STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case Nos. 19-0727E
19-3012E

SARASOTA COUNTY SCHOOL BOARD,

Respondent.
_____/

NOTICE OF CORRECTION

In preparation for drafting the final order in DOAH Case No. 19-6338E (Sarasota II), the undersigned reviewed the Final Order in DOAH Case Nos. 19-0727E and 19-3012E (Sarasota I), involving facts previous to Sarasota II and involving the same parties. In that review, a typographical error resulting in deletion of a phrase was noted in paragraph 112 of Sarasota I's Final Order. The typographical error is corrected in the Corrected Final Order, nunc pro tunc, attached hereto with the phrase highlighted in bold in paragraph 112 thereof.

DONE AND ORDERED this 25th day of February, 2020, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 25th day of February, 2020.

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19-3012E

SARASOTA COUNTY SCHOOL BOARD,

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_____/

*CORRECTED FINAL ORDER

A due process hearing was held before Administrative Law Judge Diane Cleavinger of the Division of Administrative Hearings (DOAH), on May 20 through 22 and August 5 through 7, 2019, in Sarasota, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this proceeding are:

a. Whether the Sarasota County School Board (the School District, District, School Board) failed to provide a free and appropriate public education (FAPE) to the Student when it placed the Student on modified/alternative educational standards and curriculum in 3rd grade until February 17, 2017, when the Student was in 8th grade, in violation of the Individuals with Disability Act (IDEA), 20 U.S.C. § 1400, et seq.

b. Whether the School District failed to provide a FAPE to the Student in the Student's 8th, 9th and 10th-grade years, in violation of IDEA.

c. Whether the School District failed to provide a FAPE to the Student by failing to implement the Student's individualized education programs (IEPs) in 8th, 9th and 10th grades, in violation of IDEA.

d. Whether the School District discriminated against the Student on the basis of his disability in violation of Section 504 of the Civil Rights Act (Section 504 or 504), 34 C.F.R. § 104.36, by failing to provide the Student with a FAPE.[1/]

e. If violations of IDEA or Section 504 occurred, appropriate remedies for those violations.

PRELIMINARY STATEMENT

Petitioner filed a request for a due process hearing complaint (Complaint) with the Respondent, School District, on January 14, 2019. The Complaint generally alleged that the School District violated IDEA when it failed to provide FAPE to Petitioner and failed to implement his IEPs in 8th, 9th and 10th grades. The Complaint also alleged that Respondent violated Section 504 of the Rehabilitation Act when it discriminated against Petitioner based on his disability.

On February 11, 2019, the Complaint was forwarded to DOAH. The referral by the District was for the purpose of holding a hearing under DOAH's jurisdiction to hear IDEA cases. The referral was not for the purpose of holding a hearing under Section 504 where DOAH does not have jurisdiction to hear such cases, unless specifically referred to DOAH under a contract between DOAH and the District. The matter was assigned DOAH Case No. 19-0727E and assigned to the undersigned. At the time, no other requests to hold an impartial hearing under Section 504 of the Rehabilitation Act or other federal statutes were made by the School District. A Case Management Order was issued on February 12, 2019, establishing deadlines for a sufficiency review as well as for the mandatory resolution session.

On February 25, 2019, a telephone conference was held with the parties to discuss dates for the final hearing. After conferring with the parties, the final hearing was set for April 1 through 4, 2019. The Notice of Hearing notified the parties that DOAH was hearing the case based on its hearing authority under "Section 1003.57(1)(c), Florida Statutes;" and "Florida Administrative Code Rule 6A-6.03311," both of which relate only to IDEA claims.

On March 20, 2019, Petitioner filed an Unopposed Motion for Continuance and a Motion for Clarification. An Order granting the Unopposed Motion for Continuance was entered on March 27, 2019.

On April 5, 2019, a telephone conference was held to hear Petitioner's Motion for Clarification, requesting that the 504 issues Petitioner raised in the Complaint be heard along with Petitioner's IDEA claims. During the telephone conference the District's attorney, E. Keith DuBose, confirmed that the request for due process was forwarded to DOAH only for the purpose of hearing the IDEA issues, that the District had a separate process for 504 disability and race cases and that the District did not have a contract with DOAH to hear Section 504 cases. Based on those representations, the undersigned, by Order dated April 8, 2019, ruled that jurisdiction was limited to issues raised under IDEA and that issues raised under Section 504 would not be heard.

Mr. DuBose did not further explain the District's 504 policies and did not explain why the Section 504 portions of the due process request had not been forwarded for review under the District's Section 504 policy and process as is required by the Office of Civil Rights (OCR), the federal agency which has jurisdiction over Section 504. Both parties were advised by the undersigned that there should be a written 504 policy or manual which establishes the District's 504 impartial hearing review process. See 34 C.F.R. § 104.36 and Appx., para 25.

Additionally, during the April 5, 2019, telephone conference, a discussion was had regarding dates to reschedule the final hearing. Based on that discussion the final hearing was rescheduled for May 20 through 22, 2019.

Thereafter, between April and May 2019, Petitioner's attorney attempted to clarify with the District its process for addressing the 504 claims raised in the Complaint. On April 30, 2019, the District produced its 504 procedures, which contrary to the representations of Mr. DuBose in the earlier teleconference, stated that:

> Section 504 due process hearings are governed by Chapter 120, Florida Statutes. The school district contracts with the Florida Division of Administrative Hearings (DOAH), which provides administrative law judges to conduct the hearings.

Petitioner's attorney again contacted the District to reconcile the policies with the undersigned's April 8, 2019, Order. Thereafter, on May 14, 2019, Petitioner filed a Motion to Reconsider the earlier order and again requested clarification on whether the 504 issues would be heard in DOAH Case No. 19-0727E.

A hearing was held on May 15, 2019, wherein Mr. DuBose again confirmed that the 504 issues had not been submitted to DOAH when it forwarded the Complaint and that the District had a separate process for 504 complaints. During the hearing, Petitioner's attorney indicated that the 504 race portions of the Complaint had been reviewed by some unspecified District review board, but that the 504 disability portions of the Complaint had not been addressed by that board and remained outstanding and unaddressed by the District. Notably, at this point, the District's deliberate indifference to review or address the very clearly pled 504 disability claims, which like the race 504 claims, the District had received notice in the Complaint, had occurred for approximately five months. The District was warned that the 504 disability issues should be addressed by the District. However, the 504 claims raised by Petitioner had not been forwarded to DOAH for hearing and the undersigned had no authority to force the District to forward the claims to DOAH. Therefore, by order dated May 20, 2019, the undersigned again declined to hear the 504 claims.

The hearing commenced as scheduled but did not conclude and Petitioner did not rest his case. As a result, and after discussion with the parties, the hearing was rescheduled for August 5 through 8, 2019.

In the interim, on June 5, 2019, almost six months after receiving notice of the 504 disability issues in the Complaint, the same Complaint served on the District on January 14, 2019, was forwarded to DOAH as a 504 complaint. The case was assigned DOAH Case No. 19-3012E and assigned to Judge Jessica Varn. Between June 14 and July 1, 2019, Petitioner filed a Motion to Consolidate DOAH Case Nos. 19-3012E and 19-0727E, Respondent filed an objection and response and Petitioner filed a reply. After review of the file, consideration of the parties' pleadings and consideration of the parties' arguments, Petitioner's Motion to Consolidate was granted an by Order, dated July 1, 2019. Thereafter, the hearing reconvened as scheduled.

During the final hearing, Petitioner offered the testimony of 11 witnesses. Additionally, Petitioner offered Exhibits Numbered 4 (pages 124-132, 134-137 and 163-181); 5 (pages 182-214); 6 (pages 221-232); 7 (pages 244-287); 8 (pages 288-339); 9 (pages 340-381); 10 (pages 382-406); 11 (pages 407-416); 12 (pages 427-499); 13-14; 17 (pages 647-653); 18; 19; 21; 26; 27 (pages 1149-1156, 1255-1262, 1265-1274, 1287-1301, 1306-1316, 1334-1336, 1346-1349, 1356, 1359-1361, 1364-1366, 1369-1371,

1390, 1391); 30; 31 (pages 1245-1249, 2735 and 2736); 32 (pages 1406 and 1407); 35 (pages 1409-1420, 1621, and 1622); 36 (page 1421); 37 (pages 1423-1425 and 1430); 38-40 (pages 1613-1619); 41-41a; 42 (page 1710); 43 (page 3067); 44 (pages 1746, 1747, 1764, 1765, 1793-1800, 1924-1932, 1972, 1991, 2007-2014, 2030-2039, 2070, 2084, 2091-2095, 2102, 2103, 2111-2116, 2138,2141, 2150, 2160, 2206, 2207, 2218-2221, 2229-2246, 2283, 2292-2294, 2413, 2745, 2746, 2749, 2750, 2753, 2782, 2809, 2810, 2825, 2842, 2932, 2968, 2969, 3049, 3050, 3077, 3090, 3092, 3449 and 3469); 46; 49 (pages 3256-3259); 52 (pages 3320-3357); 57 (pages 2471 and 2472); 60; 62 and 63, which were admitted into evidence. Respondent presented the testimony of eight witnesses and offered Respondent's Exhibit Numbered 1, which was admitted into evidence.

Following the conclusion of the hearing, a discussion was held with the parties regarding the post-hearing schedule. Based on that discussion an Order was issued establishing the deadline for proposed final orders as September 11, 2019, with the final order to be entered on or before October 14, 2019. However, due to the large size of the record in this case and the amount of time needed to review the record, the deadline for this Final Order was extended to October 21, 2019.

After the hearing, Petitioner timely filed a Proposed Final Order on September 11, 2019. Likewise, Respondent filed a

Proposed Final Order on the same date. The filed proposed orders were considered in preparing this Final Order.

Further, unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations are to the current codifications.

Additionally, 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. The Student, who is the subject of this case, has been enrolled in the Sarasota County School District since pre-kindergarten. There was no evidence that demonstrated which District school was the Student's home school during his time in public school. Currently, the Student is 17 years old with a date of birth of September 27, 2002. He is in the 11th grade at School D, a private school.

2. In this case, the evidence showed that the Student has always worked hard in school and takes his education seriously. Doing well in school is important to him and to his parent who has emphasized the importance of an education to him. The Student's preferred subject is math. The evidence also demonstrated that the Student is career or vocationally focused for life after graduation with an interest in creating video

content or working in law enforcement. Additionally, the Student recognizes the need for and has the goal of obtaining a job after graduation in order to support himself.

3. In late 2005, when the Student was three years old, the Student was referred to Child Find, by The Florida Center for Child and Family Development for concerns with speech, language and motor development. At the time, he was evaluated and found eligible for Developmental Delay (DD) and Occupational Therapy (OT). However, he was not found eligible for services in the category of Speech and Language Impairment (SLI). Thereafter, an initial IEP was developed for the Student on April 5, 2006.

4. In late April 2008, at the end of pre-kindergarten and when the Student was 5 years 10 months old, the SLI and psychoeducational evaluations were completed.

5. During the SLI evaluation, the Student was administered the Clinical Evaluation of Language Fundamentals, Preschool, Second Edition (CELF-PK-2), the Oral and Written Language Scales (OWLS) and the Goldman-Fristoe Test of Articulation, Second Edition (GFTA-2). All of these are well-recognized, normed, reliable and valid tests of a student's speech and language skills.

6. On the assessments, the Student's language scores across all tests demonstrated that he had a severe language impairment. As a result, language therapy services were recommended to

address the Student's language deficits "that were impacting the Student's listening comprehension, oral expression and written expression."

7. During the psychoeducational evaluation, the Student was administered the Behavior Assessment System for Children, Second Edition (BASC-II), to assess his behavior. The assessment demonstrated that the Student's overall behavior and ADHD were not clinically significant. However, the assessment also revealed that the Student demonstrated clinically significant behaviors on the matrix for anxiety relative to internalizing problems and atypicality in relation to odd or immature behavior.

8. The Student was also administered the Wechsler Pre-school and Primary Scale of Intelligence, Third Edition (WPPSI-III), to assess the Student's general intelligence and cognitive abilities. The WPPSI-III is a well-recognized, normed, reliable, and valid test of intellectual function and cognitive abilities for preschool and early elementary aged children. Standard scores obtained in the assessment are based on a mean score of 100 with a standard deviation of 15. In this case, the Student's Verbal IQ score was 72 and in the "Borderline Range," but equal to three percent of same age peers; the Student's Performance IQ score was 100 and in the "Average Range," but equal to 50 percent of same age peers; and the Student's Full-Scale IQ score was 81 in the "Low Average Range," but equal to 10 percent of same age

peers. The 28-point difference between the scores was statistically significant. More importantly, the Student's performance IQ score of 100 (Average) was considered to be the best overall estimate of the Student's level of intellectual functioning and ability.

9. The Student was also administered the Young Children's Achievement Test (YCAT). The YCAT is a normed, reliable and valid test designed to measure the achievement levels of pre-kindergarten, kindergarten and early elementary children in the skills and abilities necessary for success in school. The test assesses the areas of general information, mathematics, reading, writing, and spoken language. The standard scores are based on a mean score of 100 with a standard deviation of 15. On the YCAT, the Student's Mathematics and Writing scores were "Poor"; the Student's General Information and Reading scores were "Below Average"; and the Student's Spoken Language and Early Achievement Composite scores were "Very Poor".

