CASE NO. 17-14824

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

L.J., by His Mother and next Friend, N.N.J.,

Plaintiff/Appellant,

v.

SCHOOL BOARD OF BROWARD COUNTY,

Defendant/Appellee.

Appeal from the Order & Judgment Entered on September 28, 2017
Southern District Court Case No. 11-CIV-60772-MARRA

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CERTIFICATE OF INTERESTED PERSONS

The following persons have or may have an interest in these proceedings:

Anderson, Kirsten, Attorney for Appellant;

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Golembiewski, Kevin, Attorney for Appellant;

L.J., Appellant;

The Hon. Kenneth A. Marra, U.S. District Judge, Southern District of Fla.;

Nelson, Alice K., Attorney for Appellant;

Nelson Law Group, Attorney for Appellant;

N.N.J., mother and next friend of Appellant;

The Hon. Errol H. Powell (Ret), Administrative Law Judge, Fla. Division of Administrative Hearings;

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School Board of Broward County, Florida, Appellee;

Southern Legal Counsel, Inc., Attorney for Appellant;

The Hon. Charles R. Wilson, U.S. Circuit Judge, 11th Circuit Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly traded corporations that have an interest in the outcome of this case.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellant L.J. requests oral argument to aid the Court in the decisional process regarding the facts and legal issues. This case involves two issues of first impression in the Circuit. First, the Court must interpret and apply for the first time the standard for a free appropriate public education enunciated by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). Second, the Court must identify the standard under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., for determining whether a school board's implementation of an Individualized Education Program provided a free appropriate public education.

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STATEMENT OF SUBJECT-MATTER
AND APPELLATE JURISDICTION

This is an appeal pursuant to Fed. R. App. P. 4(a) from a final order (ECF 87) and Judgment (ECF 88) entered on September 28, 2017, granting Defendant's Motion for Judgment on the Record (ECF 29) and denying Plaintiff's Motion for Judgment Affirming the Administrative Law Judge's Order (ECF 30). The final order and judgment disposed of all Plaintiff's claims. The Notice of Appeal was timely filed on October 26, 2017. (ECF 89.) The district court had jurisdiction pursuant to 20 U.S.C. § 1415(i)(2) and 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 as this is an appeal of a final order.

STATEMENT OF THE ISSUES

I. The Supreme Court in *Endrew F*. articulated a new standard for determining whether school boards violate the Individuals With Disabilities Education Act (IDEA). Applied here, the standard is whether the Board's failure to implement L.J.'s Individualized Education Program (IEP) impeded his chance for progress appropriate in light of his circumstances. Did the district court err in reversing an administrative law judge (ALJ) decision in favor of L.J. without analyzing the Board's failures under this standard?

II. A school board violates the IDEA if it fails to implement parts of an IEP and the failures, cumulatively, deny the child an opportunity to make appropriate progress. The Board failed to implement multiple requirements of L.J.'s IEP, and the failures, taken together, thwarted his education: he made no progress for two years. Did the district court err in reversing the ALJ without analyzing the cumulative impact of the failures?

III. A district court is required to give due weight to an ALJ decision and avoid substituting its judgment for that of the ALJ. After 18 days of hearing, the ALJ issued a 103-page decision that was supported by the record. Did the district court err in overturning the ALJ's findings?

STATEMENT OF THE CASE

This action arose from an administrative due process hearing under the IDEA, 20 U.S.C. § 1400 *et seq*. Pursuant to 42 U.S.C. § 1983 and the IDEA, the Plaintiff/Appellant (L.J.) sought an injunction in the Southern District of Florida compelling Defendant/Appellee (Board) to comply with the Final Order from that hearing. L.J. also sought damages under Section 504 of the Rehabilitation Act of 1974, 29 U.S.C. § 794. Finally, L.J. sought attorneys' fees and expenses as a prevailing party under the IDEA, 20 U.S.C. § 1415(i)(3).

I. Course of the Proceedings

L.J., through his mother and next friend, N.N.J., filed a due process challenge to the Board's failure to implement his 2002 "stay-put"[1] IEP and behavioral intervention plan during the 2006-07 and the 2007-08 school years. (ECF 1-2, at 2-4; 26-4, at 22-23.) On January 11, 2011, an ALJ of Florida's Division of Administrative Hearings entered an order wholly favorable to L.J. (ECF 1-2.) The ALJ concluded that the Board denied L.J. a free appropriate public education (FAPE) and ordered compensatory education. L.J. filed his federal complaint seeking enforcement of the

[1] Stay-put is the requirement that during the pendency of any IDEA proceedings, "the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j).

order, prevailing party attorneys' fees and damages pursuant to Section 504.[2] (ECF 1.) The Board filed a separate action seeking reversal of the ALJ's order (Appendix, Tab 4), and the cases were consolidated (ECF 8). The Board filed an amended complaint in this action. (ECF 19.) The district court granted L.J.'s motion to file the administrative exhibits under seal on a CD-ROM. (ECF 32.) Administrative hearing transcripts are found at ECF 27-1 – 27-23, and the exhibits are at ECF 32.

Each party filed a Motion for Judgment on the Record. (ECF 29 & 30). The court held a hearing on the cross-motions on March 23, 2012. (ECF 57.) It established the standard of review on March 29, 2012, and ordered supplemental briefing. (ECF 55; *L.J. v. Sch. Bd. of Broward Cnty.*, 850 F. Supp. 2d 1315 (S.D. Fla. 2012).) On April 6, 2017, L.J. filed a Notice of Supplemental Authority informing the court that the Supreme Court, in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), had issued an opinion that articulated a new standard for determining when the requirement to provide FAPE is violated under the IDEA. (ECF 86.)

Five and a half years after the 2012 supplemental briefing, the court entered an order on September 28, 2017, granting the Board's motion for judgment on the record

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[2] The Section 504 claim was settled in November 2012, and dismissed with prejudice. (ECF 76 & 77.)

and denying L.J.'s. (ECF 87.) Final judgment was entered the same day. (ECF 88.) A timely notice of appeal was filed on October 26, 2017. (ECF 89.)

II. Statement of the Facts

L.J. was born in 1993. (ECF 87, at 3.) He has an IQ of 85. (ECF 1-2, at 6.) At all times relevant to this appeal, he was a child with a disability within the meaning of the IDEA and an exceptional education student within the meaning of Florida Statutes §1003.01(3). (ECF 1-2, at 5-6.) He was eligible for special education services under the categories of autism spectrum disorder and speech/language impairment, and he received related services of occupational therapy. (ECF 1-2, at 5; ECF 27-2, at 5, Tr. 192:19-22; ECF 27-6, at 62-63, Tr.829:21-830:7; ECF 32, Ex. 1.) The Board was responsible for providing an appropriate special education program for L.J. 20 U.S.C. §1401(19); §1003.57, Fla. Stat. (2017). L.J. entered the Board's school system in kindergarten and attended through seventh grade. (ECF 1-2, at 5; ECF 26-4, at 38; ECF 27-6, at 65-68, Tr. 832:1-835:22.)

Autism is "characterized by an atypical developmental profile with a pattern of qualitative impairments in social interaction and social communication, and the presence of restricted or repetitive patterns of behavior, interests, or activities, which occur across settings." Fla. Admin. Code R. 6A-6.03023(1). Consistent with these

characteristics (ECF 27-3, at 7, Tr. 424:5-23, at 15-16, Tr. 432:1-433:11), L.J. has difficulties with behavior, social interactions, social communication, and repetitive patterns of speech, behavior, interests and activities. (ECF 1-2, at 6-8; ECF 27-2, at 6, Tr. 193:1-25, at 9-10, Tr. 196:1-197:24, at 14-15, Tr. 201:19-202:13; ECF 27-3, at 19-23, Tr. 436:17-440:17; ECF 27-7, at 28-35, Tr. 924:6-931:19.) For example, L.J. does not have appropriate language to express his anxiety or stress, which results in acting out in physical ways (using behaviors instead of language). (ECF 1-2, at 6; ECF 27-3, at 22, Tr. 439:1-18; ECF 27-8, at 61, Tr. 1069:2-6; ECF 27-18, at 33, Tr. 1831:7-8, at 41, Tr. 1839:14-22.)

L.J. developed a strong aversion to attending school at the beginning of the 2005-06 school year, his first year at his middle school, Falcon Cove. (ECF 1-2, at 16-17.) He would shake and cry and say he did not want to go to school. (ECF 27-6, at 73-74, Tr. 840:6-841:4.) N.N.J. was able to get him to school only by "bribing" him with food as a reward. At the end of August 2005, L.J. had a significant behavioral incident at school. He was suspended for three days. N.N.J. believed that the suspension was counterproductive because it reinforced L.J.'s problem behavior – school refusal – by allowing him to avoid school. The principal agreed to reduce the suspension to one day. Shortly thereafter, there was another behavioral incident and he was suspended again. After L.J. returned to school, there was yet another

incident and he was suspended for a third time. L.J.'s behavior increased in intensity, with the school calling police to respond. At the time, though, he was exhibiting no problem behaviors at home. N.N.J. did not bring L.J. back to school for the remainder of the 2005-06 school year because she was afraid L.J. would become fearful of police if the school kept calling them during behavior incidents. Instead, tutors worked with him at home. (ECF 1-2, at 16-17; ECF 26-4, at 38; ECF 27-6, at 73-84, Tr. 840:6-851:18.)

