

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

Case No. 23-3093E

vs.

HILLSBOROUGH COUNTY SCHOOL BOARD,

Respondent.

_____ /

FINAL ORDER

A due process hearing was held on December 5 and 6, 2023; and March 4 through 8, 2024, before Administrative Law Judge Jessica E. Varn of the Division of Administrative Hearings (DOAH), via Zoom conference.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
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For Respondent: LaKisha M. Kinsey-Sallis, Esquire
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STATEMENT OF THE ISSUES

Whether the School Board of Hillsborough County (School Board) failed to implement the student's individualized education plans (IEPs) during the 2021-2022 and 2022-2023 school years;

Whether the School Board failed to design IEPs that would provide the student with a free and appropriate public education (FAPE) during the 2021-2022 and 2022-2023 school years;

Whether the School Board's actions violated the parents' right to meaningfully participate in educational decisions;

Whether the School Board discriminated on the basis of the student's disability, in violation of the Rehabilitation Act of 1973, Section 504¹; and lastly,

Whether, if Petitioner proved any of the alleged violations, Petitioner is entitled to any relief.

PRELIMINARY STATEMENT

The Petitioner's request for a due process hearing (Complaint) was filed on August 16, 2023. On August 25, 2023, the parties attended a resolution session. On that same day, the School Board filed a Response to Petitioner's Complaint. Five days later, the School Board filed a status report, indicating that the parties agreed to schedule subsequent IEP meetings to address the underlying issues. Following the September 14, 2023, IEP meeting, Petitioner filed a Request for a Final Hearing. A telephonic scheduling conference was held before the undersigned on September 22, 2023. By agreement of the parties, the case was set for a hearing from December 5 through 7, 2023.

The due process hearing began on December 5 and 6, 2023; but was suspended, by agreement of the parties, because of a sudden emergency.

¹ The Rehabilitation Act of 1973, 29 U.S.C. § 795, *et seq.* (Section 504).

On January 23, 2024, the parties submitted mutually agreeable dates for rescheduling the hearing. The hearing was then rescheduled for March 4 through 8, 2024.

At the due process hearing, Petitioner presented the testimony of [REDACTED], the parent's advocate during IEP meetings; [REDACTED], the parent's educational consultant and expert in exceptional student education (ESE) policies and procedures; [REDACTED], an ESE-specialized learning strategies facilitator at [REDACTED]; [REDACTED], an educational consultant, and expert in special education and reading development for children; and the student's mother.

The School Board presented the testimony of [REDACTED], an ESE-specialized coordinator at [REDACTED]; [REDACTED], ESE teacher, and former IEP case manager; [REDACTED], general education teacher; [REDACTED], a teacher at [REDACTED]; [REDACTED], Varying Exceptionalities (VE) teacher and case manager; and [REDACTED], ESE Supervisor.

The exhibits entered into the record are memorialized in the Transcript.

At the end of the due process hearing, the parties agreed to file proposed final orders 18 days after the Transcript was filed with DOAH. The parties also agreed that the final order deadline would be 36 days after the date the Transcript was filed. The Transcript of the due process hearing was filed on April 10, 2024. Proposed final orders were due by April 29, 2024; and the deadline for the Final Order was May 17, 2024.

On April 23, 2024, the School Board filed Respondent's Unopposed Motion for Extension of Time to Submit Proposed Orders, indicating that the parties

agreed to extend the deadline for proposed orders to May 17, 2024. The motion was granted, and the deadline for the Final Order was also extended to June 4, 2024.

On May 20, 2024, Petitioner filed a Joint Motion for Extension of Time to Submit Proposed Orders, indicating that the parties requested that the deadline be moved to May 24, 2024. The motion was granted, and the deadline for the Final Order was also extended to June 11, 2024.

Both parties timely filed proposed final orders, which were considered in preparing this Final Order. Unless otherwise indicated, all rules and statutory references are to the version in effect at the time of the alleged violations.