10. Additionally, the Woodcock-Johnson Test of Cognitive Abilities, Third Edition (WJ-III COG) was administered to the Student to assess his cognitive abilities. Like the WPPSI-III, the WJ-III COG is a well-recognized, normed, reliable, and valid test of intellectual function and cognitive abilities for preschool and early elementary aged children. Standard scores obtained in the assessment are based on a mean score of 100 with

a standard deviation of 15. The Student's performance on the WJ-III COG was variable on the assessment's subtests, with an extremely low score of 53 (equal to less than one percent of same age peers) in the area of Comprehension Knowledge. The score was consistent with the Student's language assessment, indicating severe language impairment. Scores in other areas of the WJ-III COG were consistent with the Student's WPPSI-III performance IQ of 100 and full-scale IQ of 81.

11. Based on the testing done during the psychoeducational evaluation, the evaluator found that the Student's very unusual scores demonstrated a need for small group and/or individualized instruction; with curriculum, academic and behavioral instruction taking into account "his very low verbal abilities and language skills" along with the Student's average nonverbal reasoning abilities. The report recommended that the Student receive instruction in a highly structured and routine environment with visual cues, visual instruction and simple directions.

12. An eligibility meeting was held on May 9, 2008. The parent attended the meeting. At the meeting, the Student was found eligible for ESE services in the categories of Specific Learning Disabilities (SLD) and Language Impairment (LI). The OT was also continued. Eligibility under the category of DD was discontinued. An IEP was developed for the Student placing him in a separate ESE class. As a result, the Student began

kindergarten placed in a self-contained, varying exceptionality, ESE classroom at School A. The placement provided a small class size and direct instruction from an ESE teacher. However, the Student was being taught on a general education curriculum. Additionally, the Student was provided extended school year (ESY) services from kindergarten through 3rd grade.

13. In 2nd grade (2010-2011), a reevaluation review was conducted in February 2011. The reevaluation team, including the parent, concluded that no further evaluations or reevaluations were needed in order for the Student to receive FAPE.

14. The evidence demonstrated that, at the time, the Student was about a year behind in reading and math but adequately progressed from year to year with documented success in the general education curriculum. His grades were in the A and B range. There was some discussion among team members about mainstreaming the Student into a regular education class. There was also discussion among team members about retaining the Student in 2nd grade to lessen his achievement gap in reading and math. At the time, neither action was taken and the Student was promoted to 3rd grade. The Student also remained in a separate, self-contained classroom on a general education curriculum, which placement would continue until late in the 3rd grade.

15. Additionally, the evidence demonstrated that the Student's behavior had improved to the point where he did not

exhibit behavior problems at home or school, was well liked by others, very polite and very respectful. He was considered a leader in the class and functioned independently for a child in the 2nd grade. In short, the Student's behavior, independent functioning, community living, leisure activities and adaptive skills were not significantly impacted by his disability.

16. During this time, policies on high-stakes testing made promotion in school dependent on achievement of a certain score; and school accountability, particularly with regard to how IDEA students would be included in such accountability standards, were in transition and being developed.[2/] In Florida, the first high-stakes test, then known as the FCAT, a Student was required to take and pass in order to be promoted to the next grade occurred towards the end of a student's 3rd-grade year.

17. Notably, the parent did not testify at the hearing. Therefore, other than the facts that the parent was a single-parent, employed and provided a very stable and loving home for her family, there was no substantive evidence regarding the life circumstances of the parent or Petitioner. Likewise, except where noted in this Final Order, there was no substantive evidence regarding the parent's attitude towards school personnel. However, the evidence did show that the parent was either an active participant or was provided the opportunity to participate in every IEP and reevaluation plan meeting throughout

the Student's education in public school. The evidence also demonstrated that the parent was very interested in the Student's education and actively communicated with school staff throughout the Student's education in public school. Further, except where noted in this Final Order, the better evidence demonstrated that the school generally met the procedural requirements under IDEA in respect to required notices.

2011-2015 (3rd through 6th Grade)

18. In August 2011, the Student continued to attend School A in 3rd grade. He would remain at School A until the end of his 6th-grade school year.

19. The Student again was placed in a segregated classroom with limited integration with nondisabled peers. He was receiving a general education curriculum based on general education standards, albeit with instructional supports provided under his IEP. The evidence was not clear which set of state educational standards were in place at the time.[3/]

20. Additionally in 3rd grade, the Student was receiving OT services until November 2011 when the services were stopped for unknown reasons. The evidence did not demonstrate that the cessation of OT services was an ongoing violation that continued into later years. Given that the parent did not raise the cessation of these services, which cessation does not appear to have had a significant impact on the Student in later years, any

alleged violations, either procedural or substantive, relative to the cessation of OT in 2011 is well outside the statute of limitations under either IDEA or Section 504 and should be dismissed. On the other hand, issues related to the Student's placement, as described more fully below, have continued through the years relative to this case.

21. In that regard, in the Student's 3rd-grade year (2011-2012), federal law, in regards to school accountability, required States to show gains and progress on student proficiency in reading and math. Such District and state accountability progress was demonstrated by high-stakes testing in those areas. Thus, in general, under federal law a group of students failing the FCAT would negatively impact the school and the District on meeting accountability requirements under federal law as imposed by the state with eventual impacts on school accountability grades and funding. However, the evidence did not demonstrate that one student's failing scores on the FCAT would have impacted a school negatively.

22. In this case, the Student would have been required to take the FCAT during his 3rd-grade year, unless he was deemed to be significantly cognitively impaired and on modified educational standards and curriculum later known as Access Points standards and curriculum.[4/]

23. On March 5, 2012, during the Student's 3rd-grade year, an IEP meeting was held with the parent in attendance. During the meeting an IEP was developed for the Student.

24. Comments in the March 2012 IEP reflect that the team felt that "[the Student] does not demonstrate appropriate level of fluency in reading"; "[the Student] is not able to use application or problem solving concepts for real world math problems at an appropriate level"; and "[the Student] has difficulty confining [his] answer to the question [he] has been asked. [He] also has difficulty following multiple step directions, and recalling sequence and main idea from stories and informational text."

25. During the meeting, the March 2012 IEP team did not conclude that the team needed more or updated data, information, evaluations or reevaluations of the Student and did not seek to have any evaluations or reevaluations completed. Because the IEP team had adequate information regarding the Student, the team continued the Student's placement in a segregated class setting on general education standards and general education curriculum. The Student was not placed on modified standards and curriculum. The Student was also not identified as having a significant cognitive impairment.

26. As admitted by District personnel, the evidence demonstrated that sometime during the Student's 3rd-grade year

and because of Florida's assessment and accountability system developed to comply with federal assessment and accountability requirements, the District and/or District schools identified a group of students whom staff believed would not pass the FCAT. The evidence did not demonstrate how many students were in the identified group. However, the number of students identified was not small. Further, except for the Student herein and that this group consisted of language impaired students, the evidence did not demonstrate these students' ESE eligibilities under IDEA or their ESE placement.

27. A 2018 voicemail left by Vicky Stillo-Gross, District ESE compliance specialist, on one of the parent's advocates' message system is informative on this point. In 2018, the parent advocate was trying to help the parent and the Student figure out what had occurred in the Student's education since the educational records they received did not make sense at the time the advocate was reviewing those records. The advocate contacted Ms. Stillo-Gross for an explanation. Ms. Stillo-Gross stated:

> Hey Susan . . . I can bet that the student is language impaired and probably had really low language scores. And there was an understanding at one point five or so years ago that we could use a language score to show that a student had a significant cognitive disability and that is not the case . . . we were corrected by DOE . . . that it has to be based on an intellectual measure, not on a language assessment. So there are

> . . . a cadre of students who were identified as participating in access points that never had an intellectual assessment at all uh and there were several, that once we did the intellectual assessment they could not meet the criteria that is um set for access point curriculum participation. So um my assumption is that that student is um in that category. So . . . if there is an IQ that shows . . . 70 or higher the state has told us in no uncertain terms that that student should not be on access points. So here's the problem, the kid's been on access points for three years so um he's going to be very far behind in the curriculum. And I just don't, I mean it's just I I don't even know what to say about it. I I I'm just kind of reporting facts. . . .

28. As the District admitted, these students were selected to be placed on modified standards and curriculum, which eventually became the Access Points standards and curriculum. The students also were not required to take the FCAT, but would take an alternate standard assessment. As noted earlier, in order to accomplish a change in placement for these students from general education standards and curriculum to modified standards and curriculum and not be required to pass the FCAT, the students' IEP teams had to determine that the students had a significant cognitive disability.

29. At the time the list of Students was developed, guidance from the Florida Department of Education (FDOE), as well as the U.S. Department of Education (U.S. DOE), directed the IEP Team to take a holistic approach and view all information

available when determining whether a student had a significant cognitive disability, which term remained undefined. This guidance was later memorialized in FDOE's "Guidance Document: Significant Cognitive Disabilities," dated October 19, 2012.

30. Under the guidance, the information districts were able to consider included psychological assessments, mental health assessments, achievement test data, adaptive behavior assessments, previous statewide assessment and district-wide test scores, language assessments, curricular content, aptitude tests, school history, observations, student response to instruction/intervention, attendance records and medical records. Importantly, no one test or assessment could dictate the determination of a significant cognitive disability. However, the guidance clearly stated that the cognitive disability had to be significant to the point of impacting "all aspects of the student's academic, independent functioning, community living, leisure, and vocational activities."[5/] In short, the disability had to severely impact both the intellectual and adaptive abilities of a student.

31. Notably, neither party in this litigation presented evidence of what abilities constitute cognitive abilities or what lack of abilities constitute cognitive disabilities, let alone significant cognitive disabilities. In that regard, according to the Merriam-Webster Dictionary, Online Edition, cognitive is

defined as: of, relating to, being, or involving conscious intellectual activity (such as thinking, reasoning, or remembering). See "Cognitive" Https://www.merriam-webster.com/dictionary/cognitive, (last visited September 30, 2019). Ability is defined as: the quality or state of being able. See "Ability" Https://www.merriam-webster.com/dictionary/ability, (last visited September 30, 2019. Combining the two definitions for purposes of education results in a definition of cognitive ability as: a general capability involving intellectual or mental activity. Such abilities include abilities like reasoning, problem solving, planning, abstract thinking, complex idea comprehension, and learning from experience. These types of abilities are the abilities assessed on standard tests of intellectual abilities and general intelligence (IQ) like the Woodcock-Johnson or the Wechsler tests, involved in this case.

32. Importantly, there was no evidence that indicated language impairment alone constituted a significant cognitive disability in 2012 or to present under any guidance provided by federal or state authorities. There was evidence that in 2012 language impairment combined with a below average IQ might suggest a cognitive disability that might impair a student intellectually and adaptively. However, under all guidance at

the time, significance depended on the global impact of a student's cognitive disability.

33. As indicated, Petitioner, who prior to this time was not identified as having a significant cognitive impairment and was being educated under general educational standards and curriculum, was one of the students selected for removal from general education standards and curriculum because it was felt by school staff that he was not likely to pass the FCAT.

34. Consequently, after the March IEP meeting combined with unspecified concerns voiced by the parent, school-based members of the Student's IEP team convened a reevaluation meeting on April 10, 2012. Based on a misunderstanding of FDOE guidance that language assessments alone could be considered as a factor in removing a student from taking the FCAT, the school-based members of the IEP team, which did not include a psychologist, recommended that a language reevaluation occur. Notably, the recommendation occurred within a month of the March 2012 IEP meeting, where no new evaluations or reevaluations were sought. More importantly, the team members present at the April meeting did not recommend that a psychological evaluation or any reassessment of cognitive abilities occur and input regarding the need for cognitive assessment was not sought from any school psychologist.

35. The evidence showed that the decision to seek a language assessment was made without prior notice of the meeting to the parent. As a consequence, the parent was not present during the reevaluation meeting. However, the evidence also demonstrated that the Local Education Agency (LEA) representative at School A, who participated as an IEP team member in the reevaluation meeting, contacted the parent after the meeting in order to gain the parent's consent for the language reevaluation. Further, the evidence demonstrated that the parent did consent to the language reevaluation. Given this consent and the lack of any evidence of materiality, the evidence did not demonstrate any violations of IDEA. Moreover, any objections to procedural irregularities relative to notice and parent participation are outside the statute of limitations for IDEA and Section 504. As a result, Petitioner's claims in regard to notice and parent participation, relative to this meeting, are dismissed.

36. More importantly, the totality of the evidence in this case indicated that the April reevaluation meeting was a pretext to lay the groundwork for removing the Student from general education standards and curriculum because it was feared that he would not pass the FCAT with its attendant consequences.

37. On April 12, 2012, in an unusually short amount of time, a Communication Skills–Assessment of Language test was performed. The same day a "Speech/Language Report" was written.

The assessment did not provide any new information regarding the Student's language impairment. It remained severe.

38. Again, in an unusually short amount of time, the day after the language reevaluation, an IEP meeting was held on April 13, 2012. Records reflect that on April 10, 2012, the parent was notified of the April 13, 2012, meeting by telephone, and gave permission for the meeting to be held without the parent. However, with less than a few days' notice, the parent was not provided a reasonable opportunity to attend or participate in the meeting and did not attend or participate in the meeting. Further, while the parent knew an IEP meeting was scheduled, the parent was not notified that a change in eligibility or placement was being considered or the very real impact on education that such changes would cause.[6/]

39. The better evidence demonstrated that no new goals, services or accommodations were added to the Student's IEP. However, the school-based members of the IEP team with essentially no new data or information removed the Student from a primary eligibility of SLD and designated LI as his primary eligibility with SLD as his secondary eligibility. Importantly, the eligibility criteria for SLD in place since March of 2009, specifically excluded children with "learning problems" that primarily result from an intellectual disability. Fla. Admin. Code R. 6A-6.0 3018(1). Further, the school-based members of the

IEP team, based on the language assessment alone and with no updated input or assessment from a psychologist indicating a pervasive impact of the Student's language impairment on all aspects of his academic, independent functioning, community living, leisure, and vocational activities, concluded that the Student had a significant cognitive disability and removed him from an education based on general education standards and curriculum to one based on modified standards and curriculum. As indicated, the school's action was based on a misinterpretation of guidance, discussed earlier, passed down from federal and state authorities through District authorities to school-based personnel.

