STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs. Case No. 20-1461E

COLUMBIA COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was conducted via Zoom Conference on September [redacted] before Administrative Law Judge (ALJ) [redacted] of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: [redacted], Esquire
[redacted].
[redacted], Florida [redacted]

For Respondent: [redacted], Esquire
[redacted], Florida [redacted]

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 an appropriate individualized educational program (IEP) that was reasonably calculated to enable Petitioner to make progress appropriate in light of Petitioner's circumstances; (2) failing to implement Petitioner's IEPs; (3) significantly

impeding Petitioner's parents opportunity to meaningfully participate in the decision-making process regarding the provision of a free appropriate public education (FAPE) to Petitioner; (4) inappropriately restraining Petitioner; and (5) failing to appropriately report incidents of restraint. 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 March [redacted]. Respondent forwarded the Complaint to DOAH on March [redacted], and the matter was initially assigned to ALJ [redacted] entered an initial Case Management Order requiring the parties to convene a resolution session no later than April [redacted], and requiring Respondent to file a status report confirming that the resolution session had occurred and advising of the likelihood that the parties would resolve the complaint.

On April [redacted], after no status report was filed, ALJ [redacted] filed an Order Requiring Status Report, requiring the parties to provide a status report regarding the resolution session no later than May [redacted]. On May [redacted] the parties filed a joint status report advising that they attended mediation with the Florida Department of Education on April [redacted], and that the mediation had not resulted in a resolution. Due to the intervening COVID-19 pandemic and the effect of same on the availability and presentation of witnesses and the proceedings in general, the parties requested a telephonic status conference before scheduling the due process hearing.

In accordance with the parties' request, ALJ [redacted] held a telephonic scheduling conference on May [redacted]. As a result of this scheduling hearing,

ALJ [redacted] entered a Notice of Hearing setting this matter for a due process hearing from June [redacted] through [redacted]. On June [redacted], the parties jointly requested a continuance of the hearing for numerous reasons, including the desire to continue informal negotiations, to engage in discovery, and to ensure the availability of witnesses who were out of school for the summer. On June [redacted], ALJ [redacted] entered an Order Granting Continuance, Rescheduling Hearing, and Extending the Time for Final Order. The due process hearing was rescheduled for September [redacted], through October [redacted]

On August [redacted], [redacted], this matter was transferred from ALJ [redacted] to the undersigned for all further proceedings. On September [redacted], the undersigned issued an Order of Pre-Hearing Instructions. Pursuant to this Order, the parties were required to file a pre-hearing stipulation no later than September [redacted].

On September [redacted], the parties filed their Joint Pre-Hearing Stipulation. On September [redacted], the parties filed an Amended Joint Pre-Hearing Stipulation, which included the parties' position(s) on the specific legal issues to be determined as well as a concise statement of facts, which are admitted and required no additional proof at final hearing.

The final hearing proceeded and concluded on September [redacted]. Upon the conclusion of the final hearing, the parties stipulated to the submission of proposed final orders within 20 days of filing the transcript and further stipulated to the issuance of the undersigned's Final Order within 20 days thereafter. The final hearing Transcript was filed on October [redacted].

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 the preparation of this Final Order. Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations.

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

FINDINGS OF FACT

Pursuant to the Amended Joint Pre-Hearing Stipulation of the parties, the Findings of Fact set forth verbatim in paragraphs 1 through 8 are stipulated to by the parties:

1. Petitioner transferred from [redacted] School District to [redacted] School District.

2. Petitioner receives services for [redacted] and [redacted].[1]

3. At some time, Petitioner's parents were allowed to bring the Petitioner lunch each day.

4. At some point, the Petitioner's [redacted] was not allowed to bring the Petitioner lunch anymore but [redacted] was allowed to bring lunch some days but not every day.

5. Petitioner's IEP called for 30 minutes of [redacted] and [redacted] therapy each week.

6. Petitioner was using a visual schedule independently, without prompting, while [redacted] was enrolled in [School A].

7. No letter was issued from [School A] or the District for parents to remain off of the campus of [School A].

8. One of the parents was trespassed from the campus.

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[1] [redacted], [redacted], and [redacted], respectively.

