**STATE OF FLORIDA**
**DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

vs. Case No. 20-4072E

LAFAYETTE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A due process hearing was held in this matter on February 16 and 17, [redacted], by Zoom Conference, before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Beverly Oviatt Brown, Esquire
Three Rivers Legal Services, Inc.
Suite 220
3225 University Boulevard South
Jacksonville, Florida 32216

For Respondent: Leenette W. McMillan-Fredriksson, Esquire
Lafayette County School Board
Post Office Box 1388
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STATEMENT OF THE ISSUES

Whether Respondent failed in its obligation under Section 504 of the Rehabilitation Act of 1973 (Section 504)[1] or the Individuals with Disabilities Education Act (IDEA)[2] to appropriately identify, locate, and evaluate

[1] 29 U.S.C. § 794.

[2] 20 U.S.C. § 1400, *et. seq.*

Petitioner to determine whether Petitioner is in need of special education and related services; and, if so, whether Respondent failed to properly convene a manifestation determination review (MDR) to determine whether Petitioner's conduct that constituted a violation of the student code of conduct was caused by, or had a direct and substantial relationship to Petitioner's disability or was the direct result of Respondent's failure to implement an individualized educational program (IEP) or Section 504 Student Accommodation Plan (Section 504 Plan); and whether Petitioner was subjected to discrimination by Respondent's failure to provide behavior support.

## PRELIMINARY STATEMENT

On September 11, 2020, Respondent received Petitioner's Request for Due Process Hearing (Complaint). Respondent forwarded the Complaint to DOAH the same day, and the matter was assigned to the undersigned.

Following an unopposed extension of time to respond to the Complaint, on October 25, 2020, the parties filed a Joint Status Report and Request to set the Case for Hearing. In that filing, the parties advised that they would not be available for hearing until February 2021. On October 27, 2020, the due process hearing was scheduled to begin on February 16, 2021.

On February 10, 2021, the parties filed a Joint Pre-Hearing Stipulation of the Parties, which included a statement of facts which the parties stipulated were admitted and required no additional proof at hearing. To the extent relevant, the stipulated facts are incorporated in this Final Order.

The hearing proceeded, as scheduled, via Zoom conference on February 16, 2021, and concluded on February 17, 2021. Upon the conclusion of the hearing, the parties stipulated to the submission of proposed final orders within 30 days of the filing of the Transcript, and that the

undersigned's Final Order would be committed within 60 days of the filing of the Transcript.

The Transcript was filed on March 9, 2021. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. The parties timely filed proposed final orders, which were considered in preparing 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, male pronouns will be used herein 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

[redacted]-[redacted] School Year

1. At all times relevant to this proceeding, Petitioner was a student at School A, a public high school in Respondent's school district. School A, although labeled as a "high school," serviced students in grades [redacted] through [redacted].

2. Petitioner was diagnosed with [redacted] in [redacted] grade and has been on varying medications for that [redacted] ever since.[3]

3. During the [redacted]-[redacted] school year, Petitioner was [redacted] years old and in the [redacted] grade. He was placed in the [redacted] setting.

4. [redacted], Petitioner's [redacted]-grade social science/social studies teacher, credibly testified about the behavior of the typical [redacted]-grade student. [redacted] explained that, at School A, [redacted] grade is "the kindergarten of high school so a lot of them require redirection." With respect to Petitioner's

[3] While this fact is stipulated, from the evidentiary record it is unclear when Respondent first became aware of the ADHD diagnosis.

behavior in [redacted] class, [redacted] testified that [redacted] believed Petitioner could conform his behavior if he chose to do so, and did not specifically recall issuing a disciplinary referral for Petitioner. [redacted] disciplinary practice with all students was as follows: 1) redirect the student and warn the student of the consequences of an unwanted behavior; 2) if the behavior continued, contact the parent or guardian; and 3) if the first two approaches failed, then issue a disciplinary referral.

5. [redacted], Petitioner's [redacted]-grade English/Language Arts teacher, also testified that Petitioner's behavior was consistent with those of his classmates. [redacted] issued one disciplinary referral to Petitioner on May 10, [redacted], for "defiance of authority." [redacted] explained, however, that "[y]ou know, I mean, [he] interacted pretty much like any other [redacted]-grade student as far as I didn't have – I didn't have any documentation for [his]." [redacted], who has 30 years of education experience, testified that [redacted] has observed [redacted] in students previously, but did not observe the disorder manifest with Petitioner. Academically, [redacted] credibly testified that with the appropriate multi-tiered system of support, Petitioner was a solid "C" student.

