Manatee County School District
No. 04-4086E
Initiated by: Parent
Hearing Officer: Daniel Manry
Date of Final Order: April 29, 2005

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-4086E
	)	
MANATEE COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER OF SUMMARY ADJUDICATION

Pursuant to agreement of the parties, this matter was submitted to the Division of Administrative Hearings and its duly-designated Administrative Law Judge, Carolyn S. Holifield on the Agreed Facts without further evidentiary hearing.

APPEARANCES

For Petitioner: [redacted], Petitioner's father
(Address of record)

For Respondent: H. Gregory Scharff, Esquire
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STATEMENT OF THE ISSUES[1/]

The issues are (1) whether Respondent, the Manatee County School Board ("Respondent" or "School Board"), is required to evaluate Petitioner, [redacted] ("Petitioner"), to determine [redacted] eligibility for services under the Individuals with Disabilities Act (IDEA) while [redacted] is at an out-of-state residential school where [redacted] was unilaterally placed by [redacted] parents; (2) whether the School Board violated the IDEA and applicable state law by failing to evaluate Petitioner; (3) whether the School Board violated the procedural due process rights of Petitioner and/or [redacted] parents; and (4) whether the School Board must reimburse Petitioner's parents for the tuition costs associated with [redacted] attendance at the private out-of-state residential school where [redacted] is enrolled.

PRELIMINARY STATEMENT

On or about October 20, 2004, the School Board sent a letter and an Informed Notice of District Refusal to Petitioner's parents, [redacted], advising them that their request to evaluate Petitioner for exceptional student education (ESE) services was denied. According to the letter, pursuant to 20 U.S.C. Section 1412(a)(1)(A) and 34 C.F.R. Section 300.300(a)(1), the School Board is required to provide a free appropriate public education (FAPE) to students residing within the borders of the state and district, and it was the School

Board's understanding that Petitioner "resides in New York and is attending private school there." The denial letter further stated:

> The evaluation and placement process involves testing and observations, interventions, etc. In order for us to complete the process, the student must not only reside in the district but must also be present for the evaluation process. Because [Petitioner] resides in New York we cannot, at this time, act upon a request for evaluation to consider placement in special education.
>
> In the event [Petitioner] resumes [redacted] residency here we will, upon proper request and consent, evaluate [Petitioner] to determine if [redacted] meets eligibility requirements.

The Informed Notice of District Refusal also stated that the district refused to initiate a formal evaluation of Petitioner because [redacted] was not currently residing in the State of Florida.

[redacted] timely filed a Request for Due Process Hearing ("Request for Hearing") in which they challenged the School Board's refusal to evaluate Petitioner. In the Request for Hearing, [redacted] alleged that the School Board (1) violated the IDEA by failing to locate and assess Petitioner to determine [redacted] eligibility for special needs/exceptional education services; and (2) violated the law by failing to timely respond, in writing, to their request for Petitioner to be evaluated and,

thereby, "negated [the parents'] procedural due process rights and right to prior written notice." Finally, [redacted] challenged the School Board's determination that Petitioner is not a resident of the school district and asserted that Petitioner continues to be a resident of the district "domiciled with [redacted] parents" who still reside there. The Request for Hearing noted that Petitioner was "a student at [redacted] School [a school in the District], at the time [redacted] condition required withdrawal as directed by school personnel at the time of [redacted] placement in private school when immediate action was taken to prevent risking both [redacted] physical and emotional well being."

In the Request for Hearing, [redacted] noted that a due process hearing would not be required if the School Board "conduct[ed] an evaluation of Petitioner to determine [redacted] eligibility for exceptional education services and/or consent[ed] to make reimbursement for same at this time and develop[ed] a service plan (IEP) for [Petitioner] continuing school hereafter."

On or about November 12, 2004, the School Board referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the due process hearing and prepare the final order. Pursuant to notice issued November 15, 2004, the hearing was set for December 1, 2004.

After the matter was forwarded to the Division of Administrative Hearings, Petitioner filed an Affidavit dated November 23, 2004, regarding [redacted] residency. The Affidavit of Petitioner indicated that [redacted] is a resident of Florida, permanently residing in Manatee County, Florida, and attends [redacted] School in [redacted], New York. The School Board accepted, as true, the representations in the Affidavit and no longer contests Petitioner's residency as a basis for its refusal to evaluate [redacted]. Rather, the School Board's refusal to evaluate Petitioner is based on the fact that [redacted] is not currently physically present in Manatee County, Florida.

A pre-hearing conference was conducted by telephone conference call on November 22, 2004. During that pre-hearing conference, the School Board made an ore tenus motion to continue the due process hearing. Petitioner did not oppose the motion and agreed to extend the 45-day requirement for issuing the final order.[2/] Based on the foregoing, the motion for continuance was granted; and upon agreement of the parties and the undersigned, the hearing was rescheduled for January 12, 2005. Prior to the rescheduled hearing date, on December 16, 2004, the parties filed a Stipulated Motion for Continuance, in which they requested that the hearing be rescheduled for the week of February 14, 2005. By Order issued January 4, 2005, the

Stipulated Motion for Continuance was granted; and the hearing was rescheduled for February 16, 2005.

On January 31, 2005, the School Board filed Motions for Status Conference, Continuance and Summary Final Order. In the Motion for Summary Final Order, the School Board asserted this matter involves threshold questions of law, and the School Board does not believe that there are any relevant factual disputes between the parties.

