

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

vs.

Case No. 22-3355EDM

SEMINOLE COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

A due process hearing was held on December 1 and 2, 2022, by Zoom conference before Todd P. Resavage, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative
MyChildWins.Com, LLC
1264 Upsala Road
Sanford, Florida 32771

For Respondent: Stephanie K. Stewart, Esquire
Seminole County School Board
400 East Lake Mary Boulevard
Sanford, Florida 32773

STATEMENT OF THE ISSUES

Whether Respondent, Seminole County School Board, violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, in failing to conduct a manifestation determination after the student was subject to discipline that included in-school-suspensions (ISS) and out-of-school suspensions (OSS); whether Respondent violated the IDEA in failing to provide support facilitation, language therapy, and accommodations; and

whether Respondent violated Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, by engaging in unlawful discrimination and retaliation.

PRELIMINARY STATEMENT

Respondent received Petitioner's Request for Due Process Hearing (Complaint) on November 1, 2022. Respondent forwarded the Complaint to DOAH on the same day, and the matter was assigned to the undersigned.

A telephonic motion and scheduling hearing was conducted on November 3, 2022, whereby Petitioner's Motion for Expedited Discovery was granted, in part, and the matter was scheduled for an expedited due process hearing on December 1 and 2, 2022.

The hearing proceeded, as scheduled, on December 1 and 2, 2022. Upon the conclusion of the hearing, the parties agreed to the submission of proposed final orders on or before 15 days from the filing of the hearing transcript and to the issuance of the undersigned's final order on or before 30 days from the filing of the hearing transcript.

The hearing Transcript was filed on January 18, 2023. The identity of the witnesses and exhibits and rulings regarding each are as set forth in the Transcript. On January 24, 2023, Petitioner filed an unopposed motion to extend the timeline for proposed final orders. Said motion was granted, and the deadline for the parties to submit proposed final orders was extended to February 5, 2023, and the undersigned's final order to February 21, 2023. Both parties timely filed proposed final orders, which have been considered in the preparation of this Final Order. Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations.

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

FINDINGS OF FACT

Pursuant to the parties' Joint Pre-Hearing Stipulation, the parties stipulated to the findings of fact set forth in paragraphs 1 through 9.

1. Petitioner began attending School A at the beginning of the [REDACTED] school year and has continuously been enrolled at School A.

2. At all times material, Petitioner was deemed eligible for exceptional student education (ESE) pursuant to the primary exceptionality of emotional or behavioral disability and the related service of language therapy.

3. On November 10, [REDACTED], Respondent convened a meeting of Petitioner's individualized education program (IEP) team and created an IEP for Petitioner. The November 10, [REDACTED], IEP was in effect on the date Petitioner's Complaint was filed.

4. On August 23, [REDACTED], Respondent issued a discipline referral finding that Petitioner had violated the Code of Student Conduct by making a "Threat/Intimidation." On the face of the referral, the conduct was described as "[Petitioner] informed a student face to face and through text message that [he] was strapped with a gun. [He] stated that [he] had a gun."

5. For the August 23, [REDACTED], violation, Respondent issued six days of OSS which were served on August 24 through 26, [REDACTED], and August 29 through 31, [REDACTED]. It also issued four days of ISS that were served on September 1 and 2, [REDACTED], and September 6 and 7, [REDACTED].

6. On September 27, [REDACTED], Respondent issued a discipline referral finding that on September 25, [REDACTED], Respondent had violated the Code of Student Conduct by making a "Threat/Intimidation." On the face of the referral, the conduct was described as: "[Petitioner] continues to threaten a student

through text messages. [His] threats concern the death of killing the student.”

7. For the September 25, 2022, violation, Respondent issued six days of ISS which were served on October 4, 6, 10, 11, 13, and 14, 2022.

8. The August 23, 2022, and September 25, 2022, violations were not drug, weapon, or serious bodily injury offenses.

9. The speech language pathologist (SLP) service logs indicate that Petitioner did not receive six sessions of language therapy (30 minutes each) last school year due to the therapist being absent from school. On October 10, 2022, the parties agreed that Respondent will make up the time missed for language therapy through the duration of the 2022-2023 school year.

10. Petitioner is currently [REDACTED] years old and is in [REDACTED] grade at School A, a public high school in Respondent’s school district.

11. Petitioner’s IEP, dated November 10, 2021, documented his present level of academic achievement and functional performance in the domains of communication and transition/instruction. The IEP documented multiple annual goals and short-term objectives or benchmarks related to these domains.