6. [redacted], Petitioner's [redacted]-grade math teacher, when describing Petitioner's behavior in class, testified that "[l]ike typical students, just having to redirect and things like that, but nothing completely out of the ordinary." [redacted] issued two disciplinary referrals for Petitioner during the [redacted]-[redacted] school year. The first, on November 16, [redacted], was for failing to listen or pay attention in class; and the second, on March 12, [redacted], was for chewing gum in class.

7. [redacted], Petitioner's [redacted]-grade life science teacher testified that [redacted] did not recall Petitioner having any specific behavioral issues.

8. Throughout the [redacted]-[redacted] school year, Petitioner received a total of seven disciplinary referrals. In addition to the three noted above, Petitioner received referrals for the following violations of the code of student conduct:

(1) "other acts," taking a candy bar out of another student's backpack; (2) an unspecified "other act," resulting in a one-day out of school suspension (OSS); (3) "defiance of authority," for failing to stay in his seat and completing work; and (4) "harassment," resulting in a 1.5 day OSS.

9. Petitioner's report card for the [redacted]-[redacted] school year documents the following: Language Arts (71); Mathematics (62); Fitness (99); Introduction to Agriscience (88); Life Science (60); Social Studies (74); Reading (76); and Intensive Mathematics (S). The comments to the report card document that Petitioner was below grade level in mathematics and that he was not working to his full potential in social studies. Otherwise, the report card documents that he was working on grade level.

10. [redacted], an instructional coach at School A, explained that School A used the "i-Ready" reading assessment and instruction program with Petitioner. A review of the i-Ready data specific to Petitioner for the [redacted]-[redacted] school year revealed that Petitioner made some growth in reading throughout the year. Notwithstanding this growth and the comments documented on his report card, Petitioner was functioning on a [redacted]-grade reading level.

11. With respect to Petitioner's math progression, [redacted] explained that Petitioner also made some growth. His first assessment score was a 477, his mid-year score a 487, and his end of year score resulted in a 494. Similar to his reading, he was functioning below grade level. For all that appears, he was functioning at a [redacted]-grade level.

12. [redacted], the director of teaching and learning services, provided testimony concerning the education supports Petitioner received

during the [redacted]-[redacted] school year. Petitioner received Tier I interventions;[4] as well as "Target Time," where Petitioner was able to work on missing assignments, and receive individual assistance. Additionally, Petitioner's class schedule included a Reading I Class, in addition to his English Language Arts (ELA) class, wherein he received Tier 2 and 3 reading interventions, that included additional whole group instruction in reading, direct specialized instruction in small groups based on Petitioner's individual needs, and i-Reading individualized instruction.

13. He also received Intensive Math, which was in addition to his regular [redacted]-grade math class. Here, Petitioner received Tier 2 interventions, which included additional whole group instruction, direct specialized instruction in small groups based on his individual needs, and i-Ready individualized instruction.

14. At the beginning of the [redacted]-[redacted] school year, all students are provided a School Health Clinic Emergency Medical Information form to be completed by the student's parent or guardian. The form provides an opportunity for the parent to list the student's physician, allergies, health

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[4] Pursuant to School A's "Student's Not Achieving at Benchmark Level" document, Tier 1 is defined as:

Problem Solving
- Define problem
- Identify goal
- Work with Instructional Team to Determine Intervention
- Use Available Strategies: Targeted Instruction, Small groups, etc
- Match Strategies to Defined Problem

The Parents
- Discuss Problem
- Discuss Classroom Interventions for Problem
- Develop Tier I Intervention Plan with Parent

Progress Monitoring
- Collect Baseline Data
- Work Samples
- Test Data
- Intervention Data (progress monitoring)
- Evaluate Effectiveness

problems/conditions, and medications the student is currently taking for health problems. It is undisputed that Petitioner's guardian did not complete and provide School A with a completed form.

