STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],

Petitioner,

vs. Case No. 15-0985E

HIGHLANDS COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

On March 10 and 11, 2015, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Sebring, Florida.

APPEARANCES

For Petitioner: Walter Wenger
Qualified Representative
[redacted]

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

STATEMENT OF THE ISSUES

The issues are whether: 1) Respondent has timely complied with its child-find obligations to identify and evaluate a student suspected of having a disability, as required by Florida Administrative Code Rule 6A-6.03311, and 2) Respondent has provided Petitioner with all of the protections stated in rule

6A-6.03312 in the course of numerous disciplinary removals of Petitioner from school, as required by rule 6A-6.03312(10).

PRELIMINARY STATEMENT

By Request for Due Process Hearing filed with Respondent on February 19, 2015 (Request), Petitioner alleged that [redacted] attends [redacted] grade at a local public [redacted] school ([redacted]). Petitioner alleged that [redacted] currently has an education plan under section 504 of the Rehabilitation Act of 1973, as amended (504 Plan), but not an individual education plan (IEP) under the Individuals with Disabilities Education Act (IDEA). The Request states that Respondent has been evaluating Petitioner since December 2014 to determine if [redacted] is a student with a disability under IDEA.

The Request alleges that Petitioner has had unspecified problems in school since 2005, but specifically limits Respondent's alleged liability to acts and omissions occurring in the two years preceding the filing of the Request.

The Request alleges multiple suspensions from school, including more than ten school days during the 2014-15 school year. At least some of the suspensions were allegedly in-school suspensions. At some point, Respondent allegedly reassigned Petitioner to the [redacted] where Petitioner alleged that [redacted] received no educational services and inappropriate counseling with students up to six years older than

[redacted]. During the 2014-15 school year, Respondent has allegedly suspended Petitioner from the [redacted] School for a total of two months, including the period during which he attended the [redacted].

The Request alleges that Respondent failed to provide Petitioner with procedural safeguards at the time of the suspensions, failed to conduct any manifestation determination hearings, and failed to conduct a functional behavioral assessment (FBA) and prepare a behavior intervention plan (BIP) rather than continue to issue suspensions. The Request claims that Petitioner received zeros and was unable to make up missed homework during periods of out-of-school suspensions, and Petitioner's teachers refused to provide [redacted] with academic work that he could complete at home.

The Request asks for a manifestation determination hearing to address the removal of Petitioner from the general education classroom to a room with no certified teacher to provide educational services, an FBA and BIP, the completion of the identification, evaluation and placement of Petitioner as a student eligible to receive ESE under at least the classification of [redacted], a home tutor to allow Petitioner to make up the missed school work due to the suspensions and reassignment to the [redacted], and a program of home instruction until Respondent prepares an IEP and is prepared

to provide Respondent with special education and related services.

The Case Management Order that was issued on February 24, 2015, applies the deadlines that appear in Florida Administrative Code Rule 6A-6.03311. Rule 6A-6.03311(9)(v)6. imposes a deadline of 75 days from the filing of the Request for issuing the final order on a child-find issue, but rule 6A-6.03312(7)(c) imposes deadlines of 20 school days from the filing of the Request to hearing the case and 10 school days after the hearing for issuing the final order on a disciplinary issue. The Administrative Law Judge has determined that the deadlines in rule 6A-6.03312 govern this case and has thus applied the deadlines of rule 6A-6.03312(7)(c).

During a prehearing telephone conference conducted on March 6, 2015, during which Mr. Wenger, the father, and Respondent's counsel participated, the Administrative Law Judge discussed with the parties the applicability of Florida Administrative Code Rule 6A-6.03312 and specifically rule 6A-6.03312(10), which addresses the discipline of students who have not been identified as disabled. During the conference, Respondent's counsel stipulated that Petitioner met one of the alternative requirements of rule 6A-6.03312(10)(a), thus relieving Petitioner of the obligation of proving that Respondent had knowledge that Petitioner was a student with a disability.

During the conference, the Administrative Law Judge denied Respondent's request for a stay, ruling that an event that occurred a few days earlier, in which Petitioner allegedly brought a knife to school, would be of limited relevance. Specifically, the alleged knife incident could not serve as an independent ground to establish a denial of a free appropriate public education (FAPE) or other violation of rule 6A-6.03311 or 6A-6.03312, nor could it serve as an independent ground to establish a defense to such claims. On the other hand, the Administrative Law Judge did not preclude the admissibility of evidence of the alleged knife incident, to the extent that it might be of some relevance to the acts and omissions alleged in the Request.

