

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

■,

Petitioner,

vs.

Case No. 14-5679E

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a due process hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on February 23 through 27, March 11 through 13, and April 8 and 9, 2015, in Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the student's Individualized Education Plan (IEP) was reasonably calculated to confer a meaningful educational benefit.

Whether the School Board failed to implement the IEP, thereby denying the student a free, appropriate public education (FAPE).

Whether the School Board violated Section 504 of the Rehabilitation Act (Section 504) by discriminating against the student due to his disabilities.

PRELIMINARY STATEMENT

On December 5, 2014, the student's parent (Petitioner) filed a request for a due process hearing. By request of both parties, the due process hearing was scheduled for February 23 through 27, 2015. The student is a [REDACTED] attended the same school during [REDACTED] grades. The student's parent filed due process hearing requests on behalf of each of the [REDACTED]; the parties agreed to consolidate the cases only to the extent that one due process hearing would encompass the three due process requests. The [REDACTED] attended two of the same schools, the issues raised are identical in all three cases,

the Respondent and Petitioner are the same, counsel for both parties is the same in all three cases, and the witnesses were identical for each case. Accordingly, the undersigned agreed to hold one hearing that would encompass all [REDACTED]; the Transcript of the hearing in this case addresses the [REDACTED] [REDACTED], but the cases are not consolidated in any other aspect.

The hearing was held on February 23 through 27, 2015, but not concluded. The hearing was continued and reconvened on March 11 through 13, 2015. Once again, the hearing did not conclude; it was rescheduled for April 8 and 9, 2015. At the hearing, Petitioner presented the testimony of the following witnesses: the student's mother; the student; [REDACTED], a science teacher; [REDACTED], a parent of a fellow student; [REDACTED] [REDACTED], a parent of a fellow student; [REDACTED], the director of Disability Research Center at Florida International University; [REDACTED], an expert in psychoeducational evaluations; [REDACTED], principal of the [REDACTED] school; [REDACTED], an expert in technology in special education and reading; and [REDACTED], a handwriting expert. Petitioner Exhibits A, 2 through 16, 18 through 29, 31 through 34, 37, 38, 41 through 44, 46, and 48 through 58, were admitted into evidence.

The School Board presented the testimony of the following witnesses: [REDACTED], a special education

consultative teacher; [REDACTED], a chemistry and marine science teacher; [REDACTED], an environmental science teacher; [REDACTED], a math teacher; [REDACTED], a biology and physics teacher; [REDACTED], an english teacher; [REDACTED], a [REDACTED] school assistant principal; [REDACTED], a special education consultative teacher; [REDACTED], a history teacher; [REDACTED], a language arts and journalism teacher; [REDACTED], a human geography teacher; [REDACTED], a guidance counselor; [REDACTED], a math teacher; [REDACTED], a curriculum support specialist; [REDACTED], a lead teacher; [REDACTED], an instructional supervisor and expert in special education; and [REDACTED], an instructional supervisor and expert in school psychology in relation to special education. School Board Exhibits 1 through 17, 19, 20, 23, 24, 26 and 27 were admitted into evidence.

The court reporter had indicated at the conclusion of the hearing that [REDACTED] would have the transcript ready in 45 days, which would fall at the end of May 2015. Inexplicably, even though three weeks had transpired between the first week of the hearing and the dates when the hearing was reconvened, and then another four weeks occurred before the final two days of hearing, by the end of May 2015, the transcript was not prepared. After waiting another two months for the transcript, on August 7, 2015,

the undersigned entered an Order requiring the parties to file proposed final orders by September 21, 2015, with or without the benefit of a transcript.

On August 27, 2015, the 18-volume Transcript was filed; the undersigned entered an Order Memorializing Final Order Due Date, which allowed for the parties to submit proposed final orders by September 21, 2015; the final order would be filed by October 21, 2015. Both parties timely submitted proposed final orders; however, a dispute arose as to the page limit of the proposed final orders and the attachments. Accordingly, on September 23, 2015, the undersigned entered an order requiring the parties to file amended proposed final orders by September 30, 2015, in compliance with the directions set forth in the order. The final order would be filed by October 30, 2015.

