

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

vs.

Case No. 21-0862E

BROWARD COUNTY SCHOOL BOARD,

AMENDED FOR SCRIVNER'S ERROR

Respondent.

AMENDED FINAL ORDER

A due process hearing was held before Jessica E. Varn of the Division of Administrative Hearings (DOAH) over the course of nine days; June 8 through 10, 2021, were held live in Weston, Florida; September 22 through 24, 2021, were held live in Lauderdale Lakes, Florida; and October 22, 2021, was held via Zoom video-conferencing.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
Disability Independence Group, Inc.
2990 Southwest 35th Avenue
Miami, Florida 33133

For Respondent: Susan Jane Hofstetter, Esquire
School Board of Broward County, Florida
K.C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

Hudson Carter Gill, Esquire
Johnson Anselmo Murdoch Burke
Piper & Hochman, P.A.
2455 East Sunrise Boulevard, Suite 1000
Fort Lauderdale, Florida 33304

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) written in June 2020, during the period of June 2020 to January 2021; and

Whether the student's parents were denied the ability to meaningfully participate in the process of drafting the January 2021 IEP; and

Whether the School Board discriminated against the student on the basis of 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 on March 5, 2021, with the School Board. On that same date, the School Board filed the Complaint with DOAH, and a Case Management Order was issued on March 9, 2021. On March 16, 2021, Petitioner filed a "Motion to Determine

¹ Petitioner raised allegations of section 504 violations in the Complaint, and the School Board placed the undersigned on notice that the scope of the due process hearing would include section 504 allegations; however, during the due process hearing, Petitioner never mentioned section 504. In fact, Petitioner frequently addressed the narrow scope of the hearing. Petitioner stated that there were only two issues: whether the School Board failed to implement the June IEP, and violated the parent's right to meaningfully participate in the January IEP. Nonetheless, because Petitioner did address section 504 in Petitioner's proposed order, and the School Board agreed to expand the scope of the due process hearing to include the 504 allegations, this Final Order will address them.

Petitioner, in Petitioner's Complaint and proposed order, also raises the substantive issues of whether the student was placed in the least restrictive environment, and whether the January 2021 IEP was designed to provide FAPE. Unlike the section 504 issue, which the School Board agreed would be within the scope of the due process hearing, there was no such agreement on these two substantive FAPE issues. As stated above, Petitioner's counsel insisted many times that the scope of the hearing was quite narrow: only the two issues of implementation of the IEP and meaningful parental participation. Accordingly, these additional substantive issues are treated as raised in the Complaint, but abandoned by Petitioner and dismissed without further analysis.

Stay Put Placement During the Pendency of this Action” (Motion for Stay Put). The School Board filed a Response to the Motion for Stay Put on March 23, 2021, and a telephonic motion hearing was held on March 26, 2021. Petitioner filed a Reply to the School Board’s Response on March 26, 2021, and an Order on Stay Put Placement was entered on March 31, 2021, ruling in favor of Petitioner.

On May 3, 2021, the School Board filed a “Notice of Submission of the Section 504 Allegations for Consideration in the Due process Hearing Scheduled for J.C.,” agreeing to have the Section 504² allegations heard during the due process hearing.

The hearing, by agreement of the parties, was first scheduled for June 7 through 10, and June 15 and 16, 2021. The parties jointly requested that the hearing dates be changed to June 8 through 10, and June 15 through 17, 2021. Petitioner filed a Motion to Compel and Request for Permission to Serve Third Party Subpoenas on May 14, 2021. On that same date, a telephonic motion hearing was held. The School Board filed “School Board’s Memorandum of Law Regarding Communications with Witnesses” on May 17, 2021. On May 20, 2021, an Order Granting Motion to Compel was entered.

On June 3, 2021, another telephonic motion hearing was held with the parties to address four motions filed by Petitioner: a Motion for Order of Contempt for Respondent’s Failure to Comply with the Tribunal Order, filed on May 28, 2021; a Motion to Compel Educational Records, filed on May 28, 2021; a Request to Set the District’s Objections to Discovery for Hearing, filed on May 28, 2021; and a Motion to Strike School Board Exhibits, filed on

² 29 U.S.C. § 794, and its implementing regulations found at 34 C.F.R. part 104.