During the conference, the Administrative Law Judge provided Mr. Wenger with the Florida Department of State web address of the Florida Administrative Code and advised that he read rules 6A-6.03311 and 6A-6.03312. Lastly, the Administrative Law Judge advised Mr. Wenger that the hearing would not address section 504 issues because Respondent had not referred any such claims to DOAH.

At the start of the hearing, the Administrative Law Judge determined, without objection from Respondent, that Mr. Wenger was a Qualified Representative under Florida Administrative Code Rule 28-106.106. The Administrative Law Judge also confirmed,

during the hearing, the desire of Petitioner's parents that the hearing be open to the public.

During the hearing, Petitioner called five witnesses and offered into evidence two exhibits: Petitioner Exhibits 1 and 2. Respondent called two witnesses and offered into evidence 29 exhibits: Respondent Exhibits 1 through 4, 6 through 15, 20 through 30, 32 and 33, and 35 and 36. All exhibits were admitted except Petitioner Exhibit 2, which was proffered.

At the start of the hearing, the Administrative Law Judge took official notice of Respondent's school calendar for 2014-15, which states that spring break was March 16 through 20, 2015. At the close of the hearing, the Administrative Law Judge advised the parties that the final order was due by April 1, 2015. The Administrative Law Judge gave the parties a deadline of March 20, 2015, for filing any proposed final orders. The parties did not file proposed final orders. The court reporter filed the transcript on March 25, 2015.

FINDINGS OF FACT

1. Petitioner was born on [redacted]. [redacted]. For the 2014-15 school year, Petitioner has attended [redacted] grade at the [redacted].

2. Petitioner's father testified, but [redacted] mother did not. At times during his testimony, the father seemed overwhelmed by the behaviors of Petitioner, [redacted]. [redacted], the father clearly has no idea why Petitioner is behaving the way [redacted] is, no idea how to reshape these behaviors, and little, if any, idea of any available resources to help in this process of understanding and managing Petitioner's behavior.

3. Petitioner's problem behaviors emerged early in life. While in daycare, Petitioner bit another child and was expelled. Petitioner attended [redacted] home elementary school and was promoted at the end of each school year, but [redacted] earned poor grades. At times during elementary school, Petitioner's misbehavior interfered with [redacted] instruction. While at school, Petitioner often engaged in horseplay and other immature behavior, and Respondent's staff repeatedly disciplined [redacted], including multiple suspensions.

4. At no time has Respondent identified Petitioner as a student with a disability, so as to qualify [redacted] for special education and related services under IDEA. Respondent has determined that Petitioner was disabled under section 504 of the Rehabilitation Act of 1973, as amended, and provided [redacted] with a 504 Plan, as noted below.

5. During [redacted] grades, Petitioner's misbehavior was defined by immaturity, such as horseplay, getting up out of [redacted] seat during instructional time, loud talking during class, and disrupting the education of [redacted] classmates--but not physical aggression. As a result, an administrator would often call one of Petitioner's parents to have [redacted] picked up early from school, and one of the parents would do so.

6. Petitioner misbehaved at home, too. [redacted] was disruptive at dinner and bedtime, often taking three to four hours to fall asleep. Over time, Petitioner's parents noticed that [redacted] never had any close friends--a fact that continues to present. [redacted] never had any friends spend the night, nor was [redacted] invited for overnight visits at another child's house. Petitioner would go out to play with other neighborhood children, but invariably some conflict would arise, and Petitioner would come home upset, sometimes crying.

7. Even today, when Petitioner goes out to play with neighborhood children, conflicts continue to arise, leaving Petitioner frustrated and upset. Over time, Petitioner has disengaged from the other children and may go weeks without going outside to play. During much of this time, Petitioner merely hangs around the house. [redacted]..

8. Things took a turn for the better in [redacted] grade. Petitioner liked [redacted] [redacted]-grade teacher, who was able to calm [redacted] when [redacted] became excited. Petitioner's grades improved to Cs and Ds. Still, Petitioner received multiple suspensions for misbehavior, which continued to present as immaturity, not physical aggression or anger.