FINDINGS OF FACT²

The student's profile

1. The student is a [REDACTED]-year-old [REDACTED] who just completed [REDACTED] grade. He attended his three years of [REDACTED] school at [REDACTED], which serves children in grades [REDACTED] to [REDACTED] grade.

2. The relevant period for the purpose of this matter is the student's [REDACTED] and [REDACTED] grade school years, which encompassed the [REDACTED]-[REDACTED] and [REDACTED]-[REDACTED] school years.

3. Due to his medical diagnoses of dyslexia and dysgraphia, the student is eligible for ESE services under the category of Specific Learning Disability (SLD). While these two diagnoses can range in severity, this student, according to all the witnesses and the record evidence, is severely affected by both.

² The Findings of Fact do not incorporate references to every witness who testified, but all testimony was considered in preparing this Final Order.

4. Everyone describes the student as intelligent, eager to learn, hard-working, an attentive and highly skilled listener, and an active participant in class. Despite the reading, writing, and spelling challenges he has faced, the student has earned good grades in his classes so far, and he has fared well on standardized tests. This has been possible because of the accommodations of screen readers, others reading for him in classes where reading was not being assessed, audio books, speech to text assistive technology, and extended time to complete assignments and assessments. This case centers on his reading, writing, and spelling abilities; foundational skills that this student, although very capable, has yet to master.

5. The student's reading, writing, and spelling challenges are well documented, and all witnesses with personal knowledge, or those with expert knowledge, agreed. A summary of their collective voices follows.

6. By way of background, it's important to highlight that the student attended [REDACTED] grade virtually for the entire school year. The student's mother, who is also dyslexic, and worked extensively with the student on his schoolwork for all of [REDACTED] grade, has a unique and compelling perspective on his abilities. She recalled that by the end of [REDACTED] school, he scored 2.7 grade levels behind in fluency and had scored five years behind in spelling. She has observed that the student can read one-syllable words and two-syllable words, but he grapples with three or more syllable words.

7. The mother also observed [REDACTED] [REDACTED] taking four hours to complete one out of three poetry assignments because the nuances of poetry present multiple challenges. Towards the end of eighth grade, the mother recalled that the student was assigned a 308-page novel and 18 assignments related to the book. When the class was on page 259, [REDACTED] [REDACTED] was still stuck on page 59 because the teacher refused to provide an audio book accommodation. The student's father read the book to him so that he could complete assignments that kept piling up.

8. [REDACTED], an ESE Specialist for the School Board, tested the student in September [REDACTED]. On the fluency test, his average words correct per minute was 78, which is below the desired 146 or 150 words for a [REDACTED] through [REDACTED] grader. [REDACTED] agreed that the student has deficits in decoding and has low fluency, meaning that he needs an oral presentation accommodation, extended time, and audio books.

9. [REDACTED], an ESE Coordinator at the [REDACTED] school, found that the student has a weakness in spelling and reading, specifically in fluency. [REDACTED] recalled that the student was reading 86 words per minute while his peers were reading 143 words a minute.

10. [REDACTED], the student's intensive reading teacher in [REDACTED] school, primarily used two programs, called Brightfish and Language! Live, which focus on foundational skills to improve fluency, vocabulary, and comprehension. When the student earned a low score on a Language! Live lesson, [REDACTED] would do a quick five-minute one-on-one "reteach" about the topic with him, and then the student would score 80% or higher when redoing the skill. [REDACTED] did not document how many retakes the student needed to get at least a 70% in Language! Live and Brightfish. [REDACTED] did recall, though, that the student never reached [REDACTED] grade level on Brightfish nor Language! Live. In [REDACTED] and [REDACTED] grades, the students in [REDACTED] reading class were given a 40-book challenge. In [REDACTED] grade, the student used audio books 80% of the time. [REDACTED] estimated that in [REDACTED] grade, he gradually decreased to 60% or 50%, but because [REDACTED] never documented these details, [REDACTED] wasn't sure. [REDACTED] did recall that on a silent reading test for fluency, he first scored a 7%, then a 27%, both of which are far below his grade level. [REDACTED] also recalled that as to spelling tests, he also performed significantly lower than grade level.

