

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

Case No. 23-2967E

vs.

PALM BEACH COUNTY SCHOOL BOARD,

Respondent.

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FINAL ORDER

This case came before Administrative Law Judge (ALJ) Sara Marken of the Division of Administrative Hearings (DOAH) for a final hearing held via Zoom conference over nine non-consecutive days beginning on November 13, 2023, and concluding on May 30, 2024.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
 Langer Law, P.A.
 15715 South Dixie Highway, Suite 205
 Palmetto Bay, Florida 33157

For Respondent: Laura E. Pincus, Esquire
 School Board of Palm Beach County, Florida
 3318 Forest Hill Boulevard, Suite C-331
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STATEMENT OF THE ISSUES

Whether the School Board denied the student a free and appropriate public education (FAPE) by failing to materially implement the student's Individualized Education Plan (IEP) during the 2022-2023 school year;

Whether the School Board denied the student a FAPE by failing to materially implement the student's IEP during extended school year (ESY);

Whether the student's parents were denied the ability to meaningfully participate in the development of the May 2023 IEP; and lastly,

Whether the School Board discriminated against the student based on his disability, in violation of section 504 of the Rehabilitation Act of 1973 (Section 504).¹

PRELIMINARY STATEMENT

The request for a due process hearing (Complaint) was filed with the School Board on August 9, 2023. The School Board filed the Complaint with DOAH on the following date and a Case Management Order was issued on the same date. A Notice of Hearing was issued on August 21, 2023, scheduling the Final Hearing for November 13 through 15, 2023.

¹ After both parties filed their Proposed Final Orders, Petitioner submitted an Objection and Motion to Strike on August 2, 2024. The School Board responded on August 5, 2024, and Petitioner filed a Reply on August 15, 2024. Petitioner contends that Respondent's Proposed Final Order improperly seeks to expand the scope of the due process hearing to include potential violations of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. The undersigned agrees with Petitioner and acknowledges that ADA claims fall outside the jurisdiction of this proceeding.

Conversely, since Petitioner raised Section 504 allegations in the Complaint, and both parties addressed these issues in their submissions and during the hearing, including questioning witnesses and introducing relevant evidence, the Final Order will address the Section 504 claims.

Petitioner's Complaint also raised the substantive allegation of whether the student was placed in the least restrictive environment; however, the argument was not raised in the Proposed Final Orders. The issue is thus treated as raised in the Complaint, but abandoned and dismissed without further analysis.

On November 13, 2023, before the start of the hearing, Petitioner filed an Emergency Motion for Sanctions and Motion for Default. As grounds, Petitioner stated that the School Board had notified Petitioner of an error in the documents disclosed in discovery and filed as proposed exhibits. An Order was entered on the same day denying the Motion for Default, ordering the School Board to amend the discovery responses to correct any errors made in previous disclosures, and reserving ruling on the Motion for Sanctions, allowing the School Board time to file a response. The School Board filed a Response on November 15, 2023, and on November 21, 2023, an Order was entered denying the Motion for Sanctions. The same day, Petitioner filed a Motion for Reconsideration and a Motion to Compel Better Answers to Discovery. The School Board filed a Response to the Motion for Reconsideration and a Response to the Motion to Compel Better Answers to Discovery, Petitioner filed a Reply, and a telephonic motion hearing was held on December 1, 2023. During the telephonic hearing, Petitioner withdrew the Motion to Compel Better Answers to Discovery. An Order was entered on December 4, 2023, denying Petitioner's Motion for Reconsideration.

On December 1, 2023, an Order was entered rescheduling the final hearing for January 16 through 19, 2024. On January 8, 2024, Petitioner filed a Notice to the Court and Request for a One-Day Continuance. As grounds, Petitioner cited an inadvertent scheduling error resulting in counsel's unavailability for a portion of the day on January 16, 2024. The School Board filed a Response to Petitioner's Notice to the Court and Request for a One-Day Continuance, objecting to the same, and a telephonic motion hearing was held on January 10, 2024. An Order was entered on January 11, 2024, denying the one-day continuance but notifying the parties that the hearing would conclude early on January 16, 2024, so Petitioner could attend

a previously scheduled matter. The undersigned fell ill before the start of the hearing. As a result, the final hearing was canceled and rescheduled for April 9 through 12, 2024.

