

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█,

Petitioner,

vs.

Case No. 14-2628E

HIGHLANDS COUNTY SCHOOL BOARD,

Respondent.

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FINAL ORDER

Administrative Law Judge, John D. C. Newton, II, of the Division of Administrative Hearings, conducted the final hearing in this case on June 29 and 30, 2014, in Sebring, Florida.

APPEARANCES

For Petitioner: Linda Montalbano, Qualified Representative

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For Respondent: James V. Loboizzo, Jr., Esquire
McClure and Loboizzo, L.L.C.
211 South Ridgewood Drive
Sebring, Florida 33870-3340

STATEMENT OF THE ISSUES

A. Did the number of suspensions imposed on Petitioner by the Highland County School Board (Board), combined with other behaviors and the fact that there was evidence that Petitioner's amount of counseling was not sufficient, establish the claim that the Board's Individualized Education Plan (IEP) for Petitioner

did not provide a free and appropriate public education (FAPE), as required by state and federal law?

B. Should the Board provide the following evaluations for Petitioner: (1) speech evaluation; (2) occupational therapy evaluation; (3) physical therapy evaluation; (4) assistive technology evaluation; and (5) neuropsychological evaluation?

During the hearing and in the proposed order, Petitioner made arguments that resemble claims that the student was denied a manifestation hearing that should have been provided because of the number and nature of suspensions. But the Amended Request explicitly states that Petitioner does not claim the child was denied a manifestation hearing. Consequently, that is not an issue in this proceeding.

PRELIMINARY STATEMENT

On May 30, 2014, the mother of Petitioner filed a Request for Due Process Hearing with the Board. The Board referred the request to the Division of Administrative Hearings (Division) for conduct of a due process hearing. The Board filed a motion to dismiss, which was treated as a Notice of Insufficiency. By Order dated June 10, 2014, the undersigned determined the due process hearing request insufficient and provided an opportunity to amend it.

The request, as well as subsequent papers, demanded information about the undersigned, including information about

education, experience, and previous rulings. By Order dated June 10, 2014, the demand was denied. Petitioner raised this issue at the start of the hearing. The request was denied again.

On June 16, 2014, Petitioner filed an Amended Request for Due Process Hearing. The Board filed a Notice of Insufficiency. The undersigned entered an Amended Order of Sufficiency on June 24, 2014, finding the request sufficient and delineating the issues raised by it. The issues are stated above.

Linda Montalbano was authorized to appear as Petitioner's representative in this proceeding. She was also allowed to participate in the hearing by telephone. The hearing was conducted on June 29 and 30, 2014. As requested by Petitioner's mother and authorized representative, Petitioner attended, and the proceeding was open to the public.

Petitioner offered the testimony of [REDACTED] (Petitioner's [REDACTED]-grade language arts teacher), [REDACTED], (exceptional student education (ESE) director for the Board), the mother of Petitioner, and Petitioner. Exhibits 1 through 22 and 24 through 30 of Petitioner were received into evidence.

The Board offered the testimony of [REDACTED] (principal) by deposition transcript, [REDACTED] (Petitioner's physical education teacher), [REDACTED] (the Board's school psychologist), and [REDACTED] (Petitioner's history teacher). Board Exhibits 1 through 11, 20, 21, 24 through 36, 38,

40 through 43, 45 through 48, 50 through 52, 55 and 56 were received into evidence.

Court Exhibits 1 and 2 were also admitted.

The parties obtained a transcript and timely filed proposed orders. Petitioner separately filed copies of the authorities relied upon in the 85-page proposed order. The Board moved to strike Petitioner's proposed order for exceeding the 40-page limit imposed by Florida Administrative Code Rule 28-106.215. The motion was denied.

The transcript was not initially filed on or before the filing of the proposed orders. Consequently, an Order granting specific extension of time extended the period of resolution for this matter until September 10, 2014. The Transcript was filed on August 25, 2014.

FINDINGS OF FACT

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1. Petitioner is a nearly ██████-year-old student with disabilities. In the 2012-2013 school year, Petitioner attended ██████ grade in ██████. There, Petitioner had an IEP dated October 12, 2013. This is the ██████ equivalent to Florida's IEP. Petitioner qualified for the plan under the classification of ██████.

2. The historical narrative portion of the program document reported that as of January 10, 2011, Petitioner had been

diagnosed with [REDACTED], [REDACTED]; [REDACTED], [REDACTED]; [REDACTED], [REDACTED]; and [REDACTED], [REDACTED]. These were diagnoses provided by [REDACTED], M.D., in a Diagnostic Statement dated October 25, 2012. The narrative also reported that Petitioner scored between average and low average on the Wechsler Intelligence Scale-IV, but noted that Petitioner's performance might be lower than Petitioner's capabilities.