11. [REDACTED], the student's ESE teacher in [REDACTED] school, also weighed in on the student's weaknesses, although [REDACTED] testimony on the student's reading level lacked detail. Instead, [REDACTED] spoke more generally on the progress the

student made while using a program ■■■ used with the student, called Rewards. ■■■ explained that the Rewards program consisted of five parts to help with reading, each with five lessons and check-ups after each part. It took the student a long time to get through these lessons, although the program was intended for a shorter time span and targeted elementary level skills, and never provided grade level work. ■■■ met with the student once a day for a school period, about 48 minutes, and ■■■ testified that ■■■ used the program weekly. ■■■ believed that the student needed help with prefixes and suffixes, vowel teams, and fluency.

12. ■■■, one of the student's high school teachers, believes that the student is a whole-word reader, as he struggles with phonics and sounding new words out. ■■■ explained that the student appears to be missing some of the derivational patterns or ending sounds, which are typically mastered by the end of third grade. With extended time accommodations, the student is able to complete college level work in ■■■ class, despite his reading deficiencies.

13. ■■■, the student's ■■■ school ESE teacher, conducted a fluency test at the start of ■■■ grade, to establish a baseline for the student's reading and writing skills. He struggled with word endings, such as "-ed" and "-ing," diphthongs, and punctuation. He read 90 words correctly per minute with ■■■ grade content, which is significantly lower than the 215 words a minute a ■■■ grader should score. ■■■ stated that his score shows that he is not reading the words well enough to fully understand the content as he needs to. To close this gap, ■■■ uses an ■■■ level curriculum with the student. ■■■ reported that he's making steady progress.

14. ■■■, an expert in ESE policy and procedure, testified to multiple objective measures that could consistently assess a deficit in a student's progress and fluency. That said, ■■■ found that this ■■■ school did not consistently administer the same type of assessment to determine the student's rate of progress, and never or rarely conducted independent

measurement probes. ■ pointed out that the student's fluency shows that he is reading grade level text at a rate of 86 words per minute, well below his peers.

15. ■, an expert in special education and reading, concluded that if the student had received the appropriate level of intensity and evidence-based practices in ■ school, he probably would not have the struggles he currently has. ■ sees nothing in the student's profile to show that he is not capable of learning accuracy along with fluency if provided with adequate instruction. ■ found that the student's severe dyslexia and dysgraphia cause him to struggle with fluency, writing, spelling, and with expressing thoughts and ideas proficiently. He struggles with the sound and symbol phonological aspect, which makes it more challenging for him to sound out the words rather than attempt to infer meaning from contextual clues. ■ believes that the student is memorizing as many words as he can, but ■ pointed out that there is a limit to the amount a child can memorize before their grades suffer.

16. As to his writing skills, ■ found his writing samples lacking in complexity and coherence when he wrote independently. He wrote at a pace of about 63 letters per minute, as compared to his peers, who write 100 letters per minute. ■ explained that his writing is slow and laborious because of his struggle with thinking of what to write and how to even write it. ■ stated that it would be impossible for the student, at this point, to go about his day-to-day life and read and write as adults do.

Creating the December ■ IEP

17. The relevant IEPs here were developed beginning in April ■, but not finalized until December ■, because of several unfortunate delays. The next IEP process began in January ■, continued through April ■, but it never resulted in a new IEP because of a protracted dispute over the student's present levels of performance. The delay in finalizing an IEP meant

that the student's only complete IEP spanned from the Spring term of [REDACTED] grade to the start of [REDACTED] school.

18. The IEP process was fraught with multiple delays, caused by both the parents and the school staff. The reasons for the delay cannot be attributed to one party, one individual, or even one distinct turning point.

