Palm Beach County School District
No. 06-4996E
Initiated by: Parent
Hearing Officer: Robert E. Meale
Date of Final Order: January 23, 2007

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted])
)
Petitioner,)
)
vs.) Case No. 06-4996E
)
PALM BEACH COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in West Palm Beach, Florida, on January 12, 2007.

APPEARANCES

For Petitioner: Barbara Burch Briggs, Esquire
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For Respondent: Helene S. Mayton, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent provided the notice required by law in removing Petitioner from [redacted] high school, conducting a manifestation determination hearing, and placing Petitioner in an interim alternative educational setting (IAES) for 45 days, and whether Respondent designed an appropriate program of instructional and behavioral services during the 45-day IAES placement.

PRELIMINARY STATEMENT

On December 11, 2006, Petitioner filed with Respondent a letter requesting a due process hearing concerning various matters arising out of the removal of [redacted] from [redacted] high school and placement in a 45-day IAES.

On December 26, 2006, the Administrative Law Judge issued an Order Denying Motion to Dismiss, Striking Specific Claims, Identifying the Issues for Hearing, and Denying Motion for Continuance. The December 26 Order identifies the following issues to be heard: 1) whether Respondent provided all notice required in connection with the removal decision and the manifestation determination hearing, at which Petitioner's individual education plan (IEP) team decided upon an IAES; and 2) whether the placement in the IAES provided Petitioner with the necessary instruction that [redacted] could appropriately progress in the general curriculum and appropriately advance toward achieving the goals of Petitioner's IEP. The December 26 Order

states that the second issue is based on alleged violations of Florida Administrative Code Rule 6A-6.03312(5)(b) and (c). By Order entered December 28, 2006, the Administrative Law Judge stated that the second issue is also based on alleged violations of Florida Administrative Code Rule 6A-6.03312(6)(a)(1) and (2).

The December 26 Order also denies a motion to dismiss and a motion for continuance. The Order notes that, pursuant to Florida Administrative Code Rule 6A-6.03312(1)(k), the Final Order is due on January 25, 2007, "without exceptions or extensions."

The Administrative Law Judge conducted a prehearing conference by telephone on December 27, 2006. During the conference, Petitioner confirmed that [redacted] was not challenging the determination that the alleged act was not a manifestation of [redacted] disability. On the day following the conference, the Administrative Law Judge issued an Order On Prehearing Conference. This Order offers to continue the hearing from January 4-5 to January 11, 2007, if the parties believed they could finish the case in a day. The parties later stated that they could finish the case in a day, so the Administrative Law Judge reset the hearing for January 11, 2007, primarily because Respondent's witnesses were still on winter break on January 4 and 5.

At the hearing, Petitioner called three witnesses, and Respondent called seven witnesses. The parties offered into evidence Exhibits 1-26. Most were jointly offered, but some were offered by one party without objection. The sole exception pertained to the report of Petitioner's expert witness, a clinical psychologist. He prepared the exhibit the day before the final hearing, and Respondent objected due to the late disclosure of the exhibit (and objected to the testimony of the witness on the same ground). The Administrative Law Judge overruled the objections, allowing the record to remain open to re-open the cross-examination of this witness, as well as to allow Respondent to call another witness the following week to testify in response to the objected-to testimony and exhibit. Subsequently, Respondent determined that it was unnecessary to elicit additional testimony.

The parties filed their proposed final orders on January 22, 2007. As instructed by the Administrative Law Judge, they emailed copies to him at the time of filing. The Administrative Law Judge thus has had ample time to read and review the proposed final orders and use them in the Final Order, as appropriate.

FINDINGS OF FACT

1. Petitioner was born on [redacted], 19[redacted]. [redacted] is a high-school senior at [redacted] High School and expects to

graduate in May or June 2007 with the rest of [redacted] class. Petitioner attended [redacted] High School for [redacted] first two years of high school and transferred to [redacted] High School midway through [redacted] junior year.

2. Petitioner is classified as a student with specific learning disabilities (SLD). Based on this classification, Petitioner has received exceptional student education (ESE) services in the form of specialized instruction, pursuant to an IEP that is updated annually at a meeting of [redacted] IEP team.

3. Petitioner is working toward a standard high school diploma. Even prior to the events described below, three issues stood in the way of [redacted] diploma. First, Petitioner has a grade point average of 1.9, which is 0.1 point below what is required for graduation. Second, Petitioner is earning credits at a rate that would leave [redacted] one credit short of what is required to graduate. Third, Petitioner needs to pass the reading FCAT when it is administered in a couple of months, after having failed it in [redacted] sophomore and junior years. Petitioner must satisfy all three of these requirements to earn a standard diploma.

4. Petitioner's last IEP prior to the events described below is dated December 7, 2005 (2005 IEP). The term of the 2005 IEP was December 7, 2005, through December 6, 2006. An IEP team at [redacted] High School developed this IEP shortly after Petitioner's arrival from [redacted] High School. The 2005 IEP

continues to classify Petitioner as SLD and notes that Petitioner is interested in the military or community college after high school. The 2005 IEP places Petitioner in general-education science and math with ESE consultation services. The 2005 IEP places [redacted] in ESE, content-equivalent English. The 2005 IEP states that Petitioner requires no assistive technology, but offers accommodations in extending the time for performing assignments and taking tests.

5. The 2005 IEP explains that this placement represents the least restrictive environment due to "student frustration and stress," "student self-esteem and worth," and "need for lower pupil-to-teacher ratio." The 2005 IEP states that "[d]ifficulty with critical reading skills may affect [Petitioner's] progress in the regular curriculum." However, the 2005 IEP adds: "[Petitioner] is eager to learn and looks forward to a bright future."

6. The 2005 IEP is accompanied by a Post Secondary Transition Plan, also dated December 7, 2005. This plan is seriously flawed. It transposes Petitioner's reading and math FCAT scores from a test administration date of October 1, 2005. The plan states that Petitioner scored a 306 in reading and 273 in math. A passing score is 300, so, according to the plan, Petitioner has passed reading, but not math. The reverse is true.

7. Compounding what would otherwise have been a minor typographical error, the Post Secondary Transition Plan provides services as though Petitioner had passed the reading FCAT, but failed the math FCAT. The Post Secondary Transition Plan notes: "[Petitioner's] low FCAT math score indicates that [redacted] may have difficulty with grade level math." The first of two priority educational needs in the plan is thus: "To achieve a grade level score in math and pass FCAT." The goal is to pass the math FCAT.

8. The Post Secondary Transition Plan addresses reading, which it identifies as Petitioner's second priority educational need, but fails to identify the all-important goal of passing the reading FCAT. The plan states that Petitioner's reading need is: "To increase comprehension and writing skills."

9. The IEP team responsible for preparing the 2005 IEP decided that Petitioner did not require a behavior intervention plan (BIP). In a handwritten note prepared by one of Respondent's employees, the 2005 IEP states: "[Petitioner] transferred from [redacted] where [redacted] had an FBA [functional behavior assessment] for self-control issues. Presently, teachers are not observing any of these problems at this time. There is no discipline screens [sic] at this time." Petitioner's father added [redacted] handwritten note: "[Petitioner]

seems to be 'on track.' A vast improvement over [redacted] High speaks volumes to staff inadequacies at [redacted] High."

10. Petitioner's Functional Behavior Assessment Report and Behavior Intervention Plan from [redacted] High School was dated January 10, 2005 (2005 BIP). The 2005 BIP was based on then-recent observations by the crisis intervention teacher, but the teacher surveys and motivation assessment scale were almost one year old as of early 2005.

11. The 2005 BIP targets defiance and resistance to authority. The 2005 BIP states that defiance is preceded by a request to follow the rules or obey the teacher or by a loss of self-control while socializing with [redacted] peers.

12. The 2005 BIP predicts that Petitioner's behavior would approve as a result of daily monitoring. The 2005 BIP identifies several strategies to help Petitioner avoid the antecedents to [redacted] bad behaviors, including giving [redacted] a choice of cooling off in a safe room, daily or weekly monitoring by the CIT, and adjustment of [redacted] schedule to meet [redacted] needs.

13. The 2005 BIP provides that the crisis intervention teacher would be called in "ALL" emergency situations involving Petitioner, who would be helped to learn self-management skills. The 2005 BIP adds that the crisis intervention teacher or IEP team will check and "redirect. . ." the 2005 BIP twice monthly.

14. Petitioner's grades improved for the spring semester of [redacted] junior year, which was [redacted] first full term at [redacted] High School. Generally, Petitioner's grades improve when [redacted] controls [redacted] behavior, and, as noted above, [redacted] behavior was good immediately after [redacted] transfer to [redacted] High School. However, Petitioner failed to pass the reading FCAT in March of [redacted] junior year. In contrast to a nearly passing score early in [redacted] sophomore year, Petitioner earned only 238 points--a loss of 35 points in nearly 18 months.

