial assistance.

29 U.S.C. § 794(a).

28. In the educational context, a disabled student can prove disability discrimination under three distinct approaches. First, a school board violates Section 504 by intentionally discriminating against a student on the basis of his or her disability. *T.W. v. Sch. Bd. of Seminole Cnty.*, 610 F.3d 588, 603-04 (11th Cir. 2010). The second approach, which does not require evidence of intentional discrimination, see *CTL v. Ashland School Board*, 743 F.3d 524, 531 n.4 (7th Cir. 2014), examines whether a school board has "reasonably accommodated the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits." *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3d Cir. 2012). Finally, and although of no relevance here, a school board violates Section 504 where it applies a rule that disproportionately impacts disabled students. *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 847 (7th Cir. 1999).

29. To prove a claim of intentional discrimination, Petitioner must demonstrate by a preponderance of the evidence that the School Board subjected her to an act of discrimination solely by reason of her disability. *T.W.* 743 F.3d at 603-04. Notably, a claim of intentional discrimination need not be supported by proof of discriminatory animus—i.e., "prejudice, spite or ill will." *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344-45 (11th Cir. 2012). It is instead sufficient for Petitioner to supply proof of "deliberate indifference," which occurs when a "defendant knew that harm to a federally protected right was substantially likely and . . . failed to act on that likelihood." *Id.*; *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)("Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that

. . . likelihood."). As discussed in *Liese*, "deliberate indifference plainly requires more than gross negligence," and "requires that the indifference be a 'deliberate choice.'" 610 F.3d at 344.

30. With this framework in mind, the undersigned turns to the specific allegations, namely, that the School Board intentionally discriminated against Petitioner by failing to provide Petitioner with behavioral accommodations, and by failing to provide Petitioner with adequate accommodations for her anxiety to allow Petitioner to fully participate in general education classes. As detailed in the findings of fact, there was no persuasive evidence establishing that Petitioner suffered from disabling anxiety, or that Petitioner exhibited any behaviors that amounted to a disability, or were a manifestation of her ADHD, requiring additional accommodations.

31. For these reasons, Petitioner's claims of intentional discrimination are rejected.

32. The Complaint also asserts that, by virtue of a series of inactions, the School Board failed to make reasonable accommodations for Petitioner's disability. In particular, the Complaint alleges that the School Board failed to implement the 504 plan.

33. To prevail on this theory, Petitioner must prove by a preponderance of the evidence that the School Board failed to reasonably accommodate her needs as a disabled student, resulting in a "denial of meaningful participation in educational activities [or] meaningful access to educational benefits." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 274 (3d Cir. 2014); *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 (2d Cir 2000) (explaining that a school district must offer reasonable accommodations to disabled students to "ensure meaningful access to its federally funded program").

34. For 504 failure-to-implement-plan violations to constitute disability discrimination, they must be significant enough to *effectively* deny a disabled child the benefit of a public education. *See Alexander v. Choate*, 469 U.S. 287

at 301 (1985) (“[A] benefit ... cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations ... may have to be made.”); *CTL*, 743 F.3d at 529-30.

35. Here, the more persuasive evidence established that Petitioner passed all of her classes and advanced from grade to grade, with the benefit of a 504 plan that was appropriate to meet her needs and provide her meaningful access to a public education and meaningful participation in educational activities. The 504 plan was implemented by the teachers in middle school and both high schools, assisting Petitioner as needed as she advanced from grade to grade, passing all of her classes.

ORDER

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

DONE AND ORDERED this 21st day of October, 2022, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO REVIEW PROCEDURE

This Final Order is subject to review procedures pursuant to 34 C.F.R.
§ 104.36.