

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

■,

Petitioner,

vs.

Case No. 14-0134E

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.

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FINAL ORDER

On February 27 and April 1 and 2, 2014, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Miami, Florida.

APPEARANCES

For Petitioner: ■

(Address of record)

For Respondent:

Mary C. Lawson, Esquire
Assistant School Board Attorney
The School Board of Miami-
Dade County, Florida
1450 Northeast Second Avenue, Suite 430
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STATEMENT OF THE ISSUE

The issue is whether Respondent provided Petitioner with a free appropriate public education (FAPE), as required by section 1003.571(1)(a), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(a).

PRELIMINARY STATEMENT

Petitioner requested a due process hearing by filing with Respondent a Request for Exceptional Student Education (ESE) Due Process on January 8, 2014 (Request). On January 22, 2014, Respondent filed a Notice of Insufficiency & Response or, in the Alternative, Request for the Administrative Law Judge to Define the Issues for Hearing.

By Order on Notice of Insufficiency and Response entered January 27, 2014, the Administrative Law Judge denied the Notice of Insufficiency. In addition to striking various allegations that were not relevant to the issues that may be raised in a case of this type, mostly involving claims under Section 504 of the Rehabilitation Act of 1973 (Section 504), the Administrative Law Judge identified the following issues in the Request:

- a. Whether Respondent failed appropriately to identify, evaluate, or place Petitioner or failed to provide FAPE by failing to provide and maintain the assistive technology (AT) device recommended by the AT Department chair on March 28, 2012.
- b. Whether Respondent failed to provide FAPE by declining to provide Petitioner with transportation to School 2.
- c. Whether Respondent failed to provide FAPE at Petitioner's home middle school (Home School) immediately before ■ transferred to another middle school (School 2) and whether any individual education plan (IEP) in effect while Petitioner attended School 2 failed to provide FAPE.

- d. Whether the behavioral provisions of the IEP in effect during the fall of 2013 failed to provide FAPE.
- e. Whether Respondent failed to provide FAPE by declining to prepare a new IEP in the fall of 2013 or whether the behavioral provisions of any new IEP, if one was prepared at that time, failed to provide FAPE.
- f. Whether Respondent committed procedural violations at one or more IEP team meetings in the fall of 2013 that impeded Petitioner's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Petitioner, or deprived Petitioner of educational benefit.
- g. Whether Respondent failed to provide FAPE due to an attempt by a science teacher to charge Petitioner for assignments.
- h. Whether Respondent failed to provide FAPE when a science teacher (as clarified at the hearing, a math teacher) assigned Petitioner to an inappropriate place to work and whether Respondent failed to provide FAPE when the science and math teachers deprived Petitioner of opportunities to work in groups of [REDACTED] peers.
- i. Whether Respondent failed to provide FAPE by failing to implement any IEP in effect during 2013.
- j. Whether Respondent failed to provide FAPE due to the refusal by Respondent's staff to collect baseline behavioral data necessary for the preparation of a behavior intervention plan (BIP).
- k. Whether Respondent failed appropriately to evaluate Petitioner at any time during the period covered by the Request.

1. If Petitioner proves any of these allegations, an additional issue is the appropriate relief to which Petitioner is entitled.

At the hearing, Petitioner called two witnesses and offered into evidence six exhibits: Petitioner Exhibits 1-6. Respondent called 12 witnesses and offered into evidence 35 exhibits: Respondent Exhibits 1-7 and 10-37. All exhibits were admitted in their entirety for all purposes except as follows: Respondent Exhibits 11 (admitted, but not for truth), 16 (page 223 and portions pertaining to "ISI Sentry" excluded; remainder admitted), 23 (admitted, but not for truth), 24 (page 337 admitted), 25 (pages 349-50 admitted), 26 (pages 354-57, 359-62, 364-65, and 369-76 admitted; pages 352-53 admitted, but not for truth), 27 (excluded; however, portions pertaining to the iPad™ admitted, but not for truth), 30 (pages 435-44 and 453-54 admitted; remainder excluded), 34 (pages 726-31 admitted; remainder excluded), and 36 (admitted as to emails that were sent or received by principal of Home School; remainder excluded).

The court reporter filed the Transcript on June 10, 2014. The parties filed proposed final orders by June 30, 2014.

Based on the date of filing of the Request, the Final Order was due on March 24, 2014. A sudden illness of Petitioner's mother after the first day of hearing precluded conducting the second day of hearing as originally scheduled on February 28.

The earliest available dates for resuming the hearing were April 1 and 2, 2014. April 2 is 33 days later than the original scheduled completion day for the hearing, so the first specific extension extended the deadline for the Final Order from March 24, 2014, to April 26, 2014.

At the conclusion of the hearing, Respondent ordered a transcript, which, as noted above, was filed 66 days later on June 10, 2014, so the second specific extension extended the deadline for the Final Order from April 26, 2014, to July 1, 2014.

At the conclusion of the hearing, the parties agreed to 20 days from the filing of the transcript within which to file proposed final orders, so the third specific extension extended the deadline for the Final Order from July 1, 2014, to July 21, 2014.

Because Petitioner did not provide a written waiver of confidentiality, the Administrative Law Judge has deleted all personal identifiers, indirect identifiers, and other information that is linked or linkable to Petitioner and that would allow a reasonable person in the school community to identify the student with reasonable certainty.

FINDINGS OF FACT

I. Introduction

1. Petitioner was born in early [REDACTED]. [REDACTED] reached all developmental milestones, except for fine motor skills, within normal limits.

2. In April 2006, a licensed school psychologist conducted a psychoeducational evaluation of Petitioner, who was then in [REDACTED], and diagnosed [REDACTED] with [REDACTED] [REDACTED]. In April 2007, while in [REDACTED] grade, Petitioner was classified as [REDACTED]. The parties stipulated that Petitioner also presents with a visual processing disorder.

3. The focus in this case is on Petitioner's middle school education. Petitioner was in [REDACTED] grade for the 2011-12 school year, [REDACTED] grade for the 2012-13 school year, and [REDACTED] grade for the 2013-14 school year. Petitioner attended the Home School for [REDACTED] grade and nearly all of [REDACTED] grade. With about two weeks remaining in [REDACTED] grade, Petitioner transferred to School 2, where [REDACTED] finished [REDACTED] grade and attended [REDACTED] grade. At the time of the hearing, Petitioner had completed the first two nine weeks and part of the third nine weeks of [REDACTED] grade.

4. Petitioner earned the promotions from [REDACTED] to [REDACTED] grade and [REDACTED] to [REDACTED] grade. Petitioner has earned

reasonably satisfactory grades in [REDACTED] school. In [REDACTED] grade, Petitioner passed all of [REDACTED] classes, except for an [REDACTED] in math; other than a [REDACTED] in art, Petitioner's remaining grades were [REDACTED] or better. In [REDACTED] grade, Petitioner did better, earning a [REDACTED] in the [REDACTED]-grade math class that he retook and no grade lower than a [REDACTED] in [REDACTED] remaining subjects, including a [REDACTED]-grade math class. For the first and second nine weeks of [REDACTED] grade, except for a D in science for the first nine weeks, Petitioner earned all Bs and Cs, including two Cs in Pre-Algebra.