19. The parents were understandably fierce advocates for their son, after seeing his struggles firsthand during a year of virtual [REDACTED] grade, and witnessing the hours upon hours of schoolwork their son did. The parents provided private evaluations, which were considered and included in the IEP. The parents brought an advocate and legal counsel at distinct points in time, and successfully had some staff members removed from the IEP team. Most of the paragraphs in the present levels of performance begin with the words: "Parents report" or "Parents cite." The mother authored lengthy emails to the school staff, including recommended goals for the IEP, detailed input that the parents wanted included in the IEP, and, of course, she often requested more IEP goal data. It was clear, during the mother's testimony, that she has deep knowledge of not just her son's deficiencies, but also in the varied programs and assessments used to measure reading skills. She insisted on being heard, and often begrudgingly, the school staff listened and incorporated her input.

20. The school staff had a revolving door of staff members added to the team, some causing delays because they wanted to catch up to speed, others causing more friction and increasing the hostility between the parents and the staff. The school-based team was often missing the most relevant teacher, Ms. Buntin, the teacher who exposed the student to grade level reading materials, and often limited the duration of the IEP meetings, causing more distress. To add to the mistrust the parents had developed, the school staff at one point asked for a facilitated IEP meeting, which would require a new introduction to new IEP members, who had never even met the student.

21. The real sticking point was IEP goal data, or progress monitoring. The parents and their advocate were adamant that without reliable data, no goals

could be drafted, and the school staff was adamant that they had given the parents all the data that existed, and there was sufficient data to proceed. Promises were made to the parents that better and more consistent data would be recorded, but none of it materialized in a satisfactory manner.

22. The evidence showed that the parents were meaningfully participating at every step in the IEP process, although the staff's failure to provide reliable and consistent IEP goal data was, understandably, frustrating.

The Design of the IEPs

23. For the Fall of the student's [REDACTED] grade year, the IEP in effect had been created in May [REDACTED], when the world was managing the COVID-19 pandemic. The student was wrapping up [REDACTED] school and about to enter [REDACTED] school. This IEP was in place from the start of [REDACTED] grade through the end of the student's fall semester of [REDACTED] grade.

24. The May [REDACTED] IEP had one priority educational need, which was to improve the student's language arts skills. The IEP had two goals in the curriculum and learning section of the IEP.

25. Goal one addressed reading and writing. The student was to read and comprehend grade level text and write a satisfactory essay as measured by a district or state rubric on 4 out of 5 assessments. There were seven objectives; three for reading and four for writing skills, targeting foundational skills. Monthly, progress monitoring would be done through teacher data collection, work samples, and formal testing.

26. Goal two addressed spelling. When presented with 50 unfamiliar polysyllabic sixth grade words, the student would accurately and independently spell them with 90% accuracy. There were four objectives to reach the goal, and monthly progress monitoring would be done through teacher and therapist data collection, and work samples.

27. A list of accommodations included: a screen reader; study guides; note-taking assistance; verbal encouragement; word processor or computer; individualized spelling lists; graphic organizers/outlines; strategies,

templates, checklists, and grammar rules; spelling and grammar checks; preferential seating; extended time; breaks; flexible presentation methods; reduced workload; no grading of spelling, grammar, and handwriting unless a part of scoring rubric; and oral presentation, verbal encouragement, transfer of multiple choice answers, extended time, breaks, and small group for testing.

28. The December [REDACTED] IEP identifies the student's priority educational need as improving his reading skills, specifically, his fluency, phonics, and vocabulary; improving his independent functioning skills; improving his spelling; and improving his written language. The IEP has five goals.

29. Goal number one combines both decoding and fluency. There are also six short term objectives, targeting foundational skills, which are intended to be benchmarks for ultimately reaching the overall goal. The goal requires specially designed instruction, and contains mastery criterion of reading a grade level text with 139 correct words per minute in four out of five opportunities every nine weeks. Progress was to be monitored through teacher data collection and formal and informal testing, monthly.

30. Goal number two combines a reading and writing goal. The goal requires specially designed instruction, and for the student to read and comprehend a grade level text without assistive technology or additional support and write an essay as measured by a rubric. There are eight short term objectives to reach the overall goal. Six relate to writing and two relate to reading, all targeting foundational skills. Data was to be collected weekly in the form of teacher data collection, work samples, informal testing, and at least three writing samples with assistive technology.