40. Oddly, the IEP continued the Student on a regular diploma track. There was no evidence if the designation regarding the diploma was a mistake or deliberate obfuscation, since at the time a student on a modified curriculum could not receive a standard diploma. However, the designation served to hide the impact of the removal from general education standards and demonstrated that the change was more related to quickly removing the Student from FCAT testing. The evidence also demonstrated that the school's actions did not provide the Student an appropriate education, would have very serious consequences later in the Student's education and are directly

related to later violations of IDEA and Section 504 by the District.

41. On the other hand, at this time, the evidence did demonstrate that staff at the school was caring and very concerned about the Student's education. They were not indifferent, deliberate or otherwise, to his situation and did not violate the Student's civil rights under Section 504.

42. Thereafter, the Student remained on modified standards and curriculum in his 4th-grade year (2012-2013) and Access Points standards and curriculum in his 5th-grade year (2013-2014). In spite of the claims that the placement was explained to the parent, which testimony was not credible, the better evidence demonstrated that the placement was not reviewed or addressed again during these elementary school years. The evidence demonstrated that the parent consented every year to alternative testing and/or placement on Access Points, which forms changed over the years as more explanatory information was added to the forms.[7/] As such, the evidence demonstrated that the parent had sufficient notice and information about the Student's placement on Access Points standards, including the impacts of such placement by March 20, 2014, in the Student's 5th-grade year, when the parent signed the parental consent form outlining the Student's placement and the impacts of such placement on receiving a diploma.

43. More importantly, the evidence relative to the Student's education demonstrated that the Student did not have to be on grade level in his education and was not on grade level during 4th and 5th grades. The evidence also demonstrated that the Student participated in the Florida Alternate Assessment for Reading, Math and Writing in 2013. He scored a 9, 8, and 8, respectively, out of a possible 9 in each section. In reading, the parent report describes this level of performance as an Independent Level in Reading that "is the highest possible performance level and reflects a higher level understanding of challenging academic expectations and the ability to provide solutions to complex problems with consistent accuracy." Such scores indicated that the Student was capable of achievement on general education standards, curriculum and testing, as well as, perform on grade level with appropriate services and accommodations. Remarkably, the scores did not cause any school personnel to question the Student's removal from general education standards and curriculum.

44. Additionally, the educational record reflects that the Student was successful while on modified/Access Points standards and was making progress towards his IEP goals from 4th to 5th grade. However, such success is expected since the standards, material and testing were simplified. As indicated, the Student was not on grade level and was not required to be on grade level.

He was also not required to meet the general education standards. More importantly, he was never provided the exposure or opportunity to meet general education standards as required by IDEA once he was inappropriately placed on modified/Access Points standards. Further, the Student's IEPs for those years were not appropriate for the Student because they were based on alternate standards on which the Student should not have been placed. The same analysis and conclusions apply to the IEPs in the following years through 6th, 7th and part of 8th grades.

45. The evidence also demonstrated that the Student was removed from ESY in 2013 and did not receive the services thereafter. The parent was aware of the Student's removal from ESY and does not appear to have objected to the lack of ESY services. There was no evidence that demonstrated that removal of ESY services had a negative impact on the Student. Similarly, there was no evidence that the Student should have received ESY services during those years. Additionally, there was no evidence that the removal of ESY services was based on the Student's disability or was done with deliberate indifference to the Student's civil rights. Given the lack of evidence and the fact that removal from ESY during 2013 was outside the time period for the statute of limitations for IDEA and Section 504, Petitioner's claims in regard to ESY during 2013 and 2014 should be dismissed.

2014-2017 (6th through 8th Grade)

46. For the 2014-2015 school year, the Student began middle school at School B, in the 6th grade, in August 2014. His eligibilities at the time were LI and SLD. He entered 6th grade with an IEP that was developed on March 19, 2014, during his 5th-grade year. The IEP indicated that placement of the Student, who was not intellectually disabled, was in a separate class in an Intellectually Disabled (InD) Cluster classroom. The evidence demonstrated that the only reason the Student was placed in an InD Cluster classroom was because that was where "kids went for Access Points that were on Access Points." The placement decision was clearly for the convenience of the District, inconsistent with his eligibilities and not based on the individual needs of the Student. More importantly, the placement was a direct result of the decision in 2013 to classify the Student as having significant cognitive disabilities and removing him from general education standards. The placement also demonstrated the lack of consideration given by school staff to the Student's classification over the years as having a significant cognitive impairment.

47. As indicated, the evidence demonstrated that the placement carried forward in 7th grade (2015-2016) through to almost the end of 8th grade (2016-2017) and continued to not provide the Student with exposure or opportunity to meet general

education standards. Given this lack of exposure to curriculum and inappropriate characterization of the Student as having a significant cognitive disability, the evidence demonstrated that the March 2014 IEP was not appropriate for the Student. Likewise, as indicated, the same is true of all the IEPs since March 2014. As such, those IEPs failed to provide FAPE to the Student in violation of IDEA.

48. As a consequence, the Student, who, on paper, appeared to be doing well because of simplified standards and curriculum, was not on grade level and did not have the knowledge base to perform on grade level. By the end of 6th grade the Student was about two grades below grade level in math and reading. By the end of 7th grade the Student had regressed in reading from a 4th-grade level to between a 2nd and 3rd-grade level and was four or five years behind in reading. In math, at the end of 7th grade, the Student was performing at the 5th-grade level and was two years behind.

49. Indeed, as indicated earlier, evidence demonstrated that the Student in 2013 participated in the Florida Alternate Assessment (the FAA, now FSAA) for reading, math and writing with high scores. The Student's score of 9 out of 9 at an independent level in reading is the highest possible performance level and reflects "a higher level understanding of challenging academic expectations and the ability to provide solutions to complex

problems contained in the independent grade level access points." Similarly, the Student scored 8 out of 9 in math and writing. Scores of 8 demonstrate "a more comprehensive understanding of challenging academic expectations and the ability to provide solutions to complex problems contained in the independent grade level access points." The scores were reflected in the Student's March 19, 2014, IEP, but did not cause a review of the 2012 decision or review of placement of the Student in an InD Cluster classroom. Similarly, the evidence demonstrated that the Student took the FAA administered in the spring of 2014. On that assessment, the Student scored 9 out of 9 at the independent level in math and reading. The Student also took the FAA in the spring of 2015 towards the end of 6th grade. He scored 8 out of 9 in reading and math. Again, the data did not trigger a review of the decisions to place the Student on Access Points or in an InD Cluster classroom.

50. At some point in 2015 and under pressure from the federal government to reduce the numbers of student's being assessed by alternative methods, FDOE began scrutinizing the records of students taking the alternative assessment to ensure that only those students with significant cognitive disabilities were assessed and educated under Access Points standards. The evidence did not demonstrate there was a change in FDOE guidance or policy on determining if a student had a significant cognitive

disability. The evidence did demonstrate that stricter enforcement of earlier guidance that limited students on an alternate assessment to those with a significant cognitive disability was imposed by FDOE on School Districts, including Respondent.

51. As a consequence, sometime in 2015 or 2016, FDOE audited Respondent's records of students taking the FAA to ensure there was evidence of the student having a significant cognitive disability. In Respondent's case and at FDOE direction, a list of students whose records did not contain such evidence was developed by the District with directions to review each student's participation in Access Points standards, assessment and curriculum. The Student, herein, was one of the students that the District was required to review.

52. As a result, the School District convened a committee of District members to address FDOE's increased enforcement. The District committee was colloquially referred to as the "Landings Team." The committee was comprised of Tim Gissal (school psychologist), Dina Gosser (chair for the social worker department), and Vicky Stillo-Gross (compliance liaison program specialist). At some point, the committee instructed the schools in the District to reevaluate students, like the Student here, who had been classified as having a significant cognitive disability based on their language disability.

53. On May 17, 2016, close to the end of the Student's 7th grade year, the District scheduled a reevaluation meeting to determine which evaluations to complete in order to assess whether the Student had a significant cognitive disability. However, unlike the meeting in 2013 where, in a few days a group of three educators inappropriately determined the Student had a significant cognitive disability and placed him on alternative standards, assessment and curriculum, the size of the 2016 reevaluation team increased significantly, and appropriately included a speech-language pathologist; school administrator; ESE teacher; ESE liaison/LEA Representative; ESE compliance liaison; school counselor; psychologist and the parent.

54. During the meeting, the team reviewed the initial evaluation, the subsequent reevaluations, the current classroom and school-based assessments, which included FAA scores, SuccessMaker scores and data from the Unique Learning Systems and Achieve 3000 instructional systems. Based on that review and for the first time since 2008, the IEP team recommended completion of a psychological evaluation, educational evaluation, social/developmental history, behavior rating scales and measure of adaptive functioning. The team also recommended completion of a communication skills assessment of language evaluation. The parent consented to the evaluations and the evaluations were completed over the next several months.

55. On August 2, 2016, the social worker for the school interviewed the parent and had the parent complete the Adaptive Behavior Assessment System, Second Edition (ABAS-II), parent form and the BASC-2 Parent Rating Scales A. The assessments were part of a social/developmental history evaluation completed by the social worker on August 3, 2016. The parent-reported data on the ABAS-II yielded a General Adaptive Composite (GAC) score of 86 and was considered Below Average (scores from 90 to 109 are considered Average). The Student's component scores within the GAC measure were significantly variable with a Conceptual component score of 85 (Below Average), a Social component score of 93 (Average) and a Practical component score of 89 (Below Average). On the BASC-II, parent-reported data yielded clinically significant scores in Hyperactivity, Depression, Internalizing Problems, Atypicality, and Functional Communication. Notably, Depression and Internalizing Problems would become significant later in the Student's education. At this point, the social worker recommended placing the burden of addressing these issues on the parent and a private provider at the parent's expense.

56. Robbie Lees was a school psychologist for Sarasota County Schools, assigned to School B. He was assigned to perform psychological and educational evaluations of the Student.

Mr. Lees testified that the Student was one of the nicest students he had ever evaluated.

57. Prior to administering any assessments, Mr. Lees reviewed the Student's cumulative record and visited the Student's classroom. As part of his review of records, he looked at the psychoeducational evaluation completed in 2008. He noted that the 2008 evaluation found that the Student needed visuals to learn and that he needed prompting to make sure he was paying attention. What stood out to Mr. Lees in the Student's records was that the Student's profile was what was expected of a student with a language impairment. Indeed, Mr. Lees testified that in his opinion, the Student never had a significant cognitive disability and that the scattering of scores indicated the Student was a classic learning-disabled child. He also testified that a language deficit is different from cognitive deficits.

58. On August 30, 2016, after the start of the Student's 8th-grade year (2016-2017) and as part of the psychological evaluation, the Student was administered the Wechsler Intelligence Scale For Children, Fifth Edition (WISC-V). The test is a well-recognized, normed, reliable and valid test of intellectual function for students aged 6 to 16 and is the sequel to the WPPSI-III for preschool-aged students that was administered to the Student in 2008.

59. On the WISC-V, the Student obtained a full-scale IQ of 66 (down from 81 but equal to or above one percent of same age peers) and a nonverbal index of 68 (down from 72 but equal to or above two percent of same age peers). Both scores were in the Extremely Low range of scores. However, the nonverbal index was considered a "better indicator of his true ability" at the beginning of 8th grade with his "true score" in the range of 64 to 75. Additional scores obtained by the Student on the WISC-V were a verbal comprehension index of 65 (Extremely Low but equal to one percent of same age peers); visual spatial index of 75 (Very Low but equal to five percent of same age peers); fluid reasoning index of 72 (Very Low but equal to three percent of same age peers); working memory index of 88 (Low Average but equal to 21 percent of same age peers); and a processing speed index of 66 (Extremely Low but equal to one percent of same age peers). Importantly, the evidence demonstrated that the lowering of the Student's scores was a direct result of the Student's lack of exposure to standard curriculum between 3rd and 8th grade.

60. In order to assess the Student's academic performance, subtests contained in the Woodcock-Johnson IV: Test of Achievement, Form A (WJ-IV ACH) were administered to the Student on September 9, 2016. The WJ-IV ACH is a well-recognized, normed, reliable and valid test of a student's academic achievement. The Student's scores on the subtests yielded a

Broad Reading score of 74 (Low with a grade equivalent of 3.7 but equal to four percent of same age peers), a Reading Comprehension score of 70 (Low with a grade equivalent of 3.0 but equal to two percent of same age peers) and Broad Mathematics score of 66 (Very Low with a grade equivalent of 3.5 but equal to one percent of same age peers). Notably, the 8th-grade scores indicated the Student was about five years behind in his education, which is about the same number of years since he had been removed from general education standards in 3rd grade. These scores are indicative of the very real harm that was done to the Student in his education when he was inappropriately removed from general education standards and curriculum.

61. On November 14, 2016, the Student was administered the OWLS-II as part of a Speech/Language evaluation. The scores were in the mid to low 70s and in the Below Average range. They were similar to the Student's earlier language assessments and continued to reflect the Student's severe language impairment.

