STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted]

Petitioner,

vs. Case No. 13-4255E

BROWARD COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH") by video teleconference on January 6 and 7, 2014, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Ann M. Cintron-Siegel, Esquire
Z. Felicia Jordan, Esquire
Disability Rights Florida
1930 Harrison Street, Suite 104
Hollywood, Florida 33020

For Respondent: Barbara J. Myrick, Esquire
Office of the General Counsel
The School Board of Broward County, Florida
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

The issues in the proceeding are: whether Respondent, the Broward County School Board, deprived [redacted] of a free, appropriate

public education ("FAPE") within the meaning of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq.; and whether Respondent violated § 504 of the Rehabilitation Act of 1973 ("§ 504"); and, if so, to what remedy is Petitioner entitled.

PRELIMINARY STATEMENT

On October 31, 2013, the [redacted] of [redacted], Petitioner in this cause, filed a Request for Due Process Hearing ("Complaint"). Respondent promptly forwarded the Complaint to DOAH for further proceedings.

The Complaint asserts three viable claims: (1) Respondent violated the IDEA's procedural requirements resulting in a denial of FAPE; (2) Respondent failed to properly implement the related service of transportation as delineated in [redacted] operative Individual Education Plan ("IEP"), resulting in a denial of FAPE; and (3) Respondent refused to transport [redacted] because of [redacted] disability, in violation of § 504.

The final hearing was scheduled for January 6 and 7, 2014, and proceeded as scheduled. The final hearing did not conclude on January 7, 2014, and, therefore, on January 8, 2014, the undersigned issued a Notice of Hearing scheduling the continuation of the due process hearing for January 9, 2014.

On January 9, 2014, the parties filed a Joint Notice Regarding Continuation of Hearing and Suggested Deadlines ("Joint

Notice"). The Joint Notice provided that the parties did not have additional witnesses to testify at the due process hearing, and, therefore, the parties rested their respective cases, and declared that the record for the hearing may be closed. Additionally, pursuant to the Joint Notice, the parties agreed to an extension of the deadline for the issuance of the Final Order, and requested an extension of time to submit their respective proposed final orders to February 7, 2014. On January 9, 2014, the undersigned issued an Order Granting Specific Extension for Issuance of Final Order wherein the parties' request for an extension of time to submit final orders to February 7, 2014, was granted and establishing the deadline for the issuance of the Final Order as February 28, 2014.

The final hearing Transcript was filed on January 23, 2014. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. Petitioner and Respondent timely filed proposed final orders, which were considered in preparing this Final Order. Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violation.

For stylistic convenience, the undersigned will use [redacted] pronouns in this Final Order when referring to [redacted]. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to [redacted] actual gender.

FINDINGS OF FACT

A. Background

1. [redacted], born [redacted], presently is a [redacted]-grade student at a public [redacted] school in Broward County, Florida. [redacted] has attended the same school since [redacted]. [redacted] has been diagnosed with [redacted] and [redacted]. At all times relevant to this proceeding, [redacted] received special education and related services pursuant to the Other Health Impaired ("OHI") eligibility category. At all material times, [redacted] was covered by a Section 504 plan.

B. 2012-2013 School Year

2. [redacted] was first diagnosed with [redacted] on or about May 31, 2012. On September 28, 2012, [redacted] then current IEP was reviewed at an interim IEP meeting. Pursuant to the terms of the ensuing "September 2012 IEP," [redacted] continued to receive various special education services, and supplementary aids and services that are not at issue in the present proceeding. Additionally, the September 2012 IEP documented that certain "special considerations" had been determined necessary for [redacted] to benefit from [redacted] education program.

3. Specifically, the special considerations included: 1) health care needs; 2) transportation needs; and 3) supports for school personnel. Concerning [redacted] transportation needs, the September IEP documented [redacted] need for transportation as follows:

> Rationale for Request: 9/28/12--Trained bus personnel to monitor health care needs; closest safest stop due to medical needs. [redacted] is diagnosed as having [redacted]. Transport time needs to be under 45 minutes. Bus personnel will monitor for signs of highs and lows in sugar levels. [redacted] is allowed to eat and drink as needed during route.