9. Petitioner began [redacted] educational career in the [redacted] County Public School District [redacted]. While attending elementary school in [redacted] Petitioner was found eligible for and received exceptional student education (ESE) services under the eligibility categories of [redacted] and [redacted] [redacted]

10. In the [redacted] school year, Petitioner was in [redacted] grade and attending public school in [redacted] [redacted] most recent IEP from [redacted] was dated August [redacted] At that time, the [redacted] IEP team, in discharging its duty, was required to determine how Petitioner would be instructed and whether Petitioner would participate in the statewide standardized assessment program. Ultimately, the IEP team concluded that Petitioner would participate in the [redacted] and that [redacted] would follow the [redacted] curriculum.

11. The [redacted] IEP team determined Petitioner's priority educational needs to include: "math skills, English Language Acquisition Skills in Reading, and English Language Acquisition Skills in Writing." The IEP team specifically documented that the following were considered in drafting his IEP: assistive technology devices and service needs (visual schedule, manipulative, and visuals); behavioral interventions, strategies, and supports for students whose behavior impedes learning; communication needs of the student (addressed via weekly language therapy, 60 minutes per week and IEP goals); language needs for students with limited English proficiency (embedded in daily lessons); and adaptive physical education needs (30 minutes per day).

12. Within the "Social or emotional behavior" domain, the following was documented on the [redacted] IEP:

> The strengths of the student:
>
> [Petitioner] is able to greet peers and teachers independently. [redacted] is able to follow one to two step

> directions. [redacted] is able to engage in a playful give and take with other peers.
>
> The affects of his disability:
>
> [Petitioner] has difficulty accepting new faces and coping with transitions and/or new environments. Behaviors strategies are used throughout the day. An update information [sic] was discussed today to be addressed in the BIP.[2] [redacted] requires monitoring and assessment of behavior.
>
> Social skills curriculum is used on a weekly bases Collaboration during music and art class, 60 minutes/week per subject for a total of 120 minutes weekly.

13. The [redacted] IEP documented that [redacted] priority educational needs in the social and emotional domain was "frustration tolerance" and a measureable goal, along with two benchmarks, were set forth to address the same. The goal provided as follows: "Given visuals (picture and word cards) to prepare for an event or activity, which may cause anxiety, [Petitioner] will review the process with an adult prior to the event in order to decrease anxiety in [redacted] out of [redacted] opportunities." As noted above, while in the [redacted] school, Petitioner had a BIP,[3] and the IEP documented that [redacted] would receive instruction in social or emotional behavior for 30 minutes per week in an individual or group setting as part of [redacted] specialized instruction and that there would be an assessment of [redacted] behavioral skills on an individual basis once per week for 25 minutes.

14. In the domain of "Communication," the [redacted] IEP documented, in pertinent part, the following:

> The affects of the disability:
>
> [Petitioner's] progress in the curriculum is impacted by mixed receptive/expressive language

[2] Behavioral Intervention Plan.

[3] The [redacted] IEP references that the BIP was revised on the meeting date; however, the BIP is not in the evidentiary record.

> delays secondary to [redacted] primary exceptionality, characterized by difficulties making a choice between two items. In the classroom, [Petitioner] has difficulties participating in a conversational exchange with teachers and/or peers.
>
> [Petitioner] requires assistance with communication skills within the classroom.
>
> Student receives 60 MPW of language therapy as a related service.

15. In Miami, as of the August [redacted] IEP, Petitioner was placed in a "special class" wherein he was in a special education setting for [redacted] percent of the day and a general education setting for 4.80 percent of the day.

16. On August [redacted] Petitioner's parents contacted [redacted] school to request an Occupational Therapy (OT) evaluation. Although the evaluation was initiated immediately, it was not completed before Petitioner withdrew from the school, on or about January [redacted]

17. In January [redacted] Petitioner's parents moved from [redacted] to [redacted] County, Florida. On or about January [redacted], Respondent's personnel met with Petitioner's parents to discuss appropriate placement. During this meeting, the team determined that a self-contained classroom at School A, a public elementary school in Respondent's school district that provided an Access Points curriculum, would best meet Petitioner's needs.

