STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 18-2378E

ALACHUA COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), on [redacted] and [redacted]; [redacted]; and [redacted], in Gainesville, Florida.

APPEARANCES

For Petitioner: Petitioner, pro se
(Address of Record)

For Respondent: [redacted], Esquire
Resolutions in Special Education, Inc.
10661 Airport Pulling Road, Suite 13
Naples, Florida 34109

[redacted], Esquire
School Board of Alachua County
620 East University Avenue
Gainesville, Florida 32601

STATEMENT OF THE ISSUES

Whether, as alleged in Petitioner's Complaint, Respondent violated the Individuals with Disabilities Education Act (IDEA),

20 U.S.C. § 1400, et seq., in failing to provide appropriate communication aids and services; failing to evaluate Petitioner to determine [redacted] present levels of performance; disciplining Petitioner for conduct that was a manifestation of Petitioner's disability; changing [redacted] educational placement; and discontinuing or interrupting Petitioner's access to an on-line computer-based curriculum.

PRELIMINARY STATEMENT

Respondent received Petitioner's Request for Due Process Hearing (Complaint) on [redacted]. On [redacted], the Complaint was forwarded to DOAH and assigned to the undersigned for all further proceedings.

The final hearing was initially scheduled for [redacted]. On [redacted], during a pre-hearing telephonic conference, it was determined that Petitioner had failed to properly comply with the evidentiary disclosure requirements of Florida Administrative Code Rule 6A-6.03311(9)(v). Petitioner made an ore tenus motion to continue the final hearing. Over objection, the undersigned granted Petitioner's motion and the final hearing was continued.

Based upon the parties' availability, the final hearing was rescheduled to [redacted]. The final hearing was conducted, but was not concluded. Based upon the parties' availability, the conclusion of the final hearing was rescheduled for [redacted]. The final hearing proceeded as

scheduled, however, it was again not concluded. On this occasion, the final hearing was interrupted by Hurricane Michael, and, therefore, was adjourned after the first day of hearing. Thereafter, the conclusion of the final hearing was scheduled for [redacted] and [redacted].

The final hearing was conducted, as scheduled, and concluded on [redacted]. The final hearing Transcript was filed on [redacted]. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

Upon the conclusion of the final hearing, the parties stipulated that the proposed final orders would be filed on or before [redacted], and the final order would issue on or before [redacted]. Pursuant to the undersigned's [redacted], Order Granting Extension of Time, the timeline for filing proposed final orders was extended to [redacted]. Accordingly, the undersigned's timeline for issuing the final order was extended to [redacted]. The parties timely filed proposed final orders, which have been considered in 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 this 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. In the summer of [redacted], Petitioner's family moved from [redacted] to [redacted] County, Florida. At that time, Petitioner was [redacted] years old and had been previously identified as a student with a disability and in need of exceptional student education services (ESE) under the eligibility programs of [redacted] ([redacted]), [redacted] ([redacted]), with [redacted] ([redacted]) services as a related service.

2. Petitioner is essentially [redacted] in [redacted] communication. Based upon the record evidence, it appears that prior to [redacted] transfer to Florida, various forms of [redacted] had been attempted or suggested including, but not limited to, showing [redacted] a choice on paper (paper choice), the use of a letter board (a laminated piece of paper with letters), an iPad, and the [redacted] ([redacted]).

3. At the time of [redacted] transfer to Respondent's school district, Petitioner had an existing Individualized Education Plan (IEP) from [redacted]. [redacted] operative [redacted] IEP documented that [redacted] educational placement was that of an "[redacted]," at a private school for the disabled. In this setting, there were [redacted] students, [redacted] teacher, [redacted] assistants,

and a [redacted]. The record evidence documents that [redacted] physically attended the school daily, arriving at approximately [redacted] a.m., due to [redacted].

4. An IEP team meeting was conducted on [redacted], to review [redacted] out-of-state IEP, review documentation to determine [redacted] continuing ESE eligibility, and discuss the need for a reevaluation. At that time, the IEP team recommended adoption of the [redacted] IEP and conducting a reevaluation prior to drafting a new IEP.

5. The conference notes from the meeting reflect, in pertinent part, the following:

> Based on the placement in the [redacted] IEP, the placement here in [redacted] County is [School A]. [Petitioner's] [redacted] expressed [redacted] concerns about the evaluators being able to communicate with [Petitioner]. [redacted] uses [redacted] ([redacted]) to communicate with [Petitioner] at home. [redacted] is requesting that someone trained in [redacted] attend the evaluations. [redacted] also has concerns about [redacted] attending [School A] where the academic levels are lower than the level where [redacted] is functioning. [Petitioner's] [redacted] does not want [redacted] County to conduct a reevaluation at this time because [redacted] wants a trained [redacted] person in attendance for such evaluations who could effectively use [redacted] during the assessment.

