

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

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Petitioner,

Case No. 20-3007E

vs.

ESCAMBIA COUNTY SCHOOL BOARD,

Respondent.

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FINAL ORDER

A due process hearing was held before Jessica E. Varn of the Division of Administrative Hearings (DOAH) on April 7 through 9, 2021, via Zoom videoconferencing.

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative  
Jessup, Inc.  
1264 Upsala Road  
Sanford, Florida 32771

For Respondent: Terry Joseph Harmon, Esquire  
Sniffen & Spellman, P.A.  
123 North Monroe Street  
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES<sup>1</sup>

Whether Respondent (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;

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<sup>1</sup> In the request for a due process hearing (Complaint), Petitioner also alleged that the School Board had willfully created a false threat assessment, but Petitioner withdrew this claim at the beginning of the due process hearing.

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

Whether the School Board discriminated against the student on the basis of his disability, in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504).

#### PRELIMINARY STATEMENT

Petitioner filed a Complaint with Respondent School Board on June 17, 2020. At this point, Petitioner had the assistance of a lay educational advocate. The School Board forwarded the Complaint to DOAH on July 2, 2020. On July 7, 2020, the School Board sought a substitution of legal counsel, which was granted. On that same date, a lay educational advocate, Ms. Woods, filed a "Notice of Appearance" on behalf of Petitioner, and Petitioner filed a letter requesting that Ms. Woods be recognized as a Qualified Representative. On July 13, 2020, Petitioner requested a withdrawal of the request to accept Ms. Woods as a Qualified Representative and to substitute Mr. Jessup as the Qualified Representative, which was granted.

On July 27, 2020, Petitioner filed an Amended Complaint. The School Board did not challenge the sufficiency of the Amended Complaint. On September 1, 2020, the School Board filed a status report indicating the parties had agreed to dispense with the resolution session and proceed to a due process hearing. On September 4, 2020, a pre-hearing telephonic conference was held, wherein the parties agreed to schedule the hearing for October 27 through 29, 2020. On October 7, 2020, Petitioner filed an unopposed motion to continue the hearing, which was granted. The parties were ordered to file a status report by November 10, 2020.

On November 16, 2020, another pre-hearing telephonic conference was held, wherein the parties agreed to reschedule the hearing for February 16

and 17, 2021. On January 29, 2021, Petitioner filed an unopposed motion to continue the hearing once again due to pending discovery matters. The parties agreed to reschedule the hearing for April 5 through 7, 2021.

On March 3, 2021, the School Board filed an unopposed motion to reschedule the hearing to April 7 through 9, 2021. At the due process hearing, testimony was heard from 16 witnesses<sup>2</sup>; School Board Exhibits 1 through 103 were admitted into the record; and Petitioner Exhibits 1 through 31, 33 through 77, 80, 82, and 86 through 97 were admitted into the record.

The Transcript of the due process hearing was filed on May 11, 2021. The parties agreed to file proposed orders by June 21, 2021, and extended the final order deadline to July 15, 2021. On June 14, 2021, the School Board filed an unopposed motion to extend the deadline for proposed orders to July 1, 2021. The motion was granted, and the deadline for the final order was extended to August 2, 2021.

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

1. The student in this case is in middle school, and during the relevant period that is at issue in this case, he attended Middle School B. He has been diagnosed with multiple conditions, including Attention Deficit Hyperactivity Disorder (ADHD), Obsessive Compulsive Disorder (OCD), Autism Spectrum

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<sup>2</sup> Petitioner presented the testimony of Dr. Kosmerl, who was tendered and accepted as an expert in Applied Behavior Analysis. After a complete review of the record, Dr. Kosmerl's testimony was considered but ultimately not relied upon in making factual findings, or conclusions of law. On balance, Dr. Kosmerl was quite limited in her review of relevant records, and was extremely limited in her knowledge of the student's educational needs.

Disorder (ASD), Impulse Control Disorder, Tourette's Syndrome, Post-Traumatic Brain Injury, Prominent Major Depressive Disorder with Suicidal Ideation, and Trichotillomania.

2. Since elementary school, he has exhibited numerous maladaptive behaviors that have surfaced at school. For most of elementary school, he was placed at a private school; but during [REDACTED] grade, he was eventually forbidden from physically attending school due to his behavioral issues.