18. Petitioner's separate class placement provided that [redacted] would participate with nondisabled peers for less than [redacted] of the day during art, music, technology lab, PE, lunch, recess, assemblies, and in transitions. [redacted], Petitioner's assigned teacher, testified that [redacted] self-contained classroom had a ratio of approximately three to five students to one adult. In addition to [redacted] self, a special care attendant was assigned to the class who focused on individual student needs.

19. Shortly after [redacted] enrollment with Respondent, on February [redacted], Respondent convened an IEP meeting for purposes of conducting an annual

review and for reevaluation. Petitioner's parents attended this meeting in person, and as their primary language is [redacted] the meeting notice was provided in [redacted] and they were assisted by [redacted], [redacted] speaking paraprofessional who served as an interpreter and thereafter routinely assisted the parents in their communication with the school.

20. Although Petitioner's IEP from [redacted] had addressed behavioral concerns, Respondent's IEP team documented that Petitioner's behavior did not impede [redacted] learning or the learning of others. Accordingly, unlike the [redacted] IEP, [redacted] present levels of performance in the areas of social and emotional behavior were not documented on the IEP, there were no corresponding goals or benchmarks drafted to address the same, and Petitioner did not have a BIP.

21. In the domain of "Curriculum and learning environment," the IEP documented, *inter alia*, the following:

> [Petitioner's] disability makes it difficult for [redacted] to communicate both expressively and receptively. When speaking, [Petitioner] says only one to two words. However, when given choices for responses, [Petitioner] tends to repeat the choices, instead of choosing one choice. [Petitioner's] disability also causes [redacted] to have difficulty with basic math vocabulary. Because of this difficulty with vocabulary, [Petitioner] has not been able to demonstrated [sic] which of two sets has "more." Because of the difficulties caused by [redacted] disability, [Petitioner] needs to be taught with a modified curriculum and in a classroom setting where [redacted] can receive supports for [redacted] language deficits. Also, because [Petitioner] has difficulty with maintaining focus, [redacted] needs to be in close proximity to an adult during instruction.

22. In the domain of "Communication," the IEP documented that Petitioner communicates using 1 to 2 word utterances; and that [redacted] also uses nonverbal means to communicate when needed, such as gestures and facial

expressions. Petitioner was not yet using a variety of words to indicate [redacted] wants and needs, and had difficulty making a choice between two pictures and participating in conversational exchange. A communication goal and two short-term objectives or benchmarks were established to address [redacted] communication shortcomings. Specifically, the goal provided that Petitioner "will make a choice between two items or pictures related to a structured therapy task given visual and verbal cues with [redacted] accuracy for 3 consecutive sessions."

23. At School A, as documented on [redacted] IEP, [redacted] language therapy was reduced from to 60 to 30 minutes per week. [redacted], one of Respondent's speech language pathologists (SLP), explained that the reduction in therapy was based on a collaboration with [redacted] teacher, a review of the records from [redacted] previous schools, and [redacted] own clinical judgment. [redacted] further testified that speech and language was also integrated into the classroom curriculum. Specifically, [redacted] testified as follows:

> So the teacher and I would have collaborated, and I can recall me helping [redacted] create a visual schedule for [Petitioner] and we would have talked about [redacted] progress and [redacted] ability to communicate functionally within the classroom and the ways that [redacted] could implement visuals and any other supports that [redacted] needed to communicate in the classroom.

24. For the [redacted] semester, [redacted] worked with Petitioner, either individually or in a small group (less than three students) setting. When asked whether Petitioner communicated, [redacted] testified that "[f]rom what I recall, it was very minimal. I think [redacted] could, maybe, sometimes express like basic needs, like bathroom, but it was very minimal." [redacted] credibly testified, however, that Petitioner made satisfactory progress throughout the [redacted] semester, noting that "we were also working on verbalizations and [redacted] was doing very well with verbalizing in a

very simple categorization task." No evidence was provided to the contrary.

25. In the domain of independent functioning, the IEP documented that, "[d]ue to [redacted] disability, [Petitioner] becomes agitated when [redacted] is not familiar with the [sic] what will occur during the day," and that [redacted] uses a visual calendar to orient [redacted] self to the day. At School A, Petitioner's frustration and agitation manifested both within and outside the classroom setting.

