

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

** ,

Petitioner,

vs.

Case Nos. 16-0651E
16-1697E
16-5488E

BROWARD COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in these cases before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), on May 3 through 6, 2016; July 12, 2016; January 24 through 27, 2017; and March 28 and 29, 2017, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
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For Respondent: Hudson Carter Gill, Esquire
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STATEMENT OF THE ISSUES

The issues in this proceeding are: whether Respondent deprived Petitioner of a free, appropriate public education

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

PRELIMINARY STATEMENT

On February 8, 2016, Respondent received Petitioner's Due Process Complaint. The same day, the complaint was forwarded to DOAH, and assigned (as DOAH Case No. 16-0651EDM) to the undersigned for all further proceedings.

On February 22, 2016, the undersigned issued an Order on Motion to Determine Stay Put Placement. On February 24, 2016, the final hearing was scheduled for March 22 and 23, 2016. After granting a requested continuance, the final hearing was rescheduled for May 3 through 6, 2016.

On March 24, 2016, Respondent received another Due Process Complaint filed by Petitioner. This complaint was forwarded to DOAH on March 24, 2016, and assigned (as DOAH Case No. 16-1697E) to the undersigned for all further proceedings. On March 31, 2016, Petitioner filed a Motion to Consolidate DOAH Case Nos. 16-0651EDM, 16-1697E, and another DOAH case (16-0257E) previously assigned to ALJ Jessica E. Varn. DOAH Case Nos. 16-0651EDM and 16-1697E were consolidated. DOAH Case No. 16-0257E was not consolidated and remained with ALJ Varn.

The final hearing proceeded as scheduled on May 3 through 6, 2016; however, the hearing was not concluded. Thereafter, the consolidated cases were scheduled for final hearing on June 29 and 30, 2016. After granting a requested continuance, the final hearing was rescheduled for July 12 through 16, 2016. The final hearing proceeded on July 12, 2016. Prior to going on the record, the parties engaged in good faith resolution discussions. At the conclusion of said discussions, the parties agreed that the consolidated proceedings should be placed in abeyance pending completion of an Independent Educational Evaluation (IEE) report and allowing for a subsequent meeting of the student's Individual Education Plan (IEP) team. Accordingly, on July 13, 2016, the undersigned issued an Order placing the cases in abeyance until August 1, 2016.

Resolution discussions thereafter deteriorated, and, on September 19, 2016, Respondent received another Due Process Complaint from Petitioner. The same was forwarded to DOAH and assigned (as DOAH Case No. 16-5488E) to the undersigned for all further proceedings. On September 28, 2016, Petitioner filed an Unopposed Motion to Consolidate this new complaint with DOAH Case Nos. 16-0651EDM and 16-1697E. All three cases were consolidated on October 11, 2016, and the final hearing was scheduled for October 24 through 27, 2016. After granting two separate

continuances, the final hearing was rescheduled for January 24 through 27, 2017.

The final hearing on the three consolidated cases proceeded, as scheduled; however, the final hearing was not concluded. Thereafter, the conclusion of the final hearing was scheduled for March 28 through 30, 2017. The hearing proceeded as scheduled and concluded on March 29, 2017.

The final hearing Transcript was filed on May 5, 2017. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

Based upon the parties' stipulation at the conclusion of the hearing, the parties' proposed final orders were to be submitted 45 days after the transcript was filed, and the undersigned's final order would issue 45 days after receipt of the proposed final orders. After granting several extensions of time to submit proposed final orders, the same were filed by Respondent and Petitioner on June 30 and July 3, 2017, respectively. Accordingly, the undersigned's final order was to be issued on or before August 17, 2017. The proposed final orders have been considered in issuing this Final Order.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use [REDACTED] pronouns in the Final Order when referring to

Petitioner. The [REDACTED] pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. Petitioner is presently [REDACTED] years old and has now completed the [REDACTED] and been promoted to [REDACTED]. [REDACTED] was first determined to be eligible for exceptional student education (ESE) services in [REDACTED] [REDACTED], when [REDACTED] was [REDACTED] years old and in [REDACTED].

Background Facts

2. In May 2014, during [REDACTED] [REDACTED] year, an IEP was developed for Petitioner. The May 2014 IEP documented that [REDACTED] remained eligible for ESE services under the [REDACTED] [REDACTED] [REDACTED] ([REDACTED]) eligibility category. Additionally, the May 2014 IEP provided that [REDACTED] would remain in the general education setting with collaboration [REDACTED] a [REDACTED] in the areas of behavior and independent functioning. The May 2014 IEP also detailed supplemental aids and services that would be implemented: daily/weekly reporting and collaboration with the parents, flexible settings which allowed the student to move as needed, and preferential seating in the classroom setting. Daily behavior charts had been introduced prior to the IEP being completed, and were recommended for continued support.

3. On May 8, 2015, a new IEP was developed for Petitioner which changed [REDACTED] eligibility category from [REDACTED] to

████████████████████ (████) and changed █████ placement from a general education class 100 percent of the time to an █████ cluster where █████ would only be in general education █████ percent of the time.

4. The proposed █████ cluster was located at a different school location because Petitioner's current school did not offer an █████ cluster for its students. Aggrieved by these significant changes, on May 21, 2015, Petitioner's parents filed a request for a due process hearing. The matter was forwarded to DOAH and assigned (as DOAH Case No. 15-2841E) to ALJ Varn.

5. The final hearing regarding DOAH Case No. 15-2841E was conducted over the summer of 2015 and concluded on August 6, 2015. When the 2015-2016 school year began, the Final Order had yet to be issued, and, therefore, the propriety of the proposed May 2015 IEP was undetermined. Accordingly, Respondent reverted back to the last unchallenged IEP, the May 2014 IEP, as the operative IEP for the 2015-2016 school year.

2015-2016 School Year

6. For the 2015-2016 school year, Petitioner was enrolled in █████ grade at School A, a public █████ school in █████ County, Florida.

7. Prior to the commencement of the 2015-2016 school year, a meeting was held at School A, on August 18, 2015, which was attended by Petitioner's parents and various staff from

Respondent and School A. During this meeting, Petitioner's parents candidly described and informed those present of Petitioner's past behavior, the intensity of the same, and what might reasonably be expected. Staff from School A addressed those supports that would be available to meet Petitioner's needs.

8. Petitioner's general education classroom consisted of [REDACTED] teacher and [REDACTED] students, four of whom were receiving ESE services. Throughout Petitioner's tenure at School A, [REDACTED] was also assigned a [REDACTED] [REDACTED], who was assigned solely to work, in close proximity, with Petitioner. The individual [REDACTED] [REDACTED] changed at various points during the year.

9. While the first two days of school passed without incident, on the third day, August 26, 2015, Petitioner demonstrated targeted behaviors of concern. Specifically, it was documented that:

[Petitioner] picked up a plugged in cord in the classroom. Teacher asked [REDACTED] to put cord down. [Petitioner] refused, teacher unplugged cord. [Petitioner] grabbed cord from teacher and began swinging cord. [REDACTED] [REDACTED] began offering breaks and cool down walks. Room clear was called. Student was hit on leg with cord by [Petitioner] while [REDACTED] was leaving the classroom.

* * *

[Petitioner] was continuously [REDACTED] toward staff, i.e. [REDACTED] with [REDACTED], [REDACTED], [REDACTED] at, [REDACTED]

████, █████. Staff repeatedly blocked and redirected. [Petitioner] would then lunge toward a different staff member and begin █████, █████, █████ at, █████, and █████. Behaviors escalated to where staff was getting injured.

10. During this process, Petitioner was removed from the classroom and restrained in the hallway. It was noted that Petitioner sustained red marks on █████ hands and wrists. As a result of the incident, Petitioner was given a referral, and the discipline included a conference with Petitioner's parents.

11. The following day, August 27, 2015, Petitioner's mother signed consent for further assessments in the areas of █████, █████, and for a █████ █████ (████). It was agreed that the █████ would be performed by a private board-certified behavior analyst (BCBA), █████.^{1/}

12. On August 28, 2015, Petitioner again engaged in inappropriate behaviors. Specifically, Petitioner's behavioral incident was documented as the following:

Student was calling out teacher gave 2 private warnings behavior continued teacher privately asked [████] to move [████] clip student refused to remove clip. Student ripped book when asked to move clip, behavior teach went over and asked [████] to move clip also that's when [████] began to grab other classroom objects and throw them at staff and students. A room clear was conducted.

13. During this incident, it was documented that Petitioner was reminded to use █████ calming strategies and was offered a

choice of a break or a cool-down walk. It was further documented that School A staff verbally prompted and physically guided Petitioner to the cool-down portable so [REDACTED] could de-escalate. After entering the portable with staff, it was further documented that Petitioner became [REDACTED] [REDACTED], attempted to remove a large bulletin board off the wall, began forcefully [REDACTED] [REDACTED] forearm into the wall repeatedly, [REDACTED] and [REDACTED] at staff and continued [REDACTED] by [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. Thereafter, School A staff implemented a physical restraint in which Petitioner was placed in a prone position on a mat in the floor of the portable, which lasted approximately six minutes.

