STATE OF FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

**,	
Petitioner,	
vs.	Case No. 19-4588E
DUVAL COUNTY SCHOOL BOARD) ,
Respondent.	/
	FINAL ORDER
Pursuant to notice, a final h	hearing was conducted in Jacksonville, Florida,

on and and before Administrative Law Judge (ALJ) Todd P.

Resavage of the Division of Administrative Hearings (DOAH).

<u>APPEARANCES</u>

For Petitioner: , Esquire

Three Rivers Legal Services, Inc.

3225 University Boulevard South, Suite 220

Jacksonville, Florida 32216

For Respondent: Esquire

Stanley Weston, Esquire Office of General Counsel

117 West Duval Street, Suite 480

Jacksonville, Florida 32202

STATEMENT OF THE ISSUES

Whether Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., by (1) failing to develop appropriate individualized educational programs (IEPs) that were reasonably calculated to enable Petitioner to make progress appropriate in light of Petitioner's circumstances; (2) failing to materially implement Petitioner's IEPs;

(3) inappropriately restraining and secluding Petitioner; and (4) failing to appropriately report incidents of restraint and seclusion. If it is concluded that Respondent substantially violated the IDEA, Petitioner's remedy must be determined.

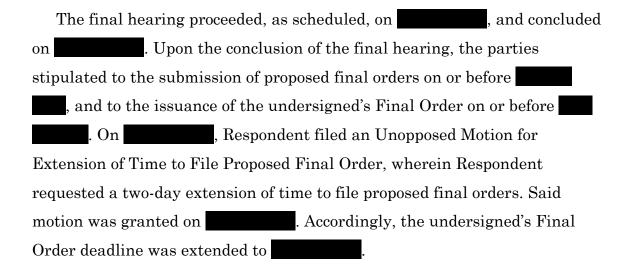
PRELIMINARY STATEMENT

Respondent received Petitioner's Request for Due Process Hearing (Complaint) on Respondent forwarded the Complaint to DOAH on ALJ Jessica E. Varn.

Due to the threat of Hurricane Dorian, the timeline for responding to the Complaint was extended by Order dated . Following a telephonic scheduling conference on through . the final hearing was scheduled for ...

On ______, a telephonic status conference was held, wherein the parties jointly requested an extension of time to conduct further discovery. On ______, ALJ Varn issued an order granting the continuance and rescheduling the final hearing to ______ through _____.

On little of this matter was transferred to the undersigned for all further proceedings. On the same day, the undersigned issued an Order on Pre-hearing Instructions, which required the parties to file a joint pre-hearing stipulation. The parties, in compliance with the Order on Pre-hearing Instructions, timely filed a Joint Pre-Hearing Stipulation. The stipulation includes, *inter alia*, the parties' position on the specific legal issues to be determined, and a concise statement of facts, which are admitted and required no additional proof at final hearing. To the extent relevant, those facts have been adopted and incorporated herein in the Finding of Facts as set forth below.



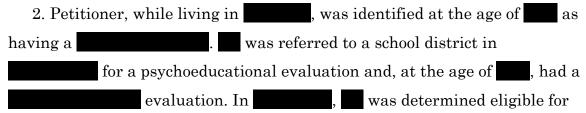
The final hearing Transcript was filed on ______. The identity of the witnesses and exhibits and rulings regarding each are as set forth in the Transcript. The parties timely filed Proposed Final Orders, which have been considered in this Final Order.