3. The [REDACTED] plan document's narrative also provides information about Petitioner having abrupt and intense mood swings, enjoying social interaction, refusing to comply with teacher direction, walking out of class, becoming oppositional, enjoying sculpting with clay, lacking empathy for others, and being reluctant to accept responsibility for Petitioner's actions. It suggests that Petitioner may be more responsive to "clear behavior plans where the rewards/consequences of behavior are clearly spelled out."

4. The Plan articulated this vision for Petitioner:

TEAM vision for [Petitioner] is that
1). [Petitioner] will develop coping skills in order to handle stressful and frustrating situations so that [Petitioner] can complete classwork without disruption
2). To increase [Petitioner's] communication around feelings and to ask for help appropriately and
3). Will succeed academically and behaviorally so that [Petitioner] can be accepted to the high school of [Petitioner's] choice.

5. The plan's relevant subparts are Present Levels of Educational Performance--general curriculum, other educational needs; Current Performance Levels/Measurable Annual Goals--social, adaptive behavior, service delivery, non-participation justification; and State or District-Wide Assessment. The present levels portion indicated that Petitioner's disability affected Petitioner's study of English, language arts, and mathematics.

6. It described the effect as:

[Petitioner's] [REDACTED] affects [Petitioner's] ability to access the curriculum and benefit from classroom instruction. [Petitioner] may refuse to participate in a class assignment or leave the classroom because of [Petitioner's] disability. Because of [Petitioner's] diagnoses, reading during ELA, SSR, and other classes remains a challenge/difficult for [Petitioner].

7. The plan listed several accommodations to help Petitioner make effective progress. They are:

Calm, consistent approach when giving directives and reinforcing school rules.

Clear consistent behavior plan that incorporates positive reinforcement.

Allow [Petitioner] access to the school social worker or school psychologist when [Petitioner] is feeling upset or having difficulty following directives with minimal impact to classwork.

Allow [Petitioner] extra breaks (allow [Petitioner] to walk around or do an errand).

Modify homework length/amount as needed.

Communicate with [Petitioner's] mother using e-mail, phone or via mail to provide feedback regarding [Petitioner's] progress as [Petitioner] often does not bring home papers/documents.

E-mail or phone call home if an unusual event occurs.

Provide opportunities to finish an assigned task with teacher support.

Use positive social encouragement without making [Petitioner] feel singled out.

Alternative activities may be provided when [Petitioner] is frustrated and unable to do [Petitioner's] work.

Allow [Petitioner] access to [Petitioner's] personal e-reader, used appropriately.

Provide designated time to complete required assignments and homework during the school day.

8. The plan does not identify a need for specially designed education instructions or modifications in a section soliciting identification of such needs.

9. Social/emotional needs and behavior are the other educational needs that the plan identifies.

10. It describes the effect of Petitioner's disability on Petitioner's education like this: "[Petitioner's] [REDACTED] [REDACTED] affects [Petitioner's] ability to communicate how [Petitioner] is feeling and ask for academic help appropriately. Petitioner's [REDACTED] may make it difficult for

[Petitioner] to participate in less structured activities and adjust to schedule or environmental changes."

11. The plan states two specific goals for Petitioner in a format that identifies current performance level, establishes a measurable annual goal, specifies indicia of achievement, and establishes benchmark/objectives. The first goal focuses on social behavior. The second focuses on adaptive behavior. Both parts are consistent with the preceding elements of the plan.

12. The measurable annual goal for the social goal is, "Given a specific situation, [Petitioner] will be able to identify the perspective of others with 60% accuracy. [Petitioner] will be able to identify and follow through on logical guidelines for unstructured school times in 2 out of 4 given opportunities."

13. The benchmark/objective is:

[Petitioner] will be able to accurately identify how a person or character may feel when exploring various scenarios through discussion, video and text 60% of the time.

[Petitioner] will identify logical rules for unstructured school time, including lunch, bus rides and field day in 2 out of 4 given opportunities.

14. The measurable annual goal for the adaptive behavior is: "[Petitioner] will increase [Petitioner's] awareness when becoming frustrated and appropriately verbalize when [Petitioner] needs help or needs to take a break."

15. The corresponding benchmark/objectives were:
"[Petitioner] will appropriately ask for a break 75% of the time. [Petitioner] will ask for teacher assistance when necessary in 5 out of 7 given opportunities."

16. The service delivery portion of the plan identifies three types of services to be delivered each six-day cycle, essentially each week. The first is "behavior," to focus on Goal 2, adaptive behavior. The teacher is designated to deliver it six times each cycle for 45 minutes at a time.

17. The second is "social skills," to focus on Goal 1, social skills. The plan designates the school psychologist to provide counseling once each cycle for 15 minutes.