9. In [redacted] grade, Petitioner's pediatrician diagnosed Petitioner with [redacted] and has prescribed medications continuously thereafter to treat the symptoms of this condition. In response to this diagnosis, during [redacted] grade, Respondent prepared Petitioner's first 504 Plan. This plan was not admitted into evidence, but an updated 504 Plan prepared three years later and described below provides a few basic accommodations, and it is unlikely that the first 504 Plan was more elaborate.

10. Things took a turn for the worse in [redacted] grade, for which Petitioner was assigned a different teacher. Petitioner continued to engage in horseplay and disruptive behaviors. Although not verbally defiant, when disciplined, Petitioner now visibly pouted and occasionally angered and became combative. Sometimes the preferred [redacted]-grade teacher was summoned to help deal with Petitioner, who was often assigned to timeout to self-calm, but also received numerous suspensions.

11. Respondent administers in-school suspensions, which are identified as Individualized Study Services (ISSs), and out-of-school suspensions (OSSs). During [redacted] grade, the OSSs lasted no more than three consecutive days. The ISSs typically ranged from one day to three consecutive days. Although the two years preceding the filing of the Request extend back to the [redacted] semester of [redacted] grade, Petitioner produced no evidence detailing the behaviors, the suspensions, and the educational services, if any, provided [redacted] during the suspensions; Petitioner's focus in this case is on the current school year, which is [redacted] grade.

12. By luck or design, Petitioner was assigned for [redacted] grade to [redacted] former [redacted]-grade teacher. Once again, Petitioner performed better for this teacher and [redacted] aide, whom Petitioner also liked. From mostly Fs in fourth grade, Petitioner improved to Cs and Ds. [redacted].

13. Despite the good relationships with the [redacted]-grade teacher and aide, Petitioner continued to misbehave, engaging in immature behavior, such as running in the halls and not listening during class, and two altercations with other students, although these did not result in any physical aggression. And Respondent

continued to administer discipline, including the loss of bus privileges and multiple suspensions. Knowing that Petitioner's parents both worked outside the home, administrators imposed only two OSSs, each of three days' duration; otherwise, the suspensions were ISSs, each of one or two days' duration.

14. By fourth or fifth grade, the morning dose of the [redacted] medication seemed to wear off during the school day, so the pediatrician prescribed a second, weaker medication to be taken at school during lunch. For a couple of months, this seemed to work, but the effects then began to fade. At this point, the pediatrician changed the morning medication. Although Petitioner's father did not detail the child's medication history, a variety of medications have been tried[redacted]--with mixed results.

15. At some point toward the end of [redacted] grade or during the summer after [redacted] grade, the family's pediatrician suggested that Petitioner see a psychologist. The parents considered this option and decided instead to change pediatricians. Sometime during the first semester of [redacted] grade, the new pediatrician saw Petitioner, changed [redacted] medication, and recommended that [redacted] see a neurologist. The record does not reveal whether [redacted] has done so or, if so, the results of any visit. [redacted]

[redacted].

16. In May 2014, at the end of [redacted] grade, Respondent updated the 504 Plan. The areas of difficulty are "maintaining focus," "on task behavior," and "low frustration tolerance." The accommodation for the first area is preferential seating. The accommodations for the second area are the repetition or clarification of summarized directions and small group testing, including the FCAT. The accommodations for the third area are verbal praise and encouragement, flexible scheduling for classwork and testing, extended time, and space to calm down and think.

17. At the end of [redacted] grade, Petitioner was promoted to [redacted] grade. [redacted] has had a very poor year in [redacted] grade, culminating in the week prior to the hearing [redacted]. Oddly, given the lone diagnosis of [redacted], Petitioner's misbehaviors have never taken place in the classroom itself, but have instead taken place nearly everywhere else at or associated with school, including the playground, restrooms, picnic area, and school bus.

18. Petitioner's first incident in [redacted] grade took place in the first week of September, which was 10 or 11 school days after the start of school. Evidently on the playground or a

hallway, Petitioner and another student became embroiled in a physical altercation, pushing and hitting each other while rolling on the ground. A staffperson witnessed the incident and brought the students to the [redacted] Dean of Students, [redacted]. [redacted] imposed two days' ISS on Petitioner, which [redacted] served on September 5 and 8. Two days' ISS is the punishment for the first "hit, trip, push" offense (HTP), pursuant to Respondent's Student Code.