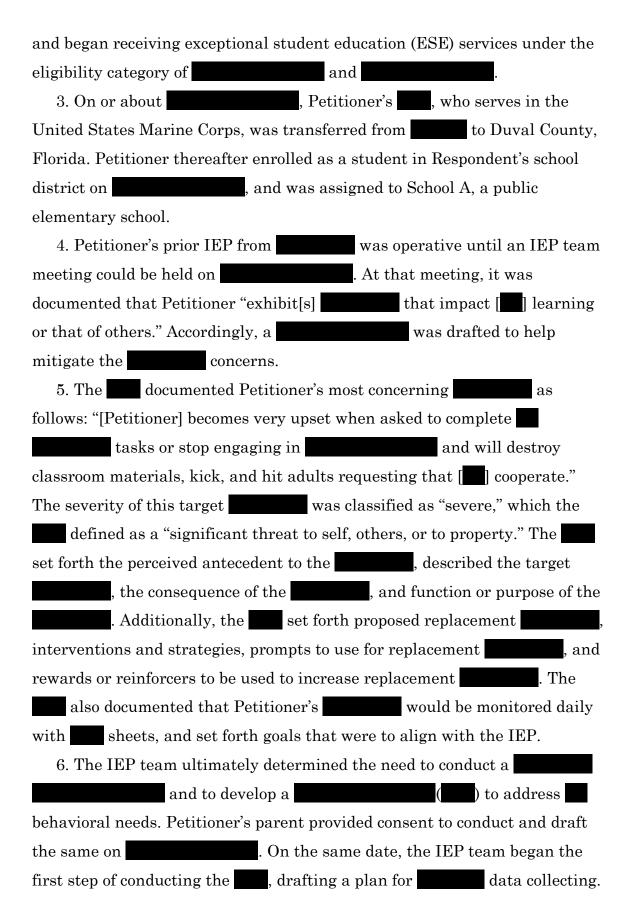
Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violations.

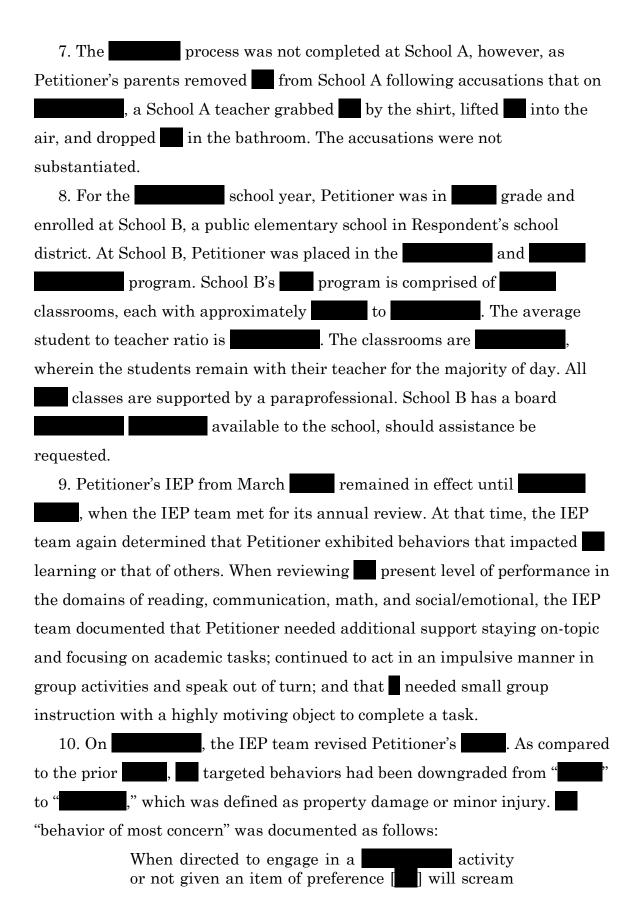
For stylistic convenience, the undersigned will use pronouns in this Final Order when referring to Petitioner. The pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. At the time Petitioner's Complaint was filed, Petitioner was nine-yearsold, and attending a public elementary school in Clay County, Florida.







"I am mad" [sic] "I am angry" [sic] "I am upset" [sic] "You broke my heart." [will throw books, push down shelves, hit, kick, bite staff and try to leave the area. [will inconsistently removes [will clothing and shoes when this happen [sic].