18. The third, also described as "social skills," is to be delivered by a social worker once a week for 30 minutes.

19. The plan stated that removing Petitioner from the classroom can be critical to Petitioner's program. It explains: "[Petitioner] may need to speak with a counselor when frustrated, angry, or anxious."

20. The plan does not indicate a need for accommodations in testing.

21. Petitioner's mother disputed one part of the plan, the school year length. She requested a longer school year because she believed a summer camp program would provide Petitioner continued social support and would help avoid social or emotional

regression. This, she thought, would "help for a successful transition back into the next school year."

22. The plan concluded with what it calls a "Full Inclusion Program" placement. This it describes as "IEP services are provided outside the general education classroom less than 21% of the time (80 percent inclusion)."

23. Petitioner's mother participated in creation of this IEP. It met all federal requirements for an IEP.

24. In [REDACTED], Petitioner also had a Functional Behavior Plan prepared by the [REDACTED] Collaborative.

25. The behavior plan presents the following "Hypothesis:"

Based on direct observation and interviews, it appears as though the function of the refusal behavior is maintained by both escape/avoidance. This is particularly noticeable around classes that [Petitioner] does not like or with staff that [Petitioner] feels do not like [Petitioner] or [Petitioner] hasn't made a connection with. Particular antecedents that set off the refusal behavior include but are not limited to: change in schedule or change in general that make [Petitioner] uncomfortable and classes that [Petitioner] does not like.

26. It concludes with six recommendations. They are:
(1) designate a few people as contacts during difficulties, ideally people who will be available throughout the time in school; (2) provide advance warning of changes in routine or schedule; (3) plan transition to the next grade as early as possible so Petitioner can start to build relationships with

the teachers; (4) possibly create a subtle reinforcement system that rewards for going to class on time and participating in classes Petitioner consistently attempts to avoid; (5) provide feedback quietly at Petitioner's level, not in an authoritarian/confrontational manner; and (6) establish an "escape" system that allows Petitioner to leave all settings briefly upon giving the teacher an agreed-upon signal.

27. Pursuant to a mediation agreement, Petitioner was removed from the [REDACTED] school two or three months before the end of the year and taught at home by a tutor. In Petitioner's words, this was because of "walking out of the classroom, not doing my work[,] being obnoxious." The documents provided by the Board did not include this information. Petitioner and Petitioner's mother did not provide the information to the Board until testimony at hearing.

Highlands County August 15 IEP

28. In the summer of 2013, Petitioner's family moved to [REDACTED] in Highlands County, Florida. Petitioner was enrolled in the [REDACTED] grade for the 2013-2014 school year.

29. When Petitioner transferred to [REDACTED], Petitioner's [REDACTED] IEP and behavioral plan were provided to the Board and the school administration. The Board also received a neuropsychological test report of [REDACTED], Psy.D., from the [REDACTED] district.

30. On August 15, 2013, the middle school staff created a transitional IEP for Petitioner. The staff based the plan on the [REDACTED] IEP and a review of records provided. It identified social and emotional behavior as the areas to be served.

31. It also documented that the parents' concern for Petitioner's education was that they "would like to see [Petitioner] be as successful as possible [at] this school."

32. It documented Petitioner's goal as wanting "to pass this school year and go on to [REDACTED]."

33. The plan indicated that Petitioner needed "positive behavior intervention strategies."

34. It provided for intensive instruction in language arts, math, science, and social studies, with an ESE teacher to be provided in the ESE and regular classes.

35. It also provided the related service of counseling with a mental health counselor once a week for a minimum of 15 minutes a week.

36. The Board IEP listed ten accommodations to be provided Petitioner, daily in all settings. They are: (1) "opportunity to paraphrase or repeat directions to show understanding"; (2) repeating, clarifying, or summarizing directions; (3) informing all school staff of the disability; (4) extended time for testing sessions; (5) test administration in individual or small group settings; (6) monitor to determine if Petitioner

is "marking in the correct space and sequence"; (7) "use of verbal encouragement" and "make sure to answer every question"; (8) allow "legitimate movement or short breaks between assignments"; (9) allow extra time for assignments; and (10) allow test taking in "several brief periods, allowing frequent breaks."

37. The IEP placed Petitioner in the ESE resource room "more than 40% of the time, but less than or equal to 79% with non-ESE." It provides for 46.8 percent of Petitioner's school time to be with non-disabled students at lunch, during transition time, during physical education, and in academic classes.

38. It provides for "specialized intensive instruction by an ESE teacher for language arts, math, science, and social studies," as well as an intensive remedial class for reading and "a credit recovery class for math."

39. The Board's IEP adopted and restated the [REDACTED] plans and observations about Petitioner's difficulty due to disability, communicating, participating in less structured activities, adjusting to change, and mood swings. It developed measurable goals to assist with the difficulties. Each goal included short-term objectives.