II. [REDACTED] Grade

5. In November 2011, one of Petitioner's parents consented to assessments for reading, writing and math, attention, behavior, vision, and visual-motor skill. For behavior, the consent states: "FAB/BIP," meaning the consent was for a functional assessment of behavior (FAB) and, if indicated, the preparation of a BIP.

6. In the latter half of [REDACTED] grade, Respondent prepared a Section 504 Eligibility Determination for Petitioner. The determination, which is dated February 23, 2012, identifies Petitioner's impairments as [REDACTED] and a [REDACTED] and finds that these impairments substantially limit Petitioner's ability to concentrate and perform manual tasks. A Section 504 Accommodation Plan (504 Plan) prepared on the same date identifies several accommodations, including the use of a

"student-owned iPad™ to type/write assignments" and advance receipt of homework assignments. The reference to a "student-owned iPad™" is to an iPad™ that Petitioner obtained privately for use at school.

7. On March 27, 2012, the chair of Respondent's K-12 AT Department conducted an AT assessment of Petitioner while ■ was in science class and then administered an AT test in a separate room. For a copying assignment, Petitioner handwrote 16 words per minute (WPM) and keyboarded 22 WPM. For a dictation assignment, Petitioner's respective rates were 80 WPM and 90 WPM.

8. The AT Department chair determined that Petitioner had "the visual-perceptual motor skills to participate in all educational activities that are required of ■." ■ stated that Petitioner showed ■ many documents stored on ■ iPad™ by means of a "notes" application, but ■ observed that Petitioner had difficulty finding some of the documents because they were poorly organized. The AT Department chair suggested that Respondent urge Petitioner instead to use a word processing application to take advantage of its superior editing and organizing capabilities. The AT Department chair also recommended that Petitioner use graph paper when performing math operations manually, so ■ could align ■ work and keep ■ steps clear; "possibly" use ■ iPad™ to obtain homework

assignments; and "possibly" use [REDACTED] iPad™ on a trial basis for classwork.

9. Evidently in response to the AT assessment, on April 5, 2012, Respondent prepared another 504 Plan for Petitioner. This 504 Plan provides 30 minutes weekly of educationally relevant counseling and two accommodations featuring the iPad™: each teacher will use the student's iPad™ to photograph the teacher-presented lessons on the classroom board and will weekly email homework assignments, such as by means of Petitioner's iPad™.

III. [REDACTED] Grade

10. At the start of [REDACTED] grade, Respondent implemented a number of general education interventions with Petitioner. On September 13, 2012, Respondent prepared a Student Services Intervention Plan (SSIP) that identified Petitioner's areas of interest as initiating and completing non-preferred tasks and completing a course-recovery program for [REDACTED]-grade math. When Petitioner initiates an assignment timely, the SSIP rewards [REDACTED] with additional time on a preferred task and positive reinforcement. The SSIP establishes June 6, 2013, as the date by which Petitioner was to complete the course-recovery course for [REDACTED]-grade math.

11. On November 16, 2012, Respondent's multidisciplinary team (MDT) prepared an evaluation report based on a recently completed psychoeducational report, which is not in the record.

The MDT report notes that Petitioner's teachers described [REDACTED] as "bright, inquisitive, creative, articulate, and personable" with "above average aptitude with technology and its use." After reviewing the results obtained from the administration of a number of instruments, the MDT determined that Petitioner's "best measured cognitive functioning" is in the "Very Superior" range, and [REDACTED] reading and writing skills are within the "average to high average" range.

12. On the other hand, the MDT found that Petitioner's calculation and math application skills are "deficient and below grade level," and [REDACTED] suffers from "deficits in processing speed, visual processing, motor coordination, and visual-motor integration skills." The MDT determined: "Overall, [REDACTED] distractibility, motivational issues, executive functioning and behavioral/emotional difficulties appear to be having a negative impact on [REDACTED] academic functioning."

13. The recommendations of the MDT report are to teach Petitioner to analyze the consequences of [REDACTED] behavior, to continue to implement a BIP that was then in effect, to provide Petitioner with opportunities to use manipulatives and hands-on materials to enhance visual-motor coordination, to provide prompts and redirection to maintain and extend on-task intervals, to divide assignments into small parts, to monitor progress

closely to ensure academic growth, and to collaborate closely with Petitioner's parents.

14. Shortly after the preparation of the MDT report, an occupational therapist conducted an occupational therapy (OT) assessment on December 7, 2012. The occupational therapist noted teachers' concerns about Petitioner's inattentiveness. Although not part of the record, the BIP mentioned in the MDT report, which had been prepared in March 2012, had targeted problem behaviors of failing to finish work and being off-task, according to the OT assessment. The OT assessment acknowledges that Petitioner could take notes on [REDACTED] iPad™, with which [REDACTED] captured images of assignments and work that was written on the classroom board. The OT assessment recommends some relatively minor classwork and environmental accommodations, but none involves the iPad™.

15. On December 10, 2012, Respondent prepared a [MDT]'s [REDACTED]. This document records concerns with Petitioner's written expression, math calculation, and math problem-solving, but states that Petitioner was still receiving interventions in the general education setting to assess [REDACTED] responses prior to consideration of [REDACTED] ESE eligibility on the basis of [REDACTED].

16. On the same date, Respondent prepared Petitioner's first IEP for an ESE eligibility--namely, [REDACTED]--as well as for [REDACTED]

█████ eligibility. The duration of this 2012 IEP is through December 9, 2013. Noting that Petitioner had been diagnosed with █████ and ████████████████████, the 2012 IEP places Petitioner in general education classes 80-100% of the time. The 2012 IEP reports FCAT scores of 231 in reading and 198 in math for tests administered on March 30, 2012, and the following Woodcock-Johnson III grade-level scores for tests administered on November 16, 2012: letter word identification--8.4; reading fluency--10.6; passage comprehension--5.4; broad reading--8.3; calculation--3.8; applied problems--3.8; writing samples--6.7; and spelling--8.5.

17. The 2012 IEP documents the parents' concerns with Petitioner's "attentional difficulties and deficient mathematics skills." The father wanted the student "to be able to do █████ work and become more independent." The mother believed that the student "has made no improvements in his acquisition of math concepts," and she wanted █████ to be taught in a "supportive environment" to help █████ "gain skills that █████ needs . . . to work to █████ potential in all █████ classes." Additionally, the mother was concerned with the student's "deficits in visual motor skills."

18. For Curriculum and Learning Environment, the 2012 IEP describes a wide range of strengths in reading above grade level, as well as some strengths in written expression. The 2012 IEP

places Petitioner in [REDACTED] science. The 2012 IEP identifies Petitioner's weaknesses as multiplication and division, math problem-solving, and the organizational skills necessary to produce paragraphs with appropriate supportive details, so [REDACTED] priority educational needs are the development of skills in math and written communication.