3. The student was then enrolled to begin middle school at Middle School B, which is a public school with an integrated curriculum that is heavily based on projects. Approximately [REDACTED] students attend the school, and sixth through eighth graders work in mixed-in classes together. The calendar is divided into trimesters, with students working together in streams dedicated to an overall topic, tying in all subject areas into that one topical stream. Each stream has four different teachers, and students change their stream each trimester (every 12 weeks). There is also no bell schedule at the school.

4. The student's first day of middle school was August 13, [REDACTED]. From the very beginning, the student's conditions manifested themselves at school with multiple maladaptive behaviors, which included: making suicidal and homicidal ideations; refusing to work; being uncooperative; screeching and making other noises; making inappropriate comments to teachers and peers; pounding on desks; destroying property; throwing items; being disrespectful; being defiant; using profanity; misusing school property; disrupting the classroom; engaging in self-injurious behavior; banging his head on a wall; climbing into the trashcan; taking pencils apart; ripping, crumpling and throwing away papers; being verbally aggressive; making claims that he had burned down his house; claiming to steal his mother's credit card and giving it to a stranger; lying; threatening to bring a weapon (scalpel) to school; avoiding non-preferred tasks; getting out of his seat; yelling in class;

wandering around the classroom; and rolling around the room in a chair with wheels.

5. The maladaptive behaviors did not occur in every class nor daily, but the evidence demonstrated that the behaviors were often severe in nature and often caused fear among his peers and the faculty and staff. The educators explained that the curriculum at Middle School B requires a significant amount of group work, which could be quite challenging with the behaviors the student frequently exhibited.

6. Response to Intervention Tiers were employed to try to manage the student's behaviors, and eventually, on August 30, [REDACTED], the student was found eligible for a Section 504 plan. The student's Section 504 plan identified issues with learning, concentrating, communicating, staying on task, and focusing.

7. On September 6, [REDACTED], just three weeks into [REDACTED] grade, the school staff referred the student to a mental health counselor. [REDACTED], a licensed mental health counselor, was brought into the school to provide the counseling sessions on site.

8. [REDACTED] provided weekly mental health counseling to the student at the school for typically 60 minutes per week from September of [REDACTED] until January 29, [REDACTED]. During this time, [REDACTED] also attended staff meetings and obtained information from the teachers and staff regarding the student. [REDACTED] counseling progress notes, which included measurable behavioral goals, demonstrate that [REDACTED] counseled the student on issues related to [REDACTED] anger, defiance, disruptive behaviors, work refusals, suicide-type comments, feelings about himself, ASD diagnosis, social skills, coping skills, processing consequences, inappropriate comments, and lack of participation. [REDACTED] also wanted to help the student learn social skills and help reduce his anxiety and his meltdowns.

9. On October 4, [REDACTED], the student was distraught, cried for an extended period of time and verbalized a desire to die while at school. As a result, he

was involuntarily committed (known as being “Baker Act”) by the school resource officer.

10. A week later, the staff began the process of evaluating the student for IDEA eligibility.

11. On November 7, [REDACTED], a Functional Behavior Assessment (FBA) was completed. The FBA identified the student’s negative behaviors at the time -- inappropriate language, suicidal ideation, and not completing assignments-- and found that the function of the student’s behavior was to gain attention. The FBA also summarized assessment data, identified antecedents, consequences, previous interventions, preferences, and reinforcers. The FBA also noted that the student was productive with certain teachers.

12. On November 12, [REDACTED], a Behavioral Intervention Plan (BIP) was prepared for the student, based on the FBA. The BIP included prevention strategies, strategies to address the behavior and to decrease inappropriate behavior, positive reinforcers, and progress monitoring.

13. On November 14, [REDACTED], as part of the student’s IDEA evaluation, [REDACTED] completed a psychoeducational evaluation. After an extensive battery of testing, observations, and interviews, [REDACTED] reported that the student displayed clinically significant levels, at home and at school, of hyperactivity and conduct problems; aggression towards others; depression; unusual behaviors; difficulty focusing and sustaining attention; inflexibility; impaired social skills; a struggle to take on leadership roles; difficulty with receptive and/or expressive communication skills; difficulty developing and maintaining relationships with others; difficulty controlling his emotions; and difficulty with executive functioning. [REDACTED] found that the student has many behavioral characteristics similar to other youth with ASD, and has deficits in attention and motor/impulse control.

