

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

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Petitioner,

vs.

Case No. 22-3347E

HILLSBOROUGH COUNTY SCHOOL BOARD,

Respondent.

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FINAL ORDER

A due process hearing was held on January 30, 2023, before Administrative Law Judge Brittany O. Finkbeiner of the Division of Administrative Hearings (“DOAH”) via Zoom conference.

APPEARANCES

For Petitioner:     Petitioner, pro se  
                              (Address of Record)

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

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated the law with respect to reevaluating Petitioner; and whether Petitioner’s individualized education plan (“IEP”) was reasonably calculated to provide Petitioner with a free appropriate public education (“FAPE”).

### PRELIMINARY STATEMENT

This matter is before DOAH on Petitioner's Request for Due Process Hearing, filed on October 26, 2022. At the final hearing, Petitioner presented the testimony of his parent and Linda Montalbano. Petitioner's Exhibits 1 through 25 were admitted into evidence. Respondent presented the testimony of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. Respondent's Exhibits 4, 6, and 8 through 15 were admitted into evidence. Both parties submitted proposed final orders, which were duly considered in the preparation of this Final Order.

Statutory references are to the 2021 codification in place at the time this cause arose. 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. Petitioner is a [REDACTED]-grade student at School A in Respondent's school district. He is a student with a disability and is receiving Exceptional Student Education ("ESE") services under the Language Impaired ("LI") eligibility category.

2. Petitioner was evaluated on October 9, [REDACTED], for initial eligibility for ESE services.

3. On May 13, [REDACTED], Petitioner was reevaluated for the purpose of determining his present level of performance as he prepared to transition from [REDACTED] to [REDACTED].

4. On January 19, [REDACTED], Petitioner's IEP team removed Petitioner's then-existing disability category of Developmentally Delayed, and the primary exceptionality was listed as LI. Petitioner was [REDACTED] years old at that time.

5. In the classroom, Petitioner is a happy child with a lot of friends. Petitioner has a great memory and is able to remember sight words easily. He is in the highest-level reading group among his same-grade peers, and scored within the top three in the district on the i-Ready reading assessment. His i-Ready reading assessment scoring shows that he is at or above grade level in all areas tested and ranks in the 79th percentile of students tested nationwide. Petitioner scored lower on the Renaissance reading assessment, in the 36th percentile and 57th percentile based, respectively, on two different administrations of the test, but still on grade level.

6. Petitioner's parent reported that Petitioner finds reading difficult and that the words move on the page when Petitioner reads. However, the weight of the evidence in the record shows that Petitioner reads at or above grade level based on standardized assessments.

7. Petitioner does well in math and is able to reteach lessons and explain problems to other students. He performed on a high level on the Star diagnostic report for math—scoring between 80 and 100 percent in all areas. On his i-Ready math assessment, Petitioner tested on grade level in all areas and ranked in the 88th percentile of students tested nationwide. Petitioner also took the Renaissance assessment for math on two occasions, scoring in the 98th percentile both times.

8. Based on Petitioner's assessment at the beginning of his [REDACTED]-grade year, his teacher determined that he was eligible for gifted testing. Accordingly, she sent a request for consent to Petitioner's parent for him to be tested for gifted eligibility, which the parent signed. Petitioner passed the initial gifted screening.

9. Petitioner's parent submitted a request for a "complete" reevaluation of Petitioner to Respondent, dated September 23, [REDACTED]. The request further specifies that the parent does not "agree with the past evaluations and want[s] a more extensive evaluation done." The parent's request contained a great deal of extraneous and confusing information, making its exact intent

difficult to discern. The undersigned, however, finds that it is most accurately categorized as a request for reevaluation.

10. Following the reevaluation request, Respondent attempted to work with Petitioner to discuss the matter. Petitioner's parent, however, declined to meet further on the topic and opted to proceed with the present case.