40. Goal 1.1 was to "successfully complete the class assignments and tests in [Petitioner's] Reading class with at least 75% accuracy in 4 out of 5 attempts." The short-term

objectives supporting the goal were: (1) "determine the author's point of view in a variety of text"; (2) "determine the central idea of the text and analyze how it developos [sic]"; and (3) cite textual evidence to support a statement regarding the text read.

41. Goal 1.2 was "[Petitioner] will successfully complete the class assignments and tests in [Petitioner's] Math class with at least 75% accuracy in 4 out of 5 attempts." The goal had three short-term objectives. They were: (1) "create and interpret tables and graphs to represent, analyze, and solve real world problems"; (2) "solve literal equations for specified variables"; and (3) "compare, contrast, and convert units of measurement systems." Each goal was to achieve success in four out of five attempts.

42. Goal 2.1 was "[Petitioner] will increase [Petitioner's] awareness when [Petitioner] becomes stressed or frustrated in order to appropriately verbalize when [Petitioner] needs help or needs to take a break." The three short-term objectives for Goal 2.1 were verbalize feelings of frustration or stress appropriately in four out of five attempts, ask for assistance when needed in four out of five attempts, and ask for a break or to speak to a guidance counselor when necessary four out of five times.

43. Petitioner and Petitioner's mother, along with school representatives, signed the document indicating their willingness to accept and support specified responsibilities.

44. Some of the accommodations in the IEP were not allowed when the student takes statewide assessment tests. The Board advised Petitioner's mother of this, and she consented to use of the accommodations nonetheless.

45. The services, as well as the goals and benchmarks of the Board's August 2013 IEP for Petitioner, were quite comparable to those in the [REDACTED] IEP. Unlike the [REDACTED] IEP, the Board IEP did not state the diagnoses for Petitioner.

46. Petitioner began the school year receiving the services and supports of the IEP.

47. In August and September of 2013, Petitioner had no discipline issues in middle school. Petitioner was performing well academically.

48. From the start of school on August 19 through September 20, 2013, Petitioner had one excused absence and one unexcused absence.

49. Petitioner's academic performance, social success, and attendance supported changing Petitioner to a less restrictive environment.

September IEP

50. A September 20, 2013, IEP recognized the positive development in Petitioner's behavior and academic performance. The IEP continued the accommodations, counseling, goals, objectives, and supports of the August IEP.

51. It changed the intensive instruction to be provided with an ESE teacher to only science. Petitioner's other classes, 79 percent of Petitioner's time, were in the general curriculum with non-ESE students. This made Petitioner's educational environment less restrictive than it was in the first Board IEP or had been in the [REDACTED] IEP.

52. The September IEP did not include mental health counseling.

53. As before, school personnel and Petitioner signed to indicate their willingness to support and accept responsibility for implementing the plan. Petitioner's parents did not participate or sign.

November Discipline Referrals

54. Petitioner's language arts class was a double period of 84 minutes, following lunch, and the last period of the day. On November 11, 2013, the language arts substitute teacher gave Petitioner a referral to the discipline office. The sanction imposed was Individualized Study Services (ISS) for one day.

55. The referral form noted, "please allow [student] to see [REDACTED]/[REDACTED] if student requests." [REDACTED] was an ESE counselor. This note made the ISS supervisor teacher aware of the IEP's provision for Petitioner to take a break or see a counselor, if stressed.

56. The regular language arts teacher, [REDACTED], gave Petitioner a referral on November 19, 2013. This referral was for refusing to hand [REDACTED] a writing assignment form. The assignment was not a class assignment. It was a behavioral consequence.

57. As part of the behavior consequences steps in her class, [REDACTED] provided students warnings, followed by a requirement to "reflect in writing on their misbehavior." The assignment given Petitioner, like assignments to other students who misbehaved, asked the student to identify which "[REDACTED] Expectations" they did not meet and write a paragraph explaining the expectation, why they did not meet it, and what they would do to meet it in the future.

58. [REDACTED] asked Petitioner to hand her the assignment form so that [REDACTED] could write Petitioner's mother a note on it. [REDACTED] told Petitioner that Petitioner could complete the assignment at home. Petitioner refused to provide it. Petitioner also would not give [REDACTED] the agenda book students carried between home and school so [REDACTED] could place a note there.

59. Petitioner's refusals became adamant and disruptive to the class.

60. These referrals were unusual for Petitioner. Ordinarily, Petitioner's behavior in language arts was acceptable and did not materially differ from that of Petitioner's non-ESE classmates. These were the first referrals that Petitioner received in [REDACTED].

61. [REDACTED] routinely followed the behavioral strategies of Petitioner's IEP. When [REDACTED] observed Petitioner getting a little antsy or on edge, [REDACTED] asked Petitioner to go into the hallway to separate and cool off. [REDACTED] would also talk with Petitioner.