15. At that point, Petitioner had--and has--only one more chance to pass the reading FCAT. If Petitioner fails to pass the reading FCAT, which is to be administered in less than two months, [redacted] will not be eligible for a standard high school diploma. A witness testified that, at an undisclosed point, [redacted] High School offered Petitioner a course of intensive preparation for the reading FCAT, but [redacted] declined to take it. However, the evidentiary record discloses no other activity by anyone at [redacted] with respect to this pressing matter.

16. In the fall of 2006, Petitioner's grades deteriorated, as did [redacted] behavior. Assistant principal William Pollard intervened numerous times to try to get Petitioner back on track. By the end of the first nine weeks of the 2006-07 school year, Petitioner was at risk of failing courses for the semester

and, thus, failing to earn credits and grade points that [redacted] needs to graduate.

17. By Parent Participation Notification (PPN) dated September 29, 2006, Respondent informed Petitioner's father of an IEP meeting on October 25, 2006. Due to a scheduling conflict, Respondent issued another PPN, postponing the IEP meeting to November 1, 2006. Petitioner's father agreed to this new meeting date on October 4. Both PPNs indicated, by a checked box among ten possible boxes, that the purpose of the meeting was to review evaluation results. These were both routine notices of routine IEP meetings.

18. Three incidents during the week of October 16 are of importance to this case. Mr. Pollard described the first incident, but [redacted] did not witness it, nor did any other witness to the incident testify at the hearing. Mr. Pollard learned from a student teacher in American government about a serious classroom incident involving her and Petitioner--so serious that the student teacher did not want to continue to have Petitioner in her class for the two weeks remaining in her student-teaching assignment.

19. Finding no other scheduling options for this class, which is required for graduation, Mr. Pollard removed Petitioner from the class and placed [redacted] in the in-school suspension classroom, where [redacted] could receive class assignments from the

regular teacher. The transfer into the in-school suspension classroom was not disciplinary. When the student teacher left in two weeks, Petitioner would return to the regular classroom.

20. Mr. Pollard described the second incident, but [redacted] did not witness it, nor did any other witness to the incident testify at the hearing. October 18 was the first day of Petitioner's two-week assignment in the in-school suspension classroom. Mr. Pollard learned that a cellphone rang shortly after the start of class. The teacher told Mr. Pollard that it was Petitioner's cellphone and had demanded that Petitioner remove the cellphone from [redacted] backpack and give it to the teacher. Petitioner had declined, and the teacher had summoned an assistant principal to remove Petitioner.

21. Mr. Pollard responded to the call, not knowing the identity of the student. After conferring with the teacher, Mr. Pollard removed Petitioner from the classroom. He spoke with Petitioner, who denied that [redacted] cellphone had rung. Mr. Pollard imposed a two-day suspension, which is school policy for any student who, after [redacted] cellphone rings, refuses to turn it over to an administrator, who keeps it until it is picked up by a parent. The two-day suspension ran the next two days, Thursday and Friday, October 19 and 20.

22. A few minutes after imposing the two-day suspension, Mr. Pollard telephoned Petitioner's father and explained that

his [redacted] was suspended for two days for failing to relinquish [redacted] cellphone. The call went poorly, as Petitioner's father called Mr. Pollard a patsy and a jerk, who did nothing but whatever the principal told [redacted] to do. In general, Petitioner's father believes that the school administration is out to get his [redacted] and attributes his [redacted]'s behavioral incidents, including skipped classes, to deficiencies in school staff.

23. After calling Petitioner's father, Mr. Pollard received the referral concerning the ringing cellphone. The referral states that, after refusing to relinquish [redacted] cellphone, Petitioner refused to allow the teacher to inspect [redacted] backpack and instead cut off the teacher with rude comments. The referral reports that Petitioner threatened to leave the classroom without permission and directed the teacher not to speak to [redacted]. The teacher wrote that he felt threatened by Petitioner, who kept pacing the floor in a hostile manner.

24. Petitioner was still in Mr. Pollard's office while he read the referral. Prompted by the details of referral, Mr. Pollard searched Petitioner's backpack. In it, he did not find a cellphone, but he found something that he deemed to be a weapon.

25. Mr. Pollard found, and confiscated, a rounded, heavy weight enclosed by woven, thick yarn or cord that extends

perhaps 6-9 inches so as to form a flexible handle (Confiscated Item). Petitioner calls the Confiscated Item a "monkeyfist," which is a knotted section of line, possibly including a weight, used to enable someone to throw naval line farther. For the reasons set forth in the Conclusions of Law, the Administrative Law Judge excluded as irrelevant all evidence concerning the proper characterization of the Confiscated Item, and this Order does not determine whether it is a weapon.

26. As soon as he discovered the Confiscated Item, Mr. Pollard directed Petitioner to remain in his office while he took it to the school police. A law enforcement officer at the school examined the Confiscated Item and informed Mr. Pollard that he would not arrest and prosecute Petitioner, but told [redacted] that he could still proceed administratively against Petitioner. Mr. Pollard then took the Confiscated Item to a meeting involving the principal and one or two other assistant principals. After examining the item, they concluded that it was a weapon and, consistent with school policy, Petitioner should be suspended for 45 days for possessing the weapon at school.

27. Mr. Pollard returned to his office to speak to Petitioner. However, shortly after Mr. Pollard's departure, which was near the end of the school day, Petitioner had disobeyed Mr. Pollard's instruction to wait and had left the

office and school campus. [redacted] served [redacted] suspension on October 19 and 20 without incident.

28. Because Petitioner is an ESE student, the principal lacked the authority to suspend Petitioner for 45 days without the approval of Respondent's Department of Alternative Education. The principal thus informed Mr. Pollard that he was recommending to the Department of Alternative Education that Petitioner be removed from [redacted] High School for 45 days. The principal memorialized this recommendation on October 23, the following Monday, by an IAES 45 Day Placement Request. Approval of suspension recommendations is not automatic; if the Department of Alternative Education cannot provide ESE services in an IAES, for instance, it will not approve the request.

29. While the removal request for the Confiscated Item was still pending, on October 24, the school sent Petitioner's father a confusing letter concerning the two-day suspension that Petitioner had already completed. The letter is relevant to this case because it may have confused Petitioner's father--underscoring the greater need for clear notice concerning the subsequent removal, IEP meeting, and proposal for an IAES--and it illustrates the casual regard of the school--probably Mr. Pollack--toward the function of notice.

30. The unsigned letter bears the closing, "Sincerely, Principal/Designee," so it is impossible to identify its author.

The letter states that, due to "disrput [sic] of school" and "poss of other danger" on October 18, 2006, the signatory held a meeting on October 24, at which Petitioner had a chance to explain why the suspension should not be imposed. The letter states that, on the basis of the evidence, "I am hereby suspending [Petitioner] from school attendance for a period of 2 school days effective 10/19/2006 through 10/20/2006."

31. The letter is confusing for three reasons. First, no such meeting ever took place, nor did Mr. Pollard inform Petitioner's father during the October 18 telephone call of a meeting to take place concerning the two-day suspension. When Mr. Pollard called Petitioner's father, the decision to impose a two-day suspension had already been made. Second, Petitioner had already served the suspension before the school sent the letter advising him of a meeting that had never taken place and the decision to suspend [redacted]. Third, the letter explains that the two-day suspension was partly for possession of the Confiscated Item, even though, as noted below, the school later suspended Petitioner for a considerably longer period of time for this offense, and nothing else in the record suggests that the two-day suspension was for anything besides refusing to hand over a cellphone.

32. The letter also betrays a casual disregard by the school for the principles of notice and a hearing. Mr. Pollard

dismissed the tardiness of the letter by the fact that it is a "machine-generated" form that is sent out by a data processor. Regardless of its source, the letter informs Petitioner's father of the right to a hearing, which never took place. The letter contains important information that became useless due to the tardiness of its submittal. More importantly, the letter states that Petitioner was subject to arrest if, during the two-day suspension, any law enforcement officer found [redacted] not in the presence of [redacted] father. The letter states that Petitioner needed to pick up [redacted] class assignments from the "principal/designee," whoever this was, to complete during the suspension. Petitioner had not previously been suspended, and neither [redacted] nor [redacted] father could reasonably have been expected to have known this important information.

33. Two days after the school sent the October 24 letter, Respondent's legal department found sufficient legal grounds to support the principal's recommendation to suspend Petitioner for possession of the Confiscated Item. On the same day, October 26, someone from the Department of Alternative Education informed Mr. Pollard that the recommendation was approved. This is the date on which the decision to remove Petitioner from [redacted] High School became final.