14. As a result of this incident, Petitioner received a referral, classified as a [REDACTED] of campus (major), and was given a two-day suspension. Petitioner was given the option of attending the [REDACTED] program, wherein [REDACTED] would spend two days at an alternative to external suspension location. If so elected, [REDACTED] would continue to receive education and behavior-related assignments. Petitioner's parents declined that option, and, therefore, [REDACTED] served the two days in external suspension.

15. After the first week of school, Respondent amended Petitioner's existing [REDACTED] [REDACTED] [REDACTED] ([REDACTED]) to include Professional Crisis Management (PCM). PCM is a behavior intervention program that Respondent utilizes for certain ESE

students as a way to safely, effectively, and efficiently minimize problem behaviors. Those certified in PCM received training on the proper techniques and implementation. The bulk of the PCM program involves prevention strategies. The strategies are generally instructional strategies or accommodations that teach communication and various replacement and self-calming skills for aggressive behaviors. Also, the program encompasses de-escalation strategies that focus on when a student engages in aggressive behavior or precursor behaviors which might lead to aggression. The strategies are on a continuum of restrictiveness, ranging from verbal encouragement to vertical and horizontal immobilization restraints. Petitioner objected to the addition of PCM on the BIP.

16. On September 2, 2015, an interim IEP meeting was held wherein the IEP team added specialized instruction in [REDACTED], [REDACTED] times per week for a total of [REDACTED] minutes. Additionally, the team noted that Petitioner uses an informal individual behavior plan that includes a breakdown of [REDACTED] daily tasks and a visual class schedule. Based on data from August 24 through 28, 2015, the school-based members of the team decided to "implement crisis management procedures to safely, effectively and efficiently minimize crisis behaviors and quickly bring [Petitioner] back to stable functioning using evidence based practices for preventing or reducing maladaptive behaviors."

Petitioner's parents objected to these procedures. Petitioner's BIP from February 26, 2015, was updated to include the crisis management referenced above.

17. On September 3, 4, 8, 10, 11, and 15, 2015, Petitioner was removed from the classroom, for various amounts of time, due to ■■■ behaviors. ■■■ received no referrals for discipline in September or October 2015.

18. On September 17, 2015, ALJ Varn issued ■■■ Final Order in DOAH Case No. 15-2841E. Judge Varn concluded that Respondent had failed to give proper notice of the change of Petitioner's eligibility from ■■■ to ■■■; that Petitioner's parents were not given meaningful opportunity to participate in IEP meetings, which ultimately changed ■■■ eligibility; and that Respondent had improperly predetermined Petitioner's placement.^{2/} Judge Varn further concluded that Respondent had failed to conduct manifestation determination hearings and that Petitioner was entitled to attorney's fees and costs. Respondent was ordered to conduct an IEP meeting with meaningful participation, and, prior to the IEP meeting, Respondent was to conduct all evaluations necessary for an ■■■/■■■ eligibility determination. Finally, Respondent was ordered to conduct a manifestation determination hearing and expunge ■■■ days of suspension from Petitioner's student records.

19. Thus, until such time as an appropriate IEP meeting was completed with the necessary evaluations, Petitioner's eligibility remained [REDACTED] and [REDACTED] placement remained in the general education setting, as set forth in the May 2014 IEP.

20. [REDACTED] began conducting the FBA on September 17, 2015, and [REDACTED] concluded the assessment on October 13, 2015. [REDACTED] FBA Report was completed on October 22, 2015. The 22-page report documents that the assessment was based on records review, direct observations of Petitioner, trial-based functional analysis, data collection, teacher/staff/parent/client interviews, surveys, and data analysis. [REDACTED]'s total direct observation of Petitioner in the classroom environment was [REDACTED] hours, which took place in Petitioner's main classroom, the cafeteria, the media center, [REDACTED] class, a portable classroom, and around the [REDACTED] school campus.

21. According to [REDACTED], Petitioner's targeted behaviors and the hypothesized functions of those targeted behaviors are as follows: (1) [REDACTED] verbal behavior-access to social positive reinforcement (tangibles) and social negative reinforcement (escape); (2) elopement (out of seat/in class)-access to social positive reinforcement (tangibles) and social negative reinforcement (escape); (3) elopement (from classroom/around campus)-access to social negative reinforcement (escape) and access to social positive reinforcement (attention);

(4) aggression-access to social positive reinforcement (tangibles/attention) and social negative reinforcement (escape); (5) property disruptions-access to social positive reinforcement (tangibles/attention) and social negative reinforcement (escape); (6) self-injurious behavior (SIB)-access to social reinforcement (attention/tangibles); and (7) noncompliance-social negative reinforcement (escape).

22. ■. ■ made the following recommendations at the conclusion of ■ FBA report:

1. Due to the reinforcement history and complexities of [Petitioner's] problem behavior, a comprehensive ■ is warranted using the specific information contained herein. Such information should include an emphasis on solid antecedent/consequent interventions (e.g., [Petitioner] has preferential seating as an accommodation; therefore, it may be useful to move ■ seat away from the classroom exit to prevent easy elopement opportunities).
2. Training of the BIP with all who interact (or may interact) with [Petitioner] by individuals trained in behavior intervention (e.g., Board Certified Behavior Analyst) which should involve emphasis on high treatment integrity.
3. Ongoing daily collection of targeted behaviors and replacement behaviors to monitor progress across time.

23. On October 28, 2015, an IEP team meeting was conducted to discuss counseling services, amending specialized instruction in social skills class, and to review the FBA and occupational

■■■■■■ evaluation. Petitioner's IEP was amended to reflect an additional session of ■■■■■■ each week, and the social skills class was, by agreement, reduced to ■■■■■■ weekly for a total of ■■■■■■ minutes.

24. In November 2015, Petitioner received two referrals resulting in discipline. On November 6, 2015, Petitioner was referred as ■■■■ was "heard calling other classmates and ■■■■ behavior tech racial slurs," and "continued to yell these racial slurs even when asked to stop." ■■■■ received a 30-minute detention at lunch, wherein ■■■■ was accompanied by adult staff. On November 16, 2015, Petitioner was referred for throwing a stick and ■■■■■■ two students from another class. On this occasion, Petitioner received a two-hour in-school suspension (ISS).

25. On November 16, 2015, school psychologist, ■■■■■■, Ed.D., NCSP, issued ■■■■ psychological report. The evaluations ■■■■ conducted were in response to Judge Varn's Order to complete all assessments required for an eligibility determination. ■■■■■■ had been requested to assess Petitioner's adaptive functioning and behavioral functioning, particularly looking at characteristics of children diagnosed with an ■■■■ disorder. ■■■■ ultimate conclusion was that, Petitioner's age-appropriate communication, reciprocal social interaction, and lack of repetitive/restricted behaviors during the ■■■■■■ administration

was not typical of children diagnosed with [REDACTED]. For Petitioner, [REDACTED] recommended "[e]nrollment in an educational setting with structured behavioral and social/emotional support," and to "[i]ncrease coping skills in order to regulate behavior in stressful situations."

26. Following the FBA completion, on November 4, 2015, [REDACTED]. [REDACTED]; [REDACTED] [REDACTED], BCBA; and [REDACTED] [REDACTED] collaboratively authored a new BIP with input from Petitioner's parents and other members of the School A team. Thereafter, a draft BIP was circulated to Petitioner's parents on November 12, 2015. Shortly thereafter, on November 18, 2015, a meeting was held with Petitioner's parents and counsel to discuss and finalize the BIP.

27. On November 30, 2015, the IEP team met for the purpose of completing the review of the prior [REDACTED] and [REDACTED] evaluations. [REDACTED], the speech-language therapist, tested Petitioner for [REDACTED] and [REDACTED] language, as well as [REDACTED] skills. Pursuant to [REDACTED] October 1, 2015, report, [REDACTED] concluded that Petitioner did not need direct services or related services in [REDACTED] or [REDACTED]. [REDACTED] evaluation revealed that Petitioner had difficulty communicating when in a behavioral crisis, but not that there was an overall communication impairment.^{3/}

28. [REDACTED]. [REDACTED], a pediatric occupational therapist, completed [REDACTED] [REDACTED] evaluation and issued [REDACTED]

report on October 13, 2015. Ultimately, [REDACTED] concluded that [REDACTED] was not warranted for Petitioner. [REDACTED] did, however, make some recommendations to help assist with [REDACTED] functioning and accommodations to help Petitioner adapt to [REDACTED] environment. Regarding [REDACTED] handwriting, [REDACTED]. [REDACTED] recommended that [REDACTED] utilize cursive than try to assist [REDACTED] printing difficulties and the use of a pencil gripper, as well as assistive technology or keyboarding, for anything long because [REDACTED] reported that [REDACTED] hand would fatigue. [REDACTED] recommendations regarding handwriting were not implemented.