On February 3, 2005, a status conference was held on the School Board's Motions for Continuance and Summary Final Order. During the status conference, the School Board's unopposed motion for continuance was granted; and upon agreement of the parties, the due process hearing was rescheduled for March 8 and 9, 2005. With regard to the School Board's motion for summary final order, by agreement of the parties, the undersigned established a briefing schedule which provided a timeline for Petitioner to file a response to the School Board's motion and attached brief and for the School Board to file a reply brief.

On February 16, 2005, Petitioner filed a brief in response to the School Board's Motion for Summary Final Order and a Cross Motion for Summary Final Order (Cross Motion). In the Cross Motion, Petitioner argued that the legal issue in this matter is a mixed question of law and fact and should be denied.

Petitioner also alleged that the School Board committed numerous procedural violations, which require reimbursement of the $66,000.00 for tuition at the private out-of-state facility at which Petitioner is currently being treated.

On February 17, 2005, the School Board filed Motions for Additional Briefing Time and Continuance of Hearing. That same day Petitioner filed a Response in Opposition to Respondent's Motion to Continue Hearing. During a pre-hearing conference on March 1, 2005, the foregoing motions were considered. Other matters considered were whether the material facts in the case were in dispute, whether the issue of payment and/or reimbursement of private school tuition for Petitioner is ripe for consideration in this proceeding, and whether issues related to the School Board's alleged procedural violations of the IDEA are at issue in this proceeding.

During the pre-hearing conference, the School Board's Motion for Additional Briefing Time was granted. Also, there was extensive discussion with the parties concerning the facts and issues in this case. Based on a review of the record in this case, the undersigned determined and advised the parties that the issue in this proceeding is limited to the issue of whether the School Board is required to evaluate Petitioner to determine [redacted] eligibility for services under the IDEA while [redacted]

is at a private out-of-state facility at which [redacted] was unilaterally placed by [redacted] parents.[3/]

In light of the parties' representations during the prehearing conference and the record, it appeared to the undersigned that the material facts in this case were not in dispute. To ascertain whether the material facts were in dispute, the parties were directed to confer and stipulate to as many facts as possible and to file such stipulation no later than March 4, 2005. The parties were further advised that if the undersigned determined that the material facts were not in dispute, the due process hearing would be cancelled and that a telephonic hearing would be scheduled to allow oral argument on the legal issue in the case.

The parties filed Agreed Statement of Facts on March 4, 2005. In addition to the 18 agreed or stipulated facts, Petitioner listed 16 "non-stipulated facts supported by previous submissions" and the School Board listed one "non-stipulated" fact. Upon review of the Agreed Statement of Facts, the undersigned found that the material facts are not disputed by the parties and that the legal issue in this case may appropriately be decided based on the "Agreed Statement of Facts" and applicable law, without the necessity of an evidentiary hearing.

Based on the foregoing and pursuant to an Order issued March 9, 2005, the School Board's Motion for Summary Final Order and Petitioner's Cross-Motion were granted; the due process hearing scheduled for March 8 and 9, 2005, was cancelled; and by agreement of the parties, a one-hour telephonic hearing was scheduled for March 9, 2005, for oral argument on the legal issue. The scheduled hearing for oral argument was held as noticed and counsel for both parties appeared and participated in that proceeding.

AGREED STATEMENT OF FACTS

1. Petitioner, [redacted], is a resident of Manatee County, Florida. Petitioner has never been qualified for special education under the IDEA.

2. Petitioner was a full-time student at [redacted] School located within the Manatee County School District.

3. Petitioner was withdrawn from [redacted] School by [redacted] parents and placed by [redacted] parents at the [redacted] ("[redacted]") on or before March 14, 2005.

4. No evaluation of Petitioner for special education has ever been performed by Respondent or any other school district. Neither Respondent nor Petitioner ever requested an evaluation for special education eligibility under the IDEA prior to Petitioner's request of June 8, 2004.

5. No special education and related services were offered or received by Petitioner from Respondent prior to [redacted] leaving for [redacted] or from any other school district.

6. The School Board, via its staff and Petitioner's teachers, did assist, however, in making arrangements for and did provide services for Petitioner to continue [redacted] studies while at [redacted].

7. Petitioner was expelled from the [redacted] program early in the process.

8. Petitioner's parents believed that given Petitioner's mental state and [redacted] life-threatening drug abuse, that it was necessary to protect Petitioner's physical and mental well-being by transporting [redacted] to, and enrolling [redacted] in, [redacted] School in [redacted], New York, a residential private school. Petitioner's parents arranged for an escort service in the middle of the night to take [redacted] to [redacted] School on April 7, 2004.

9. At the time of Petitioner's transportation to [redacted] School, no notice of this placement was given to the School Board until the request for evaluation was made by Petitioner's parents to the School Board in writing on June 8, 2004.

10. No meeting to consider the request to evaluate was conducted until August 30, 2004.

11. The Child Study Team was, on August 30, 2004, informed by Petitioner's parents that Petitioner would not return to

Florida at that point in [redacted] treatment because Petitioner's medical and other experts advised strongly that the potential for [redacted] relapse militated against [redacted] return.

12. A second Child Study Team meeting was conducted on September 13, 2004, wherein further diagnosis information was requested of Petitioner.