34. Mr. Pollard had tried to call Petitioner's father on Monday through Wednesday, October 23-25, but had not been able

to talk to [redacted]. However, it is unclear what he intended to tell Petitioner's father because the removal decision was still pending. After learning on October 26 that the Alternative Education Department had approved the removal recommendation, Mr. Pollard, on the same day, directed that another PPN be sent, by certified mail, to Petitioner's father.

35. According to Mr. Pollard, the purpose of the October 26 PPN was to notify Petitioner's father that they would "discuss" at the November 1 IEP meeting the removal of [redacted] from [redacted] High School. But the October 26 PPN poorly serves Mr. Pollard's stated intent. The PPN varies from the preceding two PPNs because a second box is checked. This box states that the purpose of the meeting is: "The opportunity to determine the appropriate educational program/placement for your child." Mr. Pollard left blank the space below the box marked, "other," where he could have described the other business to be conducted at the IEP meeting.

36. The October 26 PPN omits any mention of Respondent's intent to conduct a manifestation determination hearing at the November 1 IEP meeting. The October 26 PPN fails to disclose that Respondent has already removed Petitioner from [redacted] High School. Mr. Pollard testified, unpersuasively, that the reference in the checked box to "educational program/placement" means either the educational program or the setting/location at

which the instruction takes place--an incorrect assertion and an odd one coming from a school representative certified in ESE. By law, the reference to "educational program/placement" could include setting, provided Petitioner's father had known the law that a 10-day removal of an ESE student is a change in educational placement and had known that his [redacted] had already been removed for 45 days. But Petitioner's father knew neither of these things because no one had told [redacted].

37. Any question concerning Petitioner's IAES during [redacted] 45-day removal is answered by an email the next day, October 27, from the Department of Alternative Education to the principal and Mr. Pollard. This email states that Petitioner "has been assigned to an . . . IAES based on a weapons infraction . . .. As of Monday, October 30, 2006, [redacted] is assigned to the following Alternative Education Program: Excel . . .." The email states that the 45-day placement will expire on December 14, which is 45 days from October 30. The email advises: "The IEP team needs to meet within 10 days of incident to determine manifestation, review the IEP, and develop/review the FBA." The "FBA" is a functional behavior assessment that precedes, and informs, a BIP.

38. Consistent with the timing of the decisions to remove Petitioner for 45 days and place [redacted] at Excel starting on October 30, Petitioner was not allowed to attend [redacted] High

School on October 30 and 31, as Mr. Pollard testified. (Students had only a half day of school on October 26 and no school on October 27.)

39. On Saturday, October 28, and Sunday, October 29, Mr. Pollard telephoned Petitioner's father, finally reaching him on Sunday. It is difficult to understand why Mr. Pollard would make these telephone calls over a weekend, if he believed that the October 26 PPN adequately notified Petitioner's father of the removal decision, the IAES decision, and the upcoming manifestation determination. The inference is that Mr. Pollard recognized the obvious inadequacy of the October 26 PPN as notice to Petitioner's father of any of these matters, or of the need of the IEP team to identify instructional and behavioral services for Petitioner's 45-day IAES.

40. However, Mr. Pollard did not clearly inform Petitioner's father of any of these matters, even when he spoke with him by telephone on October 29. According to Mr. Pollard, Petitioner's father insisted that the Confiscated Item was not a weapon. Mr. Pollard suggested that they use the November 1 IEP meeting, which was scheduled to take place in three days, as a "follow up to the suspension" and as an opportunity to discuss the matter "in detail." Mr. Pollard said that they needed to discuss Petitioner's placement.

41. The version of the telephone call, as described by Petitioner's father, is not greatly different. According to Petitioner's father, Mr. Pollard told him that the "unfortunate incident" was still "under review" and that they could discuss at the November 1 IEP meeting whether the Confiscated Item was a weapon. Mr. Pollard warned that an adverse decision could result in a 45-day suspension, but Petitioner could attend school the next Monday and Tuesday. Petitioner's father misheard the last item, or, less likely, Mr. Pollard misspoke concerning Petitioner's ability to attend school the next two days, as [redacted] had already been suspended and, as noted above, did not attend school on those days.

42. On November 1, the IEP team met, as scheduled, to discuss Petitioner's education plan. Petitioner's lone ESE teacher, Ms. Trainor, was present. Her presence was important because she teaches English, which is Petitioner's most pressing need. However, none of Petitioner's general education teachers attended the meeting, which was unfortunate given the fact that [redacted] takes only one ESE class. The only general education teacher at the meeting was the crisis intervention teacher, Mr. Geiger, who was not teaching any general education courses that term and was not one of Petitioner's teachers.

43. The first part of the meeting proceeded as a typical IEP meeting. The participants discussed Respondent's recent

grades, which include some passing and some failing grades. They noted that Petitioner was skipping classes. The IEP team also noted that Petitioner needed eight credits to graduate, but students normally took only seven credits in a year, and that [redacted] had a 1.9 grade point average, and graduation required a 2.0 grade point average.

44. The IEP team closed out the objectives contained in the 2005 IEP, not documenting the obvious error in the document that contained a goal and objective to continue working on the math FCAT, which Petitioner had passed, but no goal or objective to continue working on the reading FCAT, which [redacted] had not yet passed. To the contrary, the IEP team noted, on November 1, that Petitioner would continue working on [redacted] math FCAT skills, which is an activity of questionable value due to the fact that Petitioner has passed the math FCAT, but has only one more chance to pass the reading FCAT. If the IEP team noticed the mistake in the 2005 Post Secondary Transition Plan concerning the FCAT scores, it devoted little attention to the matter.

45. The IEP team circulated a number of documents at the meeting. The circulated documents, all dated November 1, 2006, were the Summary of ESE Reevaluation Results, IEP (2006 IEP), Discipline Report of ESE Students, Manifestation Determination, Manifestation of Handicap Hearing Process, and Prior Written Notice (Change of Placement/FAPE). Petitioner's father

testified that he saw all of these documents at the IEP meeting, although the IEP team likely did not circulate the manifestation and discipline documents until toward the end of the meeting. Petitioner's father testified that he did not see the 2005 BIP; Eligibility/Consent for Placement, which is dated November 1 and signed by the principal, who was not at the meeting; or the ESE/IAES Placement Procedures Checklist for Weapon or Drug Offense, which is dated November 1. As noted below, the 2005 BIP was circulated at the IEP meeting, but it is unclear whether the other two documents were at the meeting.

46. The Summary of ESE Reevaluation Results, which was signed by Petitioner, Petitioner's father, four ESE staff, and a general education teacher, reports that Petitioner earned a full scale score of 107 on an intelligence test administered on May 15, 1998. On February 3, 2006, Petitioner took achievement tests and received the following scores: reading comprehension-107; word identification--84; math calculation-86; math application--90; total reading--94; and total math--86. The only achievement score that reveals a discrepancy of one and one-half standard deviations, which would be 23 points, is word identification. The IEP team nevertheless decided at the November 1 meeting to continue Petitioner's ESE placement under an SLD eligibility.

47. The 2006 IEP, which was signed by Petitioner, [redacted] father, four ESE employees, but not Mr. Geiger or any other general education teacher, notes that Petitioner was pursuing a standard high school diploma and was possibly interested in community college after high school. The only special education instruction is in English. The 2006 IEP provides for extra time on tests and assignments. The 2006 IEP states that Petitioner's disability may affect [redacted] academics in the following ways: "Reading grade level material and behavior may affect Petitioner's progress in the general education curriculum."

48. The 2006 IEP states that it is a change in placement or change in the provision of a free appropriate public education. The 2006 IEP notes that the placement is the least restrictive environment due to consideration of Petitioner's "frustration and stress," "self-esteem and worth," "distractibility," and "difficulty completing tasks."

49. In contrast to the 2005 IEP, the 2006 IEP states that the IEP team has considered a BIP and found that it is appropriate. The IEP identifies among the "accommodations/program modifications/supplemental aids and services" extended time on assignments and tests and a "Behavior Intervention Plan." This reference necessarily means the 2005 BIP, as it is the only BIP in the present record and the IEP team marked a copy of the 2005 BIP as "reviewed 11/1/06."

50. The record does not support findings that the IEP team actually considered a BIP, noticed that the 2005 IEP had discontinued the 2005 BIP, recognized that most of the data underlying the 2005 BIP were almost three years old and the BIP itself was almost two years old, or understood (as Mr. Pollard conceded at the hearing) that the effectiveness of the 2005 BIP was questionable in light of Petitioner's deteriorating behavior that fall. To the contrary, the IEP team never conducted an informed discussion of the relationship of Petitioner's behavior, disabilities, and academic performance, nor could the IEP team have conducted such a discussion, given the absence of Petitioner's general education teachers, who saw [redacted] classroom behavior, and current behavioral data.