14. In December of [REDACTED], [REDACTED] conducted a few more assessments to aid in the decision-making process as to the student’s potential eligibility for gifted services.

15. On January 29, [REDACTED], the student attended his last counseling session with [REDACTED]. In all, the student attended 19 counseling sessions with [REDACTED] between September 6, [REDACTED], and January 29, [REDACTED], while at school. [REDACTED] learned from the student that in December he had started to see a private counselor. [REDACTED] discontinued her counseling sessions, explaining to the parent and the school that because the student was receiving counseling through another provider at the same time, [REDACTED] felt ethically obligated to discontinue [REDACTED] sessions. The decision to discontinue the service was made by [REDACTED], and not by the School Board or the parent.

16. The evidence demonstrated that the counseling sessions with [REDACTED] were beneficial to the student. One of the primary advantages of the school offering this mental health counseling was that [REDACTED] engaged with the entire school community, spoke to teachers and staff, and came during school days to provide the necessary counseling on site. The counseling goals, then, were focused on the student's functioning at school, and [REDACTED] diligently kept progress notes. [REDACTED] counseling sessions, infused with the school community's concerns, helped the student function at school, lessened his maladaptive behaviors, and, importantly, assisted the student in accessing his education. [REDACTED] progress notes reflect [REDACTED] role as a resource for the staff to troubleshoot the management of the student's maladaptive behaviors.

17. On February 15, [REDACTED], the student was found eligible for ESE services in the eligibility category of Other Health Impairment (OHI) and Gifted. The IEP included extensive background regarding the student's present levels of performance (PLOP). Recognizing the student's behavior issues, in addition to the BIP that had been created, the IEP team agreed to include a goal to address the student's verbal and non-verbal behaviors, including aggression and off-task behavior. The IEP team also targeted the student's need for social skills by providing weekly, small-group instruction. The meeting lasted

five hours, and the student's mother was accompanied by a lay educational advocate.

18. On February 28, [REDACTED], the student's IEP was amended at an IEP team meeting to, among other things, delete the use of a personal/journal sketchbook, amend the social/emotional present level statement, and add direct instruction in work completion for 30 minutes per day. The IEP team also agreed that the student would be referred and assessed by a mental health counselor to determine counseling needs. The purpose of the referral was to establish mental health counseling for the student. The duration, location, and frequency of the counseling would be determined after the student was assessed by a mental health counselor, and those details would be added to the student's IEP after the mental health assessment.<sup>3</sup> The IEP team also agreed to continue implementing the student's BIP, screen the student for occupational therapy (OT), submit a counseling services form, initiate the revision to the student's BIP, and meet again in six weeks.

19. On that same date, February 28, [REDACTED], the mother signed a "Mental Health Services Parent Consent Form," authorizing mental health counseling at school, putting into place the same model used by [REDACTED] in the fall of [REDACTED]. The parent authorized Middle School B to exchange information with a private mental health provider (the same entity that had employed [REDACTED]), and further authorized the counselor to review school records, to consult with school staff, and to meet with her son to coordinate and deliver services at school. The consent did not expire for one year from that date unless it was terminated by the parent.

20. On March 1, [REDACTED], a "Behavior Analyst Referral" was completed by [REDACTED]. The form reflects that the student was being referred for a behavioral consult or assessment because the student's behavior consistently disrupted the learning environment and the student's behavior persisted

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<sup>3</sup> These details were never added to any IEP. No district mental health counselor ever began the process of assessing the student until February [REDACTED].



despite behavior management strategies that were consistently implemented. His behaviors were described as: “hyperactive and impulsive behaviors, defiance, and task avoidance behaviors” which occurred at varying times during the school day in the classrooms.

21. [REDACTED], a Board Certified Behavior Analyst (BCBA), began an FBA process on April 15, [REDACTED] and issued her report on May 16, [REDACTED]. [REDACTED] observed the student in the educational setting and collected data as part of [REDACTED] FBA. [REDACTED] also conducted a records review, which included the student’s prior IEPs. The FBA identified the student’s negative behaviors at the time -- refusal (saying no, pushing paper away, crumpling paper, blurting out in class, being on technology, playing with toys, poor time management, and being off task) and blurting out inappropriate statements. The FBA also summarized baseline data that was collected over 10 days, summarized assessment data, identified antecedents, consequences, previous interventions, preferences, and reinforcers. The FBA focused primarily on refusal behavior, but also recognized the student’s difficulty with peers, depression, and anxiety. The FBA was not intended to focus on suicidal ideations, homicidal ideations, depression, anxiety, or mental health issues. During [REDACTED] testimony, [REDACTED] explained that those concerns are addressed outside of a BIP, through mental health counseling.