19. For Social/Emotional Behavior, the 2012 IEP describes Petitioner's strengths as [REDACTED] intelligence, ability to advocate for [REDACTED], persistence when applying [REDACTED] to a preferred task, and helping classmates. The 2012 IEP describes Petitioner's weaknesses as distractibility, off-task behaviors, and initiating and completing assignments, so [REDACTED] priority educational needs are the development of on-task behaviors and task-completion skills.

20. For Independent Functioning, the 2012 IEP states that Petitioner's strengths are [REDACTED] abilities to follow instruction in class independently with prompting and multistep instructions and to transition between classes independently. The 2012 IEP states that Petitioner's weakness is [REDACTED] difficulty in organizing materials, so [REDACTED] priority educational need is the development of organizational skills.

21. For Communication, the 2012 IEP reports that Petitioner's strengths are [REDACTED] ability to communicate effectively with peers and adults and [REDACTED] advanced vocabulary. The 2012 IEP

reports that Petitioner has no weaknesses in Communication, so [REDACTED] has no priority educational needs in this area.

22. The 2012 IEP comprises eight goals addressing the three areas in which Petitioner displays weaknesses: Curriculum and Learning Environment, Social/Emotional Behavior, and Independent Functioning. The 2012 IEP also includes two goals and four benchmarks for Petitioner's [REDACTED] program. With the [REDACTED] goals and benchmarks listed last, the goals and benchmarks are:

Goal 1. Given a set of computation problems, [Petitioner] will use strategies to compute numerical operations involving multiplication and division of multidigit numbers with 80% accuracy.

Goal 2. Given a set of mathematical word problems, [Petitioner] will use strategies to solve problems involving multiple steps and a combination of operations with 70% accuracy.

Goal 3. Given a topic or writing prompt, [Petitioner] will organize [REDACTED] ideas in order to produce a 3 paragraph essay with a topic sentence and supporting details with 70% accuracy.

Goal 4. During a teacher presented lesson, [Petitioner] will remain on task for at least 15 minutes with verbal and physical prompting in 3 out of 4 opportunities.

Goal 5. When given a non-preferred task or assignment, [Petitioner] will initiate the task within the first 5 minutes in 3 out of 5 opportunities.

Goal 6. Given a non-preferred task or assignment, [Petitioner] will complete and turn it in to the teacher within the allotted time in 3 out of 5 opportunities.

Goal 7. Within the class environment, [Petitioner] will maintain [REDACTED] work in the respective folders by subject in 3 out of 5 occurrences.

Goal 8. During all classes, [Petitioner] will bring materials to class in 3 out of 5 occurrences.

Goal 9. [Petitioner] will formulate, collect data, evaluate and communicate results of data.

--Benchmark 1. Define a problem from the [REDACTED] grade curriculum using appropriate reference materials to support scientific understanding, plan and carry out scientific investigations of various types, such as systematic observations or experiments, identify variables, collect and organize data, interpret data in charts, tables, and graphics, analyze information, make predictions, and defend conclusions.

--Benchmark 2. Design and conduct a study using repeated trials and replication.

Goal 10. [Petitioner] will demonstrate growth in critical thinking.

--Benchmark 1. Given statements, relationships, and their grounds, [Petitioner] will be able to judge whether a statement follows a premise (deductive reasoning).

--Benchmark 2. Given statements, relationships, and their grounds, [Petitioner] will be able to judge whether a reason is relevant.

23. The 2012 IEP states that Petitioner does not have a significant cognitive disability, can master general state

content standards at [REDACTED] grade level, and pursues a standard diploma, so [REDACTED] will take the FCAT and District assessments.

24. Among the accommodations contained in the 2012 IEP are for the teachers daily to take a picture of the teacher-presented lessons on their classroom boards with the student's "personal technology" by the end of every class and for the teachers to respond to requests for homework assignments by a "communication system (email, note, or phone)." The only specialized instruction in an ESE class is 53 minutes daily of individual or group instruction in math skills. There is specialized instruction in written communication skills for an equal period of time, but this instruction takes place in a general education class. The 2012 IEP provides 13 hours weekly of [REDACTED] contact.

25. The 2012 IEP provides supplementary aids and services twice monthly in the form of consultations in behavior and language arts and related services in the form of counseling and OT. Counseling is provided twice per month for a total of 60 minutes, and OT is provided once per month for a total of 30 minutes.

26. The 2012 IEP states that "the IEP team assures that the following will be considered: [AT] devices and services needs: organizers [and] other." The accompanying detail states: "use of personal technology device."

27. The 2012 IEP also includes the assurance of the IEP team that it will consider "[b]ehavior interventions, strategies, and supports for students whose behavior impedes learning." The IEP notes a FAB dated January 30, 2012, and a BIP dated March 29, 2012, and states that the "BIP was reviewed in May 2012 and is currently being implemented." As noted above, the March 2012 BIP is not in the record, nor is the January 2012 FAB.

28. A handwritten note included in the 2012 IEP from one or both of the parents states: "I have requested [AT] for over a year. Yet [the Home School Principal] refuses to address in violation of FAPE and continues to interfere with FAPE despite need for [AT]." One of the parents objected to the implementation of the AT Implementation Plan--evidently, one of the 504 Plans or the AT assessment--because he or she had requested the plan one year earlier and objected to the refusal of Respondent to bear the cost of the iPad™.

29. Conference Notes attached to the 2012 IEP state that Petitioner "now" meets the [REDACTED] criteria, but does not meet the criteria for [REDACTED]. Conference Notes add that the occupational therapist is to provide "strategies that can be used in assisting [Petitioner] with organizational skills," and the Home School will begin the AT Implementation Plan. Conference Notes conclude that the IEP team recommends that Petitioner

continue [REDACTED] intensive math class after completing [REDACTED] course-recovery math class.

30. On January 10, 2013, the IEP team adopted an interim IEP. The purposes of this 2013 interim IEP were to settle a pending due process proceeding challenging the 2012 IEP and incorporate the AT assessment into a new IEP. Identical to the 2012 IEP except as to AT, Conference Notes attached to the 2013 interim IEP state that Respondent will provide the "portable electronic tablet device," but add:

IEP TEAM is recommending that [Petitioner] will benefit from the continued use of a portable electronic tablet device in the classroom. The use of a technology device does not require wi-fi/data plan access. Therefore, [Petitioner] is able to access [FAPE] without the need for wi-fi/data plan access.

Petitioner's mother disagreed with the statements about wifi and added a handwritten note that she believed that the child's BIP requires that [REDACTED] have access to the internet.

31. By the end of seventh grade, Respondent assessed Petitioner's progress in mastering the eight goals pertaining to [REDACTED] [REDACTED] eligibility. For all goals, Respondent determined that Petitioner was making only "some progress," which is short of "adequate progress." Although School 2 staff continued to implement the 2013 interim IEP the following school year, on October 23 and December 10, 2013, the IEP team again determined

that Petitioner was still only making "some progress" on these eight goals.

