

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

vs.

Case Nos. 19-6831E
19-6832E
19-6833E

THE SCHOOL BOARD OF HILLSBOROUGH
COUNTY, FLORIDA,

Respondent.

_____ /

FINAL ORDER

A due process hearing was held for three consolidated cases over the course of 30 non-consecutive days before Jessica E. Varn, an administrative law judge with Florida's Division of Administrative Hearings (DOAH). A live, in-person hearing began in June 2020, in [REDACTED], Florida. Due to a global pandemic, the remainder of the hearing was conducted by Zoom video-conference, and was completed on February 22, 2021.

APPEARANCES

For Petitioner:

[REDACTED]

For Respondent: LaKisha M. Kinsey-Sallis, Esquire
Fisher & Phillips LLP
101 East Kennedy Boulevard, Suite 2350
Tampa, Florida 33602

STATEMENT OF THE ISSUES

Whether The School Board of Hillsborough County, Florida (School Board), denied the student a free and appropriate public education (FAPE) by failing to design an individualized education plan (IEP) that was reasonably

calculated to enable the student to make progress in light of the student's circumstances;

Whether the School Board denied the student a FAPE by failing to materially implement the student's IEP;

Whether the School Board denied the student a FAPE by failing to provide assistive technology (AT);

Whether the School Board denied the student a FAPE by failing to provide comparable services when the student transferred from another state; and

Whether the School Board denied the student a FAPE by predetermining the IEP without meaningful parent participation.

PRELIMINARY STATEMENT

The student's mother, who at the time was acting on her own behalf and without any type of representation, filed three separate requests for due process hearings on December 23, 2019. A week later, the School Board filed a request to consolidate the three complaints and a request for an extension of time to hold a resolution session due to the closure of schools during the winter break. The student's mother objected to both requests. The request to consolidate was granted, but the request for an extension of time for the resolution session was denied.

On January 3, 2020, the School Board filed a Notice of Insufficiency on the consolidated cases, which was denied by the undersigned.

On January 13, 2020, a telephonic pre-hearing conference was held, wherein the parties agreed to schedule the hearing for February 19 through 21, 2020. On February 5, 2020, the student's mother filed an Application for Determination of Civil Indigent Status, which was granted by the Clerk of DOAH on that same date. On February 7, 2020, the student's mother requested that the case be placed in abeyance because the student's dog had died and some witnesses were unavailable for the hearing dates. On

February 10, 2020, Petitioner filed Petitioner's Request to Qualify a Representative, seeking to have the undersigned accept [REDACTED] as a qualified representative.

On February 11, 2020, a second pre-hearing teleconference was held. The parties had an opportunity to address the pending motions, and agreed to reschedule the due process hearing for February 25 through 27, 2020.

On February 13, 2020, the School Board filed Respondent's Notice of Non-Objection to Petitioner's Request to Qualify a Representative, stating that although Petitioner had not offered any information on whether [REDACTED] met the criteria set forth in Florida Administrative Code Rule 28-106.106, the School Board believed that given Petitioner's verbal representations regarding her need for [REDACTED] assistance in this matter, it would not be prudent to object to [REDACTED] participation as the Petitioner's qualified representative. Finding that Petitioner's Request to Qualify a Representative did not contain any information establishing that [REDACTED] met the criteria set forth in rule 28-106.106, Petitioner's Request to Qualify a Representative was denied on February 19, 2020.

On February 17, 2020, the student's mother filed a second request for an abeyance, stating that Ms. Card was unavailable on the hearing dates, and that there remained an outstanding issue as to the production of educational records. The due process hearing was rescheduled for April 21 through 23, 2020.

On April 7, 2020, Petitioner's Renewed Request to Qualify a Representative was filed. On that same date, a third pre-hearing teleconference was held, wherein the School Board indicated that it had no objection to [REDACTED] being recognized as a qualified representative. At the request of the parties, the hearing was once again continued, and the parties agreed to provide a status report no later than May 15, 2020. [REDACTED] was recognized by the undersigned as Petitioner's Qualified Representative on April 8, 2020.

On May 15, 2020, the parties jointly filed a status report. Petitioner continued to believe that three days were needed for the due process hearing. On May 21, 2020, a fourth pre-hearing teleconference was held, and the parties agreed to reschedule the due process hearing for June 8 through 10, 2020, in [REDACTED], Florida.

On June 3, 2020, a fifth pre-hearing teleconference was held, in order to discuss the protocols for a live hearing during the COVID-19 pandemic. From June 8 through 10, 2020, the due process hearing was held live in the media center of an elementary school in [REDACTED], Florida. The continuation of the hearing was next held on June 17 and 18, 2020, by Zoom video-teleconferencing. The parties agreed to continue the case to July 27 through 31, and August 3 and 4, 2020.

On July 23, 2020, a sixth telephonic conference was held, wherein Petitioner filed an Oral Motion to Cancel Hearing and Place Case in Abeyance, stating that Petitioner's Qualified Representative was unable to attend the scheduled due process hearing due to personal reasons. The School Board did not object. The parties agreed to a 30-day abeyance, and also agreed to attend a telephonic scheduling conference in August 2020, wherein the parties would provide mutually agreeable dates for the rescheduling of the due process hearing.

On August 20, 2020, during a telephonic conference, the hearing was rescheduled for September 24, 25, and 28 through October 2, 2020. At the conclusion of these hearing dates, the parties agreed to reconvene on October 19 through 21, 23, 26, and November 9, 2020. On November 6, 2020, the parties jointly filed an Emergency Motion to Cancel Hearing Set for November 9, 2020 to Allow Parties to Mediate the Case. The November 9, 2020, hearing date was canceled.

On November 12, 2020, a telephonic status conference was held. The due process hearing was reconvened on November 16 through 18, 2020;

December 7 through 10, 14, and 15, 2020; January 27 through 29, 2021; and February 22, 2021.

At the conclusion of the due process hearing, the parties agreed to file proposed final orders 30 days after the filing of the transcript, and for the undersigned to enter the final order 60 days after the filing of the transcript. The Transcript was filed with DOAH on March 22, 2021. On April 1, 2021, Petitioner filed a “Motion to Correct Transcripts” indicating that the transcript sometimes referred to ██████████ as an attorney, rather than as Petitioner’s Qualified Representative. While the undersigned has no authority to correct the transcript, the undersigned can state that ██████████ was accepted as a non-attorney Qualified Representative, and that ██████ never identified ██████████ as an attorney. Therefore, any transcript references to ██████████ as an attorney should be disregarded.

On April 19, 2021, the parties agreed to extend the proposed final order deadline to May 21, 2021. The deadline for this Final Order was extended to June 21, 2021. On May 18, 2021, Petitioner requested another two-week extension, which the School Board did not agree to. The undersigned granted the request, extending the deadline for proposed orders to June 4, 2021, and the final order deadline was extended to July 6, 2021. On June 2, 2021, Petitioner once again requested a two-week extension for filing the proposed orders, which was unopposed. The deadline for proposed orders was extended to June 18, 2021, and the final order deadline was extended to July 30, 2021. On June 18, 2021, Petitioner requested a fourth extension of time, which was agreed to, further extending the deadline for proposed orders to June 21, 2021. The deadline for the final order was extended to August 2, 2021. The parties timely filed proposed final orders, which were considered in the preparation of this Final Order.