11. The set forth the perceived antecedent to the behavior, described the target behavior, the consequence of the behavior, and function or purpose of the behavior. The documented the "possible reason[s] for the behavior" as to obtain attention; to obtain objects, privileges, and activities; and to escape or avoid. Additionally, the set forth proposed replacement behaviors, interventions and strategies, prompts to use for replacement behaviors, and rewards or reinforcers to be used to increase replacement behaviors. The set also documented that Petitioner's behavior would be monitored daily with a scatter plot chart, and that the would be aligned with the social/emotional goals on FEP.

By the IEP review date, will attend to classroom activities until it is finished, up to minutes in length with no behaviors

(
) in 4 out of 5 opportunities

measured by ESE teacher data.

By the IEP review date, [Petitioner] will resolve problems/conflict with peers in a manner during associative play in 3 out of 5 opportunities as measured and implemented by the ESE teacher.

13. The IEP also provided benchmarks or short-term objectives related to the above-quoted goals. The benchmarks provided that after a social skills story, Petitioner would utilize the break area when given a break card and use self-calming strategies; and that Petitioner would resolve problems or conflicts with peers in a nonaggressive manner.

14. Among other goals, the reading goal: "By the IEP Review date, when given a Level B book, [Petitioner] will receptively/expressively [sic] 20 sight words in 4 out of 5 opportunities as measured and implemented by the ESE teacher." This goal was accompanied by two benchmark or short-term objectives:

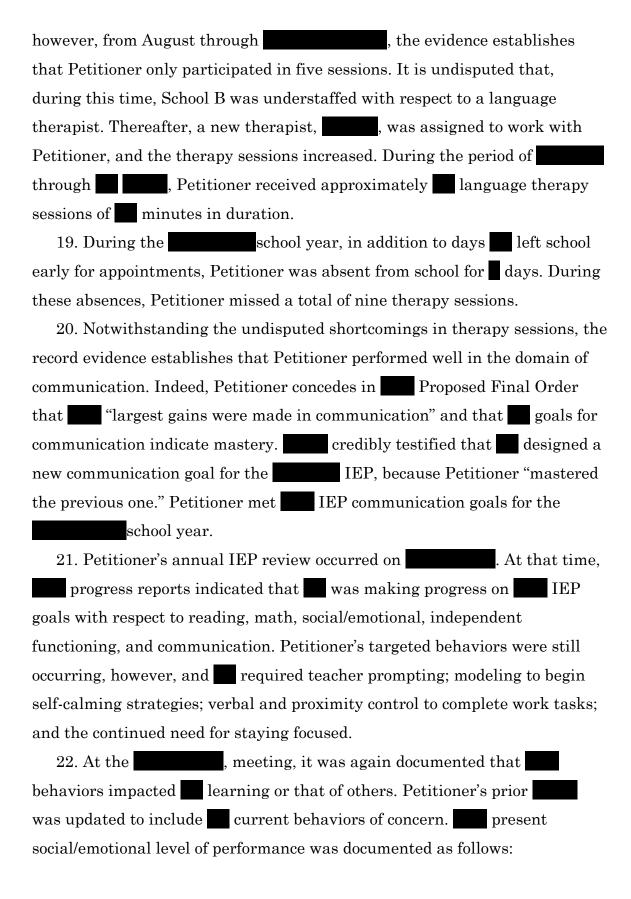
When given a Level A book, [Petitioner] will receptively/expressively [sic] 10 sight words in 2 out of 5 opportunities as measured and implemented by the ESE Teach.