26. [redacted] testified that Petitioner did not often exhibit unwanted behaviors in the classroom; however, if and when [redacted] got frustrated, [redacted] would scream and hit the table. Specifically, [redacted] noted that "[i]f [redacted] just did not want to do the task I was trying to get [redacted] to do or if [redacted] just was getting really frustrated, [redacted] would scream and sometimes cry and bang the table." [redacted] acknowledged that a BIP to address [redacted] behaviors was never created. [redacted] explained that if [redacted] needed a break, [redacted] would sometimes say "color time," which expressed [redacted] need for paper and crayons, which, at times, would help [redacted] relax.

27. [redacted] credibly testified that, in the [redacted] semester of [redacted] [redacted] was absent [redacted] days with a resulting absenteeism rate of 25.3 percent. [redacted] was also tardy [redacted] times. For the [redacted] semester, [redacted] absenteeism rate was [redacted] percent.

28. [redacted] was the student care attendant assigned to Petitioner's classroom. [redacted] credibly testified that [redacted] worked in close proximity with Petitioner on a daily basis and did "a lot of hands on." According to [redacted], two to three times per day, Petitioner would determine that [redacted] did not want to perform the assigned tasks. While this is not unusual, [redacted] also testified that the refusal would often be accompanied by "meltdowns" and credibly described them as follows:

> . . . but when I couldn't work with [redacted] comfortably it was because [redacted] was having a meltdown. If [redacted] didn't want to do it, [redacted] just wouldn't do it, and

there was nothing that I could really do to get him to get back on track.

* * *

If I seen that [redacted] didn't want to do it, I never put any pressure on [redacted] because [redacted] would get physical. Never physical with me, but [redacted] will starting hitting [redacted] self in the head. And [redacted] used to scratch like [redacted] arms and stuff, and [redacted] was likely to bounce up and down in [redacted] seat and make a lot of noise.

* * *

But the only time I would try to soothe [redacted] or make [redacted] calm is when [redacted] started hitting [redacted] self. And [redacted] was kind of good with me. I mean, I could be like [Petitioner], no, no, no, don't do that, don't hit yourself and everything, and [redacted]'ll stop. Or sometimes it took a minute, sometimes it took longer, but [redacted] stopped eventually. But, I mean, the breakdowns could happen anytime during the day.

* * *

Every time [redacted] had a tantrum [redacted] hit [redacted] self. [redacted] would hit [redacted] self in the head. [redacted] will hit [redacted] self all on the arms.

29. Petitioner also demonstrated unwanted behaviors outside the classroom while transitioning and prior to entering the cafeteria. [redacted] elaborated on this behavior as follows:

There was times when [redacted] would have [redacted] meltdowns and sit on the sidewalk. [redacted] would roll on the sidewalk. When [redacted] first started [redacted] sat on the sidewalk, but then as the tantrums got worse he will roll on the sidewalk. [redacted] will like scrape [redacted] arm like that on the sidewalk (indicating). Our sidewalk is pretty much smooth, but [redacted] will, you know, just rub [redacted] arms and things like that. [redacted] never hit anyone else, but [redacted] will only hit [redacted] self.

30. The witnesses in this matter universally testified that Petitioner developed a routine or habit of refusing to enter the cafeteria simultaneously with [redacted] fellow classmates when it was lunchtime.[4] For reasons unknown, [redacted] preferred to sit on the sidewalk outside of the cafeteria, and then, after the passage of time (which was variable) would proceed to enter the cafeteria.

31. [redacted], a guidance counselor at School A, confirmed that Petitioner's cafeteria avoidance behavior was a daily occurrence. [redacted] credibly testified that once this behavior began, [redacted] was always accompanied by an adult. [redacted], a behavior resource teacher, credibly testified that [redacted] developed a rapport with Petitioner concerning this behavior, and ultimately the time [redacted] refused to enter the cafeteria decreased from about 25 minutes down to 10 minutes.