51. Respondent produced some teacher observations at the hearing--two from October 17 and four from September 29, 2006. These documents report problems such as defiance, argumentativeness, and absences, but nothing that would indicate antecedents or triggers for these behaviors. At the hearing, there was even uncertainty as to the identity of the case manager--not surprising due to the discontinuation of the 2005 BIP--or the frequency with which, under the 2005 BIP, she was to have collected behavioral data.

52. The 2006 IEP states that the IEP is a change of placement or change in the provision of a free appropriate

public education and that the student is anticipated to graduate at the end of the current school year. The form provides that either of these conditions requires the attachment of a Prior Written Notice, which is described below.

53. The Post Secondary Transition Plan accompanying the 2006 IEP is similar in format to the Post Secondary Transition Plan that accompanied the 2005 IEP. The new plan contains two priority educational needs. Unlike the earlier plan, this one accurately reports Petitioner's FCAT scores, including [redacted] 238 in the reading FCAT taken on March 9, 2006. The new plan reports Petitioner's percentiles for these norm-referenced tests: Petitioner's math score is at the 50th percentile, but [redacted] reading score is at the 25th percentile. The new plan identifies Petitioner's first priority educational need as passing the reading FCAT and raising [redacted] grade point average to 2.0. The new plan identifies Petitioner's second priority educational need as following classroom and school rules. Among the objectives is to use decisionmaking strategies prior to taking an action.

54. The Discipline Report of ESE Students, which was signed by four ESE staff and a general education teacher, documents the determination of the IEP team that the possession of the Confiscated Item was not a manifestation of [redacted] handicap. The record suggests no significant discussion

preceded this determination. The form directs the IEP team to Section IV, if it determines that Petitioner's act was not a manifestation of [redacted] disability. This section states in part: "During any period of suspension or [ESE] exclusion of 10 days or greater, the student shall continue to receive educational services. **Document the committee's recommendations as to how the educational services will be provided and by whom:**." Immediately after the colon are two lines on which the IEP team was to have described how and who would deliver educational services. The IEP team left these lines blank.

55. The Manifestation Determination, which was signed by Petitioner's father, four ESE staff, and a general education teacher, states that the IEP team agreed, by a consensus, that, in regard to the subject behavior, the 2005 IEP was appropriate, and the special education services and behavior intervention strategies actually provided were consistent with the 2005 IEP. The Manifestation Determination states that Petitioner was able to understand the impact of [redacted] behavior and was able to control [redacted] behavior. Concluding that Petitioner's behavior was thus not a manifestation of [redacted] disability, the Manifestation Determination states that Petitioner may be disciplined as a regular education student.

56. However, the Manifestation Determination warns that education services "**MUST** be provided to enable the student to

continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications that will enable the student to meet the goals set out in the current IEP." The Manifestation Determination concludes by advising that the parents may request an expedited due process hearing, if they disagree with the manifestation hearing or the placement decision.

57. The Manifestation of Handicap Hearing Process, which was signed by one ESE staffperson, recounts the facts of the October 18 discovery of the Confiscated Item. Under teacher observations, the form states that Petitioner is capable of performing at grade level, but sometimes has trouble staying on task or not socializing excessively with [redacted] classmates. The form notes that Petitioner can be argumentative and that [redacted] has previously used "disrespectful language" and shown "insubordination." In the portion of the form that Petitioner's father could complete, he wrote that "this decision is an absolute administration railroad" and that [redacted] "was a target for previous disciplin[e.]" The form notes that a functional behavior assessment "has . . . been" completed, but fails to disclose that the assessment is nearly two years old and, in part, based on data nearly three years old. The form also notes that a BIP "has . . . been" developed, but fails to disclose that the BIP is nearly two years old and was not in effect

during the fall of 2006, at least until revived on November 1, 2006.

58. The Eligibility/Consent for Placement reports a "recommended" 45-day enrollment at Excel as an IAES. This form states that the parent has the right to an administrative review with the Area Superintendent, but nothing in the record suggests that anyone presented the form to Petitioner's father, who signed other forms on November 1 with which he disagreed. The presence of the signature of the principal, who was not at the IEP meeting, leaves open the possibility that this document was signed after the meeting.

59. The ESE/IAES Placement Procedures Checklist for Weapon or Drug Offense, which was signed by the principal and two ESE staffpersons, states incorrectly that Petitioner is in 11th grade. It appears that this form, which is dated November 1, was to have been completed by the principal at the time of the removal recommendation. According to the form's directions, by execution of this form, the director of the Department of Alternative Education indicates his approval of the removal recommendation of the principal.

60. Confirming that this form is intended to be completed prior to the day of the IEP meeting, the form indicates that, within 10 days of the placement of the student in an IAES, the IEP team will convene to conduct a manifestation determination

and consider the appropriate educational setting. The form states that that the PPN for this IEP meeting "must indicate the purpose(s)" of the IEP meeting. The form also directs the IEP team to:

> Review. . . BIP and its implementation and modif[y] BIP and its implementation as necessary, to address the behavior that led to the ESE/IAES placement. If there is no BIP, sending school ESE Contact [must] coordinate obtaining custodial parent/guardian permission, Parent Consent for Individual Student Reevaluation and developing FBA and BIP.

61. The Prior Written Notice (Change of Placement/FAPE), which is also dated November 1 and signed by an ESE staffperson, states that this notice was provided at the November 1 IEP meeting. Thus, if the Prior Written Notice was intended to serve as notice of anything taking place at the IEP meeting, it was very short notice and ineffective. The Prior Written Notice states that Respondent sent home a summary of procedural safeguards on October 27. However, as the form also states, the ESE staff gave Petitioner's father a summary of procedural safeguards at the IEP meeting. The Prior Written Notice states that Petitioner's father waived an explanation of his procedural rights at the IEP meeting.

62. The Prior Written Notice states that the IEP team considered the continuation of Petitioner's "traditional high school setting." It is impossible to harmonize this statement

with the fact that Respondent had transferred Petitioner to Excel two days prior to the IEP meeting. Even the ESE contact at [redacted] testified that the Excel setting had been "predecided" at the time of the removal decision--five or six days before the IEP meeting. The next line of the form provides a line for an explanation of why the IEP team rejected that alternative, but the line is blank. The next line of the form states: "If any other factors were relevant to the district's proposal, they included:". In the line below this section, Respondent typed "none." In addition to its untimeliness the Prior Written Notice suffers from another serious flaw in that it offers no explanation of why Respondent was "considering" the "proposed" IAES at Excel.

63. After the IEP team had taken care of the routine business, Mr. Pollard addressed the group, mentioned the Confiscated Item, stated that Petitioner had been suspended for 45 days, and started to discuss alternative settings. Petitioner's father was confused, frustrated, and angry at the process that was unfolding, his lack of notice of the nature of what he had understandably assumed would be another routine IEP meeting, Mr. Pollard's role in these matters, and his inability to discuss whether the Confiscated Item was a weapon. It would have been surprising if Petitioner's father had understood anything about what was happening at the meeting. At about this

point, Petitioner's father insisted that Mr. Pollard leave the meeting, or Petitioner's father would leave. Mr. Pollard left.

64. The IEP team then discussed alternative settings, such as an education center featuring computer-based instruction at the Palm Beach Mall known as ERC, an student-paced education program at [redacted] Charter School, and a contractor-operated school known as Excel Alternative, which is a disciplinary school to which Respondent had assigned Petitioner two days earlier. The IEP team discussed Petitioner's program at [redacted] High School and how it would match up at Excel.

65. Except for a failure to consider the need for intensive instruction to prepare for the reading FCAT, which is a material omission, the IEP team thoroughly analyzed the extent to which Excel would match up with Petitioner's schedule at [redacted], or at least they did so at the expedited due process hearing. The IEP team determined that Excel offered the following courses that Petitioner was taking at [redacted] High School: ESE English IV class, consumer math, American history, and economics. Petitioner's team sports class is not offered at Excel, nor is any other physical education course, but, at Excel, Petitioner would take a personal development course, which would include counseling and anger management, that could generate a semester's credit when added to the physical-education course that Petitioner took for the first nine weeks.

Petitioner's building construction course is not offered at Excel, which offers such vocational courses as barbering. Petitioner's environmental science is not offered at Excel, but Petitioner could take it online, although [redacted] would have to start over.