13. Subsequent to the September 13, 2004, meeting, Petitioner's parents received a phone call on October 13, 2004, and received a Consent to Evaluate form. Petitioner's parent did not execute the Consent to Evaluate form. Petitioner asserts that Petitioner's father was informed that it would be revised and that was why [redacted] did not execute it.

14. No regular education teacher was present at either the August 30 or September 13, 2004, meeting of the Child Study Team.

15. On October 24, 2004, Petitioner received a written notice of refusal to evaluate Petitioner due to [redacted] out-of-state placement.

16. Respondent would evaluate Petitioner for eligibility under the IDEA, if Petitioner made [redacted]self available to Respondent in Manatee County. Petitioner refuses to make [redacted]self available for evaluation in Manatee County based on [redacted] therapist's recommendation.

17. Petitioner filed a request for a due process hearing on October 27, 2004. Respondent forwarded the request to the Division of Administrative Hearings on November 11, 2004.

18. On October 29, 2004, Petitioner turned [redacted] and is not conserved.

FINDINGS OF FACT

Based on review and consideration of the Agreed Statement of Facts and the entire record in this case, the following findings of fact are made:

19. Prior to or near the time Petitioner was enrolled in [redacted], the School Board had been informed at a school meeting at [redacted] School that Petitioner was being sent to [redacted] for evaluation.

20. On March 14, 2004, Petitioner was admitted to [redacted] in [redacted], Minnesota. According to the clinical notes from [redacted], Petitioner was [redacted] years old when [redacted] was admitted; at the time of Petitioner's admission, [redacted] "present[ed] for [redacted] first inpatient treatment for chemical dependency"; and Petitioner's precipitating event which led [redacted] into treatment was concern voiced by [redacted] parents.

21. Petitioner was discharged from [redacted] on March 31, 2004, for violating rules of that facility and did not complete the program.

22. A week after being discharged from [redacted], Petitioner's parents enrolled [redacted] at [redacted] School, in [redacted], New York, a private

residential facility for high-risk adolescents and an accredited junior/senior high school operating on a 12-month school year.

23. By letter dated June 8, 2004, and received by the School Board on June 14, 2004, [redacted] requested that Petitioner be evaluated under the IDEA as a child with a disability in need of special education services. In that letter, [redacted] also advised the School Board for the first time that Petitioner had been enrolled at [redacted] School on an emergent basis. [redacted] described [redacted] School as "an accredited [redacted] school and unique institution providing essential medical services in a residential setting dedicated to the mental health, physical welfare, and education of at risk and disabled students, categories we now know define [Petitioner's] mental and physical condition."

24. There was on-going communication between Petitioner's parents and the School Board between June 14, 2004, when the School Board received the request that Petitioner be evaluated for exceptional services under the IDEA, and October 20, 2004, the date the School Board advised Petitioner's parents that it would not evaluate Petitioner at the private out-of-state facility in which [redacted] was enrolled.

25. By letter dated July 28, 2004, [redacted] transmitted to a school district's student services supervisor "reports with regard to [Petitioner's] condition." The reports concerning Petitioner referenced in [redacted] July 28, 2004, letter were: (1)

Client Notes and Summary Report from [redacted]; (2) [redacted] School Report dated July 17, 2004; (3) Report of a psychiatrist who evaluated Petitioner in February 2004 dated July 12, 2004; and (4) Report of a licensed mental health counselor who indicated she treated Petitioner from October 2003 until February 2004 dated July 15, 2004.

26. In the July 28, 2004, transmittal letter to the School Board, [redacted] wrote, "We are sorry for the delay in getting the attached materials to you but bureaucratic and vacation concerns slowed the process down." The letter also stated,

> As we discussed, I anticipate that the District will review these reports and contact us with its opinion in the matter. I submit that the reports make it clear that [Petitioner] was and is suffering sadly from compensable condition(s) under I.D.E.A. We sincerely hope that you will find likewise and help us care for and maintain [Petitioner] at [redacted] School which is uniquely suited to treat and educate [redacted] simultaneously.

27. In a July 17, 2004, letter, [redacted] School stated that an initial interview of Petitioner with the facility's consulting psychologist resulted in a diagnoses of Oppositional Defiant Disorder, Cannabis Abuse, Anxiolytic Abuse, and Alcohol Abuse. The letter from [redacted] School noted that Petitioner was slowly responding favorably to the discipline and structure of the facility; recommended that Petitioner continue [redacted] residential education at [redacted] School until [redacted] graduates; and stated that the

facility staff believed that removing Petitioner from the program would prove detrimental to [redacted] well-being and cause a disruption in [redacted] progress.

28. Notwithstanding the reports from [redacted] and [redacted] School, there is no indication that Petitioner had serious academic or behavior problems while [redacted] was enrolled at [redacted] School. Petitioner's only report card for the 2003-2004 school year, which is part of the record in this proceeding, is for the second grading period, which ended on December 19, 2003. Based on that report card,[4/] Petitioner earned average grades when [redacted] attended [redacted] School, and there was no indication from [redacted] academic or conduct grades that [redacted] was in need of evaluation for special education or related services.

29. In accordance with a Notice of Conference dated August 16, 2004, a Child Study Team meeting was held on August 30, 2004, to discuss [redacted] request that Petitioner be evaluated to consider [redacted] for ESE Services. The meeting was attended by [redacted], the school guidance counselor, an ESE specialist, the ESE director, and the ESE coordinator.

