STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 19-0008E

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on [redacted], by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: [redacted], Esquire
Disability Independence Group, Inc.
2990 Southwest 35th Avenue
Miami, Florida 33133

For Respondent: [redacted], Esquire
Miami-Dade County Public Schools
1450 Northeast 2nd Avenue
Miami, Florida 33132

STATEMENT OF THE ISSUES

Whether Respondent's alleged failure to convene an individualized education program (IEP) meeting, when requested by Petitioner, violated the procedural requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.

§ 1400, et seq.; and, if so, whether the procedural flaw impeded Petitioner's right to a free appropriate public education (FAPE), significantly infringed Petitioner's parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Petitioner, or caused a deprivation of educational benefit; and whether Respondent's failure to convene the requested IEP meeting was the product of retaliatory discrimination.

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. On [redacted], Petitioner filed a Motion to Amend the Request for Due Process (Amended Complaint), and the motion was granted on [redacted], [redacted].

The final hearing was scheduled for [redacted] and [redacted], and conducted 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], approximately [redacted] days after the anticipated

filing of the Transcript. Accordingly, it was agreed that the undersigned's Final Order would issue on or before [redacted], [redacted], approximately [redacted] days after receipt of the proposed final orders. Petitioner filed a motion for a brief extension of time to file proposed final orders and the motion was granted. 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. Petitioner is currently [redacted] years old.

2. Petitioner has previously been determined eligible and has received exceptional student education (ESE) services under the [redacted] and [redacted] programs, and receives language therapy, occupational therapy, and physical therapy.

3. For the [redacted] school year, Petitioner had matriculated from [redacted] to [redacted] and was

attending School A, a public [redacted] school in Respondent's school district.

4. During the [redacted] school year, an IEP meeting was conducted on [redacted]. An interim IEP meeting was also conducted during the summer on [redacted].

5. On [redacted], Petitioner filed a request for due process hearing, asserting procedural and substantive violations of the IDEA regarding the [redacted] and [redacted], IEPs.[1/] A final hearing was conducted regarding that complaint on [redacted] through [redacted], and the Final Order was issued on [redacted].

6. On [redacted], Petitioner's mother sent email correspondence to [redacted], School A's principal, requesting an interim IEP meeting (to be conducted on or before [redacted]) to address Petitioner's goals. In support of this request, Petitioner's mother represented that Petitioner had made a "great deal of progress" since [redacted], IEP.

7. Principal [redacted] provided a written response on the same date advising that "your attorney has already made a request to the School Board Attorney and a response will be provided through [counsel] since the case is in due process." Petitioner's [redacted] responded that the request was separate from the pending litigation. On [redacted], Principal [redacted] written response provided That "[a]t this time the district will not be

conducting an IEP meeting while the parties are engaged in due process."

8. On [redacted], Petitioner's [redacted] issued email correspondence to Principal [redacted], making several requests, including a request for an IEP meeting. On [redacted], Principal [redacted] provided a written response. With respect to the IEP meeting request, [redacted] written response provided that, "I understand that you would like to review the goals on the IEP, however, this will be addressed as soon as the judge's orders are made available and an IEP can be scheduled."

9. In response, Petitioner's [redacted] requested Respondent provide the "district regulation" that formed the basis for the IEP meeting denial. On [redacted], Principal [redacted] written response provided, in pertinent part, as follows:

> We understand that you have requested an IEP meeting, however, due to the "stay put" provision of the IDEA, we will wait until a decision is made by the judge in order to change the current IEP. I spoke to [redacted] regarding [Petitioner's] goals. As you are aware from the Status of Goals Report that was sent home on [redacted], [Petitioner] is making adequate progress at this time. We are expecting the judge's decision to be in by the time we return from Winter Break. As soon as this is in, we will proceed as instructed.

10. On [redacted], Petitioner's [redacted] issued correspondence to Principal [redacted], wherein [redacted] advised that [redacted]

request for an IEP meeting was not exclusively to address educational placement, but also to modify IEP goals. On [redacted], Principal [redacted] responded by providing that they could meet to review the goals "around the end of the first semester in January," and that at that time "we will also have the Administrative Law Judge's order on placement and the IEP team will be able to discuss that issue." The correspondence further requested that Petitioner's [redacted] provide any dates of unavailability.

11. The instant Complaint was filed on [redacted].

12. By agreement, the parties conducted an IEP meeting on [redacted] and [redacted].

CONCLUSIONS OF LAW

13. 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).