11. Petitioner's annual IEP meeting was held on December 1, [REDACTED]. As reflected on the IEP that was developed at the meeting, all of the following issues were discussed and are an accurate reflection of Petitioner's current functioning:

- a. [Petitioner] did not exhibit behaviors that impede his learning or that of others;
- b. [Petitioner] is not blind or visually impaired;
- c. [Petitioner] is not deaf or hard-of-hearing;
- d. [Petitioner] does have communication needs that are addressed on the IEP;
- e. [Petitioner] does not require assistive technology;
- f. [Petitioner] does not require instruction or the provision of information in the areas of self-determination and/or self-advocacy;
- g. [Petitioner] is a hard worker who is kind and respectful to adults as well as his peers;
- h. in the curriculum and learning domain, [Petitioner] is performing on or above grade level in both Math and English/Language Arts;
- i. in the social or emotional domain, [Petitioner] has lots of friends in his class; is usually happy and is able to work independently in class; is always willing to help other students; and is playful with peers and is able to initiate/reciprocate conversation with them;
- j. in the independent functioning domain, [Petitioner] is independent with all tasks in the classroom and is able to follow classroom procedures and rules, navigate the school campus, open and use school/lunch items, participate in classroom activities appropriately, and to ask for help at times when needed/advocate for himself in the classroom;

- k. in the healthcare domain, [Petitioner] is healthy and requires no assistance beyond that which is normally available to all students; and
- l. in the communication domain, [Petitioner] has made progress towards his language goal and is recommended to continue receiving weekly language therapy services to help improve overall language skills.

12. In terms of ESE services, Petitioner's IEP reflects the following:

- a. [Petitioner]'s priority education needs are to increase his social/emotional skills and improve communication skills;
- b. a communication goal that will increase his understanding of wh- questions and vocabulary while using complete sentences, given fading verbal cues and/or prompts with 80% accuracy over a nine-week period by (1) using age-appropriate grammatical markers; (2) describing a given object/picture; (3) sorting familiar objects and/or pictures of items; and (4) answering whquestions related to short stories and/or language-based activities;
- c. a social/emotional and communication goal that will increase his production of basic sentences with correct vocabulary to express his thoughts and feelings to peers and adults in 8 out of 10 opportunities with 80% accuracy over the duration of the IEP by (1) creating conversation with same age peers; (2) participating in classroom discussions with no more than 2 prompts; (3) producing 5-8 word sentences for a variety of purposes; and (4) expressing his needs/wants given fading cues;
- d. specially designed instruction in the areas of language therapy services for 120 minutes monthly on the school campus, communication skills daily on the school campus, and social skills daily on the school campus;
- e. classroom accommodations of verbal encouragement and testing accommodations of increased wait time and extended time; and
- f. behavioral supports in the form of a behavior management system.

## CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 1003.57(1)(a) and 1003.5715(5), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

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

15. Respondent is a local educational agency (“LEA”), as defined under 20 U.S.C. § 1401(19)(A). By virtue of receipt of federal funding, Respondent is required to comply with certain provisions of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1401, *et seq.* As an LEA, under the IDEA, Respondent was required to make FAPE available to Petitioner. *Sch. Bd. of Lee Cnty. v. E.S.*, 561 F. Supp. 2d 1282, 1291 (M.D. Fla. 2008) (citing *M.M. v. Sch. Bd. of Miami-Dade Cnty.*, 437 F.3d 1085, 1095 (11th Cir. 2006)); *M.H. v. Nassau Cnty. Sch. Bd.*, 918 So. 2d 316, 318 (Fla. 1st DCA 2005).

16. Petitioner’s eligibility category of Developmentally Delayed was removed by operation of law when he turned six, pursuant to section 1003.21(1)(e), Florida Statutes.

17. In enacting the 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); *See Phillip C. v. Jefferson Cnty. 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); *See also Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

18. Local school systems must also satisfy the IDEA’s substantive requirements by providing all eligible students with FAPE, which is defined as:

Special education and related 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).

19. 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.

