STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],

Petitioner,

vs. Case No. 15-2841E

BROWARD COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a due process hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on July 15, 16 and 21, 2015, in Fort Lauderdale, Florida. The hearing was continued and finalized on August 6, 2015, via webcast with sites in Fort Lauderdale and Tallahassee, Florida.

APPEARANCES

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For Respondent: Barbara J. Myrick, Esquire
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STATEMENT OF THE ISSUES

Whether the Broward County School Board (School Board) violated the Individuals with Disabilities Act, 20 U.S.C. § 1400 et seq., (IDEA), by not providing the student with procedural protections and failing to provide a free and appropriate public education (FAPE);

Whether the student's May 2015 individual education plan (IEP), which identifies the student's eligibility as Emotional Behavior Disability (EBD), is appropriate;

Whether the student's May 2015 IEP, which recommends placement in an EBD cluster classroom, provides the student with a FAPE in the least restrictive environment.

PRELIMINARY STATEMENT

On May 21, 2015, the student's parents (Petitioners) filed a request for a due process hearing. Petitioners thereafter obtained counsel, who filed a Notice of Appearance on May 26, 2015. The due process hearing was scheduled for July 15 and 16, 2015.

On May 29, 2015, Petitioners filed a "Request for Clarification of this Court's Jurisdiction Regarding Placement Under Stay Put." After conducting a telephonic pre-hearing conference, and considering both parties' positions on the "stay put" provision of the IDEA,[1/] the undersigned entered an Order on June 18, 2015, determining that the student's "stay put"

placement is a general education classroom, as detailed in the student's May 2014 IEP.

On July 8, 2015, Petitioners filed a Motion for Continuance, which was denied on July 10, 2015. The hearing was held on July 15, 16, 21, and August 6, 2015. At the hearing, Petitioners presented the testimony of the following witnesses: the student's father; [redacted], a special education advocate; [redacted], a behavior specialist with Broward County Schools; [redacted], a camp director; and [redacted], a psychologist. Petitioners Exhibits 1-26 were admitted into evidence by stipulation of the parties.

The School Board presented the testimony of the following witnesses: [redacted], the student's [redacted]-grade teacher; [redacted], the student's [redacted]-grade teacher; [redacted], an exceptional student education (ESE) field coach; [redacted], an ESE curriculum supervisor; [redacted], an ESE specialist; [redacted], a due process coordinator; [redacted], a special education advocate; [redacted], a psychologist and district coordinator; and [redacted], a school psychologist. School Board Exhibits 1-55 were admitted into evidence by stipulation of the parties.

The first eight volumes of the nine-volume Transcript were filed on August 5, 2015, and the final volume was filed on

August 18, 2015. On August 19, 2015, the undersigned entered an Order Memorializing Final Order Due Date, which allowed for the parties to submit proposed final orders by September 1, 2015; the Final Order would be filed by September 15, 2015. On August 26, 2015, the School Board filed a joint request to enlarge the page limit for the proposed orders to 80 pages. The undersigned entered an Order extending the page limit for the proposed orders to 60 pages. On August 28, 2015, the parties filed a Joint Motion to Extend the Deadline to File the Proposed Final Orders, requesting an extension of three days. On that same day, the undersigned entered an Order granting the three-day extension for the proposed orders, and setting the due date as September 4, 2015; the Final Order would be entered by September 18, 2015. Both parties timely submitted proposed final orders, which the undersigned has considered.

Unless otherwise noted, citations to the United States Code, Code of Federal Regulations, Florida Statutes, and Florida Administrative Code are to the current codifications. For stylistic convenience, the undersigned will use [redacted] pronouns in the Final Order to refer to the student. The [redacted] pronouns should not be interpreted to reflect the student's actual gender.

FINDINGS OF FACT

1. The student is a [redacted]-year-old child who was first determined to be eligible for ESE services in November 2012, when

[redacted] was [redacted] years old and in [redacted]. The student at home is generally pleasant and compliant; when [redacted] finds [redacted] frustrated or anxious, [redacted] is able to independently calm [redacted]. By all accounts, the student is bright and performs well academically. But in preschool, [redacted] began to exhibit some troublesome behavior; [redacted] behavior would escalate to meltdowns that included aggressive behavior toward adults and throwing objects in the classroom. [redacted] father recalled witnessing one of the meltdowns and feeling shocked at how different [redacted] [redacted] seemed--[redacted] was unrecognizable.