L.J. continued to resist returning to school at the beginning of the 2006-07 school year. (ECF 1-2, at 17-19.) N.N.J. believed the fear and distress he was exhibiting was related to a suspected incident at Falcon Cove the previous year. (ECF 27-4, at 22-23, Tr. 570:10-571:8; ECF 27-6, at 86-88, Tr. 853:2-855:23.) A Board employee called the abuse hotline after N.N.J. reported concerns about an inappropriate encounter with a staff member at the school. N.N.J. had concerns based on things L.J. said to her about the staff member. (ECF 27-2, at 162, Tr. 349:2-5; ECF 27-4, at 93-94, Tr. 641:1-642:9; ECF 27-6, at 86-88, Tr. 853:2-855:23.) Although the incident was not proven, the Board discussed steps to shield L.J. from interacting with the staff member due to the impact L.J.'s fear of the staff member was having on his school attendance. (ECF 27-2, at 189, Tr. 376:3-5; ECF 27-3, at 126-27, Tr. 543:1-544:8; ECF 27-4, at 84-86, Tr. 632:21-634:7; ECF 27-6, at 88-90,

Tr. 855:8-857:18.) L.J., for example, would say "No Mr.__" and "No Falcon Cove" when refusing to go to school. He refused to get on the bus, running away from the bus, screaming "No Mr.__." (ECF 27-1, at 30, Tr. 30:1-5; ECF 27-2, at 100, Tr. 287:11-24, at 161-62, Tr. 348:18-349:13, at 187, Tr. 374:1-22; ECF 27-3, at 44, Tr. 461:10-12; ECF 27-4, at 22-23, Tr. 570:10-571:8; ECF 27-6, at 94, 861:9-17, at 96, Tr. 863:19-864:21; ECF 32, Exs. 207, 209, 211, 216, 218.)

On one occasion in 2006-07, L.J. locked N.N.J. out of the house to avoid boarding the bus. When she regained entrance, he had removed his clothes and locked himself in the bathroom, wearing only his underwear. (ECF 32, Ex. 201; ECF 27-6, at 99, Tr. 866:4-8.) On another day, when she drove L.J. to school, he locked the car doors when school staff arrived. (ECF 27-1, at 30, Tr. 30:6-9; ECF 32, Ex. 218.)

N.N.J. repeatedly pleaded to the Board for help with L.J.'s school-refusal behaviors. (ECF 32, Exs. 198-99, 204-05, 217-18, 223, 225, 346.) The Board developed a plan to start him back at school slowly and to progressively add additional time. (ECF 32, Ex. 172.) L.J. started attending school in October 2006, but his school-refusal behaviors persisted the entire school year. (ECF 32, at Exs. 337, 342; ECF 27-6, at 102, Tr. 869:12-870:3.)

L.J. missed 144 school days in 2006-07 due to school-refusal behaviors and sickness. This pattern of non-attendance was new and had not occurred prior to L.J. attending Falcon Cove (e.g., in 2004-05 he missed 13 days of school). (ECF 1-2, at 19; ECF 32, Ex. 237; ECF 27-6, at 102, Tr. 869:16-871:12.)

In 2002, the Board developed an IEP[3] which placed L.J. in general education classes. (ECF 1-2, at 8; ECF 32, Ex. 1.) When L.J. transitioned to middle school in 2005, the Board proposed a new IEP, which would have changed his placement from general education to a self-contained classroom solely for children with disabilities, a segregated setting. N.N.J. challenged this proposed IEP. (ECF 27-6, at 70-71, Tr. 837:7-838:7.) In doing so, she invoked the IDEA's stay-put procedural safeguards to allow L.J. to maintain his then-current 2002 IEP until the proceedings concluded. During the 2006-07 and the 2007-08 school years (through February 28, 2008),[4] the Board was required to implement the 2002 stay-put IEP. (ECF 1-2, at 8; ECF 26-4, at 22-23, 38.)

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[3] An IEP is a written statement that sets forth the special education and related services to be provided for each child with a disability. 20 U.S.C. § 1414(d).

[4] N.N.J. placed L.J. at a residential facility on that date. The Board agreed to pay the educational, but not the residential, portion of the cost, with the residential costs provided by Medicaid. (ECF 1-2, at 5; ECF 27-7, at 80, Tr. 976:10-977:17; ECF 27-13, at 51, Tr. 1474:1-18.)

L.J.'s 2002 IEP addressed his unique needs related to his disability and contained academic, social/emotional, behavior, independent functioning, and communication goals. (ECF 32, Ex. 1.) The IEP required several accommodations, which addressed how L.J.'s curriculum was presented, practiced, and assessed. (*Id.* at 18.) It required behavioral supports through a positive behavioral intervention plan, and provided for a one-on-one aide, speech-language therapy, assistive technology, and occupational therapy services. (ECF 1-2, at 8; ECF 32, Exs. 1 & 7.)

The Board developed the behavior plan in Fall 2005. (ECF 1-2, at 14-16; ECF 32, Ex. 7.) Consistent with the characteristics of his disability, communication difficulties caused L.J. to experience frustration and anxiety, which triggered problem behaviors because he did not have language to express his feelings or emotions. (ECF 1-2, at 6-7, 79; ECF 27-3, at 22, Tr. 439:1-18; 27-8, at 61, Tr. 1069:2-6; ECF 27-18, at 41, Tr. 1839:14-22.) So, too, did academic difficulties and stressful situations. (ECF 27-3, at 22-23, Tr. 439:23-440:4; ECF 27-19, at 17, Tr. 1951:18-21; ECF 27-8, at 62, Tr. 1070:3-6; ECF 1-2, at 6, 56-57.)

Despite his many needs, L.J. has the capacity to learn positive behaviors and be successful in the school environment. (ECF 1-2, at 7; ECF 27-22, at 26, Tr. 2130:13-22; ECF 27-9, at 65, Tr. 1142:1-4.) Only with systematic programming that

addressed his behavior triggers could L.J. manage his behavior and access the educational opportunities offered by his school. (ECF 1-2, at 93-95; ECF 32, Ex. 7.)

The behavior plan's purpose was to teach L.J. how to engage in appropriate behaviors and decrease problem behaviors. (ECF 1-2, at 9-10.) The first step in crafting a behavior plan is a functional behavioral analysis, which is utilized to develop hypotheses about the functions (the reason or motivation) of the child's behavior.[5] Strategies are then identified to decrease problem behaviors, and those strategies are included in the plan. (ECF 1-2, at 9-11, 14-16; ECF 27-8, at 21-26, Tr. 1029:14-1034:13.) L.J. had two types of behaviors: low intensity behaviors (those that are annoying or mildly disruptive but do not cause harm) and high intensity behaviors (those severe enough to cause harm to himself or others and those that involve significant property destruction). (ECF 1-2, at 7; ECF 27-8, at 28, Tr. 1036:21-1037:15.)

L.J.'s plan required the Board to collect and analyze data to evaluate the plan's effectiveness, and to update the plan if the data demonstrated that different strategies were required. (ECF 32, Ex. 7 at 6; ECF 1-2, at 10-11, 94-95; ECF 27-4, at 44, Tr. 592:5-21, at 61, Tr. 609:8-11.) The frequency of the review of behavioral data varies based on the needs of an individual student (depending on frequency or nature of

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[5] Some of L.J.'s behaviors had multi-functions with the same behavior occurring for different reasons at different times. (ECF 1-2, at 13-14.)

behavior), but it generally should occur bi-weekly. For L.J., the Board determined that it should happen weekly. (ECF 27-8, at 28, Tr. 1036:3-13; 27-9, at 14-15, Tr. 1091:24-1092:11.) This is consistent with research-based practices in the field of behavior analysis: data must be collected and evaluated regularly and utilized to decrease or increase the plan's interventions based on the data analysis. (ECF 27-8, at 26, Tr. 1034:14-1036:20.)

In October 2006, an independent educational evaluation (IEE) on behavior, ordered by an ALJ in a prior hearing (ECF 27-6, at 72, Tr. 839:7-16), was conducted for L.J. and the expert evaluator provided recommendations in a written report. The Board did not implement the majority of the IEE recommendations, including a "Back to School" plan to address L.J.'s school-refusal behaviors. (ECF 1-2, at 19-26; ECF 32, Ex. 57.) Instead of revising the behavior plan, the Board referred N.N.J. to the state attorney in February 2007 for truancy because L.J. was not attending school. (ECF 1-2, at 62-64; ECF 26-4, at 38; ECF 32, Ex. 230.) The state attorney did not file charges against N.N.J. (ECF 1-2, at 62-64.)

In April 2007, the Board asked the IEE evaluator for a second behavioral evaluation because L.J. was engaging in "higher intensity behavior" and exhibiting higher stress and anxiety. (ECF 1-2, at 26-31; ECF 32, Ex. 62.) The second evaluation concluded that those evolving behavioral needs warranted updated

interventions. (ECF 32, Ex. 72.) The Board's expert witness agreed, concluding that the Board should have updated L.J.'s behavior plan during the 2007-08 school year. (ECF 27-19, at 19, Tr. 1953:1-8.) Disregarding this guidance, the Board failed to update the plan. (ECF 27-9, at 35, Tr. 1112:24-1113:16, at 73, Tr. 1150:21-1151:10; ECF 27-2, at 136-37, Tr. 323:21-324:3; ECF 32, Ex. 70, at 2.) While the Board wrote a new document in December 2007, it was "almost identical" to the 2005 plan. (ECF 1-2, at 46-47, 95; *compare* ECF 32, Ex. 7 (Oct. 2005), *with* Ex. 549 (Dec. 2007).)