29. The BIP, which is 16 pages (single-spaced) in length, is extremely comprehensive.^{4/} The BIP defines Petitioner's targeted behaviors; provides 15 proactive strategies that can be attempted to reduce the likelihood of behaviors occurring; and provides general and specific behavior interventions to address [REDACTED] targeted behaviors. Indeed, there are 20 individual bullet point directives under the heading "Use a daily point sheet to prompt and reinforce appropriate behaviors," and eight individual bullet point directives under the heading "Increase positive reinforcement for appropriate behaviors." Under the category of "Reduction Strategies," the BIP provides 26 possible procedures/directives to attempt if Petitioner engages in noncompliance.^{5/}

30. Under the BIP heading of "Inappropriate Verbal Behavior," the BIP provided 28 possible procedures/directives to attempt should this targeted behavior occur. For the targeted behavior of aggression, the BIP provided 29 possible procedures/directives. Addressing the targeted behavior of property disruption, the BIP set forth 29 possible procedures/directives to attempt should this targeted behavior occur. To the extent that Petitioner should engage in self-injurious behavior, the BIP provided 24 possible procedures/directives to attempt. For the two types of elopement (class-around campus/seat-in class), the BIP set forth 37 and 25 possible procedures/directives to attempt, respectively. Finally, the BIP set forth approximately 28 replacement behaviors to teach Petitioner to improve [REDACTED] behavior.

31. Throughout the BIP, the following admonition appears in bold print: "DO NOT remove [REDACTED] from the classroom for a walk/break, etc as this could actually increase behaviors." To the contrary, the BIP provides that, in the event Petitioner "demonstrates behaviors that disrupt other students/staff at a **high magnitude and/or are unsafe** (EXAMPLES: throwing objects at others or across the room, hitting others, attempting to elope from classroom, running around the classroom continuously, continuous yelling and/or using curse words/racial slurs)," School A staff should:

* IMMEDIATELY CLEAR THE ROOM. Do so quickly and quietly so as not to give [Petitioner] any attention. Call for additional support staff to assist.

* DO NOT TALK TO [PETITIONER] DURING THIS TIME. Do not attempt to convince [REDACTED] to follow the rules or remind [REDACTED] of [REDACTED] rewards [REDACTED] is earning.

* Move items that are valuable and/or use physical proximity by standing in front of areas, if possible, to prevent [Petitioner] from disrupting/destroying these items.

* If possible, collect items and place them in a safe location to prevent possible damage (e.g., in cabinets).

* Use response blocking and physical proximity to prevent [Petitioner] from eloping and/or hurting others/[REDACTED].

32. Training of School A staff on the particulars of the new BIP began to occur on approximately December 8, 2015. [REDACTED] presented to School A on December 8 and 9, 2015, and "modeled" staff on the proper use of the BIP and provided feedback regarding the same. [REDACTED] worked with [REDACTED] [REDACTED] (behavioral technician), [REDACTED]. [REDACTED] (behavioral program specialist), [REDACTED]. [REDACTED] (general education teacher), and other teachers and staff including the art teacher, social skills teacher, and guidance counselor. [REDACTED]. [REDACTED] took the lead on training the teachers. During this process, [REDACTED]. [REDACTED] would make suggestions, and [REDACTED]. [REDACTED] would carry out the same.

33. In addition to providing initial training, ■. ■ conducted fidelity checks with respect to the BIP's implementation by staff. On the first day, ■ found that implementation was occurring at 70 percent, and on the second day, ■ found implementation at 33 percent. These percentages do not accurately reflect the school staff's implementation of the BIP as a whole, as ■. ■ explained that in conducting ■ fidelity checks, ■ only reviewed each staff member's first attempt to implement each component of the BIP and, if a staff member failed on the first attempt, ■ was given a "0" for the day regardless of how proficient ■ was at implementation throughout the balance of the day. Fidelity checks were conducted periodically after the BIP was implemented by ■. ■ and ■. ■, which demonstrate a higher rate of compliance than that initially observed by ■. ■.

34. A meeting was scheduled for December 9, 2015. The purpose of the meeting was to develop a new IEP, review the psychological evaluation, review eligibility criteria, and determine eligibility. The notice provided that, "[o]nce all of the reports have been reviewed and eligibility has been determined, the IEP committee will develop a new IEP to include appropriate supports, services and placement, which might include a change of supports, services and placement." It is undisputed

that this meeting did not occur, and the parties did not reconvene until January 19, 2016.^{6/}

35. Shortly after the BIP was implemented, on or about December 9 or 10, 2015, Petitioner's [REDACTED] classroom had to be cleared (evacuated) due to [REDACTED] behaviors. The record evidence provides that, on this occasion, Petitioner began by demonstrating noncompliance (saying "no"), which escalated into using the "F word," left [REDACTED] seat, and then began to escalate further. At that point, pursuant to the BIP, the staff called a room clear, and all of the other students were required to leave the classroom. Thereafter, [REDACTED]. [REDACTED], [REDACTED]. [REDACTED], and the behavior technician were in the room with Petitioner. At that point, one staff member blocked the door while Petitioner ran around the room, turning over desks, taking items and throwing them at the adults in the room, ripping items off the wall, and pushing the intercom button while simultaneously using the "F" and "B" words. During this outburst, the adult staff attempted to not provide Petitioner attention, but rather to block and direct [REDACTED] actions. The adult staff was required to place higher value items on a shelf out of Petitioner's reach.

36. Ultimately, Petitioner began to calm down, and Petitioner was prompted to take [REDACTED] seat and take out [REDACTED] work. During this room clear, the balance of the [REDACTED] class was taken either to an adjacent class next door, the media center,

or to a small room adjacent to the media center utilized as a reading resource room. On December 10, 2015, Petitioner was restrained by two behavioral technicians utilizing a PCM seated restraint.^{7/}

37. Similar room clears were required on December 14, 15, and 16, 2015. On December 18, 2015, Petitioner received a referral and was given a less than one-day suspension. The record evidence demonstrates that, on this occasion, Petitioner's classroom was again cleared of all students. It was noted that [REDACTED] repeatedly used [REDACTED] directed towards the two behavior technicians, [REDACTED] and [REDACTED], both of whom are [REDACTED]-[REDACTED].

38. When classes resumed following the winter break, Petitioner, On January 4, 2016, served [REDACTED] three-hour ISS for the incident that occurred on December 18, 2015. Two days later, on January 6, 2016, Petitioner received a referral, for repeatedly using [REDACTED] directed towards [REDACTED] classmates and the behavior technicians during the process of another room clear. For this incident, Petitioner served a one-day ISS. This behavior repeated itself again on January 15, 2016, where Petitioner again repeatedly used [REDACTED] directed towards the behavior technician whilst the teacher and students were being cleared from the room. For this incident, Petitioner served a two-day ISS.

39. As a procedural aside, on January 14, 2016, Respondent filed a request for due process that sought a determination of the appropriateness of its [REDACTED] evaluation and of an [REDACTED] evaluation. The request was necessitated by its decision to deny Petitioner's requests to provide independent [REDACTED] and [REDACTED] evaluations at public expense. The matter was forwarded to DOAH and assigned (as DOAH Case No. 16-0257E) to ALJ Varn.

40. On January 19 and 20, 2016, the IEP team convened to review the evaluation from [REDACTED]. [REDACTED], begin drafting the IEP, and revise the BIP. On January 20, 2016, the BIP was modified, over Petitioner's parents' objection, to permit Petitioner to be removed from the classroom, in lieu of the entire classroom being removed, when [REDACTED] targeted behaviors warranted. This was referred to as a "Take 5." At this meeting, [REDACTED]. [REDACTED] expressed [REDACTED] opinion that Petitioner should not be allowed to leave the room due to targeted behaviors, because, in [REDACTED] opinion, the same only reinforced [REDACTED] targeted behaviors.

41. Also, during this meeting, the BIP was modified to remove work prompts to Petitioner. Thus, Petitioner could essentially engage in no academic work or otherwise participate for the entirety of the school day; however, [REDACTED] was still ultimately responsible for completing the academic assignments.

42. On January 28, 2016, Petitioner received a referral as Petitioner " [REDACTED] a staff member." For this incident, Petitioner received a two-day ISS.

43. On January 29, 2016, [REDACTED]. [REDACTED], School A's principal, filed a request that Petitioner be removed from School A and placed in an [REDACTED] school (School B) through the Behavior Intervention Committee (BIC). The BIC is a multidisciplinary team who meet on a regular basis to discuss and review cases of students having behavioral challenges in the general education classroom setting. The BIC has the authority to remove a student from a general education setting and place them into an alternative school setting. Children with disabilities may also be referred to the BIC. The BIC is typically composed of a principal from an elementary, middle, and high school; designee(s) from each alternative or center school; representatives from the ESE, social work, psychological and behavior departments. Importantly, an ESE student's IEP team is not part of the BIC.