31. Goal number three targets spelling, and also requires specially designed instruction. It provides that the student should, when given 50 unfamiliar polysyllabic grade level words, spell them independently 90% of the time. There are six short term objectives to reach the goal. The goal was

to be measured weekly, using teacher data collection and work samples; including work samples collected to analyze the generalization of the skill.

32. Goal number four is a vocabulary goal. There are three short term objectives. The student was to receive specially designed instruction, guidance, and support. The student would demonstrate an understanding of grade level multi-syllabic vocabulary words in four out of five opportunities over nine weeks. The data was to be collected monthly, through teacher data, and formal and informal testing.

33. Lastly, goal number five focused on curriculum and learning, as well as independent functioning. With adult support and guidance, and prompting, the student would demonstrate coping and self-advocacy skills by using his accommodations in four out of five observations over nine weeks. There are also three short term objectives requiring the student to ask for his accommodations. Monthly, teacher data collection, anecdotal records, and reference sheets would track his progress.

34. As to accommodations in the [REDACTED] IEP, the list was long: digital text; study guides; note-taking assistance; word processor or computer; voice recognition software; individualized spelling lists; graphic organizers/outlines; strategies, templates, checklists, and grammar rules; spelling and grammar check; extended time; breaks; reduced workload; flexible presentation methods, such as posters, charts, videos, and oral presentation; no grading of spelling, grammar, and handwriting unless a part of scoring rubric or state assessment; transfer of multiple choice answers; and small group for testing.

35. Given the student's profile as detailed above, and his priority educational needs, the goals were drafted to meet a lofty goal—to reach grade level proficiency in reading, writing, vocabulary, and spelling—within a year. And while these goals would be difficult to master, they were tailored to the unique needs of this student, and were reasonably calculated to enable this student to make progress appropriate in light of his circumstances. The goals

properly targeted the foundational skills that the student has yet to master. All of the goals were also measurable, as drafted by the team, and the accommodations were tailored to meet his needs.

Implementation of the IEPs

36. When things went astray in providing FAPE to this student, though, was in implementing the IEPs. To begin with, each goal required specially designed instruction; a research-based method that is explicitly and systematically taught, specifically targeting his dyslexia and dysgraphia challenges. There is no persuasive evidence in the record that this student, during the entire relevant period, received this type of instruction. There is no persuasive evidence that in any class, or from any teacher, he received explicit and systematically taught material to address his IEP goals; specifically targeting his foundational skills.

37. The evidence did show that he received varied curriculum in [REDACTED] class, and in [REDACTED] class, and he was assessed using various instruments, which did address objectives in reading, and objectives in writing and spelling; but no evidence that the instruction was done in an explicit and systematic manner, with weekly or monthly data collection. In place of consistent monthly or weekly data collection required by the IEP, to assess if the student was meeting his IEP objectives and goals, there is only teacher opinion, sprinkled with some pieces of actual data. And while teacher opinion is valuable and holds great weight, it needed to be supported with actual data, as the IEP required.

38. There was no persuasive data in the record showing that the student attempted to read a grade level text with 139 or fewer correct words per minute in four out of five opportunities every nine weeks. There was no monthly data showing, for example, his level of fluency on one, two, or multi-syllabic words, or vowel combinations, as the objectives list. There was no persuasive data in the record showing that the student was, weekly, working on reading and comprehending grade level text with or without assistive

technology or additional support and attempting to write an essay as measured by a state or district rubric. There was also no persuasive data, weekly, showing that the student was given 50 unfamiliar polysyllabic grade level words, and how proficient he became in independently spelling them correctly. Lastly, there was no persuasive data showing that the student could, or attempted to, demonstrate an understanding of grade level multi-syllabic vocabulary words in four out of five opportunities every nine weeks.

39. The sticking point for the parents was a legitimate one; the weekly and monthly IEP data they were seeking, which was embedded in the IEP, was never produced to them, or presented here. Instead, they were given bits and pieces of different probes and summaries by teachers.