IV. ██████████ Grade

32. On October 23, 2013, the IEP team revised the 2013 interim IEP and extended the termination date of this revised IEP to October 22, 2014. The 2013 revised IEP shows two new FCAT scores from tests taken on March 30, 2013. Petitioner earned a 220 in math--adding 32 points to ██████ score on the FCAT math test that ██████ had taken one year earlier--and a 249 in "general reading outcome," for which no score is available for the preceding year. The overall FCAT math grade improved from a 1 to a 2, although this grade is still failing.

33. The 2013 revised IEP adds additional parental concerns to those previously documented. Petitioner's mother asked for math tutoring and support in inclusive academic settings, so that Petitioner could complete ██████ work in such settings. She also wanted the BIP to be "properly implemented to address [Petitioner's] skills." Petitioner's mother broadened her previous complaint about "no improvement," which previously was limited to the acquisition of math concepts, to apply to math in general. Petitioner's mother also wanted the student to use the iPad™ "properly" because ██████ access to the AT device was being denied.

34. The 2013 revised IEP extends the previous descriptions about Petitioner's strengths and weaknesses. For Curriculum and Learning Environment, Petitioner showed the same strengths that were listed in the 2012 IEP. ■ also showed the same weaknesses, but the 2013 revised IEP adds that Petitioner exhibited difficulties with completing paper and pencil activities and "[s]ubtraction . . . when appl[ied] in different mathematical problems," and ■ needed redirection, especially when "completing multistep problems."

35. For Social/Emotional Behavior, Petitioner showed the same strengths that were listed in the 2012 IEP, but the 2013 revised IEP adds a preference to work in groups of three or four students, respect for peers and adults, and excellent leadership skills. In addition to the previous weaknesses, the 2013 revised IEP adds that Petitioner displayed difficulty in remembering things that ■ had done or must complete and a tendency to become frustrated and overwhelmed when confronted with multistep tasks.

36. For Independent Functioning, Petitioner showed the same strengths that were listed in the 2012 IEP, but the 2013 revised IEP adds skills with technology, oral presentations, and hands-on activities. The weaknesses were the same, except that Petitioner also had trouble organizing ■ thought. The 2013 revised IEP made no changes to the strengths indicated under Communications.

37. The 2013 revised IEP does not substantially change Goals 1, 4, 6, 7, and 8 of the 2013 interim IEP. The changes are to increase the required accuracy from 70% to 80% for Goals 2 and 3 and to increase the length of the essay from three to five paragraphs for Goal 3. The change to Goal 5 is to reduce the time given Petitioner to initiate a task from five minutes to one minute.

38. The 2013 revised IEP deletes the accommodation allowing Petitioner to photograph the classroom board to capture the work or assignment and adds new accommodations allowing Petitioner, after finishing ■■■ classwork, to use ■■■ AT device to access related subject-area enrichment materials and to write formal essays by dictating into ■■■ AT device and printing the output.

39. The 2013 revised IEP replaces the ESE class for specialized instruction in math with a general education class for specialized instruction in math, as well as 250 minutes weekly of collaboration in math individually or in a group. The 2013 revised IEP drops the consultations in behavior and language arts, but maintains the OT at the same level and increases counseling from 60 minutes monthly to 30 minutes weekly.

40. The 2013 revised IEP does not change the provisions of the 2013 interim IEP concerning the iPad™, but notes that the IEP team authorized, on October 23, 2013, a new FAB, and a "BIP will be developed initiated [sic] once the school has collected data."

Conference Notes explain that the IEP team will reconvene on November 7, 2013, to analyze the data collected by the FAB and develop a new BIP at that time.

41. In the meantime, starting in September of [REDACTED] grade, staff at School 2 had been collecting behavioral data. Petitioner's problem behaviors were limited to not doing [REDACTED] school work, not paying attention, and failing to be organized. The behavioral data portrayed Petitioner as occasionally distracted and trying to get the attention of other students during instructional time. Petitioner sometimes misused [REDACTED] iPad™ by playing games when [REDACTED] should have been working with the device. When a teacher confronted Petitioner about these behaviors, Petitioner would readily apologize.

42. A BIP dated December 10, 2013, requires Petitioner's teachers to provide Petitioner with redirection by using proximity control and verbal cues, ask Petitioner to repeat instructions, and reward Petitioner for completing classroom assignments by allowing [REDACTED] to use [REDACTED] iPad™ to access course-related materials. Also, upon the implementation of the BIP starting on December 16, 2013, the language arts and math teachers are to be trained in the collection of behavioral data.

43. On December 10, 2013, the IEP team prepared a new IEP. This 2013 IEP is largely identical to the 2013 revised IEP. The 2013 IEP extends parental concerns to include Petitioner's

failure to complete assignments without constant reminders from [REDACTED] teacher, the father's reporting of some improvement at home when doing math homework, and the mother's request for a Board-Certified Behavior Analyst (BCBA) at the IEP team meeting and on the IEP team.

44. The 2013 IEP makes no changes in Petitioner's strengths and weaknesses in Curriculum and Learning Environment, Social/Emotional Behavior, and Independent Functioning; the eight goals pertaining to [REDACTED] [REDACTED] eligibility; relevant accommodations; and specialized instruction, supplementary aids and services, and related services. Conference Notes report that both parents left the IEP team meeting prior to its conclusion, even though they were warned that the IEP team would continue to meet until it had completed its work. The father complained that the process was a "waste of time," and the mother objected to the absence of a BCBA.

V. Facts Specific to Individual Issues

45. Issue a. claims that Petitioner was deprived FAPE by Respondent's failures to provide and maintain an AT device, such as an iPad™. In addition to the failure to obtain the services of a BCBA, this is one of the two major complaints of Petitioner's mother in this case.

46. At the start of [REDACTED] grade, or at least from the point when, early in the school year, Petitioner transferred to the

Home School from an unidentified school, Petitioner's mother informed the Home School principal that Petitioner had [REDACTED] and asked if [REDACTED] could use an iPad™, if the mother purchased it. The principal agreed to instruct [REDACTED] teachers to allow Petitioner to use [REDACTED] personal iPad™ in class to capture images of work on the classroom board, but asked the mother to document the [REDACTED]. Although Petitioner's mother never did so, the Home School principal never rescinded [REDACTED] directive to Petitioner's teachers.

47. By allowing Petitioner to use an AT device in class early in [REDACTED] grade, the Home School principal provided Petitioner with an informal accommodation, which preceded the first 504 Plan, AT assessment, and 2012 IEP. The principal's accommodation of this AT device effectively constituted part of the preliminary process by which Respondent's staff attempted nonESE interventions and observed Petitioner's response to such interventions prior to placing Petitioner in the ESE program.