44. In this case, a packet was submitted to the BIC, who reviewed the same and, on February 4, 2016, conducted a telephonic meeting with [REDACTED]. [REDACTED] and [REDACTED]. [REDACTED] [REDACTED], School A's assistant principal. The BIC approved the request made by School A and assigned the Student to the Behavior Change Program at School B.

45. The following facts are undisputed: at the time [REDACTED] submitted the request, Petitioner was an ESE student with an IEP; parental input was not sought prior to submitting the request and attached information; a meeting of Petitioner's IEP team was not convened prior to this proposed development; and Petitioner's parents were not permitted to participate in the BIC meeting.

46. On February 8, 2016, Respondent received the due process complaint that forms the basis of DOAH Case No. 16-0651E.

47. From all that appears, despite the reassignment, Petitioner continued to attend School A. On February 22, 2016, the undersigned issued an Order regarding stay put placement. Said Order concluded that Petitioner's assignment from School A to School B transcended the simple change of "bricks and mortar," and rose to the level of a substantial and material change of the student's education program. Accordingly, the undersigned ordered that Respondent was required to continue to provide Petitioner with educational services in a regular [REDACTED] school setting.

48. During the pendency of the BIC process and subsequent due process complaint, the parties continued to meet. Indeed the parties met on February 3, 4, 8, and 18, 2016; however, the IEP was not completed.

49. On March 1, 2016, Respondent held a meeting without Petitioner's parents, counsel, or advocate in attendance to

discuss changes to the BIP. Petitioner's parents notified Respondent of their objection to conducting the meeting in their absence. Respondent had attempted to obtain a mutually-agreeable date for review of the BIP since February 9, 2016, but had been unsuccessful. Although Petitioner's parents did not attend the March 1, 2016, meeting, they provided written input to the IEP team. It is undisputed that Petitioner objected to the BIP amendments. Those amendments included: (1) reintroducing the "completes work" section on a daily sheet; (2) providing Petitioner with opportunities to earn "bucks" for work completion; (3) put procedures in place to shape behavior and gradually increase expectations to complete academic work; (4) increasing the price of items in the "toy store"; and (5) removing a requirement that Petitioner "making the day" to be able to shop in the toy store.

50. On March 3, 2016, [REDACTED], Petitioner's behavior technician reported that, after shooting a rubber band two times in class, [REDACTED] requested the rubber band. Thereafter, Petitioner began running around the classroom. [REDACTED] informed Petitioner that they needed to do a Take 5. Petitioner refused and [REDACTED] issued a Code 2 (requesting additional assistance). Upon the arrival of another behavior technician, [REDACTED], Petitioner exited the classroom and began using [REDACTED] and [REDACTED] toward students and the staff. Thereafter, Petitioner

ran into the physical education area and then began using [REDACTED] [REDACTED] directed towards students and the behavior technicians. Petitioner returned to the direction of [REDACTED] class and began banging on the windows and doors and saying "[REDACTED] come out." Thereafter, [REDACTED] ran to the media center and was waiting calmly. After entering an office, Petitioner was directed to have a seat, [REDACTED] complied, and, after approximately two to three minutes, was returned to class for [REDACTED] lunch box.

51. Shortly thereafter, [REDACTED] was advised by two students in the cafeteria that Petitioner had [REDACTED] them and used [REDACTED]. Petitioner then utilized the restroom. Two students in the restroom advised [REDACTED] that Petitioner had [REDACTED] them and told them that [REDACTED] was going to [REDACTED] them. From the restroom, Petitioner entered the classroom, placed a chair on the table, began using [REDACTED], and ignored [REDACTED] directive to Take 5. After issuing a Code 2, [REDACTED] arrived. Petitioner's behaviors escalated, and [REDACTED] eloped from the area and exited the gate by the principal's office. Petitioner continued to hold onto a gate at the front of the school.

52. [REDACTED]. [REDACTED] was contacted to determine if staff could use physical force to bring [REDACTED] back into school and was advised that would be improper because [REDACTED] was not endangering [REDACTED] or other students. Ultimately, law enforcement was contacted, who spoke

with Petitioner and departed. Petitioner's father arrived and took Petitioner from school.

53. The following day, March 4, 2016, the record evidence documents that Petitioner was serving an ISS in [REDACTED]. [REDACTED] room. The record provides that [REDACTED]. [REDACTED] asked Petitioner if [REDACTED] wanted to start working on math, to which [REDACTED] replied "no." When asked again, [REDACTED] again said "no" in what [REDACTED]. [REDACTED] perceived as a rude tone, and [REDACTED]. [REDACTED] advised Petitioner that [REDACTED] was being disrespectful. As [REDACTED]. [REDACTED] walked away, Petitioner threw a pencil which struck [REDACTED], and of which [REDACTED] made comment. Petitioner advised that [REDACTED] did not care and began making a stabbing motion.

54. [REDACTED]. [REDACTED] then called a Code 2, and [REDACTED]. [REDACTED] arrived. Petitioner's behaviors escalated to include the following:
[REDACTED] about the room, [REDACTED] the projector and phone, attempting to [REDACTED] the staff, attempting to remove pictures from the wall, [REDACTED] "[REDACTED]" repeatedly, [REDACTED] the walls, and [REDACTED] and [REDACTED] the lanyard around the behavior technician's neck. Thereafter, Petitioner would be calm for a period of seconds and then continue to attempt to [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

55. Ultimately, the "YES team" was called. This is a response team that comes to the school and observes the student to see if their services may assist. If the YES team determines that

the student is in immediate danger to themselves or others, they will initiate the process of Baker Acting the student. On this occasion, the YES team never arrived on campus, as Petitioner's father arrived at the school and removed Petitioner. Petitioner did not return to School A thereafter.

56. Against this backdrop, the IEP team assembled yet again on March 14, 2016, to finalize Petitioner's IEP. All required members of the IEP team were present, including Petitioner's parents and counsel. All team members were provided a meaningful opportunity to participate in the IEP development process.

57. The March 2016 IEP documented Petitioner's ESE eligibility category as [REDACTED]. The IEP proposed that Petitioner be placed in a [REDACTED] ESE classroom for the majority of the day. Specifically, beginning on March 29, 2016, the IEP proposed that Petitioner would be with nondisabled peers [REDACTED] percent of the day and removed from nondisabled peers for [REDACTED] percent of the day. The [REDACTED] ESE classroom placement that was offered by Respondent was an [REDACTED] cluster classroom.

58. Respondent's witnesses testified that the proposed placement was premised, in large part, on Petitioner's lack of behavioral success in the [REDACTED] setting. Respondent's witnesses also testified that the proposed placement was supported by [REDACTED] success in [REDACTED] social skills class, the benefit to be gained from a smaller student-to-teacher ratio, a structured

environment focusing on [REDACTED] behavioral concerns, and having an ESE certified teacher with Petitioner throughout the majority of [REDACTED] day. Respondent's testimony in this regard is credited.

59. Petitioner objected to the proposed placement and requested the IEP team consider, inter alia, an [REDACTED] cluster classroom as an alternative placement. Although Petitioner's eligibility was [REDACTED], Respondent rejected the [REDACTED] suggestion, in part, on the grounds that the available [REDACTED] cluster classrooms are typically composed of [REDACTED] students who function at a [REDACTED] level than Petitioner.^{8/}

60. [REDACTED]. [REDACTED], who oversees the [REDACTED] cluster classroom at School A, testified that the [REDACTED] cluster is composed of three classes: Kindergarten and first grades, second and third grades, and fourth and fifth grades. Within each class, there is a teacher and full-time paraprofessional. Additionally, the [REDACTED] cluster includes a school-based behavior technician that assists the three classes. In the [REDACTED] cluster, social skills are provided on a daily basis. The [REDACTED] cluster program is premised upon a level system, based on points earned, for behaviors. Once the students reach "Level 5," the program begins the process of mainstreaming the students into the general education setting (incrementally) based on their areas of strength.

61. The [REDACTED] cluster program additionally teaches replacement skills and works on shaping and reinforcing positive behavior.

Ultimately, the [REDACTED] cluster program is designed to stabilize the student's behavior and mainstream the student back into the general education environment.

62. While [REDACTED]. [REDACTED] testified that various placement options were discussed during the March 2016 IEP meeting, neither an [REDACTED] cluster nor [REDACTED] room setting was proffered, and "push in" and "pull out" services were not discussed. Petitioner's parents' testimony concerning their preference for educational placement was disjointed. Petitioner's father testified that an [REDACTED] cluster placement was not desired and that Respondent's [REDACTED] cluster programs are for [REDACTED] eligible students that are non-verbal. [REDACTED] further testified that, in mid-March 2016, no public school in [REDACTED] County would be sufficient unless [REDACTED] "knew the Principal personally or something." Petitioner's mother testified that they would like to have considered other options such as a [REDACTED] room or possibly push-in or push-out services. Petitioner's mother further candidly testified that, "I mean, I think what we really wanted probably didn't exist." [REDACTED] expounded on that statement by adding, "[b]ecause [REDACTED] not fitting into an [REDACTED] cluster, an [REDACTED] cluster and [REDACTED] having a lot of problems in the gen. ed. setting right now."