12. The IEP further set forth the specially designed instruction Petitioner was to receive. Specifically, Petitioner was to receive support facilitation for reading comprehension for 60 minutes per week (MPW); support facilitation for math computation for 60 MPW; consultation for behavior management and organizational skills once per quarter; and support facilitation for reading comprehension/scientific vocabulary for 60 MPW. The support facilitation was to be provided in the general education classroom.

13. Additionally, the IEP documented that Petitioner was to receive direction instruction for organizational skills and behavior management for 240 MPW in the ESE classroom; and language therapy for 30 MPW in either the ESE classroom or therapy room.

14. August 29, [REDACTED], [REDACTED], Ed.D, School A's student support services facilitator, whose duties include maintaining School A's compliance with ESE services, emailed Petitioner's ESE support facilitators, [REDACTED] and [REDACTED]; Petitioner's SLP, [REDACTED]; and School A's assistant principal, [REDACTED]. The content of the correspondence is as follows:

Hey Team! [Petitioner] will be returning to campus on 9/1 and has 4 days of ISS (returning back to a normal schedule on 9/8). Please make sure you stop in the ISS room or pull [him] out in order to provide [Petitioner] with [his] IEP services.

15. Following his first OSS, Petitioner returned to School A on September 1, [REDACTED], and began his ISS. The ISS room is located in Building 5, in the courtyard of School A, around the general student population. The students participating in ISS include general education and ESE students.

16. [REDACTED] supervises the ISS classroom. [REDACTED] explained that the ISS classroom is typically capped at 13 students, all of whom have access to an individual computer. [REDACTED] testified as to the typical day-in-the-life of an ISS student as follows:

We start at 7:20. Students arrive, we take roll. After we take roll, I usually get the students' phones, and after that I ask who needs assignments, and we call all of the teachers. I usually advocate for the student to get up and call the teacher themselves and get their work. If they choose not to do that, I will do it. Sometimes they do have their work when they arrive in ISS. And we just usually start working from there.

* * *

They're provided all of the work that they need to have done each and every day. They're required to be with me, so they're not with the general population that day or the days they're there, but they do have access to their classrooms, their work, lunch, everything's the same.

17. ██████ credibly testified that during the time Petitioner was in the ISS classroom, on three to four days, both of Petitioner's classroom support facilitators came to the ISS room and spent time with Petitioner. ██████ further credibly testified that Petitioner's SLP requested that he leave the ISS room to attend his language therapy on one occasion.

18. ██████, Petitioner's SLP, credibly testified that, during the first ISS period, Petitioner was brought from ISS to ██████ therapy room to provide therapy as a related service; however, ██████ did not provide services during the second ISS period. ██████ credibly explained that he did not receive services during the second ISS period because of a teacher work day, a day Petitioner was unavailable, and a day ██████ was unavailable. ██████ credibly explained, however, that the missed therapy time can be made up throughout the balance of the year.

19. ██████ credibly testified that, while Petitioner was in the ISS classroom, he collaborated with Petitioner's teachers to make sure he had all of the academic resources needed to complete his assignments. ██████ explained that ██████ provided Petitioner support facilitation in English; provided his accommodations for the quarterly exams that were ongoing; and that Petitioner was able to participate in a mandatory Department of Education mental health training that was attended by all students.

20. ██████ credibly testified that, while Petitioner was in ISS, ██████ provided him with support facilitation in geometry and physical science. Neither ██████ nor ██████ provided support facilitation for every day that Petitioner was in ISS.

21. All of Petitioner's teachers credibly testified that, while in ISS, Petitioner's support facilitators would obtain the necessary assignments and lessons plans, and provide the same to Petitioner to complete. All teachers further credibly testified that they were available to be reached via phone, email, and, if absolutely necessary, in person, in the event Petitioner had any questions or concerns; required supplies; or needed clarifications. ██████

██████████, Petitioner's geometry teacher, testified that all of ██████ classroom materials, including videos of class instruction, are online and can be obtained by any student when not in the actual classroom.

22. Petitioner's debate teacher, ████████████████████, credibly testified that Petitioner was brought from the ISS classroom to the debate classroom to take the debate exam. ████████████████████, a counselor at School A, explained that Petitioner's ISS was scheduled in such a manner as to permit him to participate in the SAT/PSAT that was provided on October 12, 2022.

23. ████████████████████, who served as the substitute learning strategies teacher during the time of Petitioner's ISS, did not meet with Petitioner during his ISS time. ██████ testified, however, that the typical assignments in this class include weekly or bi-weekly grade checks and the completion of worksheets. ██████ explained that the student logs on to his electronic account (Skyward) to determine their current grades and determine if there are any outstanding assignments; and complete various worksheets on topics such as avoiding confrontation. ██████ testified that this type of work was provided to Petitioner while he was in ISS.