4. On March 7, 2013, an interim IEP meeting was held. On this date, [redacted] then current IEP was reviewed. [redacted] transportation needs remained the same as noted above with one modification. Specifically, the following notation was added: "*Transportation will be provided as documented unless a Reassignment or McKay without transportation has been approved."

5. Respondent implemented all aspects of [redacted] IEP throughout the 2012-2013 school year to Petitioner's satisfaction. As the end of the 2012-2013 school year approached, on May 15, 2013, [redacted], an ESE Specialist, completed a "Transportation Request Form" on behalf of [redacted]. As the title suggests, the purpose of the form is to request transportation and secure routing that complies with an individual's IEP. The form requested that the following begin on August 19, 2013:

> Transportation Rationale: 9/28/12—Trained bus personnel to monitor health care needs; closest safest stop due to medical needs. [redacted] is diagnosed as having [redacted]. Transport time needs to be under 45 minutes. Bus personnel will monitor for signs of highs and lows in sugar levels. [redacted] is allowed to eat and drink as needed during route.

Special Transportation Needs: Trained bus personnel to monitor health care needs; closest safest stop due;

C. 2013-2014 School Year

6. [redacted] returned to the same [redacted] school for the 2013-2014 school year. At the inception of the school year, the operative IEP contained the same transportation services noted above. [redacted] Section 504/ADA Health Physician's Report, dated September 27, 2013, documents, inter alia, the need for trained bus personnel to treat [redacted] emergencies; providing a bus operator that knows the signs, symptoms, treatment, and prevention of [redacted] and [redacted]; limiting the bus ride to less than 45 minutes; checking blood glucose levels; and having water, juice or snacks; and bus air conditioning.

7. Respondent uses EDULOG school bus routing and planning software to establish routes for its students, including [redacted] Respondent's route planner, [redacted], advised that the software "pulls up all the students in the district and we create the bus stops in the general area as to where the students are actually located at."

8. [redacted] and Supervisor of Special Needs, [redacted], consistently testified that the students are typically routed (to school) such that the student assigned to the furthest stop from school is picked up first on any given

route. [redacted], Director of People Transportation and Fleet Services, concurred that "the correct way is further first and then travel to school." Notwithstanding the use of logistical bus routing and planning software, [redacted] opined that the software does not account for individual accommodation needs and [redacted] acknowledged that she does "not necessarily" route students to accommodate students with ride time limitations.

9. Against this backdrop, for the 2013-2014 school year, [redacted], whose stop was furthest from the school, was initially routed to be picked up first on Bus Route 3258, at 8:28 a.m. Route 3258 then proceeded to two additional stops picking up five other students. [redacted] is the only student on the route who has a ride time limitation per an IEP.

10. [redacted], the bus driver for route 3258, acknowledged that [redacted] stop was initially scheduled for 8:28 a.m.; however, the schedule was changed and she began arriving at [redacted] stop at 8:10 a.m.[1/] A review of the school arrival records for route 3258 from August 23, 2013, through November 1, 2013, reveals that [redacted] bus arrived at the [redacted] school, on average, at approximately 9:12 a.m. Accordingly, [redacted] average transportation time, during this period was one hour and two minutes.[2/]

11. [redacted] school begins at 9:30 a.m. On

August 21, 2013, [redacted] bus arrived at school at 10:05 a.m. That same day, [redacted] contacted [redacted] (who was in charge of ESE transportation services in the 2012-2013 school year), and advised her of [redacted] transportation time limitation of 45 minutes. [redacted] received a response from [redacted] that the bus was not running over 45 minutes; however, it was running extremely late to school.

[redacted] was further advised that the scheduled pick up time was being adjusted. The following day, [redacted] bus arrived at school at 9:37 a.m.[3/] On August 27, 2013, [redacted] notified [redacted] that [redacted] transportation time limitation was still not being met, and requested that [redacted] be picked up last on the route, if possible.