6. Respondent's witnesses credibly testified that Respondent was ready, willing, and able to substantially implement that [redacted] IEP, as written, upon enrollment. At this initial meeting, however, due to Petitioner's [redacted] issues

discussed in greater detail below, Petitioner's [redacted] inquired as to the availability of [redacted] or [redacted] ([redacted]) services. Respondent advised Petitioner's [redacted] of the eligibility requirements of specially designed instruction for students who are [redacted], including the requirement of a certification from a physician licensed in Florida. Respondent provided the necessary certification form(s). As Petitioner's family had just relocated to Florida, Petitioner had yet to establish a relationship with a Florida physician.

7. The record reveals that Petitioner has been diagnosed with or treated for a host of medical issues including multiple [redacted], and [redacted]. As a result of one or more of these issues, Petitioner frequently experiences [redacted] or [redacted] to the level that it impedes [redacted] ability to stay on task, and various interventions are required to alleviate [redacted] symptoms.

8. On [redacted], [redacted], the IEP team met again for the purpose of amending the IEP, identifying transition services, and discussing necessary evaluations and/or reevaluations. During this meeting, the IEP team properly obtained input from Petitioner's [redacted] and reviewed the available documentation,

including prior assessments and reports, from Petitioner's tenure in [redacted].

9. Respondent maintained that the [redacted] class was the most appropriate educational placement for Petitioner; however, acquiescing to parental concerns, the IEP team proposed that Petitioner would receive [redacted] instruction for [redacted] minutes, [redacted] days per week, at Petitioner's home. The IEP documented that, "[d]uring the interim IEP, [Petitioner] will receive home instruction in the home until a reassessment of [redacted] needs and the most appropriate placement can be determined." Pursuant to the documentation, the duration of the interim placement was until [redacted].

10. At this meeting, Respondent sought approval to begin a reevaluation of Petitioner with updated assessments in the areas of "[redacted] screening/evaluation," and "[redacted] assessment." Respondent provided Petitioner's [redacted] with informed consent to conduct the same. Petitioner's [redacted] did not provide the requested consent on the grounds that Respondent did not have appropriate personnel who could communicate with Petitioner.

11. Petitioner's [redacted] requested that the proposed IEP specify that communication with Petitioner was to be done through the use of the [redacted]. On [redacted], Respondent issued a Notice of Refusal to Take a Specific Action,

wherein Respondent formally rejected Petitioner's request. Respondent documented that [redacted] had not been required on [redacted] most recent IEP, and that the proposed IEP included Petitioner's favored communication forms (paper choice and letter board) and that it was Respondent's goal to expand [redacted] use of keyboarding and other multi-modal communication devices.

12. Unfortunately, there is little evidence in the record defining, with any degree of specificity, [redacted]. For all that appears, [redacted] involves pointing to letters to form words on a letter board (and in some cases a typing device, as well as handwriting). [redacted], [redacted], [redacted], and [redacted] [redacted] are used to [redacted] [redacted]. [redacted] may involve a series of "teach-ask" trials of graduated difficulty, starting with the student being given or choosing a correct answer from [redacted] written options and progressing through to composing responses by pointing to printed letters on a card, stencil, or keyboard. It appears undisputed that [redacted] is heavily prompt dependent.

13. Respondent has been steadfast in its position that [redacted], exclusively, is not appropriate to further Petitioner's communication such that [redacted] can access [redacted] education and develop independence. Respondent presented the testimony of [redacted] [redacted], [redacted], [redacted]-[redacted], as an expert in educational programming and treatment of students with disabilities, including students diagnosed with [redacted]. [redacted] [redacted] is the executive director for [redacted]

[redacted] at the [redacted]. Inter alia, [redacted] was asked to opine on the utility of [redacted].

14. [redacted] opined that while there are multiple ways to [redacted] with [redacted] students, [redacted] is not supported by the scientific community. [redacted] opined that [redacted] is not considered a scientifically valid form of effective communication for students with [redacted]; it is prompt dependent; and, at this point in time, [redacted] is considered to be a pseudoscientific technique or junk science. [redacted] further opined that, as a board certified behavioral analyst, [redacted] is ethically prohibited from using [redacted] and facilitated communication training as it is not only unsupported by scientific literature, but there is scientific evidence finding that it does not work. One of the primary concerns of [redacted] is that because this methodology is so prompt dependent, it is "not the voice of the student."