32. At the February [redacted] IEP meeting, Petitioner's parents signed a reevaluation consent for OT. On April [redacted], one of Respondent's OTs, conducted the evaluation which consisted of measures of fine motor skills and a sensory profile. On May [redacted] completed [redacted] OT Report, which set forth the following "Functional Concerns/Significant Findings":

> [Petitioner is a [redacted] year-old [redacted]] who was referred for an occupational therapy evaluation secondary to fine motor and handwriting concerns. Per results of BOT-2 Subtests, School Companion Sensory Profile 2, handwriting screen, teacher interview, and clinical observation, [Petitioner] presents with delays in the areas of handwriting, fine motor precision, visual motor integration, manual dexterity, and sensory processing. These delays affect [Petitioner's] ability to perform independently and successfully in the classroom environment. [Petitioner] can benefit from skilled occupational therapy services.

[4] Based on the evidentiary presentation, the undersigned cannot determine when this practice began.

33. During [redacted] evaluation, [redacted] documented that Petitioner became frustrated during the evaluation, as evidenced by shouting and hitting the table. [redacted] further documented that [redacted] did not use "self-regulation techniques." Accordingly, one of the short-term goals [redacted] recommended for Petitioner was that [redacted] "will engage in a novel/challenging activity for 5 minutes with minimal cues from an adult, and with minimal signs of frustration or negative behavior, with sensory/regulatory strategies in place as needed, 2/3 opportunities."

34. While [redacted] concluded that Petitioner would benefit from OT, the same was not added to [redacted] IEP until September [redacted]. Ultimately, Petitioner received five 30-minute OT sessions.

35. On the February [redacted], IEP, it was documented that Petitioner had the ability to open [redacted] lunch container independently and manipulate the tabs of [redacted] drink bottles, but had difficult with opening containers with certain lids. It was further noted that, because of [redacted] aversion to certain foods, [redacted] brought [redacted] lunch from home and did not use utensils, but rather, [redacted] fingers to eat.

36. Petitioner's parents were initially allowed to bring [redacted] lunch every day. Although School A was not required to do so, Petitioner's parents were also allowed to sit with [redacted] at lunch in designated areas. Ultimately, administrators from School A determined that Petitioner's [redacted] was not complying with the conditions set forth for eating with Petitioner while on campus, and therefore, [redacted] access to Petitioner during the school day was curtailed. Petitioner's [redacted] was not precluded from being on campus; however, like most parents, [redacted] access was limited to dropping off and picking up Petitioner and conducting business in the front office. The evidence establishes that, at no time were Petitioner's parents precluded from participating in the decision-making process regarding the provision of FAPE to Petitioner.

37. Petitioner was promoted to the [redacted] grade for the [redacted] school year. On October [redacted], Petitioner walked a short distance from [redacted] classroom toward the cafeteria before sitting on the sidewalk, as was [redacted] habit. The School Resource Deputy (SRD), [redacted], repeatedly asked Petitioner to get up off the sidewalk and proceed to the cafeteria. SRD [redacted] grasped Petitioner by the wrist in an effort to escort Petitioner to the cafeteria but was met with resistance from Petitioner who pulled back and began to slide backwards while lying on the concrete sidewalk. SRD [redacted] was able to again grasp Petitioner's wrist in an effort to guide [redacted] toward the cafeteria and prevent injury associated with sliding on the concrete sidewalk.

38. At the time that SRD [redacted] regained control of Petitioner's wrist, Principal [redacted] and [redacted] approached with Petitioner's lunch. Petitioner jumped up and ran to the cafeteria to eat lunch. Petitioner did not display any signs of injury, nor did school personnel observe any marks or injury to Petitioner associated with the escort.

39. Later that evening, Petitioner's [redacted] communicated with [redacted] to advise of marks on Petitioner [redacted] associated with the events at school described above. Petitioner's parents also contacted the local police department who in turn contacted the Department of Children and Families (DCF). DCF investigated the allegations of abuse/neglect of Petitioner and determined "that the allegations of Physical Injury are No Indicator."

40. On November [redacted], the parties attended a meeting at School A that included representatives from DCF and [redacted] as a translator for the parents. At this meeting, Petitioner's parents advised that they would be withdrawing [redacted] to homeschool. Petitioner has been homeschooled since November [redacted].

CONCLUSIONS OF LAW

41. 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).

42. 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).

43. 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).

44. 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).

45. "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).

46. 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)).

47. When a child's learning is impeded by behavioral issues, the IDEA requires the IEP team "*consider* the use of positive behavioral interventions and supports, and other strategies, including positive behavioral intervention." 20 U.S.C. § 1414(d)(3)(B)(i); Fla. Admin. Code R. 6A-6.03028(3)(g)5.(emphasis added).