Unless otherwise noted, citations to the United States Code, Code of Federal Regulations, Florida Statutes, and Florida Administrative Code are to the current codifications. For stylistic convenience, the undersigned will use [REDACTED] pronouns in the Final Order to refer to the student. The [REDACTED] pronouns should not be interpreted to reflect the student's actual gender.

FINDINGS OF FACT

1. The student is one of [REDACTED]. [REDACTED] is, by all accounts, bright and ambitious. [REDACTED] has been diagnosed with [REDACTED]

A: I was asked to provide support to the teachers. They had 504 plans, I want to say, at the time. They did not have IEPs yet. So I was just assisting with school with--they had two supplemental programs that we were using with the students at the time. One was focused on reading skills, which was [REDACTED]. For the [REDACTED], what my responsibility was for them was to get them access to the program. And, also, the other program was [REDACTED], and that is an audio books program where they would hear the books being read aloud for them, and I was going to get them access to that.

Q: Now, if there was concern about [the student in this case's] reading, why did you--why were you asked to get access for all three boys for [REDACTED]?

A: Well, he was always the one that stood out among the three of them as having a reading concern, but I think all of them--the [REDACTED] and the [REDACTED] was for all of them.

6. [REDACTED] is an application that provides audio versions of textbooks and other books, such as novels. With [REDACTED], the student could download a textbook, and have a human voice read the book. The student could speed up the pace of the reading, or slow it down. The program can also highlight the words as it reads. This application was not mandated by an IEP (the student at this point did not have one) or by a 504 plan.

7. [REDACTED] is a different reading program, which gave the student audio versions of informational text and then asked the student reading comprehension questions. The student could

reply in writing, practicing his reading and writing skills. This program, like [REDACTED], was never mandated by an IEP or a 504 Plan.

8. Both programs are purchased by the School Board, and students are given "licenses" to access them. The student in this case was given access to both programs, and because [REDACTED] 504 Plan accommodations were in large part provided, [REDACTED] performed well in [REDACTED] grade classes. [REDACTED] chose advanced level classes because [REDACTED] hoped to enter a [REDACTED] program in a public [REDACTED] school that focused on maritime science and technology. [REDACTED] reading score on the FCAT, though, was once again [REDACTED].

9. Close to the end of [REDACTED] grade, the parent provided the school with a psychological evaluation performed by [REDACTED]. [REDACTED] found that the student presented with [REDACTED].

10. As to [REDACTED] reading skills, [REDACTED] found that the student's reading scores were [REDACTED]. [REDACTED] recommended 50 percent extended time for all classroom exams and standardized tests, as well as reading interventions. [REDACTED] added that the student should listen to required texts before attempting to read them.

11. As to writing, [REDACTED] noted that [REDACTED] spelling deficiency and processing speed would make writing time consuming and aversive. Due to this, [REDACTED] might become fatigued and avoidant more readily than [REDACTED] peers. [REDACTED] recommended that the student be given written notes, that he be allowed to use technology for all written work, and given extra time for all writing assignments.

12. The school received consent from the parent for a review of [REDACTED] psychological evaluation, which would be conducted by [REDACTED], a school psychologist. [REDACTED] opined that the student had no instructional needs, but found that the student had difficulties in all areas of executive functioning; therefore, [REDACTED] added recommendations that had not been addressed by [REDACTED] (in the areas of planning and organization). Ultimately, the School Board accepted [REDACTED] evaluation in its entirety.

13. Close to the conclusion of [REDACTED] grade, the student was found to be eligible for Exceptional Student Education (ESE) services in the category of [REDACTED]. On May 31, 2013, an IEP was developed for [REDACTED].

14. Despite the trouble the student had demonstrated in reading, [REDACTED], the [REDACTED] reading score on the FCATs, and the reading programs that were implemented in [REDACTED] grade, reading was not listed as one of the student's deficiencies, no reading goals were placed in the IEP, and no

assistive technology tools ([REDACTED]) were mandated to assist the student with the task of reading.

15. The IEP instead focused on writing skills, organizational skills, task completion, and self-help skills.

16. In the area of self-help skills, the IEP team determined that although the student is independent in the areas of functional daily living skills, [REDACTED] needed assistance with self-advocacy in the educational setting.