June 1, 2021. An Order on Pending Motions was entered that same day, denying all relief requested.

The due process hearing was held live in Weston, Florida, from June 8 through 10, 2021. On June 14, 2021, the undersigned entered an Order Granting Continuance, stating as follows:

The due process hearing in this matter began on June 8, 2021, and was held for three consecutive days, in Weston, Florida. It was scheduled for three more days, June 15 through 17, 2021. Petitioner, in a Motion for Continuance filed on June 14, 2021, requested a continuance of the due process hearing, which the School Board objects to. Having been fully advised, the Motion for Continuance is granted. Petitioner has shown good cause for the request for the continuance, given that the School Board served more than 27,000 printed pages of proposed exhibits five days prior to the start of the hearing. Petitioner has requested that the hearing be rescheduled for the week beginning on September 20, 2021. The undersigned's hearing calendar has been reserved for the continuation of this matter, for the entire week of September 20 through 24, 2021.

The hearing was then rescheduled for September 20 through 24, 2021. On September 9, 2021, a Zoom motion hearing was held to address a third party's Motion to Quash Subpoena Duces Tecum and Motion for Protective Order. On that same date, the third party's request for relief was granted in an Order Granting Motion to Quash Subpoena Duces Tecum and Motion for Protective Order.

The hearing continued as scheduled from September 20 through 24, 2021, and was finished by Zoom conference on October 22, 2021. 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.

Over a month later, on November 24, 2021, Petitioner filed a Motion to Compel the Hearing Transcript, because the School Board had yet to file the transcript of the due process hearing, despite the fact that the earlier sessions had already been transcribed. The hearing transcript was eventually filed on December 2, 2021. Accordingly, proposed final orders were to be filed by December 27, 2021. The final order deadline was set for January 14, 2022. Petitioner requested a two-day extension for filing the proposed final orders, which the School Board objected to. The request was granted, and the deadline for proposed orders was extended to December 29, 2021, and the deadline for the final order was extended to January 18, 2022.

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 FACT

1. During the relevant period of this case, the student was transitioning from middle school to high school, with eligibility for exceptional student education (ESE) under the categories of Autism Spectrum Disorder (ASD) and Intellectual Disability (ID).

2. The student has been diagnosed with Angelman's Syndrome and ASD, and he is essentially non-verbal. His receptive language skills are stronger

than his expressive language skills, and he exhibits maladaptive, self-injurious behaviors, and also suffers from epilepsy.

3. As a result of his intellectual disability, he receives academic instruction using an access points curriculum, which is intended to use the age-appropriate, and grade-level curriculum that aligns with general education students, with less complexity and delivered at the student's individual level.

4. In June 2020, over the course of two days and in the midst of the first summer managing the COVID-19 pandemic, the parties mutually agreed to an IEP that would take effect immediately, during End of School Year (ESY) summer programming.

5. The student uses an Augmentative and Alternative Communication (AAC) speech-generating device, an I-pad with the Proloquo2go application, to communicate. He wears the I-pad daily, from a strap hanging from his neck. According to one witness's observations, the student treated the AAC device as another bodily appendage. Naturally, as most humans do, he also uses gesturing and vocalizations to communicate.

June 2020 IEP

6. The June IEP contained extensive detail as to the student's present levels of performance (PLOP), including detailed descriptions of his daily use of the AAC device throughout the school day. The following are excerpts taken from the PLOP sections:

[] communicates what [he] wants by using [his] AAC device.**

[His] morning routine includes putting away backpack and daily folder, greeting peers with AAC device...When sitting in a small group and engaging in the group activity... will use AAC device to communicate [his] turn.