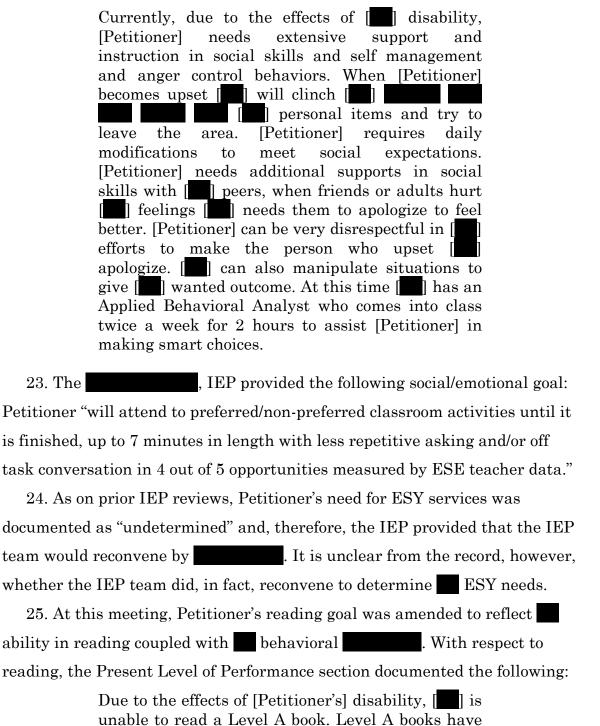
When given a Level B book, [Petitioner] will receptively/expressively [sic] 15 sight words in 3 out of 5 opportunities as measured and implemented by the ESE Teach.

15. With respect to the domain of communication, the IEP team established the following goal:

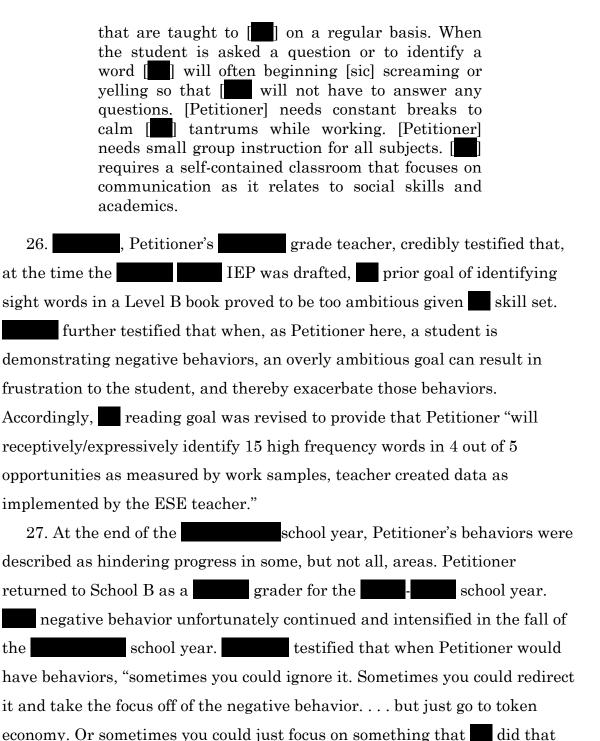
By the IEP review date, during structured and unstructured language activities that include visual and verbal prompts, [Petitioner] will independently produce age appropriate grammatically correct sentences with accuracy over three consecutive sessions measured by therapist documentation and observation and implemented by speech-language pathologist.

- 16. To help accomplish this goal, the IEP provided that Petitioner was to receive "Group and/or Individual Language Therapy 30 min.," twice per week. Petitioner was to receive the service in the therapy lab or office.
- 17. At the ______, meeting, the team documented that it was undetermined whether Petitioner required extended school year (ESY) services and that the IEP team would reconvene by the "end of April." It is unclear from the record whether the IEP team reconvened.
- 18. Petitioner remained at School B for the school year. As noted above, Petitioner was to receive language therapy twice per week;