17. A long list of accommodations, which were to be implemented daily in all classes, was created for the student: written notes; extended time to complete assignments, tests, and projects; allowing the student to sit away from distractions; flexibility in presentation; teachers should clarify, repeat, and summarize directions; teachers would provide copies of directions when available; flexibility in responding, student could use word processor, tape recorder, or computer; small group testing; preferential seating; opportunity to take tests orally; providing a set of textbooks for home; providing weekly information prior to upcoming assignments; and reducing the amount of copying.

18. After successfully completing the required [REDACTED] grade advanced courses for admittance to the [REDACTED] program, and with the IEP in place for [REDACTED] school, [REDACTED], which was a brand new program housed on a [REDACTED].

19. The [REDACTED] program in [REDACTED] first opened its doors in the fall of [REDACTED], with approximately 89 students, [REDACTED]. It is housed on a [REDACTED] [REDACTED]. The goal of the program is to educate the [REDACTED] [REDACTED] [REDACTED].

20. When it opened its doors, it had the bare minimum in terms of staff. There was no on-site principal, or any assistant principals. There was no guidance counselor, no information technology staff, no cafeteria staff, no office staff, no activities coordinator, no treasurer, no attendance clerk, no department chairs, and no ESE specialist. The faculty was led by [REDACTED], who worked as the lead teacher; [REDACTED] took on most of the responsibilities assigned to the vacant positions.

21. During [REDACTED] year, the student reasonably expected to receive the many accommodations the IEP team had determined necessary for [REDACTED] to access [REDACTED] education. Unfortunately, [REDACTED] experienced an entirely different response to [REDACTED] IEP. Many teachers failed to implement the accommodations, and many expected the student to request the accommodations before they decided whether to provide them.

22. At the end of the first nine weeks, the student, [REDACTED] parent, [REDACTED], and [REDACTED] met to discuss the student's low grades. The student described the meeting as follows:

A: Yes. It was more a meeting of [REDACTED] talking to [REDACTED] about [REDACTED] than [REDACTED] talking to my mom or my tutor. And I was given goals to complete or try to do for myself to - I don't know why they were given to me.

Q: Who gave you the goals?

A: [REDACTED].

Q: Do you remember what the goals were?

A: There were four. Ones that [REDACTED] - there were four that [REDACTED] highlighted-or five that [REDACTED] highlighted out of, I think, ten.

Q: Can you remember like one of the goals, what types they might have been?

A: Most of the ones-[REDACTED] highlighted the word "ask for". So like ask for extended time. So advocating for myself.

Q: And were those-was that-well, you testified already that that was difficult for you to do in one class. Was that-well, let's first, do you think you were not asking for accommodations; is that what you recall?

A: What's [sic] what they thought. They thought I was supposed to ask for them. They thought I was supposed to ask them for them.

Q: And if you didn't ask for your accommodations, why did you not?

A: Because I was under the impression I was already receiving them.

Q: Or you were—

A: Going to get them.

* * *

Q: And so did your IEP require you to ask for them in 2013?

A: No.

Q: But you're saying that it made you feel like -

A: I should have. It's making me feel that, oh, since now I'm in [REDACTED] school, maybe I should start asking for them.

23. Given the position taken by the lead teacher,^{2/} which was that the student had to "ask for" [REDACTED] accommodations prior to receiving them, [REDACTED] did not receive the majority of [REDACTED] IEP accommodations in four classes: [REDACTED] intensive reading and english classes, [REDACTED] science class, and [REDACTED] math class.^{3/} More specifically, the student did not consistently receive extended time, small group testing, classroom notes, flexibility in presentation, or tasks broken down into smaller segments.

24. Almost every teacher confirmed at the hearing that the student did not request particular accommodations in their respective classes; therefore, they were not consistently provided. The undersigned finds this practice troubling, given that the IEP team specifically articulated the student's deficiency in the area of self-help skills. To require this

student to request [REDACTED] IEP accommodations or go without them seems particularly obtuse, given that he struggles with self-advocacy. Further, the IEP team was certainly capable of stating that the accommodations should only be provided if requested by the student; in the absence of such a pre-requisite, it was highly inappropriate to withhold accommodations until the student requested them.