Expressively, throughout the school day using [his] AAC device, [] uses 1 to 2-word**

phrases independently and with visual/verbal cues and modeling 2 to 3-word sentences to convey [his] wants, needs, thoughts, and ideas. With respect to pragmatic language, [**] maintains eye contact during conversation and demonstrates/initiates joint attention. [**] can respond to [his] name and take turns in a preferred activity. At times, [he] can initiate and maintain a topic but has difficulty terminating a conversation. Usually [he] needs redirection and verbal/visual encouragement to continue the activity. **Overall, [**] has progressively increased using [his] AAC device in a more spontaneous manner with less verbal cues to express [his] thoughts and needs and has displayed a more positive attitude throughout the school year.**

Using [his] AAC device, [] can select the correct target core word of the week at least 8 times during each session with modeling, written text, visual and verbal cues. [**] can produce at least 8 three-word phrases with an AAC device using the target core word using modeling, visual aids, written text, and verbal cues. [**] can answer functional wh-questions (what, where) by selecting the correct visual (pictures, action photo cards) with 80% accuracy with verbal cues. [**] independently can navigate to multiple pages on [his] AAC device using familiar core and fringe words to produce 1 to 3-word phrases to express [his] thoughts and wants. [**] continues to build [his] knowledge of [his] AAC language by navigating to ‘Actions’ and ‘Descriptions’ pages on the core vocabulary folders located on the first page, as well as working on novel core words on the home page.**

Based on teacher observations around various school settings, when coming into the classroom in the morning, [**] **will greet [his] peers and teachers by pointing to them and using [his] AAC device to say their name, followed by a**

“good morning”. [] will say various peer and staff names without prompting. [**] can navigate the various pages independently when taught the location of desired word (i.e. different types of food, peer and teacher names, various coping strategies). [**] requires verbal prompting to produce three-word phrase sentences when using the first page of [his] AAC device. [**] can produce a 3 to 4-word phrase independently when using fringe words or requesting (foods, peer and staff names). [**] uses pre-recorded phrases independently when working on academic assignments and tasks (I’m ready, I want a tum). [**] will say desired staff or peer name followed by the pre-recorded message. Based on teacher observation, with verbal and gestural prompting, [**] will ask a peer a personal question from [his] device with prompting. [**] will usually disengage from a conversation after one exchange with a peer or staff member. (emphasis added).**

7. The student’s private speech language pathologist (SLP) also provided valuable input on the student’s present levels of performance, as of June 2020:

[] has significantly adopted [his] talker/words/device. [He] is now able to be directed to use [his] words, and can do so, without protest or tantrum. Due to [**]’s complexity [he] needs a team that can provide effective rapid support. Team communication: There are many people who support [**]. Best practice would be to have all support staff adopting consistent strategies and methods to provide a uniform expectation and presentation. [**] can learn some things very quickly. It is important that support staff be able to communicate recent relevant experiences to enable [**]’s program to remain strong. Much of [**]’s program is customized to [him] and [his] needs.**

Strategies that work across many environments will be most useful for improved capability. I am

constantly looking at [**], to see how [he] can be supported to better participate in required school activities... Noisy settings: **The device [**] uses has a limited loudness level. The protective case can sometimes reduce overall loudness. For settings where there are high levels of environmental noise/sound, an amplified Bluetooth speaker may be wirelessly connected to the device and will then transmit the words with a supplemental amplifier. These adaptations will only be useful if [**] is expected/allowed to respond to instructions [sic]/comments or to raise [his] own comments/needs. Training: All staff working with [**] should have access to training and some collaborative time so that the program can be constantly finely tuned to provide optimal effectiveness.** (emphasis added).

8. As to the student's behavior issues, this description is found in the June IEP:

[**] currently has a Functional Behavioral Assessment and a Positive Behavior Intervention Plan. The target behaviors from [his] behavior plan include physical responses and self-injurious behaviors. Interventions that continue to be implemented include a schedule of [his] daily activities that [he] follows, a first-then chart to show what is expected of [him] and what [he] receives after completion, one on one adult supervision for redirection of self-injurious behaviors, a token reward system with three check marks, and **continuous implementation and modeling of AAC device to promote communication.** (emphasis added).