On March 21, 2024, Petitioner filed a Request for Disqualification of Administrative Law Judge. The following day, the School Board filed a Response to Petitioner's Request for Disqualification of Administrative Law Judge. An Order Denying Motion to Recuse was filed on March 22, 2024.

The due process hearing was held via Zoom conference from April 9 through 11, 2024. On April 12, 2024, Petitioner's counsel became ill, and the hearing was postponed to April 15, 17, and 18, 2024. Additional time was needed to complete the hearing, so it was continued until May 28 through 30, 2024. At the conclusion of the due process hearing, the parties agreed to file proposed final orders 21 days after the School Board filed the Transcript and for the final order to be entered 42 days after the Transcript was filed. The Transcript of the due process hearing was filed on July 11, 2024. Proposed final orders were due by August 1, 2024, and the deadline for the Final Order was August 22, 2024. The parties both filed timely Proposed Final Orders, which the undersigned considered in drafting this Final Order.

The identity of witnesses and the exhibits entered into the record are memorialized in the hearing Transcript. Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use male pronouns in this Final Order when referring to Petitioner. The male pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT²

1. During the relevant period of this case, the student was ■ years old and an ■ grade student at School A, a school within the District.
2. The student is eligible for exceptional student education (ESE) under the categories of Autism Spectrum Disorder (ASD), Intellectual Disability (ID), and Language Impairment (LI).
3. The student is diagnosed with Angelman's Syndrome, epilepsy, and he is minimally verbal. The student primarily communicates with his augmentative and alternative communication (AAC) device, a high-tech speech-generating system with the Proloquo2Go software application. He also uses gestures, vocalizations, and nonverbal methods to communicate and interact with the world around him.
4. The student's receptive language skills are stronger than his expressive language skills. As a result, it can be challenging to measure the student's knowledge and academic progress through standardized testing measures, which can underestimate the potential of minimally verbal students.
5. As a result of his intellectual disability, he receives academic instruction using a modified curriculum. Florida's alternative academic achievement standards, or Access Points, are intended to expose students with significant cognitive disabilities to grade-level curricula with less complexity and delivered at the student's individual level. Students on Access Points need not master academic standards to receive passing grades in any one course.
6. At times, the student displays maladaptive behaviors such as physical aggression or self-harm.
7. The student is very sociable and eager to interact with others. The staff working with him during the relevant periods consistently expressed how joyful it was to work with him.

² The Findings of Fact do not contain reference to every witness who testified, but all testimony and all exhibits entered into the record were read or viewed.

████ IEP

8. The student enrolled at School A for the first time for the █████-████ school year. Previously, the student attended school in Broward County. He entered School A with an IEP drafted in Broward County in May █████ — the IEP in effect during most of the █████-████ school year.

9. The IEP contained extensive details on the student's present level of performance. The following are excerpts from the present levels of performance:

Adults working with [the student] model on the AAC device. Aided language input and descriptive teaching are used in working with [him]. Core words are modeled when working with [the student], [he] is encouraged to use the core words independently or with verbal, visual, and gestural prompts. [He] uses a small repertoire of core words independently with [his] AAC device. With max prompting, and pivot praise [he] is more successful in using core words.

Reading: ...[The student's] current reading level is AA or - A the equivalent of an emergent reader or a Pre-K grade level.

[The student] was able to identify upper-case letters with an average of 58% accuracy [he] has remained at 58% consistently over 2 quarters and lower-case letters with an average of 68% accuracy. [He] had a 6% increase for lower-case letters. Last review in March █████.

Math....[the student] is also continuing to develop [his] early math readiness skills. When requested [he] is able to put up two fingers but had difficulty correctly displaying one and three fingers. [His] lack of mastery of number recognition generally impacts [his] ability to count. [He] also does not display one-to-one correspondence when counting. With [his]

device, [he] had difficulty counting by rote from 1-10 or identifying what number comes next or is missing in a sequence of single-digit numbers. – [he] requires visual, verbal, and gestural prompts to count using [his] AAC device.