25. The failure to implement the majority of the IEP-mandated accommodations, coupled with the imposed requirement that the student ask for [REDACTED] accommodations, was much more than a minor discrepancy; it constitutes a material failure to implement the IEP for the student's entire [REDACTED] year (in the four classes listed above).

26. Not surprisingly, the student found [REDACTED] on academic probation during both semesters [REDACTED] grade. Since the IEP never listed any reading goals, or mandated any interventions or assistive technology for reading, none were provided. The student was not given access to [REDACTED], or any other text-to-speech technology for the textbooks in [REDACTED] grade, as he had been in eighth grade.

27. To the student's credit, [REDACTED] compensated for [REDACTED] reading disorder by spending many hours reading and re-reading, and losing sleep during this process in order to stay up and complete work. [REDACTED] mother also had to hire a tutor to help [REDACTED] with [REDACTED]

school work. Given [REDACTED] reading difficulties, access to text-to-speech technology would have undoubtedly decreased the amount of work [REDACTED] had to do, and allowed [REDACTED] to access the information he needed to learn without requiring [REDACTED] to read and re-read text for hours. Due to his extraordinary effort, the student passed [REDACTED], earning mostly [REDACTED] and a couple of [REDACTED].

28. In June of 2014, the IEP team drafted a new IEP for the student. In the area of curriculum, the IEP once again addressed the student's writing deficiencies, and noted that [REDACTED] learned well from audiovisual presentations. In the area of "post school adult living," the IEP team noted that the student has difficulty expressing [REDACTED] to teachers in order to meet [REDACTED] needs. A goal of self-advocacy was established: the student was to ask for help from [REDACTED] teachers, and if those needs were not met, the student needed to ask another adult for help.

29. The IEP once again did not address the student's reading deficiency, set no reading goals, and provided no reading interventions or assistive technology accommodations for reading skills.

30. The accommodations were kept the same as the previous IEP, and more were added: break long assignments into small, sequential steps; student is allowed to take screen shots of the board or screen as needed; the student may write directly in workbooks or test books, as allowed; student will maintain an

agenda of work with feedback from the teachers; the student will not be penalized for spelling, drawing, or handwriting; the student will be given short quizzes and long tests will be broken down into smaller segments; and upon an excused absence, the student will be given written lab procedures. All of these accommodations were to be given in all classes, on a daily basis.

31. With the hope that the next school year would bring more staff and a better understanding of [REDACTED] IEP-mandated accommodations, the student returned for [REDACTED] year. At this point, the other [REDACTED] were admitted to the [REDACTED] program to begin their [REDACTED] grade year as well.

32. At the outset of [REDACTED] grade, the accommodations were once again not being consistently provided by all teachers.^{4/} Specifically, the student did not consistently receive extended time, small group testing, classroom notes, flexibility in responses, or breaking up of assignments into smaller segments in the following classes: [REDACTED] environmental science class, [REDACTED] intensive reading and english class, and [REDACTED] chemistry class.^{5/}

33. The parent asked that the IEP team reconvene, and specifically requested that the team consider providing the student with text-to-speech technology.

34. [REDACTED], the curriculum support specialist who had helped the student in [REDACTED] school, came to the [REDACTED] school in

early September of 2014. Now that the student was in [REDACTED] second year of [REDACTED] school, [REDACTED] was asked to speak to the faculty about implementing the IEP accommodations, and once again provide the student access to [REDACTED], the text-to-speech program.^{6/}

35. On October 7, 2014, an interim IEP was completed, which added the following accommodation: utilize AT device for academic work when reading and writing is not being measured, as needed. In the "conference notes" section of the IEP, the following was stated:

[A]n interim IEP was conducted by parent request. District personnel will explore text-to-speech options and mom gave consent for the development of the Assistive Technology Implementation Plan, School and District personnel will explore the use of readily available computer/tablet based applications that will facilitate text to speech. An ESE teacher will consult with school staff and student on a weekly basis.

36. As to the goals of the October IEP, none addressed reading. Instead, the goals addressed writing and processing skills, communication skills, and organizational skills.