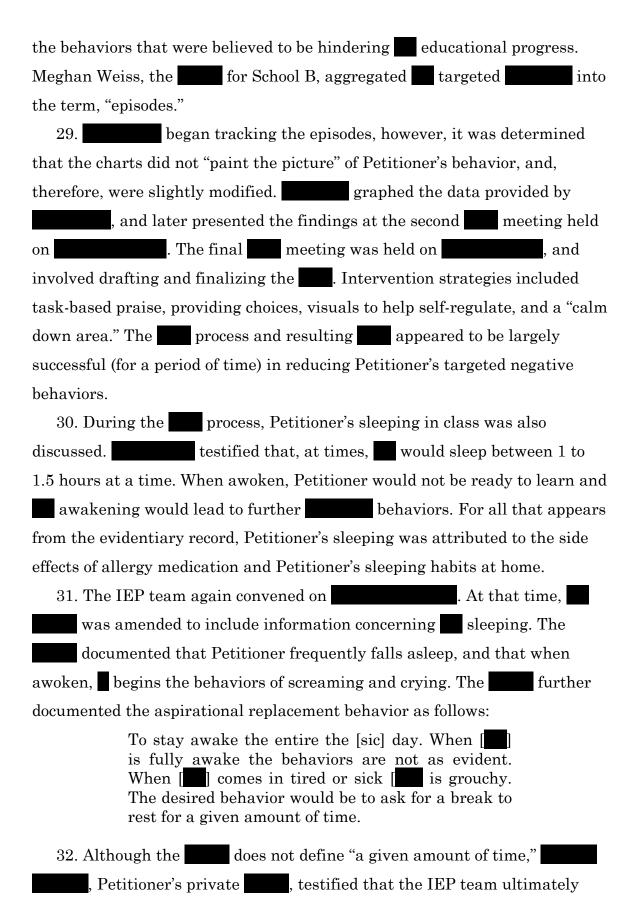
4-5 words per page to give an understanding of the depth of this level. [is unable to recognize high frequency words independently or within a text. [Petitioner] will not stay on topic when there is a discussion about books. [is often drifts to topics prefers in effort to divert the attention to [is unable to remember words

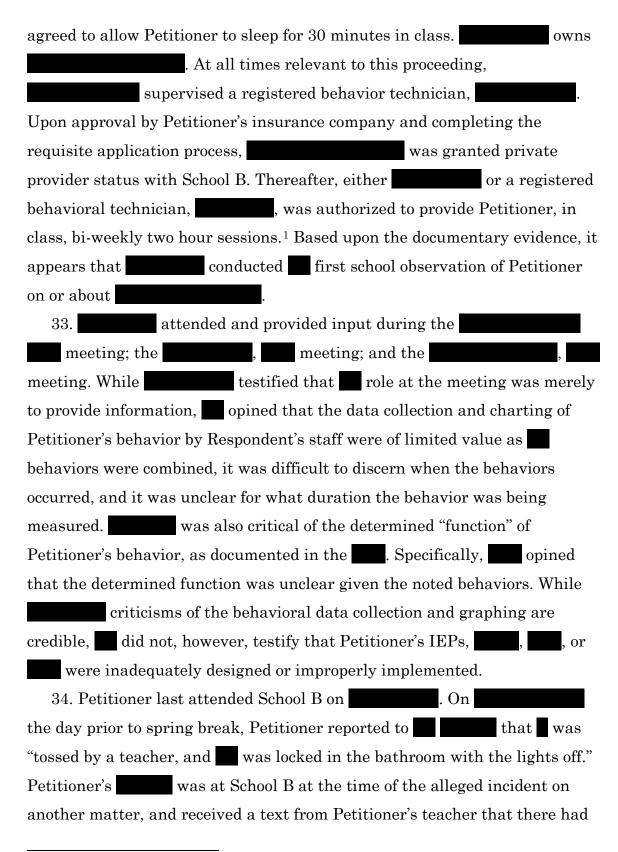


26.

28. To address the escalating behaviors, the IEP team decided to conduct and, on , held the first meeting. The IEP team discussed Petitioner's behaviors in the classroom and at home, and defined

was really, really positive to distract from the behavior."





¹ The record is unclear as to when said services began and concluded. The private services were dependent upon authorization from Petitioner's private insurance.

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been an incident, however, Petitioner was now calm. Petitioner's reported the allegation to law enforcement; however, the claim was not substantiated.