During classroom instruction, [he] benefits from a work environment where routines and expectations are clearly established. [He] uses a visual schedule, first/then chart, wait time, and verbal praise/pivot praise (when attention and praise is given to another that is engaging in the on-task behavior) to stay engaged and complete various assignments and tasks. When [he] works in a group setting a best practice during the proximity control is to watch [the student] for safe hands. At times in group activities [he] will engage in physical aggression defined as kicking, hitting, pinching or self-injury behaviors banging, stomping, hitting [his] head with [his] hand. When these behaviors are observed, move others in the group back for safety. When working on a nonpreferred task, [he] may attempt to avoid the assignment or task defined by refusing to respond, putting [his] head down, and slamming/banging [his] AAC device or table.

Communication...[the student] is very motivated by people and very friendly and social. [He] is [an] experiential learner. [He] benefits from meaningful and hands on activities. When provided with a communication rich learning environments [he] does best. [He] benefits from rich communication learning situations. Collaboration with teachers, staff, providers, and parents is beneficial for [his] continued growth in [his] language development.

[The student] requires minimal-maximal verbal, visual, and gestural cues to use [his] SGD to communicate, depending on [his] level of compliance, familiarity, and motivation during the activity. [He] benefits from Aided language stimulation throughout the day from teachers, aides, and staff in the classroom and throughout the school campus to support [his] expressive communication in a natural environment across

settings. Descriptive teaching strategies is beneficial to promote the use of [his] device across variety of settings..

Per session data and observation [he] uses the following core words independently, consistently, and appropriately; all done, go, look. [He] is able to use a wider variety of core words provided with maximal gestural cues. When presented with 4 target core words per week, [He] has demonstrated the ability to inconsistently locate the core words on his device. [He] has demonstrated improved familiarity with the use of the following core words: I, you, different, he, she, who, here, go, want, more, not, everyone. [He] requires gestural and verbal cues to use most target core words in an appropriate context.

10. The present levels of performance were determined using both teacher observations and formal assessments conducted by the speech-language pathologist, school psychologist, occupational therapist, and physical therapist.

11. The IEP provides the following special education services: direct language therapy in an ESE class five times per week for a total of 150 minutes; intensive instruction in academics, behavior, independent functioning, and communication in ESE class for a total of 1,110 minutes per week; collaboration in electives once a week; and collaboration in language once a week.

12. The [REDACTED] IEP included 16 annual goals, with 11 of them involving the use of the student's AAC device for implementation.³ The IEP also contained 36 accommodations, notably the accommodations included:

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	Implementer	Evaluation
1	ESE Teacher	Procedures Graded work

	story (beginning, middle, end) using [his] preferred mode of communication (AAC device, vocalizations, gestures, and pointing), given verbal, visual, and gestural prompts at or with 80% accuracy in 4 out of 5 trials.		samples, Informal Assessment
2	[**]will be able to match the number to touchpoints and/or manipulatives with verbal, visual, and gestural prompts, given numbers 1-30, presented using aided AAC modeling at or with 80% accuracy in 4 out of 5 trials.	ESE Teacher	Graded work samples, Informal Assessment
3	[**]will identify the corresponding letter from the field of 3 using multimodal answering of choice either by utilizing an AAC device or by pointing to the requested letter, given presenting of multisensory lessons and activities, presenting the upper case letters, when auditorily presented each letter name, sound, and words beginning with each letter, at or with an average of 80% accuracy in 4 out of 5 consecutive opportunities.	ESE Teacher	Graded work samples, Informal Assessments, Documented Teacher Observation, Other: work samples
4	[**]will improve [his] fine motor coordination and visual motor integration skills evidenced by[his] ability to type his name, [*], given a visual model, verbal and gestural prompting at or with 80% accuracy in 4 out of 5 trials.	ESE Teacher, Occupational Therapist/COT A	Graded work samples, Informal Assessment, Documented Therapist Observation
5	[**]will participate in a simple conversation by asking at least one relevant partner-focused question (ex. What you do? Where go?) and answering 1 question asked by [his] partner (ex. I go store, movie) using [his] communication device, given a structured social situation with a peer/adult and no more than 1 verbal and 1 visual prompt per question/response at or with in 4 out of 5 trials.	Speech Language Pathologist, ESE Teacher, Other: communication partner	Informal Assessment, Documented Teacher Observation, Clinician Tallies, Documented Therapist Observation
6	[**] will independently combine graphic symbols* to produce at least 10 different semantic syntactic relations (in the form of 2-3 word meaningful utterances) given graphic symbols on an (Speech Generating Device) SGD at or with within a single day by April 2023 Examples of produced semantic-syntactic relations might include attribute-entity, entity-locative, agent-action-object. Graphic symbols to include symbol	Speech Language Pathologist	Informal Assessment, Clinician Tallies, Documented Therapist Observation