37. In January of 2015, the School Board put together an Assistive Technology Implementation Plan, and gave the student access to a program called [REDACTED], which is to assist [REDACTED] with writing. It is a more advanced program than other writing programs in that it has word prediction capabilities.

38. Most of the teachers and administrators testified that in tenth grade, the student gave up trying, and that [REDACTED] received

[REDACTED]
[REDACTED]. [REDACTED],
who provided informative expert testimony on assistive technology in special education, explained this pattern of behavior in the following manner:

One of the challenges of academic failure with some people is it begins a downward spiral. It's once I start failing, it doesn't take too long before I start to internalize that message and say, "I'm no good at this," and then that lowers my motivation and interest to try and come back to the table and try again. And so I'm very concerned about that long-term effort, about what it really means.

So one of the questions that I share with districts is: How much failure do you need before you know I can't do it?

* * *

So what happens is I start to internalize that message, particularly about reading. Often by middle school, students start thinking, "I can't read, because they've been telling me all these years I can't read. I can't read. I need help." So, now, they've internalized "I can't learn."

So what you see is - the immediate effect in [REDACTED] school is [REDACTED]; before long, drop out; and then post-secondary involvement of any sort because of that negative academic pattern.

39. In [REDACTED] school, the student is asked to read not only textbooks, but also websites, and various documents prepared by teachers. The volume of assigned reading is increased in [REDACTED] school, and the assigned text is more complex. [REDACTED] provided [REDACTED] with text-to-speech access to textbooks, but [REDACTED] was never given all other mediums of information in a format that could be easily converted from text to speech.^{7/}

40. None of the IEPs drafted by the various teams addressed the [REDACTED], and none established any reading goals or interventions that would assist [REDACTED] in reading. Each of the three IEPs were deficient, in that they were not reasonably calculated to enable the student to access [REDACTED] education because they failed to address [REDACTED] reading needs.

41. While there is clear evidence that the IEPs were deficient and that the deficient IEPs were not properly implemented, the totality of the evidence did not establish that the School Board intentionally discriminated against the student based on [REDACTED] disabilities.

42. Petitioner presented the testimony of two parents of other disabled students who claimed that the [REDACTED] school was unwilling to accommodate their disabled children; therefore, the students withdrew from the school. A teacher who had been dismissed by the [REDACTED] school also claimed that the [REDACTED] school administration was unwilling to accommodate disabled children.

The student and parent testified regarding several instances where derogatory comments were allegedly made by teachers regarding the provision of accommodations.

43. The School Board brought forth many witnesses who explained the difficulties faced by this upstart [REDACTED] program—the lack of staff and resources that plagued the beginning stages of this [REDACTED] school. The School Board claims that it essentially did its best to provide an adequate education given its limited resources. The School Board witnesses also categorically denied making any derogatory comments regarding the student's disabilities or the provision of accommodations to the student.

44. On balance, the undersigned believes that because the school was understaffed and ill-prepared for the demands of running a [REDACTED] school, the IEP was not adequately prepared and its implementation was flawed due to the lack of guidance and leadership at the school. These unfortunate circumstances do not serve as an excuse for failing to provide the student with a FAPE, but they also do not rise to the level of intentional discrimination.^{8/}

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

46. 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.").

47. The Individuals with Disabilities Education Act (IDEA) ensures that all children with disabilities receive a FAPE with emphasis on special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). 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).

48. 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; the right to be involved in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the

provision of a free appropriate public education to such child."
20 U.S.C. §§ 1415(b)(1), (b)(3), & (b)(6).

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

[S]pecial 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).

50. "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) (emphasis added).

51. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance," establishes measurable annual goals, addresses the services and accommodations to be provided to the child and whether the child will attend mainstream classes, and specifies the measurement

tools and periodic reports that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320.

52. The IDEA further provides that an IEP must include measurable annual goals designed to meet each of the educational needs that result from a student's disability. 20 U.S.C. § 1414(d)(1)(A)(i)(II); Alex R. v. Forresville Valley Cmty. Unit Sch. Dist. #221, 375 F.3d 603, 613 (7th Cir. 2004) (explaining that an IEP must respond to all significant facets of a student's disability, both academic and behavioral).

