STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case Nos. 16-7487E
17-0517E
BROWARD COUNTY SCHOOL BOARD, 17-0858E
17-1181E
Respondent. 17-1361E
_____/

FINAL ORDER

A due process hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH) in Ft. Lauderdale, Florida, on March 23 and 24, and May 24 through 26, 2017.

APPEARANCES

For Petitioner: Mrs. *, Qualified Representative
(Address of record)

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

STATEMENT OF THE ISSUES

Issues raised by Petitioner are as follows: whether Petitioner is entitled to an Independent Educational Evaluation (IEE) in the field of [redacted], at public expense, conducted by [redacted]; whether Petitioner is entitled to a

[redacted] ([redacted]) conducted as an IEE also at public expense, and also to be conducted by [redacted]; whether a specific [redacted] methodology should be adopted in order to implement the Individualized Education Program (IEP) [redacted] goals; whether the School Board is educating the student utilizing a general education curriculum, as is required by the IEP; and whether the School Board should have held a manifestation determination review.

The issues raised by the School Board are as follows: whether Petitioner is entitled to IEEs in the form of an [redacted] or a [redacted] evaluation by [redacted]; and whether the student should be placed in a [redacted] school and receive instruction using an access points curriculum.

PRELIMINARY STATEMENT

Petitioner filed three separate requests for due process hearings on December 16, 2016; January 23, 2017; and February 8, 2017. The School Board filed two separate requests for due process hearings, dated February 17, 2017, and March 2, 2017. These five cases were consolidated for hearing.

On January 23, 2017, prior to filing its two complaints, the School Board filed a "Motion for Determination of Petitioner and Acknowledgement of Transfer of Rights to Adult Student" arguing that the student should make [redacted] own decisions regarding [redacted] education, that there had been no legal determination of the

student as incompetent, and that a guardian advocate had not been appointed by a court of competent jurisdiction. Accordingly, the School Board requested that the undersigned direct all pleadings and correspondence to the student, and that the student be recognized as the only individual who could make educational decisions on [redacted] own behalf. The School Board further argued that the student's [redacted] was making educational decisions on behalf of the student without legal authority to do so.

At the due process hearing, which was commenced on March 23, 2017, the undersigned questioned the student's [redacted], who had successfully represented [redacted] in two previous due process hearings, as to whether [redacted] was competent to serve as a Qualified Representative under Florida Administrative Code Rule 28-106.107. Feeling satisfied that the student's [redacted] was qualified to appear in the due process hearing and qualified to represent [redacted], the undersigned accepted the student's [redacted] as a Qualified Representative over the School Board's objection.

At the hearing, the testimony of the following witnesses was presented: [redacted], advocate for the student; [redacted], Exceptional Student Education (ESE) Specialist at School A; [redacted], ESE Support Facilitator at School A; [redacted], Assistant Principal, at School A; [redacted], substitute teacher at School A; [redacted], Curriculum Supervisor for [redacted] ([redacted]); [redacted],

ESE Director; [redacted], Speech Language Pathologist at School A; [redacted], Assistant Principal at School A; [redacted], Program Specialist for Behavior; [redacted], Curriculum and Instruction Specialist; [redacted], ESE Support Facilitator at [redacted] School; [redacted], ESE Specialist and LEA Representative at School C; and the student's [redacted].

Petitioner Exhibits 1 through 28 and School Board Exhibits 1 through 126 were admitted into evidence. At the conclusion of the hearing, the parties agreed to submit proposed final orders 21 days after the transcript was filed, and the final order would be issued no later than 21 days after the proposed final orders were submitted. The Transcript was filed on June 29, 2017. A Notice of Filing Transcript and Order Extending Final Order Deadline was issued on that same day, notifying the parties that the proposed final orders were due on July 20, 2017, and the final order would be filed no later than August 10, 2017.

The parties timely filed proposed final orders, which were considered in preparation of this Final Order.[1/] Unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations are to the current codifications. For stylistic convenience, the undersigned will use [redacted] pronouns in this Final Order when referring to Petitioner. The [redacted] pronouns are neither intended,

nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. The student in this case is [redacted] years old and was first identified as a student with a disability in [redacted] school, with the following eligibility categories: [redacted] ([redacted]), [redacted], and [redacted]. Throughout all of [redacted] school, [redacted] received instruction in the state standards [redacted] curriculum.