62. In almost all incidents, Petitioner was receptive. The strategies worked and gave Petitioner the opportunity to regroup. [REDACTED] also sometimes sent Petitioner to visit the counselors to help Petitioner calm down.

LATS Evaluation

63. In response to Petitioner's mother's concerns about Petitioner's fine motor skills and Petitioner's handwriting, supported by teacher reports of difficulty reading Petitioner's handwriting, the school initiated a LATS evaluation. This is an assistive technology evaluation. Petitioner's mother consented, and the evaluation was conducted. This is the only time that

Petitioner's mother requested an evaluation of Petitioner, until the due process hearing request.

64. The evaluation concluded that Petitioner did not need assistive technology. It made seven recommendations, including encouraging Petitioner to wear Petitioner's glasses in class, encouraging Petitioner to slow down when writing, and encouraging Petitioner to make use of Petitioner's IEP accommodation of extended time for tasks.

February IEP

65. The IEP team met on February 17, 2014, to update Petitioner's IEP. The IEP reflected additional information gathered from school personnel's observation of, and interaction with, Petitioner during Petitioner's months in middle school. This included academic success. The first nine weeks of the school year, Petitioner did well. Petitioner received an A in science, art, and physical education. Petitioner received a B in pre-algebra and history. Petitioner's only C was in language arts. Petitioner also had only received the two November referrals.

66. The IEP updated Petitioner's expression of Petitioner's desired outcomes: "[Petitioner] wants to do well in school, make friends, and act appropriately in class. Within [six] months of graduating [h]igh [s]chool, [Petitioner] wants to pursue a college degree in the field of information [t]echnology." Some

of the earlier IEPs were continued, including the mainstream placement of more than 79 percent of class time with non-ESE students.

67. Goal 1.1 was: "When given a word problem involving [m]athematical [c]oncepts, Petitioner will apply learned mathematical strategies to solve 4 out of 5 times with 75% accuracy." The supporting short-term objectives were to identify key components of a word problem 80 percent of the time, translate words in word problems to math terms and basic operations to solve them 75 percent of the time, and locate the question before reading to increase comprehension of word problems.

68. Goal 1.2 updated the reading goal to state: "Given a reading passage, [Petitioner] will apply reading strategies to answer questions on the text with 75% accuracy on 4 out of 5 attempts." The two short-term objectives are to use context clues to determine an author's point of view in different texts, determine the main idea of a text, and analyze its development.

69. Goal 2.1 of this IEP stated: "When frustrated or stressed, [Petitioner] will appropriately verbalize [Petitioner's] thoughts when [Petitioner] needs assistance or a break." The supporting short-term objectives were that Petitioner would ask for help when frustrated by an assignment, that Petitioner will ask appropriately to speak with an ESE

guidance counselor when upset, and would help others with their work when Petitioner finishes the work early.

March Discipline Referrals

70. On March 7, 2014, [REDACTED] issued another referral to Petitioner for disrupting class. Petitioner was disrupting the class by making popping noises and refused to stop after being asked twice and warned of the consequences. Petitioner was given two days of ISS.

71. ISS is the Board's most recent iteration of what was once called in-school suspension. A teacher is in the room with the students. They are provided their class assignments and the opportunity to work on them. The students' teachers visit ISS to assist and may, as [REDACTED] did in this instance, call the student back to the class for activities she thinks are critical for the student to attend.

72. Before imposing the ISS, [REDACTED] had taken a number of steps, including the "break" technique of the IEP. The steps also included conferring with Petitioner, moving Petitioner's seat, isolating Petitioner, referring Petitioner to guidance, conferring with Petitioner's mother, assigning extra work, and e-mailing Petitioner's mother.

73. On March 28, 2014, the school imposed a three-day out-of-school suspension on Petitioner for carrying a chair down a hallway yelling, "what the f***." Petitioner cursed the

teacher who talked to Petitioner about Petitioner's behavior. Out-of-school suspension was an appropriate consequence for this behavior.

April Discipline Referral

74. On April 7, 2014, [REDACTED] again was required to issue a discipline referral to Petitioner. This referral was for repeatedly disrupting instruction in the language arts class by making noises and pushing the desk in front of Petitioner with Petitioner's feet. The referral was for three days of ISS.

May IEP

75. The team met again on May 21, 2014, to review Petitioner's progress and update Petitioner's permanent IEP.

76. Petitioner's statement of desired outcome said, "Petitioner wants to attain better grades each nine weeks in preparation for [REDACTED]. Within 6 months of graduating High School, [Petitioner] will attend college to pursue the field of information technology."

77. Petitioner's parent's recorded concern was: "To support and encourage [Petitioner] in [Petitioner's] academics and improvement of behavior."