48. In her proposed final order, Petitioner's mother contends that the iPad™ could "increase" Petitioner's productivity, ability to learn, and functional skills in school. This is probably true. But more to the point, as explained in the Conclusions of Law, the AT Department chair determined that Petitioner had the visual-perceptual motor skills to participate in all required educational activities without any AT device, and

she recommended only that Petitioner "possibly" use [REDACTED] iPad™ to receive homework assignments and "possibly" use [REDACTED] iPad™ on a trial basis for classwork. This determination and these tentative recommendations do not prove the mother's contention that Petitioner needed an iPad™ or other AT device to access [REDACTED] curriculum, obtain academic benefits, or otherwise receive FAPE.

49. Within ten days of the AT assessment, Respondent revised the 504 Plan specifically to allow Petitioner to use [REDACTED] iPad™ to photograph material on the classroom board, even though [REDACTED] had already been doing so for most of the school year, and to require teachers to email homework assignments, possibly by means of Petitioner's iPad™. A 504 Plan is not an IEP, but these provisions of the second 504 Plan reinforced the informal response-to-intervention process that had started with the principal's allowance of the iPad™'s use in class.

50. Under the circumstances, it is impossible to find that any delay in identifying Petitioner as eligible for ESE services and providing [REDACTED] an AT device at Respondent's expense constituted a failure to evaluate and identify Petitioner in a timely fashion or otherwise a deprivation of FAPE.

51. In trying to prove otherwise, Petitioner's mother points to Petitioner's problems in math. Obviously, math is Petitioner's weakest subject. Petitioner's mother testified that her [REDACTED] "hit a wall" in math in [REDACTED] grade at the Home School--

implying that [REDACTED] progress was impeded because [REDACTED] was denied a Respondent-provided AT device and denied unfettered use of [REDACTED] personal iPad™. Petitioner's mother also testified that her [REDACTED] had competed in math with [REDACTED] graders during the previous school year when [REDACTED] was in [REDACTED]-grade [REDACTED] math.

52. But the mother's testimony fails to account for an important fact: one year later, early in [REDACTED] grade, Petitioner's calculation and applied-problems skills were not yet at a [REDACTED]-grade level. The genesis of Petitioner's math difficulties clearly predated [REDACTED] arrival at the Home School and any impediments [REDACTED] may have experienced there in the use of an AT device.

53. Petitioner's failure-to-provide-or-maintain claim in issue a. seems to encompass a claim that Petitioner's teachers constrained [REDACTED] classroom use of [REDACTED], and later Respondent's, iPad™. But the evidence also fails to support this claim.

54. According to Petitioner, [REDACTED] was not allowed to use [REDACTED] iPad™ in art at all during [REDACTED] grade; even if this were true, the record fails to demonstrate that Petitioner suffered academically from this prohibition. Petitioner testified that [REDACTED] first math teacher at the Home School prohibited [REDACTED] from using the iPad™. More importantly, Petitioner's first math class was [REDACTED], and much in the record suggests that this was too ambitious a placement for [REDACTED], given [REDACTED] weakness in math. After

winter break, Petitioner transferred to a general education math class taught by a different teacher, who also taught Petitioner [REDACTED]-grade math, and this teacher allowed Petitioner to use the iPad™ without substantial restrictions.

55. The Home School [REDACTED]-grade math teacher testified that [REDACTED] understood that Petitioner was allowed to use [REDACTED] iPad™ for taking pictures of [REDACTED] assignments, as well as writing [REDACTED] assignments. When presenting classwork on the board, the teacher stopped, as necessary, to allow Petitioner to capture an image of the board before erasing the material and moving on to another topic.

56. Undermining Petitioner's claim as to the importance of the iPad™ or similar AT device, several teachers testified that Petitioner frequently came to school without [REDACTED] device because [REDACTED] had forgotten it or had temporarily misplaced it. On those days, [REDACTED] manually copied assignments from the board into [REDACTED] notes, and [REDACTED] appears to have been able to do so. Similarly, one teacher noticed that, most of the time, Petitioner voluntarily used paper and a pencil to do [REDACTED] class assignments. To remind Petitioner to keep [REDACTED] digits straight, the teacher ensured that [REDACTED] used graph paper for this work, which Petitioner was able to perform.

57. The role of an iPad™ or other AT device in Petitioner's education must be assessed in conjunction with the accommodations

that Petitioner received, even prior to the first IEP that was prepared midway through [REDACTED] grade. For example, the Home School [REDACTED]-grade math teacher allowed Petitioner to turn in work late and gave [REDACTED] extended time to complete [REDACTED] assignments. [REDACTED] used different teaching media to reach all of [REDACTED] students, and, when time permitted, [REDACTED] visited with each student, on a 1:1 basis, to ensure that each student understood what he or she should be doing. The math teacher routinely communicated with Petitioner's parents to ensure that assignments were getting home, where Petitioner would complete them. For the second half of [REDACTED] grade, as well as [REDACTED] grade, the math teacher testified that Respondent received educational benefit in math class, and this testimony is credited.

58. Petitioner's mother also complained about iPad™ expenses that she incurred. She had to pay a technician to repair the device after it was broken at school, and she paid to provide her [REDACTED] with access to an expensive data plan because the school did not give [REDACTED] free access to the school wifi until the end of [REDACTED] grade.

59. The circumstances surrounding damages to Petitioner's privately owned iPad™ are undeveloped in the record. The Home School principal testified that [REDACTED] investigated one incident in which the iPad™ had been damaged, but the investigation was inconclusive in determining who had damaged the device. AT

devices in a middle school may be exposed to a variety of perils; for instance, when Petitioner later lost the iPad™ that had been assigned to ■■■ by Respondent, the school provided ■■■ with a replacement without any reported problems or delay. There is no basis to impose responsibility upon Respondent for any damage to Petitioner's iPad™ that necessitated repairs.

60. The complaint of Petitioner's mother concerning Respondent's delay in providing Petitioner with free wifi access is spurious. Petitioner's mother selected the iPad™, which, in contrast to other, similar AT devices, lacks the convenience of a USB port, which would have allowed Petitioner to transfer data files in real time to ■■■ teachers without the expense of a data plan. (By the time that Respondent provided Petitioner with an iPad™, Petitioner had free access to the school wifi.) Sometimes, when Petitioner could not find the iPad™ to bring to school, ■■■ would bring a laptop computer, which ■■■ teachers allowed ■■■ to use in class; presumably, this device had one or more USB ports. In any event, given the extensions of time that his teachers regularly permitted ■■■, Petitioner could have transmitted data files from home, instead of using the costly data plan provided by ■■■ mother while at school.

61. On January 29, 2013, midway through ■■■ grade, Respondent provided Petitioner with a District-owned iPad™ with applications for word processing, text-to-speech, speech-to-text,

Powerpoint functions, math, and homework organization, among others. To the mother's complaint that it took too long to provide the AT device, Respondent explained that it had never previously provided such technology to individual students, and its procurement process necessarily consumed much time. More importantly, Petitioner failed to prove that ■■■ could not access ■■■ curriculum or make academic gains without this AT device or similar keyboarding/camera devices.