- 35. Upon returning to school after spring break, on Petitioner's attempting to further investigate the alleged incident, had a verbal altercation with another teacher. Petitioner did not return to School B after and was officially withdrawn on Thereafter, Petitioner enrolled in School C, a public elementary school in County, Florida.
- 36. Petitioner presented sufficient evidence to establish that was restrained on several occasions. Petitioner, however, failed to present sufficient evidence to support a finding that the methodology of restraint was inappropriate or that Respondent failed to properly report said restraint. Petitioner failed to present sufficient evidence to support a finding that Petitioner was improperly secluded or that Respondent failed to properly report the same.
- 37. A review of Petitioner's IEP progress reports at the time of withdrawal from School B yields mixed results. With respect to reading, Petitioner was making progress towards meeting goal, and had mastered two benchmark or short-term objectives. In math, Petitioner was making progress and was expected to complete goal. It was reported that was not making sufficient progress on social/emotional goal as was not following directions, which was hindering progression. Concerning goal for independent functioning, it was documented that, although had the capability to meet goal, was not making sufficient progress as was exhibiting that hindered goal attainment.

CONCLUSIONS OF LAW

38. 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).

- 39. 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).
- 40. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education [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 Cty. 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. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).
- 41. 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).

42. "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).

43. 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). "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 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 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982)).

IEP Design/Content:

- 44. In a light most favorable to Petitioner, Petitioner's Complaint is construed as alleging that Respondent failed to develop appropriate IEPs while attending school in Respondent's district. Petitioner's Complaint vaguely alleges that Petitioner "has an IEP that addresses some of these needs, but the educational program was not reasonably calculated to allow to make academic progress in light of circumstances." In support of this allegation, Petitioner's Complaint alleges that Petitioner did not meet all of respective IEP goals and that some goals and benchmarks are repeated from year to year.
- 45. 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 Cty. 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). Here, Petitioner does not allege any procedural violations.

- 46. 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, 207. 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.*
- 47. 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.* For a student, like Petitioner here, not fully integrated in the

regular classroom, an IEP must aim for progress that is "appropriately ambitious in light of [the student's] circumstances." *Id.* at 1000.

- 48. Additionally, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. *Id.* 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.").
- 49. While not specifically alleged in Petitioner's Complaint, Petitioner contends in his Proposed Final Order that Respondent failed to design an appropriate IEP, by its failure to timely conduct a and draft a dark to address his targeted negative behavior. The undersigned concludes that Petitioner did not meet its burden of proof regarding this allegation.
- 50. As noted in the Findings of Fact above, at all times pertinent to the allegations in Petitioner's Complaint, Petitioner was placed in a small class setting, with an extremely low student-to-teacher ratio, with paraprofessional support. At all times relevant, positive behavior support was included in educational programming, with either a and/or a petitioner's was modified throughout tenure, with complimenting goals on respective IEPs. Petitioner failed to present sufficient evidence to establish that Respondent's approach to Petitioner's behavioral concerns through the utilization of a until the fall of the school year was improper or violated the IDEA.
- 51. The evidence established that Respondent, upon observing the escalation in Petitioner's behaviors (even with the existing in place), conducted a and drafted a which became part of IEP. While it is undisputed that Petitioner continued to have some degree of behavioral issues at School B, Petitioner failed to present sufficient evidence that the same was a result of an inadequately designed IEP.

- 52. Petitioner further contends that Respondent's alleged failure to adequately update or revise Petitioner's IEP goals resulted in a violation of the IDEA. The evidence, however, fails to provide support for this allegation. To the contrary, the evidentiary presentation supports the conclusion that Respondent aimed to design IEPs for Petitioner that were appropriately ambitious in light of his circumstances. The evidence established that when certain goals were mastered, they were amended, and when Petitioner failed to reach others, they were modified consistent with circumstances. While lack of progress can certainly be a factor to consider in determining whether an IEP was appropriately designed, it is not outcome determinative. Here, the better evidence supports the conclusion that Petitioner's lack of progress was due to behavioral issues, as set forth above in the Findings of Fact.
- 53. Finally, Petitioner contends in Proposed Final Order that Respondent's failure to schedule meetings to consider ESY services amounts to an IDEA violation. This allegation was not contained in Petitioner's Complaint (nor referenced in the parties' Joint Pre-Hearing Stipulation), and, therefore, is not properly before this tribunal. Accordingly, said claim lends no support to Petitioner's contention that Respondent failed to properly design Petitioner's IEPs.