	(e.g., SymbolStix) + Traditional Orthography representation.		
7	<p> [**] will describe a lesson based academic vocabulary word using at least two words on [his] AAC device given at least 4 new words per week , descriptive teaching methods, the least level of prompting (visual, gestural, verbal), and aided language stimulation throughout the activity at or with 80% accuracy in 4 out of 5 opportunities. </p>	ESE Teacher	Informal Assessment, Documented Teacher Observation
8	<p> [**] will use [his] AAC device to label more, less or equal/same quantities of items given manipulatives introduced through a math lesson, aided language stimulation, at or with 80% accuracy in 4 out of 5 opportunities. </p>	ESE Teacher, Other: communication partner	Graded work samples, Documented Teacher Observation, Other: work samples
9	<p> [**] will use the "dollar up" method with sums no greater than \$5.00, to determine if [he] has enough money to make a purchase given manipulatives, visual, gestural, and verbal prompts, aided language stimulation at or with 80% accuracy in 4 out of 5 opportunities, over 9 consecutive weeks </p>	ESE Teacher	Graded work samples, Informal Assessment, Documented Teacher Observation
10	<p> [**] will communicate what [he] needs using [his] AAC device in lieu of using physical aggression, SIB, and noncompliant behaviors (including: PICA, or eloping (leaving [his] designated area) from the assigned area given instruction, modeling, practice, and prompting (least to most), at or with in 8/10 opportunities. </p>	ESE Teacher, Occupational Therapist/COT A, Other, Speech Language Pathologist Other: communication partner	Documented Teacher Observation, Other: para observation and/or frequency data
11	<p> [**] will demonstrate increased executive functioning, visual perceptual, fine motor coordination skills evidenced by completing sorting and matching activities with tangible items by at least 3 properties, including size, shape, and color given a field of 3 and visual supports at or with 80% accuracy in 4 out of 5 opportunities. </p>	Occupational Therapist/COT A, ESE Teacher, General Education Teacher	Informal Assessment, Documented Teacher Observation, Clinician Tallies, Documented Therapist Observation
12	<p> [**] will select the volume level on [his] AAC device to match the environment given pre-taught strategies (identifying the volume levels on the device and description of the environment he is entering) and aided language stimulation at or with 80% accuracy in 4 out of 5 opportunities. </p>	ESE Teacher, Other: communication partner	Documented Teacher Observation, Other: para observation
13	<p> [**] will respond contingently to in an informal interaction initiated by a communication </p>	ESE Teacher	Informal Assessment,

Adult assistant assigned throughout the school day who is trained and is provided ongoing training in speech-generating device implementation and aided modeling strategies for implementing the BIP and safety.

[The student's] communication partners will utilize research-based strategies to support expressive communication (i.e. Aided AAC modeling, descriptive teachers, utterance expansion).

[He] requires a trained, designated communication partner.

SLP will model research-based AAC strategies across various settings.

Daily reporting/collaboration with parent.

	partner (eg. peer, adult) (mode of communication AAC device, gestures, and vocalizations). given verbal, visual, and gestural prompts at or within 4 out of 5 trials.		Documented Teacher Observation
14	<p>14 [**] will identify what each symbol represents when verbally provided its function using [his] preferred mode of communication (AAC device or pointing), given real-life picture cards of safety signs and symbols within the community, visual, gestural and verbal prompting with aided language stimulation provided throughout the activity at or with 80% accuracy, in 4 out of 5 consecutive opportunities.</p>	ESE Teacher	Informal Assessment
15	<p>15 [**] will navigate around obstacles and or people without physical guidance given a crowded hallway or area with verbal cues and supervision and [a] pre-determined time limit at or within 4/5 opportunities.</p>	ESE Teacher, ESE Specialist, Physical Therapist/PTA	Informal Assessment, Documented Therapist Observation
16	<p>16 [**] will ascend and descend three flights of stairs with a crowd given a handrail, adult supervision, and typical transition time at or with 4 out of 5 opportunities.</p>	Physical Therapist/PTA, ESE Teacher, Other: adult assistant	Informal Assessment, Documented Teacher Observation, Documented Therapist Observation

13. Improving the student's communication skills is consistently emphasized as **the top educational priority** in the IEP.