The Transcript reflects the identity of each of the 29 witnesses called by the parties and the exhibits which were entered into the record. 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 female pronouns in this Final Order when referring to Petitioner. The female pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

Background information

1. The student in this matter began her schooling in [REDACTED] state, where she, around the age of [REDACTED], was diagnosed with global apraxia, a rare neurological disorder which affects the student's motor planning. Gleaned from the collective testimony of the many professionals who testified in this case, global apraxia is rare and can manifest itself in multiple ways, affecting each patient's motor planning in different ways; and it can affect all motor planning, not just speech. Many witnesses described the condition as the brain sending frayed or mixed signals to the body—for example, mixed signals to this student's mouth when speaking, and to her hands while writing.¹

2. Without fail, this elementary school student is described as a smart, friendly, happy, eager to please hard worker. Of the many manifestations of global apraxia that she faces, perhaps the most noticeable are her severe and profound speaking challenges; these challenges highlighted because even as a third grader, she still did not recognize when others could not understand her.

3. Her mother considered moving from [REDACTED] to Hillsborough County, Florida, when the student was finishing kindergarten. Equipped with a [REDACTED] degree in [REDACTED], and having experienced the manner in which

¹ One school-based speech-language pathologist, [REDACTED], disagreed with the apraxia diagnosis, opining instead that the student suffered from a severe phonological disorder. [REDACTED] agreed, though, that irrespective of the diagnosis, the student was significantly impaired as compared to her peers, and her speech was only 60 percent intelligible in the Fall of 2017, when the student was in first grade.

the [REDACTED] schools addressed her daughter's unique needs, the mother reached out to the School Board of Hillsborough County prior to deciding to move to Florida.

4. In [REDACTED], the student was found eligible for exceptional student education (ESE) services in the category of Other Health Impaired (OHI), and she received individual speech and language pathology therapy (SLP), occupational therapy (OT), and physical therapy (PT) weekly while in school. Naturally, given that the student had not been cured, and the [REDACTED] professionals identified the student's need for therapies focused on gross and fine motor skills, the mother expected that when the family moved to Florida, those services would continue. But to be certain of that, the mother confirmed with the School Board that it would honor the [REDACTED] educational plan and would continue the same services.

5. Having received confirmation that the same services would be provided, but that the School Board would also seek consent to evaluate the student once enrolled, the mother decided to move to Florida.

6. The mother's credible testimony at the hearing and her email communication during this time make clear that had she known that all types of therapies would not be delivered in the same fashion and with the same frequency, and some would never be provided in any fashion, she would have stayed in [REDACTED].

7. Within the first nine weeks of first grade in Hillsborough County, the mother had hired an attorney, because she realized that comparable services were not being provided to the student. The student was receiving no OT or PT, but she did receive SLP in group and individual sessions. Due to a myriad of bureaucratic reasons, the IEP team did not create an IEP for the student until December 18, 2017, one full semester after starting school in Hillsborough County. By December 2017, the mother's attorney had filed two different conflict resolution complaints, with two different entities.

8. Throughout the due process hearing, it was apparent to the undersigned that the mother's outrage and her aggressive advocacy, which included bringing an investigative reporter to at least one meeting, strained the relationships between the educators and the mother. The mistrust among all the adults involved in this young student's life is profound.

9. During the Fall of 2017, the student was evaluated by the School Board in the areas of SLP, OT, and PT. Dissatisfied with the results of those evaluations, the parent requested, and was granted, Independent Educational Evaluations (IEE) in all of the areas. Both SLP evaluators found that the student's intelligibility level was approximately 60 percent, well below average for her age. Since this student's most obvious disability is revealed when she speaks, the differences between the SLP evaluations are not as significant as in the areas of OT and PT.

10. In October of 2017, the parent and her attorney continued to express concerns about the student's handwriting skills and overall motor planning skills. The IEP team agreed to re-evaluate the student for OHI eligibility, which was the eligibility category the student had in [REDACTED].

11. In the area of OT, the evaluation results of the School Board's occupational therapist were quite different from the results of the IEE conducted by [REDACTED] in November of 2017. During [REDACTED] testimony, [REDACTED] provided this summary of [REDACTED] findings, which were based on standardized testing and clinical observation:

A. When I evaluated [her] gross motor skills, I found that [her] upper body strength was actually poor, and [her] hand strength was significantly below average. [She] had fair coordination between right and left side of the body, as well as coordinating the upper and lower. [She] had fair to poor balance.

Q. How can these issues affect [**] in school?

A. Well, [her] hand strength and upper body strength are significantly affecting [her] in school because of [her] fine motor abilities. [Her] poor hand strength is contributing to poor handwriting, fatiguing quickly, and poor upper body strength as well contributing to that, as [she's] having to really stabilize [herself] to write.^[2]

12. More specifically, [REDACTED] found that the student's grip strength was three pounds--well below the average of 22 to 33 pounds. As to the student's handwriting skills, [REDACTED] explained:

At that time [she] was able to write [her] name and letters of the alphabet but had poor letter formation; fair linear orientation, meaning attention to writing horizontally on a line; fair spacing; and required assistance to hold a pencil correctly.^[3]

13. In comparing [REDACTED] evaluation to the School Board's OT "functional assessment," [REDACTED] testified as follows:

Q. And were any standardized test instruments used [during the School Board's functional assessment] ?

A. [REDACTED] did use the Beery-Buktenica VMI.

Q. And what were [her] results on that?

A. [Her] standard score was 98 on the VMI, 101 on visual perception and 90 on motor coordination, with an average.

Q. And did they correlate with your results from your November '17 –

A. No.

² Transcript, Volume 9, page 1687.

³ Transcript, Volume 9, page 1691.

Q. -- evaluation? How did they differ?

A. These results were better.

Q. Was that within one month of your test?

A. Yes.

Q. Is there -- can you think of any explanation why [her] results one month prior to your test would be better than when you gave the test simply one month later?

A. No, I cannot.

Q. Isn't it usual that if there's a repeat of the same test that the second testing would show better based on learned responses?

A. Possibly.

Q. Do you expect to see it decrease over one month?

A. No.

Q. When this evaluation reported about muscle tone and muscle strength, did they -- etc., did this evaluation come up with the same results that you had?

A. This one stated that [her] muscle tone was within normal limits, as was [her] muscle strength. So no.

* * *

Q. And do you know if -- I'll come back to that. In the "Mobility and Gross Motor" section, there was also references to [REDACTED] endurance and static and dynamic balance. Did you have the same results one month later as they had on this evaluation?

A. When I looked at [her] balance, no. [She] was below average.

Q. And [her] endurance?

A. I would say [her] endurance was within normal limits, other than the fatigue of handwriting.

* * *

Q. And in her summary, is there anything in her summary that strikes you as not what you found?

A. She stated that [she] writes legibly and stays on the lines, and I did not see that. She had [her] reproduce by copying -- oh, sorry. She had [her] reproduce the letters without a model, was able to do 23 out of 26. I don't know if [she] did it sequentially or not; so I don't know how [her] working memory was for that. And then she shows with an average range for the VMI, which I did not see.

Q. And did she make any recommendations?

A. She did not recommend therapeutic interventions at this time.

Q. Do you concur with that recommendation?

A. No. I recommended occupational therapy intervention.^[4]

14. ██████████ found the student's difficulties with handwriting and her fine motor issues were "definitely a component of [her] apraxia."⁵ She also pointed out that as any student ages, they are asked to write more. If this student, who has weakened hand strength and fatigues quicker, does not receive adequate therapy, ██████████ explained that it will be harder for her

⁴ Transcript, Volume 9, pages 1726 to 1732.