22. On May 16, [REDACTED], the IEP team met to amend the IEP. Several individuals were present, including [REDACTED]. The IEP team discussed, among other things, the student’s behaviors and [REDACTED] FBA. All school staff at the meeting felt that the student’s behaviors between February of [REDACTED] and May of [REDACTED], during the last trimester of the school year, had improved.

23. To address the student’s behaviors moving forward, the IEP team agreed that rather than a BIP, the more appropriate approach to address the student’s behaviors was through a system of “green sheets” and the implementation of four additional social/emotional goals in the student’s IEP.

The green sheets were intended to be used daily—the student was supposed to ask each teacher to fill out their portion of the green sheet, and then return home with the green sheet and provide it to his parents.

24. Each daily green sheet contained a section for each teacher and required the teachers to check boxes indicating the completion and submission of homework and classwork, as well as boxes to check if specific behaviors were present that day. The behaviors listed on the green sheets were: remained on task; cooperative, courteous, and helpful; had a positive classroom experience; wasted class time; too social in class; disrupted class; and out of seat too much. The teachers were also asked to list the homework and classwork for each day. Lastly, there was a box that allowed for comments to be written by each teacher and a spot for the teacher to place their initials.

25. ██████████ was comfortable with the decision to use green sheets rather than create a BIP, because the student seemed to be improving and growing. The student's mother testified at the hearing that she also agreed to forego a BIP at the meeting. The green sheets were intended to provide positive reinforcement for the student to complete tasks and avoid refusal, but they would also provide for daily communication between the teachers and the parents, to help manage the student's behaviors.

26. The team also added independent functioning as a new domain and wrote a goal to address independent functioning. The IEP team referenced the student's behaviors involving following rules, defiance, disruption, aggression, throwing items, and destroying things. In addition to the green sheets and new goals, these behaviors were to be addressed during small groups, specially designed instruction, and social skills instruction.

27. The ██████-grade year ended shortly thereafter, with the student passing all his classes.

28. From February ██████ to the end of ██████ grade, the student did not receive any mental health counseling at school, pursuant to the IEP. The

School Board witnesses explained this failure to implement the IEP by placing the blame on the parents, for choosing private counseling over school-based counseling. The student's mother testified that although she provided consent on February 28, [REDACTED], for the same mental health counseling that was offered in the Fall of [REDACTED], the school never provided mental health counseling because the student was seeing a mental health counselor provided by the parents. To the extent that the mother's testimony on this issue is in conflict with the remainder of the witnesses, the mother's testimony is found to be more persuasive and more consistent with the record as a whole.<sup>4</sup>

29. At the start of [REDACTED] grade, which began in August of [REDACTED], the green sheet system was in place. Unfortunately, the green sheets were not filled out consistently by each teacher, and more often than not, each section which the form laid out was not filled out by each teacher. Predictably, the

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<sup>4</sup> Testimony from [REDACTED], an ESE Program Specialist, was consistent with the parent's recollection:

Q: Isn't it a fact that the school district, on the number of patients [sic] after February of [REDACTED], had informed the parent that the parent cannot have private counseling for the student at the same time that school district counseling is being provided?

[REDACTED]: Object for hearsay and lack of foundation.

The Court: Overruled.

A: To my knowledge, it was given—presented to the parent in [sic] a choice that, you know, if there was private counseling going on, then that was definitely something they could continue, but that, often, depending on counselors and what the student was being treated for or counseled for would determine whether or not that was something that they would be able to provide at the same time. So, it was a choice that the parent would make. We were always willing to provide counseling.

By Mr. Jessup:

Q: If the parent would give up the private counseling, correct?

A: Yes. Yes, I believe so, in this case.

Transcript, Volume 6, page 773-74.

student developed a dislike for the green sheets, and would sometimes not present the sheet to some teachers, or he would throw them away.