78. The IEP relied upon the information received from [REDACTED], current grades, and teacher observations. It noted a decline in grades as of May 20, 2014. Petitioner had a D in

language arts, a C in math, and an A in science (where Petitioner received specialized instruction).

79. The IEP observed that Petitioner's disability led to easy frustration during reading and writing. It noted that "[Petitioner] is capable of applying self-determination skills in the classroom to set [Petitioner's] own goals[; Petitioner] needs to recognize [Petitioner's] strengths and weaknesses when determining these goals."

80. The accommodations and supports provided remained similar to the other IEPs. The IEP reintroduced counseling with a mental health counselor and continued at ten minutes once a week. The IEP proposed decreasing counseling to 20 minutes every other week when [Petitioner] reached high school.

81. This IEP instituted a measurable annual Goal 1.1 that stated: "Given Polynomials, [Petitioner] will simplify them on 4 out of 5 attempts with 75% accuracy." The supporting short-term objectives were locating like terms and combining them correctly when adding or subtracting polynomials, applying the distributive property when multiplying polynomials, and using multiplication and division skills when factoring polynomials.

82. Measurable Goal 1.2 addressed language arts. It stated: "Given a reading passage, [Petitioner] will apply previously learned reading strategies to answer question on the text with 75% accuracy on 4 out of 5 attempts." The supporting

short-term objectives provided that Petitioner would locate context clues to determine the author's point of view, identify main idea of text and analyze its development, and re-visit text several times when answering reading comprehension questions.

83. Measurable annual Goal 2.1 became: "Given a stressful situation in the school-setting, [Petitioner] will increase [Petitioner] self-awareness to apply cool-down strategies." The supporting objectives called for Petitioner to verbalize Petitioner's feelings appropriately to an adult when frustrated or confused, to ask a teacher or student for assistance "during collaboration time," and to ask to speak to the ESE guidance counselor when Petitioner needed a break.

84. Petitioner and Petitioner's mother participated in the meeting along with the appropriate school personnel.

May Referral

85. May 21, 2014, Petitioner received Petitioner's last discipline referral of the school year. This referral, from teacher [REDACTED], was for Petitioner throwing a pen at a student's head during lunch and Petitioner's reaction to being corrected. When asked why Petitioner was throwing the pen and if Petitioner knew Petitioner could injure an eye, Petitioner yelled at the teacher to calm down, that the teacher was overreacting.

86. Originally, the suspension was out-of-school suspension for six days. Petitioner's mother spoke to [REDACTED], the

school principal. The out-of-school suspension was reduced to one day, and the remaining five days converted to ISS.

87. Petitioner spent the five days of ISS in the ESE classroom where Petitioner received educational benefits, including consulting visits from Petitioner's teachers and assistance with Petitioner's work.

88. After some initial confusion about the correct policy, Petitioner was allowed to make up the work Petitioner missed, while serving the out-of-school suspension.

School in General

89. The two-period language arts class at the end of the day is the only class in which Petitioner exhibited behavior problems.

90. Petitioner misbehaved once in history class by being disrespectful to Petitioner's teacher, [REDACTED]. [REDACTED] immediately held a conference with Petitioner's mother. The matter was resolved with an apology from Petitioner. The strategies of the IEP worked.

91. [REDACTED], the physical education teacher, had good results using the take-a-break strategy of the IEPs. Again, the IEP strategy worked.

92. Through the course of the year, the student had conversations with Principal [REDACTED]. Although the principal referred to this as counseling, it was not counseling in the

medical sense of therapy. It was counseling in the better sense of "advice and support that is given to people to help them deal with problems, make important decisions, etc." Merriam-Webster.com. Merriam-Webster, n.d. Web. 8 Sept. 2014.
<http://www.merriam-webster.com/dictionary/counseling>.

93. The increasing frequency of Petitioner's behavior problems coincided with reports from Petitioner's parents that the family would be moving back to [REDACTED] in the summer. This is consistent with the observations in the [REDACTED] IEP about Petitioner's difficulty with change.

94. It is more likely than not that anxiety about the talk of an upcoming move was responsible for Petitioner's late-in-the-school-year behavioral problems. This was a factor over which the school had no control in its occurrence, how it was communicated to Petitioner, and what reassurance Petitioner received.

95. At the end of the [REDACTED] grade, Petitioner's grades were significantly better than they had been in the [REDACTED] grade. Petitioner had one A, two Bs, three Cs, and one D, resulting in a 2.434 grade point average.

96. The D was in language arts. Petitioner could have performed better in that class by completing more of the work.

97. Petitioner manifested significantly fewer behavioral problems in [REDACTED] grade than in [REDACTED]. They were fewer in number and less intense in nature.