2. The student's parents, understandably anxious as to how to help their [redacted], had [redacted] evaluated by a psychologist, [redacted]. [redacted] was diagnosed with [redacted], more specifically with [redacted]. [redacted] evaluation was conducted in August 2012 and provided to the school in October 2012.

3. In November 2012, a [redacted] multidisciplinary team was created to review the student's file and found that [redacted] was eligible for ESE services pursuant to the [redacted] eligibility category. On November 19, 2012, an IEP was developed by the team, placing the student in an ESE classroom for the remainder of the school year. The IEP set forth goals in the areas of curriculum/learning, social/emotional behavior, independent functioning, and communication. The IEP team noted:

> [The student] demonstrates behaviors such as tantrums, defiance, and difficulty expressing [redacted] emotions. [redacted] will hurt others and then show remorse. [The student] seeks attention, doesn't want to participate in activities and doesn't want to follow directions. [The student] reportedly interacts better with adults and has difficulty engaging in reciprocal back and forth exchanges with peers.

4. In May 2013, an interim IEP team meeting was held, and the IEP was revisited. In anticipation of the student leaving [redacted], the student's placement was amended to reflect that in August 2013, when [redacted] would begin Kindergarten, [redacted] would be placed in a general education classroom with consultation services provided in all academic areas, independent functioning, social skills, and communication. [redacted] eligibility remained in the [redacted] category.

5. In the fall of 2013, the student entered [redacted] at a public school, where [redacted] older [redacted] also attended. On September 18, 2013, an IEP "Closeout-Goals and Objectives" form was completed. According to the information on this form, the student had mastered the previous IEP goals in the areas of curriculum and instruction, and in social and emotional behavior.

6. Also in September 2013, the parents had received a Parent Participation Notice that indicated the following purpose for an IEP team meeting:

> To develop a new Individual Educational Plan (IEP) or Transition Individual Educational

> Plan (TIEP). Your child's existing IEP/TIEP will be reviewed, goals and objectives will be developed, and placement options will be discussed.

7. At the meeting, the IEP team wrote a new IEP. The student's eligibility remained [redacted], and although the curriculum, instruction, and communication areas contained no goals, the team once again addressed the student's independent functioning and [redacted] social/emotional behavior. The team noted:

> [The student] demonstrates concerns with social skills and behavior. [redacted] appears to get easily frustrated and anxious in general. [redacted] will also shut down when [redacted] gets upset, for example, when [redacted] has to change [redacted] color in a class as a consequence for a behavior. [redacted] had instances of aggression (tearing materials) this year. This can happen about twice a week depending on behavior and consequence.

8. The September IEP placed the student in a general education class with consultation services in all academic areas, independent functioning, and social skills.

9. For the majority of [redacted] [redacted] year, the student was successful; [redacted] teacher effectively diffused impending tantrums and managed troublesome behaviors.

10. In April 2014, at the end of the student's [redacted] year, the parents received a Parent Participation Notice, which indicated that an IEP team meeting would occur in May, for the following purpose:

> to develop a new Individual Educational Plan (IEP) or Transition Individual Educational Plan (TIEP). Your child's existing IEP/TIEP will be reviewed, goals and objectives will be developed, and placement options will be discussed.

11. Pursuant to the Notice, the IEP team met and addressed the student's IEP in May 2014. [redacted] eligibility category, [redacted], remained as it had been for almost two years. Academically, the student was performing at or above grade level; but [redacted] continued to have difficulty with behavior:

> [The student's] social skills and behavior are below age expectations. [redacted] becomes frustrated easily and appears anxious in general. . . . [redacted] has had several instances of aggression (tearing [redacted] materials, hitting others, kicking, throwing chairs, using profanity, spitting) since March of this year. These behaviors have increased in frequency over the past month. These behaviors have occurred across school settings and at various times of the day including before and after care, lunch, recess, art, music, media and once in general education class with a sub and once with [redacted] regular gen ed teacher. When these behaviors are addressed by adults [redacted] is usually observed getting red in the face, then teary but not crying, then welled tears subside, [redacted] fists clench, [redacted] smirks or smiles, then assaults adults, destroys materials, shoves furniture, kicks walls, spits at adults who are speaking to [redacted], mocks who is speaking to [redacted] while moving quickly around the environment. [redacted] has been observed lifting materials to adults field of vision, smiling and tearing them up while looking at the adult. . . . [redacted] sometimes makes faces at [redacted] peers or calls them names. When peers ignore this, [redacted] has been observed increasing the behaviors and moving closer to them . . . .