9. The June IEP contained a total of 16 goals, with 10 of those goals specifically calling for the use of the student's AAC device. As to the adult support he needed regarding the AAC device, the team decided the following:

Communication partners (ESE teacher, [his] general education teacher, para-professionals

working with [him] and backup para-professionals, SLP, OT) will model at least 1 word out of every spoken sentence and model at least 1 more word than [**] is expressing **5 times/day in all classes**.

Supports for School Personnel (special training or materials required or needed by staff): Several trainings **within the first month** and as needed for school staff who work directly with [**]: 1- Seizure Training (provided by Nursing Services) 2- Positive Behavior Intervention Plan (PBIP) 3-AAC program on assigned iPad (Proloquo) 4-Sensitivity and Understanding of ASD 5- Angelman's Syndrome. The parent will also be provided training implementation of the device and strategies. **[**]'s ESE teacher, Speech and Language Pathologist, Occupational Therapist, the two paraprofessionals assigned to [**], all backup paraprofessionals identified to work with [**] and [his] current and anticipated general education teachers will all be trained in and implement Proloquo2Go (the device), aided language input (modeling on a separate device), descriptive teaching, Environmental Communication Teaching (ECT) (excluding General Education and OT for ECT ONLY), a least to most prompt hierarchy, strategies for Angelman 's Syndrome, Autism, epilepsy, [his] behavior plan and data collection. These individuals are all [**]'s trained effective communication partners, who will teach [him] how to use [his] device and to effectively communicate with others throughout the day by modeling and aided language input on the Proloquo2Go with [**] and implement all the strategies/programs. These staff will collect data on each goal and objective.** (emphasis added).

10. It is abundantly clear, to *any* reader of the June 2020 IEP, that the student's communication skills were of the utmost importance, and the highest priority educational need. As reflected in the IEP, the student needed

to continue to learn how to communicate with the AAC device, across all settings during a school day. As reflected in the PLOPs, he was capable of increasing his ability to use the AAC device if those around him expected him to use it, modeled the use of it, and gave him the necessary support and consistent opportunities to increase his skill level.

11. Ms. Fonner, an AAC expert who assisted in the development of the June IEP and virtually worked with the student during ESY in the summer of 2020, explained that it was imperative for the AAC device to be properly modeled and used throughout the school day—not just during therapy sessions with an SLP or occupational therapist. She also opined that the student was capable of increasing his expressive language and could learn how to use the device.

12. Before the start of ESY, Ms. Fonner, who lives outside of the state of Florida and delivers most of her services virtually, had been hired by the School Board to work exclusively for this student. She was also hired to teach the student during ESY, which consisted of June and July of 2020. All ESY services were delivered virtually. Credible testimony from the mother, supported by email correspondence, establishes that approximately 25 percent of the 660 minutes of IEP-mandated intensive instruction with an ESE-certified teacher in academics, behavior, independent functioning and communication, were delivered during the eight weeks of ESY. Despite the discrepancy in the number of hours, the School Board was capable of implementing the IEP via a virtual platform.

13. Sadly, the transition from ESY to high school was met with ambivalence on the part of the high school staff. The gap in planning and training for the high school staff before the start of the school year was caused, according to all accounts, by the typical “schools are closed, and we do not work when schools are closed” explanation often given to parents. On the administrative district level, there was attention to detail and a sense of urgency in this case, but Ms. Fonner’s efforts to organize and do her job were

hindered by the high school staff's unavailability. In August, Ms. Fonner threatened to resign.

14. The school year in the Fall of 2020 kicked off virtually, just like ESY. The difficulties in implementing the student's IEP were multi-faceted. First, the School Board changed the virtual format to Microsoft Teams, which was a different virtual teleconferencing platform than what teachers had used in the past.

15. Second, teachers and staff who had no or minimal prior training on teaching virtually were tasked with doing so immediately. Third, the veteran ESE teacher assigned to the student did not have working knowledge of the AAC device and found the student to be at a much lower level academically than the other eight ESE students in her classroom.