63. Petitioner also objected to the March 2016 IEP, on the grounds that the same failed to provide for direct [REDACTED] [REDACTED] and direct [REDACTED]. Respondent's Notice of

Proposal/Refusal dated March 14, 2016, provides that the same were refused for the following reasons:

1). The IEP team developed goals to address the communication needs for [Petitioner] that can be addressed through social skills instruction, counseling and collaboration in Communication.

2). Based on evaluation data and observations by the school and district staff, [Petitioner] does not exhibit sensory needs that can not [sic] be met through the supplemental aids as outlined on the current IEP finalized March 14, 2016.

64. The March 2016 IEP was never implemented as Petitioner has not returned to public school in ██████████ County, Florida. Petitioner's due process complaint (DOAH Case No. 16-1697E) was initiated on March 24, 2016.

65. On July 7, 2016, Judge Varn issued the Final Order in Case No. 16-0257E. Judge Varn concluded that Respondent had proven that its comprehensive ██████████ evaluation completed by ██████. ██████████ fully complied with Florida Administrative Code Rule 6A-6.0331(5). The Final Order further concluded that Petitioner was entitled to an independent psychological evaluation at public expense, as Respondent had failed to timely grant Petitioner's May 2015 request for an IEE (concerning a report authored by ██████████ on December 5, 2014) or initiate a due process hearing request to defend the prior evaluation. The Final Order expressly made no findings of

fact as to whether the contents of the psychological evaluations conducted by ■. ■■■■■, or subsequently, by ■. ■■■■■, were appropriate.

66. On July 19, 2016, Petitioner's parents provided Respondent with a ■■■■■ evaluation completed by ■■■■■, Ph.D., and ■■■■■, Ph.D. The parties agreed that the "■■■■■ report," which was authored prior to Judge Varn's Order in DOAH Case No. 16-0257E, would be utilized as the required IEE, in lieu of conducting a new evaluation.

67. Of importance to the issues in this matter, ■. ■■■■■ report made the following recommendations for Petitioner's schooling:

A. It is strongly recommended that [Petitioner's] teachers be made aware of [■■■■] diagnosis and learn signs for decompensation, such as disorganization, increased withdrawal, fearfulness of others, problems with clear communication, etc.

B. It is suggested that [Petitioner] be provided with a "safe room" where ■■■ can go when ■■■ feels agitated. If ■■■ uses the safe room (often a counselor's office, special education classroom, or study hall), it should only be for a period of time that allows ■■■ to de-escalate and feel safe.

C. The ideal classroom placement appears to be a structured classroom with a small student to teacher ratio where ■■■ could receive individual attention and specialized instruction. ■■■ will most likely benefit from structure and support and consistent feedback. It is strongly recommended that

[Petitioner] not be placed in an [REDACTED] cluster; as [REDACTED] behavior will very likely decompensate.

D. [Petitioner] is very slow processing information. When [REDACTED] comes back to school, [REDACTED] will need 50% to 100% extra time during tests and accommodations regarding school work and homework.

68. An IEP meeting was scheduled for August 31, 2016. On August 30, 2016, Respondent issued a Notice of Proposal, wherein Respondent proposed the following actions: (1) to have Respondent's professionals confer with [REDACTED]. [REDACTED] and review the protocols [REDACTED] utilized in the report; (2) obtain consent to evaluate Petitioner regarding social interaction, social communication skills, and restricted or repetitive patterns of behavior interests, or activities across settings; and (3) to obtain an updated Medical Evaluation Form for [REDACTED] for Petitioner.

69. Although the parties differ as to the issue of consent to speak with [REDACTED]. [REDACTED], it is undisputed that Respondent did not confer with [REDACTED]. [REDACTED] about the report, and [REDACTED] did not attend the August 31, 2016, IEP meeting. [REDACTED]. [REDACTED] did not testify at the final hearing.

70. The IEP meeting proceeded, as scheduled. All team members were provided a meaningful opportunity to participate in the IEP development process. Respondent considered the results of the [REDACTED] report in the IEP process. Ultimately, Petitioner's

placement remained the same as in the March 2016 IEP. Respondent also continued to decline to provide Petitioner direct [REDACTED] and [REDACTED] therapy.

71. Petitioner's third request for a due process hearing (DOAH Case No. 16-5488E) followed on September 20, 2016.

72. After Petitioner's parents removed [REDACTED] from School A, in approximately the beginning of April 2016, Petitioner was enrolled at the [REDACTED] School in [REDACTED], Florida.^{9/} Petitioner's father testified that Petitioner's class consisted of approximately 13 students and two adults. [REDACTED] was not certain if both of the adults were teachers and was unaware of the adults' training. [REDACTED] believed that the classroom setting was a [REDACTED] classroom. [REDACTED] was unaware of whether Petitioner's fellow classmates were [REDACTED] or any particular disability.

73. At the time Petitioner's father testified at final hearing, Petitioner was not required to perform school work at [REDACTED] and, for the first six weeks of school, was not required to engage in any homework, but merely to get settled into the environment. [REDACTED] opined that [REDACTED] did not believe [REDACTED] was doing anything a public school could not.

74. Petitioner's mother further testified that Petitioner did not receive any therapies while enrolled at [REDACTED]. Petitioner's mother was also unaware of the specialized training of the [REDACTED]

staff working with Petitioner. While [REDACTED] opined that [REDACTED] provided Petitioner with some educational benefit and addressed [REDACTED] academic deficits and [REDACTED] needs, no specific information was proffered concerning [REDACTED] educational programming at [REDACTED].

75. On or about January 23, 2017, Petitioner was enrolled at The [REDACTED] Institute. At the time Petitioner's mother testified at final hearing, Petitioner had only been enrolled at this school for a few days. Petitioner's mother believed that Petitioner's class was comprised of approximately five students. [REDACTED] was uncertain as to the teacher's name, [REDACTED]/[REDACTED] certifications, how many teachers interact with Petitioner, and the eligibility makeup of [REDACTED] classmates. [REDACTED] believed [REDACTED] was receiving an academic benefit. [REDACTED] further testified that this school was addressing [REDACTED] assistive technology needs and that the school has a sensory room with a Wii, bean bags, and a therapy dog. No additional evidence was presented concerning Petitioner's educational programming at The [REDACTED] Institute.

CONCLUSIONS OF LAW

IDEA Claims

76. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 1003.57(1)(b) and 1003.5715(5), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

77. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

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

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

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

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

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

20 U.S.C. § 1401(9).

81. "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).

82. 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. "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

83. The IDEA further provides that, in developing each child's IEP, the IEP team must, "[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (emphasis added).

84. In Rowley, 458 U.S. 176 (1982), the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Rowley, 458 U.S. at 206-207. A procedural error does not automatically result in a denial of FAPE. See G.C. v. Muscogee

Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. Winkelman v. Parma City Sch. Dist., 550 U.S. 5-16, 525-26 (2007).

85. Petitioner's consolidated complaints set forth a multitude of procedural violations. Petitioner's proposed final order, however, is construed by the undersigned as significantly reducing those allegations to the following: (1) Respondent's BIC improperly met and determined a change in Petitioner's placement outside the procedural protections of the IDEA; (2) Respondent's determination of Petitioner's placement in the March and August 2016 IEPs, was the product of impermissible predetermination; (3) the March 1, 2016, BIP meeting was improperly held without the participation of Petitioner's parents and counsel; (4) Respondent failed to provide Petitioner with requested educational records of Petitioner such that they could not meaningfully participate in the IEP process; and (5) Respondent failed to reasonably conduct the IEP process and those evaluations necessary to determine Petitioner's necessary supports and services to meet ■■■ individual needs in a timely fashion. Those allegations are addressed seriatim.

86. Petitioner's contention that the BIC improperly determined the educational placement of Petitioner without parental input is well-founded. Pursuant to rule 6A-6.03028(3)(i)4., in determining the educational placement of a student with a disability, each school district must ensure that, inter alia, the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. Here, the evidence clearly established that the BIC meeting, and its ultimate placement decision of School B (both of which were conducted outside of the IEP process) for Petitioner, was intentionally conducted without parental participation. This procedural violation rises to the level of a FAPE denial in that Respondent's conduct in this regard significantly infringed Petitioner's parents' opportunity to participate in the decision-making process.

87. Petitioner's allegation that the IEPs developed in March and August 2016 were the result of predetermination is not supported by the record. Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. See R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1188 (11th Cir. 2014)(explaining that "[p]redetermination occurs when the state

makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team."); H.B. v. Las Virgenes Unified Sch. Dist., 239 F. App'x 342, 344 (9th Cir. 2007)(explaining that in finding predetermination, a trier of fact must include findings as to the school district's predetermined plan and make findings as to the school district's unwillingness to consider other options); W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont., 960 F.2d 1479, 1483 (9th Cir. 1992)(finding that the school district independently developed a proposed IEP that would place the student in a predetermined program, where at the IEP meeting, no alternatives were considered).