40. Given this vacuum of data reflecting implementation of the IEP goals, the only conclusion that can be drawn is that there was a material failure to implement the IEPs during the student's seventh and eighth grade years.

41. The good news is that this student, according to everyone who knows him, can close this gap if he receives the interventions he was entitled to receive in middle school, or before then.

CONCLUSIONS OF LAW

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

43. Petitioner bears the burden of proof on each of the issues raised. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

44. The IDEA is a comprehensive federal statutory scheme that governs how states provide special education and related services to children with disabilities. *Sch. Bd. of Miami Dade Cnty. v. C.A.F.*, 194 So. 3d 493, 495 (Fla. 3d DCA 2016). 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, which hinges 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).

45. Parents and children with disabilities are given 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 can examine their child’s records and participate in meetings concerning their child’s education; receive written notice before any proposed change in the educational placement of their child; and file an administrative due process complaint about any matter relating to the identification, evaluation, or educational placement of their child, or the provision of FAPE. 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6)(A).

46. 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. Under the first step of *Rowley*, it is necessary to examine whether the school district has complied with the IDEA’s procedural requirements. *Rowley*, 458 U.S. at 206-07. A procedural error does not automatically result in a denial of FAPE. See *G.J. v. Muscogee Cnty. Sch. 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).

47. In this case, Petitioner's Complaint contained one alleged procedural violation: that the IEP team created the IEPs without parent input, denying them meaningful participation in the creation of the IEPs. The more persuasive and credible evidence established that the parents were involved in the creation of the IEPs every step of the protracted way. The parents brought experts for many of the IEP meetings, and even succeeded in removing some staff members from the team. The parents and school staff differed in their perspectives on many substantive issues, but disagreement is to be expected when addressing the nuanced profile of this student, who is passing all his classes, and is able to, at this point, plow through homework for hours on end, unseen by the school staff.

48. Petitioner also alleges two substantive violations; that is, that the IEP was flawed in its design and did not provide FAPE, and that the IEP was not implemented. 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 student's present levels of academic achievement and functional performance; establishes measurable annual goals; addresses the services and accommodations to be provided to the student, and whether the

student will attend mainstream classes; and specifies the measurement tools and periodic reports to be used to evaluate the student'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, 598 (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 *Rowley*, 458 U.S. at 181). *See also C.A.F.*, 194 So. 3d 493 at 495 ("The core of the IDEA is the collaboration it establishes between parents and schools. The central vehicle for this collaboration is the individualized education program process If parents believe that an individualized education program is not appropriate, they may seek an administrative impartial due process hearing." (internal quotation marks, brackets, and citations omitted)).

50. Under the second step of the *Rowley* test, it must be determined whether the IEP developed under the IDEA is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07.

51. 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." *Endrew F.*, 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.*

52. Most importantly, the IDEA provides that an IEP must be individualized to the student and include measurable annual goals and services designed to meet each of the educational needs that result from the student's disability. 20 U.S.C. § 1414(d)(1)(A)(i)(II); *Alex R. v.*

Forrestville Valley Cmty. Unit Sch. Dist. #221, 375 F.3d 603, 613 (7th Cir. 2004)(explaining that an IEP must respond to all significant facets of the student’s disability, both academic and behavioral); *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 642 (8th Cir. 2003)(“We believe, as the district court did, that the student’s IEP must be responsive to the student’s specific disabilities, whether academic or behavioral.”).

53. Here, the more persuasive evidence establishes that the IEPs were appropriately ambitious in light of the student’s circumstances in all areas. The IEPs did properly identify the student’s levels of performance and academic achievement; addressed the student’s specific reading deficiencies; established somewhat lofty, but still reasonable, annual goals; and were tailored to meet his reading, writing, spelling, vocabulary, and independent functioning needs. They also specified the measurement tools and periodic reports to be used to evaluate the student’s progress. The record as a whole established that the IEPs were designed to provide this student FAPE.