15. Petitioner did not present competent evidence to refute [redacted] opinions, and the same are credited.

16. At the time of the [redacted], [redacted], IEP, Respondent attempted to determine Petitioner's present levels of performance. This task was complicated by incongruous documentation provided by [redacted] former school, private evaluations, and Petitioner's [redacted] input. For example, a private report from [redacted], [redacted], indicated Petitioner achieved above

chronological age performance on areas including [redacted], the ability to understand the [redacted], and efficiency in formulating [redacted] and [redacted] using [redacted] letter board. Another report from January [redacted] provided a much lower assessment: that [redacted] was able to read simple words and recognize sounds of some letters and that [redacted] could indicate the named parts of some objects, including "house," "shoe," and "boy."

17. Confronted with conflicting out-of-state assessments, the lack of documentation with respect to [redacted] prior curriculum performance, and Petitioner's [redacted] refusal to consent to the above-referenced assessments, Respondent proceeded to provide a curriculum utilizing the "[redacted]." In essence, the curriculum initially provided to Petitioner was not that of an incoming [redacted] grade student, but rather, a [redacted] school student.

18. Initially, Petitioner received [redacted] home instruction from [redacted], who has [redacted] years of experience in ESE. [redacted] provided the Student with a computer based curriculum [redacted] days per week in [redacted], [redacted] and [redacted]. In the fall of [redacted], the curriculum level taught was [redacted] school, which advanced to [redacted] grade academics in February [redacted]. [redacted] credibly opined that [redacted] was able to have Petitioner

participate and stay on task for increments of approximately [redacted] minutes.

19. Petitioner's [redacted] testified that [redacted], unknowledgeable about the letter board, could not communicate with Petitioner. [redacted], however, received training from a speech pathologist in utilizing the letter board, and credibly testified that [redacted] was able to communicate with Petitioner prior to receiving letter board training.

20. Apparently, in October [redacted], Petitioner's [redacted] submitted the requisite [redacted] medical certificate to Respondent. Thereafter, Respondent conducted an eligibility meeting and Petitioner was determined to be formally eligible for [redacted].

21. At Respondent's request for technical assistance, [redacted], Ph.D., who works with the [redacted] and [redacted] ([redacted]) at the University of Florida, conducted an observation of the home instruction on [redacted], [redacted]. [redacted] report sets forth no criticism of [redacted] instruction, technique or approach to communication. [redacted] report did, however, offer several recommendations including considering a [redacted] and [redacted] evaluation, and an [redacted] evaluation.

22. [redacted] days after [redacted] home observation, on [redacted], [redacted], the IEP team met. At this meeting, Respondent proffered that, when Petitioner is able to attend school full-

time, [redacted] would attend general education classes with a [redacted] assistant for [redacted] subject periods and would attend [redacted] ESE classes for [redacted] and a [redacted]. Should Petitioner not be able to attend full-time, Respondent proposed a partial day with concurrent [redacted] services.

23. At this meeting, Respondent further agreed to provide additional training with staff from [redacted] to train [redacted] in the use of letter board communication. [redacted] was also to receive additional training from the Florida Diagnostic Learning Resource Services. Additional IEP meetings were scheduled for [redacted] and [redacted], [redacted]; however, the meetings were cancelled at parental request.

24. Despite Respondent's documented refusal to exclusively utilize [redacted] as a means of communication with Petitioner, at Petitioner's [redacted] request, Respondent contracted with [redacted], a Speech Language Pathologist and "[redacted] Certified Provider," to provide training to its staff. To accomplish the training, Respondent undertook the expense of flying [redacted] and [redacted] assistant to [redacted] County, Florida, and paying their costs and expenses. To maximize the potential value of this training to all [redacted] students in Respondent's district, the training was to be conducted at a local public school, with multiple staff, teachers, and other students in attendance.

25. The training was originally scheduled to be conducted over a period of three days, from [redacted] through [redacted], [redacted]. Halfway through the first day, Petitioner did not feel well, and could not remain at School A. Respondent then accommodated Petitioner and transferred the balance of the training to Petitioner's home, albeit without the other students. The training also included follow-up video teleconferencing via Skype to assess how staff was implementing the [redacted] techniques. During the training, Respondent monitored Petitioner's responses, in part, to determine [redacted] academic levels.