66. Except for reviving an old BIP, the IEP team did not address Petitioner's behavior. The IEP team did not order a new functional assessment of behavior and start the process toward developing a BIP, nor did the IEP team review the 2005 BIP. The IEP team did not--and, given its composition and lack of behavioral data, could not--consider identifying behavioral services that would prevent help staff shape Petitioner's behavior and prevent or reduce [redacted] defiant and oppositional behavior or even to initiate the process by which staff would collect behavioral data toward the preparation of such a behavioral program. It is not that the IEP team did not do enough regarding behavioral services or that it did the wrong thing; it essentially did nothing.

67. Although the Department of Alternative Education had started Petitioner's Excel assignment two days earlier, the IEP team left it up to Petitioner's father to select one of the alternative settings that they had discussed and get back to them. Undoubtedly, the atmosphere at the IEP meeting was not conducive to a thoughtful discussion of Petitioner's alternative

educational program and where instructional and behavioral services would be delivered. Likely, the IEP team knew that the Department of Alternative Education would not object if Petitioner attended another alternative setting at the insistence of [redacted] father, who continued to press his claims that the Confiscated Item was not a weapon, that the school was treating .... [redacted] unfairly, that his [redacted]'s behavior is not a problem, and that his [redacted]'s absences are due to deficiencies in the classroom. Finally, Petitioner and [redacted] father, who claimed he had been "duped," walked out of the meeting.

68. Petitioner and [redacted] father visited Excel that day, but the father was dissatisfied with the tone of an Excel employee whom they met at the school. At one point well into their meeting, she asked Petitioner if [redacted] would ask [redacted] father if [redacted] would allow her to speak to the prospective student. Petitioner's father asked for the name of her supervisor and rejected Excel as an option.

69. Petitioner has not attended school of any sort since the week of October 23. After December 14, when Petitioner was allowed to return to [redacted], [redacted] father refused to allow [redacted] to attend [redacted] High School for fear that [redacted] would suffer psychological damage from the persecutions of school staff. Among other things, Petitioner's father requests compensatory education in the form of tutoring, the return of

the Confiscated Item, the expungement of all records concerning the incident involving possession of the Confiscated Item, and assignment to another high school, such as [redacted] High School, which, evidently, is now acceptable to [redacted].

70. The notice issues break down into the notice of the removal decision that took place on October 26, the notice of the manifestation determination hearing that was to take place at the November 1 IEP meeting, and the notice of the IAES at Excel. The education-planning issues break down into the instructional and behavioral services identified at (or before) the November 1 IEP meeting.

71. The absence or inadequacy of notice in this case prevented meaningful participation by Petitioner's father in the education-planning process that was taking place. Notice of the removal decision, which is not required until the date of the removal, would have alerted him days in advance of the November 1 IEP meeting of the seriousness of the situation and allowed Petitioner's father to obtain counsel, as [redacted] obviously has done since the events described above.

72. Worse, though, is the failure of Respondent to notfy Petitioner's father about the manifestation determination hearing that was to take place at the IEP meeting. He was effectively denied an opportunity to be heard by this failure, as much as he was by the predecision, several days before the

IEP meeting, to place [redacted] at Excel. He is entitled to notice so that he can participate in the meeting, perhaps to challenge the manifestation determination or at least to shape the decisions about instructional and behavioral services to be provided for the ensuing 45 days (or 42 days, as the Excel placement officially started three days before the IEP meeting). Respondent's handling of this aspect of the notice deprived Petitioner's father of meaningful participation in this IEP meeting.

73. The predecision about Excel also denied Petitioner's father of the notice to which he was entitled. In disciplinary removals, an ESE student's parents certainly may not expect to get their way at the manifestation determination hearing concerning the IAES. But to require that the school not make the IAES decision until after the hearing is not to unduly restrict the ability of the school staff to do what they deem necessary to protect the safety of other students, as well as teachers, noninstructional personnel, and administrators. The removal decision, for which no advance notice is required, preserves school safety. Perhaps, in many cases, the requirement to maintain an open mind about the IAES only preserves the appearance of a viable discussion about the matter at the manifestation determination hearing. It is likely the rare case in which a parent can prove that a school district has

predecided an IAES before the manifestation determination hearing, but, once proved, as here, even the appearance of a viable discussion is no longer possible.

74. These notice violations deprive Petitioner's father of meaningful participation in the IEP meeting and manifestation determination hearing that took place during the meeting, and they were prejudicial. Given the findings concerning the substantive failures concerning the instructional and behavioral services to be delivered during the 45-day IAES, it appears likely that timely and adequate notice would have prevented at least some of these substantive violations from occurring.

75. The failure to include information for Excel teachers concerning Petitioner's shortcomings on the reading FCAT is material. With time running out for Petitioner to pass the reading FCAT, the IEP team sent [redacted] to Excel without providing Excel teachers with a plan to remediate the specific deficiencies that are preventing Petitioner from passing the reading FCAT. This failure precluded the continuation of instructional services at Excel to enable Petitioner to progress in the general education curriculum and to progress toward meeting the goal of [redacted] 2006 IEP--passing the reading FCAT.

76. The failure to initiate a functional assessment of behavior and develop a new BIP, or at least review and update the 2005 BIP, also is material. Petitioner's behavior problems

are clearly jeopardizing [redacted] ability to earn a standard diploma. Absent the initiation of services, starting at Excel, to address Petitioner's defiance and disruptiveness, which led to the IAES at Excel, [redacted] will be unable to access [redacted] education, and [redacted] goal of obtaining a standard diploma will evade [redacted].

77. For these reasons, Respondent has failed to provide Petitioner with a free appropriate public education.

CONCLUSIONS OF LAW

78. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1003.57(1)(e), Fla. Stat. (2006).

79. Petitioner bears the burden of proof. Schaffer v. Weast, 546 U.S. 49 (2005). The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

80. Section 1003.57(1)(a), Florida Statutes, requires each school district to provide "an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable . . .." Section 1003.01(3)(a), Florida Statutes, defines an "exceptional student" as any student determined to be eligible for a special program pursuant to rules of the State Board of Education.

81. One court has described the relationship between federal and state law in this area as "cooperative federalism." Town of Burlington v. Department of Education, 736 F.2d 773, 785 (1st Cir. 1984), aff'd 471 U.S. 359 (1985). Federal law imposes requirements on states in crafting plans for the education of ESE students, if states are to qualify for federal funds for their ESE programs. 20 U.S.C. Section 1412(a). States receiving federal funds are required to "ensure that any State rules, regulations, and policies . . . conform to the purposes of this chapter." 20 U.S.C. Section 1407(a)(1). Among the conditions in federal law are that the state plan provide a "free appropriate public education to all children with disabilities residing in the State . . ., including children who have been suspended or expelled from school," 20 U.S.C. Section 1412(a)(1)(A), and that the state afford ESE students and their parents the procedural safeguards described in 20 U.S.C. Section 1415. 20 U.S.C. Section 1412(a)(6)(A).

82. The distinctions between federal and state law are typically insignificant, except when, as now, federal law has undergone recent, substantial revisions.[1] For instance, federal law has recently undergone substantial changes in the requirements for classifying a student as SLD[2] or the requirements for determining whether behavior is a manifestation of a child's disability,[3] but state plans, such as that of

Florida, continue to respond to the provisions of now-superseded federal law until state education agencies can update their plans to respond to the new federal requirements.[4]

83. Recognizing that states will need time to respond to the requirements of new federal laws, 20 U.S.C. Section 1412(c) provides that federal ESE funding will continue to states with plans that were compliant with the federal law as it existed before such amendments. However, the U.S. Department of Education "may require a State to modify its application [i.e., state plan] only to the extent necessary to ensure the State's compliance with this subchapter" in the case of substantive amendments of federal statutes or regulations, a decision by a federal court or the state's highest court making a "new interpretation" of these federal statutes, or an "official finding" by the U.S. Department of Education of noncompliance with the federal statutes or regulations,

84. In addition to the general provisions contained in the Florida statutes set forth above, then, the source of more detailed provisions to apply to this case is the Florida Administrative Code. This case is governed primarily by Florida Administrative Code Rule 6A-6.03312, which applies to ESE students who are disciplined. Federal law remains useful, however, for interpreting provisions of Florida law that may lend themselves to multiple interpretations.

85. Florida Administrative Code Rule 6A-6.03312 provides in relevant part:

> For students whose behavior impedes their learning or the learning of others, strategies, including positive behavioral interventions and supports to address that behavior must be considered in the development of the students' individual educational plans (IEPs). Procedures for providing discipline for students with disabilities must be consistent with the requirements of this rule.
>
> (1) Definitions.
>
> (a) Change of placement. For the purpose of removing a student with a disability from the student's current educational placement as specified in the student's individual educational plan (IEP) under this rule, a change of placement occurs when:
>
> 1. The removal is for more than ten (10) consecutive school days . . ..
>
> * * *
>
> (b) Positive behavioral support. Positive behavioral support is a process for designing and implementing individualized behavioral intervention plans based on understanding relationships between the student's behavior and his or her environment as determined through a functional behavioral assessment.
>
> (c) Functional behavioral assessment. A functional behavioral assessment (FBA) is a process for developing a useful understanding of how behavior relates to the environment and may include any or all of the following: review of records,

interviews, observations, and the collection of data using formal or informal measurement procedures.