15. No evidence was presented that, during the [redacted]-[redacted] school year, Petitioner's guardian requested Respondent to evaluate Petitioner to determine if he was a student with a disability. There was also no evidence presented that Respondent, during the same time, sought consent to evaluate Petitioner to determine if he is a student with a disability.

[redacted]-[redacted] School Year

16. Petitioner was promoted to [redacted]-grade and remained at School A for the [redacted]-[redacted] school year until March 13, [redacted], when he was withdrawn from the Lafayette County School District by his guardian.

17. From September 3 through October 16, [redacted], Petitioner received eight disciplinary referrals. The infractions primarily consisted of defiant behavior, general disruptions of the classroom, and repeated cellphone violations.

18. On one occasion, Petitioner received a referral for "other acts," wherein he slapped another student across the face leaving a red mark. As a result, Petitioner received a one-day OSS. He also received a half-day OSS for defiance related to cellphone use in the classroom.

19. On October 16, [redacted], Petitioner received a referral for defiance of authority. Respondent's Student Discipline Report documents the reason for the referral as follows:

> Today, [Petitioner] was asked not to throw [his] bottle into the trash can. [His] reply "I didn't throw it I shot it." [He] continued to talk out about this while I attempted to start class. Then, when given work to do, [he] was copying a note. I told [him] to put it away, [his] response, "Oh no! It's not going like that today." [He] continued to make defiant remarks. I asked [him] again to put it away. [He] did. Then 5 minutes later [he] had it out again doing the same thing. When [his] behavior is

> redirected, [he] always responds with some disrespectful comment relating that [he] doesn't have to do what is asked of [him.] [His] continual need for redirection results in lost class instruction time for [him] and others.

20. Due to the excessive referrals over a short period of time, a conference was scheduled for the following day, October 17, [redacted]. The conference was attended by Petitioner; Petitioner's guardian; Principal [redacted]; [redacted], Dean of Students; and several of Petitioner's teachers, including [redacted]; [redacted], [redacted]-grade [redacted]; [redacted]; and Ms. Lamb.

21. The conference notes drafted by [redacted] were memorialized as follows:

> This meeting was arranged to try to find ways to improve [Petitioner's] grades and behavior.
>
> [redacted] addressed [Petitioner] and asked "What can we do to help you make better decisions?" [Petitioner] agreed that [he] need to take responsibility for [his] actions.
>
> [Petitioner's guardian] asked if [Petitioner] could be isolated from other students to help [him] concentrate better. Another idea was to have [Petitioner] bring [his] phone to the office in the morning and pick it up at the end of the day. This would help so that [Petitioner] would not get the phone taken away and receive a referral.
>
> It was also discussed that [Petitioner] can't keep doing the same things behaviorally or it could result in [Petitioner] being placed in Alternative School. [Petitioner] already has 8 referrals up to this point.

22. As a result of the meeting, Petitioner's class seating was changed to help reduce distractions from other students, and he was required to place his cellphone at the front office before the first period.

23. [redacted] specifically recalled the October [redacted] conference meeting as [redacted] had issued three disciplinary referrals leading up to the meeting. [redacted] testified that Petitioner's [redacted] behavior was not only detrimental to Petitioner, but to others in the classroom. [redacted] opined that, after the October meeting, Petitioner's behavior improved tremendously through the Winter break. Indeed, according to [redacted], Petitioner was becoming a pleasure in class.

24. On October 30, [redacted], Petitioner received a disciplinary referral for throwing an object across the classroom toward [redacted], his history teacher. There were no further referrals during the Fall semester.

25. On November 12, [redacted], while at school, Petitioner accidentally ingested [redacted], mistakenly believing the substance to be candy, and due to his subsequent behavior after school, was admitted to the emergency room at [redacted]. Due to [redacted] concerns, he was [redacted].

26. On November 14, [redacted], [redacted] notified [redacted], the school nurse, that Petitioner was in the hospital and had a reaction to [redacted] that was ingested on campus. [redacted] advised that [redacted] had spoken with Petitioner's guardian regarding obtaining consent to have an exchange of information with Petitioner's physicians to obtain information regarding the incident.

27. On November 15, [redacted], [redacted] faxed the lab results from Petitioner's hospital admission. On the same day, Petitioner's guardian requested that upon Petitioner's return to school to not ask "what happened," as Petitioner was uncomfortable discussing the incident.