12. On September 10, 2013, an annual review of [redacted] IEP was conducted. Concerning transportation services, the IEP developed on that date ("September 2013 IEP") was essentially a mirror image of the September 2012 IEP. In summary, the September 2013 IEP again documented [redacted] need for an ESE bus with the "closest safest stop due to medical needs." Additionally, it was again determined that [redacted] required trained bus personnel to monitor for signs of high and low blood sugar, and that [redacted] transport time needed to be under 45 minutes.

13. Following the IEP meeting, [redacted], on September 11, 2013, issued email correspondence to [redacted], ESE &

Support Services Department Curriculum Supervisor, requesting assistance in facilitating [redacted] transportation needs.

14. On September 24, 2013, [redacted], the Director of Student Transportation and Fleet Services, forwarded a "Reimbursement Application for Private Car Transportation" to [redacted], the Acting Director of Supply Management and Logistics. If authorized, transportation of [redacted] by private car ("contract car") to the elementary school would be permissible. [redacted] noted that should [redacted] require additional information, to contact [redacted]. Sometime after September 24, 2013, [redacted], in turn, requested [redacted], Transportation Budget and Payroll Shift Supervisor, to perform a cost estimate on the potential contract car for [redacted]

15. Thereafter, on September 25, 2013, [redacted] issued email correspondence to [redacted], advising that [redacted] IEP required transport time of less than 45 minutes was not in compliance, noting that [redacted] transportation needs had been met in the preceding year, and requesting assistance.

16. On that same date, [redacted] directed her staff to provide a copy of [redacted] IEP, provide any solutions, and determine if [redacted] transportation accommodations could be met. Several hours later, [redacted] forwarded the subject concern to [redacted], the Executive Director of Exceptional Student Education

and Support Services. [redacted] email correspondence is set forth, in pertinent part, as follows:

> We have a student [redacted] that attends [the [redacted] school] by choice. [redacted] IEP states [redacted] ride cannot be longer than 45 minutes, which we cannot meet without adding a bus just for [redacted]. There is not anything on [redacted] IEP that states [the [redacted]] is the school the student needs to attend due to [redacted] disability. Since [the [redacted]] is totally a choice school that uses a lottery to accept students, [redacted] IEP requirements can only be met if [redacted] goes to [redacted] home school or one of the cluster schools associated with [redacted] home school [another [redacted]].

17. On September 26, 2013, [redacted] completed his cost estimate for the potential contract car. [redacted] determined that the total projected annual cost for transporting [redacted] to school in the morning via a contract car would be $1,306.85. Ultimately, the contract car option was not approved. According to [redacted], [redacted] was determined ineligible for the contract car as [redacted] was not "geographically isolated" or "medically fragile."

18. On October 8, 2013, [redacted] advised [redacted] that she did not know the rules of "school choice," and, therefore, would require further guidance on that issue. [redacted], however, provided the following suggestion:

> Since there is an attendant on the bus-if [parent] wants to continue to send the student to [the [redacted]] with transportation because there is an attendant-

> then I think we need to get something from the physician now stating that [redacted] can ride with an attendant. You can advise that the attendant will be trained by health education services.

19. On October 7, 2013, Petitioner's parent issued correspondence to Superintendent [redacted] regarding transportation for [redacted], on October 9, 2013, issued a response. The text of [redacted] correspondence, in pertinent part, is set forth as follows:

> After review by Transportation staff, Special Needs staff, and Schools of Choice staff, it has been determined that transportation to your school of choice, [the [redacted]], can not [sic] be accommodated within the time limit of 45 minutes that is indicated on [redacted]'s Individual Education Plain (I.E.P.). If you wish to continue transportation services to [the [redacted]], [redacted]'s I.E.P. would have to be modified to have the time restraint removed; however, we can accommodate [redacted]'s ride time limitation to [redacted] home school, [another [redacted]]. Please advise us as to your decision to ensure that there are not additional concerns.

20. [redacted] credibly testified that the intent of the correspondence was to advise Petitioner's parent that they could convene a meeting with the IEP team or, alternatively, [redacted] transportation time limitation could be met at [redacted] "home school."