> [The student] needs frequent prompting to refrain from defiant behaviors and to "make good choices." [redacted] is showing much more physical aggression toward teachers and peers when outside [redacted] general education classroom setting (specials, lunch, morning/after care). Because of this, [redacted] requires continuous close adult supervision.

12. Despite this behavior, [redacted] proposed placement for the remainder of the [redacted] year, and looking ahead to first grade, remained in general education with collaboration once a week in the areas of behavior and independent functioning. The IEP also detailed supplemental aids and services that would be implemented: daily/weekly reporting and collaboration with the parents, flexible settings which allowed the student to move as needed, and preferential seating in the classroom setting. Daily behavior charts had been introduced prior to the IEP being completed, and were recommended for continued support.

13. The student spent a good portion of [redacted] summer between [redacted] and [redacted] grade attending a camp for [redacted] children, where the counselors were successful in diffusing escalating behaviors, and in controlling [redacted] environment. The student/adult ratio at the camp was 2:1, and sometimes 1:1. Similar to most summer camps, and unlike a classroom setting, the student was never asked to perform non-preferred tasks.

14. Before the start of [redacted] grade, the parents met with school officials to attempt to address concerns proactively.

Specifically, the parents expressed concerns that at the end of [redacted], a pattern had emerged of removing the student from the classroom when [redacted] exhibited bad behavior; this was resulting in the student realizing that if [redacted] acted out and became disruptive, [redacted] could avoid performing non-preferred tasks. Understandably, the parents sought the school's assistance in curbing this behavior.

15. [redacted] grade began and quickly turned bad. In the first two weeks of school the student's behavior resulted in two detentions, a verbal warning, five days of suspension, and a referral to law enforcement.

16. For two of the five suspension days in August 2014, the student was sent to an [redacted]. [redacted] behavior in this alternative setting was so disruptive that [redacted] was asked to leave the program and went home. While [redacted] was in the [redacted] setting, [redacted] was not given academic work to do; [redacted] played with Legos and colored. Later in the school year, the student was assigned to out-of-school suspension at this same alternative setting, but given this first experience, [redacted] parents refused to send [redacted] there, and instead requested that any school work be sent home so they could have [redacted] complete it.

17. In August 2014, the parents requested a meeting with the school, hoping to begin the process of obtaining a Functional Behavior Assessment (FBA). The parents received a Parent

Participation Notice, advising them that the purpose of the meeting was "to develop the reevaluation plan. Your child's need for individualized evaluation will be determined." Logically, the parents were under the impression that the "reevaluation" was the FBA they had requested.

18. On August 28, 2014, the IEP team asked the parents to sign a "Consent for Reevaluation Plan" which detailed the same behaviors that had been noted in the last IEP, adding only that the daily behavior charts were not resulting in consistent success. The student's eligibility in the [redacted] category remained unchanged. The purpose of the reevaluation plan, as stated on the form, was to determine the student's present level of performance and educational needs, and to determine whether any additions or modifications were needed to enable the student to meet the annual goals set out in his IEP.

19. The assessments promised in the reevaluation plan were in the areas of: cognitive functioning, personality/emotional functioning, and behavioral functioning in the form of an FBA.

20. The parents believed that they were signing consent forms to begin the FBA process, which would result in a more robust and effective behavior plan that would limit the amount of discipline being imposed. The FBA, they hoped, would be the first step in properly studying and troubleshooting their [redacted] challenging behavior patterns.

21. From September 2014 to February 2015, the student's daily behavior chart was amended to target fewer behaviors and to provide more positive reinforcement throughout the day. A behavior technician was also placed in the classroom for several days, with varying success. The student was also switched from one [redacted]-grade class to another one, in hopes that a change in environment and teacher would result in a change in [redacted] behavior.

22. During the months of November 2014 through February 2015, three evaluations were completed by the School Board: a psychological evaluation, a psychosocial assessment, and an FBA. These are the three evaluations that are required by Florida Administrative Code Rule 6A-6.03016, when assessing a student's eligibility for the EBD category.