28. Petitioner did return to school on November 18, [redacted]. As both Petitioner's guardian and School A staff were concerned about his welfare, [redacted] called Petitioner to [redacted] office to check on him and advise that he could come to the clinic if he needed anything.

29. Although Petitioner's guardian had advised Respondent of the [redacted] admission, [redacted] did not, at that time, [redacted] or provide any additional records regarding the same. Similarly, Petitioner's guardian did not request that the [redacted] records be provided to School A.

30. Following the Winter break, Petitioner's behavioral incidents began to rise. On January 15, [redacted], Petitioner received a referral for harassment of another student, resulting in a 1.5 day OSS.

31. On January 21, [redacted], Petitioner received a referral for being disrespectful to [redacted]. His school schedule was changed and he was not allowed to visit the restroom between classes. On January 27, [redacted], he received a referral for skipping classes and being disrespectful to a teacher. As a consequence, Petitioner was required to attend after school detention for two days.

32. Seeing a spike in behavior, on January 30, [redacted], a teacher/parent conference was held. Participants to the meeting included Petitioner, Petitioner's guardian, [redacted], and Principal [redacted]. The conference notes from this meeting memorialize the following:

> This meeting was arranged to discuss [Petitioner's] behavior on campus and changes that have been made in [his] schedule to improve [his] behavior and to explore any other options to improve [his] behavior. . . .
>
> [Petitioner's] schedule was changed by [redacted] in an effort to improve [his] behavior and lessen the distraction of classmates in [his] former classes. Also, a plan was put in place to give [him] more supervision between classes because this is where many of [his] discipline issues are

> occurring. Both [Petitioner] and [his guardian], were supportive of those decisions. [Petitioner's guardian] discussed some medication that their doctor was prescribing [Petitioner]. [Petitioner's guardian] felt this medication would also improve [Petitioner's] behavior at school.
>
> As of October 17, [redacted], [Petitioner] already had 8 referrals. By January 30, [redacted], [Petitioner] had referrals [sic]. It was discussed at both meetings that if [Petitioner's] behavior does not improve, [he] will be placed in Alternative School.

33. Medical records from [redacted] reveal that, on or about February 7, [redacted], Petitioner was [redacted] procedure and treated at [redacted] following an allegation that he threatened to stab two students with a pen.[5] Specifically, it was reported that, when he arrived at home, after the alleged incident, he obtained a knife, punched the window, and threatened to kill himself. He was admitted to the [redacted] at [redacted].

34. While at [redacted], he was diagnosed with [redacted], [redacted], and [redacted]. He was discharged from [redacted] on February 10, [redacted].

35. [redacted], Respondent's Director of Safety and Mental Health, testified that [redacted] has known Petitioner's guardian for at least [redacted] years, and they had previously worked together for [redacted] years. On or about February 11, [redacted], [redacted] had a conversation with Petitioner's guardian wherein [redacted] advised [redacted] that counseling services were available through the school. [redacted] credibly testified that immediately following that conversation, [redacted]

[5] While the record contains two student statements describing the alleged incident, the record evidence fails to provide that Petitioner received a disciplinary referral regarding the allegations.

referred Petitioner to counseling with [redacted], Respondent's Mental Health Coordinator.

36. [redacted] is a licensed mental health coordinator. [redacted] provided counseling for Petitioner on three occasions between February 11 through March 13, [redacted]. [redacted] credibly testified that [redacted] was only advised by Petitioner and Petitioner's guardian of the [redacted] diagnosis. [redacted] sessions with Petitioner were approximately 30 minutes to one hour in length. [redacted] used Cognitive Behavioral Therapy to assist Petitioner with [redacted] areas of concern. During [redacted] limited involvement, [redacted] did not conduct any evaluations of Petitioner and was not provided with, nor requested to examine, Petitioner's records from [redacted].

37. On February 10, [redacted], Petitioner's guardian advised Principal [redacted] that Petitioner was seeing a physician and receiving medication to address [redacted], [redacted], and focus. The record fails to provide any evidence that, prior to this time, Respondent was notified of any diagnosis other than [redacted].