98. During Petitioner's year in [REDACTED], Petitioner achieved meaningful progress, academically, socially, and behaviorally. The credible evidence does not prove that the events of a year in which the student, who, by all measures and according to all witnesses, did better than the student had done the year before, should be reevaluated.

This Dispute

99. Until May 2014, there were no documents or reports indicating any dissatisfaction of Petitioner's mother with the education or supports the Board gave Petitioner. The day of the May 21, 2014, IEP meeting, she wrote asserting a right to a manifestation hearing because the recent discipline should have been recognized as a manifestation of Petitioner's disability. She demanded a hearing by May 27 and said that she would request a due process hearing if she had not heard anything by then.

100. On May 30, 2014, Petitioner's mother sent a letter requesting an independent educational evaluation for Petitioner by [REDACTED], Ph.D. She had not previously requested a reevaluation.

101. The due process request starting this proceeding followed on June 5, 2014.

CONCLUSIONS OF LAW

Overview

102. This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 and corresponding Florida Statutes and Florida Administrative Code provisions.

103. The Division has jurisdiction over the parties and the claims under the IDEA in this proceeding. § 1003.57(1)(c), Fla. Stat. (2014); Fla. Admin. Code R. 6A-6.03311(9)(u).

104. As the party claiming a violation of the IDEA, the student bears the burden of proving that the Board has not provided a FAPE. Schafer v. Weast, 546 U.S. 49, 62 (2005); Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1313 (11th Cir. 2003); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).

105. The purpose of the IDEA is to offer students with disabilities a public education on appropriate terms. Schools must provide an IEP that is likely to produce progress, not regression, and provides a greater opportunity than trivial advancement. S.F. v. N.Y. City Dep't of Educ., 2011 U.S. Dist. LEXIS 129672; 57 IDELR 287; 111 LRP 70544 (S.D. N.Y. 2011). A school must provide an appropriate education reasonably calculated to allow the student to receive a meaningful educational benefit. Id.

106. Congress enacted the IDEA:

(1)(A) to 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 further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected;

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. § 1400(d). The IDEA requires all states to provide resident children with disabilities a FAPE designed to meet their unique needs. 20 U.S.C. § 1412(a)(1). The opinion in Maynard v.

Dist. of Columbia, 701 F. Supp. 2d 116, 121 (U.S. D.C. 2010)

explains:

The IDEA attempts to guarantee children with disabilities a FAPE by requiring states and the District of Columbia to institute a variety of detailed procedures. "[T]he primary vehicle for implementing" the goals of the statute "is the [IEP], which the [IDEA] mandates for each child." Harris v. District of Columbia, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing Honig v. Doe, 484 U.S. 305, 311-12, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a written statement that includes, among other things: (i) a statement of the child's present levels of academic achievement and functional performance; (ii) a statement of measurable annual goals, including academic and functional goals; (iii) a description of the child's progress in meeting those goals; (iv) a statement of the special education and related services and supplementary aids and services to be provided to the child; and (v) an explanation of the extent, if any, to which the child will not participate with nondisabled children in any regular classes. Id. § 1414(d)(1)(A)(i). An "IEP Team"--which consists of the parents of the child with disability, not less than one regular education teacher of the child (if applicable), not less than one special education teacher or provider of the child, and a representative of the local education agency--is charged with developing, reviewing, and revising a child's IEP. See Id. § 1414(d)(1)(B) (defining an IEP Team). Because the IEP must be "tailored to the unique needs" of each child, Bd. of Educ. v. Rowley, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities, and must be amended if its objectives are not met. See 20 U.S.C. §§ 1414(b)-(d). To be

sufficient to confer a FAPE upon a given child, an IEP must be "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207. Each local educational agency is required to have an IEP in effect for each child with a disability in the agency's jurisdiction at the beginning of each school year. 20 U.S.C. § 1414(d)(2)(A).

See also Nack ex rel. Nack v. Orange City Sch. Dist., 454 F.3d 604, 608 (6th Cir. 2006); S.F. v. N.Y. City Dep't of Educ., supra.

107. The legal analysis of the validity of an IEP has two parts. The first is whether the school complied with the procedures established by the IDEA and implementing state statutes and rules. The second is whether the school system created an IEP reasonably calculated to provide the child an educational benefit. Bd. of Educ., Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690, 712 (1982).

August IEP

108. Title 20 U.S.C. section 1414(d)(2)(c)(i)(II) requires a school district to provide a transferring student "a [FAPE], including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is

consistent with Federal and State law." Florida imposes a similar requirement. Fla. Admin. Code R. 6A-6.0334.

109. When the student started school in Highlands County, the Board created an IEP which provided a FAPE as required by state and federal law. As required, it consulted with the parent and offered an IEP that included services similar to those of the [REDACTED] IEP. The only notable difference between the two is the fact that the Board's IEP did not recite the diagnosis leading to the disability, while the [REDACTED] plan did. Nothing requires the diagnosis to be stated in an IEP.