30. A document titled, Report of Conference ("Report") dated August 30, 2004, summarizes the substance of the Child Study Team meeting. According to the Report, the Child Study Team met at the request of Petitioner's father to consider Petitioner for special education. Also, the Report notes that

the Child Study Team discussed Petitioner's current placement at [redacted] School in [redacted], New York, where [redacted] was receiving services for [redacted] medical and educational needs; that [redacted] requested that the Child Study Team "look at possible services that could be provided under the IDEA, Section 504, and the ADA [Americans with Disabilities Act]"; and that because the school district psychologist was unable to attend the meeting due to "a crisis" in another county, the Child Study Team decided to reconvene the meeting on September 13, 2004.

31. Pursuant to the Notice of Conference dated August 30, 2004, Petitioner's parents were notified of the Child Study Team meeting scheduled for September 13, 2004. The September 13, 2004, Child Study Team meeting took place as scheduled and was attended by [redacted], the school psychologist, the guidance counselor, the ESE parent support specialist, the ESE coordinator, another representative from the ESE Department, and one other person whose title was listed as "SSWI."

32. The Report of Conference dated September 13, 2004, noted that the Child Study Team needed a letter from a medical doctor who is treating Petitioner, which includes a "DSM diagnosis" and how the diagnosis impacts Petitioner educationally and achievement test results of any such tests administered at Petitioner's "current placement." If no

achievement test had been administered, the team wanted to determine if [redacted] School could administer the test.

33. After the September 13, 2004, Child Study Team meeting, [redacted] wrote a letter dated September 28, 2004, to a member of the team clarifying [redacted] understanding of what had occurred at that meeting. One of the issues addressed in the letter was the September 13, 2004, Child Study Team discussion of where Petitioner would be evaluated. In the September 28, 2004, letter, [redacted] stated:

> This will also confirm that we discussed whether or not [Petitioner] should be evaluated in [redacted], New York, given the confines and programmatic attributes of the school, and we determined that this issue will be addressed at a later time if needed. We again offered to provide the team with names of certified individuals from the [redacted] area who could do the relevant evaluating at reasonable rates.

34. On or about October 13, 2004, the School Board sent an Informed Notice and Consent for Evaluation (Consent for Evaluation) to Petitioner's parents. That form indicated that Petitioner has been recommended for an individual evaluation, that the evaluation is to assist the school in meeting Petitioner's educational needs, and that the proposal is based on Petitioner's educational performance, observations, conferences and a review of previous evaluation information, which includes "previous academic and private evaluations." As

noted in paragraph 13, Petitioner's parents never signed the Consent for Evaluation because [redacted] was informed, presumably by a School Board employee, that the form would be revised. There is no indication that a revised form was ever provided to [redacted]

35. About one week after the School Board sent [redacted] the Consent for Evaluation, it sent a letter and Informed Notice of District Refusal, both of which were dated October 20, 2004, informing them that the School Board would not initiate a formal evaluation of Petitioner. According to the letter, the evaluation and placement process involves testing, observation, interventions, etc.; and in order to complete the process, Petitioner must not only reside in the school district, but must be present for the evaluation.

36. Petitioner's parents seek to have the School Board reimburse them $66,000.00 for the tuition related to Petitioner's enrollment at [redacted] School. Petitioner contends that this amount would cover the period from April 2004, when [redacted] first enrolled at [redacted] School, through December 2005, Petitioner's expected graduation date.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. § 1003.57(5), Fla. Stat. (2004), and Fla. Admin. Code R. 61-6.03311(5)(e).

38. The primary purpose of the IDEA, 20 U.S.C. Section 1400, et seq., is

> [T]o ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.

20 U.S.C. § 1400(d)(1)(A).

39. A "child with a disability" is defined in 20 U.S.C. Section 1401(3) of the IDEA, in pertinent part, as follows:

> (A) In general. The term "child with a disability" means a child -
>
> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance") orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who, by reason thereof, needs special education and related services.

In addition, 34 C.F.R. Section 300.7(a), the federal regulations implementing the IDEA, includes in the definition of a "child with a disability" the provision that the child must be "evaluated in accordance with §§ 300.530-536 [Procedures for Evaluation and Determination of Eligibility]" and found to have one of the conditions enumerated in 20 U.S.C. Section 1401(3)(A) and (B) of the IDEA.

40. "Special education" is defined in 20 U.S.C. Section 1401(25) of the IDEA as:

> [S]pecifically designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including
>
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
>
> (B) instruction in physical education.

41. A "free appropriate public education" is defined in 20 U.S.C. Section 1401(8) of the IDEA as follows:

> The term "free appropriate public education" means special education and related services that -
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) [of the IDEA].

42. An "individualized educational program" or "IEP" is defined in 20 U.S.C. Section 1401(11) of the IDEA as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title." 20 U.S.C. Section 1414(d) of the IDEA contains a

detailed description of the procedures to be used in developing an IEP and the provisions that must be included in the written document.

43. 20 U.S.C. Section 1412(1) of the IDEA sets forth the conditions that must be met in order for a state to receive federal funds for the education of children with disabilities. Florida's plan for providing a FAPE to children with disabilities is consistent with the procedural and substantive requirements of the IDEA and with the regulations interpreting the IDEA.