26. The IEP team next met on [redacted], [redacted], to finalize the IEP and include updated performance measures addressing Petitioner's present levels of performance. During this meeting, Respondent again recognized the need for Petitioner to phase in to full-time attendance at a physical school. The IEP provided for [redacted] placements options: 1) when it was anticipated that [redacted] would be out of school for medical reasons for more than [redacted] consecutive days, [redacted] would continue to receive [redacted] instruction and [redacted] in the home [redacted] days per week for [redacted] academic subjects; and 2) when able to attend school, [redacted] would attend general education classes with a [redacted]-[redacted]-[redacted] [redacted] for up to [redacted] subject periods [redacted] days per week. It was anticipated that, as [redacted] services were reduced and school attendance increased, Petitioner would receive

[redacted] per week at school and [redacted] per week.

27. The April [redacted] IEP further documented that Petitioner would receive [redacted] support for additional supervision and support for communication of [redacted] needs, both at home, and at school. During this meeting, Petitioner's [redacted] requested a [redacted] be conducted, to which Respondent agreed and provided Petitioner's [redacted] the requisite consent forms. Respondent also requested, consistent with the [redacted] recommendation, consent for an [redacted] evaluation. Petitioner's [redacted] provided consent for the evaluations.

28. On [redacted], [redacted] provided training on the "[redacted] of [redacted] for [redacted] with [redacted]" for [redacted] working with Petitioner. The following day, on [redacted], the IEP team met to establish a [redacted] for when Petitioner would attend school. It had been determined that Petitioner required, and was eligible, for [redacted] during the summer months. During this meeting, Petitioner's [redacted] revoked [redacted] consent for Respondent to conduct the [redacted].

29. Petitioner began attending [redacted] at a public [redacted] school on [redacted]. On [redacted], the IEP team met again to review and revise transportation arrangements for Petitioner

to attend [redacted]. From [redacted], through approximately the end of July [redacted], Petitioner attended school [redacted] days a week for [redacted] hour. Based on the evidentiary presentation, it is difficult to assess the success of Petitioner's attendance and performance during [redacted].

30. At the beginning of the [redacted] school year, the IEP team met on [redacted], to discuss Petitioner's progress and plan for the upcoming year. Petitioner's August [redacted] IEP continued to provide [redacted] separate educational placement options depending upon whether Petitioner was able to attend school or whether receiving [redacted] services.

31. During this meeting, Petitioner's [redacted] revoked [redacted] prior consent for an [redacted] evaluation. For all that appears, also during this meeting, [redacted] of the [redacted] assigned to Petitioner resigned. The unexpected resignation, coupled with an injury suffered by Petitioner's [redacted], had the unfortunate effect of derailing Petitioner's gradual transition to a public [redacted] school. Indeed, the conference notes of the meeting document that, "[t]his affects the plans for [Petitioner] to attend [the public [redacted] school] at this time, and the team agreed that this should be tabled pending the hiring and training process being completed. Schedules for [redacted] were re-worked to account for the changes in [redacted] schedule due to [redacted] not going to [the public [redacted] school]."

32. The IEP team met again on [redacted], wherein the conference notes reflect that Respondent agreed to provide [redacted] teachers, as well as a [redacted] (to provide assistance with the letter board). [redacted] IEP was modified to reflect that direct services for [redacted] and [redacted] ([redacted]) would be provided to Petitioner in the school setting.

33. On [redacted], Petitioner engaged in [redacted] toward one of [redacted] teachers, [redacted], while [redacted] was working with [redacted] in the home. The record evidence documents that while Petitioner was seated next to [redacted], [redacted] stood up next to [redacted], reached around with both hands on [redacted] and [redacted], [redacted] in a [redacted], [redacted] down off the [redacted] to the [redacted], and proceeded to [redacted] and [redacted] on [redacted]. The [redacted] was required to intervene and drag [redacted] from [redacted] Petitioner. As a result of the incident, [redacted] was required to seek medical attention.

34. Prior to the [redacted], incident, on [redacted] occasions Petitioner had similarly engaged in [redacted] and [redacted] towards staff working with [redacted] in the [redacted], albeit without [redacted].

35. Although not required, Respondent convened a manifestation determination review (MDR) on [redacted], to determine whether Petitioner's conduct was a manifestation of [redacted] disability. The team determined that [redacted] was, in fact, a

manifestation of [redacted] disabling conditions. Respondent suspended Petitioner from [redacted] services for [redacted] school days, while still providing Petitioner access to an on-line computer-based curriculum.

36. During this meeting, Respondent further formally issued an Informed Notice/Change of Placement or Dismissal, advising that Respondent was recommending a change of Petitioner's educational placement whereby, starting [redacted], Petitioner would no longer receive [redacted] services at Petitioner's [redacted], but rather, all [redacted] instruction would be provided at a physical school location. The proposed location was a public [redacted] school, approximately [redacted] miles from Petitioner's home. During this meeting, Petitioner's [redacted] requested that Respondent cease providing direct services for [redacted] and [redacted]. The record is unclear concerning whether Petitioner's [redacted], on this date, agreed to the alternate setting for [redacted] services.