38. Within two days after being discharged from [redacted], on February 12, [redacted], Principal [redacted] drafted a [redacted] with respect to Petitioner. On February 13, [redacted], a meeting was conducted with Petitioner, Petitioner's guardian, Principal [redacted], and Assistant Principal [redacted].

39. While Principal [redacted] wrote the [redacted], [redacted] testified that it was created with all members' participation. The evidence supports a finding that Petitioner's guardian was provided an opportunity to discuss the [redacted], and that [redacted] was in agreement with the contents of the [redacted]. All those in attendance received a copy of the [redacted]; however, the evidence fails to establish whether the [redacted] was distributed to all personnel working with Petitioner.

40. The [redacted] documented Petitioner's "problem behaviors" as "low grades, disrespectful behavior, focus in class, and student interaction." The "replacement behaviors" or "what is expected of the student" was documented

as "improve grades, decrease discipline referrals." The [redacted] provided that desired behaviors would be taught by direct instruction, anger management, role playing, decision-making lessons, social skills training, providing cues, modeling, and stress management. The same would be provided by staff and counselors.

41. The [redacted] provided the following accommodations to assist Petitioner in displaying positive behavior: clear, concise directions; frequent reminders/prompts; teacher/staff proximity; reprimand the student privately; review rules and expectations; communicate regularly with parents; supervise free time; avoid strong criticism; predictable, routine schedule; preferential seating; avoid power struggles; specifically define limits; avoid physical contact; and provide highly-structured setting.

42. Interventions were also documented to include that Petitioner's scheduled had been changed; he was seeing a counselor; he was being supervised between classes; and Petitioner was to bring his cellphone to the office before school began. The [redacted] also documented how progress would be measured, the duration (initially two weeks/continuous), and the positive and negative consequences for behavior. The [redacted] provided many of the standard accommodations that one would find in a Section 504 Plan for a student with [redacted].

43. On March 3, [redacted], Petitioner received a disciplinary referral for defiance of authority, again related to electronic device issues in the classroom. The infraction was resolved by a parental conference.

44. Petitioner's last disciplinary referral occurred on March 9, [redacted], and was due to disrespectful speech. The infraction was resolved by a parental conference.

45. Petitioner's report card for the first semester of the [redacted]-[redacted] school year documents the following grades: Earth Science (80); United States History (68); Language Arts 2 (71); Orientation to Agriscience (91); Grade 7 Mathematics (72); Reading 2 (65); and Intensive Mathematics (65). The

report card comments provide that Petitioner was working below grade level in reading.

46. A review of the i-Ready data specific to Petitioner for the [redacted] school year revealed that Petitioner made some growth in reading throughout the year. The evidence provided that Petitioner also made some progression in math. Neither the final assessments nor the Florida Standardized Assessment were administered due to the COVID-19 pandemic; however, Petitioner was projected to make growth in both math and reading.

47. At Petitioner's guardian's request, on March 13, [redacted], Petitioner was withdrawn from the Lafayette School District. As of March 13, [redacted], Petitioner's grades were reported as follows: Earth Science (73); United States History (51); Language Arts 2 (61); Music 2 (94); Grade 7 Mathematics (53); Reading 2 (69); and Intensive Math (no score provided). [redacted], Respondent's [redacted], credibly opined that while his grades had overall decreased since the first semester, it is possible Petitioner's grades would have been higher at the conclusion of the semester due to the missed opportunities to turn in missed assignments, extra-credit, and assessments.

48. [redacted] provided unrefuted testimony concerning the supports provided to Petitioner during the [redacted] school year. [redacted] credibly testified that Petitioner received [redacted] interventions (Tier 1) in all classes. Additionally, Petitioner participated in an additional reading class wherein he received whole group instruction, direct specialized instruction in small groups, and a specific i-Ready instruction pathway (Tier 2 and 3). Petitioner also attended an intensive math class, in addition to his [redacted]-grade math class, where he received whole group and direct special instruction in small groups.

49. No evidence was presented that, during the [redacted] school year, Petitioner's guardian requested Respondent to evaluate Petitioner to determine if he was a student with a disability. There was also no evidence

presented that Respondent, during the same time, sought consent to evaluate Petitioner to determine if he is a student with a disability.

## CONCLUSIONS OF LAW

50. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 1003.57(1)(c), Florida Statutes, Florida Administrative Code Rule 6A-6.03311(9)(u), and section 120.65(5), Florida Statutes.