Beginning of the [REDACTED]-[REDACTED] school year

14. School began on August 10, [REDACTED]. The student was assigned to a self-contained ESE unit with eight students, the classroom teacher, four paraprofessionals, and a Registered Behavior Tech (RBT). [REDACTED] taught Math, English/Language Arts, U.S. History, and Unique Skills. [REDACTED] taught Science, and [REDACTED] taught personal fitness. The student also had a general education elective, weight training, taught by [REDACTED]. Throughout the school day, he attended all his classes with his assigned one-to-one paraprofessional, [REDACTED].

15. [REDACTED] taught the student most of the school day. She also served as his IEP case manager. Her responsibilities included gathering data and information from other teachers and service providers to track the student's progress toward his goals. [REDACTED] has over 22 years of experience teaching ESE students with intellectual disabilities, limited language skills, and behavior challenges. Her classroom was organized, highly structured, and functioned with impressive efficiency.

16. Along with his teachers, the student had multiple service providers, including his speech-language pathologist, [REDACTED]; the assistive technology specialist, [REDACTED]; and [REDACTED], a board-certified behavioral analyst with the District's behavior team. [REDACTED] has multiple years of experience working with students who communicate using an AAC device, as well as experience with the Proloquo2Go application. [REDACTED] has over two decades of experience as an assistive technology specialist. Together, [REDACTED] and [REDACTED] provide training to staff supporting the students throughout the year.

Staff training

17. Service providers and teachers at School A learned that the student would attend school the week before the beginning of school. The parents met the staff working with the student and toured the classroom.

18. School began on August 10, [REDACTED], and [REDACTED] held the first training session with [REDACTED] on August 12, [REDACTED]. The [REDACTED]-[REDACTED] school year was [REDACTED] first time with a student using an AAC device. [REDACTED] continued to receive training from [REDACTED] and [REDACTED] throughout the school year.

19. [REDACTED] has been training the staff at School A for the past 20 years. Most of the teachers were well-informed on using AAC devices and the Proloquo2Go application, as they had experience with other students. [REDACTED] and another assistive technology specialist provided ongoing training throughout the year. [REDACTED] visited his classroom at least once a week. During [REDACTED] visits, [REDACTED] consistently looked for ways staff could enhance communication, such as encouraging more student interaction and providing improved modeling. [REDACTED] also scheduled formal training sessions. [REDACTED] did not attend the training.

20. [REDACTED] led a training session focusing on Autism and Angelman's Syndrome. While some staff members participated in person, others chose to review the video recording of the session.

21. [REDACTED] also provided training to the staff. According to [REDACTED] testimony, [REDACTED] needed minimal training on the device and the application. The training mainly focused on the student's personalized vocabulary sets.

Daily communication notes

22. Throughout the school year, the school sent home a daily progress report. The template and the contents of the note were constant sources of disagreement between the parents and school staff. As a result, the note was revised multiple times. The final version of the daily note, in November [REDACTED],

contained four pages. It included sections for the vocabulary covered during each class, details about lunchtime, behavior information such as the cause and nature of the behavior (e.g., self-injurious or physical aggression), and the steps taken by staff to address the behavior.

23. The daily note includes a section for service providers to note the activities during their sessions and for parents to provide additional information and comments. The note also became a mechanism for the parents to ask questions about what was occurring at school. Along with the daily notes, the parents and school staff communicated constantly over emails and text messages.

24. Despite the abundant amount of communication back and forth, as the school year progressed, there was an increasing distrust among the parents and the school staff.