⁵ Transcript, Volume 9, page 1704.

to keep up with handwriting assignments. Perhaps in an effort to help the IEP team draft an IEP that addressed the student's OT needs, [REDACTED], in her November 2017 evaluation report, included specific IEP goals for the student, and recommended direct OT at school. During her testimony, she summarized them as follows:

The initial first goal was about fine motor coordination and handwriting, about writing the upper case and lowercase letters of the alphabet with improved formation, good formation; writing sentences with good formation and spacing; and improving [her] hand strength by 5 pounds.

The second goal looked at visual motor integration and core strength, things like supine flexion and prone extension exercises to strengthen [her] core for postural control; tracking an object without moving [her] head and keeping [her] eyes fixated on the object; and then copying block designs.

The last one had to do with motor planning, things like an obstacle course in a distracting environment, staying on task. And then there's a particular program called Neuromat that works on motor planning, and I included that too.^[6]

15. In terms of PT, the student was observed by a School Board PT therapist in November of 2017 and also underwent an IEE, conducted by [REDACTED]. The school-based PT assessment was done solely by observation of the student, with no standardized testing. It reflected that the student's muscle tone, muscle strength, range of motion, quality of movement, endurance and balance were all within functional limits; the student completed transitions on the school campus with her peers; she was able to access seating independently in the classroom and cafeteria; she walked independently, navigated around obstacles, kept pace with her peers,

⁶ Transcript, Volume 9, pages 1705-06.

was able to carry items while walking; she could go up and down eight stairs with an appropriate reciprocal gait; and she was able to access recess and physical education (PE) without modifications or accommodations.

16. [REDACTED] IEE was completed over the course of two days, and included standardized testing. During [REDACTED] testimony, [REDACTED] listed the tests [REDACTED] administered:

The first was an evaluation of muscle tone, the Modified Ashworth Scale. I did the Pediatric Balance Scale. I did not do a gross motor assessment because one had recently been done -- a standardized one had recently been done in [REDACTED]. None were done in Hillsborough. And I also did a PEDI-CAT 14 functional mobility assessment. Those are all standardized. In addition to that, I used the standard scores for the President's Physical Fitness Challenge, which gives you percentiles for children on several fitness activities based on their gender and age, and I modified a nonspeech apraxia test -- several nonspeech apraxia tests for adults for children because none of them exist for children.⁷

17. [REDACTED] IEE results, as [REDACTED] explained, revealed significant abnormalities in the student's muscle tone. [REDACTED] explained:

Okay. First of all, just the basic -- [her] Ashworth Scale for muscle tone showed that there was a significant increase in [her] biceps and in [her] ankles, which had not been noted in any other assessments. A non-standardized test but still one that is in the literature, [her] core strength showed deficits. [Her] balance scale placed [her] at the 95th percent confidence level for an age of three years, 3.5 months. [Her] PEDI-CAT mobility evaluation placed [her] in less than the 5th percentile for [her] gender and age, and the President's Physical Fitness Challenge test, depending on which they were, placed [her] at less than 50th percentile. The tests for nonspeech motor apraxia showed deficits in all areas tested, with [her] lower extremities

⁷ Transcript, Volume 7, page 1397.

being more involved than [her] uppers, and with meaningful tasks being easier for [her] than nonmeaningful.⁸

18. ██████ noted that ██████ PT evaluation results concurred with the ██████ PT evaluation results, which ██████ had reviewed as part of ██████ evaluation, which also utilized standard testing, and which had been conducted just months before the student arrived in Florida. ██████ also pointed out that some of the School Board observations were quite different from the standardized testing results from ██████ and from her IEE.

19. ██████ recommended that the student receive weekly individual PT while at school. ██████ summarized ██████ recommendations as follows:

I made several -- I made recommendation that ██████ did receive physical therapy services. I based a lot of that on the results of the tests for motor apraxia, which is [her] primary diagnosis, because I think, in my opinion, that is the thing that will be the most challenging for [her] in [her] school environment. With apraxia, even with very familiar tasks, your brain -- the brain of a person with apraxia has very much difficulty picking a motor - the motor plan to execute.

For instance, even after years of ballet, asked to perform five basic movements of ballet, the child is unable to make a plan to do that unless they are given verbal cues and, very oftentimes, being placed in the position. They can't necessarily follow your invitation or your verbal cue. They know what they want to do; their brain cannot execute the plan to do it. And I believe that that will be the most significant difficulty for [her] as [she] goes through new and novel experiences in [sic] school year after year.

⁸ Transcript, Volume 7, page 1397.

Q. And did you see this with [**] specifically?

A. Yes, I did.⁹

20. [REDACTED], much like [REDACTED], opined that if this student was not taught compensatory strategies while young, her disabilities would be more difficult to manage as she gets older.

21. In the area of speech, the IEE was conducted by [REDACTED], who is a master's level SLP, a doctoral level Board Certified Behavior Analyst (BCBA), and has a doctorate in educational policy, planning, and administration. [REDACTED] also evaluated the student in November of 2017 and again in February of 2020. [REDACTED] found the student to have significant difficulty with intelligibility and often not able to be understood. In [REDACTED] evaluation report, [REDACTED] provided a glimpse of how the student's disability manifests itself:

[**] was looking at [her] shoes and kept repeating a phrase that neither this examiner nor [her] mother understood. [**] began to look frustrated and disappointed. After multiple attempts to determine what [**] was saying, [**]'s mother finally asked [**] if [she] was referring to the sand in [her] shoes. [**] responded "yes". [**]'s mother's [sic] stated that she did not understand [**], but noted that the shoes [she] was wearing that day are the same ones [she] wears to the beach and thought that perhaps [**] kept pointing to the shoes because [she] was feeling the sand in [her] shoes. Vowel and consonant distortions were noted to impact intelligibility even for a familiar listener and an experienced clinician.

22. [REDACTED] assessment of the student's intelligibility, at 60 percent, concurred with the School Board SLP evaluation. During her testimony, [REDACTED] opined that direct individual SLP and OT at school was key to manage the student's deficits, and that keyboarding should have been introduced to the

⁹ Transcript, Volume 7, page 1397.

student as an alternative way to communicate, given her speech and handwriting deficits. ■ noted that keyboarding could have certainly been taught starting in first grade, and would be helpful as an alternative for communication.

23. In December 2017, the IEP team met and considered both SLP evaluations, the school-based OT functional assessment, the OT IEE conducted by ■, the school-based PT observation, and ■ PT evaluation. All school-based professionals opined that other than in the area of speech, the student was functioning normally and at the same level as her peers. The parent attended this IEP meeting with her attorney, and the meeting was conducted by a state facilitator, at the request of the parent.

24. The student was only found eligible for ESE services in the category of Speech Impairment (SI), despite the extensive standardized testing and recommendations made by ■, ■, and ■, coupled with the extensive ■ educational service plan, which included individualized SLP, OT, and PT therapies. Incredibly, the December 2017 IEP was the first IEP created for the student, and it did not incorporate any OT or PT services, of any type.

