

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs.

Case No. 17-6594EDM

PINELLAS COUNTY SCHOOL BOARD,

Respondent.

\_\_\_\_\_ /

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on January 11, 2018, in Largo, Florida.

APPEARANCES

For Petitioner: Petitioner, pro se  
(Address of Record)

For Respondent: Heather J. Wallace, Esquire  
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STATEMENT OF THE ISSUE

The issue for determination in this proceeding is whether the student's conduct on October 24, 2017, that constitutes a violation of the student code of conduct, was a manifestation of [REDACTED] disability.

PRELIMINARY STATEMENT

On November 3, 2017, Respondent conducted a Manifestation Determination Review, at the conclusion of which the team ("MDT") determined that the student's October 24, 2017, acts of misconduct did not constitute manifestations of ■■■ disability. Petitioner's parents were dissatisfied with the MDT's decision and, on December 7, 2017, filed a request for an expedited due process hearing. The request was forwarded to DOAH the same day and assigned to Administrative Law Judge Diane Cleavinger. On December 13, 2017, the final hearing was scheduled for January 11, 2018.

On January 5, 2018, the parties filed a Joint Stipulation of Facts. To the extent relevant, those facts are incorporated in this Final Order. On January 9, 2018, this matter was transferred to the undersigned for all further proceedings. The final hearing was held, as scheduled, on January 11, 2018. At the conclusion of the final hearing, the parties stipulated to submitting proposed final orders five business days after the filing of the Transcript. The final hearing Transcript was filed on January 19, 2018. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

The parties timely filed proposed final orders, which were considered in preparing this Final Order. Unless otherwise

indicated, all rule and statutory references are to the version in effect at the time of the alleged violation.

For stylistic convenience, the undersigned will use [REDACTED] pronouns in the Final Order when referring to the student. The [REDACTED] pronouns are neither intended, nor should be interpreted, as a reference to the student's actual gender.

#### FINDINGS OF FACT

1. The student is currently [REDACTED]. [REDACTED] is a student who qualifies for exceptional student education ("ESE"). [REDACTED] documented exceptionality is [REDACTED]. [REDACTED]. During the 2017-2018 school year, the student was in [REDACTED] and attended School A, a public [REDACTED] school in Pinellas County, Florida.

2. The student attended [REDACTED] school in a different state, wherein, at some point in time, [REDACTED] was ostensibly evaluated and determined to meet the criteria for ESE services due to [REDACTED]. An individualized education plan ("IEP") was developed for [REDACTED] in the foreign state.

3. On September 30, 2014, the student enrolled in a public [REDACTED] school in Pinellas County. [REDACTED] previously drafted IEP, including [REDACTED] eligibility, was accepted by Respondent.<sup>1/</sup>

4. On February 19, 2015, an IEP meeting was held at the [REDACTED]. At that time, [REDACTED] eligibility remained [REDACTED]. During the meeting, it was noted that the student's behavior

impeded [REDACTED] learning or the learning of others. Specifically, it was noted that, at times, [REDACTED] would participate in undesirable behaviors, such as throwing objects, and making cruel comments to peers.

5. At this meeting, the student's mother advised that the student takes medication for [REDACTED] [REDACTED] at home. The IEP documented that [REDACTED] annual goals included maintaining conversation in the classroom focused on the learning objective; and respecting the personal space of [REDACTED] peers in the classroom setting, including [REDACTED] desk/work area, as well as in small group areas. At that time, the student was in all general education classes with support from an ESE teacher in [REDACTED] science class. Additionally, [REDACTED] received counseling from the school social worker [REDACTED], and speech therapy [REDACTED].

6. On January 8, 2016, an annual review of the student's IEP was conducted at School A, where the student was now a [REDACTED]. [REDACTED] primary exceptionality remained [REDACTED], and the IEP documented that [REDACTED] behavior continued to impede [REDACTED] learning or the learning of others. It was noted that the student had a functional behavior assessment and/or positive behavior plan.

7. The IEP documented that the student was easily distracted and may have outbursts that impeded [REDACTED] ability to interact positively, which can affect [REDACTED] overall learning.

Notwithstanding, it was further documented that ■ had shown improvement in controlling physical responses, had excellent attendance, and had received no discipline or disciplinary interventions. ■ emotional behavior goals were amended to now provide that ■ would "demonstrate self determination through self advocacy" and to "maintain conversation focused on the learning objective."