62. These new scores and evaluations were first brought to the District and reviewed by the District Landings committee. The District committee was not the IEP team. Indeed, the IEP team would not meet until February 17, 2017, nine months after consent for the reevaluation was signed by the parent. The record was not clear when the District review occurred. However,

the District committee, after consultation with FDOE, instructed the school to assess the Student's adaptive functioning.

63. As a result, on December 16, 2016, and halfway through the Student's 8th-grade year, additional testing was conducted by Mr. Lees to determine the Student's adaptive functioning. The ABAS-II, Teacher Rating Form was completed by two of the Student's teachers. The scores generally fell in the average range with a GAC of 70 and 63 (Average and equal to 70 and 63 percent of same age peers) respectively. These scores were very different from the scores obtained from the parent, but appeared to be more reliable scores.

64. Mr. Lees also felt additional testing was needed to assess the Student's nonverbal intelligence since that was the Student's strength. Therefore, on January 13, 2017, the Student was administered the Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-II). The CTONI-II is a well-recognized, normed, reliable and valid test of intelligence, which limits the impact of language on a student's scores. Standard scores obtained in the assessment are based on a mean score of 100 with a standard deviation of 15.

65. On the CTONI-II, the Student obtained a score of 75 (Poor but equal to the five percent of same age peers) on the Pictorial Nonverbal Intelligence Composite. The Student obtained a score of 84 (Below Average but equal to 14 percent of same age

peers) on the Geometric Nonverbal Intelligence Composite. Additionally, the Student obtained an overall score of 78 (Poor but equal to seven percent of same age peers) on the Nonverbal Intelligence Composite (NVI). The NVI score on the CTONI-II was considered to be the best indicator of the Student's current academic and adaptive performance. Notably and unusually, the psychoeducational evaluation report did not make recommendations regarding the Student's education, classification or placement. Indeed, the evidence indicated that neither the District nor the school had any clear idea or plan on how to provide FAPE to the Student.

66. At some point, Mr. Lees and Ms. Mims (ESE liaison for School B) met with the parent to review the new evaluations. Ms. Mims described the meeting as emotional. Mr. Lees testified:

> A: So I can tell you right now, I've cried over this numerous times and I cried in the meeting with [the parent].
>
> So we reviewed the report. I shared the information with [the parent]. I showed [the parent] the good and the bad. Talked about how, really, on Access, [he] was scoring 8s and 9s. [He] was the superstar teacher's helper in that classroom, and that this was going to afford [him] more opportunities and it was something that I think we owed to [the Student] to give it a try.
>
> The Judge: What was?
>
> Q (by Mr. Pendley): To give what a try?

> A: To remove [him] from Access Points. I know that mom had concerns. I think [the parent] was proud of the progress that [he] had made, but certainly worried about what the future looked like for [the Student]. We were both quite emotional, teary-eyed. I reassured [the parent] of a couple of times. I was honest that it wasn't going to be easy, and we were going to provide [him] with the structure and support that [he] needed to be successful at [School B], because that's where I was at at the time. But that with [his] language impairment, that [he] was going to have to work really hard.

Mr. Lees also testified that the parent expressed concerns about the Student being with a new group of students. Additionally, Mr. Lees testified:

> To be completely honest, [the parent] was very emotional, and I think it was hard for [the parent] even to get words out. So it was more me explaining and [the parent] kind of shaking [the parent's] head and just – that was [the parent's] baby and [the parent] wanted us to take care of [him].

More importantly, the evidence was clear that neither the parent nor the Student were happy and were somewhat traumatized by the District's about face on whether the Student had a significant cognitive disability and eventual planned placement on general education standards.

67. On February 17, 2017, an IEP meeting was held. The parent was not present at the meeting, but did receive notice of the IEP meeting. The evidence demonstrated that the parent asked that the meeting be moved to a date and time the parent could be

in attendance, providing an alternative date and time to the school. However, the parent's request was not honored. Instead, the school called the parent, who had always been cooperative with the school, and asked to proceed without the parent's presence. The parent consented and gave permission for the meeting to proceed without the parent. While it is troubling, given the history of this case, that the school did not comply with the parent's request for an alternate meeting date, the evidence was clear that the parent had knowledge of the upcoming change in placement to general education standards and that a new IEP was going to be developed at that meeting. Further, the evidence demonstrated that the District complied with the notice requirements for IEP meetings and that any procedural irregularities in scheduling the meeting were not material. As such, the District did not violate IDEA and the allegations of the complaint relative thereto is dismissed.

68. Notably, the only people present for this meeting were Ms. Mims, Mr. Dixon (a special education teacher), Christy Savage (the SLP) and the Student. There were no general education teachers present and no evaluators present. As indicated, the team did have the reports, but those reports were uniformly short on recommendations for educating the Student. As such, the team did not have the appropriate expertise at the meeting to create an IEP for the Student. The failure to ensure appropriate

expertise at the meeting violated IDEA and failed to provide FAPE to the Student.

69. At the meeting, the IEP team relied on the newly collected data contained in the reevaluation report and comprehensive psychological and educational report. The decisions made during this IEP meeting were memorialized in writing in an IEP, dated February 17, 2017.

70. On paper, the February 2017 IEP placed the Student back on a general education curriculum, required him to take standardized tests for the first time in his academic career and moved him into a general education setting with 80 percent or more of his time spent with nondisabled peers.

71. However, a review of the IEP created on February 17, 2017, demonstrates that it was not created for the individual needs of the Student, in this case, but appears to be created for a student named Jerome since the first goal of the IEP in the domain of Curriculum and Learning states that "Jerome will" achieve the goal. Other goals do state that the Student will achieve the goals. However, such discrepancy throws into question the other goals contained in the IEP. The error is compounded by the fact that the IEP states that the Student will be educated with nondisabled peers 80 percent of the time but then places delivery of his services in an ESE classroom for writing, math and reading. Those courses constitute the bulk of

the Student's day. Language therapy (two times a week, in 30 minute sessions) appears to be the only service offered in the "school environment." Further, the IEP listed the strengths of the Student as being able to write 3 to 4 paragraphs on topic; decode multi-syllabic words; identify, with support, characters, setting, and major events in literary text; and that his vocabulary skills were on grade level. However, inconsistent with the Student's strengths, the second goal for the Student on the IEP, in the domain of curriculum and learning, was for the Student to write three simple sentences. The February 2017 IEP stated that the Student would take the general standard test for assessment purposes. However, the District administered the FSAA to the Student for English, math and science on April 28, 2017.

72. In addition, the February 2017 IEP added assignment planners and graphic organizers, which accommodations were appropriate for the Student. On the other hand, the same IEP no longer offered several accommodations that were available under the March 2016 IEP. The removed accommodations included: the use of a calculator, materials broken down into manageable parts, explicit cues, small group setting for instruction, increased wait time, and frequent feedback and praise. Additionally, no testing accommodations were added to the February 2017 IEP. Notably, all of these accommodations can be supplied in a general education setting. More importantly, the evidence demonstrated

that the removed accommodations were accommodations the Student continued to need. Further, and most egregiously, the February 2017 IEP does not address the gap between where the Student was academically functioning and where his peers would be academically functioning in the general education setting. There was nothing in the IEP, either during the school year or over the summer, to provide the Student with tutoring or ESY to try to lessen the gap in his knowledge that had developed from years in an inappropriate placement. Based on the evidence, the need for tutoring and ESY was absolutely foreseeable when the February 2017 IEP was developed and during the years thereafter.

73. The evidence was clear that the District and IEP team knew that the change to general education standards and curriculum was going to be a serious challenge for the Student and that he was going to need significant support to be successful. The District and the IEP team were aware that the Student was at least five grades behind in reading and math, had not been required to master general education standards for years and had not been on grade level for the same number of years. However, except as noted above, the February 2017 IEP provided no additional services; no additional accommodations; no independent functioning goals; no social emotional goals to help with the very significant changes in the Student's education and no tutoring or ESY. Given these facts, the evidence demonstrated

that the February 2017 IEP was not appropriate for the Student, failed to provide FAPE to the Student and violated IDEA. In particular, the failure to provide intensive tutoring to ameliorate the deficits in the Student's education caused by a multiple year lack of exposure to general education curriculum demonstrated deliberate indifference to providing services that could lessen the educational gap. Such indifference violated Section 504 by failing to provide FAPE to the Student.

74. The evidence demonstrated that both the District and school personnel involved with the Student during this time were very good at paying lip service to the concepts in IDEA regarding team development of an IEP, team decision making regarding the education of a student and FAPE principles, but those IDEA concepts were not provided to this Student.

75. In that regard, after the February 2017 IEP was implemented, there were no significant changes in the Student's education until the very end of 8th grade. Despite the paperwork from February 2017, the Student remained in the same InD Cluster classroom, with the same teacher and the same group of students. Detail grade reports show the Student continued in Access curriculum courses for science, math, and language arts through May 2016. The evidence also demonstrated that the Student remained in his InD Cluster classroom the last few months of school so that he would be with a familiar teacher in a familiar

class. The decision to transition the Student slowly to a general education environment was reasonable. However, the better evidence demonstrated that the Student did not receive general education curriculum during that time. Curiously, as indicated earlier, the Student was administered the alternative assessment instead of the FCAT as should have been required since the Student was now allegedly on general education standards. Indeed, it was not until two weeks before school ended that the Student was moved into general education classes for the first time. The change to general education curriculum so close to the end of the school year was insignificant and did not provide FAPE to the Student.

76. The District and the IEP team knew the February 2017 IEP would carry over into 9th grade, the beginning of high school for the Student. Transition to high school is generally stressful for many students. In this case, the evidence demonstrated that it was extremely stressful for the Student who was fearful of being bullied in high school and generally afraid of the larger environment that he would be entering to which he had never had significant exposure. Moreover, the evidence was clear that the February 2017 IEP was inadequate and did not provide FAPE to the Student particularly in regards to transition to high school. Again, the inactions of the IEP team and the District violated both IDEA and Section 504.

77. After the meeting, the District failed to issue a prior written notice after the February 2017 IEP meeting. However, the parent did receive notification from the school of the change from a modified curriculum to a general education curriculum, standardized testing and general education placement when the February 2017 IEP was sent to her. Given the fact the parent had actual notice of these changes, the evidence did not demonstrate that the procedural irregularity regarding the absence of a written notice was material. As such, the irregularity did not violate IDEA and allegations regarding this procedural irregularity are dismissed.

78. The Student's report cards demonstrate that the Student made progress on his goals and in his classes for the remainder of his 8th grade year. However, the evidence demonstrated that such progress was made on Access Points curriculum and not general education curriculum. Further, as indicated earlier, the Student took the alternate assessment for English, math and science toward the end of 8th grade. The Student's scores on the FSAA were in the mid-range to upper-low range of scores. The scores were not the high-level scores he had achieved on the alternate assessments in earlier years. The Student was promoted to 9th grade with no services (ESY, remediation nor tutoring) provided over the summer to prepare the Student for high school or expose him to general education curriculum to begin to try to

close the Student's knowledge gap. The lack of these services failed to provide FAPE to the Student and violated both IDEA and Section 504.

2017-2019 (9th and 10th Grade)

79. The Student attended 9th grade at School C from August 14, 2017, to January 15, 2019. The Student's 8th-grade IEP carried over from School B to School C.

80. Prior to the Student's attendance at School C, School B's LEA representative met with School C's LEA representative, in an attempt to ensure a smooth transition for the Student, who was placed in larger general education classes, on a general education curriculum, for the first time in almost six years. The evidence demonstrated that no one appeared to notice that the Student's February 2017 IEP had goals for another student or that the goals in the February 2017 IEP were not consistent with the Student's present levels of performance. Notably, the Student was not on grade level and had received no tutoring nor remediation over the summer to close the gap created by not being on general education standards for almost six years and/or prepare him for the transition to high school and the increased demands of a general education curriculum. The evidence demonstrated that the failure to provide such services would be disastrous for the Student, failed to provide FAPE to the Student, and violated IDEA and Section 504.

81. In 9th grade (2017-2018), the Student immediately began to struggle in his classes. The evidence demonstrated that during the first quarter of 9th grade, the Student was failing or on track to fail. He had an F in Earth Space Science, and Ds in Intensive Language Arts, Critical Thinking Skills and English. During the second quarter the Student continued to fail. He had Fs in Algebra, Earth Space Science, Intensive Language Arts and English and Ds in Hope class and in Critical Thinking Skills. In addition, the Student's IEP progress reports showed that he was not meeting with success in high school. He had satisfactory progress on a couple of goals in the first quarter but by the second quarter he was making only minimal progress on all of his goals. The Student began skipping classes. Such behavior was new and unusual for the Student who had always enjoyed school.

82. Stephen Marland, the Student's volunteer Big Brother, noticed changes in the Student almost immediately after beginning 9th grade. Mr. Marland noticed that the Student had failing grades and that his attitude towards school had changed to the negative because the Student felt very different from his class peers. The evidence was clear that the Student's emotional state was declining and he was becoming depressed.

83. The evidence showed that the Student's failure in school was the direct result of failing to implement the Student's IEP. In that regard, the IEP required the Student to

be placed in ESE supported classes with direct instruction in those courses. However, the evidence demonstrated that the Student was actually placed in core curriculum classes in English Language Arts, responsible for teaching reading and writing, and Algebra with long-term substitutes who were not ESE certified and who were not receiving support from an ESE teacher. The evidence also demonstrated that the teachers in those classes did not know what direct instruction was. The evidence was clear that the Student needed these services and support in class. There was no credible evidence to explain the placement of the Student in these classes and no credible evidence to explain why the Student was allowed to remain in these classes for his 9th-grade year, while failing. Further, there was no credible substantive evidence that, other more appropriate supported ESE classes were available to the Student, either at School C or in another District school, especially since no attempts to move the Student to other classes or another school were made during this time.