25. The IEP, did, however, contain an SLP goal that called for a variety of specialized therapeutic techniques with fading cues (visual, tactile, verbal) across a variety of school settings, with the goal of improving overall speech intelligibility to at least 75 percent in connected speech as measured in four out of five speech samples sustained over a nine-week period; eight objectives aimed at the student's need to work on /l/ and /l/ blends, /s/ and /s/ blends, the production of "r", "ch", "sh", "j", "ay", "ah", "ow", "oy" and "t" sounds, using strategies (e.g., decreased rate, vowel lengthening, stretchy speech, syllable taping) to improve intelligibility, recognize nonverbal cues from listener, and intelligibly produce targeted classroom vocabulary; SLP to be provided 20 minutes, three times a week 1:1, push in therapy 30 minutes one time

weekly, and pull out therapy 30 minutes weekly; and classroom accommodations of preferential seating, extended time, and extended time for testing.

Spring semester, first grade

26. The facts relevant to the scope of this due process hearing begin at this point, at the end of the fall semester of first grade, two years before the complaint was filed. More specifically, the scope of this hearing is restricted to December 23, 2017, to December 23, 2019.¹⁰

27. In February of 2018, due to the agreement back in October to reevaluate the student for possible OHI eligibility, the student was finally evaluated by [REDACTED] and [REDACTED], two school psychologists employed by the School Board. In conducting their evaluation, they reviewed many prior evaluations: a neuropsychological report from [REDACTED], dated May 11, 2017; another [REDACTED] neuropsychological report dated July 27, 2017; a neurologist's letter from [REDACTED], dated December 15, 2017; the School Board's OT functional assessment dated October 23, 2017; the School Board's PT functional observation dated October 23, 2017; [REDACTED] OT IEE; [REDACTED] PT IEE; and [REDACTED] SLP IEE.

28. Given the extensive evaluations administered in the very recent past, the only standardized assessment administered by [REDACTED] was the Vineland Adaptive Behavior Scales, 3rd Edition. [REDACTED] found that the results obtained during this assessment were consistent with the diagnosis of global or motor apraxia, reflecting significant weaknesses in planning and executing motor skills. In [REDACTED] report, [REDACTED] wrote:

¹⁰ Petitioner raised as an issue in this case whether the School Board failed to provide comparable services to the student upon transferring from [REDACTED] to Florida. At the close of the due process hearing, after hearing testimony on the issue, the undersigned ruled that the scope of the hearing would be limited to the two years preceding the filing of the complaints. The uncontroverted testimony established that the parent knew about the alleged failure to provide comparable services within the first month of first grade, and, with the help of an attorney, filed two complaints before December of 2017. Therefore, the issue of whether the School Board failed to provide comparable services when the student transferred to Florida will not be addressed in this Final Order, as it is time-barred.

*While the teacher indicates that [**'s] writing skills are meeting grade level expectations, [her] handwriting does appear to be immature and inconsistent, and at times illegible to the unfamiliar reader due to poor letter formation and spelling errors that are not easily interpreted. Due to [**]'s difficulty with motor planning and weakness in fine motor dexterity, increased cognitive effort and focus is needed in order for [her] to complete writing tasks. Although the content of [her] writing and ideas reportedly reflects adequate progress, [her] relative difficulty with the aspect of writing appears to impact her ability to express her knowledge and ideas effectively in written form. (emphasis added)*

29. ██████████ recommended “more direct instruction” in spelling, providing many tips on different strategies that could be employed in the classroom. ██████ also recommended that consultation between the SLP and the classroom teacher occur regarding the connection between the student’s spelling deficits and her speech articulation. ██████████ also recommended that efforts be made to improve the student’s handwriting skills.

30. ██████████ testimony and ██████ report identify one consistent theme in this case, repeated in every field of expertise: the school staff and school-based evaluators insisting that the student is functioning at grade level in all areas except speech; but the mother and all private evaluators, and ██████████, finding that the standardized testing reflect a significant weakness in all motor planning, affecting gross and fine motor functioning. These deficits manifest themselves at school in the student’s speech, handwriting, and spelling challenges.

31. In April of 2018, the IEP team met to discuss Ms. Preston’s reevaluation. The parent brought with her an educational advocate and an investigative reporter. The meeting notes reflect ██████████ concern that as writing becomes more difficult in each grade, the student’s weaknesses may make writing more challenging for her, requiring more effort and

impacting her efficiency and performance. The notes also reflect [REDACTED] recommendation for more focus on handwriting.

32. The IEP team belatedly (at the end of her first academic year in Florida) found that the student met the eligibility standard for OHI, but were unable to formalize the additional eligibility and amend the IEP due to time constraints.

33. The team did not reconvene until May 21, 2018—at the very end of the first grade, to finalize the amendment to the IEP. OT, as a related service, was finally added to the IEP. Setting aside the mother’s concerns, which were supported by [REDACTED] evaluation and recommendations, direct OT was not added to the IEP—only monthly OT consultation services were included.

34. The first-grade teacher opined that the student was at grade level in all areas, except speech. As to the spelling deficit that most professionals and the mother noticed, the first-grade teacher dismissed the concern because in [REDACTED] opinion, there exists no particular spelling levels students are expected to reach. By removing grade level standards, the student was deemed to be performing satisfactorily in spelling.

35. As to handwriting, the first-grade teacher also found that the student was performing at grade level. The student was provided with highlighted paper to help her stay on the line, thicker pencils, pencil grips, and paper with wider lines than most of the students. With these classroom strategies, often only used if the student asked for them, the teacher opined that the student was performing satisfactorily, and the teacher found the student’s handwriting to be legible.

36. According to the teachers, academically, the student was performing at grade level by the end of first grade.

37. As to speech services, which was the only area in which the student actually received direct therapy, the student made some progress (the production of /l/ in phrases and when blended, the /s/ sound in all positions, the /ch/ sound in all positions, and the /sh/ sound) but she still could not

produce vowel sounds and still could not discern when listeners could not understand her speech.

38. The May 2018 IEP added one goal to the IEP, addressing the student's difficulty with spelling during written communication, apparently setting aside the first-grade teacher's insistence that the student had no spelling deficits. Interestingly, in contrast to the idea that there are no grade level expectations for spelling, the goal was to be measured by a "nationally normed writing assessment." It reads as follows: "With cues, prompts, and support, [**] will apply learned phonics skills to encode words across the curriculum with close approximation to increase [her] correct writing sequence by .5 words per week as measured by a nationally normed writing assessment."

39. The objectives for the goal included the student self-monitoring her writing legibility. Rather than add direct OT as the IEEs recommended, the handwriting deficit that even ██████████ recognized was addressed with only the student, a first grader, self-monitoring her own handwriting and monthly OT consultation.

Second grade

40. The student continued to be educated in a general classroom with support from an ESE teacher. Her general education teacher was ██████████, and her ESE teacher was ██████████.

41. In September of ██████████, the IEP team met to discuss whether compensatory services were warranted as a result of an Office of Civil Rights complaint filed by the mother. Not surprisingly, all teachers opined that the student was progressing at grade level in all areas, except speech, and the school staff decided that FAPE was provided, and no compensatory services were owed.

42. Also in September of 2018, the student was once again evaluated by ██████████ for her PT needs. Her recommendation for individual PT at school remained unchanged, and she saw no improvement—which was not

surprising given that the student had not received any PT services. In fact, she found that the student regressed in her core strength in less than a year. During her testimony, [REDACTED] was adamant that all of the student's PT needs are educationally relevant, and that she needed PT in the school setting:

Q: So when you completed this, what goals and objectives had you seen on [her] IEP that would have made physical therapy educationally relevant for [her]?