51. 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).

52. The gravamen of Petitioner's Complaint is that Respondent breached its so-called "Child Find" duty under Section 504 and IDEA. Child Find "refers to a school's obligation, under relevant federal law, to identify students with disabilities who require accommodations or special education services proactively rather than waiting around for a child's parents to confront them with evidence of this need." *Culley v. Cumberland Valley Sch. Dist.*, 758 Fed. Appx. 301, 306 (3d Cir. 2018). Both Section 504 and the IDEA impose such a duty.

53. The IDEA sets forth the Child Find obligation as follows:

> All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).

54. In complaince with this mandate, rule 6A-6.0331 sets forth the school districts responsibilities regarding students suspected of having a disability. This rule provides that school districts have the responsibility to ensure that students suspected of having a disability are subject to general education intervention procedures. Additionally, they must ensure that all students with disabilities and who are in need of exceptional student education (ESE) are identified, located, and evaluated, and FAPE is made available to them if it is determined that the student meets the eligibility criteria.

55. As an initial matter, the school district has the "responsibility to develop and implement a multi-tiered system of support ("MTSS"), which integrates a continuum of academic and behavioral interventions for students who need additional support to succeed in the general education environment." Fla. Admin. Code R. 6A-6.0331(1).

56. The general education intervention requirements include parental involvement, observations of the student, review of existing data, vision and hearing screenings, and evidence-based interventions. Fla. Admin. Code R. 6A-6.0331(1)(a)-(e).[6] Rule 6A-6.0331(1)(f) cautions, however, that nothing in this section should be construed to either limit or create a right to FAPE or to delay appropriate evaluations of a student suspected of having a disability.

[6] Regarding the evidence-based interventions, rule 6A-6.0331(1)(e), provides, as follows:

> Evidence-based interventions addressing the identified areas of concern must be implemented in the general education environment. The interventions selected for implementation should be developed by a team through a data-based problem solving process that uses student performance data to identify and analyze the area(s) of concern, select and implement interventions, and monitor the effectiveness of the interventions. Interventions shall be implemented as designed for a period of time sufficient to determine effectiveness, and with a level of intensity that matches the student's needs. Pre-intervention and ongoing progress monitoring measures of academic and/or behavioral areas of concern must be collected and communicated to the parents in an understandable format, which may include, but is not limited to, graphic representation.

57. Rule 6A-6.0331(3)(a) then sets forth a non-exhaustive set of circumstances, which would indicate to a school district that a student may be a student with a disability who needs special education and related services. As applicable to this case, those circumstances include the following:

> 1. When a school-based team determines that the kindergarten through grade 12 student's response to intervention data indicate that intensive interventions implemented in accordance with subsection (1) of this rule are effective but require a level of intensity and resources to sustain growth or performance that is beyond that which is accessible through general education resources; or
>
> 2. When a school-based team determines that the kindergarten through grade 12 student's response to interventions implemented in accordance with subsection (1) of this rule indicates that the student does not make adequate growth given effective core instruction and intensive, individualized, evidence-based interventions; or
>
> * * *
>
> 4. When a parent requests an evaluation and there is documentation or evidence that the kindergarten through grade 12 student or child age three (3) to kindergarten entry age who is enrolled in a school district operated preschool program may be a student with a disability and needs special education and related services.

58. When the above circumstances are present, and the school district suspects the student is a student with a disability and needs special education and related services, the school district must seek consent from the parent or guardian to conduct a full and individual initial evaluation. Fla. Admin. Code R. 6A-6.0331(3)(a).

59. Section 504 contains its own Child Find requirement that is similar, but not identical, to the child find requirement of IDEA. Section 504 requires school districts to:

> . . . conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

34 C.F.R. § 104.35.[7]

60. The undersigned concludes, based on the Findings of Fact above, that prior to February 10, [redacted], none of the conditions set forth above existed such as would indicate to Respondent that Petitioner may be a student with a disability thus triggering the duty to conduct an evaluation under either Section 504 or the IDEA.