30. On September 4, [REDACTED], the student's IEP was amended to remove push-in services. The team continued to agree that a BIP was unnecessary. At the time, the student was uncomfortable with [REDACTED], the ESE teacher, pushing into his classroom and he felt embarrassed. [REDACTED] and the student's mother agreed to remove push-in services. Instead of pushing into the student's general education class to assist with initiation and completion of work, [REDACTED] provided the service in the ESE setting and provided consultative services to the student's teachers.

31. During the fall semester of [REDACTED], the mother frequently communicated via text messaging with [REDACTED]. This chain of text communications makes clear that the student continued to exhibit most of the same maladaptive behaviors that he had exhibited in the prior school year. In fact, in one particular exchange on September 17, [REDACTED] [REDACTED] asked the mother to intervene because the student was making comments that could result in the student once again being Baker Acted.

32. At this point, the student was still not receiving mental health counseling at school.

33. On November 4, [REDACTED], the student was with [REDACTED] in [REDACTED] room and was upset about an incident in class. He rocked back and forth and kept saying that he wanted to hurt teachers and, that if he did, he could get expelled. He was also focused on one particular teacher, [REDACTED]. During his conversation with [REDACTED], he shared that he had dark thoughts and wanted to hurt himself. After consulting with the student's mother, the school staff decided not to involve law enforcement or pursue a Baker Act.

34. On November 5, [REDACTED], the student's team of teachers met and confirmed that the team was not to write negative things on the green sheets because of concerns that the student would tear them up. However, the team acknowledged that they still needed to use structure and make the student

aware of issues. The teachers opted to fill out virtual Google forms that the parent could access. This system, however, was also not consistently followed.

35. According to [REDACTED], the student continued to act in an unusual manner in the weeks that followed November 4, [REDACTED]. He continued to make inappropriate comments about others, pulled his hair, and taunted other students. The student also started talking about past school shootings. This was behavior that [REDACTED] had never before seen from the student, and it was consistent for roughly two weeks.

36. On November 19, [REDACTED], in an attempt to gather better information about the student's behaviors at school, the mother asked the staff to return to the paper copy of green sheets, and stop using virtual versions.

37. On November 20, [REDACTED], in light of his comments about wanting to hurt teachers and his continued erratic behavior, the school staff decided to conduct a threat assessment. The members of the threat assessment team were [REDACTED], the school guidance counselor, and an assistant principal. The team also consulted with [REDACTED], a licensed mental health counselor employed by the School Board.

38. When the student was interviewed, he said he was upset with [REDACTED] and stated that if he harmed a teacher, he would be expelled. The team ultimately determined that the student's threat was transient, which meant that the student had made a verbal threat but he did not have the means or intent to carry out the threat. The student was not disciplined.

39. Once the parents were notified of the threat assessment, they chose to not send the student to school, and he never again attended Middle School B in person.

40. On December 6, [REDACTED], school staff met with the student's mother and a lay advocate to address the student's IEP and to persuade the student to return to school. The school staff felt it was in the student's best interest to return to school with IEP modifications, additional training, and additional accommodations. The student's mother requested that a new FBA be

conducted by a BCBA and that mental health counseling be provided. On December 9, [REDACTED], the student's IEP was amended and accurately reflected that the parents had provided consent for mental health counseling in February [REDACTED], and had never withdrawn the consent.

[He] will be referred and assessed by the mental health counselor to determine counseling needs. Parents have provided consent and will provide an updated consent if needed. At this time [he] is not seeing a counselor outside of school. Behaviors are addressed through a Functional Behavior Assessment that the parents have given recent consent to conduct at their request.

41. On January 21, [REDACTED], a meeting was held between school staff and the student's mother. Everyone in attendance agreed to proceed with an IEP team meeting. The student's mother was given information regarding Hospital Homebound (HH) and notified that the School Board was unable to provide gifted instruction at that time in HH. As of the date of the meeting, all of the student's absences from November 21, [REDACTED], through the meeting were marked as unexcused. In order to help the student, the school staff agreed to mark the unexcused absences as excused if the mother could obtain documentation from a physician. The student's physician, however, refused to excuse the absences.

42. On February 3, [REDACTED], the School Board received a completed Hospital/Homebound Program Physician's Referral form from the student's physician.