A. Well, all of the – [she] has so many different things that interfere with [her] ability to move and maintain [her] body in space, and this affects everything from sitting, to extremity control, to moving through [her] environment, to actually [her] ability to learn and formulate a plan to repeat something that [she]'s already learned again and again. Without getting rid of that interference, [she] will never make progress. You have to remove that so that [she] can move forward in [her] educational endeavors.

43. The IEP team met on October 15, 2018, for an annual review of the student's IEP. Given that the school was not providing any OT or PT, the student was, at that point, receiving individual OT outside of school. [REDACTED] and the private OT therapist attended the IEP meeting by telephone, and shared their opinions. The private OT therapist stated that the student's fine motor skills were at the level of a five-year old, and that her hand fatigued after writing a few sentences. The classroom teachers, in line with all school-based personnel (except [REDACTED] at this juncture), opined that the student did not need any additional therapies to be able to function satisfactorily in the classroom, and that her writing was and always had been legible. As to the opinions shared by [REDACTED], the teachers and Principal all opined that the student moved around campus without any

issues, and was functional in all areas of the school. The team decided to have a school-based PT once again observe the student.

44. The team was unable to finalize the annual IEP, and agreed to reconvene. The student's mother, seeing that OT and PT direct services would once again be denied, asked for [REDACTED] to attend the next meeting. Due to scheduling conflicts, [REDACTED] was never able to attend an IEP meeting.

45. In late October 2018, the student underwent a psycho-educational evaluation by [REDACTED], as an IEE. After completing an extensive battery of assessments, [REDACTED] noted that the student presented with severe dyspraxia, evidenced by poor articulation and often being unintelligible. She also noticed that the student used a thumb wrap grasp while writing, which would cause premature fatigue. Overall, the student's intellectual abilities were comparable to same-age peers, but she would need a variety of strategies to express knowledge through speech and writing. [REDACTED] found that the student's ability to integrate visuospatial skills and motor activity were significantly delayed. Her visual motor integration for reproducing forms, which is required for handwriting, was in the lowest, first percentile, on the standardized assessment. She explained,

In the classroom this is evidenced by poor handwriting as letters are object forms. [**] is likely to require more effort and concentration the motor skills required for writing, the increased cognitive demand thus interfering with attention to the ideas being expressed.

46. [REDACTED] added that as writing assignments get longer, the student would need more time to complete the writing task. As to written language, [REDACTED] found:

[Her] language skills assist with ability to express [her]self in written form, however, *poor letter formation, letter spacing, and letter placement on the line reduce readability*. As with reading,

[she] can spell many simple words but does not apply phonological skills to more difficult words (e.g. “disgusting’ spelled as [REDACTED]). [She] excels when provided word spellings and was able to write sentences quickly and accurately. *Spelling is [**]’s greatest weakness*, as [she] struggles to spell words and nonwords. [She] does not have sound-symbol correspondence and is not able to sequence sounds for novel words and nonwords. For example, “cooked” was spelled [REDACTED] and [REDACTED] was spelled [REDACTED]. Basic reading and writing skills indicate a breakdown in ability to integrate auditory and visual information, that is, hearing a word spoken and imagining its corresponding text form (phoneme knowledge). *Writing skills are more delayed because they also require integration of fine motor skill which is an additional area of deficit (grapheme knowledge)*. Although [**] can produce simple, legible sentences now, written expression will become more difficult with increasing grade levels as vocabulary and text become more complex. (emphasis added)

47. During her testimony, she provided insight into how global apraxia manifests itself when the student is trying to spell words and handwrite them:

[E]ven though [she] had poor phonics skills when [she] was spelling, [she] was able to identify words at an adequate rate according to [her] age. Spelling is a little bit easier to evaluate because you can actually see the pattern that [she] uses because it's right in front of you. And for [**], you know, [she] has also some misarticulations. So it's hard sometimes to hear the exact phonemic code. I could tell [she] was getting the whole word, but when [she] spells, I can actually see the misrepresentations of sounds and how they correspond to letters. That process in the brain of connecting those two is the same; one output is through your mouth, and one output is on paper.^[11]

¹¹ Transcript, Volume 4, page 909.

48. ██████████ made multiple recommendations for reading, writing, spelling, and handwriting skills. One of ██████ recommendations was AT that would help the student communicate and correct her spelling errors, requiring keyboarding skills.

49. On November 15, 2018, a school-based PT therapist observed the student make her way through one school day. Consistent with the past observation, which again did not incorporate any standardized assessments, the therapist reported that the student could access her school environment, across multiple settings, without any PT concerns.

50. The November 2018 IEP reflected the student's present level of performance (PLOP) in writing with these statements included:

[**] demonstrates a preference for planning in [her] head or orally with an adult to take notes for [her].

[**] struggles to independently apply the strategies [she] has learned for phonics while spelling, and this can make [her] writing readability difficult for the unfamiliar reader.

Typically, [**] states a preference for classroom handwriting paper to have a highlighted bottom half to give a visual cue for letter placement. At times, however, [**] will request that the lines not be highlighted resulting in variability of alignment of letters to lines.

51. The school OT therapist, ██████████, adjusted the desk and chair for the student, provided a different pencil grip for better finger positioning while writing, provided a composition book with "hi-write" paper (contains highlighted lines for accurate alignment), provided a visual model of upper and lower case letters for self-monitoring, and introduced red and green highlights on the left and right margins on "hi-write" paper to help with adhering to margins. There were no direct OT sessions, of course, because the IEP only required monthly consultation. ██████████ opined that the

student's handwriting was age appropriate and always legible, but was never able to state whether the student wrote at an age-appropriate speed, which is relevant in a classroom setting.

52. As to her progress on speech, the following is stated:

[**]'s spontaneous speech continues to be fast which negatively impacts [her] intelligibility. A measure of speech intelligibility found [**] to be 60% intelligible in connected speech.

[She] demonstrates understanding of a listener's facial gestures that indicate whether or not [her] speech was understood. However, [she] does not typically monitor [her] speech or seem aware of [her] listener's difficulty understanding [her] during spontaneous speaking situations. Recently, [**] was observed to use natural gestures to help a listener understand [her] speech during a conversation.

53. The IEP identified written expression and speech intelligibility as the student's priority educational needs. To address these needs, two goals were established. The spelling goal from the previous IEP was increased from .5 to .75 frequency, once again measured by a nationally normed writing assessment.

54. The second goal was to reach 75 percent intelligibility in connected speech, which was unchanged from the previous year's IEP goal, with objectives focusing on the student's vowel distortion; /l/ and /l/ blends; /s/ and /s/ blends; /sh/ and /ch/ in sentences and spontaneous speech; and /j/, /z/, and /r/ in various positions of syllables, words, and phrases. Another objective, the same as the year before, was for the student to better identify nonverbal cues from listeners to increase her self-monitoring.

55. The OT services were once again limited to monthly consultation, with no direct therapy. SLP was to be delivered individually, in a small group setting and in a push-in format on a weekly basis.