2. On or about September 2, 2015, the student's IEP team convened an IEP meeting. At this meeting, the team proposed administering to the student an [redacted] assessment pursuant to section 1008.22, Florida Statutes, and providing the student instruction in the state standards [redacted] curriculum (which was the same curriculum that had been administered to the student for years). The student's parents did not consent to the proposal.

3. As the parents did not provide consent, on September 4, 2015, the School Board, pursuant to section 1003.5715, Florida Statutes, filed a due process complaint seeking approval to administer to the student an [redacted] assessment and provide instruction in the state standards [redacted] curriculum.

4. The School Board's due process complaint proceeded to a final hearing on October 7, 2015, before Administrative Law Judge

T. Resavage; however, the hearing was suspended at the request of the parents. The conclusion of the hearing was scheduled for November 5, 2015.

5. On October 27, 2015, the parents filed a Motion to Dismiss stating:

> [redacted] the parents of the petitioner [sic] do hereby make known to you that the respondent no longer lives nor attends any school in the Broward County District, and is outside of Broward County attending a school that is not affiliated to any Broward County School/District nor is under the John McKay Scholarship as of October 26, 2015 [redacted] is enrolled & attending a High School.
>
> [redacted] ask that this serves as notification for the record on this case, and request that [redacted] be notified upon this our immediate request for a complete dismissal of this case and that it be dismissed with prejudice.

6. On October 29, 2015, Judge Resavage granted the parents' request, over the School Board's objection, but did so without prejudice for the School Board to reopen the case should the student return to the jurisdiction of the Broward County School Board. The second day of hearing was canceled and never held.

7. The student stopped attending school in Broward County, and moved to the [redacted], area where [redacted] was enrolled in a public school. While in the [redacted] area, an IEP was designed for the student which placed [redacted] in a general education setting with ESE services provided to [redacted] by an ESE teacher inside the classroom, with a standard graduation curriculum.

8. Beginning in December 2015, the student's parents made numerous requests for the student's [redacted] school reassignment for both the 2015-2016 school year, and the upcoming 2016-2017 school year. These reassignment requests were all considered based on the student's last known IEP from Broward County, which placed the student in an ESE seat, not a general education seat.

9. At one point, the parents' request that the student be assigned to a non-neighborhood school of choice for the 2016-2017 school year was accepted, but the reassignment was based on the last known Broward County IEP, which placed the student in an ESE seat rather than a general education seat. In other words, the reassignment was awarded because there was a seat available for an ESE placement at the school of choice.

10. On or about April 29, 2016, the student's parent reappeared in Broward County, requesting that the student be placed in a non-neighborhood school of choice for the remainder of the 2015-2016 school year. The parent presented the [redacted] IEP, which placed the student in a general education setting, with instruction geared toward a standard general diploma.

11. Five business days later, the School Board sent the parents two letters, notifying them that the 2016-2017 reassignment to the non-neighborhood school of choice was denied (and the student was placed on a waiting list) because there were no general education seats available for reassignments, and the

ESE seat (which remained available) was not a proper seat for the student given [redacted] new [redacted] IEP, which placed the student in a general education seat.

12. The second letter informed the parents that for the same reasons described in the previous paragraph, the request for reassignment was denied for the remainder of the 2015-2016 school year, but that the student could enroll at [redacted] neighborhood school.

13. On or around May 6, 2016, the student's parent contacted [redacted], the executive director of Exceptional Student Education and Special Services Department for the School Board. Understanding that the non-neighborhood school of choice, which was [redacted] ([redacted]), was unavailable at that point, [redacted] offered the parents three [redacted] schools for immediate enrollment: [redacted] School, [redacted] School, and the student's neighborhood school.

14. Although three different [redacted] schools were being offered to the student, the parents elected not to enroll the student in [redacted] school.

15. On or around May 13, 2016, [redacted] issued a memorandum and called the student's parents to notify both [redacted] and the parents that [redacted] was administratively placing the student at [redacted] and the student was given permission to enroll. [redacted] explained that [redacted] decision, which acted as an

override of the decision to place the student in the waiting pool (as any other student in a similar position would be placed), was being motivated by [redacted] concern that the parents were not sending the student to any school, and [redacted] wanted to make a quick decision to get the student enrolled and attending [redacted] school.