The ALJ concluded that the 2005 and 2007 behavior plans (ECF 32, Exs. 7 & 549) were inadequate to meet L.J.'s needs or address his extreme fear and aversion to attending school because the Board never updated them to address those unique needs, despite ample evidence that demonstrated the plans were not working. (ECF 1-2, at 46-47, 95.) If there was no change in behavior, then either the strategies were not working or the strategies were not being implemented properly. (ECF 27-8, at 26-28, Tr. 1034:14-1036:2.) The ALJ found that the Board neglected the majority of the behavior plan's requirements by: failing to collect data sufficient to identify the functions of L.J.'s problem behaviors (ECF 1-2, at 13-14, 35-36, 42); failing to evaluate and update sensory strategies to effectively prevent problem behaviors (ECF 1-2, at 32-33, 45); failing to implement with fidelity the prevention strategy of

providing three sensory breaks per day[6] (ECF 1-2, at 42-43); and failing to meaningfully analyze data to update L.J.'s behavioral interventions when it was evident the strategies were not decreasing his problem behaviors (ECF 1-2, at 32, 36-42, 94-95).

Compounding these failures, the Board neglected other IEP services that L.J. required to overcome his behavioral needs and benefit from his education. Specifically, the Board departed from L.J.'s IEP by:

- Failing to timely provide books to use at home and to provide lesson plans and study guides two weeks (but no less than seven days) in advance of lessons to allow pre-teaching, an effective learning strategy to reduce anxiety, increase comprehension, and prevent problem behaviors.[7] (ECF 1-2, at 54-57; ECF 87, at 56; ECF 32, Ex.1, at 18 & Settlement Agreement 1.)

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[6] Failure to provide sensory breaks was identified as an important preventive strategy for L.J. to make problem behavior less likely to occur. (ECF 27-17, at 19-20, Tr. 1720:16-1721:4.)

[7] The requirement to provide materials no less than seven days in advance was to allow tutors who worked with L.J. the opportunity to "pre-teach" him the material; otherwise, he could not benefit from school lessons and would engage in problem behaviors due to frustration. (ECF 27-7, at 26, Tr. 922:14-923:2, at 35-37, Tr. 931:20-933:24, at 46-48, Tr. 942:21-945:5, at 56, Tr. 952:12-953:4; ECF 27-3, at 13-14, Tr. 430:9-431:6; ECF 27-8, at 62, Tr. 1070:7-22; ECF 27-13, at 14-18, Tr. 1437:20-1441:20, at 35-36, Tr. 1458:22-1459:1; ECF 27-14, at 42, Tr. 1540:9-18; ECF 27-19, at 17, Tr. 1951:18-21; ECF 32, Exs. 362, 572, at 11 & 42.)

- Failing to modify assignments to accommodate L.J.'s learning needs (i.e., breaking assignments into shorter segments and modifying font size).[8] (ECF 1-2, at 75-76; ECF 87, at 52; ECF 32, Ex. 1, at 18.)
- Providing only 12 occupational therapy sessions during the 2006-07 school year, even though his IEP required weekly sessions to teach him how to manage sensory stimuli and regulate his behavior. (ECF 1-2, at 44-46; ECF 87, at 16; ECF 32, Ex. 1, at 3.)
- Providing only 17 speech and language therapy sessions during the 2006-07 school year, even though his IEP required daily sessions to develop language skills and limit communication difficulties.[9] (ECF 1-2, at 79-82; ECF 87, at 25-26; ECF 32, Ex. 1, at 2.)

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[8] These accommodations were to reduce stimuli to avoid overwhelming L.J. and to allow him to focus. (ECF 27-1, at 119, Tr. 119:14-18; ECF 27-7, at 53, 949:5-12;ECF 27-11, at 18, Tr. 1202:7-9.)

[9] Speech therapy was important to assist L.J. with social interactions, participate in class, stay on task, and express himself to avoid behavior problems. (ECF 27-18, at 8, Tr. 1806:16-22, at 33, Tr. 1831:7-8, at 41, Tr. 1839:14-22.)

- Failing to hold weekly teacher meetings with all general education teachers to ensure a consistent approach to L.J.'s needs.[10] (ECF 1-2, at 57-58; ECF 87, at 46-47; ECF 32, Ex. 1, at 2.)
- Providing no social skills training, even though L.J.'s IEP required weekly counseling sessions and the use of a buddy system with two peers to improve L.J.'s ability to navigate social situations.[11] (ECF 1-2, at 50-51; ECF 87, at 50-52; ECF 32, Ex. 1, at 2-3.)
- Failing to provide a study carrel to limit L.J.'s exposure to stimuli and distractions.[12] (ECF 1-2, at 75; ECF 87, at 52; ECF 32, Ex. 1, at 18.)

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[10] Weekly meetings were a strategy to ensure successful inclusion, i.e., meaningful participation of a student with a disability in a general education setting (beyond just physical presence). The primary purpose of collaboration was to see how L.J. was progressing and assess needed changes to curriculum modifications, instructional support, and teaching strategies. (ECF 27-8, at 11, Tr. 1019:14-1020:13, at 15-18, Tr. 1023:3-1026:12.)

[11] Social skills instruction promotes positive interactions with peers, which was difficult for L.J. (ECF 27-3, at 15-16, Tr. 432:15-433:11, at 22, Tr. 439:23-25; ECF 27-4, at 7, Tr. 555:6-16; ECF 27-8, at 18-20, Tr. 1026:13-1028:11.)

[12] L.J. required constant supports to increase focus and decrease distractions from irrelevant information. (ECF 27-11, at 18, Tr. 1202:9-17; ECF 27-23, at 10, Tr. 2150:1-15.)

- Failing to consistently provide an FM system during academic instruction to help with focus and an AlphaSmart to help with writing. (ECF 1-2, at 72-75; ECF 87, at 52-53, 58; ECF 32, Ex. 1, at 20-21.)[13]
- Failing to comply with the IEP's requirement that L.J. spend 61% of the day in general education with students without disabilities. (ECF 1-2, at 50; ECF 87, at 47-48; ECF 32, Ex. 1, at 4).

Denied these services, as well as the behavioral supports required by his behavior plan, L.J.'s behavior did not improve during the 2006-07 and 2007-08 school years (the years at issue here). (ECF 1-2, at 95.) Instead, his behavior grew significantly worse, putting him and others at risk of harm and resulting in substantial property damage. (ECF 27-13, at 31-35, Tr. 1454:12-1458:8, at 43-44, Tr. 1466:14-1467:3; ECF 32, Ex. 410.) L.J.'s problem behaviors deteriorated to the point where the Board recommended him for expulsion[14] and filed police reports against him. (ECF 32, Exs. 545-46.) Likewise, he did not make progress during these years in reading, math, speech-language, or social skills. (ECF 1-2, at 47-50, 77-82; ECF 32,

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[13] The FM system is an assistive technology device to be used at all times in class to amplify teacher's voice so that L.J. could block out other noise and focus on instruction. (ECF 27-1, at 30, Tr. 30:10-31:9; ECF 27-7, at 52, Tr. 948:9-25; ECF 32, Ex. 1 at 167.) The Alpha Smart is an assistive technology device to help with writing. (ECF 27-7, at 53-54, Tr. 949:12-950:5.)

[14] The Board did not expel L.J. after it determined that the behavioral incident was a manifestation of his disability. (ECF 32, Ex. 550.)

Exs. 6, 301, 304, 270, 296, at 6.) Ultimately, his mother removed him from Falcon Cove and placed him in a residential program. (ECF 1-2, at 67-68.)

III. Standard of Review

This Court reviews *de novo* the district court's determination that the Board provided FAPE, a mixed question of law and fact. *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1284 (11th Cir. 2008). Where, as here, the district court's findings are "based solely on a cold administrative record," this Court "stand[s] in the same shoes as the district court in reviewing the administrative record and may, therefore, accept the conclusions of the ALJ and district court that are supported by the record and reject those that are not." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1181 (11th Cir. 2014).

The district court must give "due weight to the ALJ decision, and ... be careful not to substitute its judgment for that of the" ALJ. *See T.P. v. Bryan Cnty. Sch. Dist.*, 792 F.3d 1284, 1290 n.11 (11th Cir. 2015); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (receiving records from the administrative proceeding "carries with it the implied requirement that due weight shall be given to these proceedings"). The ALJ had "the benefit of observing and determining the credibility of the various witnesses." *Parker v. Heckler*, 763 F.2d 1363, 1365 (11th Cir. 1985). The district court is therefore required to respect an ALJ's "findings when they are thoroughly

and carefully made." *Cory D. v. Burke Cnty. Sch. Dist.*, 285 F.3d 1294, 1298 (11th Cir. 2002).

SUMMARY OF ARGUMENT

L.J. is a young man with autism and complex needs who required systematic behavioral and academic interventions under the IDEA to benefit from education. The ALJ concluded that the Board failed to provide numerous interventions that L.J. needed and that his IEP and behavior plan required. In reaching that conclusion, the ALJ properly considered the cumulative effects of the Board's various failures, including the effects on L.J.'s school-refusal behaviors.