43. On February 7, [REDACTED], the IEP team completed the student's IEP for HH placement. The IEP noted that the FBA evaluation was open and ongoing, as Ms. Wilmot had experienced difficulty meeting with the parents. The parents once again requested that counseling be implemented. The IEP team agreed to add counseling as a related service, and the amount and frequency would be determined by the mental health counselor based on the student's needs. The IEP also noted that the student's gifted services were

going to be suspended and reinitiated when the student returned to a school campus.

44. On that same date, a mental health counselor with the school district, [REDACTED], traveled to the student's home to assess the student. While the counselor was on [REDACTED] way to the home, [REDACTED] received a call from the student's father letting him know that the appointment needed to be canceled, and the parents would let the counselor know when the assessment could be rescheduled. The parents never rescheduled the appointment.

45. A month later, in March [REDACTED], the student began seeing a private mental health counselor, [REDACTED]. When the student began counseling, [REDACTED] presented as having significant difficulties with trust, anxiety, and behavior issues. [REDACTED] worked with the student on emotional regulation, social skills, and decision-making. Over the course of several counseling sessions, the student expressed thoughts regarding violence, homicidal fantasies, weapons, guns, and school shootings.

46. During his placement in HH, up until the end of the school year, the student finished all of his academic work, passed all of his classes, and met his IEP goals that were applicable in a HH setting, but received no gifted services.

#### CONCLUSIONS OF LAW

47. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. *See* §§ 1003.57(1)(c) and 120.65(6) Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

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

49. 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).

50. 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).

51. 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).

52. 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." *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. v. Rowley*, 458 U.S. at 181). School districts must also ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 20 U.S.C. § 1412(a)(5)(A). In other words, the school district must endeavor to educate each disabled student in the least restrictive environment (LRE). *A.K. v. Gwinnett Cty. Sch. Dist.*, 556 Fed. Appx. 790, 792 (11th Cir. 2014).

53. 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, 207. A procedural error does not automatically result in a denial of FAPE. *See G.C. v. Muscogee Cty. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the 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).

54. Pursuant to the second step of the *Rowley* test, it must be determined if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206, 207. 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.” 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.*

55. 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.

56. 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.”).

57. The Complaint in this matter generally alleges that the IEPs during the relevant period were deficient because they did not contain accurate and complete PLOPs; the FBAs were deficient; the BIPs were deficient or non-

existent; and the IEPs failed to include sufficient details about mental health counseling, and did not list mental health counseling in the proper IEP sections.

58. As detailed in the Findings of Fact above, the IEPs contained appropriate PLOPs, which included information regarding the parent's concerns, the student's health concerns, the results of statewide or District assessments, the results of the student's most recent evaluations, the student's strengths, the student's abilities (based on formal and informal assessments, observations, and work samples), and how the student's disability impacts his involvement and progress in the general curriculum.

59. The IEPs also included a referral for mental health counseling, to be provided by the school, and appropriately allowed for the mental health counselor to develop the plan for frequency and duration.

60. As to the appropriateness of the FBAs, the undersigned is guided by the language found in Florida Administrative Code Rule 6A-6.03411(1)(q), which states:

A FBA is a systemic process for defining a student's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior. The purpose of conducting an FBA is to determine *whether a behavior intervention plan should be developed*. (emphasis added)

61. The FBAs that were conducted of this student were appropriate, and met the requirements of the above-cited rule, and also met the requirements of rule 6A-6.0331(5), (7) and (8) and 34 C.F.R. § 300.304(b). The FBAs addressed the student's behaviors and provided for strategies to manage the behaviors.

62. Even if the FBAs were found to be deficient, the evidence established that the IEP team created a system, the green sheets, that the team believed would appropriately address the student's behavioral challenges.

Importantly, the IEP team included the parent and a BCBA, all of whom agreed that the green sheets were appropriate at that time, in lieu of a BIP.

63. In sum, the greater weight of the evidence established that the IEPs were reasonably calculated to enable the student to make progress appropriate in light of his specific circumstances.

64. As to the implementation of the IEP, Petitioner's Complaint alleges that portions of the IEP were not implemented; in particular, that the green sheet system was not implemented with fidelity; that during the global COVID pandemic, the IEP was not implemented for 21 hours; that progress reporting was deficient; and that gifted services were not implemented once the student was placed in HH.

65. In *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit Court of Appeals addressed 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.

66. 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.*

67. 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.