* * *

(f) Weapon. A weapon is defined in Section 790.001(13), Florida Statutes, and includes a dangerous weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury.

* * *

(h) Individual Educational Plan (IEP) Team. An IEP team must meet the requirements specified in subsection (4) of Rule 6A-6.03028, F.A.C.

(i) Manifestation Determination. A manifestation determination examines the relationship between the student's disability and a specific behavior that may result in disciplinary action.

(j) Interim Alternative Educational Setting. An interim alternative educational setting (IAES) is a different location where educational services are provided for a specific time period due to disciplinary reasons and that meets the requirements of paragraph (6)(a) of this rule.

(k) Expedited Due Process Hearings. Expedited due process hearings shall be conducted by an administrative law judge for the Division of Administrative Hearings, Department of Management Services, on behalf of the Department of Education, and shall be held at the request of either the parent or the school district regarding disciplinary actions. These hearings must meet the requirements prescribed in subsection (11) of Rule 6A-6.03311, F.A.C., except that the written decision must be mailed to the

parties within forty-five (45) calendar days of the school district’s receipt of the parent’s request for the hearing or the filing of the district’s request for the hearing without exceptions or extensions.

* * *

(m) Long Term Removals. A long term removal is the removal of a student with a disability from the student's current placement for more than ten (10) school days in a school year which may or may not constitute a change in placement as defined in paragraph (1)(a) of this rule.

* * *

(3) Manifestation Determination. A manifestation determination, consistent with the following requirements, must be made any time disciplinary procedures result in a change of placement.

(a) In conducting the review, the IEP team and other qualified personnel shall:

1. Consider all relevant evaluation and diagnostic information including information supplied by the parents of the student, observations of the student, the student’s current IEP and placement, and any other relevant information, then

2. Determine that, in relationship to the behavior subject to disciplinary action:

a. The student’s IEP and placement were appropriate and whether the special education services, supplementary aids and services, accommodations and modifications as defined in paragraphs (2)(e) and (f) of Rule 6A-6.03028, F.A.C., and positive behavior intervention strategies were provided consistent with the student’s IEP and placement;

b. The student's disability impaired the ability of the student to understand the impact and consequences of the behavior subject to disciplinary action; and

c. The student's disability impaired the student's ability to control the behavior subject to disciplinary action.

(b) If the IEP team and other qualified personnel determine that the student's behavior was not related to the disability, the relevant disciplinary procedures applicable to students without disabilities may be applied to the student in the same manner in which they would be applied to students without disabilities. However, services consistent with subsection (5) of this rule must be provided.

* * *

(e) The review described in paragraph (3)(a) of this rule may be conducted at the same IEP meeting that is required by paragraph (4)(b) of this rule.

(f) Immediate steps must be taken to remedy any deficiencies in the student's IEP or placement or in their implementation that were identified during the manifestation determination.

(g) If a parent disagrees with the manifestation determination decision made by the IEP team pursuant to this rule, the parent may request an expedited due process hearing as described in subsection (7) of this rule.

(4) Long Term Removals. For all such removals contemplated:

(a) The school district must notify the parent of the removal decision and provide the parent with a copy of the notice of

procedural safeguards as referenced in Rule 6A-6.03311, F.A.C., on the same day as the date of the removal decision;

(b) An IEP meeting must be held immediately if possible but in no case later than ten (10) school days after the removal decision to conduct a manifestation determination review as described in subsection (3) of this rule;

(c) Services consistent with subsection (5) of this rule must be provided;

(d) Either before or not later than ten (10) business days after either first removing the student for more than ten (10) school days in a school year or beginning with a removal that constitutes a change in placement:

1. If the school district did not conduct a functional behavioral assessment (FBA) and implement a positive behavior intervention plan (PBIP) for the student before the behavior that resulted in the removal, the IEP team must meet to develop an assessment plan.

2. As soon as practicable after developing the assessment plan and completing the FBA, as prescribed in subparagraph (4)(d)1., of this rule, the IEP team must meet to develop an appropriate PBIP to address the behavior and shall implement the PBIP.

3. If the student has a PBIP, the IEP team shall meet to review the plan and its implementation and revise the plan and its implementation as necessary to address the behavior.

* * *

(5) Free Appropriate Public Education for Students with Disabilities Who Are Suspended or Expelled.

(a) A school district is not required to provide services to a student with a disability during short-term removals totaling ten (10) school days or less in a school year, if services are not provided to students without disabilities during such removals.

(b) Beginning on the eleventh cumulative school day of removal in a school year, a school district must provide a free appropriate public education (FAPE) to a student with a disability, consistent with the requirements of this rule and the following:

1. A school district must provide services to such a student to the extent necessary to enable the student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in the student's IEP.

* * *

(c) If the removal is due to behavior that was determined not to be a manifestation of the student's disability, the IEP team shall determine the extent to which services are necessary to enable the student to appropriately progress in the general curriculum and appropriately advance toward achieving the student's IEP goals.

(6) Interim Alternative Educational Setting (IAES).

(a) The IEP team must determine the IAES, unless it is determined by an administrative law judge in accordance with paragraph (8)(a) of this rule.

1. The IAES must be selected so as to enable the student to continue to progress in the general curriculum and to continue to

receive these services, accommodations, and modifications, including those described in the student's current IEP, that will enable the student to meet the IEP goals.

2. The IAES must include services, accommodations, and modifications to address the behavior that resulted in the change of placement and that are designed to prevent the misconduct from recurring.

(b) School personnel may place a student in an IAES without the consent of the parent for the same amount of time a student without a disability would be placed, but for not more than forty-five (45) calendar days. Such a placement can only occur if the student:

1. Carries a weapon or firearm to school or to a school function . . ..

* * *

(c) School personnel must notify the parent of any IAES placement contemplated and provide the parent with a copy of the notice of procedural safeguards, referenced in Rule 6A-6.03311, F.A.C., on the day the placement decision is made.

(7) Expedited Hearings.

(a) An expedited hearing may be requested:

1. By the student's parent if the parent disagrees with a manifestation determination or with any decision not made by an administrative law judge regarding a change in placement under this rule.

* * *

(c) The decision of the administrative law judge rendered in an expedited hearing may be appealed by bringing a civil action in a federal district or state circuit

court, as provided in Section 1003.57(5), Florida Statutes, or by requesting an impartial review by the appropriate district court of appeal as provided by Sections 120.68 and 1003.57(5), Florida Statutes.

(8) Authority of an administrative law judge.

(a) An administrative law judge may order a change in the placement of a student with a disability to an appropriate interim alternative or another educational setting for not more than forty-five (45) calendar days if the administrative law judge, in an expedited due process hearing:

1. Determines that the school district has demonstrated by substantial evidence that maintaining the current placement of the student is substantially likely to result in injury to the student or to others;

2. Considers the appropriateness of the student's current placement;

3. Considers whether the school district has made reasonable efforts to minimize the risk of harm in the student's current placement, including the use of supplementary aids and services; and

4. Determines that the interim alternative educational setting (IAES) that is proposed by school personnel who have consulted with the student's special education teacher meets the requirements of subparagraphs (6)(a)1.-2. of this rule.

(b) In reviewing a decision with respect to the manifestation determination, the administrative law judge shall determine whether the school district has demonstrated that the student's behavior was not a manifestation of the student's disability

consistent with the requirements of subsection (3) of this rule.

(c) In reviewing a decision to place a student in an IAES, the administrative law judge shall apply the requirements of subsection (6) and paragraph (8)(a) of this rule.

(9) Student's Placement During Proceedings.

(a) If a parent requests a hearing or an appeal to challenge an IAES placement, a manifestation determination or disciplinary action resulting from the student's involvement with a weapon, illegal drugs, or a controlled substance, the student must remain in the IAES pending the decision of the administrative law judge or until the expiration of the forty-five (45) day time period, whichever occurs first, unless the parent and the school district agree otherwise.

(b) If the school district proposes to change the student's placement after the expiration of the forty-five day period of the IAES placement, and the parent challenges that proposed change of placement, the student must return to his or her placement prior to the IAES, except as provided in paragraph (7)(b) of this rule.

(c) In accordance with paragraph 6A-6.03311(11)(d), F.A.C., and Section 1003.57(5), Florida Statutes, except as specified in paragraphs (9)(a)-(b) of this rule, if a parent requests for a hearing to challenge a manifestation determination, the student must remain in the current educational placement, unless the parent of the student and the district agree otherwise.