The district court recognized that the Board failed to implement many provisions of L.J.'s IEP and behavior plan. Yet, the court concluded that these failures were either justified or were *de minimis* violations of the IEP. The court erred by not analyzing the Board's failures to implement L.J.'s IEP under the new Supreme Court standard articulated in *Endrew F.*, i.e., whether the failure to implement impeded L.J.'s chance for progress appropriate in light of his circumstances. Analyzed properly, the failures were material.

The district court further erred by identifying numerous Board implementation failures, but not considering the cumulative impact of the failures. Instead, it considered each failure in isolation. The cumulative impact was material and denied

L.J. the chance to make progress appropriate in light of his circumstances. Indeed, L.J. regressed behaviorally, and made no progress academically during middle school.

The district court also erred in overturning the ALJ's thoroughly and carefully made findings that the Board failed to implement the IEP and behavior plan. Throughout its opinion, the district court substituted its judgment for the ALJ's. Affording the ALJ's findings due weight, they must be upheld.

ARGUMENT

I. THE DISTRICT COURT ERRED BY FAILING TO APPLY *ENDREW F.'S* STANDARD FOR DETERMINING WHETHER L.J. RECEIVED AN APPROPRIATE EDUCATION.

A. IDEA's Statutory Framework

A child with a disability who is eligible for services under the IDEA is entitled to FAPE from his local educational agency (here, the Board). 20 U.S.C. § 1412(a)(1). FAPE is defined as special education and related services that are provided at public expense to meet the unique needs of a child with a disability. *Id.* § 1401(9). Special education is specially designed instruction, at no cost to the parents, designed to meet the child's needs. 34 C.F.R. § 300.39. The instruction must address not only a child's academic needs, but also his social, emotional and behavioral needs. *Robert M. v. Hawaii*, 2008 WL 5272779, at *16 (D. Haw. Dec. 19, 2008) (psychological, behavioral and emotional goals are properly addressed through an IEP when they affect academic progress, school behavior and socialization). Specially designed instruction is adapting, as appropriate to the needs of the child, the content, methodology, or delivery of instruction to: 1) address his unique needs that result from his disability and 2) ensure access to the general education curriculum provided to peers without disabilities. 34 C.F.R. § 300.39.

The IDEA requires school boards to evaluate a child suspected of having a qualifying disability to determine his IDEA eligibility. School boards also must evaluate to identify an eligible child's unique educational needs. 20 U.S.C. § 1414(b)(2). The evaluation procedures must include a variety of assessment tools and strategies, assess all areas of suspected disability, and gather relevant functional, developmental, and academic information. *Id.* § 1414(b)(2)(A).

Re-evaluations must be conducted at least every three years. *Id.* § 1414(a)(2). Parents have the right to an IEE if they disagree with a school board's evaluation. *Id.* § 1415(b)(1) & (d)(2)(A); 34 C.F.R. § 300.502. The results of an IEE must be considered in any decision with respect to the provision of FAPE. 34 C.F.R. § 300.502(c)(1).

An IEP is a written statement for a child with a disability that is developed, reviewed, and revised in a meeting with the child's parent, teachers, and others. 20 U.S.C. § 1401(14); § 1414(d)(1)(A). Special education and related services must be included in the IEP, and they must be based on peer-reviewed research to the extent practicable. *Id.* § 1414(d)(1)(A)(IV). Related services are developmental, corrective, and other supportive services that assist a child with a disability to benefit from special education. *Id.* § 1401(26). The IDEA includes a suggested, not exclusive, list of services, including occupational therapy, speech-language pathology, and

counseling. *Id*. Related services are not educational services, but rather are services that enable a child to access special education. *See Irving Sch. Dist. v. Tatro,* 468 U.S. 883, 890 (1984) (clean intermittent catheterization is a related service since a child cannot attend school without it).

In the case of a child whose behavior impedes his learning or that of others, his IEP team (parents and others charged with developing the IEP) must consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior. 20 U.S.C. § 1414(d)(3)(B)(I); Fla. Admin. Code R. 6A-6.03028(3)(g). For a Florida child with autism, if behavioral concerns are present, a functional behavioral assessment must be conducted to identify the functions of his behavior and interventions that address those functions. Fla. Admin. Code R. 6A-6.03023(3)(f). A functional behavioral assessment is a systematic process for defining a student's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The assessment process includes examining the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior. The purpose of the assessment is to determine whether a behavioral intervention plan should be developed. *Id.* 6A-6.03411(1)(q). A behavioral intervention plan uses positive behavior interventions,

supports and other strategies to address challenging behaviors, and enables the student to learn socially appropriate and responsible behavior. *Id.* 6A-6.03411(1)(d).

Children with disabilities must be educated with children without disabilities to the maximum extent appropriate – inclusiveness is a primary goal of the IDEA. 20 U.S.C. § 1412(a)(5).

Parents may request an administrative hearing with respect to any matter relating to the identification, evaluation, or educational placement or provision of FAPE to a child. 20 U.S.C. § 1415(b)(6). During the pendency of these and subsequent judicial proceedings, the child remains in the then-current "stay-put" educational placement. *Id*. § 1415(j). Stay-put is a procedural protection that strips schools of the unilateral authority to exclude students with disabilities until the completion of review proceedings. *Honig v. Doe*, 484 U.S. 305, 323 (1988); *CP v. Leon Cnty. Sch. Bd.*, 483 F.3d 1151, 1156 (11th Cir. 2007). "Educational placement" is not defined by the IDEA, but has been interpreted to mean whether a change in placement is likely to affect in some significant way the child's learning experience. *D.M. v. N.J. Dep't of Educ*., 801 F.3d 205, 215 (3d Cir. 2015). In general, the stay-put placement is the program and services specified in the IEP. *Id*. at 215-18.

Under the IDEA, courts shall grant such relief as they determine appropriate. 20 U.S.C. § 1415(i)(2)(C)(iii). This provision allows courts to fashion prospective

injunctions. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Compensatory education is prospective injunctive relief under the IDEA. *Todd D. v. Andrews*, 933 F.2d 1576, 1584 (11th Cir. 1991). In the Eleventh Circuit, once a determination has been made that a school board failed to provide FAPE, compensatory education that prospectively compensates for past deficient programs may be awarded. *Draper,* 518 F.3d at 1280.

B. *Endrew F.'s* New Standard.

Prior to 2017, the landmark case on providing FAPE was *Rowley.* Parents of Amy, a deaf first grader in general education, sued to compel her school to provide a sign language interpreter. Amy had successfully completed Kindergarten without the interpreter and was an above average student getting passing grades and advancing easily from grade to grade. The Court found that the purpose of the IDEA (formerly the Education of All Handicapped Children's Act) was not to maximize each child's potential, but to provide access to specialized instruction and related services individually designed to provide educational benefit to the child. The Court held that a child's educational program must be reasonably calculated to enable the child to receive some educational benefit. 458 U.S. at 203-04.

In March 2017, the Supreme Court articulated a new FAPE standard. In *Endrew F.*, the Court examined the test for determining FAPE that it had established

in *Rowley*. 137 S. Ct. at 994-96, 997-00. It found that the key facts in *Rowley* that supported the conclusion that Amy's school was providing FAPE were that she was making excellent progress in a regular class and her IEP offered substantial specialized instruction and services. *Id*. at 996. *Endrew F.* distinguished *Rowley* in that Endrew 1) "exhibited multiple behaviors that inhibited his ability to access learning in the classroom" and 2) "was failing to make meaningful progress toward his aims." *Id*. The Court found that children who are not fully integrated in the regular classroom and who are not progressing at grade level are still entitled to an educational program that is "appropriately ambitious in light of [their] circumstances .... The goals may differ, but every child should have the chance to meet challenging objectives." *Id*. at 1000.

Endrew F. articulated a stronger, "more precise" FAPE standard than did *Rowley*. *M.C. v. Antelope Valley Union High Sch. Dist*., 858 F.3d 1189, 1200 (9th Cir. 2017). Instead of an educational program being reasonably calculated to make "some" progress, the Court held that it must be "reasonably calculated to enable a child to make progress appropriate in light of child's circumstances." *Id*. at 1001. Noting that this standard is "markedly more demanding than the 'merely more than *de minimis*' test," applied by the lower court, the Court rejected that test. *Id*. The

Court reasoned that "instruction that aims so low" would hardly be offering an education at all. *Id*.

Under the *Endrew F.* standard, an IEP must be "constructed only after careful consideration of" the child's circumstances: "present levels of achievement, disability, and potential for growth." *Id.* at 999. IEPs must "set out a plan for pursuing academic and functional advancement." *Id*. For most children, this means an IEP that provides "integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade" in the general education curriculum. *Id.* at 1000. For other children, "[t]he goals may differ" but the goals must nevertheless be challenging given the children's potential for growth. *See id.* at 1000-01.

Endrew F. requires a rigorous analysis by courts. Courts must identify the specific "circumstances" that *Endrew F.* recognized, and determine whether the IEP is "appropriately ambitious" in light of those circumstances. *See id.* at 999-00. School boards must be able to defend IEP decisions as being tailored to the unique circumstances of the child; they must be able to offer "cogent and responsive explanations" for their decisions. *See id.* at 1002. While deference to a school's education policy is warranted, the Court stated that "deference is based on the

application of expertise and the exercise of judgment by school authorities." *Id*. at 1001.