8. The January 8, 2016, IEP provided that the student would participate in Learning Strategies in an ESE classroom for 238 minutes per week (on average) and receive intensive reading for 238 minutes per week (on average) in the general education setting. ■ would receive all other instruction in the general education classroom. Additionally, the IEP set forth several classroom/instructional accommodations including: directions repeated or clarified; student to demonstrate understanding of directions (e.g., repeating or paraphrasing); verbal encouragement (e.g., "keep working," and "make sure to answer every question"); extended time to complete assignments; assignments or tests administered in a small group setting of a size comparable to the normal instruction group size up to 25; reduced stimuli (e.g., limit number of items around the student's computer station); and preferential seating.

9. At the January 8, 2016, meeting, the student's mother advised that the student continues to take medication for ■,

and that the parents desired to add lunchtime medication to [REDACTED] routine.

10. By the time of [REDACTED] next annual IEP review, on January 5, 2017, the student had demonstrated improvement in [REDACTED] emotionality. Indeed, at this time, the IEP team determined that [REDACTED] behavior no longer impeded [REDACTED] learning or the learning of others. Specifically, the IEP documented that "[the student] has excellent attendance and has had no issues with discipline this year" and that "[REDACTED] is taking responsibility for [REDACTED] learning and behavior." Under the domain of emotional behavior, the IEP team noted that [REDACTED] "has shown improvement in controlling physical responses and understanding personal space." The IEP team further concluded the following:

[The student] has no discipline events or interventions to date at [School A]. [REDACTED] is easily distracted and may have outbursts that impeded [REDACTED] ability to interact positively which can affect [REDACTED] overall learning but [REDACTED] is actively taking responsibility for [REDACTED] behavior and [REDACTED] academics.

11. The January 5, 2017, IEP contained the following emotional behavioral goals: demonstrate self-determination through self-advocacy, and take personal responsibility for grades by checking weekly with teachers for assignments due.

12. At the January 5, 2017, IEP meeting, it was determined that [REDACTED] no longer required Learning Strategies. Instead, there was merely an ESE consultation with [REDACTED] general education class

teachers, once per grading period. ■ continued to require intensive reading services as previously set forth and ■ classroom/instructional accommodations remained the same as the previous IEP. At this time, ■ was with nondisabled peers 100 percent of the school day. It was again documented that ■ had a diagnosis of ■, and was taking medication at home.

13. During the summer of 2017, the student's parents made the decision to take the student off of ■ ■ medication. The student returned to School A for the 2017-2018 school year and remained off of the medication. The student did not demonstrate any negative behaviors warranting discipline until October 24, 2017.

14. On that date, the student engaged in conduct during school that resulted in a disciplinary referral. The referral form documents that the referral was due to the student using a razor blade to cut one student in one class and another student in another class. The form indicates that said behavior aligns with an infraction for "battery on student." Said form further indicates that the administrative action was two days of an Alternative Bell Schedule and two days of out-of-school suspension. Finally, the referral indicates that it was the recommendation of School A administration that ■ be reassigned to an alternative educational school setting.

15. On November 3, 2017, a Manifestation Determination meeting was conducted. The school-based members in attendance included a local education authority (LEA) representative, a special education teacher/service provider, a general education teacher (via phone), an interpreter of instructional implications of evaluation, School A's assistant principal (via phone), a behavioral specialist, and the school psychologist. The student did not appear; however, [REDACTED] parents did participate in the meeting.

16. The record is unclear regarding exactly what information, documentation, or findings School A provided to the MDT regarding the October 24, 2017, incident. The evidence did establish, however, that the MDT reviewed the student's records, the student's IEP, teacher statements, disciplinary/behavioral records (or the absence thereof), and information provided by the student's parents. No evidence was presented that the school-based members of the MDT rejected or failed to consider any relevant documentation, information, or statements provided on behalf of the student.

17. At the meeting, School A's assistant principal, [REDACTED], described the incident to the MDT. The MDT ultimately noted in its report the following:

Incident: On 10/24/17, [the student] removed a blade from a pencil sharpener. [REDACTED] used a razor blade to cut two students

one in [REDACTED] ([REDACTED]) & [REDACTED]  
class ([REDACTED]).