16. Fourth, at least one paraprofessional assigned to the classroom, who virtually worked with the student on a daily basis, was never given an AAC device to use with the student.

17. Fifth, the virtual platform for teaching eventually caused the veteran ESE teacher to resign in September.

18. Sixth, from September to January 2021, there was no ESE-certified teacher working with the student. The high school staff faced teacher shortages and budget restraints, and although there was another ESE-certified teacher at the high school, the student remained in his original classroom with a substitute teacher that was not ESE certified, but was supervised by ESE-certified staff. Oddly, the student was placed in a chorus class during the Fall, despite his inability to virtually participate or be assessed. His schedule changed multiple times, which caused major inconsistencies in implementing the IEP. He was placed in a study hall

session, although he usually had no academic assignments or homework to complete.³

19. Seventh, once the non-ESE-certified substitute teacher was put in place as a long-term substitute, she needed time to be trained in how to implement the IEP.

20. Eighth, the School Board did not timely provide AAC devices and the IEP-mandated training for use of the AAC device to the veteran ESE teacher, the non-ESE-certified substitute teacher, nor the two paraprofessionals assigned to the classroom. During the Fall of 2020, the only staff member that consistently utilized the AAC device, knew how to properly model the use of the device, and gave the student ample opportunity and instruction on using the device, was the SLP. All other staff members specifically listed in the IEP were either never provided an AAC or were not trained to properly use it and model it as required by the IEP.

21. Ninth, the ECT training was interrupted and not delivered as the IEP required. In Ms. Fonner's words, the ECT training was mired in difficulties:

So there were -- you know, and this has not been a smooth [ride]. Not that I'm always looking for a smooth ride, but there were interfering factors all along the way. You know, we weren't able to do ECT in the style that we usually do. So the first time Sue McClosky has taught ECT virtually. I had had that experience in other states so I knew what kinds of modifications needed to be made but, you know, then we only had three teams so then we didn't need all five days and people not understanding that, and people not understanding that this is a process, that it takes all school year to get through that process. And of course, that was interrupted because we had three different teachers. And even as much as we tried to catch everybody up, it still interrupts the process of training.

³ To the extent that School Board witness testimony conflicts with this finding of fact, the mother's testimony is credited, as she had first hand knowledge of the assignments her son was given and if he ever had any homework to complete.

22. Tenth, there were major difficulties in tracking the implementation and progress on IEP goals and on academic progress during the first quarter. District level staff had to intervene and help organize the intake of data. It took four months, well into the second quarter of school, for data to be taken in a more consistent manner.

23. A team of approximately eight or nine school board professionals plus Ms. Fonner met weekly in an effort to implement the IEP. And many district level staff were employed to support the high school staff. Every one of them testified that they personally worked more on this student's case than any other student's case.

24. The best evidence, which is supported by the PLOPs in the June IEP and January 2021 IEP, established that academically speaking, the student's math, reading, and writing skills remained essentially the same from the June IEP PLOPs to the January IEP PLOPs. During eight weeks of ESY with Ms. Fonner, he had progressed from a level 0 to 3 on the Developmental Writing Scale, but then made no more progress by the end of the Fall semester.

25. The student's mother credibly testified, having been given a rare opportunity to witness her son's student life and see the academic rigor of the access points curriculum, that her son did almost no academic work to earn straight A's and that he sat for hours every day with nothing to do. Since her son could not speak for himself with ease, she often spoke up on his behalf. Her persistent involvement created tension with the high school staff, and resulted in a deep level of distrust between the high school staff and the student's mother.

26. It bears repeating that the majority of the IEP goals incorporated the use of the AAC device, and the IEP required a specific list of staff to use and model the AAC device daily, and throughout the entire school day. This centerpiece of the June IEP, addressing his highest priority educational need for maximizing communication, was not implemented as required by the IEP.