62. The final of the mother's complaints concerning the iPad™ that will be addressed in this Final Order involves headphones. At some point, Petitioner began to use the iPad™ with headphones. At least one academic program--Conn Academy, which includes a math component--contained an audio feature, but Petitioner frequently used the headphones to mix music during class. When ■■■ teachers detected this unauthorized use of the iPad™ and headphones, they would prohibit Petitioner from using the headphones or, at times, the iPad™ itself.

63. Petitioner's mother unreasonably equates the purposes served by one iPad™ with wifi and headphones--accessing specific enrichment or even remedial materials--with the more basic purposes of the iPad™ without wifi and headphones in capturing board work and notetaking. In doing so, Petitioner's mother chooses to ignore the heightened potential for misuse of the wifi and headphones, given her ■■■ expressed interest in mixing

music and demonstrated willingness to engage in this activity during class time. When Petitioner yielded to this temptation, it was a measure of the dedication of [REDACTED] teachers to teaching Petitioner that they deprived [REDACTED] of the use of the headphones or sometimes even the iPad™, rather than let [REDACTED] sit contentedly in a corner mixing music and watching videos while they taught the rest of the class.

64. Issues b. and c. involve the timeframe surrounding Petitioner's transfer from Home School to School 2 at the end of [REDACTED] grade. Issue b. claims that Respondent's failure to provide transportation to and from School 2 deprived Petitioner of FAPE. Because Petitioner was not deprived FAPE at the Home School, [REDACTED] transfer to School 2 was voluntary. Respondent did not offer free transportation to other similarly situated students, who sought and obtained transfers to schools other than their home schools, so Respondent's refusal to provide Petitioner with free transportation to School 2 did not deprive Petitioner of FAPE.

65. Issue c. claims that Respondent failed to provide FAPE at the Home School just prior to transferring to School 2 and at School 2. During this timeframe, Petitioner received instruction under the 2013 interim IEP, 2013 revised IEP, and 2013 IEP.

66. These three IEPs provided FAPE. They reflect the IEP team's understanding of, and response to, Petitioner's math

deficits, visual processing problems, distractibility, and tendency to engage in off-task behaviors. Because Petitioner's performance in math was substantially below grade level, these IEPs provided intense math instruction. Petitioner's progress in math justified the replacement of the ESE math class with a math general education class in October 2013. All three of these IEPs maintained or increased critical supports in OT and counseling and provided a wide range of accommodations, including the use of the iPad™.

67. During the period of time covered by issue c., Petitioner earned a promotion from ██████ to ██████ grade and was obtaining reasonably satisfactory grades, including Cs in prealgebra. The only fact casting doubt upon the determination that these IEPs provided FAPE is that, from December 2012 through December 2013, Petitioner never made adequate progress on a single goal in any of ██████ IEPs.

68. The record does not reveal any attempt by Petitioner's teachers to monitor ██████ progress in attaining these eight goals. No one seems to have collected any data on such goals as to whether Petitioner could write a three-paragraph essay or remain on task with prompting three out of four times. It is equally unclear how the IEP team determined that Petitioner had not made adequate progress in mastering these goals.

69. The eight goals identify discrete skills within larger subjects or areas, such as math, written expression, and independent functioning. Mastery of these discrete skills is less important than demonstrations of broader academic achievement through more comprehensive evaluations--namely, end-of-year earned promotions, reasonably satisfactory grades, and standardized achievement testing. Therefore, the failure to have made adequate progress on any of the goals in these three IEPs does not preclude a finding that the IEPs provided FAPE.

70. Petitioner's teachers testified that Petitioner made meaningful academic progress during the period covered by these three IEPs. In addition to the [REDACTED]-grade math teacher, the Home School [REDACTED] language arts teacher for [REDACTED] grade, the [REDACTED] language arts teacher for [REDACTED] grade, and the math teacher for [REDACTED] grade also testified. Each of these teachers described instructional methods and accommodations similar to those used with success by the [REDACTED]-grade math teacher, as described above.

71. The Home School [REDACTED] language arts teacher concluded that Petitioner could do the work, but chose sometimes not to do so, although the teacher conceded that Petitioner had difficulty transferring what was on the board to what was in front of [REDACTED]. The [REDACTED]-grade [REDACTED] language arts teacher opined that Petitioner could capture in class [REDACTED] own homework assignments

and should be allowed to do so to develop more independence. The [REDACTED]-grade math teacher testified that, without question, Petitioner could understand [REDACTED]-grade math; progressed during the school year while in this class, so that [REDACTED] was now completing about 80% of the classwork while still in class; and, despite obvious difficulties with math, grasped math concepts at grade level. All of this testimony is credited.

72. Issues d. and e. claim that, in the fall of 2013, any IEPs then in effect failed to provide FAPE by failing to address Petitioner's behavior adequately. Issue j. claims that any refusal by Respondent to collect baseline behavioral data deprived Petitioner of FAPE. Underlying these issues is the mother's insistence that FAPE requires the assistance of a BCBA in designing and implementing a BIP and the behavioral provisions of an IEP. As noted above, this is the second of the two major complaints raised by the mother in this case.

73. Petitioner has displayed pronounced problems with succumbing to distractions and indulging in off-task behaviors, but [REDACTED] problem behaviors have not been so intense or persistent to have prevented [REDACTED] from accessing [REDACTED] curriculum. Petitioner has presented with many positive behaviors and skills, including strong communication skills, respectful relations with adults and peers, and leadership.

74. Petitioner's problem behaviors are at least partly driven by a lack of effort and motivation. Confirming the observation of more than one teacher, Petitioner candidly testified that, when motivated, ■ can do the work. Petitioner's father agreed, testifying that the big issue with ■ ■ is a lack of motivation, which leads to escapist behaviors to avoid work.

75. Bearing out this testimony from Petitioner's teachers, Petitioner's father, and Petitioner ■, shortly before the hearing, Petitioner passed a comprehensive entrance examination to a prestigious private school that ■ plans to attend for ■ grade. The preparation book for the test is 500 pages, and the test covers comprehensive reading, grammar, spelling, and math. Of the 1000 students taking the test, only 400, including Petitioner, received admission offers.

76. It is thus not unreasonable that Petitioner's classroom teachers found nothing in ■ problem behaviors that they could not manage without a BIP or detailed behavioral provisions in an IEP. In particular, nothing in the record demonstrates that Petitioner's behaviors were so intense or persistent that, without the intervention of a BCBA, ■ would have been unable to access ■ curriculum or make academic progress. In fact, when the mother, at her expense, produced a BCBA at the October 2013 IEP team meeting, the behavior specialist participated freely in

the meeting, but did not produce new insights or suggestions in terms of managing Petitioner's behaviors.

77. Issue j. fails to specify a timeframe. As already noted, the record omits the BIP and FBA that were prepared in early 2012, but the record generally discloses no serious shortcomings in Respondent's data collection, even if Respondent relied exclusively on the informal collection of anecdotes orally recounted by classroom teachers. As found immediately above, even without a BIP, Petitioner's classroom teachers were able to manage ■■■ behaviors using the types of common classroom interventions that are described as accommodations in the IEPs, such as preferential seating and positive reinforcements.