37. As a result of the team's determination, Respondent recommended conducting a [redacted] and drafting a [redacted] ([redacted]). As discussed above, Respondent had been precluded from conducting a [redacted] previously due to the lack of parental consent. Petitioner's [redacted] ultimately provided the requisite consent.

38. Although not clear, Petitioner's Complaint and testimony are construed as contending that, following the [redacted],

Respondent removed or discontinued Petitioner's access to [redacted] on-line curriculum. Based on the very limited evidentiary presentation, the best evidence is that Respondent did not discontinue or remove Petitioner's on-line access. For all that appears, Petitioner's [redacted] was initially provided "teacher access" to the curriculum. When it was determined that such access was mistakenly granted and intended solely for certified teachers, the access was amended to that of "tutor status."

39. [redacted], the IEP team met again. During this meeting, the school-based members of the IEP team reiterated that due to [redacted] recent [redacted] and concerns for [redacted], the [redacted] services would not be provided at [redacted], but at the public [redacted] school. During this meeting, Petitioner's [redacted] requested that [redacted], alone, be the communication interpreter for Petitioner the grounds that there is no other qualified person. [redacted] request was rejected, and Petitioner's [redacted] was reminded that significant training had been conducted by providers of Petitioner's choosing in April, August, and October [redacted], and that additional training was scheduled for February [redacted].

40. Again, Respondent requested consent from Petitioner's [redacted] to conduct an [redacted] evaluation. Despite the IEP team's strong recommendation for an [redacted] evaluation to potentially expand [redacted] independent communication, Petitioner's [redacted] would not

agree to permit an [redacted] evaluation. Moreover, on this date, Petitioner's [redacted] was not in agreement to the delivery of [redacted] services at an alternative setting other than the [redacted].

41. On [redacted], a facilitated IEP meeting was conducted, with the facilitation being provided by a state-trained, third-party facilitator. During this meeting, the IEP team discussed, in detail, Petitioner's present levels of performance. The team proposed a progressive or graduated [redacted] approach, which would include starting with paper choice, then using a stencil letter board, then a trifold letter board, then [redacted] of the letter board at a time, then a full letter board, progressing ultimately to a [redacted] keyboard and [redacted] keyboard. For [redacted], Petitioner uses a different board wherein the layout resembles a calculator.

42. At that time, Respondent's staff had begun the [redacted] process; however, the same had not been completed. The school-based members of the team again recommended an [redacted] evaluation; however, Petitioner's [redacted] continued to decline as [redacted] was concerned that any such evaluation would be used as grounds to remove the use of the letter board and paper choice. Indeed, [redacted] would only consent to such an evaluation after there was a staff member "fluent" with the letter board.

43. During this meeting, Petitioner's continuing eligibility for [redacted] was addressed. Petitioner had not submitted

the requisite [redacted] information for continuing [redacted] eligibility. Accordingly, Respondent requested an updated [redacted] examination and report, offered to provide Petitioner with a list of local [redacted] providers, and offered to pay the costs associated therewith. At that time, Petitioner's [redacted] eligibility was terminated and [redacted] educational placement was amended to that of a [redacted] class placement, wherein [redacted] would receive all instruction at a physical school location. At the conclusion of the facilitated IEP meeting, Petitioner's [redacted] wrote that [redacted] "would like to have [Petitioner] un-enrolled from the [redacted] Public Schools."

44. Apparently, Petitioner's [redacted] did not formally withdraw Petitioner from school, as [redacted] attended a [redacted] [redacted], [redacted], IEP meeting. By the time of this meeting, the [redacted] and [redacted] had been completed, and Petitioner's [redacted] was provided a copy.

45. The IEP team again discussed Petitioner's eligibility for [redacted], because, on [redacted] [redacted], [redacted], Petitioner had submitted a [redacted] certificate that apparently recommended Petitioner's reentry into school by August [redacted]. While the school-based members of the IEP team were in agreement that Petitioner has [redacted] or more chronic conditions, the team did not concur that the same confined [redacted] to the [redacted]. Moreover, the team determined that Petitioner's [redacted] needs could be met at [redacted] of [redacted] [redacted] school locations, with an appropriate [redacted] [redacted] plan

and staff training. Respondent concluded that without further [redacted] clarification, there was a lack of evidence to support the position that Petitioner was confined to the [redacted]. Respondent, therefore, provided Petitioner's [redacted] with a release of information to permit Respondent to communicate further with Petitioner's physician. The undersigned has been unable to discern from the record whether the additional medical information was subsequently provided or reviewed.