February, April and May IEPs

110. The criticism of the remaining Board IEPs is that they should have provided more or different services or have been preceded by an evaluation because of the disciplinary issues of March through May. The IEPs evolved in keeping with the student's performance and behavior in middle school. With the student's grades and absence of behavioral problems, the student's time in the least restrictive environment, with non-ESE students, was increased. In the absence of behavioral problems, counseling was eliminated in February. But the strategies, both for the student and for the teachers, of taking breaks and being able to move about continued. The facts proven showed that they worked.

111. Once behavior problems became more frequent, counseling was reinstated. This was a reasonable change. There also is no credible, persuasive evidence of other strategies that may have been more effective. In fact, even with the decline in behavior and grades, the student successfully finished the school year, doing better than the year before.

112. The education offered by the Highlands County IEPs provides what the IDEA requires--a plan reasonably calculated to provide some educational benefit. Devine v. Indian River Cnty. Sch. Bd., supra. The IDEA does not require schools to provide the best possible education at public expense or to maximize a student's potential. Nack ex rel. Nack v. Orange City Sch. Dist., supra. But the plan must be reasonably calculated to provide some educational benefit. Devine v. Indian River Cnty. Sch. Bd., supra. "Put another way, 'the IDEA sets modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP.' D.B., a minor, by his next friend and mother, Elizabeth B., 675 F.3d 26, 2012 U.S. App. LEXIS 6099, 2012 WL 975564 (1st Cir. March 23, 2012), citing Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993)." L.J. v. Sch. Bd., 850 F. Supp. 2d 1315, 1319 (S.D. Fla. 2012). The party attacking an IEP has the burden of proving that the IEP is not reasonably calculated to confer an

appropriate education. Devine v. Indian River Cnty. Sch. Bd.,
supra.

113. The Petitioner has not met the burden of proving that the IEPs were not reasonably calculated to confer an appropriate education.

Evaluation

114. Petitioner argues that the Board must provide five different evaluations at Board expense. They are: (1) speech evaluation, (2) occupational therapy evaluation, (3) physical therapy evaluation, (4) assistive technology evaluation, and (5) neuropsychological evaluation. But Petitioner presented no credible, persuasive evidence that the student had any issues that would be addressed by these evaluations. Also, the Board had recently provided an assistive technology evaluation.

115. The focus of Petitioner's case at the hearing was that the Board should be required to provide the student an independent evaluation at the Board's expense and that it should be conducted by [REDACTED].

116. This demand relies upon the right created by the IDEA to an independent evaluation at a school's expense if a parent disagrees with the school's evaluation. Parents have a right under certain circumstances "to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1). A parent has a right to evaluation "at public expense if the parent disagrees

with an evaluation obtained by a public agency." 34 C.F.R. § 300.502(b)(1). "A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees." Id., 34 C.F.R. § 300.502(b)(5).

117. However, "[t]he right to a publicly funded independent educational evaluation does not obtain until there is a reevaluation with which the parents disagree." G.J. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1266 (11th Cir. 2012). In this case, the student's parent, so far, refuses to allow the Board to conduct an educational reevaluation.

118. The relevant inquiry is the appropriateness of the district's evaluation. See, e.g., Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583 (3d Cir. 2000); Grapevine-Colleyville Indep. Sch. Dist. v. Danielle R., 31 IDELR 103 (N.D. Tex. 1999). Consequently, the right to Board payment for an independent evaluation of the student is not triggered. Because of this, there is no need to address the issues raised by the dispute about who may conduct the independent evaluation.

119. However, the May 30, 2014, letter from the student's mother to [REDACTED] could only be reasonably interpreted as a request for a reevaluation. Florida Administrative Code Rule 6A-6.0331(7)(a) requires a school district to ensure a reevaluation, if a student's parent requests one. The Board

should have conducted a reevaluation in response to the May 30 letter.

120. Given the dispute in this proceeding about who would conduct an independent educational evaluation, it is worth noting that the criteria for an independent evaluation at public expense, "including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation." 34 C.F.R. § 300.502(e).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent, Highlands County School Board, did not deny Petitioner a FAPE and is not required to provide Petitioner a private educational evaluation at the Board's expense.

It is further ORDERED that the Board shall offer a reevaluation of the student in full compliance with the notice and content requirements of 34 C.F.R. section 300.304 and Florida Administrative Code Rule 6A-6.0331(5).

DONE AND ORDERED this 10th day of September, 2014, in
Tallahassee, Leon County, Florida.

S

JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
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this 10th day of September, 2014.

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Linda Montalbano, Qualified Representative


NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes (2011), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).