54. As to the issue of implementation of the IEPs, in *L.J. v. School Board of Broward County*., 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit 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 conclude 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 *L.J.* court provided a few principles to guide the analysis. *Id.* at 1214. To begin, the court said that the focus in implementation cases should be on the proportion of services mandated to those 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 delivered to the services described in the IEP itself. In turn, “courts must consider implementation failures both quantitatively and qualitatively to determine *how much* was withheld and *how important* the withheld services were in view of the IEP as a whole.” *Id.*

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.

Id. at 1215.

57. In this case, the failure to provide specially designed instruction, systematically, and the failure to collect data as the IEP required, amounted to a material failure to implement the IEP as a whole. These failures conspired to deny the student a FAPE, and stymied his ability to reach grade level proficiency in reading, writing, vocabulary, and spelling. Because the School Board denied the student FAPE by failing to materially implement the IEPs, the student is entitled to an appropriate remedy.

58. In that regard, if a district court or administrative hearing officer determines that a school district has violated the IDEA by denying that

student FAPE, then the court shall “grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). In so doing, the court or administrative hearing officer has broad discretion. *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009)(observing that 20 U.S.C. § 1415(i)(2)(C)(iii) authorizes courts and hearing officers to award appropriate relief, despite the provision’s silence in relation to hearing officers).

59. Such “appropriate” relief may include reimbursing parents for the cost of private replacement therapy; transportation expenses; credit card transaction fees and interest; and, when a trained service provider is unavailable, reimbursement for the time a parent spent in providing therapy personally. *See Bucks Cnty. Dep’t of Mental Health v. Pa.*, 379 F.3d 61(3d Cir. 2004)(“[W]e hold that under the particular circumstances of this case, where a trained service provider was not available and the parent stepped in to learn and perform the duties of a trained service provider, reimbursing the parent for her time spent in providing therapy is ‘appropriate’ relief”); *D.C. ex rel. E.B. v. N.Y.C. Dep’t of Educ.*, 950 F. Supp. 2d 494, 516 (S.D.N.Y. 2013)(awarding reimbursement for transportation costs); *JP v. Cnty. Sch. Bd. of Hanover Cnty.*, 641 F. Supp. 2d 499, 506-07 (E.D. Va. 2009) (awarding parents a reasonable rate of interest to compensate them for tuition payments made on their credit cards, as well as credit card processing fees). Appropriate relief depends on equitable considerations, so that the ultimate award provides the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

60. In addition, one type of relief that a court may provide is an award of compensatory education. *Sch. Comm. of Town of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369 (1985) (quoting 20 U.S.C. § 1415(e)(2)) Compensatory education is an award “that simply reimburses a parent for the cost of obtaining educational services that ought to have been provided

free.” *Hall v. Knott Cnty. Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *see also Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1352-53 (N.D. Ga. 2007)(holding that, in formulating a compensatory education award, “the Court must consider all relevant factors and use a flexible approach to address the individual child’s needs with a qualitative, rather than quantitative focus”), *aff’d*, 518 F.3d 1275 (11th Cir. 2008).

61. Guided by the above stated principles, Petitioner is entitled to compensatory reading, writing, spelling, vocabulary, and independent functioning instruction, designed specifically for his multiple needs, for all of his [REDACTED] and [REDACTED] grade years. The School Board must reimburse the parents for any costs they incurred, that can be verified by receipts, for any tutoring or private evaluations they paid for during those years.

62. Lastly, Petitioner also alleges that the alleged procedural and substantive IDEA violations also constitute violations of Section 504; that is, the School Board discriminated against the student due to his disability. In that regard, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) [29 U.S.C. § 705(20)], shall, solely by reason of his or her 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

63. Title 29 U.S.C. § 794(b)(2)(B) defines a “program or activity” to include a “local education agency ... or other school system.” Title 29 U.S.C. § 794(a) requires the head of each executive federal agency to promulgate such regulations as may be necessary to carry out its responsibilities under the non-discrimination provisions of Section 504.