46. The last IEP meeting preceding the filing of the instant Complaint occurred on [redacted], [redacted]. At this meeting, Petitioner's [redacted] presented medical information from a [redacted]; however, as the IEP team had not received the information prior to the meeting, further discussion was tabled for a subsequent meeting. The IEP that was developed appropriately considered Petitioner's present levels of performance, as well as communication strategies.

47. Pursuant to this IEP, Petitioner was to receive "very small group [redacted] instruction," in a [redacted] class setting, for [redacted] hours per day. It was also proposed that Petitioner would receive a [redacted] for additional supervision and communication support. The [redacted] duties also included accompanying Petitioner on the bus.

48. Classroom and instructional accommodations for Petitioner included, but were not limited to, responding via

[redacted], [redacted], or [redacted] [redacted]; mathematics [redacted]/[redacted]; use of [redacted] [redacted], [redacted] boards, [redacted] boards, [redacted], and electronic [redacted] keyboards; and the use of a [redacted].

49. The undersigned finds that Respondent, throughout multiple IEP meetings, appropriately attempted to evaluate Petitioner and provide a statement of [redacted] present levels of academic achievement and functional performance, including how [redacted] disability affected [redacted] involvement and progress in the general education curriculum. As would be expected, with the passage of time Respondent became more familiar with Petitioner, and the subsequent IEPs reflected a greater understanding of [redacted] strengths and weaknesses, provided greater insight into [redacted] specific levels of performance and achievement, and appropriately documented the special education, related services, and aids necessary for [redacted] to make progress, given [redacted] unique circumstances.

50. The undersigned further finds that Respondent's efforts to evaluate or reevaluate Petitioner were consistently thwarted by Petitioner's [redacted] refusal to consent to necessary evaluations or otherwise hinder the process. The undersigned further finds that Petitioner's [redacted] adherence to the belief that Respondent's staff were "unqualified" or "untrained" to communicate with Petitioner was without merit and compounded the

problem of proper evaluation and communication. Contrary to Petitioner's assertions, the undersigned finds that Respondent dedicated significant time and resources in training an already knowledgeable staff on the best potential practices to facilitate communication with Petitioner under a multitude of communication options.

51. While it appears that, at various times pertinent to this matter, there was turnover in both [redacted] instructors and [redacted] assigned to work with Petitioner, Petitioner failed to present sufficient evidence for the undersigned to find that the same was tantamount to a failure to provide appropriate personnel, or a failure to implement [redacted] IEP.

52. Petitioner failed to present sufficient evidence for the undersigned to find that the [redacted] was improperly convened or determined or that the [redacted]-day suspension was improper. Similarly, Petitioner failed to present sufficient evidence that Respondent removed Petitioner's on-line curriculum. Finally, Petitioner failed to present sufficient evidence to find that Petitioner's change of educational placement was inappropriate.

CONCLUSIONS OF LAW

53. DOAH has jurisdiction over the subject matter of this proceeding and 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).

54. 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).

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

56. 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).

57. Local school systems must satisfy the IDEA's substantive requirements by providing all eligible students with a free appropriate public education (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).

58. "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).

59. 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).

60. "The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 13 S. Ct. 988, 994 (2017)(quoting Honig v. Doe, 108 S. Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." Id. (quoting Rowley, 102 S. Ct. at 3034).

61. In Rowley, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Rowley, 458 U.S. at

206-207. A procedural error does not automatically result in a denial of FAPE. See G.J. v. Muscogee Cnty. 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. 516, 525-26 (2007).

62. Here, Petitioner's Complaint is not construed as asserting a procedural violation. 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." Rowley, 458 U.S. at 206-07. Recently, in Endrew F., the Supreme Court addressed the "more difficult problem" of determining a standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." Endrew F., 13 S. Ct. at 993. In doing so, the Court held that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 999. As discussed in Endrew F., "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school

officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." Id.

63. The determination of whether an IEP is sufficient to meet this standard differs according to the individual circumstances of each student. For a student who is "fully integrated in the regular classroom," an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Id. (quoting Rowley, 102 S. Ct. 3034). For a student not fully integrated in the regular classroom, an IEP must aim for progress that is "appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." Id. at 1000.

64. The assessment of an IEP's substantive propriety is further 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, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See Endrew F., 13 S. Ct. at 1001 ("This absence of a bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review" and explaining that "deference is based on the application of expertise and the exercise of judgment by school authorities.").