27. There is no persuasive record evidence establishing that the IEP requirement of 1,250 minutes of intensive instruction from an ESE-certified teacher in academics, behavior, independent functioning, and communication were delivered during the entire Fall semester.

28. These multiple failures of implementation resulted in a material failure to implement the June IEP and, therefore, denied the student a FAPE from June 2020 to January 2021.

Preparation of the January 2021 IEP

29. The following timeline of events is best understood with this caveat: the School Board was hyper-focused on the requirement of completing an annual IEP by January 16, 2021. With that compliance-at-all-costs by January 16 mindset, the following occurred:

30. The parents were notified, on December 5, 2020, of an annual IEP meeting, set for two full days: January 12 and 14, 2021. The parents agreed with the dates, and that same day, requested educational records to be able to prepare for the annual IEP meeting.

31. On December 9, 2020, the parents, who had been receiving weekly data on the IEP goals since November, asked for a key, or some type of aide, in understanding the data collection sheets that had been sent. These parents are college educated professionals, presumably with a high level of cognitive and intellectual abilities, and although they had a pile of records, they had no way of making sense of the data. They were told there was no key available.

32. Five days later, on December 10, 2020, the School Board put into effect a “communication plan.” According to the School Board, it was created because the volume of email communication from the student’s mother to the high school staff was interfering with their ability to implement the IEP, and because the mother had sent some of the emails to the wrong staff members.⁴

⁴ Respondent’s proposed final order, page 18.

33. By December 14, 2020, the parent had received copies of a recent physical therapy evaluation, a school-based psychological evaluation, a school-based SLP evaluation, and a private SLP evaluation.

34. On December 17, 2020, the IEP team convened for a re-evaluation meeting. The data contained in the evaluations was reviewed, and the student was not found eligible in the category of Speech Impaired (SI) and was denied speech services because he did not have adequate control of his articulators to make him a functional communicator.

35. A draft IEP was sent to the parents on January 5, 2021.

36. The draft IEP contained goals that were quite different from the June IEP goals. Notably, the AAC device was no longer the centerpiece of the IEP—it was now, as explained at the hearing, *implied* in all goals, and only specifically listed in the IEP goals focused on SLP therapy and OT therapy, and in the training requirements for staff.

37. Not surprisingly, given the failure to materially implement the June IEP, the student had made minimal progress on the June IEP goals.

38. On January 6, 2021, the parents were given access to review the student's records, and requested copies of some of the records they had reviewed.

39. On January 8, 2021, copies were provided. According to the School Board, 541 pages were copied.

40. Two days later, on January 10, 2021, the parents asked for copies of 62 items that had not been copied, and they believed to be missing. They included report cards, work samples, student portfolio, and IEP goal data. The parents also stated that in the alternative, if the school staff had no more educational records, to please indicate that. The parents suggested that the meeting on the first of the two IEP dates, January 12, 2021, would focus on a review of the student's progress on the IEP goals and they could also receive the records they believed were missing.

41. On January 11, 2021, the day before the scheduled IEP meeting, the attorney for the School Board wrote a letter to the parents stating that the School Board was not required to allow the parents to review every single record that it had regarding the student.

42. Later that evening, the Due Process Coordinator wrote an email stating that a conference to review the IEP goal data and see the goal data was certainly an option, but that the entire IEP team, which would be convening the next morning, was not needed for that review. The parents replied that they would prefer to spend the first day, January 12, reviewing the IEP goal data with only the staff who implemented the goals.

43. In the early morning hours before the IEP meeting on January 12, the Due Process Coordinator responded that the IEP team would not spend the beginning of the IEP meeting reviewing the IEP goal data and the student's progress on IEP goals. She added that progress reports for the second quarter of the year were due that same day (January 12), therefore, later that day, the progress reports would be in the parent's hands. But, she indicated, the IEP meeting would go forward.

44. The IEP meeting convened at 9:00 a.m., and not surprisingly, the parents were still requesting to review the data on the student's progress on the June IEP goals, and did not feel comfortable proceeding until they received it and understood it.