Two recent decisions shed light on how behavioral needs should be analyzed under *Endrew F.* One highlights the unique needs of students with autism, like L.J. *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151 (W.D. Ark. Apr. 3, 2017). In *Paris*, the court reasoned that the student had not received an appropriate education because the district's "behavior plans were inadequate, especially in light of the higher standard of *Endrew*." *Id.* at *8. The school had lumped the student's inappropriate behaviors together as "noncompliance," which "completely ignor[ed] the nuances of behaviors that manifest with autism." *Id.* In determining whether a student's IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F.*, 137 S. Ct. at 1001, the court found it is reasonable for courts to analyze whether a school is effectively addressing behavior that impedes a student's ability to learn. "[W]hile the IDEA does not explicitly mandate a behavior plan, any given child's circumstances might implicitly require one" under *Endrew F.* *Paris,* 2017 WL 1234151 at *8, n.10.

Another court examined the educational needs of a child with multiple disabilities, including Asperger's Disorder. *Pocono Mountain Sch. Dist. v. J.W.*, 2017 WL 3971089 (M.D. Pa. Sept. 8, 2017). Similar to L.J., the student there had

work refusal and work avoidance behaviors which "interfere[d] substantially with [his] access to the curriculum." *Id.* at *7. The court analyzed the administrative record in light of *Endrew F.* and found that the school district failed to offer the student "an educational program reasonably calculated to allow him to make behavioral progress in light of his circumstances." *Id.* The court stated that the school district "knew that the student's serious behavioral issues were impeding his education, the various IEPs inadequately addressed and/or did not address these behaviors, and these behavioral problems were not managed through a consistent plan." *Id.* The court held that the student was, "therefore, denied a FAPE based on the District's failure to 'address these behavioral problems in a systematic and consistent way.'" *Id.* (citation omitted).

C. The *Endrew F.* Standard Applies to L.J.'s Claim that the Board Failed to Implement His Stay-Put IEP.

It is well established that IEPs must be implemented as written; courts cannot rewrite them. *Todd D.*, 933 F.2d at 1581-82. However, this Court has yet to determine the applicable standard for considering whether school boards have met their obligations when implementing IEPs. *Endrew F.* resolves this issue. Prior to *Endrew F.*, other courts held that IEP implementation failures deny a child FAPE if

the failures are material or more than *de minimis*.[15] Under *Endrew F.*, the failures are material and deny FAPE if they jeopardize the child's opportunity to make progress appropriate in light of his circumstances.

Before *Endrew F.*, the Fifth Circuit articulated the test for materiality as:

> a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board ... failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000).

Courts have applied materiality to cases involving behavioral issues. One court analyzed whether a failure to implement a behavioral goal of video taping was material, finding that the failure was not material since the child's behavior was "largely in check" despite the failure. *Burke v. Amherst Sch. Dist.*, 2008 WL

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[15] *Woods v. Northport Pub. Sch.*, 487 Fed. Appx. 968, 974 (6th Cir. 2012); *Sumter Cnty. Sch. Dist. 17 v. Heffernan,* 642 F.3d 478, 484 (4th Cir. 2011); *A.P. v. Woodstock Bd. of Educ.* 370 Fed. Appx. 202, 205 (2d Cir. 2010); *Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir. 2007); *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 Fed. Appx. 184, 187 (3d Cir. 2006); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); *Garmany v. Dist. of Columbia*, 935 F. Supp. 2d 177, 181 (D.C.C. 2013); *Burke v. Amherst Sch. Dist.*, 2008 WL 5382270, *9 (D.N.H. 2008). *See also Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (would have applied *Bobby R.* had plaintiffs made implementation argument).

5382270, *11 (D.N.H. 2008). By contrast, in *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1025 (8th Cir. 2003), the court found that a failure to develop and implement a behavior plan was material where there was a dramatic increase in challenging behaviors.

Materiality must be analyzed consistent with the new *Endrew F.* standard since FAPE claims arising from implementation failures use the same substantive criteria as other FAPE claims. *See Bobby R.*, 200 F.3d at 349 (linking implementation with *Rowley's* meaningful educational benefit criteria); *Ross v. Framingham Sch. Comm.*, 44 F. Supp. 2d 104, 119 (D. Mass. 1999) (linking implementation to progress toward achievement of IEP goals). Applying *Endrew F.*'s FAPE standard to implementation failures requires the following analysis: whether a school board's failure to implement an IEP impeded progress appropriate in light of the child's circumstances.

The standard for implementation of a stay-put IEP is no different. Prior to *Endrew F.*, the Seventh Circuit addressed the implementation of a stay-put IEP. *John M. v. Bd. of Educ. of Evanston Township High Sch. Dist. 202*, 502 F.3d 708 (7th Cir. 2007). When the status quo no longer exists, such as moving from elementary to middle school, school boards are allowed some degree of flexibility in implementing stay-put IEPs . *Id.* at 715. But *John M.* went on to state:

> The recognized and defined special needs of the child and the educational goals originally set by the parents and by

> professional educators must be respected. Protestations that educational methodologies proven to be helpful to the child in the past are now impossible must be evaluated with a critical eye to ensure that motivations other than those compatible with the statute, such as bureaucratic inertia, are not driving the decision.

Id. The Seventh Circuit directed on remand that "[g]enerally, the terms of this IEP should be enforced, without exception, as the stay-put relief." *Id.* Further, before any changes to the stay-put IEP are made, "the court must require <u>very compelling evidence</u> from the School District before permitting a deviation from the course already set." *Id*. at 716 (emphasis added).

Post-*Endrew F.,* the standard for determining if implementation of an IEP – stay-put or not – violates the IDEA must be analyzed in the context of whether the failure to implement is impeding progress appropriate in light of the child's circumstances.

D. The District Court Did Not Apply the *Endrew F.* Standard.

In ruling that the Board deprived L.J. of FAPE, the ALJ concluded that in light of L.J.'s unique needs there was a material failure in the Board's implementation of his stay-put IEP. (ECF 1-2, at 96.) The district court also applied materiality (ECF 87, at 9-11), but contravening *Endrew F.* it used its own quantitative approach divorced from L.J.'s circumstances and needs. The court considered only the amount of services denied to L.J., without analyzing the consequences for a child with L.J.'s

complicated profile. The court, using its own calculations, failed to analyze whether the missed 6% of occupational therapy and 13% of speech-language therapy sessions, or 4% shortfall in completing sensory forms, or not analyzing the functions of two behaviors, or providing lesson plans on average 4.42 instead of 7 days in advance of lessons, were failures that jeopardized L.J.'s chance of making progress appropriate in light of his circumstances. (*Id.* at 18, 24, 27, 33, 56.) A small amount was automatically deemed by the court to be *de minimis*. This reasoning cannot be squared with *Endrew F.*, which requires an analysis of the impact of implementation failures in light of the child's unique needs and circumstances.

The district court added that for stay-put IEPs: "the materiality of the deviation is necessarily measured by reference to the feasibility and utility[16] of its continued implementation in the new setting in light of the goals of the IEP." (*Id*. at 10 & 52, citing as authority its own previous order in this case.) The court did not require "very compelling evidence" to deviate from the stay-put IEP. *See John M.*, 502 F.3d at 716. Instead, the court used 1) its own "common sense" to relieve the Board from implementing L.J.'s buddy system and social skills training;[17] 2) a "lack of

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[16] The court does not define or rely on any other court for using "utility" as a standard.

[17] There is no evidence linking "L.J.'s strong aversion to school" to what the court terms "forced peer interactions." (ECF 87, at 52.)

feasibility" to allow the failure to hold required weekly teacher meetings; and 3) "flexibility" to exempt the Board from providing the required number of sensory breaks. (ECF 87, at 19, 47 & 52.) This analysis, too, failed to take into account L.J.'s unique needs and circumstances.

Simply put, the district court failed to consider *Endrew F.* In its order, the court did not even reference *Endrew F.* even though L.J. had notified it of the landmark case. (ECF 86.) The court never considered whether the Board's various implementation failures were material in light of L.J.'s unique needs and circumstances. It never considered L.J.'s lack of behavioral or academic progress – which, though not dispositive, tends to show that the Board's implementation failures jeopardized L.J.'s chance to make appropriate progress.[18] *See Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("if the child is not provided the reading instruction called for and there is a shortfall in the child's reading achievement, that would certainly tend to show that the failure to implement the IEP was material. On the other hand, if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material."); *S.G.W. v. Eugene Sch. Dist.*, 2017 WL 1027031, *4 (D. Ore. Mar. 16, 2017)

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[18] (ECF 87, at 12 (lack of progress in reading not sufficient to warrant a failure-to-implement finding), at 44-45 (no improvement in behavior does not demonstrate that behavior plan was inadequate), at 62 (Board's school aversion strategies were adequate even though L.J. had continued reluctance to go to school).)

(student's progress is relevant to resolve doubts about the extent of the implementation "shortfall" from the IEP's standards). The court failed to consider whether the multiple implementation failures by the Board impeded the chance for L.J. to progress in light of his circumstances.

E. The Board's Failure to Implement L.J.'s IEP is a Violation of FAPE Under the *Endrew F.* Standard.

Under the *Endrew F.* standard, the Board's implementation failures denied L.J. FAPE. As a child with autism, L.J. required specific strategies, accommodations, therapies, and supports to allow him to access education and attend school. The Board's failure to implement and update a behavior plan caused him to miss significant amounts of school, make little to no progress academically, and become locked in a pattern of significantly escalating problem behaviors that ultimately caused him to be removed to a residential placement.