65. Here, Petitioner advances several substantive claims. First, Petitioner contends that Respondent failed to establish Petitioner's present levels of performance, and, therefore, the IEPs were not reasonably calculated to enable [redacted] to make progress in light of [redacted] circumstances. This contention is without merit.

66. It is presumed that Petitioner's parent(s) had previously provided consent to the [redacted] public agency for [redacted] initial evaluations and the provision of special education and related services. When Petitioner's family relocated to Respondent's school district, Respondent sought to conduct certain reevaluations to determine [redacted] present levels of performance. Like the initial consent for evaluations and services, parent consent is required for reevaluations. 34 C.F.R. § 300.300(c), sets forth the consent requirements, as follows:

> *Parental consent for reevaluations.*
>
> (1) Subject to paragraph (c)(2) of this section, each public agency—
>
> (i) Must obtain informed parental consent, in accordance with § 300.300(a)(1), prior to conducting any reevaluation of a child with a disability.
>
> (ii) If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section.
>
> (iii) The public agency does not violate its obligation under § 300.111 and §§ 300.301 through 300.311 if it declines to pursue the evaluation or reevaluation.

67. The evidence demonstrates that Petitioner's [redacted] consistently refused to provide consent to perform critical evaluations. The evidence further reveals that, at times,

Petitioner would only provide conditional consent-–only if the evaluation was to be conducted by an expert of Petitioner's choice. As noted in M.T.V. v. DeKalb County School District, 446 F.3d 1153, 1160 (11th Cir. 2006), when conducting a reevaluation, a school is entitled to reevaluate a child by an expert of its choice. "The school cannot be forced to rely solely on an independent evaluation conducted at the parents' behest." Id. Petitioner's [redacted] conditional consent upon the requested evaluations is tantamount to the absence of consent. See Muscogee Cnty. Dist., 668 F.3d 1258 at 1263-1265 (affirming district court's conclusion that parents had refused to provide consent for reevaluation due to the number of conditions imposed by Petitioner).

68. The better evidence establishes that Respondent properly sought the necessary evaluations to establish Petitioner's present levels of performance at all times relevant to this proceeding. Notwithstanding Petitioner's [redacted] lack of cooperation, Respondent complied with its obligation to assess and document Petitioner's present levels of performance in [redacted] multiple IEPs.

69. Petitioner next contends that Respondent failed to provide the appropriate training, staff, and methodology to allow effective communication for Petitioner, who is [redacted]. Petitioner failed to present sufficient evidence to meet [redacted]

burden concerning this claim. The undersigned concludes that Respondent provided significant training, at considerable cost, to its staff working with Petitioner to facilitate effective communication. Indeed, although Respondent did not agree to exclusively utilize the [redacted] method, on several occasions, Respondent contracted with providers of Petitioner's choosing to provide expertise on this methodology to the extent the same could, in some measure, benefit Petitioner's communication.

70. Petitioner failed to present sufficient evidence to establish that Respondent's personnel failed to properly implement Petitioner's IEP with respect to communication. As noted above, while there was evidence to suggest that there was some turnover amongst Petitioner's [redacted] teachers and [redacted], the lack of specificity in the evidentiary record evidence precludes the undersigned from reaching a conclusion that the same rose to the level of a substantive failure to implement the IEP.

71. Petitioner's contention that Respondent failed to properly provide appropriate communication services and aids is primarily centered upon a disagreement of methodology. The record evidence clearly demonstrates Petitioner's [redacted] preference for the [redacted] methodology, or a variation thereof under [redacted] specific direction. It is, however, well-established that the choice of educational methodology falls within the discretion

of the school district. See Rowley, 458 U.S. at 207 (holding that once a court determines that the requirements of the [IDEA] have been met, questions of methodology are for resolution by the states); M.M. School Bd. of Miami-Dade Cty., Fla., 437 F.3d 1085, 1099 (11th Cir. 2006)(quoting Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988)("Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [IDEA] to provide a specific program or employ a special methodology in providing for the education of their handicapped child.")).

72. Here, the evidence established that Respondent offered and attempted various and appropriate methodologies of communication to Petitioner, a [redacted] student. Efforts to further evaluate Petitioner's communication skills and to offer alternatives via [redacted] devices that have the potential to increase [redacted] independence were consistently refused by Petitioner's [redacted]. The undersigned concludes that Respondent met its requirement to provide communication aids and services necessary to provide effective communication such that Petitioner has access to participate in, and enjoy the benefits of, the services, programs, and activities of Respondent's school district.