IEP Design/Content:

48. In a light most favorable to Petitioner, Petitioner's Complaint is construed as alleging that Respondent failed to develop an appropriate IEP 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 him to make academic progress in light of his circumstances."

49. 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 206-07. 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 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).

50. Here, in a construction most favorable to Petitioner, the undersigned construes Petitioner's Complaint as alleging a procedural violation. Specifically, Petitioner's Complaint is construed as alleging that Respondent significantly impeded Petitioner's parents' opportunity to meaningfully participate in the decision-making process regarding the provision of FAPE to Petitioner, by precluding Petitioner's parents daily access to accompany Petitioner during lunch. As discussed in the Findings of Fact above, however, the evidence establishes that, at no time were Petitioner's parents precluded from participating in the decision-making process regarding the provision of a FAPE to Petitioner.

51. Pursuant to the second step of the *Rowley* test, it must be determined if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive "educational benefits." *Rowley*, 458 U.S. at 206-07. Recently, in *Endrew F.*, the Supreme Court addressed the "more difficult problem" of determining a standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Endrew F.*, 13 S. Ct. at 993. In doing so, the Court held that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress

appropriate in light of the child's circumstances." *Id.* at 999. As discussed in *Endrew F.*, "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Id.*

52. 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, 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.

53. 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.").

54. While not specifically alleged in Petitioner's Complaint, Petitioner argues in [redacted] Proposed Final Order that Respondent failed to design an appropriate IEP in failing to adequately address Petitioner's behavioral concerns and in failing to maintain the same or greater level of language therapy, as provided in [redacted] IEP.[5]

55. 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

[5] While Petitioner raises other substantive violations in his Proposed Final Order, the same were not raised in the Complaint. Even assuming *arguendo* that said violations were properly raised, Petitioner failed to present sufficient evidence to support said claims.

setting, with an extremely low student-to-teacher ratio, with the additional support of a student care attendant. Notwithstanding, during [redacted] brief tenure at School A, Petitioner demonstrated behaviors that were impediments to [redacted] learning that were not adequately addressed by Respondent.

56. While some of the behaviors Petitioner demonstrated in the classroom may be fairly and commonly attributable to [redacted] ASD eligibility, [redacted] self-injurious behavior warranted further consideration. As Petitioner was a new student at School A, it was reasonable for Respondent to monitor [redacted] behavior for a period of time, and, therefore, the undersigned concludes that Respondent committed no substantive IDEA violation in failing to initially include positive behavioral interventions (besides a visual schedule) and supports during most of the [redacted] semester.

57. The results of the OT evaluation coupled with the observed behaviors both in the classroom and during transitions, however, triggered an obligation for the IEP team to reconvene to consider Petitioner's behavioral concerns. Although OT was ultimately added to [redacted] IEP in September [redacted] and arguably some of the behavioral concerns may be addressed therein, the response was untimely and insufficient. It is concluded that Respondent's failure to properly and appropriately consider the use of positive behavior interventions and supports resulted in an IEP that was not reasonably calculated to enable Petitioner to make progress appropriate in light of the child's circumstances. The undersigned concludes that the deficient IEP and its implementation, without modification, following the OT evaluation report and up to the time Petitioner withdrew from School A resulted in a denial of FAPE to Petitioner.

58. With respect to Petitioner's allegation concerning the decrease in language therapy, the undersigned concludes that Petitioner failed to present sufficient evidence that the IEP team erred in its determination to reduce said therapy, and, therefore, no substantive violation is found.

IEP Implementation:

59. Petitioner alleges in [redacted] complaint that [redacted] was denied FAPE due to [redacted] failure to make adequate progress. Petitioner's Proposed Final Order essentially repackages the IEP design claim argument under the heading of "failure to implement." In other words, Petitioner contends that Respondent failed to implement appropriate IEPs because it had not, at the outset, designed an appropriate IEP. To the extent Petitioner has properly raised a failure to implement claim, which is dubious, the same is addressed below.

60. 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.

61. 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.*

62. 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.