88. Here, the record demonstrates that over the multiple IEP team meetings, including the IEP meetings of March 1, 2016, and August 31, 2016, Petitioner's parents, counsel, and (at times) advocate were engaged in spirited discussions with the school-based members of the IEP team on multiple topics, including the topic of placement. Although Respondent did not concur with Petitioner's suggested alternative placements, the record does not support that Respondent was unwilling to consider Petitioner's perspective, or that Respondent approached the IEP meetings with a closed mind, having already decided Petitioner's education programming.

89. Petitioner's claim that Respondent committed a FAPE denial by its procedural violation in conducting the BIP meeting on March 1, 2016, without parental attendance is not supported by the evidence. Even assuming, arguendo, that Respondent must take steps to ensure that one or both of Petitioner's parents are present at a meeting concerning amendments to a student's BIP, (as is required pursuant to 34 C.F.R. § 300.322 for an IEP team meeting), Petitioner failed to demonstrate that the parents' absence that day impeded the child's right to a FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. The evidence established that Petitioner's parents communicated their disagreement with the proposed changes to the BIP. Moreover, it is undisputed that Petitioner ceased attending School A within three days of the BIP amendments.

90. Petitioner's procedural claim related to educational records is not supported by the evidence. The IDEA's implementing regulations provide that school districts "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by [the school district]." 34 C.F.R. § 300.613(a). This opportunity applies to records concerning the identification, evaluation, and educational placement of the child; and the

provision of FAPE to the child. 34 C.F.R. § 300.501(a).

Section 300.613(b) provides that the right to inspect and review education records includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

34 C.F.R. § 300.613(b)(1)-(3).

91. The school district must comply with a request "without unnecessary delay" and before any meeting regarding an IEP, any due process hearing, or resolution session, and in no case more than 45 days after the request has been made. 34 C.F.R.

§ 300.613(a). Florida Administrative Code Rule 6A-1.0955(6)(b), entitled "Education Records," provides that a school district shall comply with a request within a reasonable period of time, but in no case more than 30 days after it has been made.

92. Petitioner's Proposed Final Order generically asserts that records were not produced prior to IEP and BIP meetings, and instead, were produced the day of the meeting. Petitioner asserts that this process resulted in delaying the progress of

meetings and resulted in Petitioner being ambushed. The lack of specificity of the evidence presented on this topic, and the failure in Petitioner's Proposed Final Order to cite to the record of any specific records requested and refused or untimely provided, precludes the undersigned from finding a procedural violation against Respondent on the issue of educational records.

93. Finally Petitioner contends that Respondent's failure to conduct an eligibility meeting and delays in conducting the FBA, BIP, [REDACTED], [REDACTED] therapy, and [REDACTED] evaluation result in a denial of FAPE. Judge Varn's Final Order in DOAH Case No. 15-2841E, issued on September 17, 2015, specifically required Respondent to conduct all evaluations necessary for an [REDACTED]/[REDACTED] eligibility determination prior to conducting an IEP meeting. The undersigned concludes that the FBA, BIP, [REDACTED] therapy, [REDACTED] therapy, and [REDACTED] evaluation were conducted in a reasonable time period, and do not constitute a procedure violation.

94. It is undisputed that Respondent never conducted an eligibility determination during the 2015-2016 school year, and had still not completed such a determination by August 31, 2016. Notwithstanding the procedural nuances of this matter, Respondent's failure cannot be excused.

95. Notwithstanding, Petitioner has failed to demonstrate how this failure resulted in a denial of FAPE, significantly

infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. A review of the March 14 and August 31, 2016, IEPs reveal that Petitioner's documented eligibility category for both IEPs is [REDACTED]. Thus, [REDACTED] documented eligibility category on the subject IEPs is exactly that of which Petitioner has steadfastly maintained, [REDACTED].

96. Pursuant to the second step of the Rowley test, it must be determined if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive "educational benefits." 458 U.S. at 206-07 (1982). The Eleventh Circuit Court of Appeals has clarified that the IDEA does not require the local school system to maximize a child's potential; rather, the educational services need provide "only a 'basic floor of opportunity,' i.e., education which confers some benefit." Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991); C.P. v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1153 (11th Cir. 2007)("This standard, that the local school system must provide the child 'some educational benefit,' has become known as the Rowley 'basic floor of opportunity standard.'")(internal citations omitted); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001)("[A] student is only entitled to some educational benefit; the benefit need not be maximized to be adequate."); see also Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1313

(10th Cir. 2008)("[W]e apply the 'some benefit' standard the Supreme Court adopted in Rowley.").^{10/}

97. 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. 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.").

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); 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). Third, great deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See A.K. v. Gwinnett Cnty. v. Sch. Dist., 556 F. App'x 790, 792 (11th Cir. 2014)("In determining whether the IEP is substantively adequate, we 'pay great deference to the educators who develop the IEP.'")(quoting Todd D. v. Andrews, 933

F.2d 1576, 1581 (11th Cir. 1991)). As noted in Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1048 (5th Cir. 1989), "[the undersigned's] task is not to second guess state and local policy decisions; rather, it is the narrow one of determining whether state and local officials have complied with the Act."

98. As found above, Petitioner's March and August 2016 IEPs provide that Petitioner be placed in a separate ESE classroom for the majority of the day. Specifically, beginning on March 29, 2016, the IEP proposed that Petitioner would be with nondisabled peers [REDACTED] percent of the day and removed from nondisabled peers for [REDACTED] percent of the day. The separate ESE classroom placement that was offered by Respondent was an [REDACTED] cluster classroom.

99. Petitioner contends the March and August 2016 IEPs are inappropriate in that Respondent failed to make a placement recommendation in the least restrictive environment (LRE). In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on students' placements or education environment in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A) provides as follows:

Least restrictive environment.

(A) In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled,

and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

100. Pursuant to the IDEA's implementing regulations, states must have in effect policies and procedures to ensure that public agencies in the state meet the LRE requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the above-referenced mandates concerning the LRE and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) & 6A-6.0311(1).

101. In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1). Additionally, the child's placement must be determined at least annually, based on the child's IEP,

and as close as possible to the child's home. 34 C.F.R.
§ 300.116(b).

102. With the LRE directive, "Congress created a statutory preference for educating handicapped children with nonhandicapped children." Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act, School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to [REDACTED] special needs." Daniel, 874 F.2d at 1036, 1044.

103. In Daniel, the Fifth Circuit set forth a two-part test for determining compliance with the mainstreaming requirement:

First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. See § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Daniel, 874 F.2d at 1048.

104. In Greer, infra, the Eleventh Circuit adopted the Daniel two-part inquiry. In determining the first step, whether a school district can satisfactorily educate a student in the regular classroom,^{11/} several factors are to be considered: (1) a

comparison of the educational benefits the student would receive in a regular classroom, supplemented by aids and services, with the benefits ■ will receive in a self-contained special education environment; (2) what effect the presence of the student in a regular classroom would have on the education of other students in that classroom; and (3) the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the student in a regular classroom. Greer, 950 F.2d at 697.

105. The undersigned concludes that applying the above factors to the facts of this matter, Petitioner cannot, at this time, be satisfactorily educated in a regular classroom, with the use of aides and supplemental services. The evidence established that in the regular education setting, Petitioner had a general education teacher with 18 students, and required the utilization of a behavior technician, who was assigned solely to work in close proximity with Petitioner. While Petitioner may certainly benefit from the presence of nondisabled peers, those benefits are offset by ■ significant behavioral needs. The evidence presented established that Petitioner would certainly benefit from a smaller teacher-to-student ratio, a greater structured environment, and an ESE-certified teacher.

106. The effect of Petitioner's presence in a regular classroom on the education of other students in that classroom

does not weigh in favor of a general classroom placement. Due to Petitioner's repeated behavioral outbursts, his entire classroom was required to be repeatedly removed from their setting and displaced throughout the school. Moreover, Petitioner's repeated utilization of racial slurs directed to and in earshot of [REDACTED] elementary classmates is unquestionably harmful to those children's learning environment. While this would appear to be unassailable, Petitioner argues that "room clears should not have been done because [Petitioner] said the "N" word" and that "[c]urse words are not dangerous, words alone are not dangerous and yet the school implemented room clears, removals, restraints, seclusions and suspensions." The undersigned strongly disagrees. The repeated use of racial slurs against students and staff certainly exposes such students and staff to disparagement and provides an environment that is harmful to those students' learning, mental health, and may expose both those students and Petitioner to physical injury.

107. Concerning the third factor in determining whether the student can be educated in the regular class setting, no evidence was presented by either party regarding cost analysis.

108. Having concluded step one in the negative, the instant proceeding turns on the second part of the test: whether Petitioner has been mainstreamed to the maximum extent

appropriate. In determining this issue, the Daniel court provided the following general guidance:

The [IDEA] and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation under the [IDEA].

Daniel, 874 F.2d at 1050 (internal citations omitted).