Communication partner

25. There was a discrepancy in the record on the [REDACTED] IEP's requirements for communication partner(s). Some witnesses defined a communication partner as any individual who communicates with the student. [REDACTED], however, defined an effective AAC communication partner as someone trained in the individual's AAC system and strategies, whether it's no-tech, low-tech, mid-tech, or high-tech. The individual should be proficient in using a similar device, know the location of cells on the speech-generating device, and consistently support the student's communication and comprehension throughout the day and across different settings. Their role extends beyond communication; they support the learning process and ensure effective communication at all times.⁴ The ambiguity extended to the [REDACTED] IEP, where

⁴ [REDACTED] is the Program Director at Els for Autism Foundation and is a licensed speech-language pathologist. She has worked with the student's family in providing the IEP team input including the [REDACTED] IEP.

there was disagreement among the team members over what the term entailed.⁵

26. Regardless of the disagreement over the term “communication partner,” it is evident from the testimonies and both IEPs that the student required the staff members working with him to receive training on the use of the AAC device and the strategies necessary to help him improve his communication skills. These strategies include aided language stimulation, descriptive teaching, modeling, and motor planning.

27. The record showed that staff members working with the student were trained on the use of the AAC device and the essential strategies, such as aided language stimulation, descriptive teaching, modeling, and motor planning. Some of the staff members had extensive experience working with students who used AAC devices. Those who did not, such as [REDACTED], received continuous training and understood their role in improving the student’s communication skills.⁶

28. The student’s use of his AAC device to communicate improved throughout the school year.

Goal implementation and data

29. [REDACTED] provided detailed examples of how [REDACTED] worked and noted progress on the students' goals. At the beginning of the year, [REDACTED] used more manipulatives to work on the student’s goals, but as the year progressed and the parents requested evidence of goal implementation, [REDACTED] began to use more worksheets. [REDACTED] designated specific days of the week for

⁵ “Parent is concerned that the IEP does not explicitly state that the student will be assigned a one-to-one trained and competent effective communication partner to be with [him] throughout the school day across all settings.”

⁶ “Well, my responsibility was to modify on a device, was to make sure [he] understood what [h]e was doing, ask [him] questions to try to get an understanding as to where [he] was going or where [he] knew how to find it. If [he] would get lost, my responsibility was to, like I said, to modify and show [him] on my device and then show [him] how to do it on [his] device. And then ask [him], can you show me, and then [he] would be able to show me how to find this and how to find that.”

collecting data and assessing progress on IEP goals for all [REDACTED] students. [REDACTED] used a combination of manipulatives and worksheets to evaluate progress.

30. [REDACTED] collected data on two of the IEP goals. Like [REDACTED], [REDACTED] didn't collect data at every session but had set dates for data collection once a week. [REDACTED] reports indicate the student made progress on his goals.

31. [REDACTED] testified credibly that [REDACTED] used descriptive teaching to work on the student's lesson-based vocabulary goal. [REDACTED] began implementation after receiving training and support from district staff.

32. The student made progress on most of the goals in his IEP. The student mastered his last goal, implemented by the physical therapist.

33. [REDACTED] collected behavior data throughout the school day. [REDACTED] regularly visited the classroom to check in, provide support, and address any questions, particularly those from the student's mother, regarding the implementation of the behavior plan and data collection (specifically, A-B-C data, which stands for antecedent, behavior, and consequence). [REDACTED] also assisted the classroom team in analyzing patterns in the student's behavior to determine whether there was a need to adjust the teaching methods. [REDACTED] worked closely with [REDACTED], who was receptive to feedback and collaborative in implementing and discussing strategies to support the student. Data summaries were provided during parent meetings to track the student's progress and ultimately to update his behavior plan.

34. As the year progressed, there was a major decrease in the student's self-injurious behaviors. While his other targeted behavior— noncompliance and physical aggression— remained the same.

35. Despite staff working on the student's goals and tracking progress, the data showing the work was not clearly and promptly communicated to the parents. The method of documenting data changed throughout the year, often because of the parents expressing concerns. Whether the lack of transparency

stemmed from miscommunication, mistrust, or a combination of both, the student's mother credibly testified that [REDACTED] did not receive most of the records until April [REDACTED] despite requesting data as early as October [REDACTED].

Access Points Curriculum

36. The evidence established that the student's teachers used district-approved curricula to expose the student to the access point standards. The curriculum was reduced in complexity to be delivered at the student's level.

[REDACTED] IEP

37. As a result, when it came time to draft the annual IEP, the parents disagreed with the student's present level of performance and chose to focus on drafting the new goals. The present levels of performance were not discussed during the IEP meetings.

38. [REDACTED] shared a draft of the IEP with the parents and their advocate, and the team exchanged multiple emails to discuss and draft the goals. The team also discussed the goals during the various IEP meetings. Ultimately, the team reached a consensus on the goals and reached a general agreement on the IEP.