84. In January 2018, the District scheduled a reevaluation meeting for January 17, 2018. At the meeting, the parent, her friends/advocates and the teachers voiced very serious concerns that the Student was exhibiting odd behavior, was depressed, was shutting down, and was far behind in understanding material and struggling in class, while relying on other students to help him. In fact, the Student attended the reevaluation meeting and cried.

However, despite the Student's clearly declining emotional state, no evaluations or reevaluations were sought. Further, no steps were taken to provide mental health counseling to the Student or place him in ESE supported classes. In fact, the evidence demonstrated that there was disagreement among the IEP team members at the January 2018 reevaluation meeting about keeping the Student's IEP eligibilities the same. At that time, the evidence indicated that the District wanted to move the Student back to a modified curriculum, but that Dr. Candis Castorani, the psychologist for the District, objected. Oddly, information regarding the discussion was not contained in the Student's educational record. There was, however, a promise to get back to the parent or her advocates on what other services might be available to help the Student.

85. After the reevaluation meeting, Dr. Castorani sent an email to, among others, Tammy Cassels, district ESE supervisor; Brittany Shurley, district ESE program specialist; and Debra Giacolone, district supervisor of Pupil Support Services. The email shared concerns about the Student, as well as inquired about what the District was doing for the group of students that had an abrupt change in their curriculum, when they were removed from Access Points standards to general education standards. Next, Dr. Castorani met with Ms. Cassels and Ms. Giacolone to

discuss what types of supports or interventions could be put into place to help the Student. The District personnel never got back to Dr. Castorani as to potential supports for the Student. Dr. Castorani followed up again in the Spring of 2018, but did not receive a response from District personnel. As a result, Dr. Castorani was unable to follow up with the parent, as promised at the reevaluation meeting, resulting in the further erosion of any trust the parent had in the school system.

86. As a consequence of the school's or the District's failure to act, the Student continued to fail and his mental health continued to decline. This failure to act did not provide FAPE to the Student and violated IDEA. Moreover, the failure to act demonstrated a deliberate indifference towards the rights of the Student to receive FAPE and violated Section 504.

87. Because the required annual review of the Student's IEP was approaching, on February 15, 2018, an IEP meeting was held. Physically present at the meeting were Kim Belli, LEA representative, and Stacia Hill who signed as both the ESE teacher and the General Education teacher. Notably, the school participants in this meeting were surprisingly few, given the number of District personnel involved in the Student's case and the clear evidence of failure by the Student, as well as the Student's declining mental health.

88. The evidence demonstrated that there was no meeting notice provided to the parent prior to this meeting and that steps taken to provide notice were insufficient to notify the parent prior to the meeting. However, the evidence also demonstrated that the school staff intended to have the Student attend the IEP meeting, but they could not locate him for the meeting. As a result, Ms. Belli called the parent when they could not locate the Student. The parent remained on the telephone in order to participate in the IEP meeting where she reiterated concerns about the Student's mental health, grades and school work. Eventually, the Student was found hiding in a bathroom almost an hour later.

89. During the meeting, an IEP was developed for the Student. Under the IEP, the Student remained on general education standards and curriculum. The February 2018 IEP was the last agreed upon IEP for the Student.

90. The IEP reflected that:

> [The Student] needs academic support (reading, math and writing) and accommodations in the classroom on state and district tests. [The Student] needs extended time for assignments and assessments . . . ; preferential seating . . . and repeat, simplify and clarify directions or instructions. . . . Oral presentation of test items and directions to allow [him] to process the information.

Indeed, there was general concern by IEP team members, including the parent, that the Student was on a track that would cause him to eventually fail high school. The evidence reflected that, by this time, unless major interventions and services like intensive tutoring and mental health counseling, were provided to the Student, he would fail.

91. However, even with the above concerns, the February 2018 IEP did not significantly increase the Student's accommodations and support. In fact, the evidence demonstrated that the only changes in accommodations from the 8th grade IEP to the 9th grade IEP was the removal of assignment planners; the addition of oral presentation of directions, instructions or test items; and the reduction of extended time from 75 percent to 50 percent. The reduction in extended time was not explained by the evidence. However, given the Student's difficulty in completing school work and noted need for extended time, the reduction in time did not provide FAPE to the Student. Further, the addition of oral presentation of directions, instructions or test items, in particular, does not appear to be based on the Student's real needs because the record is replete with evidence from experts that the Student is a visual learner. There was no evidence to explain this apparent lack of individualization. Moreover, the evidence demonstrated that the goals in the February 2018 IEP similarly were not individualized for the Student in the domain

of curriculum and learning. Additionally, there was lack of goals or services in the IEP to address the Student's declining mental health issues and failure to participate or inattentiveness in class. Notably, data on the Student's lack of attentiveness was known to the school-based members of the IEP team, but not addressed in the IEP. In short, the evidence demonstrated that the IEP was not appropriate for the Student, did not provide FAPE to the Student and violated IDEA.

92. More egregiously, the evidence demonstrated that after the February 2018 IEP, the Student continued not to receive important direct instruction services from certified ESE teachers as required in the IEP. As a result, some of the Student's classes, including the critical classes of English/reading and Algebra, were taught by long term substitutes who were non-ESE certified or trained teachers. As indicated, direct teaching by an ESE certified teacher was a critical component of the Student's IEP, which the evidence demonstrated the District failed to provide. The failure violated IDEA and failed to provide FAPE to the Student.

93. On March 5, 2018, about three weeks after the February IEP 2018 meeting, the Student was picked up by another student multiple times and put into a trash can. This incident was video recorded and was distributed via snapchat. Brian Dorn, the assistant principal at School C testified: "The video of this

incident showed the perpetrator picking up [the Student] and putting [him] upside down – or attempting to put [him] upside down in a trash can several times before successfully doing so." The incident was investigated and found to be a bullying incident with the Student as the victim. As a direct result of this incident, the bully was removed from School C for the remainder of the 2017-2018 school year. The bully was allowed to return to School C the following school year. The Student was not informed of the bully's return. However, as bad as the above-described incident was, the evidence did not demonstrate that bullying had been an ongoing problem for this Student and was not addressed by the school. Indeed, the evidence only demonstrated that, over the years, the Student and the parent were concerned that he might be bullied; not that bullying had occurred and remained unaddressed. Further, the evidence did not demonstrate that the school's response to this incident caused a denial of FAPE to the Student, violated IDEA or Section 504. As such, the allegations regarding bullying and this bullying incident are dismissed.

94. At the end of 9th grade, the evidence showed that the Student was promoted to 10th grade. He remained at School C for a portion of his 10th-grade school year when he was withdrawn by the parent and enrolled in School D, a private school.

95. Again, the evidence demonstrated that no ESY, tutoring or remediation services were offered to the Student over the

summer or included in his IEP. The failure to offer such services to a failing student who had spent almost six years on Access Points standards and was now expected to achieve on general education standards is glaring. The evidence was clear that the Student needed these services in order to ameliorate the effects of being inappropriately placed on Access Points standards and curriculum. The failure to provide these services over the summer denied FAPE to the Student, violated IDEA and section 504.

96. Additionally, over the summer of 2018, Mr. Marland and the parent, who had asked Mr. Marland to help resolve problems with the Student's education, began to seek the Student's educational records. The evidence demonstrated that the level of frustration and mistrust of the school, by the parent and Mr. Marland was significant and growing. Over the summer, the two sought help from a candidate at a school board political rally they attended. The candidate directed them to Sue Memminger, a well-known and experienced special education parent advocate in the Sarasota area. Ms. Memminger requested Mr. Marland, who had participated in past meetings with District personnel on behalf of the parent and the Student, to gather the Student's educational records so that she could review them and develop a plan to help the Student. Later, Ms. Memminger would request the

aid of Ms. Mager, another well-known and experienced parent advocate in the Sarasota area.

97. Thereafter, Mr. Marland began the process of collecting the Student's educational records, which the evidence showed was a painstakingly slow and overly frustrating process. He first assembled all the records the parent possessed. He then reached out to someone at the District who referred him to Ms. Belli. Mr. Marland emailed Ms. Belli in September 2018, but records were not forthcoming. Ms. Belli referred Mr. Marland to the school's registrar, who sent Mr. Marland to the principal, who directed Mr. Marland to the district registrar, who directed him to the executive director of high schools, who finally required the parent to sign and notarize a consent form so that Mr. Marland could obtain the Student's educational records. The parent signed and notarized the form. Thereafter, Mr. Marland was only able to view the records, he was not allowed to copy the records. Mr. Marland was advised that he needed to physically bring the parent to the school before copies would be provided. The authority for such a requirement is not clear in the record and there does not appear to be any authority for such requirement. It took from September 15 through October 30, 2018, to get the first batch of educational records from the School District. Indeed, the record reflects that the parent and her advocates had to go to extraordinary efforts to obtain educational records and

other records in this case. The difficulty in obtaining records only served to undermine the parent's trust in the school and District.

98. In addition to extreme slowness in providing records, Mr. Marland was incorrectly advised by Ms. Belli that she needed written authorization from the parent before an IEP meeting could be scheduled. Further misinformation was disseminated by the District when the registrar advised Mr. Marland that the parent was required to sign an authorization form before he would be allowed to participate in any IEP meetings regarding the Student. All of this misinformation served to undermine the parent's trust in the school or District. In fact, the evidence demonstrated the parent's and the Student's mistrust was becoming toxic to continuing any relationship with the District.

99. Unfortunately, on October, 24, 2018, during the period of time the parent was seeking help for the Student, the Student's declining mental health, which the evidence demonstrated was the direct result of the District's denial of FAPE, led to the Student becoming suicidal and threatening to commit suicide by hanging himself. He felt he was a failure. As a consequence, the Student was involuntarily committed for a short period of time in a mental health facility. More importantly, the evidence was clear that the Student had no trust

in the school or the District and that it would be detrimental for him to remain in the public school system.

100. During the time the Student attended 10th grade at School C, the evidence demonstrated that the Student continued to struggle in all his classes and was failing.

101. After reviewing the records, the parent advocate, Ms. Magers contacted Ms. Cassels to explain she was working with the family and needed her assistance in scheduling an IEP meeting. The advocates had earlier requested that an IEP meeting be scheduled. However, at the instruction of District staff, Ms. Belli instead scheduled another reevaluation meeting. After contacting Ms. Cassels, a Meeting Notice reflecting both a reevaluation meeting and an IEP meeting was created, scheduling the meeting for November 9, 2018.

102. On November 1, 2018, Dr. Castorani sent an email to School C's administration attempting to put supplemental programs in place for the Student. However, she never heard back from the staff. At the time, Dr. Castorani informed School C and District liaisons that she recommended lower-level interventiontools be used with the Student, while she continued to follow up with her supervisor regarding Headsprout.com for supplemental instruction for borderline kids like the Student herein.

103. The School District held a pre-IEP meeting on November 2, 2018, regarding the Student. The meeting included school and District staff, with Sonia Figaredo-Alberts, executive director of ESE, and Ms. Cassels participating by conference call. The evidence demonstrated the District's educational plan regarding the Student was to do a reevaluation first, address eligibility, and then write an IEP for the Student. The focus of the plan was to change the Student's eligibility by dropping SLD in order to permit the IEP team to determine the Student had a significant cognitive disability and place him back on Access Points standards and curriculum. The plan was confirmed by an email from Brittany Shurley to the meeting attendees, including Dr. Castorani.

104. On Saturday, November 3, 2018, Dr. Castorani responded by email to the members of the meeting stating her objections to the plan to place the Student back on a modified curriculum. She stated as follows, in part:

> This child was then placed on access point curriculum despite having a Full Scale IQ score of 81 and having no adaptive rating scales completed. In my opinion as I stated last year, this student was inappropriately placed and was never given an opportunity to receive access to standard curriculum and that exposure after that until 2016.
>
> Last year when this case was discussed at length, we discussed compensatory education due to this.

This child is profoundly language impairment which affects [his] academic functioning but that does not mean that [he] has a significant cognitive disability, it just means [his] strength is nonverbal. Being in access point classes over the years is unjustifiable in my professional opinion given the 81 and the language impairment. Putting [him] back on access points and giving [him] a modified curriculum at this point will be the easy option in my opinion. [His] adaptive skills are strong and those are not due to 'street smarts' as was presented at the meeting yesterday. That is due to the fact that this child has always had these skills.

When [he] was reassessed in 2016, it is not a surprise that intellectual functioning measures are going to be diminished because of the lack of exposure as well as the depth and breadth of information that has been provided to [him] compared to same age peers. This was my experience in my last school. Kids who were in the 80's in initial evaluations were placed on access point curriculum before we had more solid criterion and when I went to re-evaluate, scores had often dipped 20- points on average which is substantial. This was no different for this child. . . .

The ability for this student was there, but given [his] repeated exposure to FSAA curriculum and not maintaining the rigor of standard curriculum has adversely affected [him] as seen in [his] academic scores from the WJ ACH. The scores from the WJ ACH also have to be taken with a grain of salt because [he] was assessed without being exposed to standard curriculum. . . .