63. Here, Petitioner failed to present sufficient evidence that Respondent failed to implement any provision of Petitioner's IEPs during the relevant time period. Accordingly, Petitioner's failure to implement claims are not substantiated.

Restraint/Seclusion:

64. Petitioner's Complaint avers that, as a result of the October [redacted], incident, [redacted] was improperly restrained which resulted in injury to [redacted] person. Petitioner further contends that the restraint and injury were not properly reported.

65. 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.

66. 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).

67. Petitioner failed to present sufficient evidence to establish that, during the October [redacted], incident, Petitioner was restrained. Accordingly, Petitioner also failed to present sufficient evidence for the undersigned to also conclude that Respondent failed to properly report such restraint or seclusion. Furthermore, outside of the unsubstantiated allegations by Petitioner's parents, Petitioner failed to present sufficient evidence to

establish that Petitioner was injured due to the incident on October [redacted]. Accordingly, Petitioner failed to establish a substantive violation.

Compensatory education:

68. As discussed above, the undersigned concludes Respondent denied Petitioner FAPE during the regular school year from May [redacted] through November [redacted], to which Petitioner is entitled to compensatory education. In calculating an award of compensatory education, the undersigned is guided by *Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005), wherein the D.C. Circuit emphasized that IDEA relief depends on equitable considerations, stating, "in every case . . . the inquiry must be fact specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id.* at 524. The court further observed that its "flexible approach will produce different results in different cases depending on the child's needs." *Id.*

69. This qualitative approach has been adopted by the Sixth Circuit and a number of federal district courts. *See Bd. of Educ. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007) ("We agree with the district court . . . that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the child's] educational problems successfully."); *Petrina W. v. City of Chicago Pub. Sch. Dist.*, 2009 U.S. Dist. LEXIS 116223, at *11 (N.D. Ill. Dec. 10, 2009) ("Because a flexible, individualized approach is more consonant with the aim of the IDEA . . . this Court finds such an approach more persuasive than the Third Circuit's formulaic method."); *Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1352-53 (N.D. Ga. 2007) (holding that, in formulating a compensatory education award, "the Court must consider all relevant factors and use a flexible approach to address the individual child's needs with a qualitative, rather than quantitative focus"), *aff'd*, 518 F.3d 1275 (11th Cir. 2008); *Barr-Rhoderick v. Bd. of Educ.*, 2006

U.S. Dist. LEXIS 72526, at *83-4 (D.N.M. Apr. 3, 2006) (holding that an award of compensatory education "must be specifically tailored" and "cannot be reduced to a simple, hour-for-hour formula"); *Sammons v. Polk Cty. Sch. Bd.*, 2005 U.S. Dist. LEXIS 45838, at *21-2 (M.D. Fla. Oct. 7, 2005) (adopting *Reid's* qualitative approach).

70. Against this legal backdrop, the evidence establishes that Petitioner is entitled to specialized instruction in social or emotional behavior for 30 minutes per week, as previously provided in the [redacted] IEP, as compensatory education from May [redacted] through November [redacted] (calculated during the regular school year).

ORDER

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

1. Respondent denied Petitioner FAPE during the regular school year from May 29 through November [redacted], by designing and implementing an IEP that was not reasonably calculated to enable Petitioner to make progress appropriate in light of his circumstances; and

2. Petitioner is entitled to 30 minutes per week of specialized instruction in social or emotional behavior as compensatory education from May [redacted] through November [redacted] (calculated during the regular school year).

DONE AND ORDERED this [redacted] day of December, [redacted] in Tallahassee, Leon County, Florida.

[redacted]

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 [redacted] day of December, [redacted].

COPIES FURNISHED:

[redacted], Esquire
[redacted] Legal Services, Inc.
Suite 220
3225 University Boulevard South
Jacksonville, Florida 32216
(eServed)

[redacted], [redacted]
Bureau of Exceptional Education
and Student Services
Department of Education
Turlington Building, Suite 614
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

[redacted], Esquire
177 Northwest Madison Street
Lake City, Florida 32055
(eServed)

[redacted], Esquire
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399
(eServed)

[redacted], Educational Program Director
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399
(eServed)

[redacted], General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

[redacted], Superintendent
Columbia County School District
372 West Duval Street
Lake City, Florida 32055-3990

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).