23. The school never conducted a speech/language evaluation, despite requests from the parents and their advocates.

24. On February 23, 2015, the school sent the parents a Parent Participation Form Notice, indicating that a meeting would be held on February 26, 2015. The purpose of the meeting was stated as follows:

> Review reevaluation plan information. The results of your child's individualized evaluation will be discussed. These results may require changes to all or some of the child's Individual Educational Plan (IEP) or Transition Individual Education Plan (TIEP).

25. The parents reasonably believed that the meeting was intended to finally review the FBA, which had been authorized in August, and inexplicably took six months to complete. They were excited to see the results of the FBA and help formulate a behavior plan that would better address their [redacted] behavior issues. At no time were the parents advised that their [redacted] eligibility was being questioned or revisited.

26. In anticipation of the meeting, the parents requested all paperwork that would be discussed at the meeting. They were provided with a draft FBA, which listed the student's eligibility of [redacted], as expected. No other documents were provided to the parents.

27. On February 26, 2015, the IEP team met. The majority of the meeting was spent going through the psychologist's report and the social worker's report. At the end of the meeting, the parents were shown the eligibility requirements for [redacted], side by side for comparison. The school officials advised the parents that their [redacted] eligibility was no longer [redacted]; [redacted] eligibility category had changed to [redacted]. At the hearing, the father recalled the meeting as follows:

> Most of the time [sic] was walking through the [redacted] report and the one from [redacted], the social worker. And then at the end they put something on the screen from some website and said, you know, based on all of this, if you look over here and look over here, comparing these two side by side, [the

student] doesn't fit [redacted], [redacted] fits this [redacted]. I'm like, okay, and what are we doing for the kid? I had no idea what that meant.

* * *

We kind of walked out of there like okay, what just happened, where is that extra help for [the student], what are we doing here, where is the help that we've been waiting for since August [sic] for.

28. When asked about his level of participation in the February meeting, the father credibly testified[2/]:

Q: Do you believe that you had any ability to have input on the determination to change eligibility in the February meeting?

A: No. I mean we were just told at the end of it that, when they had the side-by-side up there, and because of this [the student] is now [redacted].

Q: There was no discussion?

A: No.

Q: Should we do it--

A: No.

Q: --is it a good fit for [redacted]?

A: No, no. We were told this is the data, look at [redacted]——and they actually had, and this is the projector again, right, they've always got the projector out. Look at them side by side, so look at the data here, look at our evaluations, [the student] is now [redacted]. [redacted] fits [redacted], [redacted] does not fit [redacted].

29. This was the first time the parents had ever heard the term "[redacted]"; they had never been told by anyone that the school

was considering removing their [redacted] eligibility for [redacted] services. The meeting was concluded abruptly, as the parents needed to leave for a trip; therefore, the team agreed to reconvene the meeting at a later date. Everyone agreed that the meeting would continue on April 30, 2015.

30. On April 30, 2015, the same day as the meeting, the parents were given a Parent Participation Notice, which indicated the purpose of the meeting as follows:

> To develop a new Individual Educational Plan (IEP) or Transition Individual Educational Plan (TIEP). Your child's existing IEP/TIEP will be reviewed, goals and objectives will be developed, and placement options will be discussed.
>
> Other: possible change of placement.

31. At the meeting, the parents were told that the current IEP was about to "expire," therefore, the top priority for the meeting was to revisit the IEP for the upcoming year.

32. The School Board asked an ESE field coach, [redacted], to attend the meeting. [redacted] had never met the parents or their [redacted], and [redacted] was informed of the circumstances of the student's case a few days before the meeting. [redacted] role was to ensure that the process of developing the IEP for the next year moved along, and that the focus would remain on the future rather than the past. [redacted] insisted during the meeting that eligibility

had been determined at the February meeting, and that it would not be revisited.

33. In the father's words, the meeting progressed as follows:

> [W]e basically got into the fast track, let's get this IEP done. We're not going backwards, we're not changing anything. We've got to finish this IEP because they said it later, but, you know, compliance came later, but the IEP had to be done because it was expiring in four days [sic] or whatever it [sic].
>
> * * *
>
> I think it was more they were just hell-bent on getting this thing done, going through the process. They were going through—-I stopped like two times, I said all we're doing is going through the motions. We're not--you're not letting us talk about anything. Eligibility, nothing. Nothing. Why aren't we part of this process, why are we doing this. It's like you just want to get it done.