18. The school-based members of the MDT ultimately determined that the incident was not a manifestation of the student's disability and that it was not the result of a failure to implement the student's IEP. The student's parents disagreed with this decision. The MDT form completed by the MDT does not set forth the rationale behind the MDT's decision.

19. Respondent's witnesses testified that the MDT decision was based on the student's complete absence of disciplinary referrals over the course of [REDACTED] high school career, [REDACTED] lack of aggressive behavior towards students or staff, and the isolated nature of this incident. While some of Respondent's witnesses testified that the student, at times, engages in off-task behavior, the student can usually be redirected. In making its determination that the incident was not a manifestation of [REDACTED] disability, the school-based members of the MDT also noted that the subject incident occurred over three separate periods and, therefore, was not considered an act of impulsivity.

#### CONCLUSIONS OF LAW

20. 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) and 6A-6.03312(7).

21. Petitioner bears the burden of proof with respect to each of the claims raised in the complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005); Dep't of Educ., Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46724 (Aug. 14, 2006) (explaining that the parent bears the burden of proof in a proceeding challenging a school district's manifestation determination).

22. In enacting the Individuals with Disabilities Education Act ("IDEA"), Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on 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).

23. 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; 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).

24. School districts have certain limitations on their ability to remove disabled children from their educational placement following a behavioral transgression. Specifically, the IDEA provides that where a school district intends to place a disabled child in an alternative educational setting for a period of more than ten school days, it must first determine that the child's behavior was not a manifestation of ■ disability. 20 U.S.C. § 1415(k)(1)(C). Pursuant to the IDEA's implementing regulations, "[o]n the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct,

the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504." 34 C.F.R. § 300.530(h).

25. The necessary inquiry is set forth in 20 U.S.C. § 1415(k)(1)(E), as follows:

Manifestation determination.

(i) In general. Except as provided in subparagraph (B), within 10 school 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 relevant members of the IEP Team (as determined by the parent and the 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.

26. If the local educational agency, the parent, and relevant members of the IEP team determine that either subclause (I) or (II) of clause (i) is applicable, the conduct shall be determined a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E)(ii). If the conduct is deemed a manifestation of the child's disability, the student must be returned to the educational placement from which he or she was

removed. 20 U.S.C. § 1415(k)(1)(F)(iii). Additionally, if no behavioral intervention plan ("BIP") was in place at the time of the misconduct, the school district is obligated to "conduct a functional behavioral assessment, and implement a [BIP] for such child." 20 U.S.C. § 1415(k)(1)(F)(i).

27. If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the school district may apply the relevant disciplinary procedures in the same manner and duration as would be applied to children without disabilities. 34 C.F.R. § 300.530(c). The child, however, must continue to receive education services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. Additionally, the child must receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(i) and (ii).

28. Petitioner's complaint first alleges that the conduct in question was a result of Respondent failing to implement the student's "IEP accommodations." Succinctly, Petitioner failed to present sufficient evidence to support this allegation. First, Petitioner failed to present sufficient evidence to support a

finding that Respondent failed to implement any component of the student's operative IEP. Second, assuming, arguendo, that Petitioner established a failure to implement the IEP, Petitioner failed to present sufficient evidence to establish that the conduct in question (battery on a student) was the direct result of Respondent's failure to implement the IEP. Accordingly, this claim must fail.

29. Petitioner's complaint further alleges that the conduct in question was a manifestation of [REDACTED] disability, [REDACTED]. Pursuant to Florida Administrative Code Rule 6A-6.03016(1), [REDACTED] is defined as:

A student with an [REDACTED] [REDACTED] has persistent (is not sufficiently responsive to implemented evidence based interventions) and consistent emotional or behavioral responses that adversely affect performance in the educational environment that cannot be attributed to age, culture, gender, or ethnicity.