21. She further explained that the determination that Respondent could not accommodate the 45 minute transportation requirement was based on several reasons. First, in her opinion,

it was simply not possible to route [redacted] to [redacted] current [redacted] [redacted] in less than 45 minutes. When queried as to what efforts were made to keep the route under 45 minutes, [redacted] offered the following: "Well, you do the best you can and you route it the correct way, which is furthest from school gets on first and then you travel to school" and that "it's routed the correct way and that's the way it should be done and the buses can't get there any faster."

22. Secondly, according to [redacted], another bus could not be added to transport [redacted], as an additional bus would cost approximately $48,000.00 per year, and Respondent could not justify said cost.

23. Finally, [redacted] declared that, despite [redacted] IEP being developed and adopted at [redacted] current [redacted], because [redacted] current [redacted] was a "school of choice" and not [redacted] "boundaried school," Respondent was not legally required to implement the time limitation contained in the related service of transportation on [redacted] operative IEP.

24. Understandably, Petitioner's parent was not motivated to remove the very time limitation that [redacted] had been struggling for months to have implemented, and was disinclined to available [redacted] of the option of removing [redacted] child, [redacted], from the school [redacted] had attended since [redacted]. Accordingly, [redacted] did not respond.

25. In the wake of [redacted] October 9, 2013, correspondence, neither Petitioner nor Respondent requested an interim IEP meeting to revise [redacted] IEP.

26. Without consulting [redacted] ESE specialist, [redacted], or any member of [redacted] IEP team, [redacted] discharged further correspondence to Petitioner's [redacted] on October 23, 2013. The substance of the correspondence is set forth below:

> As stated in the previous letter, it has been determined that transportation to your school of choice, [the [redacted]], can not [sic] be accommodated within the time limit of 45 minutes that is indicated on [[redacted]]'s Individual Education Plan (I.E.P.). Therefore, effective Thursday, October 31, 2013, transportation will no longer be provided to [the [redacted]] for your [child], [[redacted]].

27. On October 24, 2013, at [redacted] direction, the routing department was instructed to discontinue transportation services for [redacted] and to remove [redacted] stop from route 3258, effective October 31, 2013.

28. Petitioner filed the instant due process complaint on October 31, 2013.

29. As noted in both [redacted] operative IEPs and 504 plan for the 2013-2014 school year, in addition to transporting [redacted] to school within 45 minutes, Respondent was to provided trained bus personnel to monitor [redacted] for signs of irregular blood sugar levels. Respondent provided a bus attendant to monitor [redacted] en

route to school; however, the bus attendant did not receive the requisite training (approximately one hour) specific to [redacted] condition until approximately November 8, 2013.

30. Petitioner's [redacted] contends [redacted] operative IEP for the 2013-2014 school year was properly implemented, with the exception of the related service of transportation. At no time since the beginning of the 2013-2014 school year has [redacted] required hospitalization or emergency care treatment related to [redacted].

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 1003.57(1)(b) and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).[4/]

IDEA Claims:

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

FAPE analysis, the Supreme Court made it quite clear that it's holding applied to the appropriateness of the IEP as a whole.").

33. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

34. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's

education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1), (b)(3), and (b)(6).

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

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

20 U.S.C. § 1401(9).

36. "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).

37. The IDEA, at 20 U.S.C. § 1401(26), explains that transportation is a "related service" for students who are identified with a disability. The term "related services" is defined as:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Id.

38. 34 C.F.R. § 300.34 further defines related services, in pertinent part, as follows:

> (a) General. Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children,

> counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

34 C.F.R. § 300.34(a).

39. The regulations clarify that transportation includes (1) travel to and from schools and between schools; (2) travel in and around school buildings; and (3) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability. 34 C.F.R. 300.34(c)(16).[5/]

40. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance," establishes measurable annual goals, addresses the services and accommodations to be provided to the child and whether the child will attend mainstream classes, and specifies the measurement tools and periodic reports that will be used to evaluate the child's progress. Id. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. The team that develops an IEP must consist of, at a minimum, the parents, at least one of the child's regular education teachers, at least one special education teacher, and a qualified representative of the local educational agency. 20 U.S.C.