16. As of May 16, 2016, the student attended [redacted] until the school year ended. During this time, the student's [redacted] IEP was implemented. The school staff felt that it was unnecessary and unfair to the student to have [redacted] take final exams in [redacted] second week of being at this new [redacted] school; therefore, they essentially tried to get to know the student and help [redacted] get familiar with the campus and staff prior to the next school year.

17. The student received Extended School Year (ESY) services during the summer of [redacted]. [redacted] was instructed in a classroom setting with only ESE students, with a total of [redacted] to [redacted] students. During this four-week session, [redacted] exhibited no target behaviors and successfully worked on [redacted] IEP goals.

18. In the fall of 2016, the student returned to [redacted]. In early September, school staff, with the input of the parents, developed a transitional IEP placing the student in a general education classroom with supplementary aids and services. In reality, [redacted], the ESE Support Facilitator for [redacted], and a paraprofessional attended every class with the student, in an

attempt to break down the general education curriculum to meet the student's needs and to learn the student's learning style.

19. Some of the interventions used by [redacted], including [redacted] synthesizing the instruction in every academic class and [redacted] prompting [redacted] in every class, were: digital textbooks, a laptop, [redacted] support, a [redacted] organizer with [redacted] coding, a [redacted] book (that was recreated a few times because the student lost it more than once), and daily emails to the parents regarding behavioral issues which were characterized as [redacted] behaviors.

20. Concerns with the September 2016 IEP, the student's lack of academic progress, and the student's behavioral issues prompted the school staff to readdress the IEP. On October 17, 2016, an IEP meeting was scheduled for November 3, 2016. Specifically, [redacted] began to see that due to academic struggles, despite the intense interventions being implemented, the student tended to avoid academic work and [redacted] behavioral issues would then surface; [redacted] could become [redacted] and [redacted]. The staff saw a direct relationship between [redacted] academic struggles and [redacted] behavioral [redacted]; [redacted] was performing at an [redacted] school level across all subjects, and [redacted] was visibly frustrated with the demanding curriculum.

21. During the weeks leading up to the IEP meeting, an incident occurred wherein the student made a reference to killing

[redacted]. This prompted the school staff to request that an intervention team, referred to as the "[redacted] Team," evaluate the student. Rather than speaking to [redacted] staff to work things out, the parents withdrew the student once again from school.

22. The parents next enrolled the student at School A, during the first week of November. On [redacted] first day at School A, [redacted] told school staff that [redacted] did not want to attend School A, and wanted to return to [redacted] School, where [redacted] had attended prior to moving to [redacted]. [redacted] was upset that [redacted] family had moved to a new home. On the first day of school, [redacted] once again threatened to kill [redacted]; once again the [redacted] team was asked to evaluate the student.

23. An IEP meeting was held on December 5, 2016. School staff recommended that the student receive [redacted] services, that [redacted] services be placed on the IEP, and received consent from the parents to conduct an [redacted]. The student attended one family [redacted] session, but [redacted] instructed [redacted] not to participate.

24. The school staff saw that the student, who was receiving the same educational supports as [redacted] received at [redacted], was becoming increasingly frustrated with the academic challenges. [redacted] frustration resulted in [redacted] behavior, including [redacted] and [redacted] furniture, [redacted] authority,

[redacted], and [redacted]. [redacted] peers reported that [redacted] were afraid of [redacted] outbursts in the classroom.

25. On January 18, 2017, a facilitated IEP team meeting was held. The school staff considered the parents' input, and decided that the proper placement for the student was in a [redacted] school, and that [redacted] should receive instruction using an [redacted] curriculum, rather than a [redacted] curriculum. At all times relevant to the issues in this matter, the student had been educated using the [redacted] curriculum, but the staff recommended the change in curriculum prospectively.[2/] At the January IEP meeting, the parents sought to place the student in a [redacted] placement, and wanted the student to be educated using the [redacted] curriculum.

26. During the IEP meeting, tempers flared due to the disagreement between the parents and the school staff. At one point, the student's [redacted] the laptop that was being used to develop the IEP, and attempted to [redacted] it at one of the school staff members. During the IEP meetings, the parents were under the mistaken impression that [redacted] could dictate their [redacted] placement and could choose the curriculum for their [redacted]. During the due process hearing, the parents and their advocate were under the mistaken impression that they possessed veto power as to all educational decisions made by the IEP team.