44. Section 1003.57, Florida Statutes (2004), the statute governing the proceedings herein provides, in relevant part, the following:

> Exceptional students instruction.--Each district school board shall provide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable, including provisions that:
>
> (1) The district school board provide the necessary professional services for diagnosis and evaluation of exceptional students.
>
> * * *
>
> (5) No student be given special instruction or services as an exceptional student until after he or she has been properly evaluated, classified, and placed in the manner prescribed by rules of the State Board of Education. The parent of an

> exceptional student evaluated and placed or denied placement in a program of special education shall be notified of each such evaluation and placement or denial. . . .

Also see § 1001.42(4)(l), Fla. Stat. (2004).

45. "Exceptional student" is defined for purposes of Florida law in Subsection 1003.01(3)(a), Florida Statutes (2004), and means

> (3)(a) "Exceptional student" means any student who has been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospital and homebound, autistic, developmentally delayed children, ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e).

Under Florida law, the term "exceptional student" includes gifted children, but is otherwise interchangeable with the term "child with a disability" as defined in 20 U.S.C. Section 1401(3) of the IDEA.

46. "Special education services" are defined under Florida law, in pertinent part, as "specially designed instruction and such related services as are necessary for an exceptional

student to benefit from education." § 1003.01(3)(b), Fla. Stat. (2004).

47. In order to be eligible for services pursuant to the IDEA, it must be determined that the child has a disability and requires special education and related services as a result of that disability. 20 U.S.C. § 1401(3)(A)(i) and (ii).

48. Prior to making an eligibility determination and before the provision of special education and related services, each public agency is required to conduct a full and individual initial evaluation. See 34 C.F.R. § 300.531 and Fla. Admin. Code R. 6A-6.0331.

49. The criteria and guidelines that are required in the identifying, evaluating, and determining eligibility of exceptional students for specially designed instruction is set forth in Florida Administrative Code Rule 6A-6.0331 and provides, in relevant part, the following:

> Identification and Determination of Eligibility of Exceptional Students for Specially Designed Instruction.
>
> The state's goal is to provide full educational opportunity to all students with disabilities ages three (3) through twenty-one (21). Local school boards have the responsibility to ensure that students suspected of having a disability or being gifted are identified, evaluated, and provided appropriate specially designed instruction and related services if it is determined that the student meets the eligibility criteria . . . .

* * *

(4) Student evaluation.

(a) The school board shall be responsible for the medical, physical, psychological, social, and educational evaluations of students, who are suspected of being exceptional students, by competent evaluation specialists.

* * *

(b) The school board shall ensure that students suspected of having a disability are evaluated within a period of time, not to exceed sixty (60) school days of which the student is in attendance, or for pre-kindergarten children not to exceed sixty (60) school days after:

1. The completion of the activities required in subsection (2) of this rule;

2. The receipt of the referral for evaluation; and

3. The receipt of parental consent for the evaluation.

* * *

(6) Determination of needed evaluation data for a student suspected of having a disability. As part of an initial evaluation, if appropriate, and as part of any reevaluation, a group that includes the IEP team participants as described in subsection (4) of Rule 6A-6.03028, F.A.C., and other qualified professionals, as appropriate, take the following actions:

(a) Review existing evaluation data on the student, including:

1. Evaluations and information provided by the student's parents and the student as appropriate;

2. Current classroom-based assessments and observations; and

3. Observations by teachers and related services providers.

(b) Identify, on the basis of that review and input from the student's parents and the student as appropriate, what additional data, if any, are needed to determine the following:

1. Whether the student has a particular disability, as defined in Section 1003.01(3)(a), Florida Statutes, or in the case of reevaluation, whether the student continues to have a disability;

2. The present levels of performance and educational needs of the student;

3. Whether the student needs specially designed instruction and related services, or in the case of reevaluation, whether the student continues to need specially designed instruction and related services; and

4. Whether any additions or changes to the specially designed instruction and related services are needed to enable the student to meet the measurable annual goals set out in the student's IEP and to participate, as appropriate, in the general curriculum.

(c) May conduct its review without a meeting.

(d) The school district shall administer tests and other evaluation materials as may be needed to produce the data identified in subsection (6) of this rule. . . . [Emphasis added]

The School Board's Duty to Evaluate

50. Petitioner raises several issues regarding the School Board's duty to evaluate. First, Petitioner alleges the School Board failed to satisfy the "child find" requirements in 20 U.S.C. Section 1412(a)(3) and 34 C.F.R. Section 300.125 by failing to locate and assess Petitioner to determine whether [redacted] qualifies for special education. Second, Petitioner alleges that the School Board violated the IDEA by failing to evaluate Petitioner at the private out-of-state facility at which [redacted] is enrolled. Third, Petitioner alleges that the School Board failed to evaluate Petitioner within 60 days of receiving the parents' request for evaluation.

"Child Find" Requirements

51. The responsibility to identify, evaluate, and determine the eligibility of students who are potentially in need of special instruction and services is codified in 20 U.S.C. Section 1412(a)(3) of the IDEA, which labels the responsibility "child find." See also 34 C.F.R. § 300.125. As the court in Clay T. v. Walton County School District, 952 F. Supp. 817, 822 (M.D. Ga. 1997), explained, "the first responsibility of an educational authority is to locate and identify children who might be disabled in some way."