Conversation about TAP [Technical Assistance Paper] for Significant Cognitive Disabilities was also brought up yesterday. Many conversations with the psychologists in the county, myself, Deb, and David Wheeler at the

FLDOE have had conversations since this TAP came out regarding the wording and nuances. While IQ is not the sole determining factor, you cannot blatantly disregard it either. Along with all of the things listed below, adaptive skills are huge as [he] mentioned with daily living skills, leisure, and independent functioning. As we know, this student is Average on Adaptive school scales (SS of 108 and 105) and Low Average with an 83 (Parent). When you look further, it says to look at school history and curricular content. This child was an IQ of 81 and should not have been put on access point curriculum in the first place. The TAP also says look at Language Assessments. The student is Language Impaired with a SS of 72. The TAP says look at Mental Health Assessments. The child is ADHD. The TAP also says look at Achievement Test Data. When you look back at [his] original FSAA scores back in 3rd-4th grade when that IQ was maintaining at an 81- [he] was maxing out on the FSAA assessment with 8's and 9's. . . .

Professionally and ethically, I cannot find justification for saying this student has a significant cognitive disability and will not do so. Please look at all of the data before making this decision as it greatly impacted this child already. As this is an IEP decision and not just my decision, please go in with all of the factual data before making your decision.

I am in no way saying that this child does not need help and assistance because [he] surely does and is why I am trying to get access to supplementary programs. Putting [him] on a modified curriculum and continuing with aspects of [his] day in an access point curriculum is not the solution in my mind, especially since [he] was taken off of access points. Last year we spoke about compensatory education given all of this and believe that this may be the better option rather than looking at eligibility and

> dismissing SLD to make [him] solely LI in order to propose a significant cognitive disability again.
>
> I think that the SLP needs to be brought into this conversation prior to this meeting as well since she was not part of yesterday's meeting and she is a service provider. I can voice my opinion in front of the parent advocate but would like to see if there is another solution besides the one that is being put on the table.

105. Because of her significant disagreement with the school and District meeting members, Dr. Castorani, for the first time in her career, asked to be removed from the Student's case. Her request was honored and Mr. Lees was reassigned as the psychologist on the Student's case. Notably and most troubling, Dr. Castorani's email was not contained in the Student's educational records but was only produced by the District in discovery, after the first segment of the hearing had concluded causing the Petitioner to recall Dr. Castorani as a witness to testify about the emails during the second half of the hearing. The failure to disclose this information in a timely manner to the parent and the parent's advocates demonstrates a lack of forthrightness on the District's part.

106. Evidence showed that a second pre-IEP meeting was held on November 6, 2018, to discuss the Student and develop a plan for the upcoming IEP meeting. After the meeting on November 8, 2018, Ms. Belli sent a draft of the reevaluation, a draft IEP and

evaluation to District staff. The draft IEP prepared for the November 9, 2018, IEP meeting, places the Student on alternate assessment, standards and curriculum with a career-oriented diploma track. Ms. Belli testified, which testimony is not credited, that placement on alternative standards was put in the draft IEP because the parent had indicated a desire for the Student to return to Access Points. The reevaluation that was also drafted included transition information collected from the Student on October 22 through 30, 2018, without the parent's nor the advocates' knowledge. The information was not shared with either the parent or the advocates prior to the meeting.

107. The District also instructed the school to have the Student take the Test of Adult Basic Education (TABE) so that the IEP team could look into Suncoast Technical College and gather job placement assessment data. However, the reevaluation information appears to have been collected to meet the District's obligation to address transition services in the Student's IEP.

108. The better evidence demonstrated that the documents were reviewed and approved by the District prior to the reevaluation/IEP meeting. The evidence also demonstrated that it is standard District practice to prepare and distribute a draft IEP to the IEP meeting participants for review, before the IEP meeting. Normally, the draft IEP reflects the position of the school-based members of the IEP team. However, the draft IEP is

discussed in full during the IEP meeting and changes can and will be made based on the IEP team's discussions during the meeting. In this case the better evidence demonstrated that school and District IEP team members had predetermined the educational plan of the Student in violation of IDEA.

109. The evidence demonstrated that the next day, on November 7, 2018, a third pre-IEP meeting was held. The third meeting was held to discuss how the District's educational plan for the Student would be presented to the parent and the advocates.

110. On November 9, 2018, the IEP team held the scheduled reevaluation/IEP meeting. The parent and the advocates attended the meeting. The draft IEP and change in placement were discussed. However, the advocates requested and the IEP team agreed that more data should be collected on the Student's classroom behavior and that the iReady toolbox assessment should be used to focus instruction and gather information on the Student before a change in eligibility could be considered. The IEP team also agreed to provide the teachers with an aide so that they would have more time to provide direct instruction to the Student. Placement of the aide in the classroom was to be coordinated with the Student so that he would not feel uncomfortable. Additionally, the IEP team agreed to communicate on a weekly basis with the parent regarding the Student's

behavior and education. The meeting ended with an agreement to meet again before the winter break in December 2018. Oddly, thereafter, a parent-teacher conference, not an IEP meeting, was scheduled for December 18, 2018.

111. By December 10, 2018, the evidence showed that except for the collection of data, none of the above-referenced services were provided. Further, as indicated, the aide was not used to allow teachers more time to provide direct instruction to the Student, but to collect behavioral data. The failure to provide these services was communicated to the school by the advocate on December 10, 2018.

112. More disturbing, the evidence demonstrated that the data collected by the aide was altered by school ESE and District ESE staff, Kim Ellis, Erin del Castillo and Brittany Shurley, to show behavior that the District desired to justify a return to Access Points standards and curriculum, as well as, be more parent friendly. For example, the aide noted the Student stared into space for 20 minutes not attending work. The aide's **data was changed to** reflect that the Student sat at his seat for 20 minutes playing on his phone. Further, school and District personnel significantly altered prompting levels from the original data collected by the aide; such that Level 3 prompting, indicating the Student needed continuous prompting for support in the classroom, was changed to level 1 prompting; indicating the

Student only needed minor prompting for support in the classroom. The evidence demonstrated that staff conduct related to such misrepresentations was systemic in the District and fundamentally violated IDEA, which is based on individualized education derived from an honest reporting of data. Further, the evidence demonstrated that the District's failure to provide agreed services for one and a half years and/or slowness to provide such services was material and failed to provide FAPE to the Student and violated IDEA. Moreover, the evidence showed that the District's failure to provide services for one and a half years and/or slowness to provide such services constituted deliberate indifference in the education of the Student and violated Section 504.

113. In the interim, the evidence demonstrated that the Student's mental health was declining. In a phone call between the parent and the advocate, the Student could be heard in the background crying and reporting that he had thrown away his school work because he was failing. He said, "momma I was failing. I'm a failure." The evidence demonstrated that the Student had a D in World History, and Fs in Math, Science and Intensive Language Arts.

114. Because the school had not provided most of the agreed upon services and having concerns about the Student, Ms. Magers contacted Ms. Cassels to discuss the Student's education and the

next steps in that education. During the discussion and based on the District's failure to provide agreed services and the need for more behavior data on the Student, the December 18, 2018, IEP meeting was cancelled. Additionally, during the discussion, a private school placement was discussed, but not promised. The District requested the advocate provide the District with tuition information so that the same could be discussed with the District ESE director.

115. On December 19, 2018, tuition information was provided to the District. Rather than address a private school placement as an alternative, the District instead responded that the parent could call the school choice office if the parent wanted the Student to go to a different District school. However, the evidence demonstrated that the District, for reasons that are not clear in the record, was systemically unable to provide FAPE to the Student who had been struggling and failing in school for more than a year, resulting in the declining mental health of the Student. There was no evidence that appropriate services would be provided at any other school in the District. Further, the evidence demonstrated that the mistrust of the school and the District by the Student and the parent had become toxic to the point that working with the school was not possible and remaining in public school would be dangerous to the Student's mental health. As a result, on January 3, 2019, the parent sent the

school a "10 Day Notice to Cure" letter requesting compensatory education for a failure to provide FAPE and to honor agreements made by the School District. The Notice also notified the school that the Student would be moved to private school and sought reimbursement if the school failed to resolve the parent's concerns. The District did not respond to the parent's notice. Therefore, on January 23, 2019, the Student was removed from public school and enrolled in School D, a private school. The Student remains in private school to date. However, the record is devoid of any evidence about appropriateness of the Student's educational plan or current curriculum at School D. Similarly, the record is devoid of evidence about the Student's educational success at School D.

CONCLUSIONS OF LAW

116. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. See §§ 120.65(6) and 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

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

118. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and

prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); 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) and (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).

119. Parents and students 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 a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

120. Importantly, under IDEA any due process complaint must be filed within two years of the time the complainant knew or should have known about the facts that form the underlying basis of the complaint. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511. See Jefferson Cnty. Bd. of Educ. v. Lolita S., 977 F.Supp.2d 1091, 1123 (N.D. Ala. 2013). However, the two-year statute of limitations period does not apply to a parent if the parent was prevented from filing a due process complaint due to specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or the LEA's withholding of information from the parent that was required under this part to be provided to the parent. 34 C.F.R. 300.511 (f). See Jenkins v. Butts Cnty. Sch. Dist., 62 IDELR 142 (M.D. Ga. 2013)(holding that the Georgia district's failure to inform a parent of her procedural safeguards tolled the statute of limitations on her IDEA claim); Centennial Sch. Dist. v. S.D., 58 IDELR 45 (E.D. Pa. 2011)(holding that the district's failure to seek consent for an evaluation delayed the start of the IDEA's two-year limitations period).

121. In this case, the Petitioner's complaint was filed with the District on January 14, 2019. Based on the filing date, specific causes of action occurring more than two years prior to January 13, 2017, are barred. However, while individual claims may be barred, the two-year statute of limitation does not apply

to the remedy that may be awarded based on an ongoing and continuing violation of IDEA. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015)(stating that student whose rights were violated is entitled to compensatory education for the entire "period of deprivation," no matter how many years the student's rights were violated). Thus, compensatory education in this case includes the entire period of deprivation, which extends to April 13, 2012, when the Student was inappropriately determined to have a significant cognitive impairment and inappropriately removed from general education standards and curriculum. Additionally, specific causes of action occurring after January 13, 2017, are not time-barred by IDEA's statute of limitation and have been addressed in this Final Order.

122. In that regard, 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).

123. The central mechanism by which the IDEA ensures FAPE for each child is the development and implementation of an IEP. 20 U.S.C. § 1401(9)(D); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985)("The modus operandi of the [IDEA] is the . . . IEP.")(internal quotation marks omitted). The IEP must be developed in accordance with the procedures laid out in the IDEA, and must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Endrew F. v. Douglas Cnty. Sch. Dist., RE-1, 137 S. Ct. 988, 999 (2017).

124. "Special education," as that term is used in the IDEA, is defined as:

> [S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--
>
> (A) [I]nstruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. . . .

20 U.S.C. § 1401(29).

125. 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. "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

126. Indeed, "the IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 994 (2017)(quoting Honig v. Doe, 108 S. Ct. 592 (1988))("The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child."). Id. (quoting Rowley, 102 S. Ct. at 3034)(where the provision of such special education services and accommodations are recorded).

127. In Rowley, the Supreme Court held that a two-part inquiry or analysis of the facts must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system 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. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to a free appropriate public education, 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. 5-16, 525-26 (2007).

128. In this case, the Petitioner alleged that multiple procedural violations occurred. However, most of those allegations were barred by IDEA's two-year statute of limitations. On the other hand, two procedural violations involving the makeup of the IEP team in 2017 and the lack of notice of the 2018 IEP meeting were established by the evidence. The evidence demonstrated that both of these violations impeded the Student's right to FAPE and impeded the parent's opportunity to participate in the education of the Student. As such, those actions violated IDEA.

129. Turning to substantive issues involved in the second step of the Rowley test, it must be determined if the IEP developed, pursuant to the IDEA, is reasonably calculated to enable the child to receive "educational benefits." Rowley, 458 U.S. at 206-07. Recently, in Endrew F., the Supreme Court addressed the "more difficult problem" of establishing a standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." Endrew F., 13 S. Ct. at 993. In doing so, the 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." Id. 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.

130. The determination of whether an IEP is sufficient to meet this standard differs according to the individual circumstances of each student. For a student who is "fully integrated in the regular classroom," an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Id. (quoting Rowley, 102 S. Ct. at 3034). For a student, who is not fully integrated in the regular classroom, an IEP must aim for progress that is "appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." Id. at 1000. This standard is "markedly more demanding" than the one the Court rejected in Endrew F., under which an IEP was adequate so long as it was calculated to confer "some educational benefit," that is,

an educational benefit that was "merely" more than "de minimis." Id. at 1000-1001.

131. The assessment of an IEP's substantive propriety is guided by several principles, the first of which is that it must be analyzed in light of circumstances as they existed at the time of the IEP's formulation; in other words, an IEP is not to be judged in hindsight. M.B. v. Hamilton Se. Sch., 668 F.3d 851, 863 (7th Cir. 2011)(holding that an IEP can only be evaluated by examining what was objectively reasonable at the time of its creation); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990)("An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."). Second, an assessment of an IEP must be limited to the terms of the document itself. Knable v. Bexley Cty. Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001); Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1315-16 (8th Cir. 2008)(holding that an IEP must be evaluated as written).

132. Third, great deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See Endrew F., 13 S. Ct. at 1001 ("This absence of a bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound

educational policy for those of the school authorities which they review" and explaining that "deference is based on the application of expertise and the exercise of judgment by school authorities."); A.K. v. Gwinnett Cnty. v. Sch. Dist., 556 Fed. Appx. 790, 792 (11th Cir. 2014)("In determining whether the IEP is substantively adequate, we 'pay great deference to the educators who develop the IEP.'")(quoting Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991)). As noted in Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1048 (5th Cir. 1989) ("[the undersigned's] task is not to second guess state and local policy decisions; rather, it is the narrow one of determining whether state and local officials have complied with the Act.")