20. “The IEP is the centerpiece of the statute’s education delivery system for disabled children.” *Endrew F.*, 137 S. Ct. at 994 (quoting *Honig v. Doe*, 484 U.S. 305, 311 (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 the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982)).

21. 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. Petitioner's parent alleges a procedural violation with respect to Respondent's failure to reevaluate Petitioner. The undersigned finds that Petitioner did not prove that any procedural violation occurred, as Respondent attempted to follow the proper protocols to work with the parent with respect to the request for reevaluation.

22. Turning 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.*

23. The undersigned, based on a full review of the record, finds no defect with the design of the IEP and that the IEP afforded Petitioner a FAPE. Deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. *Id.* at 1001. In the present case, Petitioner's classroom teacher who testified did so reasonably and credibly as to how Petitioner is excelling academically and even stands out as especially capable among his peers. Further, Petitioner's standardized assessments show that he is performing at or above grade level in all areas tested.

24. Turning to the issue of implementation, in *L.J. v. School Board of Broward County*, 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit Court



of Appeals articulated 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.

25. Here, the record does not reflect a material failure to implement Petitioner’s IEP.

26. A student’s IEP is based, in significant part, on the results of statutorily mandated evaluations of the child. *See, e.g.*, 20 U.S.C. § 1414(b)(2)(A)(ii), (c)(1)–(2), (d)(3)(A), (d)(4)(A). Under the IDEA, a student with a suspected disability must receive a “full and individual initial evaluation” to determine the existence and extent of his disability and whether he is entitled to special education and related services under the IDEA. 20 U.S.C. § 1414(a)(1). The student is further entitled to a “reevaluation” at least once every three years for the purpose of updating his IEP. 20 U.S.C. § 1414(a)(2), (d)(4)(a).

27. The IDEA requires that a student’s initial evaluation and reevaluations be comprehensive, meaning the evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information,” 20 U.S.C. § 1414(b)(2)(A), and the school must assess the student in “all areas of suspected disability,” 20 U.S.C. § 1414(b)(3)(B). The student’s IEP team takes the results of these evaluations

and regularly collaborates to develop, maintain, and update the child's IEP over the course of his education. *See* 20 U.S.C. § 1414(d)(4)(A).

28. At issue here is not the initial evaluation, but rather, reevaluation. Reevaluation requirements are set forth in Florida Administrative Code Rule 6A-6.0331(7), which provides, in pertinent part, as follows:

(7) Reevaluation Requirements.

(a) A school district must ensure that a reevaluation of each student with a disability is conducted in accordance with rules 6A-6.03011-.0361, F.A.C., if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reevaluation or if the student's parent or teacher requests a reevaluation.

(b) A reevaluation may occur not more than once a year, unless the parent and the school district agree otherwise and must occur at least once every three (3) years, unless the parent and the school district agree that a reevaluation is unnecessary.

(c) Each school district must obtain informed parental consent prior to conducting any reevaluation of a student with a disability.

29. "Consent" for purposes of a reevaluation means:

(a) the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;

(b) the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c)(1) the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

34 C.F.R. § 300.9.

30. Throughout the hearing, it was apparent that Petitioner was conflating the request for reevaluation with “consent” as defined above. Although it is clear that the request for reevaluation was made, Petitioner did not show that consent, as defined by law, was ever provided, making it impossible for Respondent to move forward with reevaluation procedures. In other words, Respondent never had the opportunity to meet with the parent to provide the required information as to how a potential reevaluation would be conducted so that legally sufficient consent could be provided.

31. Here, Petitioner contends that Respondent failed to appropriately evaluate him. However, the undersigned concludes that Petitioner failed to meet his burden of proof in establishing the same. Although Petitioner requested to be reevaluated, the evidence in this case established that the parent never provided consent for the reevaluation.

#### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that that all requests for relief are DENIED.

DONE AND ORDERED this 30th day of March, 2023, in Tallahassee, Leon County, Florida.



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BRITTANY O. FINKBEINER  
Administrative Law Judge  
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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).