45. The next logical and collaborative step would have been to wait until the progress reports were completed (later that day) and hold the meeting offered by the Due Process Coordinator to review the June IEP goal data and the student's progress on those IEP goals. Rescheduling the IEP meeting until after that review meeting, which was the more prudent choice, was never an option on the table, according to the School Board staff, due to compliance rules.

46. Understandably, the parents chose to leave the IEP meeting, stating that they could not meaningfully participate in creating a new IEP without a

conversation on data and progress on the June IEP goals with supporting and coherent records.

47. Rather than stop the IEP team meeting once the parents left, the school-based IEP team continued on, for the rest of January 12, 2021, and created the new IEP. That January 16, 2021, deadline was certainly met, but the IEP was created without meaningful parent participation, denying the student a FAPE.

CONCLUSIONS OF LAW

48. 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).

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

50. 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 is 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).

51. 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, or educational placement of their child, or the provision of FAPE. 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

52. 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).

53. The components of FAPE are recorded in an IEP, which, among other things, identifies the child’s present levels of academic achievement and functional performance; establishes measurable annual goals; addresses the services and accommodations to be provided to the child, and whether the child will attend mainstream classes; and specifies the measurement tools and periodic reports that will be used to evaluate the child’s progress.

20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. “The IEP is the centerpiece of the statute’s education delivery system for disabled children.” *Andrew 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).

54. 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 students 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).

55. In this case, Petitioner’s Complaint contained one alleged procedural violation: that the IEP team created the January 2021 IEP without parent input, therefore, denying meaningful participation in the creation of the January 2021 IEP. The more persuasive and credible evidence established that the parents requested, and were denied, the ability to review coherent records prior to the creation of the January IEP—and that the School Board could have, and should have, rescheduled the IEP meeting until those records were reviewed in a comprehensible manner.

56. As to the implementation of the IEP, Petitioner’s Complaint alleges that the June 2020 IEP was not implemented; in particular, that accommodations were not properly implemented from June 2020 to January 2021.

57. 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.

58. 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 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.*

59. 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.

60. Here, the more persuasive evidence established that the School Board materially failed to implement the IEP because it failed to implement the most significant provision of the IEP, which was daily, consistent and proper use of the student's AAC device across all settings. The overarching goal and centerpiece of the June IEP was the use of the AAC device, and despite the IEP team placing this priority in the IEP, it was more often than not ignored by the high school staff. From June 2020 until January 2021, the School Board failed in supporting its personnel by not providing prompt training in use of the AAC device; not providing the device to most of the staff working with the student; not providing an ESE-certified teacher as required by the IEP; and not providing 495 minutes of ESY and 1,250 minutes weekly of intensive instruction from an ESE-certified teacher in academics, behavior, independent functioning, and communication. The cumulative impact of these implementation failures, detailed in the Findings of Fact, resulted in a denial of FAPE.

61. 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).

62. To prove a claim of intentional discrimination, Petitioner must demonstrate by a preponderance of the evidence that the School Board subjected him to an act of discrimination solely by reason of his disability. *Id.*

Notably, a claim of intentional discrimination need not be supported by proof of discriminatory animus—i.e., “prejudice, spite or ill will.” *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344-45 (11th Cir. 2012). It is instead sufficient for Petitioner to supply proof of “deliberate indifference,” which occurs when a “defendant knew that harm to a federally protected right was substantially likely and . . . failed to act on that likelihood.” *Id.* at 344-45; *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)(“Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood.”).

63. Petitioner alleges that the School Board committed acts of discrimination by failing to implement the June 2020 IEP and by denying the student’s ability to effectively communicate.