73. Petitioner further contends that Respondent violated the IDEA in its discipline of Petitioner for conduct that was a

[redacted] of [redacted] disability, that allegedly resulted in a change of educational placement, and the discontinuation of [redacted], then, current curriculum. School districts have certain limitations on their ability to remove disabled children from their educational placement following a [redacted] transgression. Specifically, the IDEA provides that where a school district intends to place a disabled child in an alternative educational setting for a period of more than 10 school days, it must first determine that the child's [redacted] was not a [redacted] of [redacted] disability. 20 U.S.C. § 1415(k)(1)(C).

74. Pursuant to the IDEA's implementing regulations, "[o]n the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the local educational agency (LEA) must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504." 34 C.F.R. § 300.530(h).

75. The necessary inquiry is set forth in 20 U.S.C. § 1415(k)(1)(E), as follows:

> [redacted] [redacted].
>
> (i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and

> relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—
>
> (I) [I]f the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (II) [I]f the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

76. If the LEA, the parent, and relevant members of the IEP team determine that either subclause (I) or (II) of clause (i) is applicable, the conduct shall be determined a [redacted] of the child's [redacted]. 20 U.S.C. § 1415(k)(1)(E)(ii). If the [redacted] is deemed a [redacted] of the child's [redacted], the student must be returned to the educational placement from which [redacted] or [redacted] was removed. 20 U.S.C. § 1415(k)(1)(F)(iii). Additionally, if no [redacted] was in place at the time of the [redacted], the school district is obligated to "conduct a [redacted], and implement a [redacted] for such child." 20 U.S.C. § 1415(k)(1)(F)(i).

77. Here, following the incident of [redacted], Respondent suspended Petitioner from [redacted] services for 10 days. Although a 10-day suspension does not trigger the requirement to conduct a [redacted], Respondent did so. As a result of the [redacted], it was determined that the [redacted] in question was caused by, or had a

direct and substantial relationship to, Petitioner's disability. Respondent thereafter sought consent to conduct a [redacted] and [redacted].

78. Following the [redacted], Petitioner was returned to [redacted] educational placement, albeit in an alternate setting other than the [redacted]. The school-based members of the IEP team determined that [redacted] instruction would be best delivered in a setting other than the [redacted] (i.e., a public [redacted] school) due to [redacted] of the staff while in Petitioner's home, until such time as the [redacted] and [redacted] could be drafted and implemented. Pursuant to rule 6A-6.03020(5)(d), the IEP team "may determine that instruction would be best delivered in a mutually agreed upon alternate setting other than the home, hospital or through telecommunications or electronic devices." Although Petitioner's [redacted] did not agree to any location of services outside of the [redacted], the school based members of the team, by consensus, mutually agreed to the [redacted] school location.

79. Pursuant to rule 6A-6.03020(5)(c), "when the IEP . . . team determines that instruction is by telecommunications or electronic devices, an open, uninterrupted telecommunication link shall be provided at no additional cost to the parent, during the instructional period." As discussed in the Findings of Fact, Petitioner did not present sufficient evidence for the undersigned to conclude that Respondent failed to comply with its obligation, as set forth in rule 6A-6.03020(5)(c).

80. Ultimately, on [redacted], Respondent proposed, and the IEP reflected, a change in Petitioner's educational placement to that of a separate class placement in a physical school. Petitioner contends this change in placement violated the IDEA.

81. The IDEA provides 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.

82. 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 least restrictive environment (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 LRE and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

83. 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).

84. 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 R.R. v. State Bd. of Educ., 874 F.2d at 1044.

85. 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.

86. 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, 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 [redacted] will receive in a [redacted] 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.

87. In this matter, it is undisputed by the parties that presently Petitioner cannot satisfactorily be educated in the

regular classroom. Accordingly, the focus is upon whether Respondent's proposed placement mainstreams Petitioner to the maximum extent appropriate.

88. At the time the instant Complaint was filed, Respondent had determined that Petitioner no longer met the eligibility requirements of [redacted]. Petitioner failed to present sufficient evidence for the undersigned to overturn that eligibility determination. As Petitioner is not currently eligible to receive [redacted] services, the [redacted] placement is concluded to be overly restrictive. The undersigned concludes that Respondent's proposed placement of a separate class appropriately discharges the duty to mainstream Petitioner to the maximum extent appropriate, and is approved.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and concluding the Petitioner failed to meet the burden of proof regarding any of the allegations in Petitioner's Complaint, it is ORDERED that Petitioner's Complaint is dismissed in its entirety.

DONE AND ORDERED this 1st day of March, 2019, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings

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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).