109. The evidence establishes that, at all times relevant to this proceeding, Respondent attempted to mainstream Petitioner, in the general education setting, to the maximum extent appropriate. Respondent dedicated significant resources, time, and staff to developing a [REDACTED] and a comprehensive [REDACTED]; assigned behavior technicians; modified [REDACTED] [REDACTED]; and attempted new strategies and interventions, with the goal of success in this setting, without success.

110. The March and August 2016 IEPs propose a change of Petitioner's placement to a more restrictive setting on the

continuum of possible placements. While it is undisputed that the proposed placement offers less potential for interaction with nondisabled peers, from the evidence presented, Petitioner's behaviors, at this time, warrant such a result. The proposed separate class placement, in an [REDACTED] cluster classroom, is also the same level of restrictiveness as that proposed by Petitioner in an [REDACTED] cluster classroom placement. The undersigned concludes that Respondent's proposed placement of Petitioner in a separate class mainstreams Petitioner to the maximum extent appropriate. Accordingly, the proposed placement is approved.

111. Next, Petitioner contends that occupational therapy and language therapy were never provided. The undersigned construes this argument as contending the IEPs at issue are deficient for the failure to so provide. The evaluations and testimony of Respondent's witness demonstrated that Petitioner did not require direct occupational therapy or language therapy. Petitioner failed to produce sufficient evidence to meet [REDACTED] burden concerning this allegation.

112. Petitioner further contends that Respondent failed to implement the BIP. In determining whether the failure to comply with the terms of the IEP constitutes a denial of FAPE, two primary standards have been articulated. In Houston Independent School District v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000), the following standard was set forth:

[A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failure and for providing the disabled child a meaningful educational benefit.

Utilizing the foregoing standard, which requires proof of "substantial or significant" implementation failures, the court in Bobby R. held that the school district's failure to provide speech services for four months—among other implementation deficiencies—did not constitute a denial of FAPE. 200 F.3d at 348-49.

113. A competing standard was set forth in Van Duyn v. Baker School District 5J, 502 F.3d 811, 822 (9th Cir. 2007). In Van Duyn, the Ninth Circuit articulated a standard that, similar to Bobby R., 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. However, in contrast to Bobby R., the court in Van Duyn held that its materiality standard "does not require that the child suffer demonstrable educational harm in order to prevail." Id. at 822 (emphasis added). Thus, under the Van Duyn standard, a material failure to

implement an IEP could constitute a FAPE denial even if, despite the failure, the child received non-trivial educational benefits.

114. The undersigned concludes that, pursuant to either of the above-articulated standards, Petitioner failed to establish that Respondent substantially, significantly, or materially failed to implement the comprehensive BIP. While some evidence was presented that Respondent, on several occasions, removed Petitioner from the classroom during behavioral incidents, in contravention of the BIP's directive to evacuate the entire classroom during Petitioner's behavioral outbursts, the undersigned concludes Petitioner did not meet [REDACTED] burden.

115. Contrary to the argument that removing Petitioner from the classroom was inappropriate, Petitioner's Proposed Final Order cites [REDACTED]. [REDACTED] [REDACTED], a BCBA, for the proposition that clearing the room of all other students could have a detrimental effect on Petitioner's behaviors. Indeed, [REDACTED]. [REDACTED] credibly testified that "I believe a room clear would actually be worse in some instances, and one of the reasons is it affords [REDACTED] a tremendous amount of control. So [REDACTED] can, at will, disrupt the entire classroom any time [REDACTED] wants." Indeed, the undersigned concludes that those school staff attempting to implement an elaborate BIP addressing multiple, and at times functionally conflicting, targeted behaviors must be afforded some level of discretion in its application.

116. Petitioner appears to contend that the utilization of PCM strategies (restraint) and the utilization of a portable classroom during Petitioner's behavioral incidents were inappropriate approaches utilized by Respondent in fulfilling their mandate to consider the use of positive behavior interventions and supports, when drafting the IEP and BIP. State law and regulations generally determine the legality of using aversives, such as restraint and seclusion. In Florida, the use of restraint and seclusion on students with disabilities is addressed in section 1003.573, Florida Statutes. This section provides, in pertinent part as follows:

(4) PROHIBITED RESTRAINT.--School personnel may not use a mechanical restraint or a manual or physical restraint that restricts a student's breathing.

(5) SECLUSION.--School personnel may not close, lock, or physically block a student in a room that is unlit and does not meet the rules of the State Fire Marshal for seclusion time-out rooms.

117. Section 1003.573 does not define the term restraint. The U.S. Department of Education, however, has provided the following definition of physical and mechanical restraint:

[A physical restraint is defined as a] personal restriction that immobilizes or reduces the ability of a student to move or torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose

of inducing a student who is acting out to walk to a safe location.

[A mechanical restraint is defined as] the use of any device or equipment to restrict a student's freedom of movement. This term does not include devices implement by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed.

Restraint and Seclusion: Resource Document (U.S. Dept. of Ed. 2012).

118. It is undisputed that, at various times throughout the 2015-2016 school year, Petitioner was restrained and at times taken to a portable classroom. Petitioner failed to present any evidence, however, that Petitioner's utilization of restraint or placing Petitioner in a portable classroom was violative of section 1003.573(4) and (5). Accordingly, such claims are dismissed.

119. Finally, Petitioner argues that the discipline administered to Petitioner was inappropriate and overused. In essence, Petitioner argues that Petitioner should not be disciplined for behaviors that are known, identified, and being addressed through a behavior plan. While Respondent is not precluded from disciplining an ESE student for known targeted behaviors, there are different limitations and requirements that apply to disciplinary actions taken against students with

disabilities than apply to actions taken against nondisabled students. See 34 C.F.R. § 300.530; Fla. Admin. Code R. 6A-6.03312. Petitioner failed to present sufficient evidence to establish Respondent violated the procedural safeguards set forth for discipline of students with disabilities.

Section 504 Claims

120. Section 504's statutory text, succinctly provides, in pertinent part, as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 7(20) 29 USCS § 705(20), shall, solely by reason of [REDACTED] or [REDACTED] 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

29 U.S.C. § 794(a).

121. In contrast to the IDEA, Section 504's text does not create a number of different procedures that a school district must follow to comply with the statute. The U.S. Department of Education, however, has promulgated regulations under Section 504 addressing, inter alia, identification, evaluation, and educational placement of disabled preschool, elementary,

secondary, and adult education students. See 34 C.F.R. § 104.32-35.

122. Pursuant to Section 504's implementing regulations, participating school districts are required to establish procedural safeguards with respect to actions regarding the "identification, evaluation, or educational placement" of students with disabilities who "need or are believed to need special instruction or related services." 34 C.F.R. § 104.36. The procedural safeguards must include "notice, an opportunity for the parents or guardian of the [student] to examine relevant records, an impartial hearing with opportunity for participation by the [student's] parents or guardian and representation by counsel, and a review procedure." 34 C.F.R. § 104.36. An "impartial hearing" as contemplated in § 104.36 may not be conducted by an employee of the subject school district or a school board member. See, e.g., Leon Cnty. (FL) Sch. Dist., 50 IDELR 172 (OCR 2007).

123. In addition to the impartial hearing right with respect to identification, evaluation, or educational placement, an individual may file a complaint with the U.S. Department of Education Office for Civil Rights (OCR) alleging discrimination based on disability or retaliation. See 34 C.F.R. § 104.61; OCR Case Processing Manual (revised Feb. 2015). Moreover, under 34 C.F.R. § 104.7, any school district that employs 15 or more

persons must designate an individual responsible for coordinating its compliance efforts and to "adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part." Thus, any person who believes ■■■ or ■■■ has been subjected to discrimination on the basis of disability may file a grievance with the school district under this procedure.^{12/}

124. With respect to IDEA claims, sections 1003.571 and 1003.57 provide this tribunal with jurisdiction over the subject matter and the parties, and rule 6A-6.03311 sets forth how an IDEA due process hearing shall be conducted and the scope of the ALJ's hearing decisions. By contrast, with respect to Section 504, Florida does not have a statute adopting or mandating compliance with Section 504. Concomitantly, the Florida Department of Education has not promulgated any regulations addressing compliance with Section 504, how an impartial Section 504 hearing should be conducted, or the scope of the decision to be determined.

125. Pursuant to section 120.65(6), Florida Statutes, however, DOAH "is authorized to provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by [section 120]." Thus, if such a contract exists, DOAH may assign an ALJ to preside over an impartial

hearing regarding Section 504 claims concerning the student's "identification, evaluation, or educational placement."

126. As a contracted ALJ (for purposes of Petitioner's Section 504 claims), on April 5, 2016, the undersigned issued an Order requiring Respondent to advise the undersigned as to the procedures to be utilized in conducting the impartial hearing. In response, Respondent requested that the impartial hearing regarding Petitioner's Section 504 claims be conducted contemporaneously with the IDEA due process hearing and to utilize the procedures set forth in rule 6A-6.03311.