133. Further, the IEP is not required to provide a maximum educational benefit, but only need provide a basic educational opportunity. Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991); C.P. v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1153 (11th Cir. 2007); and Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).

134. The statute guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents." Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 (2d Cir. 1989)(internal citation omitted); see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-534 (3d Cir. 1995); Kerkam v. McKenzie, 862 F.2d 884, 886 (D.C. Cir.

1988)("proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act"). Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998); and Doe v. Bd. of Educ., 9 F.3d 455, 459-460 (6th Cir. 1993)("The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. . . . Be that as it may, we hold that the Board is not required to provide a Cadillac. . . .").

135. Most importantly, the IDEA provides that an IEP must be individualized to the student and include measureable annual goals and services designed to meet each of the educational needs that result from the child'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. Schs., 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").

136. Here, Petitioner takes issue with the design of the Student's IEPs developed in 8th and 9th grades because they failed to provide goals that were individualized for the Student.

Further, Petitioner contends that the IEPs in effect for 8th, 9th and 10th grades were inadequate because they did not include needed ESY, tutoring services or mental health counseling and removed services that were necessary for the Student to succeed in high school. In that regard, the clear evidence demonstrated that the IEPs designed during the Student's 8th and 9th-grade years were deficient for these reasons. They failed to meet every educational need of the Student, especially in the area of tutoring and counseling, which need was caused by the Student's inappropriate removal from general education standards and curriculum in 2012 and multiple year lack of exposure to general education standards and curriculum thereafter. As such, the IEPs were not reasonably calculated to enable the Student to make progress in light of his circumstances, failed to provide FAPE to the Student and violated IDEA. See, B.R. v. N.Y.C. Dep't of Educ., 910 F. Supp. 2d 670, 675-79 (S.D.N.Y. 2012)(holding IEP was substantively inadequate in that the occupational services required by the IEP were incapable of being implemented by the child's assigned school); West Va. Schs. for the Deaf & Blind v. A.V., 2012 U.S. Dist. LEXIS 69807, at *14-16 (N.D. W. Va. May 14, 2012)(holding IEP was substantively deficient due to significant inconsistencies within the document concerning the percentage of time the child was to be educated in the general education environment); S.S. v. Howard Rd. Acad., 585 F. Supp. 2d 56, 71

(D.D.C. 2008)(holding school district's failure to provide ESY services during the summer months constituted a material failure to implement the child's IEP).

137. Additionally, Petitioner alleged that the IEPs in effect for 9th and 10th grades failed to meet the educational needs of the Student because the Student did not receive direct instruction from ESE certified teachers, as required by the IEPs effective for those grades.

138. Because this claim challenges the School Board's implementation of Petitioner's educational programming——rather than its substance——a different standard of review applies. L.J. by N.N.J. v. Sch. Bd. of Broward Cnty., 927 F.3d 1230 (11th Cir. 2019). In particular, a parent raising a failure-to- implement claim must present evidence of a "material" shortfall, which occurs when there is "more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 (9th Cir. 2007). Notably, this standard does not require that the student suffer demonstrable educational harm in order to prevail. Id. at 822; Colon-Vazquez v. Dep't of Educ., 46 F. Supp. 3d 132, 143-44 (D.P.R. 2014); Turner v. Dist. of Columbia, 952 F. Supp. 2d 31, 40 (D.D.C. 2013)(finding material failure to implement IEP due to "total lack of special education support within the general education environment"). Rather, the

materiality standard focuses on "the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." Wilson v. Dist. of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

139. In that regard, the clear evidence demonstrated that provision of direct instruction by ESE certified teachers was vital to the Student's success in school and was not provided, as required in the IEPs, in effect during the 9th and 10th grades. Further, the failure to provide instruction was material and caused serious harm to the Student. Given these facts, the evidence demonstrated that the District denied FAPE to the Student and violated IDEA.

140. Because the School Board procedurally violated IDEA, denied the Student FAPE by failing to design appropriate IEPs and also failed to implement the IEPs, the Student is entitled to appropriate remedies under IDEA.

141. In that regard, if a district court or administrative hearing officer determines that a school district has violated the IDEA by denying the student in question 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, notwithstanding the provision's silence with regard to hearing officers). Such "appropriate" relief may include, inter alia, reimbursing parents for the cost of private replacement therapy; transportation expenses; credit card transaction fees and interest; and, in circumstances where 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. Pennsylvania, 379 F.3d 61, 63 (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 performed 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., 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). Further, 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 (D.C. Cir. 2005).

142. 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 Cty. 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); Bd. of Educ. v. L.M., 478 F.3d 307, 316 (6th Cir. 2007)(agreeing with the district court that a flexible approach, rather than a rate hour-by-hour compensation award, is more likely to address the student'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)(noting that a flexible, individualized approach is more consonant with the aim of the IDEA, the court found such an approach more persuasive than the

Third Circuit's formulaic method); 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).

143. Guided by the above-stated principles, Petitioner is entitled to compensatory education for a period of time that encompasses the entire period of deprivation that the Student did not receive an appropriate education. In this case, the period of deprivation began on April 13, 2012, when the Student was inappropriately removed from general education standards and curriculum to the point the Student was removed from public school in January 2019. The period encompasses approximately 6.5 years and is based on a 180-day regular school year. The period also includes ESY for the summer of 2017 and 2018.

144. In regard to reimbursement for private school tuition, the U.S. Supreme Court first recognized and laid the groundwork for the parent's right to private school tuition reimbursement in Burlington School Committee v. Massachusetts Department of Education, 556 IDELR 389 (U.S. 1985). The IDEA later codified the tuition reimbursement remedy expressed in Burlington. The IDEA provides in relevant part:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a

> public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs. 34 C.F.R. 300.148 (c).

145. However, 34 C.F.R. § 300.148 (d) and (e) provide that the cost of reimbursement can be reduced or denied in certain circumstances with exceptions. The subsections state:

> (d)(1) If --
>
> (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;
>
> (2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in 34 C.F.R. 300.503 (a)(1), of its intent to evaluate the

child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement –

(1) Must not be reduced or denied for failure to provide the notice if -

(i) The school prevented the parents from providing the notice;

(ii) The parents had not received notice, pursuant to § 300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if -

(i) The parents are not literate or cannot write in English; or

(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.
34 C.F.R. 300.148 (d) and (e).

146. Notably, for purposes of IDEA, a parental placement is appropriate if it is "reasonably calculated to enable the child to receive educational benefits." Sumter Cnty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 488 (4th Cir. 2011). Significantly, the

parental placement need not satisfy every last one of the child's special education needs. Frank G. v. Bd. of Educ., 459 F.3d 356, 365 (2d Cir. 2006). Rather, the placement must "provide only some element of the special education services missing from the public school alternative in order to qualify as reasonably calculated to enable the child to receive educational benefit." Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 25 (1st Cir. 2007); see also Frank G., 459 F.3d at 364 ("An appropriate private placement need not meet state education standards or requirements. For example, a private placement need not provide certified special education teachers or an IEP for the disabled student")(internal citations and quotation marks omitted); Warren G. v. Cumberland Cnty. Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999)(holding that the "test for the parents' private placement is that it is appropriate, and not that it is perfect.").

147. In this case, the evidence demonstrated that the District failed to provide an appropriate education to the Student for over 6 years. See Mr. & Mrs. A ex rel. D.A. v. N.Y.C. Dep't of Educ., 769 F. Supp. 2d 403, 420 (S.D.N.Y. 2011)(holding that the failure of the district to offer a FAPE resulted not from a parental lack of cooperation but from the district's abandonment of its responsibility to offer the child a placement prior to the start of the school year.); M.H. v. N.Y.C.

Dep't of Educ., 712 F. Supp. 2d 125, 170 (S.D.N.Y. 2010)("[T]he IHO correctly found that the equities weigh in favor of reimbursement. The administrative record . . . shows in graphic detail that the DOE gave M.H. and E.K. the runaround during every step of the IDEA's statutory process. . . . Cavalier conduct such as this comports with neither the letter nor spirit of the IDEA and is inequitable in any event"), aff'd, 685 F.3d 217 (2d Cir. 2012); and Gabel ex rel. L.G. v. Bd. of Educ., 368 F. Supp. 2d 313, 329 (S.D.N.Y. 2005)(concluding that although the parents "may have taken advantage of some of the District's lapses," the school district's "utter abdication of its responsibility to provide [the child] with a FAPE [was] so clear from the record . . . that the equities favor the parents.").

148. The evidence also demonstrated that the District received appropriate notice from the parent. Moreover, even if the notice was not appropriate, the evidence in this case demonstrated that the Student was likely to be harmed if he remained in the public school system. However, the record is devoid of any evidence that the private school program was appropriate for the Student. Notably, if such evidence of appropriateness had been introduced, tuition reimbursement would likely have been awarded in this case. However, since there was no evidence of appropriateness, reimbursement of tuition for the remainder of 10th grade through the date of this Order must be

denied. See T.Y. v. N.Y.C. Dep't of Educ. Region 4, 53 IDELR 69 (2d Cir. 2009), cert. denied, 110 LRP 28696 , 130 S. Ct. 3277 (2010)(denying tuition reimbursement where a New York district made an appropriate placement offer when it proposed that a child with autism attend a 6:1+1 class in a school for students with disabilities.); and Pinto v. Dist. of Columbia, 64 IDELR 103 (D.D.C. 2014)(denying tuition reimbursement where the parents failed to show that the private placement was appropriate).

149. On the other hand, as indicated above, the evidence demonstrated that continued placement in the public school system would be harmful to the Student and that an appropriate education could not be provided to him in public school. Given these facts, IDEA requires that the Student receive his education in a private school with such location included in the development of an appropriate IEP for the Student.

150. Further, Petitioner is entitled to reimbursement for the costs of the private advocates, Ms. Memminger and Ms. Mager. The evidence demonstrated that the two advocates' services were necessary in order to provide the parent the information required for the parent to fully participate in the educational decisions regarding the Student, especially in regards to discovery of the District's actions or lack of action in this case.

151. Finally, Petitioner contends that the violations of IDEA, both procedural and substantive, including inappropriate

IEPs and failure to implement IEPs constitute violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 795, et seq. (Section 504). In that regard, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides in pertinent part as follows:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C. § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

152. Section 794(b)(2)(B) defines a "program or activity" to include a "local education agency . . . or other school system." Section 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 nondiscrimination provisions of Section 504.

153. The U.S. DOE has promulgated regulations governing preschools, elementary schools, and secondary schools. 34 C.F.R. part 104, subpart D. The K-12 regulations are at sections 103.31-39. Sections 104.33-.36 enlarge upon the specific provisions of Section 504 by substantially tracking the requirements of IDEA.

154. Section 104.33 requires that Respondent 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 nonhandicapped persons are met and (2) are based upon adherence to procedures that satisfy the requirements of sections 104.33(b)(1), 104.34, 104.35 and 104.36. An "appropriate education" can also be provided by implementing an IEP that is compliant with the IDEA. 34 C.F.R. § 104.33(b)(2).

155. Notably, Section 504 does not include a statute of limitations. In that regard, federal courts hearing claims for disability discrimination typically borrow the limitations period from the most analogous state law. See e.g., Bishop v. Children's Ctr. for Dev. Enrichment, 55 IDELR 32 (6th Cir. 2010)(borrowing Ohio's two-year statute of limitations for claims of bodily injury or injury to personal property); T.L. v. Sherwood Charter Sch., 62 IDELR 284 (D. Or. 2014)(applying the two-year limitations period from a state statute prohibiting disability discrimination); Kabacinski v. State of Del. Dep't of Educ., 62 IDELR 133 (D. Del. 2013)(applying Delaware's two-year statute of limitations for personal injury claims); J.W. v. Johnston Cnty. Bd. of Educ., 59 IDELR 246 (E.D.N.C. 2012)(holding that the two-year limitations period from North Carolina's Persons with Disabilities Protection Act applied to the parent's

Section 504 and Title II claims); Henson v. Baker Sch. Dist. No. 12 Bd. of Trs., 59 IDELR 124 (D. Mont. 2012)(applying Montana's three-year statute of limitations period for personal injury claims); and Henneghan v. Dist. of Columbia, 58 IDELR 188 (D.D.C. 2012)(ruling that the District of Columbia's three-year statute of limitations for nonemployment personal injury cases applied to the parent's Section 504 and Title II claims). Cf., P.P. v. West Chester Area Sch. Dist., 53 IDELR 109 (3d Cir. 2009)(holding IDEA's two-year statute of limitations applicable because 504 education claims were more similar to IDEA claims than personal injury claims). Additionally, where civil rights actions under 42 U.S.C. § 1983 have been brought, the federal courts have applied Florida's four year statute of limitations for personal injury actions to such complaints. See Ellison v. Lester, 275 Fed.Appx. 900 (11th Cir. 2008). Also see Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000)(holding four-year statute of limitations in section 95.11(3)(f, Florida Statutes, applies to claims under Florida Civil Rights Act when the Commission on Human Relations fails to make a reasonable cause determination within 180 days).

156. Given the above, the statute of limitations for Section 504 education claims is the four-year limitation period provided for personal injury claims in section 95.11(3), Fla. Stats. Thus, since the Complaint herein was filed on January 14,

2019, individual causes of action occurring prior to January 13, 2015, are barred. However, like IDEA, remedies that may be awarded are not limited by the statute of limitations.

157. Thus, turning to the issue of discrimination, in order 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 solely 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).