52. The record in this case reveals nothing in Petitioner's academic performance or [redacted] behavior at [redacted] School that would have put Petitioner's teachers and/or the administrators at the school on notice that [redacted] was potentially a child with a disability. Until the third grading period of the 2003-2004 school year, when Petitioner parents withdrew [redacted] from school, Petitioner was earning average grades in all but one of [redacted] classes, had no excessive absences from school, and had "excellent" conduct grades in all [redacted] classes.[5/] In light of Petitioner's academic performance and conduct through December 2003, there was no reasonable basis for the School Board to suspect that Petitioner was a student with a disability. Given these facts, the School Board had no duty to identify Petitioner as a potential "child with a disability" under the "child find" provisions of the IDEA, as codified in 20 U.S.C. Section 1412(a)(3) and 34 C.F.R. Section 300.125. Thus, the School Board did not violate the "child find" provisions of the IDEA.

53. Although the School Board did not violate the "child find" provisions of the IDEA, in June 2004, when Petitioner's parents requested that [redacted] be evaluated, the School Board was placed on notice that Petitioner's parents believed that [redacted] might be eligible for special education and related services. At that time, the School Board became responsible for initiating the process described by the governing statutes and rules for

evaluating Petitioner and determining [redacted] eligible for special education and related services.

60-Day Timeframe for Completing Evaluation

54. Petitioner alleges that the School Board failed to comply with the requirement in Florida Administrative Code Rule 6A-6.0331(4)(b), quoted in paragraph 49, in that it did not evaluate Petitioner within 60 days of receiving the request for evaluation.

55. In Florida, school boards are required to evaluate students suspected of having a disability within a period not to exceed 60 school days of which the student is in attendance, after (1) completion of activities specified in Florida Administrative Code Rule 6A-6.0331(2); (2) receipt of the referral for evaluation; and (3) receipt of the parental consent for the evaluation. See Fla. Admin. Code R. 6A-6.0331(4)(b).

56. Pursuant to Florida Administrative Code Rule 6A-6.0331(4)(b), the School Board is required to evaluate students, such as Petitioner, who are suspected of having a disability within the prescribed 60-day timeframe. However, that timeframe begins to run only after the enumerated activities and referral and consent form have been completed and/or received. After the requisite activities, referrals, and consent forms have been completed and/or received, the School

Board must then evaluate the student within "60 school days of which the student is in attendance."

57. Here, it is not clear that all the requisite activities and consent forms were completed and/or received by the School Board.[6/] However, assuming that all the required activities, referrals, and consent forms were completed and/or received, the School Board must complete the evaluation "within 60 school days of which Petitioner was in attendance" in the Manatee County School District. In the instant case, Petitioner has not been in attendance in the school district after completion of the pre-referral activities, receipt of the required referral, and/or the consent form. Therefore, the 60-day time period prescribed in Florida Administrative Code Rule 6A-6.0331(4)(b) has ever started to run and, thus, is inapplicable in this case. Based on the foregoing, the School Board did not violate the 60-day time requirement prescribed and referenced in paragraph 55.

Evaluations Conducted at Private Out-of-State Facility

58. Petitioner asserts that the School Board violated the IDEA by failing to evaluate Petitioner at the private out-of-state facility at which [redacted] parents unilaterally enrolled [redacted].

59. In Great Valley School District v. Douglass, 807 A. 2d 315 (Pa. Commonwealth 2002), the court held that a school district cannot be assigned any burden arising from a unilateral

out-of-state placement in which it did not participate, including the burdens associated with that location. Also see Patricia P. v. Board of Education at Oak Park, 203 F.3d 462 (7th Cir. 2000).

60. Great Valley, like this case, involved a regular education student whose parents unilaterally enrolled the student in an out-of-state residential facility after the child's behavior took a downward spiral of self-destructive tendencies, including drug use and acting out. Also, in Great Valley, as in the instant case, those professionals working with or treating the student, recommended that due to the students' condition, he not leave the out-of-state facility and return to the school district for an evaluation. Notwithstanding these facts, the court held that

> [A]mong the burdens initially assumed by those unilaterally enrolling a child in a remote educational institution are the burdens associated with the location of that institution. Where a district has not participated in a placement decision, no burden associated with that location can be assigned to it. Thus, a school district cannot be compelled to assume any responsibility for evaluating a child while he remains outside Pennsylvania in a unilateral placement.
>
> * * *
>
> In absence of violation of IDEA, there is no basis to impose any responsibility on the School District to overcome conditions

> created by the parents' unilateral placement decisions. [Emphasis added.]

Id. at 321- 322.

61. Based on the foregoing, the School Board is not required to evaluate Petitioner at the private residential school in [redacted], New York, where [redacted] was unilaterally placed by [redacted] parents.

Reimbursement for Tuition at Out-of-State School

62. Petitioner's parents contend that they are entitled to reimbursement for the cost of tuition at the private out-of-state facility under the "safe harbor" provision in 20 U.S.C. Section 1412(a)(10)(C)(iv)(II).

63. 20 U.S.C. Section 1412(a)(10)(C) provides, in relevant part, the following:

> (10) Children in private schools
>
> * * *
>
> (C) Payment for education of children enrolled in private schools without consent of or referral by the public agency
>
> * * *
>
> (i) In general
>
> Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and

the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa);

* * *

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement may not be reduced or denied for failure to provide such notice if—

* * *

(II) compliance with clause (iii)(I) would likely result in physical or serious emotional harm to the child; . . . .