64. The U.S. Department of Education has promulgated regulations governing preschools, elementary schools, and secondary schools. 34 C.F.R. §

104, subpart D. The K-12 regulations are at 34 C.F.R. § 103.31-39. Title 34 C.F.R. § 104.33-.36 enlarge upon the specific provisions of Section 504 by substantially tracking the requirements of IDEA. Title 34 C.F.R. § 104.33 requires that School Boards provide FAPE to “each qualified handicapped person who is in the recipient’s jurisdiction.” For purposes of Section 504, an “appropriate education” is the provision of regular or special education and related aids and services that: (1) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met; and (2) are based on adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.33(b)(1), 104.34, 104.35, and 104.36. An “appropriate education” can also be provided by implementing an IEP that complies with the IDEA. 34 C.F.R. § 104.33(b)(2).

65. Turning to the discrimination issue, 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).

66. Assuming Petitioner has established a prima facie case, the School Board must present a legitimate, non-discriminatory 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 non-discriminatory 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).

67. Here, the evidence demonstrated that Petitioner meets the first, second, and fourth factors for establishing a prima facie case. Thus, the remaining issue is whether the School Board discriminated against Petitioner solely by reason of his disability. As noted in *J.P.M.*, the definition of “intentional discrimination” in the Section 504 special education context is unclear. *J.P.M.*, 916 F. Supp. 2d at 1321 n.7. In *T.W. ex rel. Wilson v. School Board of Seminole County*, 610 F.3d 588, 604 (11th Cir. 2010), the Eleventh Circuit stated that it “has not decided whether to evaluate claims of intentional discrimination under Section 504 under a standard of deliberate indifference or a more stringent standard of discriminatory animus.” But in *Liese v. Indian River County Hospital District*, 701 F.3d 334, 345 (11th Cir. 2012), the Eleventh Circuit, in a case involving a Section 504 claim for compensatory damages, concluded that proof of discrimination requires a showing, by a preponderance of the evidence, that the Respondent acted or failed to act with deliberate indifference. *Id.*

68. Under the deliberate indifference standard, Petitioner must prove that the School Board knew that harm to a federally protected right was substantially likely and that the School Board failed to act on that likelihood. *Id.* at 344. As discussed in *Liese*, “deliberate indifference plainly requires more than gross negligence,” and “requires that the indifference be a ‘deliberate choice.’” *Id.*

69. Here, the school staff could have and should have been diligent in monitoring the implementation of the IEPs, and should have measured the student’s IEP goal progress with the monthly and weekly requirements laid out in the IEP. The resulting failures denied this student of a chance to

become a proficient reader. That said, the School Board designed IEPs that met the student's needs, the teachers provided instruction that was likely beneficial, and the record does reflect minimal progress on the IEP goals. On balance, the record establishes negligence, but not indifference that was a deliberate choice. Thus, Petitioner has failed to establish a violation of Section 504.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board did violate the IDEA by failing to materially implement the student's IEPs, and is ORDERED to:

1. Fully evaluate the student, within 45 days of this Order, in all areas of need, including reading, vocabulary, writing, spelling, independent functioning, and emotional and social behavior.
2. Next, reconvene the IEP team, including reading specialists from the school and district level, to help develop a research-based, systematic approach to address the student's foundational reading, writing, spelling, and vocabulary needs.
3. The IEP team must develop a robust progress monitoring plan for the IEP goals and objectives, and for data collection, to track the student's progress.
4. The school staff must give the parents weekly or monthly data on the student's progress, as laid out in the IEPs, in a format that is easily understood by the parents.
5. The student is entitled to two years of compensatory education in the form of 1:1, or similar small group settings, in reading, writing, vocabulary, and spelling instruction by a reading endorsed teacher, at a rate of five days a week, with a goal to reach grade level proficiency, as laid out in the IEPs.
6. All other forms of relief are denied.

DONE AND ORDERED this 10th day of June, 2024, in Tallahassee, Leon
County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
DOAH Tallahassee Office

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Filed with the Clerk of the
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this 10th day of June, 2024.

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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).