ESY

39. The student attended ESY during the summer of [REDACTED]. A new team of individuals was assigned to work with the student. The team included [REDACTED], the student's speech-language pathologist, and [REDACTED], the assistive technology specialist. [REDACTED] continued to provide behavioral support.

40. [REDACTED] conducted training on Autism and Angelman's Syndrome. The ESY team also received training from [REDACTED] on using the AAC device and strategies to grow the student's communication skills. She conducted coaching sessions during the first weeks of ESY.

41. During the ESY, staff sent home a daily report summarizing the day's progress on the student's goals, any observed behaviors, and the student's use of his AAC device.

42. The [REDACTED] IEP identified seven goals for implementation during ESY. The ESY section of the IEP identified the service providers responsible for the goal in parenthesis. [REDACTED] testified that [REDACTED] worked on the communication goal that asked the student to “...demonstrate comprehension of who, what, and where questions by accurately responding with a person, thing, or place...” The District’s Goal Progress Report noted the progress made on all ESY goals.

Family Empowerment Scholarship

43. Ultimately, the family moved from the school district to an adjacent one. The parents wanted the student to remain at School A for his senior year. The student’s mother applied for the Family Empowerment Scholarship, which allows a student to attend a school in an adjacent school district if the school can implement the student’s IEP and if there is capacity for the student. Citing capacity issues, the District denied the parent's request to keep the student at School A.

CONCLUSIONS OF LAW

44. 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).

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

46. In enacting the Individuals with Disabilities Education Act (IDEA), Congress sought to “ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A); *Phillip C. v. Jefferson 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, contingent on each agency's compliance with the IDEA's procedural and substantive requirements. *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

47. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint with respect to any matter relating to the identification, evaluation, educational placement of their child, or the provision of FAPE. 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

48. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

[S]pecial education services that –

(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

49. 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 to be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017)(quoting *Honig v. Doe*, 108 S. Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Id.* (quoting *Bd. of Educ. v. Rowley*, 458 U.S. at 181).

50. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a student with FAPE. As an initial matter, it is necessary to examine whether the school district has complied with the IDEA's procedural requirements. *Rowley*, 458 U.S. at 206, 207. A procedural error does not automatically result in a denial of FAPE. *See G.C. v. Muscogee Cnty. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the student's right to FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007).

51. In this case, Petitioner's Complaint contained one alleged procedural violation: that the staff failed to timely provide the parents with records supporting the implementation of the IEP goals. The more persuasive and credible evidence established that requests for data began as early as October [REDACTED] and continued for the rest of the school year. Although work samples were sent home and some data was periodically shared, most documents were not produced until April [REDACTED].

52. Although there was a procedural flaw, it did not prevent the parents from participating in the decision-making process or result in an actual loss of educational benefits. The evidence shows that the parents were actively involved in creating the IEP goals, agreed with the [REDACTED] IEP, and are not, in

this instant case, challenging the contents of this IEP. Therefore, the procedural error does not constitute a denial of FAPE.

53. As to the implementation of the IEP, Petitioner alleges that the [REDACTED] IEP was not implemented because the School Board failed: 1) to train staff working with the student adequately; 2) failed to implement the goals as written; and 3) failed to provide adequate and appropriate grade level instruction on a modified curriculum during the [REDACTED]-[REDACTED] school year and the summer of [REDACTED].⁷

54. In *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit Court of Appeals confronted, for the first time, the standard for claimants to prevail in a “failure-to-implement case.” The court concluded that “a material deviation from the plan violates the [IDEA].” *L.J.*, 927 F.3d at 1206. The *L.J.* court expanded upon this conclusion as follows:

Confronting this issue for the first time ourselves, we concluded that to prevail in a failure-to-implement case, a plaintiff must demonstrate that the school has materially failed to implement a child’s IEP. And to do that, the plaintiff must prove more than a minor or technical gap between the plan and reality; de minimis shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child’s IEP.

Id. at 1211.