64. Pursuant to 20 U.S.C. Section 1412(a)(10)(C)(ii), quoted above, if parents of a child with a disability who previously received special education and related services from a public agency enroll that child in a private school without consent or referral by the public entity, they may be reimbursed by the public agency if a court or hearing officer finds that the agency had not made a FAPE available to the child in a timely manner prior to the enrollment. However, such reimbursement may be reduced or denied if the parents fail to comply with the notice requirements in 20 U.S.C. Section 1412(a)(10)(C)(iii) (i.e. inform the IEP team at the most recent IEP meeting that they were rejecting the proposed placement to provide a FAPE and stating their concerns and their intent to enroll their child in a private school at public expense; or ten days prior to the removal of the child from public school, give written notice to the public agency that they are rejecting the proposed placement and stating their concerns and intent to

enroll the child in a private school.) See 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) and (bb).

65. Petitioner's parents acknowledge that they gave no prior notice to the School Board that they were enrolling Petitioner in a private residential school in New York, but contend that they are entitled to reimbursement under the "safe harbor" exception in 20 U.S.C. Section 1412(a)(10)(C)(iv)II. Pursuant to that provision, reimbursement may not be reduced or denied for failure to comply with 20 U.S.C. Section 1412(a)(10)(C)(iii)(I), if such compliance would likely result in "physical or serious emotional harm to the child."

66. Petitioner's reliance on the "safe harbor" provision is misplaced. When 20 U.S.C. Section 1412(a)(10)(C) is read in its entirety, it is clear that the reimbursement provisions, notice requirements, and the exceptions thereto, apply only to parents of children with disabilities. For example under that provision, parents are required to give notice to the IEP team at the most recent IEP team meeting or to the school district that they are rejecting the proposed placement to provide a FAPE and that they intend to enroll their child in a private school at public expense. The IDEA requires IEP teams and IEP meetings only for children with disabilities. The same is true with regard to the IDEA requirement that local education agencies provide a FAPE; under the IDEA, local education agencies, such as the School

Board, are required to provide a FAPE only to children with disabilities.

67. 34 C.F.R. Section 300.403, the regulation that authorizes and implements 20 U.S.C. Section 1412(a)(10)(C), also makes clear that the former provision, including the "safe harbor" clause therein, applies to parents of children with disabilities. This implementing regulation titled, "[p]lacement of children by parents if FAPE is at issue," (1) addresses situations where there is a disagreement about a FAPE between the parents and the local education agency, and (2) authorizes reimbursement, in certain circumstances, to the "parents of a child with a disability." See 34 C.F.R. § 300.403(b) and (c). Moreover, the general provision of that regulation provides that the local education agency is not required to pay "for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility."

68. 20 U.S.C. Section 1412(a)(10)(C) and its implementing regulation, 34 C.F.R. Section 300.403, apply only to parents of children with disabilities, those for whom local education agencies are required to provide a FAPE.

69. Petitioner has not been evaluated and determined to be a child with a disability as that term is defined in the IDEA. Accordingly, the School Board is under no obligation to provide Petitioner a FAPE under the IDEA. Therefore, Petitioner's

parents do not come within the purview of 20 U.S.C. Section 1412(a)(10)(C)(iv)(II) and, thus, are not entitled to reimbursement for the cost of private school tuition.

Procedural Violations

70. Petitioner has raised several procedural due process claims--(1) the School Board's failure to provide prior written notice of its refusal to evaluate Petitioner, after indicating that it would do so; (2) the School Board's failure to provide documentation that it complied with the IDEA (i.e. held no IEP team meetings, developed no IEP for Petitioner, or had no regular education teacher present at Child Study Team meetings); and (3) the School Board's failure to comply with Pre-hearing Order in this case to produce and exchange documents for the anticipated due process hearing.[7/]

71. Petitioner contends that as a result of the foregoing alleged procedural violations, the School Board denied Petitioner a FAPE, and as a result of such denial, the School Board should be required to pay $66,000.00 for Petitioner's tuition at [redacted] School for the period beginning April 2004 to December 2005, Petitioner's projected graduation date.

72. The IDEA contains numerous procedural safeguards, the purpose of which is to provide the opportunity for "'full participation of concerned parties [parents or guardians] throughout the development of the IEP.'" Doe v. Alabama State

Department of Education, 915 F.2d 651, 662 (11th Cir. 1990) (quoting Hendrick Hudson Central School District Board of Education v. Rowley, 458 U.S. 176, 205 (1982)). Procedural violations are significant only if the "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the [IEP] formulation process, or caused a deprivation of educational benefits." Roland M. v. Concord School Committee, 910 F.3d 983, 994 (1st Cir. 1990). See also E.D. ex rel. Dukes v. Enterprise City Board of Education, 2003 WL 21755971 (11th Cir. 2003).

73. Florida Administrative Code Rule 6A-6.03311 sets forth procedural safeguards to ensure, among other things, that parents are provided the notices required by the IDEA and Florida Statutes, that parental consent is obtained when appropriate, and that parents are fully informed of their rights to request a due process hearing to challenge "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." Fla. Admin. Code R. 6A-6.03311(5)(a).

74. Procedural violations, as alleged by Petitioner, must be analyzed in view of whether actual harm results. Doe v.

Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990).