§ 1414(d)(1)(B); 34 C.F.R. § 300.321(a). "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

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

42. In the instant matter, Petitioner's Complaint may be construed as advancing a procedural error. Specifically, Petitioner avers that Respondent's October 23, 2013, correspondence notified Petitioner of the termination of the related service of transportation afforded under [redacted] operative IEP. Petitioner, in [redacted] proposed final order, argues that, in the absence of an IEP meeting revising the September 2013 IEP,

said correspondence is tantamount to a constructive IEP revision, without the required procedural safeguards.

43. The undersigned concurs. A student's need for related services (including transportation) is determined on an individual basis as part of the IEP process. See 34 C.F.R. § 300.320(a)(4). As Respondent correctly noted in its proposed final order, "an IEP can only be changed by holding an Interim IEP meeting or through an amendment process, where the parent and the school are in agreement with the changes that are being made." It is undisputed that neither an Interim IEP meeting nor an IEP amendment process occurred following [redacted] operative September 2013 IEP.

44. Respondent's October 23, 2013, correspondence advised Petitioner that, as of October 31, 2013, transportation would no longer be provided for [redacted]. There is nothing in said correspondence that indicated the matter was still under consideration. Indeed, the following day, Respondent directed the transportation routing department to cease transportation for [redacted] for the [redacted] school and to remove [redacted] stop from route 3258, effective October 31, 2013. Petitioner's [redacted] logically interpreted the October 23, 2013, correspondence as notification of Respondent's decision. On the effective date of the transportation termination, Petitioner filed the instant Complaint.[6/]

45. Respondent's decision had the effect of unilaterally terminating the related service of transportation afforded under [redacted] operative IEP without following the proper IEP processes. Respondent's procedural flaw significantly infringed Petitioner's [redacted] opportunity to participate in the decision-making process. This procedural violation deprived [redacted] of [redacted] substantive right to FAPE.

46. Having concluded that Respondent deprived [redacted] of FAPE by unilaterally terminating the related service of transportation, outside of the IEP process, the undersigned need not reach Petitioner's alternative claim that Respondent failed to properly implement specific components of the related service of transportation contained in [redacted] operative IEP.

504 Claim:

47. Petitioner's Complaint succinctly alleges that Respondent "is discriminating against [redacted] due to [redacted] disability" and that Respondent "is refusing to transport [redacted] because of [redacted] disabling condition in violation of Section 504 of the Rehabilitation Act." Petitioner's Complaint further alleges that Respondent "refuses to provide appropriate accommodations for [redacted] within the appropriate transportation time for [redacted], in conformity of [redacted] IEP, which is a denial of [FAPE]."

48. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides in pertinent part as follows:

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

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

50. The U.S. Department of Education has promulgated regulations governing preschools, elementary schools, and

secondary schools. 34 C.F.R. part 104, subpart D. The K-12 regulations are at sections 103.31-39. Sections 104.33-.36 enlarge upon the specific provisions of Section 504 by substantially tracking the requirements of IDEA.

51. Section 104.33 requires that Respondent provide FAPE to "each qualified handicapped person who is in the recipient's jurisdiction." For purposes of Section 504, an "appropriate education" is the:

> provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

34 C.F.R. § 104.33(b)(1). An "appropriate education" can also be provided by implementing an IEP that is compliant with IDEA. 34 C.F.R. §104.33(b)(2).

52. Pursuant to School Board Policy 4001.1(1), Respondent, under Section 504, "has the responsibility to identify, evaluate and if the student is determined eligible provide appropriate, specialized educational services." Policy 4001.1(1)(a) further provides:

> Students with disabilities shall be provided equal access to programs, benefits, activities and services available to those students without disabilities, when they meet the essential eligibility requirements for receipt of those programs and services.

> Students shall be provided with a free appropriate public education (FAPE). To facilitate equal access, reasonable accommodations shall be provided to remove or reduce barriers that prevent student access to or participation in programs, benefits, activities or services unless doing so would impose an undue hardship on the district.