* * *

> (12) Disciplinary Records of Students with Disabilities. School districts shall include in the records of students with disabilities a statement of any current or previous disciplinary action that has been taken against the student and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with the student records of nondisabled students.
>
> (a) The statement may be a description of any behavior engaged in by the student that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the student and other individuals involved with the student.
>
> (b) If the student transfers from one school to another, the transmission of any of the student's records must include both the student's current individual educational plan (IEP) and any statement of current or previous disciplinary action that has been taken against the student.
>
> * * *

86. Florida Administrative Code Rule 6A-6.03028(2)(a) defines the "general curriculum" as "course of study that addresses the Florida Sunshine State Standards and state and district requirements for a standard diploma." Rule 6A-6.03028(3)(b) requires that the school district provide:

> written notice to the parents [that] must indicate the purpose, time, and location of the meeting, and who, by title or position, will be attending. The notice must also include a statement informing the parents that they have the right to invite individuals with special knowledge or expertise about their child.

87. Florida Administrative Code Rule 6A-6.03028(4) provides in relevant part:

> (4) IEP team participants. The IEP team, with a reasonable number of participants, shall include:
>
> * * *
>
> (b) At least one (1) regular education teacher of the student, if the student is or may be participating in the regular education environment. The regular education teacher of a student with a disability must, to the extent appropriate, participate in the development, review, and revision of the student's IEP, including assisting in the determination of:
>
> 1. Appropriate positive behavioral interventions and strategies for the student; and
> 2. Supplementary aids and services, classroom accommodations, modifications or supports for school personnel that will be provided for the student consistent with paragraph (7)(c) of this rule.
>
> * * *

88. Florida Administrative Code Rule 6A-6.03311 provides in relevant part:

> Providing parents with information regarding their rights under this rule is critical to ensuring that they have the opportunity to be partners in the decisions regarding their children. . . . The establishment and maintenance of policies and procedures to ensure that students with disabilities, as defined in Section 1003.01(3)(a), Florida Statutes, and their parents are provided procedural safeguards with respect to the provision of a free appropriate public

education is required in order for school boards to receive state and federal funds for the provision of specially designed instruction and related services to these students. The school board policy and procedures for procedural safeguards shall be set forth in accordance with Rule 6A-6.03411, F.A.C., and shall include adequate provisions for the following:

(1) Prior notice. The school district shall provide parents with prior written notice a reasonable time before any proposal or refusal to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student. Graduation from high school with a regular diploma constitutes a change in placement, requiring written prior notice.

(a) The prior notice to the parents shall be written in language understandable to the general public and shall be provided in the native language or other mode of communication commonly used by the parents unless such communication is clearly not feasible to do so.

* * *

(c) The notice to the parents shall include:

1. A description of the action proposed or refused by the district, an explanation of why the district proposes or refuses to take the action, and a description of any other options the district considered and the reasons why those options were rejected;

2. A description of each evaluation procedure, test, record, or report the district used as a basis for the proposed or refused action;

3. A description of any other factors that are relevant to the district's proposal or refusal;

4. A statement that the parents of a child with a disability have protections under the procedural safeguards specified in this rule;

5. The means by which a copy of a description of the procedural safeguards can be obtained; and

6. Sources for parents to contact to obtain assistance understanding their procedural safeguards specified in this rule.

* * *

(g) . . . Parents must be provided prior written notice, as defined by subsection (1) of this rule prior to any proposal or refusal to initiate or change the identification, or educational placement of the student, or the provision of a free appropriate public education to the student after the initial provision of specially designed instruction.

* * *

(4) Parents' opportunity to examine records and participate in meetings.

* * *

(d) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, educational placement of their child or the provision of a free appropriate public education to their child. Parents shall be provided notice of such meetings early enough to ensure that they will have an opportunity to attend. The written notice to the parents must

include the purpose, time, location of the meeting, and who, by title or position, will be attending. The notice must also include a statement informing the parents that they have the right to invite individuals with special knowledge or expertise about their child.

* * *

(8) Discipline Procedures. Discipline procedures for students with disabilities must be in accordance with the provisions of Rule 6A-6.03312, F.A.C.

* * *

(11) Due process hearings. While use of mediation and the state complaint procedure may be preferable and less litigious, due process hearings are required to be available to parents of students with disabilities and to school districts to resolve matters related to the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education.

(a) Such hearings may be initiated by a parent or a school district on the proposal or refusal to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education to the student.

(b) A hearing shall be conducted by an administrative law judge (ALJ), appointed as required by Section 120.65, Florida Statutes, from the Division of Administrative Hearings, Department of Management Services, on behalf of the Department of Education.

(c) An administrative law judge (ALJ) shall use subsection (11) of this rule for any such hearings and shall conduct such

> hearings in accordance with the Uniform Rules for Administrative Proceedings, Chapter 28-106, F.A.C. . . .
>
> * * *

89. The issues in the case divide into two parts: the adequacy of notice and the adequacy of the educational program designed by the IEP team for the 45-day removal period.

90. As noted above, the notice issues involve the adequacy of Respondent's notice of the removal decision, the November 1 IEP meeting and manifestation determination hearing, and the notice of the 45-day removal to the IAES. To prevail on the notice issues, Petitioner must show that the procedural violations deprived [redacted] of educational opportunity or seriously infringed upon [redacted] father's right to participate in the educational planning for [redacted]. See, e.g., Park v. Anaheim Union High School District, 464 F.3d 1025, 1031 (9th Cir. 2006).

91. As cited above, Florida Administrative Code Rule 6A-6.03312(4)(a) requires Respondent to notify Petitioner's father of the removal decision and provide a copy of the notice of procedural safeguards "on the same day as the day of the removal decision." Petitioner has not challenged the provision of the procedural safeguards.

92. As noted in the Findings of Fact, the removal decision took place on October 26, Respondent failed to provide Petitioner's father with notice of the decision on that date,

the failure to provide this notice was prejudicial and deprived Petitioner's father of a meaningful participation in the education-planning process that was underway, and deprived Petitioner of a free appropriate public education.

93. As cited above, Florida Administrative Code Rule 6A-6.03028(3)(b) requires Respondent to provide Petitioner's father with written notice of an IEP meeting, including the purpose of the meeting. Additionally, if Respondent intends to propose a change in placement, Rule 6A-6.03311(1) imposes more rigorous requirements on the prior written notice that Respondent must provide. Rule 6A-6.03312(6)(c) requires notice to the parent on the day that an IAES placement is made. A 45-day removal clearly constitutes a change in placement, pursuant to Florida Administrative Code Rule 6A-6.03312(1)(a)1. The prior written notice must be prior-given a "reasonable time before any proposal," pursuant to Rule 6A-6.03311(1). The prior written notice must be notice, providing, "in language understandable to the general public," a "description of the [proposed] action," an "explanation of why the district proposes . . . to take the action," a "description of any other options the district considered and the reasons why these options were rejected," and "sources for parents to contact to obtain assistance understanding their procedural safeguards."

94. As noted in the Findings of Fact, the notice that Respondent provided prior to the IEP meeting and the IAES decision failed in both respects. It was not prior. Respondent had already settled on the removal of Petitioner and to Excel prior to the IEP meeting, although the IEP team had the authority to allow Petitioner's father to place [redacted] in another, similar IAES. In fact, the suspension and the Excel assignment had both started two days prior to the IEP meeting. Nor was the notice adequate. It failed even to inform Petitioner's father of the facts that the IEP team would be conducting a manifestation determination hearing during the meeting, to explain what a manifestation determination involved, or disclose the consequences that would follow a determination that the possession of the Confiscated Item was not a manifestation of a disability. Likewise, the notice failed to inform Petitioner's father why Respondent was taking the actions that it was "proposing" to take (actually had already taken) and what other options it had considered.

95. Predeciding educational placement in advance of the IEP meeting violates the principle of notice and constitutes a procedural violation. Speilberg v. Henrico County School Board, 853 F.2d 256 (4th Cir. 1988). Nothing gives Petitioner a veto over proposals of Respondent, but the proposals must remain proposals at least until the IEP meeting. In this case, the

IAES assignment had actually started two days prior to the IEP meeting, and, perhaps as a result, the IEP team did not adequately consider Petitioner's programmatic needs regarding instruction for the reading FCAT and behavioral interventions.

96. As noted in the Findings of Fact, the inadequacies concerning the notice provided prior to the IEP meeting and the IAES decision were prejudicial and deprived Petitioner's father of a meaningful participation in the education-planning process that was underway, and deprived Petitioner of a free appropriate public education.