24. It is self-evident that while in the ISS classroom, Petitioner was not in his typical educational placement, and, therefore, not able to participate to the same extent as he would in his typical setting.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. *See* § 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u) and 6A-6.03312(7).

26. 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); Dep't of Educ., Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46724 (Aug. 14, 2006)(explaining that the parent bears the burden

of proof in a proceeding challenging a school district's manifestation determination).

27. In enacting the IDEA, Congress sought to “ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A); *Phillip C. v. Jefferson 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).

28. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. 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 a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(1), (b)(3), (b)(6).

29. School districts have certain limitations on their ability to remove disabled children from their educational placement following a behavioral transgression. The IDEA provides that where a school district intends to place a disabled child in an alternative educational setting for a period of

more than ten school days, it must first determine that the child's behavior was not a manifestation of his disability. 20 U.S.C. § 1415(k)(1)(C); Fla. Admin. Code R. 6A-6.03312(3).

30. The necessary inquiry is set forth in 20 U.S.C. § 1415(k)(1)(E), as follows:

Manifestation determination.

(i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

31. If the local educational agency, the parent, and relevant members of the IEP team determine that either subclause (I) or (II) of clause (i) is applicable, the conduct shall be determined a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E)(ii). If the conduct is deemed a manifestation of the child's disability, the student must be returned to the educational placement from which he or she was removed. 20 U.S.C. § 1415(k)(1)(F)(iii). Additionally, if no behavioral intervention plan (BIP) was in place at the time of the misconduct, the school district is obligated to “conduct a functional behavioral assessment, and implement a [BIP] for such child.” 20 U.S.C. § 1415(k)(1)(F)(i).

32. If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the school district may apply the relevant disciplinary procedures in the same manner and duration as would be applied to children without disabilities. 34 C.F.R. § 300.530(c). The child, however, must continue to receive education services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. Additionally, the child must receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(i), (ii).

33. Pursuant to rule 6A-6.03312(7), a student's parent may request an expedited due process hearing "if the parent disagrees with a manifestation determination or with any decision not made by an administrative law judge (ALJ) regarding a change of placement under this rule;....."

34. Petitioner contends that Respondent violated the IDEA in its failure to include the days Petitioner was in ISS in the determination of whether there was a disciplinary change of placement. That failure, Petitioner argues, led to the subsequent failure to conduct a manifestation determination, which, in turn, resulted in a denial of FAPE.

35. As a threshold matter, therefore, it must first be determined whether Petitioner has been subjected to a "change of placement because of disciplinary removal." Rule 6A-6.03312 provides that, "[s]chool personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the requirements and procedures in this rule, is appropriate for a student with a disability who violates a code of student conduct."

36. Pursuant to this rule, a "change of placement because of disciplinary removal" is defined as follows:

(1) Definitions applicable to discipline of students with disabilities. For purposes of this rule, the following definitions apply:

(a) Change of placement because of disciplinary removals. For the purpose of removing a student with a disability from the student's current educational placement as specified in the student's IEP under this rule, a change of placement occurs when:

1. The removal is for more than ten (10) *consecutive* school days, or

2. The student has been subjected to a *series of removals that constitutes a pattern* that is a change of placement because the removals cumulate to more than ten (10) school days in a school year, because the student's behavior is substantially similar to the student's behavior in *previous incidents* that resulted in the *series* of removals, and because of additional factors, such as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another. A school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement, and this determination is subject to review through due process and judicial proceedings.

Fla. Admin. Code R. 6A-6.03312(1) (emphasis added).

37. With respect to the first incident that occurred on August 23, 2022, Petitioner received six days of OSS and four days of ISS. Assuming, arguendo, that an ISS day may be included in the calculation, the discipline imposed regarding the first incident was not a change of placement because of disciplinary removal pursuant to rule 6A-6.03312(1)(a)1., as the removal was not for more than ten consecutive school days. Concerning the discipline imposed on account of the second incident that occurred on September 25, 2022, Petitioner received six days of ISS. Similarly, it was not a change

of placement because of disciplinary removal pursuant to rule 6A-6.03312(1)(a)1., since the removal was not for more than ten consecutive school days.