56. ██████████, the second-grade teacher, was particularly defensive while testifying—██████████ recounted ██████████ first encounter with the student's mother during the school's open house event:

And it was an interesting interaction, to say the least. She was very adamant at that time that she was going to be the biggest pain in the ass that I've ever had. So that pretty much set the tone for what I thought our year was going to be. So it took me back because obviously I do not want to have a relationship like that with a parent. So -- but [**] and I had a great relationship. [She]'s a great student.^[12]

57. When explaining the student's handwriting skills, ██████████ could only state that the student's skills "grew" and that the student "knew" she could write legibly. When asked for specificity, ██████████ avoided stating whether the student's handwriting was age appropriate or on par with her peers, or if the student wrote at the same speed as her peers.¹³ When explaining the student's struggles with spelling, which are evident in the work samples in the record and in standardized testing conducted by ██████████, ██████████ felt like ██████████ was being attacked, and blamed the mother for not practicing the spelling words at home. ██████████ testified:

Q. I'm not going to ask a lot of questions about specific [spelling] tests because they're pretty self-explanatory, but was [**] still struggling with [her] spelling at the end of the second grade year?

A. By "struggling," what do you mean?

Q. Well, for example, page 304, 305.

A. I would like to say, though, just in my defense that there was no support at home in spelling. So I just want to put that out there too, that there was no -- I feel like I'm being attacked here for spelling, but there was no -- there was no

¹² Transcript, Volume 3, page 576.

¹³ Transcript, Volume 3, page 579.

practice at home either. So there wouldn't have been much progress on these words if [she]'s only practicing them with me. So -- so there were gains. Obviously you can see in [her] writing there were gains; *but the specific spelling words, [she] was not studying them at home, so they were not being -- there was [sic] no gains in those words.* (emphasis added)¹⁴

58. The [REDACTED] teacher for second grade, [REDACTED], was similarly defensive during [REDACTED] testimony, stating that the mother accused the teaching staff of lying, and that handwriting accommodations such as the hi-write paper were *only* used because the mother had concerns—in [REDACTED] opinion, the student's handwriting was always legible, with or without the highlighted lines. Interestingly, the IEP contained monthly OT consultation with handwriting guides and tools when there was, according to the teachers, never a need for them. Their collective opinion, in lockstep, and contrary to independent professionals, was that the student's handwriting was always legible.

59. The IEP team met and created a new IEP on May 15, 2019, intended to only address the need for extended school year (ESY) services. In addressing this issue, the PLOP was updated.

60. The PLOP reflected that at the end of second grade, the student was at grade level in all areas except speech, and her handwriting was legible to all teachers. As to speech, the student had made some progress, with some informal intelligibility measures ranging from 70 to 80 percent. Her intelligibility continued to be primarily affected by vowel distortions and the phoneme /r/.

61. Interestingly, the goals on the May IEP remained the same as they were written in the November 2018 IEP. To the extent that any progress was made over the course of six months in second grade, the student had not mastered either of the two goals or any of the objectives— goals that

¹⁴ Transcript, Volume 3, page 621.

addressed her spelling and speaking deficits. Once again OT services were limited to monthly consultations, with no direct therapy.

62. The mother, likely in response to the private evaluators who had recommended keyboarding skills and to the lack of meaningful progress on the IEP goals, requested an AT evaluation.

Third grade

63. The student remained in the general education classroom with support from an ESE teacher. Her third-grade teacher was [REDACTED], and her ESE teacher was [REDACTED].

64. At the beginning of third grade, the AT evaluation was performed by [REDACTED] and [REDACTED]. As part of their evaluation, [REDACTED] and [REDACTED] reviewed academic data, teacher input, handwriting samples, device trial data, observation, IEPs, evaluation data, parent input, and student input. During the period of August 19, 2019, through September 6, 2019, the student was provided a computer in the classroom. No one had, at this juncture, taught the student how to type. Not surprisingly, the student refused to use the computer for writing, because she had no typing skills.

65. [REDACTED] and [REDACTED] also administered an assessment to evaluate the student's performance on handwriting and typing. The assessment required the student to copy sentences. Again, not surprisingly, it showed that the student handwrites significantly faster and produces overall better product when writing (47.3 seconds per sentence) over typing (138 seconds per sentence), because she's been using a pencil since at least kindergarten and has never been taught how to type. Naturally, when asked, the student preferred writing over typing—which should have surprised no one.

66. Based on this non-sensical approach to try out a keyboard without ever teaching the student to type, as well as the teacher's report that the student's handwriting was legible, [REDACTED] and [REDACTED] recommended

that the student continue to use handwriting supports discussed on the IEP instead of using a device that required keyboarding skills.

67. Understandably, the mother immediately requested an IEE in the area of AT. Due to the parent pointing out the obvious—that [REDACTED] and [REDACTED] AT assessment did not consider the fact that the student had no typing skills--the school staff agreed to provide keyboarding assistance to the student in the classroom during bell work or during her computer lab time. Information regarding typing websites and a sheet that mimicked a keyboard was provided to the student so that she could practice on her own. The student did not receive any direct instruction on keyboarding.

68. [REDACTED] testified that the students in Hillsborough County who are outfitted with a high-tech AT device are those students with severe speech apraxia, who have speech intelligibility below 30 percent. The school based SLP who worked directly with the student gave informal intelligibility assessments that were done during recorded conversations on her phone, but then those recordings were deleted. According to her, the student ranged from 55 percent intelligibility to some that were higher, in the 80 percent range.

69. One year after [REDACTED] issued [REDACTED] report, and due to the mother's request, [REDACTED] met with key school-based members of the IEP team and wrote up a conference summary, dated October 23, 2019. It reads, in part:

3. Information I shared:

- Although school personnel are not observing the severity of difficulties described by the parent, [**] does have a documented speech and motor disability.

- Given her overall cognitive ability, [**] has many areas of strength to draw upon, as well as the ability to develop compensatory strategies.

- Difficulties with executive function are not unexpected, as speech and motor apraxia involve areas of the brain in and adjacent to the frontal lobes, which also regulate attention, planning, organization, etc.

- The impact of these difficulties is often increased beginning in third grade, given the increased academic demands as well as expectations for increased independence and self-regulation typically noted at that grade level.

- [**] may work hard to control frustration and regulate at school, but then express [her] frustrations more in the home environment after school when [she] is cognitively and/or physically fatigued. In addition, the structured environment of the classroom often contributes to the student's self-regulation, while frustration or negative responses may be seen in other environments where there is less consistency and structure.

- While handwriting is not emphasized in the curriculum, frequent and consistent practice and feedback with handwriting is helpful to students with dysgraphia or motor apraxia, as it can help increase the neural connections and fluency/automaticity of motor movements required for writing.

4. Suggestions to offer for [her] IEP:

- *Add/include direct handwriting intervention (see [redacted] evaluation, page 8, #3, bullet 2). This could be as simple as a daily scheduled time (10-15 minutes max) to practice handwriting skills independently from a written expression or written language assignment. Immediate feedback, correction, and opportunity for [**] to then copy the corrected writing is important.*

- [redacted] indicated that she is beginning to teach cursive writing. This may be helpful for [**] in that the motions for cursive are more fluid.

Provide [her] adequate practice time, as again, the practice and repeated exercises increase automaticity and fluidity, as well as the integration of auditory and visual information with motor output.

* * *

- From ██████████ report, page 7, last bullet before #2: It is important to teach basic skills to mastery and automaticity, rather than specifically to the curriculum pacing, in order for skills to become fluid.

* * *

- The multiple strategies/interventions as suggestions in ██████████ report still apply, so in addition to the specific ones I have referenced here I would suggest you review it again to give you any ideas about how you might tweak or enhance your strategies based upon [her] current performance. (emphasis added)

70. During ██████ testimony, ██████████ agreed that keyboarding skills are a good possibility for the student, and that she would need specific, explicit instruction to learn to type. ██████ explained that in terms of hand fatigue, typing would be easier for the student. And ██████ also explained that when ██████ sent the summary to the IEP team, ██████ did so to reiterate the information that ██████████ had provided, and help the teachers understand the neuropsychological perspective of global apraxia.