The Board's most significant failure was its failure to adequately address L.J.'s problem behaviors, particularly his severe school-refusal behaviors. *See Indep. Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769, 777 (8th Cir. 2001) (child's truancy and disruptiveness substantially prevented her from receiving educational benefit); *Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009) (once child's truancy became excessive, school had affirmative duty to take some sort of responsive action); *Lamoine Sch. Comm. v. Ms. Z.*, 353 F. Supp. 2d 18, 34, 37 (D.

Me. 2005) (IEPs were not reasonably calculated to provide academic benefit because they failed to include any plan or supports to address non-attendance issues).

"[T]he quality of a child's education is inextricably linked to that child's behavior." *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). A child's behavioral needs can impede his learning or that of others. *See* 34 C.F.R. § 300.324(a)(2)(i). Disruptive behavior, for example, can derail a child's participation in classroom instruction, and school-refusal behavior can altogether prevent a child from accessing school. Therefore, school boards must address behavioral needs. *See Cnty. of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1467 (9th Cir. 1996) (educational benefit includes "social and emotional needs that affect academic progress, school behavior, and socialization"); 20 U.S.C. § 1414(d)(3)(B)(I); Fla. Admin. Code R. 6A-6.03023(3)(f) & .03028(3)(g).

This requirement is particularly important for children on the autism spectrum. Behavioral needs are often their primary barrier to education. *See* Fla. Admin. Code R. 6A-6.03023(1). Because of self-regulation, attentiveness, and socialization needs, many children on the spectrum require intensive behavioral support throughout the day. *Drew P. v. Clark Cnty. Sch. Dist.*, 877 F.2d 927, 930-31 (11th Cir. 1989). Positive behavioral intervention plans are to children with autism what braille is to children who are blind.

L.J., a person with autism, required intense behavioral support to progress academically and behaviorally. By including a positive behavioral intervention plan in L.J.'s IEP, the Board itself determined that he required such support to receive FAPE. His behavioral needs impeded his education in a variety of ways: they caused him to refuse school, act disruptively, and lose focus in school. To make educational progress – or even access the schoolhouse door – he required a positive behavioral intervention plan that addressed these "unique needs" and "circumstances." *See Endrew F.*, 137 S. Ct. at 999.

The Board, however, neglected L.J.'s behavioral needs and failed to follow the behavior plan requirements. The Board was aware of L.J.'s school-refusal behaviors that commenced after the behavior plan was developed, and thus that L.J.'s behavior plan required updating. Yet the Board failed to revise the plan to address the school-refusal behaviors in a systematic way, such as the "back-to-school plan" recommended by the behavioral analyst who conducted L.J.'s IEE on behavior. (ECF 1-2, at 19-26; ECF 32, at 57.) At a minimum, the plan required the Board to adopt interventions for the school-refusal behavior, collect data on the interventions, and "determine the need to increase or decrease the reinforcements or the need to update the plan." (ECF 32, Ex. 7, at 6.) School refusal and sickness caused L.J. to miss 144

school days during the 2006-07 school year, denying him most of the instructional and therapy time that school year.

The district court recognized that L.J.'s "sporadic attendance ... was an obstacle to his realizing many benefits of the services that the School Board offered pursuant to the IEP." (ECF 87, at 61.) However, the court concluded that the Board's implementation of supports and strategies to get L.J. to school were adequate. (*Id*. at 62.) The court erred by failing to apply the *Endrew F.* standard of whether the Boards failures impeded his chance at progress. The Board failed to implement systematic interventions to address school-refusal behaviors, collect and analyze data on the interventions, and update the interventions to ensure effectiveness. Much like a lack of a ramp prevents a child with a wheelchair from accessing school, the Board's failures left L.J. without the support he needed to benefit educationally. While the strategies are different, the purpose is the same: to ensure children with disabilities are not excluded from school.

The Board's implementation failures, however, went well beyond failing to address L.J.'s school-refusal behavior. With an average IQ, L.J. had the capacity to learn. But the Board's multiple implementation failures all but ensured that he did not make even *de minimis* progress. Because the strategies in L.J.'s IEP that the Board ignored were designed not only to calm him down, but also to teach him to use

the strategies without prompting and allow him to focus on his schoolwork, his behaviors did not improve and indeed regressed. The district court, though, failed to acknowledge these consequences of the failures. For example, the district court acknowledged that sensory breaks keep L.J. on task and focused, but it simply concluded that the failure to provide them consistently were either justified because flexibility was needed or because they were not material. (*Id.* at 18-21.) Analyzed properly as whether these failures impeded L.J.'s chance at behavioral and academic progress appropriate in light of his circumstances, the failures were material.

The district court ignored substantial evidence in the record about the importance for L.J. of specific accommodations that the Board failed to implement. In excusing the Board's failure to modify assignments (i.e., shortened assignments and enlarged font), provide a study carrel for independent work, and consistently use the FM system to amplify the teacher's voice during instruction, the court reasoned that "there is no evidence that the challenged accommodations had any special importance in furthering that overarching objective" of promoting L.J.'s ability to access the curriculum. (ECF 87, at 54.) To the contrary, the evidence demonstrates that each accommodation was specially designed to allow L.J. to focus on learning and not become overwhelmed by distractions. (*See supra* notes 7-8, 12-13.) The court erred in speculating on the lack of importance of each individual

accommodation on L.J.'s IEP (which had already been determined to be necessary to meet his needs). The ALJ correctly concluded that these accommodations were important to L.J.'s success and that the Board's numerous failures impeded L.J.'s ability to make progress. (ECF 1-2, at 73-76.)

II. THE DISTRICT COURT ERRED BY NOT CONSIDERING THE CUMULATIVE IMPACT OF THE BOARD'S MULTIPLE IMPLEMENTATION FAILURES.

A court must examine the cumulative effect of multiple implementation failures. If the failures taken together impeded the child's chance to make progress appropriate in light of his circumstances, the failures denied the child FAPE. Here, the district court identified numerous Board implementation failures, but did not consider their cumulative impact. Instead, it considered each failure in isolation. Accepting the court's findings of the numerous implementation failures, reversal is warranted because cumulatively those failures denied L.J. FAPE.[19]

A. Courts must Consider the Cumulative Impact of Multiple Implementation Failures.

When presented with a FAPE claim, a court must consider whether the child's educational program as a whole is appropriate, and not analyze each program part in isolation. *See R.L.*, 757 F.3d at 1182 (various IEP shortcomings together "rendered

[19] Even if this Court concludes that *Endrew F.* broke no new ground or is otherwise irrelevant, the court's failure to consider the Board's implementation failures cumulatively requires reversal. Whether *Endrew F.* applies or not, the Board's implementation failures, taken together, were material.

the whole educational program deficient"); *R.K. v. N.Y.C. Dep't of Educ.*, 2011 WL 1131492, at *25 (E.D.N.Y. Jan. 21, 2011) ("analyzing and ruling on each alleged violation in isolation, the [ALJ] neglected to address their cumulative effect .... Collectively, these deficiencies deprived [student] of significant educational benefits and thereby denied her a FAPE.").

FAPE claims alleging multiple implementation failures are no exception. While this Court has not addressed how to evaluate a series of implementation failures, other circuits have indicated that courts must assess the alleged implementation deficiencies collectively to determine whether the program that the child received provided FAPE. The Fifth Circuit held that a party challenging the implementation of an IEP can prevail by showing "more than a *de minimis* failure to implement <u>all</u> elements of that IEP" *Bobby R.*, 200 F.3d at 349 (emphasis added) (must demonstrate that school board failed to implement "substantial or significant provisions of the IEP"). Thus, if a school board fails to implement several parts of a child's IEP and the failures taken together amount to more than a *de minimis* departure from the IEP, the board violates the IDEA. *See L.O. v. N.Y.C. Dep't of Educ.*, 822 F.3d 95, 109 (2d Cir. 2016) (multiple IDEA violations, which included not assessing the function of school refusal behaviors, "may cumulatively result in the denial of a FAPE even if the violations considered individually do not"); *Wilson v.*

Dist. of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) ("courts applying the materiality standard have focused on the proportion of services mandated to those actually provided"). This rule parallels the well-known cumulative-error doctrine: an aggregation of non-reversible trial errors can yield a denial of rights. *U.S. v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005).

B. The District Court Did Not Consider the Cumulative Impact of the Board's Multiple Implementation Failures.

The district court acknowledged that the Board violated numerous IEP requirements (ECF 87, at 11-62), yet it never analyzed the cumulative effect of those violations. Under the court's own view of the facts, the cumulative impact of the Board's implementation failures denied L.J. FAPE. The court recognized that the Board departed from L.J.'s IEP by:

- Providing only 12 occupational therapy sessions during the 2006-07 school year, even though the IEP required weekly sessions to teach L.J. how to manage sensory stimuli and regulate his behavior (*id.* at 16);
- Providing only 17 speech and language therapy sessions during the 2006-07 school year, even though the IEP required daily sessions to develop language skills and limit communication difficulties (*id.* at 25-26);[20]

[20] Although the court agreed with the ALJ that the Board provided limited therapy, it asserted that this failure was excusable because of L.J.'s absences. Not so. L.J. missed school because of school aversion that the Board failed to address. The Board cannot use L.J.'s behaviors as an excuse when the Board's own failures

- Failing to hold weekly teacher meetings to ensure a consistent approach to L.J.'s needs throughout the school day (*id.* at 46-47);
- Failing to comply with the IEP's inclusion requirements by denying L.J. 30 minutes a day of programming with regular education students to expose him to positive peer role models (*id.* at 47-48);[21]
- Providing no social skills counseling, even though the IEP required weekly sessions (*id.* at 50);
- Failing to modify all assignments to ensure accessibility (i.e., breaking assignments into shorter segments and modifying font size) (*id.* at 52);
- Failing to provide a study carrel to limit L.J.'s exposure to stimuli and distractions (*id.*);
- Failing to consistently provide an FM system during academic instruction to help with focus (*id.* at 52-53);
- Failing to provide lesson plans, study guides, and books the required seven days in advance of lessons – an effective learning strategy of pre-teaching (*id.* at 56); and
- Failing to provide all textbooks at the start of the school year (*id.* at 57-58).