78. Issue f. claims that the IEP team meetings in the fall of 2013 were procedurally flawed and significantly impeded the mother's opportunity to participate in the decision-making process by which the IEP team developed the 2013 IEP. The gist of this complaint is the refusal of Respondent to enlist the assistance of a BCBA in the preparation of the 2013 IEP or 2013 BIP.

79. After the BCBA obtained by Petitioner's mother participated in the October 2013 IEP team meeting, as described above, Petitioner's mother asked the IEP team to retain the services of a BCBA at Respondent's expense. After considering the request, the IEP team reasonably rejected it as unnecessary.

80. Issue k. is partly related to Issue f. Issue k. claims that Respondent failed appropriately to evaluate Petitioner during the timeframe covered by this case. However, Respondent timely evaluated Petitioner for AT in March 2012 and OT in December 2012, and ■ received the device and services indicated as necessary or appropriate by these evaluations.

81. At the hearing, the mother stated that issue k. refers to Respondent's failure to obtain an evaluation by a BCBA. In the proposed final order, Petitioner links issue k. to Respondent's failures to obtain the services of a BCBA and an AT device. Either way, these issues have already been addressed.

82. Issue g. claims that the ■-grade science teacher charged Petitioner \$1.00 for a replacement copy of the instructions for a science project after Petitioner had lost the instructions that the teacher had initially given ■ and each of the other members of the class. The teacher did not charge for another copy of the instructions, but for the paper on which the instructions had been printed. ■ apparently imposed a charge for blank paper in an effort to encourage students to assume a minimal level of personal responsibility. After learning of this practice, the School 2 principal directed the teacher not to charge students for paper, but to send them to the office if they came to school without paper.

83. Issue h. claims that a teacher assigned Petitioner an inappropriate place to work and that the science and math teachers deprived Petitioner of an opportunity to work in groups. The Request claims that the teacher who assigned an inappropriate place to work was a science teacher, but Petitioner's mother corrected this allegation at the hearing to refer to the math teacher. These allegations involve Petitioner's *****-grade teachers.

84. Petitioner missed a math test. On the day that the [REDACTED]-grade math teacher was going to go over the test with the class, [REDACTED] sent the co-teacher and Petitioner to a resource room. The room is relatively small and used to store a few items of equipment, but it is routinely used for this and similar purposes. This happened only one time to Petitioner and did not constitute a deprivation of FAPE.

85. At the hearing, the mother limited the second allegation to the science teacher. Petitioner testified that the eighth-grade science teacher took [REDACTED] out of groups, but never elaborated. The record fails to provide sufficient detail to address further this allegation.

86. Issue i. claims that Respondent failed to implement the interim 2013 IEP, the revised 2013 IEP, or the 2013 IEP so as to deprive Petitioner of FAPE. In all respects but one, Respondent implemented all three IEPs. Petitioner's failure-to-implement

claim finds some support in the failure of Respondent to monitor Petitioner's progress in mastering any of the eight IEP goals from December 2012 through December 2013. Under the unusual facts of this case, though, this failure is immaterial because there is ample evidence--in earned promotions, satisfactory grades, standardized test results, and teacher testimony--that establishes that Petitioner obtained clear educational benefits from [REDACTED] educational program during the time in question.

CONCLUSIONS OF LAW

87. DOAH has jurisdiction over the subject matter. § 1003.57(1)(c), Fla. Stat. (2013); Fla. Admin. Code R. 6A-6.03311(9)(u).

88. Petitioner bears the burden of proving the alleged violations by a preponderance of the evidence. Schaffer v. Weast, 546 U.S. 49, 62 (2005). As noted above, Petitioner has failed to meet its burden of proving the material allegations of any of the 11 issues raised in this case.

89. A student with a disability has a right to FAPE, rule 6A-6.03028(1), and a right to a due process hearing on any matter "related to the identification, evaluation, eligibility determination, or educational placement of a student or the provision of FAPE to the student." Rule 6A-6.03311(9)(a).

90. In a due process hearing, a student may raise any violation occurring no more than two years prior to when the

parent knew or should have known of the facts giving rise to the violation. Fla. Admin. Code R. 6A-6.03311(9)(b). There is no dispute that, in the present case, Petitioner may allege violations no earlier than two years prior to the date of the filing of the Request, which, as noted above, was January 8, 2014.

91. In general, Petitioner alleges that Respondent failed to follow required procedures in adopting IEPs, adopted IEPs that did not provide FAPE, and failed to implement IEPs.

92. A procedural violation requires a showing that "the procedural inadequacies impeded the student's right to FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or caused a deprivation of educational benefit." Fla. Admin. Code R. 6A-6.03311(9)(v)4. As noted above, issue f. alleges such a violation in the failure of Respondent to enlist a BCBA in the design and implementation of the 2013 revised IEP or the 2013 IEP.

93. Rule 6A-6.03028(3)(c) identifies the persons who must be included in an IEP team. These persons include a general education teacher, an ESE teacher, and a District employee who can supervise the provision of specialized instruction and knows the District's curriculum and resources. Rule 6A-6.03028(3)(c)6. adds that members of the IEP team also may include:

At the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate. The determination of the knowledge or special expertise of any such individual shall be made by the party who invited the individual to be a member of the IEP Team.

94. Petitioner's mother had the right to invite the BCBA to join the IEP team, as she did in October 2013, at no expense to Respondent, but FAPE does not require Respondent, at its expense, to add this or any other BCBA to the IEP team, retain a BCBA to conduct a FAB or prepare a BIP, or retain a BCBA to implement a BIP. As noted above, Petitioner's behavioral challenges were neither so intense nor so persistent as to require these levels of behavioral intervention.

95. Rule 6A-6.03028(3)(g)5. requires the IEP team to "consider" strategies to address behavior that disrupts the learning of a student or other students. There is no evidence that Petitioner's behavior disrupted the learning of ■■■■ classmates. Although Petitioner's distractible and off-task behaviors disrupted ■■■■ learning, the rule requires no action by the IEP team other than to consider strategies, such as to enlist the assistance of a BCBA. The IEP team did so. The IEP team's decision not to use the services of a BCBA is entirely consistent with the fact that Petitioner's classroom teachers were generally

able to manage Petitioner's behavior sufficiently so that [REDACTED] could access [REDACTED] curriculum and obtain academic benefits from [REDACTED] educational program.