71. Five days later, the IEP team met to hold the annual review of the IEP. ██████████ participated in the IEP meeting, and encouraged the team to consider teaching keyboarding skills as an alternative form of communication. The meeting had to be continued, and the team reconvened on December 11, 2019. An IEP was never finalized until January of 2020—past the date when the complaints were filed in this matter.

72. In January of 2020, a month after the complaints were filed, ██████████, a private OT, once again evaluated the student. ██████ found that the student still demonstrated deficits in handwriting, and saw no improvement over a span of over two years. In fact, ██████ noticed that in third grade, the student blocked a significant amount of the paper in such a way that she could not see what she was writing. She would write something, then lift her hand to see what she had written before moving to the next word. Letter spacing, letter formation, and line alignment had remained the same. The student was still using a thumb wrap, lateral grasp with the pencil, and still had poor hand strength, and no pinching strength.

73. The IEE in AT was delayed quite a bit—another bureaucratic bundle of obstacles that is inexcusable--and not conducted until June of 2020, during the summer break between third and fourth grade, and just weeks before the due process hearing began. It was conducted by ██████████, whose specialty is pediatric SLP. ██████ had, during ██████ SLP training, specifically worked to create a statewide program for Florida on the topic of apraxia. During ██████ testimony, ██████████ found the student to be profoundly unintelligible due to her apraxia of speech, and recommended an Augmentative and Alternative Communication (AAC) device, finding that it was necessary for the student to access her education, in particular, to assist the student when her communication skills break down. ██████ too recommended that the student learns how to type. ██████ explained:

Q. In your opinion, based on your review and your evaluation, what you know of [**], do you feel that [she] requires assistive technology?

A. So -- yes. I think providing [her] with either a telephone or an iPad with that Proloquo2Go or the Proloquo4Text, I think that would assist [her] in those moments where [she] is trying to get [her] message across and [her] listener is just not understanding [her]. So I would, as a therapist,

have [her] use [her] verbal production as well as the device productions in combination.

Q. And for [her] handwriting?

A. For [her] handwriting, I absolutely would teach [her] to type and use a word processor and teach [her] how to look at the spelling errors that [she] made and make the corrections, in addition to targeting the phonological awareness skills.

Q. And would you also recommend a spelling prediction assistance for things that are not assessing [her] spelling?

A. Yes. Part of the reason why I choose Proloquo4Text for [her] is the fact that it does have that word predictor. I would choose the same for typing as well.^[15]

74. ██████████ and ██████████, like all the other teachers before, opined that the student was performing at grade level in all areas except speech. ██████████, at the due process hearing, was particularly defensive and unhelpful. Despite being the ESE teacher who had most recently worked with the student, ██████████ had a great deal of trouble recalling anything, and was evasive when asked questions by Petitioner’s Qualified Representative. Like ██████████, ██████████ blamed the student’s spelling deficits on the lack of studying at home.

75. ██████████, though, admitted that the student “had a difficult time writing,” referring to handwriting, rather than content and structure of sentences. Given this handwriting difficulty, ██████████ also did not require the student, on longer writing assignments, to ever handwrite a final draft—the student would put pencil to paper to produce a rough draft, but would then “conference” with ██████████ for completion of the assignment. ██████████ notes, which ██████████ keeps for only some of her students and were taken

¹⁵ Transcript, Volume 7, page 1352, 1353.

contemporaneously with the dates in the Fall of 2019, contain these observations:

8/15 Looking around the room even after prompts given to get started. Writing—just sitting with both hands on [her] head. 10 minutes to get started, but only because I handed out SStars [sic].

8/16 Got started on reading assignment right away. Pulled bookmark to help guide [her] reading. 15 min. in started playing with [her] hair and looking around the room. Spelling—lines highlighted. Began 5-8 minutes after everyone else.

8/21 Several reminders to get busy and stay on task.

8/22 Needed to be redirected. Not completing work! [She] skipped coloring equator paper and finished reading paper instead.

8/28 Continent/map practice wrote nothing. Needed to be redirected.

9/24 Needed reminders to get going.

10/1 ELA Form 2, complained that [her] hand hurt. Needed to be redirected.

76. When asked to go through some of the work samples from [REDACTED] grade, [REDACTED] explained:

Q. So these [Petitioner's Exhibit 139, pages 175 through 183] were not considered a longer writing assignment because it was done in pieces?

A. Correct. The outcome is a longer writing piece, but I never expected [**] to sit -- it would just take too much time away from the rest of [her] instruction to expect [her] to sit and write the whole thing over, fixing the corrections, but we would still conference and discuss.

Q. Why would it take [her] too much time?

A. Just in prior things that [she's] done, it takes [her] a while to get things started, to get going. So I wouldn't expect [her] to rewrite the whole thing.

77. The record contains voluminous stacks of email communications, spanning the scope of the relevant period in this matter, from the mother to every general education teacher, ESE teacher, school-based SLP, school-based OT consultant, district level staff, school-based staff, and the Principal --all with one singular goal in mind: to find anyone who would pay attention to her daughter's educational needs, which were supported by every independent evaluator.

78. To the extent that the school staff's testimony conflicts with the mother's in any respect, the undersigned finds the mother's testimony to be credible and more consistent with the greater weight of the testimony provided by all the other witnesses. And to the extent that school-based professionals' opinions in the fields of SLP, OT, and school psychology conflict with the IEEs in those fields, the undersigned finds the independent professionals to be more thorough and more persuasive.

79. The most persuasive evidence established that the student needed weekly direct, individual OT from December 2017 to December 2019 in the educational setting. Her deficits in hand strength, handwriting, and fine motor functioning, as well as her visual motor integration deficits, should have been addressed in individual, weekly OT.

80. The most persuasive evidence established that the student's speech, spelling, and handwriting skills have only improved marginally in that same period of time, and that teaching her how to type would have provided an alternative, less fatiguing mode of written communication, necessary for her education.

81. The most persuasive evidence established that the IEP team should include an AAC device in the next IEP, to meet this student's overall

communication needs, which include significant speech, spelling, and handwriting challenges. This student, as described by all, is a smart girl who has a lot to say, but she is often unable to speak intelligibly, and does not self-correct. Thus, in light of her individual circumstances, she requires an AAC device to level the playing field for her—allowing her to communicate effectively at all times.

82. The more persuasive evidence established that the student could function, from a PT perspective, without any issues at school, and was able to access the school grounds without the need for PT at school.

CONCLUSIONS OF LAW

83. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. *See* § 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

84. Petitioner bears the burden of proof with respect to each of the issues raised herein. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

85. In enacting the Individuals with Disabilities Education Act (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 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 each 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).

86. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *Bd. of Educ. 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 FAPE. 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

87. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

[S]pecial education services that –

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

20 U.S.C. § 1401(9).

88. 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. "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Andrew 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. v. Rowley*, 458 U.S. at 181).

89. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a student with FAPE. As an initial matter, it is necessary to examine whether the school district has complied with the IDEA’s procedural requirements. *Rowley*, 458 U.S. at 206-07. 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 students 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).

90. In this case, Petitioner’s Complaints contain one alleged procedural violation: that the parent was deprived of meaningful participation in the creation of the IEPs, because the School Board predetermined the IEPs.