53. The due process complaint in the instant case challenges the facial adequacy of the student's IEP. Such claims are analyzed under a two-part inquiry set forth in Rowley: whether the state has complied with the procedures set forth in the IDEA; and second, whether the IEP was reasonably calculated to enable the child to receive educational benefits. Petitioner has not brought a procedural claim in the instant case; rather, the issue is the substantive adequacy of the student's IEPs.

54. Most circuits describe the second Rowley step as requiring "some benefit" that is "more than de minimis." See, e.g., Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1313 (10th Cir. 2008). This standard has been articulated in slightly different terms: "[T]o comply with the IDEA, an IEP must be reasonably calculated to confer a *meaningful* educational

benefit." D.B. v. Esposito, 675 F.3d 26, 34 (1st Cir. 2012); Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3d Cir. 2012); N.B. v. Hellgate Elem. Sch. Dist., 541 F.3d 1202, 1212-13 (9th Cir. 2008); Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 862 (6th Cir. 2004).

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

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

[W]e must limit our evaluation of Bexley's proposed IEP to the terms of the document itself, as presented in writing to the

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

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

57. Third, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See Sch. Dist. of Wis. Dells v. Z.S. ex rel. Littlegeorge, 295 F.3d 671, 676-677 (7th Cir. 2002).

58. With these principles in mind, the undersigned must determine whether the three IEPs developed for the student--as

written--were reasonably calculated to confer a meaningful educational benefit to the student.

59. Here, the IEPs were substantively deficient because they failed to address one of the student's most basic needs: reading. Despite a medical diagnosis of a [REDACTED], the [REDACTED] on the reading portions of the FCAT, and the knowledge that the School Board had of the student's struggles with reading, none of the IEPs identified reading as a deficiency, none identified a single goal in reading, and no reading interventions were mandated by the IEP team. The State-mandated intensive reading class is not specially designed instruction that addressed this individual student's specific needs in reading; it was merely a class for disabled and non-disabled students who scored [REDACTED] on the FCAT. As evidenced by the provision of [REDACTED] in [REDACTED] grade and once again in [REDACTED] grade, the School Board had knowledge of the student's difficulties in reading; it failed, however, in all three IEPs, to articulate the student's need, set any goals as to the student's reading skills, or establish any reading interventions. See Me. Sch. Admin. Dist. No. 56 v. Ms. W, 2007 U.S. Dist. Lexis 22085, *36 (D. Me. Mar. 27, 2007) (finding that because the district ignored the student's writing-related issues, the failure to provide any services in the IEP

for writing was sufficient to deny the student a FAPE), adopted in full, 2007 U.S. Dist. LEXIS 28330 (D. Me. Apr. 16, 2007).

60. Since all three IEPs were not reasonably calculated to confer a meaningful educational benefit to the student, the School Board failed in its duty to provide the student with a FAPE.

61. Although the IEP was deficient, and it would stand to reason that whether or not the deficient IEP was properly implemented seems a moot issue, the undersigned will address the implementation issue nonetheless, for the sake of completeness.

62. The determination that a school board has failed to implement an IEP, and, therefore, denied the student a FAPE, requires proof of a material failure to implement the child's IEP--that is, something more than a "minor discrepancy" between the services a school district provides and the services required by the IEP. Van Duyn v. Baker School District 5J, 502 F.3d 811, 822 (9th Cir. 2007). This materiality standard "does not require that the child suffer demonstrable educational harm in order to prevail." Id. at 822 (emphasis added). Thus, a material failure to implement an IEP could constitute a FAPE denial even if, despite the failure, the child received non-trivial educational benefits.

63. Here, the IEP accommodations were not properly implemented in that they were conditioned upon the student

requesting them. This practice is inappropriate not only because it was a requirement that was imposed by the faculty, but never articulated in the IEP, it is also wholly inappropriate given that the IEP identified self-advocacy as an area in which the student had a deficiency. More troubling is the fact that even if the student requested the accommodations, they were not consistently provided. In [REDACTED] grade, the student did not consistently receive most of [REDACTED] accommodations in intensive reading, english, math and science. In [REDACTED] grade, [REDACTED] did not consistently receive most of [REDACTED] accommodations in two science classes, and in english and intensive reading.