96. Except for issue i., which involves implementation, the remainder of the issues raise questions concerning the content of the IEPs and, more broadly, the educational programs that Respondent designed for Petitioner. Rule 6A-6.03411(1)(p) defines FAPE as "special education or specially designed instruction and related services" that are provided "at public expense . . . and without charge to the parent" in conformity with an IEP. Rule 6A-6.03028(3)(h) requires an IEP to contain present levels of performance, measurable goals, a list of special education, related services, supplementary services, accommodations and modifications to curriculum or mastery criteria, and a statement of how the student's progress toward attaining individual goals will be measured. More succinctly, case law requires a parent challenging the content of an IEP to prove that the IEP does not provide "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982). Applying Rowley, the Eleventh Circuit requires that the IEP must be "reasonably calculated to enable the student to receive educational benefits." Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309,

1312 (11th Cir. 2003) (citing Rowley, 458 U.S. 176, 206-07 (1982)).

97. As relevant to this case, rule 6A-6.03028(3)(g) provides direction to the IEP team in the preparation of an IEP:

Considerations in IEP development, review, and revision for students with disabilities. The IEP team shall consider the following in IEP development, review, and revision:

1. The strengths of the student and the concerns of the parents for enhancing the education of their student;
2. The results of the initial or most recent evaluation or reevaluation of the student;
3. As appropriate, the results of the student's performance on any general statewide or district-wide assessment;
4. The academic, developmental, and functional needs of the student; [and]

* * *

10. Whether the student requires assistive technology devices and services. On a case-by-case basis, the use of school-purchased assistive technology devices in a student's home or in other settings is required if the IEP Team determines that the student needs access to those devices in order to receive [FAPE.]

* * *

12. If, after consideration of the factors in paragraph (3)(g), the IEP Team determines that a student needs a particular device or service, including an intervention, accommodation or other program modification, in order for the student to receive [FAPE], the IEP must include a statement to that effect.

98. Issue a. claims that Respondent's failure to provide and maintain the iPad™ deprived Petitioner of FAPE. But as the above-quoted rule indicates, the obligation to provide an AT device arises only when the device is required for FAPE, and Petitioner failed to prove that ■ required an AT device to access ■ curriculum or obtain any educational benefits.

99. Issue b. claims that Respondent's failure to provide transportation to School 2 deprived Petitioner of FAPE. "Related services" include transportation and other services "as are required to assist a student with a disability to benefit from special education." Fla. Admin. Code R. 6A-6.03411(1)(dd)1. As noted above, the transfer from the Home School to School 2 was voluntary and not required for Petitioner to receive FAPE.

100. Issue c. claims that Respondent failed to provide FAPE immediately before Petitioner transferred to the Home School and after Petitioner transferred to School 2. As noted above, Petitioner has failed to prove that ■ did not receive individualized specialized instruction and related services so as to obtain meaningful academic benefits. At all times, Respondent provided Petitioner with specialized instruction in math--initially in an ESE class and later in a general education class--and related services in the form of OT and counseling, which increased in the revised 2013 IEP. At all times, Respondent provided Petitioner with accommodations, including the

use of an AT device and conventional classroom assistance, such as extra time. And at all times, Petitioner's IEPs were reasonably calculated to provide meaningful educational benefit in all subjects and did so.

101. Issues d., e., and j. raise various claims concerning whether the provisions of various IEPs and BIPs provided FAPE and whether Respondent failed to provide FAPE when it did not collect baseline behavioral data for a new BIP. As noted above, rule 6A-6.03028(3)(g)5. requires that the IEP team "consider" a BIP for "a student whose behavior impedes the student's learning or the learning of others." The IEP teams considered BIPs at all relevant times, choosing to develop and implement them twice. But FAPE did not require the development and implementation of these BIPs; as found above, common interventions by classroom teachers were sufficient to shape Petitioner's behaviors, so that ■■■ could access ■■■ curriculum and obtain academic benefits from ■■■ instruction. Likewise, FAPE did not require that Respondent conduct a FAB at any time.

102. Issue g. claims that Respondent's science teacher denied Petitioner a "free" appropriate public education because the teacher charged students, including Petitioner on one occasion, for paper. Rule 6A-6.03411(1)(kk) defines the no-cost component of FAPE to mean, among other things, "that all specially designed instruction is provided without charge, but

does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program."

103. Issue h. claims deprivations of FAPE in a relocation of Petitioner and a co-teacher to a resource room so that Petitioner would not hear the other teacher go over a test that Petitioner had not taken and in failing to allow Petitioner to work in groups of ■■■ peers. The first claim has nothing to do with FAPE, and Petitioner never proved the facts underlying the second claim.

104. Issue k. claims that Respondent failed to appropriately evaluate Petitioner. As noted above, Respondent timely evaluated Petitioner for AT and OT, as well as other services and accommodations. Rule 6A-6.03311(3)(a) imposes a child-find obligation on a school district based on when a district "suspects" that a child has a disability and is in need of special education and related services. But Respondent discharged this obligation when, in December 2012, it classified Petitioner as ■■■ and determined that ■■■ was eligible for special education and related services. The key point is that Petitioner timely received ESE services from this point, not the label on which ■■■ ESE eligibility was based. Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 (8th Cir. 2011); Heather S. v. Wisconsin, 125 F.3d 1045, 1055 (7th Cir. 1997).

105. More narrowly, as discussed above, FAPE did not require evaluations necessitating the provision of an AT device or the services of a BCBA.

106. Lastly, issue i. raises a failure-to-implement claim. Rule 6A-6.03028(3)(m) imposes the requirement of implementation by requiring the school district to provide special education "in accordance with the student['s] IEP."

107. As noted above, Petitioner proved that Respondent failed to implement one element of all of the IEPs--monitoring the progress, if any, that Petitioner made on ■■■ eight goals. But case law requires that Petitioner prove that Respondent's failure to implement is material, meaning that the failure to implement must consist of "more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 (9th Cir. 2007). Although the materiality standard does not require the child to suffer demonstrable educational harm to prevail, the presence or absence of educational progress during the period of the failure to implement may be useful in determining the materiality of the failure to implement. Id. Accord L.J. v. Sch. Bd. of Broward Cnty., 850 F. Supp. 2d 1315, 1319-20 (S.D. Fla. 2012). See also Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir.), cert. denied, 531 U.S. 817 (2000).

108. As noted above, Respondent's failure to monitor Petitioner's progress, if any, in mastering his eight IEP goals is not material because educational benefits in this case are evidenced by earned promotions, satisfactory grades, standardized test scores, and teacher testimony.

109. In its proposed final order, Respondent has requested attorneys' fees and costs because, it claims, the mother's claims were frivolous or presented for an improper purpose. Rule 6A-6.03311(9)(x) authorizes a court, but not a DOAH Administrative Law Judge, to award attorneys' fees under certain circumstances, so this authority is unavailable in the present administrative proceeding. Other statutes providing for the award of attorneys' fees in administrative proceedings under chapter 120, Florida Statutes, do not apply because due process hearings arise under section 1003.57, not chapter 120. A.L. v. Jackson Cnty. Sch. Bd., 127 So. 3d 758 (Fla. 1st DCA 2013) (per curiam). Respondent's request is thus denied.

ORDER

It is

ORDERED that Petitioner's Request is dismissed.

DONE AND ORDERED this 21st day of July, 2014, in
Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes (2011), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).