64. As explained above, the evidence demonstrated that the School Board created an appropriate IEP in June 2020, but materially failed to implement it. Petitioner failed to produce, however, any evidence that any School Board employee acted with deliberate indifference by failing to act. The record is clear that the School Board, facing unprecedented challenges with staffing created by the COVID pandemic, compounded by the challenges inherent in virtual and hybrid teaching, made an effort to implement the IEP given some circumstances that were out of the School Board’s control. The School Board hired Ms. Fonner to work exclusively with the high school staff, and assembled a team of professionals to meet regularly in an attempt to fix, or manage, many of the complications detailed in the Findings of Fact. These actions constitute affirmative action to protect the student’s rights. Those efforts fell short of materially implementing the June 2020 IEP, but did not reflect, nor did Petitioner establish deliberate indifference.

65. Petitioner’s claim of intentional discrimination, therefore, is rejected.

Relief

66. Having been denied a FAPE, the student is owed compensatory education. The Eleventh Circuit has held that compensatory education is

considered “appropriate relief where responsible authorities have failed to provide a handicapped student with an appropriate education as required by [the Act].” *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008), (quoting *Todd D. ex rel. Robert D. v. Andrews*, 933 F.2d 1576, 1584 (11th Cir. 1991)). Although “ordinary [educational programs] need only provide ‘some benefit,’ compensatory awards must do more -- they must *compensate*.” *Reid v. Dist. of Columbia*, 401 F.3d 516, 525 (D.C. Cir. 2005).

67. The *Reid* court emphasized that IDEA relief depends on equitable considerations, stating, “in every case . . . the inquiry must be fact specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Id.* at 524. The court further observed that its “flexible approach will produce different results in different cases depending on the child’s needs.” *Id.*

68. This qualitative approach has been adopted by the Sixth Circuit and a number of federal district courts. See *Bd. of Educ. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007) (“We agree with the district court . . . that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the child’s] educational problems successfully.”); *Petrina W. v. City of Chicago Pub. Sch. Dist.*, 2009 U.S. Dist. LEXIS 116223, at *11 (N.D. Ill. Dec. 10, 2009) (“Because a flexible, individualized approach is more consonant with the aim of the IDEA . . . this Court finds such an approach more persuasive than the Third Circuit’s formulaic method”); *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); *Barr-Rhoderick v. Bd. of Educ.*, 2006 U.S. Dist. LEXIS

72526, at *83-84 (D.N.M. Apr. 3, 2006) (holding that an award of compensatory education “must be specifically tailored” and “cannot be reduced to a simple, hour-for-hour formula”); *Sammons v. Polk Cnty. Sch. Bd.*, 2005 U.S. Dist. LEXIS 45838, at *21-22 (M.D. Fla. Oct. 7, 2005) (adopting *Reid’s* qualitative approach).

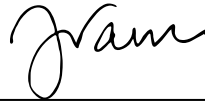
69. The School Board is ordered to re-convene an IEP meeting to provide the parents meaningful participation in the creation of the IEP.

70. Since the implementation failures were pervasive throughout the entire school day, and the student’s communication needs permeate the student’s ability to access his education during the entire school day, Petitioner is entitled to full school days of compensatory education during the relevant time period. The School Board is ordered to provide compensatory education for each full school day between June 2020 and January 2021.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board of Broward County denied this student a FAPE by failing to materially implement the June 2020 IEP; and by denying the student’s parents meaningful participation in the creation of the January 2021 IEP. Petitioner is entitled to compensatory education for every school day between June 2020 and January 2021. All other requests for relief are denied.

DONE AND ORDERED this 7th day of February, 2022, in Tallahassee, Leon County, Florida.



JESSICA E. VARN
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of February, 2022.

COPIES FURNISHED:

Susan Jane Hofstetter, Esquire
School Board of Broward County, Florida
K.C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

Julian Moreira
Educational Program Director
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399-0400

Hudson Carter Gill, Esquire
Johnson Anselmo Murdoch Burke
Piper & Hochman, P.A.
Suite 1000
2455 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

Stephanie Langer, Esquire
Disability Independence Group, Inc.
2990 Southwest 35th Avenue
Miami, Florida 33133

Amanda W. Gay, Esquire
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Vicki Cartwright
Interim Superintendent
Broward County School Board
10th Floor
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

Anastasios Kamoutsas, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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).