30. Rule 6A-6.03016(4) sets forth the criteria for [REDACTED] eligibility as follows:

A student with an [REDACTED] must demonstrate an inability to maintain adequate performance in the educational environment that cannot be explained by physical, sensory, socio-cultural, developmental, medical, or health (with the exception of mental health) factors; and must demonstrate one or more of the following characteristics described in paragraphs (4) (a) or (4) (b) of this rule and meet the requirements of paragraphs (4) (c) and (4) (d) of this rule:

(a) Internal factors characterized by:

1. Feelings of sadness, or frequent crying, or restlessness, or loss of interest in friends and/or school work, or mood swings, or erratic behavior; or
2. The presence of symptoms such as fears, phobias, or excessive worrying and anxiety regarding personal or school problems; or
3. Behaviors that result from thoughts and feelings that are inconsistent with actual events or circumstances, or difficulty maintaining normal thought processes, or excessive levels of withdrawal from persons or events; or

(b) External factors characterized by:

1. An inability to build or maintain satisfactory interpersonal relationships with peers, teachers, and other adults in the school setting; or
2. Behaviors that are chronic and disruptive such as noncompliance, verbal and/or physical aggression, and/or poorly developed social skills that are manifestations of feelings, symptoms, or behaviors as specified in subparagraphs (4)(a)1.-3. of this rule.

31. At the final hearing, no evidence was presented to establish the basis for which the student was initially determined, by the out-of-state school district, to meet the requirements of ■■■ eligibility. Similarly, no evidence was presented to explain the specific basis of the student's continued eligibility under ■■■ while at School A. It is undisputed, however, that School A's IEP team, which includes the

parents, continued to find the student entitled to special education by meeting the criteria for [REDACTED]. It is further undisputed that the student has been diagnosed with [REDACTED] since [REDACTED] enrollment in Respondent's school district and that said diagnosis, as well as [REDACTED] medication management, are referenced in all of the student's IEPs.

32. The accommodations set forth in the student's recent IEPs (preferential seating, repeating instructions, reduction in available stimuli, verbal encouragement, increased time for assessments, etc.) appear consistent with assisting a student with [REDACTED]. The goals contained in the student's IEPs also appear, in part, to address the concerns of a student with [REDACTED]. In the absence of any evidence to the contrary, the undersigned cannot rule out that the basis for [REDACTED] initial eligibility was due, at least in part, to [REDACTED] [REDACTED]. Similarly, the undersigned cannot exclude the student's [REDACTED] diagnosis as one of the, if not the sole, rationales for [REDACTED] ongoing [REDACTED] eligibility at School A.<sup>3/</sup>

33. Against this backdrop, the pertinent determination is whether the misconduct under review was caused by, or had a direct and substantial relationship to, the student's disability. The criteria to be considered in resolving this question shall be "broad and flexible," and must include an analysis of the "child's behavior as demonstrated across settings and across

time." See Dep't of Educ., Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 4620 (Aug. 14, 2016).

34. An analysis of the student's behavior, based on the totality of the evidence presented at the hearing, and "across settings and time," reveals that the misconduct in question (battery on a student) was not caused by, or had a direct and substantial relationship to ■■■ disability. To the contrary, the analysis reveals that, prior to the subject incident, the student had received no disciplinary referrals for any misconduct. The student has not previously engaged in any acts of physical aggression or engaged in any erratic behavior.

35. The evidence, as a whole, establishes that the student's disability primarily manifests itself in the student's failing to stay on task, as it pertains to academic focus and assignments. Although one teacher opined that the student, on very limited occasions, will distract other students by playing with school equipment, the same is insufficient to support a causal connection to the incident in question.

36. The evidence further establishes that the subject incident transpired over several class periods. Accordingly, the undersigned concurs with the MDT's opinion that the incident was not one of impulsivity or otherwise directly and substantially related to the student's disability.

ORDER

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

1. Petitioner's conduct on October 24, 2017, was not a manifestation of ■■■■ disability.

2. Respondent may apply the relevant disciplinary procedures in the same manner and duration as would be applied to students without disabilities.

3. All other requests for relief are denied.

DONE AND ORDERED this 5th day of February, 2018, in Tallahassee, Leon County, Florida.

**S**

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TODD P. RESAVAGE  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of February, 2018.

ENDNOTES

<sup>1/</sup> The record evidence does not include the out-of-state IEP.

2/ The record evidence does not include either a functional behavior assessment or a positive behavior intervention plan.

3/ While a student with [REDACTED] may be eligible as "[REDACTED]," a student with [REDACTED] may be eligible for services under the classification of [REDACTED] if he meets the specific eligibility requirements for [REDACTED].

COPIES FURNISHED:

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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).