27. Once again faced with the proposition of placing the student on an [redacted] curriculum (which had been utilized throughout [redacted] school and at the beginning of [redacted] school), the parents again withdrew the student from school, and [redacted] never returned to [redacted] school for the entire spring semester of 2017.

28. During the last two school years, the student was not suspended for ten or more days; thus, none of the schools ever had a responsibility to conduct a manifestation determination review.

29. The [redacted] school, School C, that is being recommended for the student is a smaller school setting with a therapeutic component. The class sizes are smaller, with about [redacted] to [redacted] students in each class, instructed by a teacher and a paraprofessional. All faculty members are ESE and general education certified in their content area, and therapists are available all the time. Students are assigned a therapist when they enroll, and have daily access to their therapist. The school also has a behavior specialized team that assists with de-escalation crisis intervention.

30. The students who are educated at School C are there because they were not meeting success in a general education setting, and their mental health needs were also not being met. School C provides a more conducive environment for meeting academic success; most of the students there receive instruction

utilizing the [redacted] curriculum and graduate or return to the general education setting.

Facts Relating to IEEs

31. The first IEE requested was for a [redacted] evaluation conducted by [redacted]. The School Board had never conducted a [redacted] evaluation; therefore, there was never an evaluation with which the parents disagreed. Secondly, the last [redacted] evaluation conducted by the School Board was in April 2013, which was never challenged within the two-year statute of limitations.

32. The second IEE requested is an [redacted]. An [redacted] is a process that attempts to identify the purpose and function of problem behaviors. Once completed, an [redacted] becomes the basis of a [redacted] ([redacted]), whose terms are designed to address conduct that interferes with a student's ability to learn.

33. The parents provided consent for an [redacted] on December 5, 2016, and the [redacted] was completed on February 13, 2017. Because the student attended school sporadically and stopped attending in mid-January, the final [redacted] was delayed due to interrupted efforts to collect the necessary data on the behaviors.

34. The [redacted] was conducted by a few of the staff members who worked daily with the student, including the ESE support facilitator, the speech pathologist, a school psychologist, and a

behavior program specialist who is a licensed mental health counselor.

35. The target behaviors listed on the [redacted] were: leaving assigned areas without permission, not going to designated safe places when [redacted] needed to de-escalate, [redacted] breathing, [redacted] furniture, verbal [redacted], [redacted], [redacted] and [redacted] assignments, [redacted], [redacted] and [redacted] walls or furniture, and [redacted] self in rooms.

36. A complete review was done of the student's educational background, including the most recent academic testing conducted in August of 2016, which revealed [redacted] present level of performance in [redacted] and [redacted] to be at [redacted] school levels. [redacted] required [redacted] assistance to complete all academic tasks.

37. The [redacted] noted that by December, only a month into arriving at School A, the student tended to become tense and demonstrate [redacted] and [redacted] when presented with academic work in the general education setting. [redacted] often had [redacted] and [redacted] outbursts and often expressed that the academic work was too difficult for [redacted].

38. The student was interviewed for the [redacted], and indicated that the academic work was too hard for [redacted], and that if [redacted] could be granted three wishes, [redacted] would be to go back to [redacted] school (where [redacted] received instruction on [redacted]), become

happy and get [redacted] life together, and return to [redacted] [redacted] School or go to a different [redacted] school.

39. The parents also had input for the [redacted], and felt that the student's behaviors were all a result of the school staff failing to properly address the student's needs and never decreasing [redacted] sensory sensitivities. According to the parents, the school was creating the student's [redacted] behaviors.

40. When asked what might help the student perform better in school, the parents' written response was:

> Follow our request for an IEE from Dr. [redacted]; refrain from targeting, mistreating, abusing, threatening, harassing, violating [redacted]; be a qualified teacher who understands and knows the law, autism, [redacted] [redacted], policy, procedures, and willing to help [redacted] per the IEP, IDEA, FAPE; listen to [redacted], [redacted] parents, advocate who has [redacted] PHD in [redacted]; own when [redacted] are not doing right and fix it; take proper actions to help/assist and give the resources [redacted] needs to meet [redacted] measurements, and goals, and pass [redacted] courses; stop fighting the parents, advocate and [redacted] for what federal law, congress, and civil rights under IDEA says [redacted] is to receive.