64. The fact that the student [REDACTED] grade is not dispositive of the implementation issue; given that the school was not providing many of the accommodations, [REDACTED] parents hired a tutor to work with [REDACTED] all year. See Houston Indep. Sch. Dist. v. VP, 582 F.3d 576, 587-90 (5th Cir. 2009) (finding that although the student received passing grades, the school district materially failed to implement the IEP, and therefore denied the student a FAPE).

65. Accordingly, the School Board materially failed to implement the IEPs, thereby denying the student a FAPE.

66. The denial of a FAPE in this case, which was due to deficient IEPs and the material failure to implement the IEPs, resulted in substantive harm; therefore, Petitioner is entitled

to an award of compensatory education.^{9/} The goal of such an award is to place the student in the same position that ■ would have occupied but for the denial of a FAPE. An award of compensatory education must be reasonably calculated to provide the educational benefits that would have accrued from special education services the School Board should have provided to begin with. Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005); Jana K. v. Annville Cleona Sch. Dist., 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014).

67. The School Board argues that Petitioner failed to present any evidence as to the amount of compensatory education that should be awarded; therefore, the undersigned should not award any compensatory education. The undersigned is guided by the court's reasoning in Pennsbury School Dist., 65 IDELR 220 (Pa. S.E.A. Mar. 2, 2015), wherein the court explains that in the absence of evidence to prove the type or amount of compensatory education, the hour-for-hour approach is the default approach,^{10/} unless the record establishes such a widespread decline that full days of compensatory education are warranted, as is this the case here. See also Jana K. v. Annville Cleona Sch. Dist., 39 F. Supp. 3d 584, 609 (M.D. Pa. 2014) (explaining that an award of full days of compensatory education is warranted where the school board's "failure to provide specialized services permeated the student's education and resulted in progressive and widespread

decline in [the student's] academic and emotional well-being."); Tyler W. v. Upper Perkiomen Sch. Dist., 963 F. Supp. 2d 427, 439 (E.D. Pa. 2013) (awarding full days of compensatory education for 15 school weeks, the span of time that the school district failed to implement the child's IEP).

68. Here, the School Board's failure to properly design the IEPs affected every academic area that required the most basic skill of reading. The failure to address the student's deficit in reading created a harm that permeated the entirety of [REDACTED] school days in all of [REDACTED] grade, and the first semester of [REDACTED] grade.

69. Accordingly, Petitioner is entitled to full days of compensatory education for [REDACTED] entire [REDACTED] grade year, and the first semester of [REDACTED] grade year.

70. As the prevailing party in this due process hearing, Petitioner is entitled to attorney's fees and costs pursuant to Florida Administrative Code Rule 6A-6.03311(9)(x).

Section 504

71. Section 504, which may be found at 29 U.S.C. § 794(a), provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program

or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (emphasis added).

72. While the IDEA imposes an affirmative obligation on states to assure disabled children a FAPE, Section 504 broadly prohibits discrimination against disabled persons in federally assisted programs or activities. D.A. v. Houston Indep. Sch. Dist., 629 F.3d 450, 453-54 (5th Cir. 2010).

73. Because denial of a FAPE is an actionable claim under the IDEA, there is obvious overlap between Section 504 and the IDEA. Brennan v. Reg'l Sch. Dist. No. Bd. of Educ., 531 F. Supp. 2d at 279. Nonetheless, there is at least one important difference between claims under the IDEA and Section 504: Section 504 only remedies acts of intentional discrimination against the disabled. Id.

74. As applied in this case, Petitioner must present evidence that the School Board was deliberately indifferent to a strong likelihood that the student's federal rights would be violated. Id.

75. When a petitioner's claims under Section 504 are factually and legally indistinct from the IDEA claims, as is the case here, general principles of issue preclusion will bar redundant claims. Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 297 (5th Cir. 2005). "[T]o establish a claim for disability discrimination, in the educational context, something more than a

mere failure to provide the free appropriate education required by IDEA must be shown." D.A., 629 F.3d at 454 (internal citations omitted). Thus, facts demonstrating professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under Section 504 against a school district when the claim is based on a disagreement over compliance with the IDEA. Id. at 455.