158. Assuming a petitioner has established a prima facie case, the respondent must present a legitimate, non-discriminatory reason for the adverse actions it took. Lewellyn v. Sarasota Cnty. Sch. Bd., 2009 U.S. Dist. LEXIS 120786, at *29 (M.D. Fla. Dec. 29, 2009)(citing Wascura v. City of S. Miami, 257 F.3d 1238, 1242 (11th Cir. 2001)). The 11th Circuit has stated that the respondent's burden, at this state, is "exceedingly light and easily established." Id. quoting Perryman v. Johnson Prods. Co. Inc., 698 F.2d 1138, 1142 (11th Cir. 1983). Once the defendant has articulated a nondiscriminatory reason for the

actions it took, the petitioner must show that the respondent'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); and Timothy H. v. Cedar Rapids Cnty. Sch. Dist., 178 F.3d 968 (8th Cir. 1999).

159. 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 Respondent discriminated against Petitioner solely by reason of his disability.

160. 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 1320 n.7. In T.W. ex rel. Wilson v. School Board of Seminole County, 610 F.3d 588, 604 (11th Cir. 2010), the 11th 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." However, in Liese v. Indian River County Hospital District, 701 F.3d 334, 345 (11th Cir. 2012), the 11th 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.

161. Under the deliberate indifference standard, a petitioner must prove that the respondent knew that harm to a federally protected right was substantially likely and that the respondent 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.

162. In Ms. H. v. Montgomery County Board of Education, 784 F. Supp. 2d 1247, 1263 (M.D. Ala. 2011), comparing failure-to-accommodate claims under Section 504 and the IDEA, the district court noted that:

> To state a claim under § 504, "either bad faith or gross misjudgment should be shown." Monahan v. Nebraska, 687 F.2s 1164, 1171 (8th Cir. 1982)]. As a result, a school does not violate § 504 merely by failing to provide a FAPE, . . . Id. Rather, [s]o long as the [school] officials involved have exercised professional judgment, in such a way not to depart grossly from accepted standards among education professionals," the school is not liable under § 504. Id. . . . The courts agree that "[t]he 'bad faith or gross misjudgment' standard is extremely difficult to meet."

(citations omitted).

163. The Ms. H. opinion further noted that, "if a school system simply ignores the needs of special education students, this may constitute deliberate indifference."

164. In this case, the evidence did not demonstrate that the District was deliberately indifferent to the Student's right to FAPE when the District, in 2012, placed him on Access Points standards and curriculum. However, the evidence demonstrated that once the misidentification was corrected by the District, the District continued to fail to provide FAPE to the Student by failing to provide him with tutoring, ESY or mental health counseling to prepare him for transition to general education standards. This failure was compounded by failing to implement the Student's IEPs in 8th, 9th and 10th grades. The prolonged duration and repetition of these failures support a finding of deliberate indifference. Accordingly, Petitioner's discrimination claim under Section 504 is sustained. As such, Petitioner is entitled to the same remedies as outlined above.

165. Finally, the balance of Petitioner's claims as asserted Complaint were not supported by the evidence, and, therefore, are dismissed. However, in this action Petitioner has prevailed on the majority of his IDEA and Section 504 claims. As such, Petitioner is the prevailing party in this action.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Petitioner is the prevailing party in this case.

2. The District shall immediately convene an IEP meeting to draft an appropriate IEP for the Student, which addresses all of the Student's specific needs, including intensive tutoring, mental health counseling and placement in an appropriate program in a private school at the District's expense;

3. Provide Petitioner with 6.5 years of compensatory education based on a 180-day school year and compensatory education for ESY for the years 2017 and 2018;

4. Reimburse Petitioner for the cost of the two private advocates.

DONE AND ORDERED this 21st day of October, 2019, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of October, 2019.

ENDNOTES

[1/] Petitioner, who is African-American, did raise the issue of discrimination based on race in his Request for Due Process Hearing. However, there was no evidence presented at the hearing that Petitioner was discriminated against based on his race. Given this lack of evidence, the issue of discrimination based on race is dismissed and will not be discussed further in this Final Order.

[2/] Some history in the area of school accountability as related to alternate assessments, alternate curriculum and alternate educational standards is helpful and reflective of an ever changing understanding and legal framework in both general and special education over several decades to the current time. Against this backdrop, it should be noted that provision of standard assessments, general curriculum and education standards have been required for regular education, non-ESE students. However, appropriate standards for and assessment of ESE students on their mastery of curriculum has progressed from functionally focused curriculum standards through social development focused standards to general curriculum focused standards. See Quenemoen, R., A brief < history of alternate assessments > based on alternate achievement standards (Synthesis Report 68). Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes (2008).

Relative to this history in the preamble to the reauthorization of IDEA in 1997, Congress noted that:

> [T]he implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities. Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible. (emphasis supplied)

As a result, formal alternate assessments to demonstrate a student's proficiency in meeting standards were first developed in response to IDEA 1997, which required that all states and districts develop by the year 2000 alternate assessments for those students with disabilities unable to participate in regular assessments even with accommodations. See, Thurlow, M. L., Lazarus, S. S., Larson, E. D., Albus, D. A., Liu, K. K., & Kwong, E. Alternate assessments for students with significant cognitive disabilities: Participation guidelines and definitions (NCEO Report 406)(2017). Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes. Notably, IDEA did not specifically identify the students who might take an alternate assessment, nor did IDEA use the phrase "significant cognitive disability."

In the meantime, the shift toward academic content based assessment as opposed to functional based assessment of students with significant cognitive impairment that began in 1997 was accelerated in 2002 with the passage of the No Child Left Behind Act (NCLB) and its focus on standards based curriculum and increased accountability stakes based on assessment testing for schools, districts, and states. Notably, NCLB and regulations thereunder clarified that the general curriculum being taught in schools was to be based on or linked to the same academic standards and expectations that applied to all regular education students in a state, with alternate assessments aligned or linked to the same state educational content standards in each grade. The difference between curriculum and standards is important, because, for students on alternate assessments who are receiving an alternate curriculum, grade level achievement is not required. In short, while the curriculum being taught to a student who is technically in third grade may be linked to state general education standards, that curriculum need not be 3rd-grade material, but may be curriculum aligned or linked to 2nd-grade standards or below.

In 2003, regulations added to the Elementary and Secondary Education Act (ESEA), a general education act that for purposes relevant here, implemented proficiency standards for schools as measured by high-stakes testing, allowed states to count as proficient those students with significant cognitive disabilities who participated in the alternate assessment and met rigorous alternate achievement standards set by the state. It was at this time that the alternate assessment based on alternate achievement standards (AA-AAS), was first recognized. And, it was in connection with ESEA and subsequent regulations that the term "students with the most significant cognitive disabilities" was

first used. (Emphasis supplied). Also made clear under ESEA regulations was that the term "students with the most significant cognitive disabilities" did not refer to a specific category of disability, and that no category of disability would automatically make a student one with a significant cognitive disability. These 2003 regulations also established a 1 percent cap on the percentage of students who could be counted proficient using the AA-AAS. This rule attempted to ensure that the students who took the alternate assessment included only those students for whom it was most appropriate. Id. Section 200.6(a)(2)(iii) of the 2003 regulations stated:

> If a State permits the use of alternate assessments that yield results based on alternate academic achievement standards, the State must---
>
> (A)(1) Establish and ensure implementation of clear and appropriate guidelines for Individualized Educational Program (IEP) teams to apply in determining when a child's significant cognitive disability justifies assessment based on alternate academic achievement standards…

Notably, the term "significant cognitive disabilities" is not defined in ESEA statutes or rules. Further, the term is not included or defined in IDEA statutes or rules and does not directly match any of the special education categories under IDEA. Similarly, neither ESEA nor IDEA defined cognitive abilities or what abilities constitute cognitive abilities. However, students with a Specific Learning Disability eligibility under IDEA were not expected to be included within the group of student's considered to be significantly cognitively impaired. Id.

Language in the U.S. DOE's 2005 Non-Regulatory Guidance on Alternate Achievement Standards for Students with the Most Significant Cognitive Disabilities stated:

> It is the State's responsibility to define which students have the most significant cognitive disabilities. It also is the State's responsibility to establish clear and appropriate guidelines for IEP teams to use when deciding if an alternate assessment based on alternate achievement standards is

> justified for an individual child. These guidelines should provide parameters and direction to ensure that students are not assessed based on alternate achievement standards merely because of their placement outside the regular classroom, their disability category, or their racial or economic background.
>
> In most schools, students with the most significant cognitive disabilities represent a small portion of students with disabilities who would appropriately participate in an assessment based on alternate achievement standards; all other students with disabilities must be assessed against grade-level standards. In general, the Department estimates that about 9 percent of students with disabilities (approximately one percent of all students) have significant cognitive disabilities that qualify them to participate in an assessment based on alternate achievement standards

Over the next several years, the number of students taking alternate assessments and placement of students on alternate standards or modified curriculum increased to more than 1 percent in a large majority of the states. Id. As a result of the increase the reauthorization of ESEA in 2015 as the Every Student Succeeds Act (ESSA), attempted to address the issue of increasing participation of students in the AA-AAS. In that regard, ESSA established a participation cap rather than a cap on the percentage of students who could be counted as proficient on the assessment. However, even though states were to be held to a 1 percent cap at the state level, they could not establish a fixed cap on participation at the district level. Id. The effect of this cap was to increase scrutiny on those students who were identified by IEP teams as student's with significant cognitive disabilities to ensure that those students met the criteria for removal from general education standards, assessment and placement on alternative standards and assessment.

Assessment regulations for ESSA were enacted in January 2016. This period of time coincides with the 7th-grade year of the Student involved in this case. The regulations required states to establish clear guidelines about participation criteria and to provide a definition of students with significant

cognitive disabilities. Id. The regulations provided, in pertinent part:

> (d) State guidelines for students with the most significant cognitive disabilities. If a State adopts alternate academic achievement standards for students with the most significant cognitive disabilities and administers an alternate assessment aligned with those standards, the State must—
>
> (1) Establish, consistent with section 612(a)(16)(C) of the IDEA, and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining, on a case-by-case basis, which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards. Such guidelines must include a State definition of "students with the most significant cognitive disabilities" that addresses factors related to cognitive functioning and adaptive behavior, such that—
>
> (i) The identification of a student as having a particular disability as defined in the IDEA or as an English learner does not determine whether a student is a student with the most significant cognitive disabilities;
>
> (ii) A student with the most significant cognitive disabilities is not identified solely on the basis of the student's previous low academic achievement, or the student's previous need for accommodations to participate in general State or district wide assessments; and
>
> (iii) A student is identified as having the most significant cognitive disabilities because the student requires extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the

> student is enrolled. . . . (Section 200.6(a)(7)(iii)(d)(1))

Commentary included in the regulations stated:

> [W]e are not defining the term "students with the most significant cognitive disabilities;" rather, the regulations require States to define this term and establish criteria for States to adhere to in establishing their own definition. Further, given that an AA-AAAS, as described in section 1111(b)(2)(D) of the ESEA, is only for students with the most significant cognitive disabilities, and that States must now ensure that no more than 1.0 percent of assessed students in the State take such assessments, we believe requiring a State to define "students with the most significant cognitive disabilities" in accordance with factors related to cognitive functioning and adaptive behavior is both consistent with and within the scope of the ESEA. (Federal Register, 2016, p. 88916)

[3/] Educational standards are broad statements that describe the knowledge or ability that a student should be able to demonstrate by the end of every grade from 1st through 12th grade. Like much in education during the 90s and the two decades of this century, state educational standards in Florida were changed and were titled in a variety of ways, including the Sunshine State Standards, Next Generation Sunshine State Standards, Common Core State Standards and Florida Standards.

[4/] As with Florida's state educational standards, Access Points standards and curriculum have undergone many changes over the years relevant to this Final Order. In general, Access Points standards are academic expectations written specifically for students with significant cognitive disabilities. They reflect only the essence of the intent of the general state educational standards that apply to all students in the same grade, but at reduced levels of complexity. They are standards, which are broken down into smaller digestible parts depending on the skill level of the student. There are three levels: 1) independent, 2) requiring prompting or assistance, and 3) participatory.

[5/] The one percent criteria provided in guidance from the federal government is a clue to the level of severity of the cognitive

impairment of the Student. In essence, a significant cognitive impairment would be one that caused a student to fall into a group comprised of less than one percent of ESE students. Notably, standardized tests of cognitive abilities and intelligence quantify such percentages for individual students.

[6/] As troubling as the parent's lack of notice about the April reevaluation meeting and IEP meetings, the evidence was clear that the parent became aware of the changes in placement and eligibility around April 16, 2012, when a copy of the IEP containing those changes was provided to the parent. The last page of the April 13, 2012, IEP included the "Testing Accommodations/Participation/Placement" Form. This form unambiguously stated that the "[s]tudent will participate in an alternate assessment". The parent signed the Testing Accommodations/Participation/Placement Form on April 16, 2012, acknowledging that the Student would take an alternate assessment. The form did not address the removal from the general education standards, but only addressed testing. Further, the evidence regarding the parent having the impacts about removal from general education standards explained to her after the fact was not credible given the other facts in this case. However, any alleged procedural violations, which may have occurred in 2012 are outside the statute of limitations for either IDEA or Section 504. On the other hand, the facts regarding 2012 actions, or lack thereof, in later years are being determined relative to appropriate remedies in this case.

[7/] Since the parent did not testify at the hearing, the reasons or the parent's knowledge for the consents were not established by the evidence. However, in this case, such consents are immaterial since a parent cannot consent to an inappropriate educational placement because the duty to provide FAPE rests ultimately on the District. See 20 U.S.C. § 1412 (a)(1)(A) and 34 C.F.R. § 300.101.

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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).