68. Here, Petitioner failed to establish, with persuasive evidence, that the School Board failed to provide sufficient progress reporting.

69. The greater weight of the evidence, though, did establish that the School Board failed to properly implement mental health counseling from February [REDACTED] to February [REDACTED] and failed to materially implement the green sheet system with fidelity. The School Board also, as admitted, failed to implement gifted services from February [REDACTED] until the end of the academic school year. Lastly, the evidence established that during the first few months

of the global COVID pandemic, roughly 21 hours of instruction were not delivered.

70. Guided by the above principles, the failure to provide gifted services from February [REDACTED] to the end of the school year, and the roughly 21 hours of instruction that were not delivered during the global pandemic, resulted in little to no cumulative effect on the student's ability to progress through the curriculum, meet applicable IEP goals, and finish all his coursework. The student was receiving, during this time period, one-on-one instruction with teachers who came to his home and were able to build a rapport with him—allowing him to focus on his academic work and meet applicable IEP goals with individualized attention. The cumulative effect of these two violations was not material.

71. However, the evidence established that the student's behavioral needs were substantial. The creation of the green sheet system in lieu of a BIP was appropriate, and, in conjunction with mental health counseling, was the most significant portion of the IEP. This IEP approach might have been effective had it been implemented with fidelity, but it was not. Therefore, the failure to implement the green sheet system with fidelity and the failure to provide mental health counseling amounts to a material failure to implement the student's IEP, denying the student a FAPE, from February [REDACTED] to February [REDACTED].

72. Lastly, Petitioner claims that the School Board violated Section 504. Section 504 of the Rehabilitation Act of 1973 forbids organizations that receive federal funding, including public schools, from discriminating against people with disabilities. 29 U.S.C. § 794(b)(2)(B). In relevant part, Section 504 provides that no otherwise qualified individual with a disability shall, "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" receiving Federal financial assistance. 29 U.S.C. § 794(a). A school board, as is alleged here, violates Section 504 by

intentionally discriminating against a student on the basis of his or her disability. *T.W. v. Sch. Bd. of Seminole Cty.*, 610 F.3d 588, 603-04 (11th Cir. 2010).

73. To prove a claim of intentional discrimination, Petitioner must demonstrate by a preponderance of the evidence that the School Board subjected him to an act of discrimination solely by reason of his disability. *Id.* Notably, a claim of intentional discrimination need not be supported by proof of discriminatory animus—i.e., "prejudice, spite or ill will." *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 344-45 (11th Cir. 2012). It is instead sufficient for Petitioner to supply proof of "deliberate indifference," which occurs when a "defendant knew that harm to a federally protected right was substantially likely and . . . failed to act on that likelihood." *Id.* at 344-45; *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)("Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood").

74. Petitioner alleges that the School Board committed acts of discrimination by failing to create appropriate IEPs that properly addressed the student's behavioral needs and by failing to implement mental health counseling and the green sheet system.

75. As explained above, the evidence demonstrated that the School Board created appropriate IEPs, but materially failed to implement the system of green sheets and the delivery of mental health counseling. Petitioner failed to produce, however, any evidence that any School Board employee acted with deliberate indifference when failing to fill out the green sheets as intended, or in assuming that the student's mental health counseling needs were being met by the private counselors.

76. Petitioner's claim of intentional discrimination, therefore, is rejected.

#### Relief

77. In calculating an award of compensatory education, the undersigned is guided by *Reid ex rel. 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.* at 524. 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) (agreeing with the district court that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address the student’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) (noting that a flexible, individualized approach is more consonant with the aim of the IDEA, the Court found such an approach more persuasive than the Third Circuit's formulaic method); *Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1352-3 (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).

78. Guided by these principles, the student is entitled to receive compensatory education for one calendar year; specifically, one calendar year of mental health counseling.

#### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board shall provide compensatory education in the form of mental health counseling for one calendar year and to continue to



provide mental health counseling, as needed. All other forms of relief are DENIED.

DONE AND ORDERED this 2nd day of August, 2021, in Tallahassee, Leon County, Florida.

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JESSICA E. VARN  
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Filed with the Clerk of the  
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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party: a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).

NOTICE OF RIGHT TO REVIEW SECTION 504 PROCEDURE

This Final Order is also subject to review procedures pursuant to 34 C.F.R. § 104.36.