97. The work of the IEP team was flawed. First, the IEP team lacked a critical member, as required by Florida Administrative Code Rule 6A-6.03028(4)(b): one of Petitioner's general education teachers. Although Petitioner did not raise this as an issue, this failure affects the work of the IEP team in ways raised by Petitioner. Rule 6A-6.03312(3) requires, where the IEP team determines that the behavior is not a manifestation, that Respondent provide services consistent with Rule 6A-6.03312(5)(b), which requires generally that Respondent provide Petitioner with a free appropriate public education during the 45-day IAES.

98. Specifically, Rule 6A-6.03312(5)(b)1 requires services, starting on the tenth cumulative school day of removal in a school year, "to the extent necessary to enable the student

to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in the student's IEP." The general curriculum is work toward a standard diploma, and this objective, in Petitioner's case, was directly at risk due to [redacted] three major academic problems, most notably, though, [redacted] failure to pass the reading FCAT, which was one of the goals of [redacted] 2006 IEP.

99. Whatever else this rule means, it requires at least that Respondent provide Petitioner with a free appropriate public education, as provided by Rule 6A-6.03312(5)(b). A free appropriate public education means that the educational program is reasonably calculated to provide Respondent with educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 188 (1982). In J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1573 (11th Cir. 1991), the court stated: "We . . . define 'appropriate education' as making measurable and adequate gains in the classroom."

100. The failure of the IEP team to identify those instructional services that Excel must provide to ensure that Petitioner would, among other things, continue working on [redacted] deficits so as to pass the reading FCAT in a couple of months, and otherwise appropriately progress in the general education curriculum toward a standard diploma, deprived [redacted] of a free

appropriate public education. The decline of 35 points in 18 months coupled with the removal from [redacted] High School mandated careful attention to this component of Petitioner's academic program during the 45-day IAES--something that the IEP team neglected to do.

101. The question arises whether Florida Administrative Code Rule 6A-6.03312(6) applies in cases in which the behavior resulting in long term removal is not a manifestation of the student's disability. The reference in Rule 6A-6.03312(3) exclusively to Rule 6A-6.03312(5) suggests not, but the language of Rule 6A-6.03312(6) seems applicable. The applicability of the subsection (6) is suggested by 20 U.S.C. Section 1415(k)(1)(D), which provides:

> A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall—
>
> (i) continue to receive educational services, as provided in section 1412(a)(1) of this title, 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; and
>
> (ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

102. Florida Administrative Code Rule 6A-6.03312(6)(a) requires the IEP team to determine the IAES and requires the IEP team to make this determination based on the ability of the IAES to provide such services as to allow the student to continue to progress in the general curriculum and meet [redacted] IEP goals and to provide such services "to address the behavior that resulted in the change of placement and that are designed to prevent the misconduct from recurring." Also, Rule 6A-6.03312(4)(d)1-3 requires the IEP team, within 10 days of the removal decision, to conduct a functional assessment of behavior and prepare a BIP, if neither had been done before the subject behavior, or review and revise the existing BIP and its implementation.

103. The language of the rule seems to allow review and revision, even of a discontinued BIP, as was the 2005 BIP. If so, the IEP team was only required to review and revise the 2005 BIP and its implementation, but the IEP team failed to do that or even initiate the process by which these tasks could be addressed. This failure was prejudicial and deprived Petitioner of a free appropriate public education.

104. Petitioner's father seeks a wide array of relief that an Administrative Law Judge is not authorized to order. Florida Administrative Code Rule 6A-6.03311(11) authorizes the Administrative Law Judge to "resolve matters related to the identification, evaluation, or educational placement of the

student or the provision of a free appropriate public education." The broad relief awarded in court cases is not available administratively. Florida Administrative Code Rule 6A-6.03311(11)(j) authorizes courts to award such relief, as does 20 U.S.C. Section 1415(i)(2)(C)(iii), just as Florida Administrative Code Rule 6A-6.03311(12) authorizes courts to aware attorney's fees and costs to prevailing parties. The only exception is 20 U.S.C. Section 1412(a)(10)(C)(ii), which authorizes the court "or hearing officer" to order reimbursement of certain private school expenses, but Florida law has not apparently adopted this provision, which has no applicability to the facts of this case.

105. However, as recognized in Hendry County School Board v. Kujawski, 498 So. 2d 566 (Fla. 2d DCA 1986) (dictum), the Administrative Law Judge may make recommendations to assist the dispute-resolution process. In that regard, the Administrative Law Judge recommends some form of compensatory education, but the record lacks a basis on which to recommend the details of such compensatory education. The Administrative Law Judge declines to recommend a transfer to another comprehensive high school, which is outside the range of relief that even a court typically orders. See, e.g., Hendry County School Board v. Kujawski, above. The Administrative Law Judge declines to recommend the expungement of the disciplinary records, as the

issue of whether the Confiscated Item was a weapon was not litigated, and Florida Administrative Code Rule 6A-6.03312(12) precludes this action. The Administrative Law Judge declines to recommend the return of the Confiscated Item (at least until Petitioner graduates or permanently discontinues attending Respondent's schools).

ORDER

Based on the foregoing, it is

ORDERED that Respondent has violated the various provisions of law set forth above and has therefore failed to provide Petitioner with a free appropriate public education.

DONE AND ORDERED this 23rd day of January, 2007, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of January, 2007.

ENDNOTES

1/ The enactment of the Individuals with Disabilities Education Improvement Act (P.L. 108-446, 118 Stat. 2647, December 3, 2004) became effective on July 1, 2005 (P.L. 108-446, Title III, Section 302(a)(1)), and the regulations became effective on October 13, 2006 (Fed. Reg. Vol. 71, No. 156, p. 46540 (August 14, 2006).

2/ Federal and state treatments of the eligibility of SLD illustrate why it is necessary to restrict the application of federal law to state plans and to apply state law to individual cases arising out of requests for due process hearings. Former federal regulation, 34 C.F.R. Section 300.541(a)(2) provided that an IEP team may classify a child as SLD if the child had a "severe discrepancy" between achievement and intellectual ability in one or more of several areas. In response, Florida Administrative Code Rule 6A-6.03018(2)(c) requires, among other things, evidence of academic achievement "significantly below" intellectual functioning for an SLD classification.

However, new 20 U.S.C. Section 1414(b)(6) provides that a state, in determining whether a child has an SLD, is not required to ascertain the presence of a "severe discrepancy" between his achievement and intellectual ability, but "may use a process that determines if the child responds to scientific, research-based intervention . . .." Old 34 C.F.R. Section 300.541 has been superseded. New 34 C.F.R. Section 300.307 goes further than the new statute and provides that the state "[m]ust not require the use of a severe discrepancy between intellectual ability and achievement," but "[m]ust permit the use of a process based on the child's response to scientific, research-based intervention."

Obviously, the new federal regulation prohibits the eligibility criterion in the Florida rule, which remains in effect. Moreover, it is impossible to apply the federal law concerning the SLD eligibility criteria to an individual case because federal law contains no such criteria; it leaves to the states the task of identifying a research-based process. Thus, the situation as to SLD eligibility criteria illustrates clearly the impropriety of applying federal law to an individual case. Applying federal law to an individual case abrogates the discretion of the state education agency to apply its educational expertise to respond to federal requirements and the discretion of the U.S. Department of Education to apply its educational expertise to evaluate the response of the state to federal law.

Of course, the Florida Department of Education is aware of the situation regarding its SLD eligibility criteria and the revision of these criteria in federal law. The state agency has responded by commissioning a task force to consider the agency and, presumably, identify a research-based process by which to identify students with SLDs. See "Idea 2004 Highlights--A Study Guide," April 2005, page 8, at the Florida Department of Education website, as found on January 17, 2007 at http://www.firn.edu/doe/bin00014/doc/ideagide.doc.

3/ By contrast to its treatment of SLD eligibility criteria, as discussed in the preceding endnote, the Florida Department of Education has expressed its intent to apply to requests for due process hearings concerning the discipline of ESE students the provisions of Florida Administrative Code Rule 6A-6.03312 "until further clarification." See "Idea 2004 Highlights--A Study Guide," April 2005, page 13, at the Florida Department of Education website, as found on January 17, 2007 at http://www.firn.edu/doe/bin00014/doc/ideagide.doc.

4/ Obviously, Section 120.54(1)(a), Florida Statutes, prevents the Florida Department of Education from adopting the federal law as part of Florida's plan for the education of ESE students, unless the state agency does so by rulemaking. Section 120.54(6), Florida Statutes, facilitates the adoption by Florida rule of federal regulations, although Section 120.54(6)(d), Florida Statutes, also provides for the automatic repeal within 180 days of Florida rules when their federal counterparts are "substantially amended."

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.