14. 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).

15. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them 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).

16. 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).

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

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

20 U.S.C. § 1401(9).

18. "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).

19. 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).

20. "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).

21. 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.C. 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).

22. Petitioner's Amended Complaint asserts a procedural violation. Petitioner avers that the failure to conduct an IEP meeting, as requested by Petitioner's [redacted] at various times during the fall of [redacted], constitutes a procedural violation that rises to the level of a denial of FAPE.

23. Title 20 U.S.C. § 1414(d)(4)(A)(i) provides the following directives to the IEP team concerning IEP review and revision:

> (4) Review and revision of IEP.
>
> (A) In general. The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team--
>
> (i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and
>
> (ii) revises the IEP as appropriate to address--
>
> (I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;
>
> (II) the results of any reevaluation conducted under this section;
>
> (III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

24. The IDEA's implementing regulations provide virtually identical directives to the IEP team. See 34 C.F.R. § 300.324(b). Under a plain reading of the IDEA and its implementing regulations, to ensure procedural compliance, the IEP team is required to review the student's IEP at least annually to determine whether the annual goals are being achieved, and during such review, determine whether the IEP should be revised. Thus, the IDEA does not require more than one IEP per year.

25. Here, Petitioner requested an IEP meeting on several occasions to, inter alia, review Petitioner's annual goals. Respondent declined to convene an IEP meeting for several documented reasons. First, Respondent advised that a meeting would not occur as a due process complaint was currently pending. Standing alone, the fact that a matter is pending before DOAH would not support a unilateral decision by Respondent to postpone or ignore its procedural requirement to timely review and revise (if necessary) an IEP. Indeed, neither the IDEA nor its implementing regulations condition Respondent's obligation to timely convene an IEP meeting to review and potentially revise a student's IEP upon the outcome of pending litigation.

26. Respondent also declined to convene an IEP meeting due to the "stay put" provision of the IDEA. Although a specific "stay put" order was not requested in DOAH Case No. 18-4167E, "stay put" refers to a student's status during proceedings. Title 34 C.F.R. § 300.518(a) addresses a student's status during proceedings and provides that, "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in [redacted] or [redacted] current educational placement."

27. While the undersigned acknowledges that Respondent's ability to review and potentially revise an IEP may be constrained in certain aspects by the operation of "stay put," Respondent is cautioned that the mere existence of "stay put" does not excuse it from its procedural requirement to timely conduct an annual review. For example, a local educational authority, such as Respondent, could review and potentially update a student's present levels of academic achievement and functional performance, review evaluations and parental information, and establish corresponding goals and objectives, all without running afoul of a student's current educational placement.

28. Against this backdrop, it is undisputed that Petitioner's IEP had been reviewed and revised in April and July [redacted]. It is further undisputed that the IEP team reconvened for an IEP meeting in February [redacted]. Accordingly, Respondent timely complied with the IDEA procedural requirements for reviewing and revising Petitioner's IEP, periodically, but not less frequently than annually. Respondent complied with the procedural obligation imposed by Congress and this administrative tribunal can require no more. See Rowley, 458 U.S. at 206-207. Accordingly, Petitioner has failed to present sufficient evidence to support the procedural violation.

29. Petitioner further claims that the failure to convene an IEP meeting, as requested, supports a claim for retaliation under Section 504 of the Rehabilitation Act of 1973 (Section 504). A parent has a private right of action to sue a school system for violating Section 504. Ms. H v. Montgomery County Bd. of Educ., 784 F. Supp. 2d 1247, 1261 (M.D. Ala. 2011).

30. 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 his or her 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 shown. A plaintiff must also demonstrate some bad faith or gross misjudgment by the school or that he was discriminated against solely because of his disability. A plaintiff must prove that he or she 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 County Bd. of Education, 120 F. Supp. 3d 1287, 1295 (M.D. Ala. 2015)(internal citations omitted).

31. 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 County 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).

32. Succinctly, Petitioner failed to establish a procedural violation under the IDEA. Petitioner further failed to present sufficient evidence to establish that the failure to convene an IEP meeting, as requested, supports a finding of deliberate indifference. Accordingly, Petitioner's retaliation claim under Section 504 is denied.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is denied in all respects.

DONE AND ORDERED this 16th day of April, 2019, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of April, 2019.

ENDNOTE

[1/] ** v. Miami-Dade County School Board, Case No. 18-4167E (Fla. DOAH [redacted]).

COPIES FURNISHED:

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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).