41. Data was taken on baseline behavior and observable behaviors. Triggers were documented, and a hypothesis was developed. The [redacted] used reliable instrumentation to determine the function of the student's behavior, and the method was nondiscriminatory.

42. The [redacted] was conducted using a systemic process that assisted in defining the student's behavior and the function of the behavior. Direct and indirect assessment was done, ABC (antecedent, behavior, consequence) data was collected, records were reviewed, and input was gathered from all teachers and staff, the student [redacted], and [redacted] parents.

43. The functions of [redacted] behavior were identified as any non-preferred or novel task, when the student is denied a desired item/person/activity, when [redacted] is asked to complete assignments, and when [redacted] is asked to engage in work. [redacted] desire when acting out is to avoid non-preferred tasks and regain control. Another function of troubling behavior is when the student is transitioning from a less structured environment (such as [redacted]), [redacted] seeks to vent or express [redacted] frustration. The [redacted] ultimately recommended that a [redacted] ([redacted]) be developed.

44. A [redacted] was developed for the student, but never implemented because [redacted] never returned to school after mid-January 2017.

CONCLUSIONS OF LAW

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

46. Both parties bear the burden of proof with respect to each of the issues raised herein, as both parties are seeking relief in these consolidated cases. Schaffer v. Weast, 546 U.S. 49, 62 (2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."). As delineated above in the Statement of the Issues, each party has the burden of proof on the claims they each brought forth.

47. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on each agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Ala. State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

48. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. Bd. of Educ. v. Rowley, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of 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 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. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

> [S]pecial education services that – (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

51. The central mechanism by which the IDEA ensures a FAPE for each child is the development and implementation of an IEP. 20 U.S.C. § 1401(9)(D); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985) ("The modus operandi of the [IDEA] is the . . . IEP.") (internal quotation marks omitted). The IEP must be developed in accordance with the procedures laid out in the IDEA, and must be "reasonably calculated to enable the child to receive educational benefits." Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982).[3/]

52. Turning to the substantive claims, the totality of the evidence establishes that the IEP was reasonably calculated to enable the student to receive educational benefits. Petitioner

claimed that the [redacted] methodology was not appropriate for the student's needs, but failed to provide any credible evidence to establish the claim.

53. Likewise, Petitioner claimed that school staff was instructing the student utilizing an [redacted] curriculum, but the credible evidence established the contrary. The school staff was implementing the IEP with fidelity, instructing the student utilizing the [redacted] curriculum.

54. Turning to the issue of placement, the IDEA mandates that:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). "Educating a handicapped child in a regular education classroom . . . is familiarly known as 'mainstreaming.'" Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1039 (5th Cir. 1989). Courts have acknowledged, however, that the IDEA's strong presumption in favor of mainstreaming must be "weighed against the importance of providing an appropriate education to handicapped students." See Briggs v. Bd. of Educ., 882 F.2d 688, 692 (2d Cir. 1989).

55. In evaluating whether an IEP places a student in the least restrictive environment, a two-part test is applied:

> First, [redacted] ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily. If it cannot and the school intends to provide special education or remove the child from regular education, [redacted] ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991) (internal citation omitted); L.B. v. Nebo Sch. Dist., 379 F.3d 966, 976 (10th Cir. 2004); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989).

56. To determine whether a child with disabilities can be educated satisfactorily in a regular class with supplemental aids and services (the first part of the test described above), several factors are properly considered:

> (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

P. v. Newington Bd. of Educ., 546 F.3d 111, 120 (2d Cir. 2008) (quoting Oberti v. Bd. of Educ., 995 F.2d 1204, 1217-18 (3d Cir. 1993)).

57. In Florida, parental consent is required to administer to the student an [redacted] assessment and provide instruction in the state standards [redacted] curriculum, and to place a student in an exceptional student education center. See § 1003.5715(1)(a) and (b), Fla. Stat.