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contributed to the behaviors.

[21] The court calculated that L.J. spent 54% instead of the required 61% of time in general education. Based on a six and a half hour day, the Board denied about 30 minutes a day of general education.

But the district court considered each of these IEP violations in isolation. It, for example, found that the therapy "shortfalls [did] not amount to a material failure to implement the IEP." (*Id.* at 14-15.) Next, it concluded that the failure to comply with the IEP's inclusion requirement was not by itself a material deviation from the IEP. (*Id.* at 47-48.) It then held that the failure to provide social skills counseling was immaterial. *Id.* at 51.) It provided similar reasoning for excusing the remaining implementation failures: weekly teacher meetings were impractical and therefore not material (*id.* at 47); failure to provide required accommodations did not have any special importance to L.J. in accessing curriculum (*id.* at 54); failure to timely provide study materials was not material (*id*. at 56-57).

This splintered approach was improper and failed to consider the totality of the Board's numerous failures on L.J.'s ability to make progress. A child's education is not a series of discrete parts, especially for a child like L.J. with complex needs. Academic frustration affects behavior, behavior affects academic engagement, and so on. For example, the court agreed that the Board failed to provide lesson plans seven days in advance but found that it was not material because (using the court's own calculations) the Board provided lesson plans approximately 4.42 days in advance. *(Id.* at 56.) The court failed to analyze any of the evidence that shows L.J. needed the plans seven days in advance to allow tutors the opportunity to pre-teach

him which is not only an effective strategy for children with autism, but also without pre-teaching L.J. could not learn and his resulting frustrations would translate into behavioral problems. (ECF 1-2, at 54-57; ECF 27-7, at 26, Tr. 922:14-923:2.) The court's approach to these implementation failures ignores the cumulative impact of failing to provide these accommodations and services that were necessary for L.J. to benefit from his education.

C. The Cumulative Impact of the Board's Multiple Implementation Failures Denied L.J. FAPE.

Even considering only the implementation failures that the court identified, there was significantly more than a minor discrepancy between the services provided to L.J. and those required by his IEP. *See Van Duyn*, 502 F.3d at 815. The discrepancy was material and denied L.J. the chance to make progress appropriate in light of his circumstances, which L.J. did not do behaviorally or academically.

It is undisputed that L.J. required comprehensive supports addressing his language, academic, and social skills needs. Communication difficulties caused L.J. to experience frustration and anxiety, which triggered disruptive behaviors. (*See supra* note 9.) So, too, did academic difficulties and stressful social situations. Only with systematic programming that addressed these behavioral triggers could L.J. manage his behavior and access education. *See Drew P.,* 877 F.2d at 930-31 ("autistic children require constant, round the clock, expert educational supervision

in order to progress”). While L.J.’s IEP provided for a comprehensive educational program, he received only a handful of therapy sessions; decreased inclusion programming; just a portion of his academic accommodations; and no social skills counseling.

While *arguendo* these implementation failures addressed separately may have had *de minimis* effects, the failures combined were destabilizing. Denied most of his speech and language therapy, L.J. was deprived of skills to avoid communication-related behavior triggers. Denied most of his occupational therapy, L.J. was deprived of the competency to self-regulate when he became overwhelmed in school. Denied the benefit of weekly teacher meetings, L.J.’s access to consistent approaches to academics and behavior was jeopardized. Denied multiple academic accommodations, L.J.’s learning was stifled and academic frustration increased. Denied a buddy system and social skills counseling, L.J. was deprived of the chance to learn to navigate social situations. And denied thousands of minutes of inclusion programming, L.J. was deprived of important opportunities to learn appropriate behaviors from his regular education peers.

As a result, L.J. was denied an opportunity to make educational progress appropriate in light of his circumstances. He was not positioned to overcome his school-refusal behaviors, thus denying him access to the schoolhouse door. When

he was able to access school, he was not positioned to overcome his disruptive behaviors. His behaviors during the 2006-07 and 2007-08 school years deteriorated. The upshot: although L.J. has an average IQ, he made *de minimis* educational progress during those years. *See Van Duyn*, 502 F.3d at 822 ("child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided").

The district court erred in not considering the negative cumulative impact of the Board's multiple implementation failures.

III. THE DISTRICT COURT ERRED BY FAILING TO GIVE DUE WEIGHT TO THE ADMINISTRATIVE LAW JUDGE'S DECISION.

A court is required to give "due weight to [an] ALJ decision"– it must avoid "substitut[ing] its judgment for that of the" ALJ. *T.P*, 792 F.3d at 1290 n.11. Although a court has discretion to accept or reject an ALJ's factual findings, when ALJ findings are "thoroughly and carefully made," the court must "respect" them. *Cory D.*, 285 F.3d at 1298. The district court here erred in overturning the ALJ's thoroughly and carefully made finding that the Board failed to implement L.J.'s behavior plan, denying him adequate behavioral support. Affording this finding due weight, it must be upheld. Thus, even if this Court finds *Endrew F.* inapposite, and even if the Court finds that the district court did not err in failing to review the

Board's implementation failures cumulatively, reversal is warranted on these grounds alone.

The district court's approach to the ALJ's behavioral findings is emblematic of the court's broader approach. Its opinion has very detailed citations to the record, but it ignores substantial evidence in the record or substitutes its own judgment for the ALJ's. Based on a cold record, the court ignored findings that the ALJ made in a 103-page opinion after 18 days of hearing with 604 exhibits and 28 witnesses. (ECF 1-2, at 1 & 4.)

A. The ALJ's Findings were Thoroughly and Carefully Made.

The ALJ spent 41 pages examining L.J.'s behavioral needs and the Board's approach to them. (ECF 1-2, at 7-42, 46-47, 93-95.) The ALJ's analysis was thorough and careful; it offered concrete, sound reasons for the findings, and the reasons comported with the record.

The ALJ found, supported by the record, that the Board neglected the majority of the behavior plan's requirements. The plan required the Board to: 1) provide L.J. behavioral interventions; 2) collect data; 3) analyze the data to identify the specific functions of the behaviors and the effectiveness of the plan's interventions; and 4) update the interventions based on the data. (ECF 1-2, at 9-11, 14-16.) The ALJ explained that L.J. had complex behaviors during the 2006-07 and 2007-08 school

years, and that those behaviors required updated interventions. The ALJ determined that the Board, though, neither collected data sufficient to identify the functions of L.J.'s problem behaviors (i.e., data about the events preceding a problem behavior, data about the timing of the behavior, and data about the nature of the behavior) (ECF 1-2, at 31-36, 42); nor properly analyzed data about his behaviors (*id.* at 36-42); nor used data to update L.J.'s behavioral interventions to effectively address his behaviors (*id.* at 32, 36, 46-47, 94-95). Relying on evidence in the record, the ALJ provided specific examples of these failures:

- One high intensity behavior was throwing glasses, but the Board neither recorded the frequency of this behavior nor analyzed its function. (*Id.* at 36.)
- The Board did not collect the information necessary to understand the cause or function of L.J.'s low-intensity, high-frequency behaviors, such as frequently requesting bathroom breaks. (*Id.*)
- The Board failed to collect information necessary to determine the function of at least six high-intensity behavior episodes, including incidents where L.J. broke a computer mouse, pushed over computers, and tried to bite school staff. (*Id.* at 38-40.)
- The Board did not analyze and respond to data showing that over the course of three days L.J. engaged in over 100 low-intensity behaviors. (*Id.* at 37.)

- The Board's occupational therapist did not evaluate L.J. to develop sensory strategies that would calm L.J. and help him remain in the classroom. (*Id.* at 32-33.)
- On at least three school days, L.J. engaged in a high-intensity behavior; the Board did not properly address the behavior; and as a result, L.J. engaged in additional high-intensity behaviors later the same day. (*Id.* at 37-39.)

The record supports the ALJ's determinations. The Board's own expert witness testified that the Board on various occasions failed to collect data necessary to identify the functions of L.J.'s problem behaviors.[22] L.J.'s expert similarly testified that the Board's data collection documents lacked sufficient data to understand the behaviors,[23] and the documents themselves show that the Board collected limited data

[22] (ECF 27-18, at 52, Tr. 1850:15-1851:4 (Board's data collection documents did not provide any information about why L.J. flooded a school bathroom); at 96, Tr. 1894:10-1895:15 (Board's data collection documents did not include information necessary to determine the events leading up to a behavior episode during gym); at 108-09, Tr. 1906:16-1907:23 (Board's data collection documents did not provide sufficient information to discern the function of one of L.J.'s behavior episodes in computer class); at 110-12, Tr. 1908:18-1910:20 (Board's data collection documents did not provide sufficient information to understand why L.J. ran away from staff on multiple occasions).)