38. The discipline imposed also does not constitute a change of placement because of disciplinary removal pursuant to rule 6A-6.03312(1)(a)2., as the two incidents do not meet the plain meaning of “a series of removals that constitutes a pattern.” Two events do not constitute either a “series” or a “pattern,” as those terms are commonly construed. Accordingly, because the discipline administered to Petitioner does not rise to the level of a change of placement because of disciplinary removal, Respondent was not obligated to conduct a manifestation determination as set forth in 20 U.S.C. § 1415(k)(1)(E) and rule 6A-6.03312(3).

39. It must next be determined whether Respondent met its obligation to provide a FAPE to Petitioner during his OSS and ISS suspensions. As a starting point, a review of the terms “OSS” and “ISS” is a necessary exercise. While not defined in rules 6A-6.0311 through 6A-6.0361, section 1003.01(5), Florida Statutes, provides the following definitions:

(a) “Suspension,” also referred to as out-of-school suspension, means the temporary removal of a student from all classes of instruction on public school grounds and all other school-sponsored activities, except as authorized by the principal or the principal’s designee, for a period not to exceed 10 school days and remanding of the student to the custody of the student’s parent with specific homework assignments for the student to complete.

(b) “In-school-suspension” means the temporary removal of a student from the student’s regular school program and placement in an alternative program, such as that provided in s. 1003.53, under the supervision of district school board personnel for a period not to exceed 10 school days.

40. Pursuant to rule 6A-6.0328(1), a “FAPE shall be made available to students with disabilities, including students who have been suspended or expelled, ……” Rule 6A-6.03312(5), in turn, provides as follows:

Free appropriate public education for students with disabilities who are suspended or expelled or placed in an IAES.^[1]

(a) A school district is not required to provide services to a student with a disability during removals totaling ten (10) school days or less in that school year, if services are not provided to students without disabilities who are similarly removed.

(b) Students with disabilities who are suspended or expelled from school or placed in an IAES must continue to receive educational services, including homework assignments in accordance with Section 1003.01, F.S., so as to enable the student to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals in the student’s IEP and receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur.

(c) After a student with a disability has been removed from the current placement for ten (10) school days in the school year, if the current removal is not more than ten (10) consecutive school days and is not a change of placement under this rule, school personnel, in consultation with at least one of the student’s special education teacher(s), shall determine the extent to which services are needed so as to enable the student to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals in the student’s IEP.

¹ Interim alternative educational setting.

(d) If the removal is a change of placement under this rule, the student's IEP Team determines appropriate services under paragraph (b) of this subsection.

41. Here, based on the undisputed facts, Petitioner was temporarily removed from his current placement for a total of 16 days. Pursuant to rule 6A-6.03312(5)(a), Respondent was not required to provide Petitioner with services for the August 2022 incident, which resulted in six days of "suspension" and four days of ISS.

42. Regarding the September 2022 incident, Petitioner was not "suspended" as that term is defined in section 1003.01(5)(a), but rather, received an ISS as defined in section 1003.01(5)(b). Accordingly, rule 6A-6.03312(5)(b) is inapplicable because he was not suspended, expelled or placed in an IAES.

43. Rule 6A-6.03312(5)(c) is, however, applicable, as he was initially removed for ten school days, and then subsequently removed for not more than ten consecutive days, and the second removal does not constitute a disciplinary change of placement. Accordingly, School A personnel, in consultation with at least one of Petitioner's special education teacher(s), were required to determine the extent to which services were needed so as to enable Petitioner to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals in his IEP.

44. Based on the Findings of Fact above, the undersigned concludes that Respondent met its obligation to provide Petitioner with a FAPE. The evidence demonstrates that School A's student support services facilitator communicated with Petitioner's ESE support facilitators, SLP, as well as School A's assistant principal regarding Petitioner's IEP services to be provided during ISS. The evidence further supports the conclusion that Petitioner was provided the appropriate services and supports necessary to

allow him to participate in the general curriculum, albeit in the ISS room, and to progress towards meeting his IEP goals.

45. Petitioner further contends that Respondent knowingly and intentionally removed Petitioner from his placement without convening the mandatory manifestation meeting and in deliberate indifference to its duty to comply with the IDEA. Petitioner further contends that these actions or inactions constitute unlawful discrimination in violation of Section 504.

46. Section 504's statutory text, succinctly provides, in pertinent part, as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 7(20) 29 USCS § 705(20), 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

29 U.S.C. § 794(a).

47. In contrast to the IDEA, Section 504's text does not create a number of different procedures that a school district must follow to comply with the statute. The U.S. Department of Education, however, has promulgated regulations under Section 504 addressing, *inter alia*, identification, evaluation, and educational placement of disabled preschool, elementary, secondary, and adult education students. *See* 34 C.F.R. § 104.32-35.