34. The parents had brought with them to the meeting an advocate, [redacted]. [redacted] too was told numerous times that eligibility would not be discussed because it had already been determined; the School Board employees insisted that the IEP would be amended, and that the topic of eligibility was off the table as a matter for discussion. [redacted] efforts to open up the conversation on eligibility were rejected at every turn.

35. Ultimately, the April meeting was also concluded without finishing the IEP, and the parties agreed to meet again

on May 8, 2015. A draft IEP was sent to the parents a few days before the May meeting, and it indicated no change in placement.

36. During the May meeting, the school had asked a representative from a different school to take part in the meeting; this individual spoke about the [redacted] cluster that existed at the school where [redacted] taught, and explained what services would be provided in an [redacted] cluster classroom. The representative only discussed the [redacted] cluster classroom. No other placement options were discussed, or offered as an alternative.[3/]

37. During the May meeting, the parents once again attempted to discuss eligibility, but were repeatedly told that the process was not moving backward—-eligibility was not a topic for discussion. As to placement, the parents were shocked to hear that their [redacted] placement was being changed from 100% general education to 16%, and that [redacted] was being placed in an [redacted]. According to the father and the advocate, the School Board was unwilling to consider other placements.

38. The IEP was finalized on May 8, 2015. It changed the student's eligibility from [redacted] to [redacted] and changed the student's placement from a general education class 100% of the time to an [redacted] where [redacted] would only be in general education 16% of the time. This [redacted] would be at a different school location because the student's current school did not offer an [redacted] for its students.

39. In paperwork sent to the parents after the meeting, the parents were informed that if they did not file a request for a due process hearing by May 18, 2015, their [redacted] new placement at the new school location would become effective on May 19, 2015.

40. Since a due process hearing request had not been filed by the deadline announced by the School Board, the student was administratively removed from [redacted] school and placed in the new [redacted] at the new school. The family learned of this change when they attempted to drop off their [redacted] for school on May 19, 2015, 11 days after the IEP meeting.

41. The parents, who had been clearly objecting to the new eligibility and the new placement from the moment they realized the changes were being made, chose not to send their [redacted] to a new school for the final weeks of [redacted] grade.

42. The totality of the evidence establishes that the School Board did not give the parents proper notice of the issues that were to be addressed during the IEP meetings, did not allow the parents to have meaningful participation during the IEP meetings, and predetermined the student's placement.

43. Turning to the discipline that was imposed, the record reflects that during the student's [redacted]-grade year, [redacted] was suspended, either through in-school suspensions, out-of-school suspensions, or alterative external suspensions, for at least

39 days.[4/] Whether the suspension was in school, out of school, or in the alternative setting, [redacted] was not receiving instruction. At most, he received minimal educational services. Absent from the record is any credible evidence to the contrary.

44. The school never held a manifestation determination hearing to determine whether the student's behavior that resulted in a definite pattern of discipline was a manifestation of [redacted] disability. A manifestation determination hearing should have been conducted after ten days of disciplinary removals, as required by 20 U.S.C. § 1415(k).

45. During the student's [redacted]-grade year, despite the number of hours the student was removed from the classroom and the number of days [redacted] was suspended with little to no instruction, [redacted] academic performance was good, and [redacted] progressed to the [redacted] grade.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-03311(9)(u).

47. The IDEA ensures that all children with disabilities receive a FAPE with emphasis on special education and related services designed to meet their unique needs. 20 U.S.C.

§ 1400(d)(1)(A). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

48. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. 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; the right to be involved 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).

49. In Rowley, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. First, it is necessary to examine whether the school system has complied with the IDEA's

procedural requirements. Id. at 206-07. A procedural error does not automatically result in a denial of FAPE. 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 FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 (2d Cir. 2012); Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 (2007).

50. The second step of the Rowley test, which is inapplicable here, examines whether the IEP developed pursuant to the IDEA is reasonably calculated to enable the student to receive educational benefits. 458 U.S. at 206-07 (1982).

51. As to all the issues raised in the due process complaint, Petitioners bear the burden of proof. Schaeffer v. Weast, 546 U.S. 49, 62 (2005).