58. Here, the school staff at [redacted] and School A made more than reasonable efforts to accommodate the student's needs in a general education classroom. [redacted] had a one-on-one paraprofessional, an ESE Support Facilitator providing [redacted] instruction in all subject matters, [redacted] support, [redacted] therapy, [redacted] services, and many more accommodations in and out of the classroom. Despite all these efforts, the student was frustrated with the academic demands and grew [redacted] because of the academic challenges [redacted] faced. There was credible evidence presented indicating the negative effect [redacted] outbursts had on the other students; [redacted] were afraid of [redacted]. In addition, there was credible evidence that the student did well in a smaller setting over the summer of 2016; when [redacted] received ESY services in a small group setting, the educators saw very few [redacted] behaviors.

59. School C is a smaller school setting with a therapeutic component. The class sizes are smaller, with about [redacted] to [redacted] students in each class, instructed by a teacher and a

paraprofessional. All faculty members are ESE and general education certified in their content area, and therapists are available all the time. Students are assigned a therapist when they enroll, and have daily access to their therapist. The school also has a behavior specialized team that assists with de-escalation crisis intervention.

60. The undersigned is convinced, after a review of [redacted] entire educational background (including instruction on access points for years before [redacted] moved to [redacted]) that the student did not meet with success in the general education setting because the academic challenges were too demanding, and [redacted] behavioral needs require a more [redacted] therapeutic component.

61. Accordingly, the undersigned orders that the student be instructed utilizing an [redacted] curriculum, in a [redacted] school (School C) that is better equipped to handle [redacted] behavioral needs at this point.

Manifestation Determination Review

62. Petitioner also claimed that the School Board failed to conduct a manifestation determination review, as is required by Florida Administrative Code rule 6A-6.03312(3). The School Board was never required to hold such a review because the student was never removed from [redacted] placement for more than ten days, either consecutively or using a cumulative review. Petitioner presented no evidence to the contrary.

Independent Educational Evaluations

63. Under the IDEA and its implementing regulations, a parent of a child with a disability is entitled, under certain circumstances, to obtain an IEE of the child at public expense. The circumstances under which a parent has a right to an IEE at public expense are set forth in 34 C.F.R. § 300.502(b), which provides as follows:

> Parent right to evaluation at public expense.
>
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--
>
> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
>
> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
>
> (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

64. Florida law, specifically rule 6A-6.03311(6), provides similarly as follows:

(a) A parent of a student with a disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

* * *

(g) If a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay either:

1. Ensure that an independent educational evaluation is provided at public expense; or

2. Initiate a due process hearing under this rule to show that its evaluation is appropriate or that the evaluation obtained by the parent did not meet the school district's criteria. If the school district initiates a hearing and the final decision from the hearing is that the district's evaluation is appropriate, then the parent still has a right to an independent

> educational evaluation, but not at public expense.
> (h) If a parent requests an independent educational evaluation, the school district may ask the parent to give a reason why he or she objects to the school district's evaluation. However, the explanation by the parent may not be required and the school district may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the school district's evaluation.
>
> (i) A parent is entitled to only one (1) independent educational evaluation at public expense each time the school district conducts an evaluation with which the parent disagrees.

65. These provisions make clear that a district school board in Florida is not automatically required to provide a publicly funded IEE whenever a parent asks for one. A school board has the option, when presented with such a parental request, to initiate a due process hearing to demonstrate, by a preponderance of the evidence, that its own evaluation is appropriate. T.P. v. Bryan Cnty. Sch. Dist., 792 F.3d 1284, 1287 n.5 (11th Cir. 2015). If the district school board is able to meet its burden and establish the appropriateness of its evaluation, it is relieved of any obligation to provide the requested independent educational evaluation.

66. To satisfy its burden of proof, the School Board must demonstrate that the assessments at issue complied with rule 6A-6.0331(5), which sets forth the elements of an appropriate

evaluation. Palm Beach Cnty. Sch. Bd. v. **, 66 IDELR 29 (Fla. DOAH July 2, 2015). Rule 6A-6.0331(5) provides as follows:

> (5) Evaluation procedures.
>
> (a) In conducting an evaluation, the school district:
>
> 1. Must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student within a data-based problem solving process, including information about the student's response to evidence-based interventions as applicable, and information provided by the parent. This evaluation data may assist in determining whether the student is eligible for ESE and the content of the student's individual educational plan (IEP) or educational plan (EP), including information related to enabling the student with a disability to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), or for a gifted student's needs beyond the general curriculum;
>
> 2. Must not use any single measure or assessment as the sole criterion for determining whether a student is eligible for ESE and for determining an appropriate educational program for the student; and,
>
> 3. Must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
>
> (b) Each school district must ensure that assessments and other evaluation materials and procedures used to assess a student are:
>
> 1. Selected and administered so as not to be discriminatory on a racial or cultural basis;

2. Provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;

3. Used for the purposes for which the assessments or measures are valid and reliable; and,

4. Administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.

(c) Assessments and other evaluation materials and procedures shall include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(d) Assessments shall be selected and administered so as to best ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's sensory, manual, or speaking skills, unless those are the factors the test purports to measure.

(e) The school district shall use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student.

(f) A student shall be assessed in all areas related to a suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

> (g) An evaluation shall be sufficiently comprehensive to identify all of a student's ESE needs, whether or not commonly linked to the suspected disability.

67. Pursuant to the findings of fact contained herein, the School Board has proven that the [redacted] at issue fully complied with rule 6A-6.0331(5). In particular, the [redacted] was conducted by trained and knowledgeable personnel who utilized——and properly administered——a variety of valid instruments that yielded reliable and comprehensive information concerning the student's behavioral and educational needs.

68. The undersigned notes that while Petitioner is not entitled to an IEE at public expense, the parents are free to obtain an independent [redacted] at their own expense, whose results the IEP team would be required to consider. See Fla. Admin. Code R. 6A-6.03311(6)(j)1. (providing that if a parent "shares with the school district an evaluation obtained at private expense . . . [t]he school district shall consider the results of such evaluation in any decision regarding the provision of FAPE to the student, if it meets appropriate district criteria").

69. As to the request for an IEE in neuropsychology, the School Board never conducted the prerequisite evaluation with which Petitioner disagreed. Accordingly, there is no entitlement to an IEE at public expense. See G.J. v. Muscogee Cnty. Sch. Dist., 58 IDELR 61 (11th Cir. 2012). Even if the

psychoeducational evaluation conducted in 2013 were to be considered the initial evaluation, it would be time-barred, as the two-year statute of limitations has long passed. See Broward Cnty. Sch. Bd. v. **, Case No. 15-5531E (Fla. DOAH Oct. 29, 2015); Broward Cnty. Sch. Bd. v. **, Case No. 10-4494E (Fla. DOAH Oct. 5, 2010).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner is not entitled to a neuropsychological IEE at public expense, Petitioner is not entitled to an independent [redacted] at public expense, the School Board was not under any obligation to hold a manifestation determination review, Petitioner did not prove that the student's [redacted] needs were unmet, and the School Board properly implemented the student's IEPs, which required instruction utilizing the [redacted] curriculum. All other requests for relief made by Petitioner are DENIED.

As to the School Board's other claims, it is ORDERED that the student be placed on an [redacted] curriculum, and that [redacted] proper placement is School C, which is a [redacted] school.

DONE AND ORDERED this 8th day of August, 2017, 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 8th day of August, 2017.

ENDNOTES

[1/] Petitioner attached a color photo of the student's family standing with Florida Governor Rick Scott to [redacted] Proposed Final Order. This photo is stricken from the record, as it has no relevance to the scope of this due process hearing. The undersigned can only speculate on the purpose of such an attachment, one such purpose being to inappropriately influence the undersigned's decision.

[2/] There was conflicting testimony on this point. The parent and advocate testified that the student was inappropriately instructed on an access points curriculum, in violation of the IEP. The school staff uniformly testified that the IEP was faithfully implemented, and that the student always received instruction using the Florida standards curriculum. The undersigned finds the school staff testimony to be credible, and the [redacted] and advocate's testimony to be disjointed, exaggerated, and not credible on every issue raised in the Complaint.

[3/] On March 22, 2017 (after the instant due process Complaints were filed), the United States Supreme Court readdressed this prong, finding that a school board must offer an IEP that is reasonably calculated to enable a student to make progress

appropriate in light of the student's circumstances. Endrew F. v. Douglas Cnty. Sch. Bd., 137 S. Ct. 988, 991 (2017). Given that this is a substantive change to the legal standard, it is not applicable to the instant case. Assuming, arguendo, that it is applicable, the Endrew standard would not alter the outcome in this matter.

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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).