75. As to the School Board's failure to provide prior notice to Petitioner's parents regarding its refusal to evaluate, Petitioner has stated no authority that requires the School Board to issue written notice in advance of its formal written notice of refusal to evaluate. Petitioner merely argues that such notice was required, in light of discussions and meetings with School Board personnel, indicating that it would evaluate Petitioner. The School Board is required to provide the parents with prior written notice of its refusal to evaluate a student suspected of having a disability. See Fla. Admin. Code R. 6A-6.03311(1). In this case, the School Board sent out a written notice of its refusal to evaluate Petitioner, as prescribed. Having provided such written notice, notwithstanding any prior contrary verbal representations made to the parents or misunderstanding by the parents, there is no procedural violation of the IDEA.

76. As to the School Board's alleged failure to provide documentation that it complied with the IDEA, failure to conduct IEP meetings and failure to develop an IEP, there is no basis upon which to conclude that, even if true, these constitute procedural violations of the IDEA. Petitioner does not specify the documentation that the School Board allegedly was obligated

to provide, but failed to provide to Petitioner. However, based on documents filed in this case by Petitioner, it is clear that the School Board provided prior written notice of the two Child Study Team meetings and, as noted above, prior written notice of its refusal to evaluate Petitioner. Also, included in the documents filed by Petitioner is a copy of the "Procedural Safeguards" form, which is referenced as being enclosed in the October 20, 2004, letter denying Petitioner's parents' request for evaluation.

77. As to the claim that the School Board did not convene an IEP team meeting and develop an IEP for Petitioner, no legal authority for such requirements was cited. The requirement in the IDEA that an IEP team meet and develop an IEP applies only to those students classified as children with disabilities. 20 U.S.C. § 1401(11) and 34 C.F.R. §§ 300.340 and 300.343. Petitioner has not been classified as a child with a disability or an exceptional student. Accordingly, the School Board was not, and is not, required to convene an IEP team meeting to develop an IEP for Petitioner.

78. Finally, the alleged procedural due process claim that the School Board failed to produce or exchange documents in compliance with a Pre-hearing Order is without merit. The Pre-Hearing Order was issued in anticipation of a hearing which

did not occur. Instead, the hearing proceeded on the facts agreed to by the parties and on the record in this case.

79. Based on the foregoing, the School Board did not violate Petitioner's procedural rights under the IDEA. Assuming that the alleged claims constituted procedural violations and that such violations occurred, there was no actual harm to Petitioner or Petitioner's parents resulting from the violations.

Summary

80. Having carefully reviewed the agreed facts and the entire record in this case, it is concluded that the School Board did not violate Petitioner's or [redacted] parents' procedural or substantive rights under the IDEA.

81. For the reasons stated above, the School Board, while required to evaluate a child suspected of having a disability, is not required to evaluate Petitioner at the private residential facility in [redacted], New York, where [redacted] was unilaterally enrolled by [redacted] parents. Because Petitioner has not been evaluated and classified as a "child with a disability" within the meaning of the IDEA, the School Board is not required to provide Petitioner with a FAPE. In absence of such obligation under the IDEA, the School Board is not required to reimburse Petitioner's parents for tuition and related costs at the private out-of-state facility at which they unilaterally enrolled [redacted] and where [redacted] is currently enrolled.

ORDER

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

ORDERED that

1. Petitioner's parents request that the School Board conduct an initial evaluation of Petitioner while [redacted] is enrolled at [redacted] School in [redacted], New York, is hereby DENIED.

2. Petitioner's parents request for reimbursement is hereby DENIED.

DONE AND ORDERED this 29th day of April, 2005, in Tallahassee, Leon County, Florida.

S

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 2005.

ENDNOTES

[1/] At the prehearing conference on March 3, 2005, the undersigned determined that the issue in this case would be limited to whether the School Board is required to evaluate Petitioner at the out-of-state facility at which [redacted] was unilaterally enrolled by [redacted] parents. After reconsideration of Petitioner's Formal Request for

Due Process Hearing and Petitioner's Cross Motion for Summary Final Order, the undersigned determined that the issues related to reimbursement, the School Board's duty to evaluate, and alleged violations of procedural due process have been properly raised and should and will be considered.

[2/] There is no prejudice to Petitioner by extending the time in this case, as Petitioner is currently, and has been, at the private facility in [redacted], New York, since [redacted] parents enrolled [redacted] there in April 2004. Petitioner's father indicated that it is the parents' intent that Petitioner remain at that facility until December 2005, when [redacted] is expected to graduate from [redacted].

[3/] See comment under Endnote 1.

[4/] Petitioner was enrolled in seven classes and earned two B's, three C's, and one D; [redacted] conduct in all seven classes was graded as "1" or excellent; and five of six teachers who provided comments on the report card indicated that Petitioner was a pleasure to have in class. For the term (semester), Petitioner had a B average in two of [redacted] classes, a C average in four of [redacted] classes, and an F average in one of [redacted] classes.

[5/] The record indicated the parents' report that Petitioner was failing all [redacted] classes and had excessive absences at or near the time they withdrew [redacted] from school. However, this was clearly not the case in the grading period immediately prior to Petitioner's being withdrawn from the Manatee County School District.

[6/] It is undisputed that [redacted] had not signed the consent form, even though they wanted the evaluation performed. As noted in paragraphs 13 and 34, they did not execute the form because they were told the form would be revised.

[7/] Other procedural due process claims of Petitioner, i.e. failure to comply with the "child find" provisions of the IDEA and the 60-day requirement for conducting evaluations of students suspected of having a disability, are addressed under separate categories in this Final Order.

COPIES FURNISHED:

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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.