52. Chronologically, the first procedural flaw in the instant case concerns the notice given to the parents regarding the purpose of the February meeting. The requirements of the meeting notice that must be given to parents can be found in 34 C.F.R. § 300.322(b), which states:

> (b) Information provided to parents.
>
> (1) The Notice required under paragraph(a)(1) of this section must——

(i) Indicate the purpose, time, and location of the meeting and who will be in attendance;

53. Here, the parents received a notice for the February 2015 meeting which vaguely indicated the intent to discuss the reevaluation plan information. It also stated that the results of the student's individualized evaluation would be discussed, and that the results might require changes to all or some of the IEP. Since previous notices for IEP team meetings had always included language regarding the review of the IEP, this language did not signal to the parents that their [redacted] eligibility might change from [redacted] to [redacted]. Moreover, the parents were led to believe that the FBA results would be discussed--a meeting they had anxiously awaited for six months. No one ever advised the parents, either orally or by written notice, that eligibility was being evaluated, or that it might change.

54. Notably, the school had documented the student's disruptive behaviors in previous IEPs, and those behaviors remained, unfortunately, unchanged from [redacted] through [redacted] grade. While these disruptive behaviors were being meticulously documented all year, the student's eligibility remained [redacted]. The parents had no reason to believe that eligibility would change, given that the behavior pattern had not changed.

55. Even assuming the parents received enough written or oral notice that eligibility was being evaluated and might change, once the February meeting was held, the School Board was required to ensure that the parents would have meaningful participation in the decision-making process. 20 U.S.C. §§ 1400(c)(5)(B), 1414(b)(4)(a); C.F.R. § 300.306(a)(1). During the February meeting, the change in eligibility was simply announced by the School Board without allowing the parents to discuss the change. The School Board inappropriately took a "take or leave it" position as to eligibility, and eventually as to placement. See, e.g., Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1056 (9th Cir. 2012)(stating that the school district's "take it or leave it" approach contravened the purposes of the IDEA). In April, and again in May, when the parents requested to address the change that had been announced in eligibility, they were forbidden from addressing the issue, and they were presented with only one option for placement. The totality of this evidence demonstrates that the parents were not provided the opportunity to meaningfully participate in the IEP meetings, which ultimately changed their [redacted] eligibility from [redacted] to [redacted], and drastically changed [redacted] placement.

56. The lack of proper meeting notice and the failure to allow the parents to participate in the discussion as to eligibility and placement, lead the undersigned to evaluate

whether the School Board predetermined eligibility and placement prior to ever meeting with the parents. Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. See H.B. v. Las Virgenes Unified Sch. Dist., 239 Fed. App'x 342, 344 (9th Cir. 2007)(explaining that in finding predetermination, a trier of fact must include findings as to the school district's predetermined plan and make findings as to the school district's unwillingness to consider other options); W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont., 960 F.2d 1479, 1483 (9th Cir. 1992)(finding that the school district independently developed a proposed IEP that would place the student in a predetermined program, where at the IEP meeting, no alternatives were considered).

57. Here, the School Board conducted only the evaluations necessary for the determination of [redacted] eligibility and never conducted a speech/language evaluation, which would have been required for [redacted] eligibility. This selection of evaluations is indicative of the course of action that was planned for the student: to change [redacted] eligibility from [redacted] to [redacted], and to drastically change [redacted] placement from 100% general education to an [redacted] classroom. During the meetings, the parents were never afforded the ability to weigh in on the decisions, and at

some meetings, absolutely foreclosed from discussing the change in eligibility. When placement was determined during the May IEP meeting, only the [redacted] classroom was discussed. In fact, the School Board only invited a school representative from the new school location to speak with the parents. The representative only discussed the [redacted] classroom; no other options were presented to the parents, and no other guests were invited to discuss the continuum of services that is available. The father's credible testimony, bolstered by the advocate's testimony, establishes that their input was not considered. Lastly, prior to the May IEP meeting, the parents had never been advised that an [redacted] classroom was being proposed for their [redacted]. All of these facts lead the undersigned to conclude that the School Board improperly predetermined the student's placement.

58. Given that the only appropriate remedy for this flawed process is to hold a new IEP meeting, the remaining issues raised in the due process claim (whether the [redacted] eligibility is appropriate and whether the [redacted] classroom is the least restrictive environment for the student) need not be addressed in this Final Order.

59. Turning to the discipline imposed on this student, the IDEA states, in 20 U.S.C. § 1415, as follows:

(k) Placement in alternative educational setting.

(1) Authority of school personnel.

(A) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority. School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

* * *

(E) Manifestation determination.