Predetermination

91. In *R.L., S.L., individually and on behalf of O.L. v. Miami Dade County School Board*, 757 F.3d 1173 (11th Cir. 2014), the Eleventh Circuit addressed the issue of predetermination for the first time; finding that the school district had predetermined the student’s placement when it foreclosed all discussion of the placement sought by the parents, relying heavily on the Sixth Circuit’s decision in *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004) (finding predetermination where the state “did not have open minds and were not willing to consider” a particular service the parents thought the child needed to access his education). The Eleventh Circuit explained that predetermination occurs when the school district makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate

as equal members of the IEP team. *R.L.*, 757 F.3d at 1188; *see also, Deal*, 392 F. 3d at 857-59. The school district cannot come into an IEP meeting with closed minds, having already decided material aspects of the child's IEP without parental input. *R.L.*, 757 F.3d at 1188, *see also N.L. v. Knox Cty. Schs.*, 315 F.3d 688, 694-95 (6th Cir. 2003) (finding no predetermination where school district representatives "recognized that they were to come to the meeting with suggestions and open minds, not a required course of action").

92. This is not to say that school-based members of the IEP team may not have any pre-formed opinions about what is appropriate for a child's education. *R.L.*, 757 F.3d at 1188. But any pre-formed opinion the school district might have must not obstruct the parents' participation in the planning process. It is not enough, the Court explained, that the parents are present and given an opportunity to speak at an IEP meeting. *Id.*

93. The Court went on to explain that in order to avoid a finding of predetermination, there must be evidence that the school district has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child. *Id.* A school district can make this showing by, for example, evidence that it was receptive and responsive at all stages to the parents' position, even if it was ultimately rejected. *Id.* Those responses, though, should be meaningful responses that make it clear that the school district had an open mind about and actually considered the parents' concerns. *Id.* at 1189. This inquiry is inherently fact-intensive, but should identify those cases where parental participation is meaningful and those cases where it is a mere formality. *Id.*

94. Here, the most persuasive evidence does support a finding of predetermination. The record is replete with the mother's concerns and recommendations, which were always supported by every independent evaluator in every single area of expertise. And still, even when the parent's concerns were supported by all independent professionals, the school staff

remained in lockstep, denying the student's need for direct OT, stating that the student's handwriting was always legible, blaming the mother for the student's obvious spelling deficit, and performing a meaningless assistive technology assessment that only served to inflame the mother's outrage. The more persuasive evidence established that the parent's participation was nothing more than a mere formality, which fueled the mother's resentment and mistrust.

95. This procedural violation resulted in a denial of FAPE because it significantly infringed upon the mother's ability to meaningfully participate in the creation of the IEPs. At every turn, no matter what independent evidence she compiled, her concerns regarding SLP and OT, spelling, handwriting, and AT were ultimately dismissed, or begrudgingly addressed. She was heard, and responded to, but those responses were not meaningful responses that made it clear that the school staff had an open mind and could actually be swayed by the mother.

96. Pursuant to the second step of the *Rowley* test, it must be determined if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07. In *Endrew F.*, the Supreme 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.” *Endrew F.*, 137 S. Ct. 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.*

97. 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.

98. 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.”).

99. Here, the more persuasive evidence establishes that the IEPs were not appropriately ambitious in light of the student’s circumstances in all areas; specifically, as explained in the Findings of Fact, the IEPs never included direct OT, direct instruction in keyboarding skills, or an AAC device to allow the student to communicate when her listeners fail to understand her.

Failure to Implement

100. As to the implementation of the IEP, Petitioner’s Complaint alleges that portions of the IEP were not implemented; in particular, that accommodations were not properly implemented.

101. 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-to-implement 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.

102. While declining to map out every detail of the implementation standard, the court provided a few principles to guide the analysis. *Id.* at 1214. To begin, the court stated 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. In other words, the task 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.*

103. 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.

104. Here, Petitioner failed to establish any material failure to implement the IEP. The more persuasive evidence established that the school staff implemented the IEPs, deficient as they were, as a whole. The student did receive the accommodations that were in the IEPs with sufficient consistency.

Assistive Technology

105. When an IEP is developed, the IEP team is required to consider, among other things, the child's communication needs and "whether the child needs assistive technology devices and services." 20 U.S.C. §§ 1414(d)(3)(B)(iv), (v). An AT device is "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 20 U.S.C. § 1401(1)(A); 34 C.F.R. § 300.5. An AT service is "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device." 20 U.S.C. § 1401(2); 34 C.F.R. § 300.6. AT services also include an evaluation of the child's AT needs, the purchase or acquisition of an AT device, and training of the child and the child's family, if appropriate. *Id.*

106. Here, as detailed in the Findings of Fact, the AT assessment was pointless and wholly inadequate because the student had not been taught how to type. Applying the statutory language to the facts as found, the student requires instruction on keyboarding, until she reaches proficiency; an AT device that allows her to use keyboarding to submit written work; and an AAC device to increase, maintain, and improve her functional communication skills.

Relief

107. The Eleventh Circuit has held that compensatory education is considered "appropriate relief where responsible authorities have failed to provide a handicapped student with an appropriate education as required by [the Act]." *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008), quoting *Todd D. ex rel. Robert D. v. Andrews*, 933 F.2d 1576, 1584 (11th Cir. 1991). Although "ordinary [educational programs] need only provide 'some benefit,' compensatory awards must do more -- they must *compensate*." *Reid v. Dist. of Columbia*, 401 F.3d 516, 525 (D.C. Cir. 2005).

108. Based on the independent professionals whose testimony is detailed in the Findings of Fact, the School Board is ordered to provide direct, individual OT compensatory education hours calculated at 60 minutes weekly for four academic semesters.

109. Based on the collective testimony of the independent professionals whose testimony is summarized in the Findings of Fact, the School Board is ordered to provide direct instruction in keyboarding skills until the student reaches a functional level of proficiency.

110. And lastly, the School Board is ordered to provide an AAC device that will serve to increase, maintain, and improve the student's functional communication skills. The School Board is also ordered, as required by statute, to train the student's family on how to use the AAC device.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board denied Petitioner FAPE, and is ORDERED to:

1. Provide compensatory education in the form of direct, individual OT compensatory education hours calculated at 60 minutes weekly for four academic semesters.

2. Provide Petitioner direct instruction in keyboarding skills until the student reaches a functional level of proficiency.

3. Provide an AAC device that will serve to increase, maintain, and improve the student's functional communication skills. The School Board is also ordered to train the student's family on how to use the AAC device, as needed.

DONE AND ORDERED this 26th day of July, 2021, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of July, 2021.

COPIES FURNISHED:

LaKisha M. Kinsey-Sallis, Esquire
Fisher & Phillips LLP
Suite 2350
101 East Kennedy Boulevard
Tampa, Florida 33602

Victoria Sears Gaitanis
Dispute Resolution Program Director
Department of Education
325 West Gaines Street
Tallahassee, Florida 32312

Petitioner
(Address of Record)

Amanda W. Gay, Esquire
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399

Julian Moreira
Educational Program Director
Florida Department of Education
325 West Gaines Street
Tallahassee, Florida 32399-0400

Tracy L. Card
1317 West Hampshire Boulevard
Citrus Springs, Florida 34434

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Addison Davis, Superintendent
The School Board of Hillsborough County
901 East Kennedy Boulevard
Tampa, Florida 33602-3408

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).