48. Pursuant to Section 504's implementing regulations, participating school districts are required to establish procedural safeguards with respect to actions regarding the "identification, evaluation, or educational placement" of students with disabilities who "need or are believed to need special

instruction or related services.” 34 C.F.R. § 104.36. The procedural safeguards must include “notice, an opportunity for the parents or guardian of the [student] to examine relevant records, an impartial hearing with opportunity for participation by the [student’s] parents or guardian and representation by counsel, and a review procedure.” 34 C.F.R. § 104.36. An “impartial hearing” as contemplated in 34 C.F.R. § 104.36 may not be conducted by an employee of the subject school district or a school board member. *See, e.g., Leon Cnty. (FL) Sch. Dist.*, 50 IDELR 172 (OCR 2007).

49. In addition to the impartial hearing right with respect to identification, evaluation, or educational placement, an individual may file a complaint with the U.S. Department of Education Office for Civil Rights (OCR) alleging discrimination based on disability or retaliation. *See* 34 C.F.R. § 104.61; *OCR Case Processing Manual* (revised February 2015). Moreover, under 34 C.F.R. § 104.7, any school district that employs 15 or more persons must designate an individual responsible for coordinating its compliance efforts and to “adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part.” Thus, any person who believes he or she has been subjected to discrimination on the basis of disability may file a grievance with the school district under this procedure.

50. With respect to IDEA claims, sections 1003.571 and 1003.57 provide this tribunal with jurisdiction over the subject matter and the parties, and rule 6A-6.03311 sets forth how an IDEA due process hearing shall be conducted and the scope of the ALJ’s hearing decisions. By contrast, with respect to Section 504, Florida does not have a statute adopting or mandating compliance with Section 504. Concomitantly, the Florida Department of Education has not promulgated any rules addressing compliance with Section 504, how an impartial Section 504 hearing should be conducted, or the scope of the decision to be determined.

51. Pursuant to section 120.65(6), Florida Statutes, however, DOAH “is authorized to provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by [section 120].” Thus, if such a contract exists, DOAH may assign an ALJ to preside over an impartial hearing regarding Section 504 claims concerning the student’s “identification, evaluation, or educational placement.”

52. As a contracted ALJ (for purposes of Petitioner’s Section 504 claims), the impartial hearing regarding Petitioner’s Section 504 claims was conducted contemporaneously with the IDEA due process hearing and the procedures set forth in rule 6A-6.03311 were utilized.

53. Rule 6A-6.03311(9)(v)4. sets forth the scope of the ALJ’s hearing decision as follows:

An ALJ’s determination of whether a student received FAPE must be based on substantive grounds. In matters alleging a procedural violation, an ALJ may find that a student did not receive FAPE only if the procedural inadequacies impeded the student’s right to FAPE; significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or caused a deprivation of educational benefit. This shall not be construed to preclude an ALJ from ordering a school district to comply with the procedural safeguards set forth in Rules 6A-6.03011-.0361, F.A.C.

54. If a student with a disability qualifies for services under the IDEA, as Petitioner here does, Respondent can satisfy Section 504’s standard of FAPE by developing and implementing an appropriate IEP. *See* 34 C.F.R.

§ 104.33(b)(2). Petitioner’s Complaint alleges as follows:

The failures of convening a manifestation meeting constitute a failure to provide the STUDENT with procedural due process. The failure to provide Petitioner with procedural due process was done with the intent to discriminate against Petitioner because of his disability and to retaliate against Petitioner’s parents for their engagement in the

protected activities of advocating for their children based upon their disabilities.

55. While the undersigned's authority to determine Petitioner's "non-FAPE" claims is dubious, the exercise will be undertaken for the purposes of administrative exhaustion.

56. A parent has a private right of action to sue a school system for violation of Section 504. *Ms. H. v. Montgomery Cnty. Bd. of Educ.*, 784 F. Supp. 2d 1247, 1261 (M.D. Ala. 2011). 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 Cnty., 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 Cnty. Bd. of Educ., 120 F. Supp. 3d 1287, 1295 (M.D. Ala. 2015)(internal citations omitted).

57. 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 Cnty. 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).

58. Succinctly, Petitioner failed to present sufficient evidence to establish that he was subjected to discrimination or excluded from a program or denied benefits by reasons of his disability.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner failed to meet his burden of proof with respect to the claims asserted in Petitioner’s Complaint, and, therefore, Petitioner’s Complaint is denied in all aspects.

DONE AND ORDERED this 20th day of February, 2023, 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 20th day of February, 2023.

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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 PROCEDURE

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