53. Policy 4001.1(1)(d)(2) defines a "reasonable accommodation" as "an adaptation to a program, policy, [or] facility . . . that allows an otherwise qualified individual with a disability to participate in a program, service, [or] activity . . . unless the accommodation would impose an undue hardship on the school district." An "undue hardship" is defined in Policy 4001.1(d)(3) as "an action which requires significant difficulty or expense." Said policy further provides that, "[a]n accommodation that would impose an undue hardship would be an action that is unduly costly, extensive, substantial, disruptive, or one that would fundamentally alter the nature of the program."

54. To establish a prima facie case under Section 504, Petitioner must prove that [redacted] (1) had an actual or perceived disability, (2) qualified for participation in the subject program, (3) was discriminated against solely because of [redacted] disability, and (4) the relevant program is receiving federal financial assistance. Moore v. Chilton County Bd. of Educ., 936 F. Supp. 2d 1300, 1313 (M.D. Ala. 2013) citing L.M.P. v. Sch. Bd. of Broward Cnty., 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007);

see also J.P.M. v. Palm Beach Cnty. Sch. Bd., 916 F. Supp. 2d 1314, 1320 (S.D. Fla. 2013).

55. Assuming a petitioner has established a prima facie case, the respondent must present a legitimate, non-discriminatory reason for the adverse actions it took. Lewellyn v. Sarasota Cnty. Sch. Bd., 2009 U.S. Dist. LEXIS 120786 at *29 (M.D. Fla. Dec. 29, 2009) citing Wascura v. City of S. Miami, 257 F.3d 1238, 1242 (11th Cir. 2001). The Eleventh Circuit has stated that the respondent's burden, at this stage, is "exceedingly light and easily established." Id. quoting Perryman v. Johnson Prods. Co. Inc., 698 F.2d 1138, 1142 (11th Cir. 1983). Once the defendant has articulated a non-discriminatory reason for the actions it took, the petitioner must show that the respondent's stated reason is pretextual. "Specifically, to discharge their burden, Plaintiffs must show that Defendant possessed a discriminatory intent or that the Defendant's espoused non-discriminatory reason is a mere pretext for discrimination." Id.

56. Here, Respondent, in its proposed final order, stipulates to the elements of Petitioner's prima facie case, except the intentional discrimination element. Thus, the remaining issue is whether Respondent discriminated against Petitioner solely by reason of [redacted] disability.

57. As noted in J.P.M., the definition of "intentional discrimination" in the § 504 special education context is unclear. J.P.M., 916 F. Supp. 2d at 1320 n7. In T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., 610 F.3d 588, 604 (11th Cir. 2010), the Eleventh Circuit stated that it "has not decided whether to evaluate claims of intentional discrimination under § 504 under a standard of deliberate indifference or a more stringent standard of discriminatory animus." In Liese v. Ind. R. Cnty. Hosp. Dist., 701 F.3d 334, 345 (11th Cir. 2012), the Eleventh Circuit, in a case involving a § 504 claim for compensatory damages, concluded that proof of discrimination requires a showing, by a preponderance of the evidence, that the respondent acted or failed to act with deliberate indifference.

58. In this case, neither party argues in their respective proposed final orders that the discriminatory animus standard applies. Accordingly, the undersigned has analyzed Petitioner's claim under the deliberate indifference standard, which is a more lenient standard than discriminatory animus. Under the deliberate indifference standard, a petitioner must prove that the respondent knew that harm to a federally protected right was substantially likely and that the respondent failed to act on that likelihood. Id. at 344. As discussed in Liese, "deliberate indifference plainly requires more than gross negligence," and "requires that the indifference be a 'deliberate choice.'" Id.

59. In Ms. H. v. Montgomery Cnty. Bd. of Educ., 784 F. Supp. 2d 1247, 1263 (M.D. Ala. 2011), comparing failure-to-accommodate claims under Section 504 and IDEA, the district court noted that:

> To state a claim under § 504, "either bad faith or gross misjudgment should be shown." [Monahan v. Nebraska, 687 F.2s 1164, 1171 (8th Cir. 1982)]. As a result, a school does not violate §504 merely by failing to provide a FAPE, ... Id. Rather, [s]o long as the [school] officials involved have exercised professional judgment, in such a way not to depart grossly from accepted standards among education professionals," the school is not liable under §504. Id. . . . The courts agree that "[t]he 'bad faith or gross misjudgment' standard is extremely difficult to meet." (citations omitted).