61. The undersigned concludes that, on February 10, [redacted], when Respondent became aware of Petitioner's recent [redacted] and had knowledge that Petitioner was under the care of a physician, and had been diagnosed, in addition to [redacted], with [redacted], there were sufficient indications that Petitioner may be a student with a disability who needs special education and related services, triggering Respondent's duty to evaluate under both Section 504 and the IDEA.

62. This, however, does not end the Child Find inquiry. School districts are granted a "reasonable time" to identify, locate, and evaluate children with disabilities once they are on notice of the student's need for special education.

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[7] Florida does not have a statute adopting or mandating compliance with Section 504, and, therefore, there are no Florida administrative rules addressing compliance with Section 504, how an impartial Section 504 hearing should be conducted, or the scope of the decision to be determined.

*Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1196 (11th Cir. 2018). Within three days of receiving the new mental health diagnoses, Respondent had referred Petitioner to a licensed mental health counselor, drafted an initial [redacted], and conducted a meeting to assist the struggling student. Petitioner's guardian withdrew Petitioner from the Lafayette County School District within 30 days of the meeting, on March 13, [redacted].

63. It is concluded that Respondent did not violate its Child Find duty by failing to identify and evaluate Petitioner within 30 days of February 10, [redacted]. If Petitioner had remained in the Lafayette County School District, and if Respondent had not initiated the evaluation process within a reasonable time thereafter, the undersigned would have no hesitation in concluding otherwise.

64. Having concluded that Respondent did not violate its Child Find duty under either Section 504 or the IDEA, it is further concluded that Respondent did not fail to properly convene an MDR to determine whether Petitioner's conduct that constituted a violation of the student code of conduct was caused by, or had a direct and substantial relationship to, Petitioner's disability or was the direct result of Respondent's failure to implement an IEP or Section 504 Plan.

65. Even assuming, *arguendo*, that Petitioner was a student with a disability entitled to the protections of Section 504 or the IDEA at the time of the alleged misconduct, Petitioner failed to present sufficient evidence to establish that an MDR was warranted. This is so because Petitioner failed to present sufficient evidence that there had been a "change of placement," as defined in rule 6A-6.03312(1), because of disciplinary removals.

66. Petitioner further claims that the failure to create a Section 504 Plan supports a claim for discrimination. A parent has a private right of action to sue a school system for violating Section 504. *Ms. H. v. Montgomery Cty. Bd. of Educ.*, 784 F. Supp. 2d 1247, 1261 (M.D. Ala. 2011).

67. To prevail on a Section 504 claim, a plaintiff must show:"(1) the plaintiff is an individual with a disability under the Rehabilitation Act; 2)the plaintiff is otherwise qualified for participation in the program; (3) the plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reasons of his or her disability; and (4) the relevant program or activity is receiving federal financial assistance." *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cty., Fla.*, 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007). As the Middle District of Alabama has explained:

> To prove discrimination in the education context, courts have held that something more than a simple failure to provide a FAPE under the IDEA must be shown. A plaintiff must also demonstrate some bad faith or gross misjudgment by the school or that he was discriminated against solely because of his disability. A plaintiff must prove that he or she has either been subjected to discrimination or excluded from a program or denied benefits by reason of their disability. A school does not violate
> § 504 by merely failing to provide a FAPE, by providing an incorrect evaluation, by providing a substantially faulty individualized education plan, or merely because the court would have evaluated a child differently. The deliberate indifference standard is a very high standard to meet.

*J.S. v. Houston Cty. Bd. of Educ.*, 120 F. Supp. 3d 1287, 1295 (M.D. Ala. 2015)(internal citations omitted), reversed, in part, on other grounds, 877 F.3d 979(11th Cir. 2017).

68. The Eleventh Circuit has defined deliberate indifference in the Section 504 context as occurring when "the defendant knew that harm to a federally protected right was substantially likely and … failed to act on that likelihood." *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012). This standard "plainly requires more than gross negligence," and

"requires that the indifference be a deliberate choice, which is an exacting standard." *Id.* (internal and external citations omitted).

69. Succinctly, Petitioner failed to present sufficient evidence to establish that the failure to create a Section 504 Plan for Petitioner supports a finding of deliberate indifference. Accordingly, Petitioner's discrimination claim under Section 504 is denied.

## ORDER

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

DONE AND ORDERED this 10th day of May, [redacted] in Tallahassee, Leon County, Florida.

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, [redacted].

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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).