55. While declining to map out every detail of the implementation standard, the court provided a few principles to guide the analysis. *Id.* at 1214. To begin, the court stated that the focus in implementation cases should be on the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld. In other words, the task is to compare the services that are actually delivered to the services described in the IEP itself. In turn, “courts must

⁷ Petitioner’s Proposed Final Order pg. 5.

consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole.” *Id.*

56. Additionally, the *L.J.* court noted that the analysis must consider implementation as a whole:

We also note that courts should consider implementation as a whole in light of the IEP’s overall goals. That means that reviewing courts must consider the cumulative impact of multiple implementation failures when those failures, though minor in isolation, conspire to amount to something more. In an implementation case, the question is not whether the school has materially failed to implement an individual provision in isolation, but rather whether the school has materially failed to implement the IEP as a whole.

57. Guided by these principles, the record in this case shows that the School Board implemented the most significant provision of both IEPs--the daily, consistent, and proper use of the student’s AAC device--across all settings. Although there were shortfalls, the failures were not substantial. Staff assigned to work with the student had years of experience using AAC devices, and those staff members who lacked experience received continuous training throughout the year. His teachers and service providers implemented the goals, and the student showed progress. The student’s use of his AAC device increased throughout the school year, and ESY and his self-injurious behaviors decreased.

58. In sum, Petitioner failed to prove, by a preponderance of the evidence, that the School Board denied the student FAPE during the [REDACTED]-[REDACTED] school year.

59. Lastly, Petitioner claims that the School Board violated Section 504. Section 504 of the Rehabilitation Act of 1973 forbids organizations that receive federal funding, including public schools, from discriminating against people with disabilities. 29 U.S.C. § 794(b)(2)(B). In relevant part, Section

504 provides that no otherwise qualified individual with a disability shall, “solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” receiving Federal financial assistance. 29 U.S.C. § 794(a). A school board, as is alleged here, violates Section 504 by intentionally discriminating against a student on the basis of his or her disability. *T.W. v. Sch. Bd. of Seminole Cnty.*, 610 F.3d 588, 603-04 (11th Cir. 2010).

60. To establish a prima facie case under Section 504, Petitioner must prove that he: (1) had an actual or perceived disability; (2) qualified for participation in the subject program; (3) was discriminated against only because of his disability; and (4) the relevant program is receiving federal financial assistance. *Moore v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1313 (M.D. Ala. 2013)(citing *L.M.P. v. Sch. Bd. of Broward Cnty.*, 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007)); *see also J.P.M. v. Palm Beach Cnty. Sch. Bd.*, 916 F. Supp. 2d 1314, 1320 (S.D. Fla. 2013).

61. If Petitioner establishes a prima facie case, the School Board must present a legitimate, nondiscriminatory reason for the adverse actions it took. *Lewellyn v. Sarasota Cnty. Sch. Bd.*, 2009 WL 5214983, at *10 (M.D. Fla. Dec. 29, 2009)(citing *Wascura v. City of S. Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001)). The Eleventh Circuit has stated that the respondent’s burden, at this stage, is “exceedingly light and easily established.” *Id.* (quoting *Perryman v. Johnson Prods. Co. Inc.*, 698 F.2d 1138, 1142 (11th Cir. 1983)). Once the School Board has articulated a nondiscriminatory reason for the actions it took, Petitioner must show that the School Board’s stated reason was pretextual. “Specifically, to discharge their burden, Plaintiffs must show that Defendant possessed a discriminatory intent or that the Defendant’s espoused non-discriminatory reason is a mere pretext for discrimination.” *Id.*; *see also Daubert v. Lindsay Unified Sch. Dist.*, 760 F.3d 982, 985 (9th Cir. 2014).

62. The evidence demonstrated that the School Board's decision to deny the parent's application for the Family Empowerment Scholarship and remain at School A was based on the school's student capacity. *See* § 1002.394(7)(c)(4), Fla. Stat. ("The parent may choose, as an alternative, to enroll the student in and transport the student to a public school in an adjacent school district that has available space and has a program with the services agreed to in the student's IEP already in place..."). The School Board articulated a nondiscriminatory reason, but Petitioner failed to provide evidence that the stated reason was pretextual. Petitioner's claim of intentional discrimination is thus rejected.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner failed to satisfy his burden of proof with respect to the claims asserted in Petitioner's Complaint. All requests for relief are denied.

DONE AND ORDERED this 21st day of August, 2024, in Miami, Dade County, Florida.



SARA M. MARKEN
Administrative Law Judge
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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).