[23] (ECF 27-22, at 19-22, Tr. 2123:25-2126:16 (data needs to have sufficient information about what occurred to determine functions and setting events or triggers that contribute to the problem behavior so team can make changes to the interventions).)

about the functions of the behaviors.[24] Further, the Board's expert testified that the Board did not evaluate which of L.J.'s behavioral interventions were effective.[25]

Finally, in October 2006, a court-ordered IEE was conducted, but the Board did not implement most of the recommendations or update the behavior plan. Then, in 2007, the Board requested that evaluator do a second behavioral evaluation because L.J. was engaging in "higher intensity behavior" and exhibiting increased stress and anxiety.[26] The evaluation concluded that those evolving behavioral needs warranted updated interventions.[27] The Board's expert witness agreed that the Board should have updated L.J.'s behavior plan during the 2007-08 school year.[28] But the plan itself, which required updating as needed (ECF 32, Ex. 7, at 6), shows that the Board never updated it in any material way. (*See supra* p.12.) And the Board did not otherwise provide L.J. interventions to address his high-intensity and school-refusal behaviors. Those behaviors escalated during the 2006-07 and 2007-08 school years.

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[24] (*See, e.g.*, ECF 32, Ex. 17, at 6 (10/30/06 - 11/3/06); Ex. 31, at 10 (2/12/07 - 2/16/07); Ex. 34, at 11-12 (3/5/07 - 3/9/07).)

[25] (*See* ECF 27-19 at 16, Tr. 1950:5-8 (when asked, "But there's no evaluation in which of those strategies that were used and weren't used were effective; isn't that correct?," The expert responded, "That's correct.").)

[26] (ECF 32, Ex. 62.)

[27] (ECF 32, Ex. 72, at 9-11. The evaluator reviewed L.J.'s educational records, spoke with N.N.J., and interviewed twelve school staff members. *See id.* at 2-3.)

[28] (ECF 27-19, at 19, Tr. 1953:1-8.)

This Court holds that where an ALJ's findings are thoroughly and carefully made, district courts are required to respect them. *Cory D.*, 285 F.3d at 1298. The district court here did not respect the ALJ's findings, and instead "substitute[d] its judgment for that of the" ALJ. *T.P.*, 792 F.3d at 1290 n.11. Pointing to some evidence that cut against the ALJ's specific examples of the Board's failures, the court discounted the ALJ's analysis. But that contrary evidence does not justify setting aside the ALJ's finding. After considering the testimony of dozens of witnesses, the ALJ found persuasive the testimony indicating that the Board neglected the majority of the behavior plan's requirements. And the ALJ thoroughly explained its findings, offering analysis that the record supports. A federal court reviewing a cold record should not intervene and disturb such a finding.[29]

Where, as here, the district court's findings are "based solely on a cold administrative record," this Court owes them no deference. *R.L.,* 757 F.3d at 1181; *see also NLRB v. Dixie Lime & Stone Co.*, 737 F.2d 1556, 1560 (11th Cir. 1984) ("extreme deference" is given to "hearing officer credibility determinations"); *Cnty.*

[29]This case underscores why. Congress intended special education proceedings to be expedient. *See Strawn v. Missouri State Bd. of Educ.*, 210 F.3d 954, 957 (8th Cir. 2000) ("children protected by the IDEA benefit greatly from quick resolution of disputes because lost education is a substantial harm, and that harm is exactly what the IDEA was meant to prevent"). Affording ALJ decisions due weight helps achieve this goal because it avoids each court of review performing extensive fact finding. Here, however, L.J. has languished for years; the district court took over six years to resolve this case.

Sch. Bd. of Henrico Cnty. v. Z.P., 399 F.3d 298, 307 (4th Cr. 2005) (in IDEA cases, credibility determinations implicit in a hearing officer's decision are entitled to deference). The ALJ's conclusion that the Board's failures denied L.J. FAPE should be affirmed. *See Neosho*, 315 F.3d at 1029-30 (student denied FAPE where "behavior problems ... precluded him from attending a regular classroom" but the district failed to develop and implement a behavior plan); *Chavez v. Bd. of Educ. of Tularosa Municipal Sch.*, 614 F. Supp. 2d 1184, 1210 (D.N.M. 2008) (student was denied FAPE due to school's failure to amend IEP to address refusal to attend school).

B. The District Court Substituted its Judgment for the ALJ's.

The district court quibbled with many of the ALJ's implementation findings, not because evidence contradicted the findings, but because 1) viewing the same evidence as the ALJ, the court reached different conclusions, or 2) the court simply believed that the Board's failures were justified. Further, it relied on its own view of the evidence, discounting expert testimony, making speculations, and substituting its judgment for that of the ALJ.

The court introduced ambiguities into its interpretation of the IEP where none exist. For example, the court found that there was no information in the IEP as to the "frequency or duration" of the challenged accommodations such as the FM system.

(ECF 87, at 52-53.) The Board, however, was not confused about the requirement nor was there any evidence in the record to support the court's view. To the contrary, the Board's audiologist clearly instructed L.J.'s teachers that the FM system was to be used at all times and in all classes. (ECF 32, Exs. 167, 169.) Similarly, the court found that the IEP does not define the meaning of "buddy system" (ECF 87, at 49) when there is ample evidence in the record that this is a recognized evidence-based strategy for teaching social skills to children with autism, and that the Board was not confused about its meaning. (ECF 27-8, at 18-20, Tr. 1026:13-1028:11; ECF 27-4, at 7, Tr. 555:6-16.)

The court acknowledged that the Board did not provide a buddy system, but the court believed that this failure was acceptable because the Board generally "promoted the goal of peer interactions." (ECF 87, at 49-50.) In reaching this conclusion, the court cobbled together evidence that L.J. had opportunities for peer interactions in school, but it cited no evidence that such opportunities were a sufficient substitute for the buddy system. (*Id.*) The court reached that conclusion on its own stating that "common sense dictates that forced peer interactions are not as feasible in the new middle-school setting." (*Id.* at 52.) Thus, the court improperly substituted its "common sense" for the evidence before and judgment of the ALJ. *See T.P*, 792 F.3d at 1290 n.11. It used its own assumptions to set aside the ALJ's finding. Further, it

disregarded the importance of social skills to the circumstances of L.J.'s unique needs.

The court also acknowledged the Board's failure to provide sensory breaks in accord with the IEP, but found the failure acceptable. The court speculated that some sensory breaks were not logged as occurring, but they most likely did occur "since no associated behavioral problem was recorded." (ECF 87, at 20.) Despite recognizing that sensory breaks were important to "preempt problem behavior," the court decided that flexibility justified the Board's failure to provide other breaks. (*Id.* at 19.) This analysis substituted the court's judgment for not only the ALJ's, but also the Board's, which had crafted an IEP providing for a set number of sensory breaks per day. If the Board thought flexibility was necessary, it could have included a range rather than a set number.

The court substituted its own judgment for the ALJ in finding that there was insufficient evidence in the record to show that the Board failed to analyze the interrelationship between L.J.'s sensory needs and his behaviors, and whether the strategies that were being used were effective in preventing his inappropriate behaviors. (ECF 87, at 24.) The ALJ made extensive findings to reach his conclusions based on his review of voluminous exhibits, and listened to fact and expert witness testimony about L.J.'s sensory needs and his behaviors. (ECF 1-2, at

11-12, 31-32, 42-46.) By contrast, the court ignores this evidence and instead embarks upon his own independent analysis of a subset of the Board's data collection forms to reach his conclusion that the sensory strategies were effective in "calming" L.J.'s behavior. (ECF 87, at 23-25.) The court overstates what this data represents, ignoring testimony, for example, from L.J.'s school occupational therapist who said these forms do not demonstrate what state of arousal L.J. was in prior to the use of the activity (i.e., was he aggressive or calling out in class). (ECF 27-21, at 44-45, Tr. 2072:19-2073:3.) This analysis also ignores that sensory difficulties can build to high states of sensory overload, even if an individual event does not trigger overreaction at the moment. (ECF 1-2, at 11.) The court disregards the major point of the ALJ's findings – that the Board failed to meaningfully analyze whether the sensory strategies were working to decrease L.J.'s problem behaviors (not simply to calm him in a given moment) and to modify its interventions accordingly.

The court also agreed that the Board did not provide N.N.J. with the lesson plans and other "required materials in perfect compliance with the IEP." The court calculated that most of the lesson plans were provided "approximately 4.42 days in advance," and concluded that was "far from a material deviation" from the required seven days. (ECF 87, at 55-56, 63-66.) This quantitative method substitutes the

judgment of the court for the ALJ and ignores the evidence the ALJ relied on showing how crucial the full seven days was to L.J.'s academic progress.

CONCLUSION

For the above reasons, L.J. respectfully requests that this Court: 1) reverse the district court's order graning the Board's motion for entry of judgment; 2) affirm the ALJ's decision that the Board violated the IDEA; 3) conclude that L.J. is entitled to compensatory education; and 4) remand to determine the amount of compensatory education.

Dated: February 12, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume requirements of Fed. R. App. P. 32(a), because it contains 12,825 words and has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the brief was electronically served on the following counsel via the CM/ECF system, on this 12th day of February, 2018:

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