(i) In general. Except as provided in subparagraph (b), within 10 days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and the relevant members of the IEP team (as determined by the parent and local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine——

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

60. The School Board was obligated to hold a manifestation determination hearing once the suspensions during [redacted] [redacted]-grade year exceeded ten days. During the 39 days of suspensions, which were a mixture of in-school suspensions, out-of-school suspensions, and placement in an [redacted], no instruction or limited educational services were delivered to the student. Although the School Board was not obligated to provide a FAPE during the first ten days of suspension, it was obligated to do so for the remaining 29 days. The student would ordinarily be entitled to receive 29 days of instruction, as compensatory education; however, because the facts in this case demonstrate that the student performed well academically and progressed to the second grade, no award of compensatory education is warranted.[5/]

61. The School Board's actions in the course of amending the IEP, and its failure to hold a manifestation determination hearing after ten days of suspension, contravened one of the purposes of the IDEA, which is to ensure that the rights of children with disabilities and parents of such children are protected. These procedural violations were substantial and deprived the student of a FAPE.

62. As the prevailing party in this due process hearing, Petitioner is entitled to attorney's fees and costs pursuant to Florida Administrative Code Rule 6A-6.0331(9)(x).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that: the School Board has committed procedural violations of the IDEA that resulted in the failure to provide the student with a FAPE, and has violated the protections afforded to the student in disciplining the student without holding a manifestation determination hearing. The School Board is ORDERED to:

1. Hold an IEP meeting, wherein the School Board provides the parents with meaningful participation in the decision-making process;

2. Prior to the IEP meeting, the School Board must conduct all evaluations that are necessary to determine eligibility for the [redacted] and [redacted] categories;

3. Conduct a manifestation determination hearing;

4. Expunge from the student's records the 29 days of suspension that were imposed after ten days of suspension had occurred; and

5. Pay Petitioner's attorney's fees and costs. Petitioner shall have 45 days from the date of this Final Order within which to file a motion for attorney's fees and costs (under this case number), to which motion (if filed) Petitioner shall attach appropriate affidavits (e.g., attesting to the reasonableness of

the fees) and essential documentation in support of the claim such as timesheets, bills, and receipts.

6. All other relief requested is denied.

DONE AND ORDERED this 17th day of September, 2015, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of September, 2015.

ENDNOTES

[1/] The "stay put" provision of the IDEA can be found in 20 U.S.C. § 1415(j), 34 C.F.R. § 300.518(a), and Florida Administrative Code Rule 6A-6.0331(9)(y).

[2/] The School Board employees testified that the parents were given ample opportunity to discuss their concerns and were active participants in all meetings. The undersigned rejects this testimony, finding it lacking in credibility. The father's testimony, which is supported by the multiple emails he sent exhibiting frustration with the entire process, and further corroborated by his advocate's testimony, is found credible.

[3/] The School Board witnesses testified that other placements were discussed; on the other hand, the parent and his advocate testified that no other placements were discussed. The School Board offered into evidence a form which lists other placements that were purportedly considered and rejected. The perfunctory

listing of other placements on a form does not convince the undersigned that other placements were actually offered, discussed, or considered. The School Board's witnesses' testimony is rejected, and the father and advocate's testimony is found credible.

[4/] The undersigned's calculation falls between the father's calculation (37), and counsel's calculation in Petitioner's proposed final order (41). All three calculations do not account for the multiple hours during which the student was removed from [redacted] classroom or sent home after the school day began. The actual calculation of those hours and days, for which there is no record evidence, would result in a much higher calculation.

[redacted] and [redacted] stated that they did not agree with Petitioner's calculation of 37 days of suspension. Both relied on the information provided to them by the assistant principal, who did not appear as a witness in the hearing. Accordingly, the undersigned rejects the School Board witnesses' testimony in this regard. The undersigned relies on the credible testimony provided by the father and the school disciplinary records.

[5/] See e.g., Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009) (stating that when a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors in determining whether reimbursement for some or all of the cost of the private school is warranted); M. M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1101 (11th Cir. 2006)(stating that the ALJ and the district court did have jurisdiction to award the parents reimbursement for tuition and related services for a child who had never enrolled in the Dade County public school system, but had been denied FAPE).

As to the award of compensatory education, the undersigned is guided by the explanation found in Jana K. v. Annville Cleona Sch. Dist., 39 F. Supp. 3d 584, 608 (M.D. Pa. 2014), wherein the judge stated: "the appropriateness and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

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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).