IEP Implementation:

- 54. Petitioner's Complaint is construed as alleging that Respondent did not properly implement Petitioner's IEPs from through
- 55. In *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit Court of Appeals confronted, for the first time, the standard for claimants to prevail in a "failure-to-implement case." The court concluded that "a material deviation from the plan violates the [IDEA]." *L.J.*, 927 F.3d at 1206. The *L.J.* court expanded upon this conclusion as follows:

Confronting this issue for the first time ourselves, we concluded that to prevail in a failure-toimplement case, a plaintiff must demonstrate that the school has materially failed to implement a child's IEP. And to do that, the plaintiff must prove more than a minor or technical gap between the plan and reality; de minimis shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child's IEP.

Id. at 1211.

56. While declining to map out every detail of the implementation standard, the court did "lay down a few principles to guide the analysis." *Id.* at 1214. To begin, the court provided that the focus in implementation cases should be on "the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld." *Id.* (external citations omitted). "The task for reviewing courts is to compare the services that are actually delivered to the services described in the IEP itself." In turn, "courts must consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole." *Id.* (emphasis in original).

57. Additionally, the *L.J.* court noted that the analysis must consider implementation as a whole:

We also note that courts should consider implementation as a whole in light of the IEP's overall goals. That means that reviewing courts must consider the cumulative impact of multiple implementation failures when those failures, though minor in isolation, conspire to amount to something more. In an implementation case, the question is not whether the school has materially failed to implement an individual provision in isolation, but rather whether the school has materially failed to implement the IEP as a whole.

Id. at 1215.

- 58. Here, it is undisputed that Respondent failed to implement the prescribed language therapy as delineated on Petitioner's IEP during the school year. The failure far exceeds a "de minimis shortfall." Had Petitioner established that the language therapy implementation failure resulted in a failure of Petitioner to progress in communication goals, there would be no hesitancy in determining that Respondent committed a material deviation from the plan, and, therefore an IDEA violation.
- 59. The evidence, however, established that notwithstanding the failure to deliver the language therapy, Petitioner progressed appropriately in communication given circumstances. Indeed, the evidence established that Petitioner mastered communication goal at the end of the year. When viewing the therapy sessions withheld in context of the IEP as a whole, it is concluded that the failure to implement the language therapy did not result in a material implementation failure.
- 60. Petitioner otherwise failed to present sufficient evidence that Respondent failed to implement any other provision of Petitioner's IEPs during the relevant time period. Accordingly, Petitioner's failure to implement claims are not substantiated.

Restraint/Seclusion

- 61. Petitioner's Complaint contends that was improperly restrained and secluded, and that the same were not properly reported.
- 62. 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. 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.

63. 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 his or her 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).

64. It is undisputed that, on several instances, Petitioner was restrained or required the use of a quiet or calming room. Outside of the unsubstantiated allegations by Petitioner to parents, Petitioner failed to present sufficient evidence to establish that the utilization of restraint or placing Petitioner in the quiet room violated section 1003.573(4) and (5). Petitioner failed to present sufficient evidence for the undersigned to also conclude that Respondent failed to properly report such restraint or seclusion. Accordingly, such claims are dismissed.

ORDER

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

ORDERED that Petitioner failed to satisfy burden of proof with respect to

the claims asserted in Petitioner's Complaint. Petitioner's Complaint is denied in all aspects.

DONE AND ORDERED this 13th day of May, 2020, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, Florida 32399-3060 (850) 488-9675 Fax Filing (850) 921-6847 www.doah.state.fl.us

Filed with the Clerk of the Division of Administrative Hearings this 13th day of May, 2020.

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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).