127. Rule 6A-6.03311(9)(v)4. sets forth the scope of the ALJ's hearing decision as follows:

An ALJ's determination of whether a student received FAPE must be based on substantive grounds. In matters alleging a procedural violation, an ALJ may find that a student did not receive FAPE only if 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. This shall not be construed to preclude an ALJ from ordering a school district to comply with the procedural safeguards set forth in Rules 6A-6.03011-.0361, F.A.C.

128. If a student with a disability qualifies for services under the IDEA, as Petitioner here does, Respondent can satisfy Section 504's standard of FAPE by developing and implementing an appropriate IEP. See 34 C.F.R. § 104.33(b)(2). Petitioner's

Proposed Final Order contends that Respondent violated Section 504's FAPE requirements with respect to the use of restraint and seclusion. The undersigned concludes that Petitioner failed to satisfy [REDACTED] burden regarding said claims based on the facts and analysis of those claims as set forth in the preceding IDEA claims section of this Order.

129. Petitioner's Proposed Final Order further contends Respondent engaged in acts of: deliberate indifference, harassment and discrimination, retaliation and discrimination, and created a hostile environment at School A. While the undersigned's authority to make a determination concerning Petitioner's "non-FAPE" claims is dubious, the exercise will be undertaken for the purposes of administrative exhaustion.

130. A parent has a private right of action to sue a school system for violation of Section 504. Ms. H v. Montgomery Cnty. Bd. of Educ., 784 F. Supp. 2d 1247, 1261 (M.D. Ala. 2011). To prevail on a Section 504 claim, a plaintiff must show "(1) the plaintiff is an individual with a disability under the Rehabilitation Act; (2) the plaintiff is otherwise qualified for participation in the program; (3) the plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reasons of [REDACTED] or [REDACTED] disability; and (4) the relevant program or activity is receiving federal financial assistance." L.M.P. ex

rel. E.P. v. Sch. Bd. of Broward Cnty., Fla., 516 F. Supp. 2d
1294, 1301 (S.D. Fla. 2007). As the Middle District of Alabama
has explained:

To prove discrimination in the education context, courts have held that something more than a simple failure to provide a FAPE under the IDEA must be show. A plaintiff must also demonstrate some bad faith or gross misjudgment by the school or that he was discriminated against solely because of [REDACTED] disability. A plaintiff must prove that [REDACTED] or [REDACTED] has either been subjected to discrimination or excluded from a program or denied benefits by reason of their disability. A school does not violate § 504 by merely failing to provide a FAPE, by providing an incorrect evaluation, by providing a substantially faulty individualized education plan, or merely because the court would have evaluated a child differently. The deliberate indifference standard is a very high standard to meet.

J.S. v. Houston Cnty. Bd. of Educ., 120 F. Supp. 3d 1287, 1295
(M.D. Ala. 2015)(internal citations omitted).

131. The Eleventh Circuit has defined deliberate indifference in the Section 504 context as occurring when "the defendant knew that harm to a federal protected right was substantially likely and failed to act on that likelihood."
Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 344 (11th Cir. 2012)). This standard "plainly requires more than gross negligence," and "requires that the indifference be a deliberate

choice, which is an exacting standard." Id. (internal and external citations omitted).

132. Here, Petitioner's best evidence of deliberate indifference concerns the BIC. ██████████ ██████████ testified that ██████████ was concerned about the impact Petitioner was having on students in ██████████ classroom, other students on campus, ██████████ teachers and the school as a whole. Ostensibly as a result of the same, on January 29, 2016, Principal ██████████ issued correspondence to the BIC, requesting consideration of the Behavior Intervention Program for Petitioner. After setting forth the rationale for the request, Principal ██████████ noted that, "[d]ue to [██████████] continuous disciplinary infractions and behavioral difficulties a more structured learning environment with a behavioral modification program may be beneficial to [Petitioner]."

133. The following facts are undisputed: at the time Principal ██████████ submitted the request, Petitioner was an ESE student with an IEP; parental input was not sought prior to submitting the request and attached information; a meeting of Petitioner's IEP was not convened prior to this proposed development; and Petitioner's parents were not permitted to participate in the BIC meeting.

134. On February 2, 2016, ██████████ ██████████, Respondent's ESE director, authored a memorandum wherein ██████████ set forth ██████████ "support [to] the school's request for the student to be

considered for a Behavior Intervention Program." [REDACTED]. [REDACTED] conceded that the BIC operates outside of the IEP process. Felica Starke, Respondent's due process coordinator, who was extremely knowledgeable of Petitioner's ESE status and educational history, and has been involved in all of the due process hearings referenced in this Order, opined that [REDACTED] was in disagreement with the decision to utilize the BIC process to change Petitioner's placement from School A to School B.

135. The undersigned concludes that Respondent knew Petitioner, as an ESE student, possessed the procedural right to have any consideration of a change placement (outside of the disciplinary context) proceed through an IEP team meeting. It is further concluded that Respondent deliberately conducted the BIC and determined that Petitioner would be removed from School A and attend School B armed with that knowledge. The final piece that must be considered is whether Respondent deliberately modified Petitioner's placement.

136. Respondent maintained at the time, and continued to maintain until the undersigned's February 22, 2016, Order on Motion to Determine Stay Put Placement, that the change from School A to School B was merely a change in the location of services and not a proposed change in educational placement. While ultimately the undersigned concluded that the change was, in fact, a change in placement, Respondent's representations and

legal arguments were not frivolous or without any legal underpinning. Accordingly, the undersigned cannot conclude that Respondent's acted with deliberate indifference in utilizing the BIC to change Petitioner's placement from School A to School B.

137. The balance of Petitioner's "non-FAPE" claims are not supported by the evidence, and, therefore, are denied.

CONCLUSION

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

Respondent's improper utilization of the Behavioral Intervention Committee to determine Petitioner's placement in School B resulted in a substantive violation of Petitioner's rights under the IDEA, as the same significantly infringed Petitioner's parents' opportunity to participate in the decision-making process.

The balance of Petitioner's IDEA claims and Section 504 claims fail as a matter of fact or law, and are therefore dismissed.

DONE AND ORDERED this 17th day of August, 2017, in
Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
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Filed with the Clerk of the
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this 17th day of August, 2017.

ENDNOTES

^{1/} An [REDACTED] therapy evaluation was conducted by [REDACTED] on September 3 and 4, 2015, and October 13, 2015. A [REDACTED] evaluation was conducted by [REDACTED] on October 1, 2015.

^{2/} Judge Varn's Order did not address whether [REDACTED] was the appropriate eligibility for Petitioner or whether the proposed placement of [REDACTED] cluster was the least restrictive environment.

^{3/} Although [REDACTED]. [REDACTED] opined that Petitioner did not need communication goals, they were ultimately included in a future IEP, March 2016, as Goals 8 through 10, at the request of the parents.

^{4/} Petitioner has not alleged in any of the instant consolidated due process complaints, that the BIP, as originally drafted, was improperly designed to address Petitioner's behavioral concerns.

^{5/} Noncompliance being defined as "refusal to follow directions within 5 seconds by not beginning the task, arguing, 'you can't make me,' waving hand back and forth 'no,' 'I don't want to,' [or] turning away."

6/ Petitioner contends the meeting was unilaterally cancelled by Respondent, and Respondent contends the meeting was cancelled by agreement of the parties to allow time for the new BIP to be implemented. Thereafter, a meeting was scheduled for December 15, 2015; however, the same was cancelled by Respondent. Respondent proposed the next meeting to occur on January 7, 2016; however, Petitioner was then unavailable.

7/ It is unclear from the record if the restraint occurred concurrent with the above-described room clear.

8/ While both the [REDACTED] and [REDACTED] cluster classrooms constitute separate class placements, the undersigned has been unable to find in the voluminous record, for the purposes of comparison, a clear description of the [REDACTED] cluster classroom. The parties' respective proposed final orders also fail to set forth an accurate description of the [REDACTED] cluster.

9/ From a one-page printout of the [REDACTED] website that was admitted, the document provides that [REDACTED] is fully accredited by the Southern Association of Colleges and Schools.

10/ On March 22, 2017 (after the instant due process complaints were filed), the United States Supreme Court readdressed this prong, finding that a school board must offer an IEP that is reasonably calculated to enable a student to make progress in light of the student's circumstances. Endrew F. v Douglas Cnty. Sch. Bd., 137 S. Ct. 988, 991 (2017). Given that this is a substantive change to the legal standard, it is not applicable to the instant case. Assuming, arguendo, that it is applicable, application of the Endrew standard would not alter the outcome in this matter.

11/ A "regular class" instructional setting is defined as a class in which a student spends 80 percent or more of the school week with nondisabled peers. § 1003.57(1)(a),(c), Fla. Stat.

12/ It appears that Petitioner filed such a grievance with its correspondence directed to Respondent's superintendent dated January 30, 2016, and entitled: Legal Notice of Civil Rights Violations and Intentional Torts. Said correspondence alleges that Respondent committed various violations of the IDEA, the ADA, Section 504, and the Florida Civil Rights Act.

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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).