60. The Ms. H. opinion further noted that, "if a school system simply ignores the needs of special education students, this may constitute deliberate indifference." Id.

61. In the instant case, Petitioner failed to present sufficient evidence to support [redacted] claim that Respondent intended to discriminate against [redacted] on the basis of [redacted] disability, or knew that it was substantially likely that a violation of [redacted] federally protected rights would occur. To the contrary, the record supports a conclusion that, aware of [redacted] disability, Respondent, exercising its professional judgment, considered, attempted, and rejected one or more options in an attempt to

transport [redacted] to the [redacted] in keeping with the requirements of [redacted] IEP.

62. For all that appears, Respondent's implementation shortcomings, rather than demonstrating a discriminatory intent, may be fairly attributable to (1) poor coordination by and between the special education professionals and transportation department, and (2) advice concerning "school of choice" law. Although Respondent's unilateral termination of Petitioner's transportation, as discussed above, resulted in a FAPE denial, Respondent's rationale was based on its perception that it simply could not implement [redacted] transportation needs at [redacted] current [redacted]. With this genuinely held belief, Respondent suggested the need for an alternative [redacted] location where [redacted] transportation needs could be accomplished without incident, further discrediting Petitioner's claim of intentional discrimination. Accordingly, Petitioner has failed to meet [redacted] burden of establishing a violation of Section 504.

ORDER

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

1. The Broward County School Board shall provide Petitioner transportation to school as delineated in Petitioner's current IEP. Such transportation shall be accomplished, at the

discretion of the Broward County School Board, by either school bus or contract car.[7/]

DONE AND ORDERED this 27th day of February, 2014, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of February, 2014.

ENDNOTES

[1/] The record is void as to the date this change occurred.

[2/] This calculation assumes [redacted] riding the bus every day.

[3/] Route 3258 was also several minutes late for school on August 27 and September 19, 2013.

[4/] Respondent referred the § 504 claim to DOAH requesting an administrative hearing, and the entry of a final order. Petitioner acquiesced to this referral, acceded to DOAH's exercise of jurisdiction in the matter, and has voiced no objection to the undersigned's entry of a final order. Although the undersigned recognizes that the parties cannot confer jurisdiction, the undersigned is unaware of any explicit prohibition against proceeding as the parties have requested.

[5/] Neither the IDEA nor its implementing regulations specifically address the appropriate length of bus rides for students with disabilities. Florida Administrative Code Rule 6A-3.0171,

however, provides guidance on routing, scheduling, and aspirational time limitations concerning busing for all students.

[6/] Due to filing the instant Complaint and the operation of 34 C.F.R. § 300.518(a), [redacted] has remained in his current educational placement and has continued to receive the related service of transportation, albeit not in strict conformity with the time limitations or other parameters.

[7/] The undersigned notes that Petitioner's Complaint asserts claims for (1) compensatory education (for days [redacted] missed from school due to denial of appropriate transportation); (2) compensatory "related services" (for days [redacted] missed from school due to denial of appropriate transportation); and (3) monetary compensation (to reimburse [redacted] parent for mileage and time to transport [redacted] to and from school). Petitioner did not, however, provide persuasive evidence to support the above-referenced claims for relief, and, therefore, the same are rejected.

COPIES FURNISHED:

Catherine A. Bishop
Bureau of Exceptional Education
and Student Services
Turlington Building, Suite 614
325 West Gaines Street
Tallahassee, Florida 32399-0400

Barbara J. Myrick, Esquire
Broward County School Board
Eleventh Floor
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301

Z. Felicia Jordan, Esquire
Disability Rights Florida
Suite 104
1930 Harrison Street
Hollywood, Florida 33020

Ann Marie Cintron-Siegel, Esquire
Disability Rights Florida
Suite 104
1930 Harrison Street
Hollywood, Florida 33020

Matthew Carson, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Pam Stewart, Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Robert Runcie, Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

NOTICE OF RIGHT TO JUDICIAL REVIEW

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

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes (2011), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).