76. Here, Petitioner is claiming that by not implementing the IEP, and by not providing the student with a working tablet and particular assistive technology tools (speech-to-text technology and text-to-speech technology), the School Board violated Section 504. Citing the general alleged treatment of the student by administrators and the faculty, Petitioner alleges that the School Board acted with deliberate indifference to a strong likelihood that the student's federal rights would be violated.

77. There is no credible evidence of professional bad faith or gross misjudgment on the part of the school staff and faculty; instead, the evidence establishes that the school was ill-prepared to handle student needs because it was understaffed. One lead teacher was essentially the acting ESE specialist, guidance counselor, principal, and various assistant principals. Under these conditions, it was inevitable that tasks would not be completed and duties would be mishandled or simply not performed.

This was an unfortunate setting for the student to find [REDACTED] in; the end result was a failure to provide [REDACTED] with a FAPE. These circumstances, though, fall short of demonstrating intentional discrimination based on the student's disability.

ORDER

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

1. None of the three IEPs provided the student with a free, appropriate public education.
2. The School Board materially failed to implement the three IEPs.
3. Petitioner is entitled to an award of full days of compensatory education for his entire ninth grade year, and the first semester of [REDACTED] grade year.
4. Petitioner is entitled to attorney's fees and costs. Petitioner shall have 45 days from the date of this Final Order within which to file a motion for attorney's fees and costs (under this case number), to which motion (if filed) Petitioner shall attach appropriate affidavits (e.g., attesting to the reasonableness of the fees) and essential documentation in support of the claim such as time sheets, bills, and receipts.
5. Petitioner's other requests for relief are denied.

DONE AND ORDERED this 21st day of October, 2015, in
Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of October, 2015.

ENDNOTES

^{1/} See Florida Administrative Code Rule 6A-6.054.

^{2/} To the extent that [REDACTED] testimony contradicts the student's testimony as to the dialogue between the parties at this meeting, the undersigned rejects [REDACTED] testimony and finds the student's testimony (which is corroborated by [REDACTED] mother's testimony) credible.

^{3/} In making this factual finding, the undersigned credits the student's testimony, which is corroborated by [REDACTED] mother's testimony. The undersigned rejects the individual teachers' testimony to the extent it conflicts with the student's testimony in this regard.

^{4/} The undersigned finds the student and [REDACTED] mother's testimony credible on this issue, and rejects the testimony provided by the individual teachers, who all claimed that they provided the IEP accommodations. The record is replete with correspondence from the mother and the student to the individual teachers and the administration which corroborates the testimony provided by the student and [REDACTED] mother.

^{5/} As to this finding, the undersigned credits the testimony given by the student and his mother, and rejects the testimony provided by the individual teachers. The record is replete with correspondence from the mother and the student to the individual teachers and the administration which corroborates the testimony provided by the student and his mother.

^{6/} There is conflicting testimony as to whether the student had access to Learning Ally in tenth grade, which would have given [REDACTED] access to textbooks and novels in digital format. The undersigned credits [REDACTED] testimony in this regard, and rejects all testimony to the contrary.

^{7/} [REDACTED] explained that teachers simply have to provide the student with documents in Microsoft Word format, so that the student could enable the text-to-speech capabilities that come with most tablets, laptops, and cellular phones. [REDACTED] also gave the school this information when she visited the school in the beginning of the student's tenth grade year; even though this recommendation was made by a School Board employee, it was never done.

^{8/} Findings of Fact 41 through 44 and Conclusions of Law 71 through 77 are to be considered recommended only; the undersigned has final order authority as to the due process complaint, but only recommended order authority as to the Section 504 allegations.

^{9/} See 20 U.S.C. § 1415(i)(2)(C)(iii); See e.g., Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009) (stating that when a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors in determining whether reimbursement for some or all of the cost of the private school is warranted); M. M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1101 (11th Cir. 2006) (stating that the ALJ and the district court did have jurisdiction to award the parents reimbursement for tuition and related services for a child who had never enrolled in the Dade County public school system, but had been denied FAPE).

^{10/} See, e.g., M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

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