19. On any given day, 6 to 12 students attend ISS at the [redacted] School, although typically the number of students is at the lower end of the range because problems arise when the room is too full. The ISS room is staffed by a single paraprofessional, who does not have an educator certificate, [redacted]. When the paraprofessional is at lunch, a certified teacher covers the ISS room for one hour.

20. Classroom teachers are supposed to provide the classwork that the student in ISS is missing. When they fail to do so, [redacted], the paraprofessional "can" call a teacher who fails to turn in classwork. [redacted]. There is no classroom instruction in the ISS room, which

would be difficult because the students sit in study carrels and they are from different classes within three different grades. Nor is there any individualized instruction, according [redacted], although the paraprofessional can help a student with an assignment.

21. ISS thus resembles a study hall with two or three computers available to the students. A student with average reading skills might keep up for a single day of ISS, but Petitioner, with below-average reading skills, as noted below, had very little chance of not falling behind in nonmath courses, especially if, in the meantime, the classroom teacher were effectively delivering instruction to the rest of the class.

22. The second incident took place 21 school days after Petitioner returned to class from ISS for the first incident. The record contains the written referrals for all but the first two incidents; however, [redacted] recalled the second incident clearly due to the oddness of Petitioner's behavior. In the second incident, which was also an HTP, Petitioner walked up to an eighth-grade student whom [redacted] did not know and hit [redacted] in the back of the head for no reason. The other student seemed incredulous for a moment, but then chased Petitioner around the school courtyard. [redacted] issued Petitioner three days' OSS, which [redacted] served on October 8, 9, and 10. Three days' OSS is the punishment for the second HTP, pursuant to the Student Code.

23. According to the Student Code, middle and high-school students on OSS "will not be allowed to make up missed work for credit unless other options are listed in an individual school's handbook." Student Code, p. 20. The [redacted] School handbook, of which the Administrative Law Judge hereby takes official notice, likewise provides that missed "assignments may **not** be made up." [redacted]. For these reasons, the father's testimony that [redacted] informed him that Petitioner would not be able to make up missed work during OSSs is credited over [redacted] testimony that he told the father that it was up to the teacher.

24. In connection with the second incident, Petitioner's father came to the office and spoke with [redacted]. During their conversation, the father said that Petitioner was "slower" and performing at a second-grade level. [redacted] referred the father's concerns to the Guidance Department for possible initiation of interventions under the Multi-Tiered System of Supports (MTSS).

25. It is difficult on this record to assess the father's concerns, but they were justified in one respect. Petitioner had poor grades, but some of that must be attributed to all of [redacted] suspensions over the years, and Petitioner had passed [redacted] FCATs.

On December 9, 2014, when Petitioner's grade level was [redacted], [redacted] took the Woodcock-Johnson III Normative Update Tests of Achievement (Woodcock-Johnson). Among the clusters, Petitioner's grade equivalents ranged from 8.1 in Brief Math, 7.6 in Math Calc[ulation] Skills, and 7.4 in Broad Math to 4.2 in Oral Language, 4.4 in Reading Comp[rehension], and 4.8 in Broad Reading. Among subtests, Petitioner's grade equivalents ranged from 9.4 in Calculation, 7.2 in Applied Problems, and 6.7 in Letter-Word Identification to 1.5 in Story Recall--Delayed, 2.4 in Story Recall, and 3.2 in Passage Comprehension. Based on the wide spread between Petitioner's math and reading achievement levels, the father's concern was justified as to Petitioner's reading skills.

26. In addition to relaying the father's academic and cognitive concerns, [redacted] also voiced [redacted] own behavioral concerns to the Guidance Department. [redacted] spoke to [redacted], a guidance resource teacher who had preceded [redacted] as the Dean of Students for several years up to the start of the 2014-15 school year, and [redacted], the [redacted] School guidance counselor, who had one year's experience in community mental health prior to becoming a guidance counselor eight years earlier. [redacted] told [redacted] that Petitioner seemed very different at times--sometimes presenting in a very silly, extremely immature manner and other times presenting with anger

and apathy. [redacted], [redacted], agreed to initiate the MTSS process.

27. By no later than the meeting between the father and [redacted] after the second incident, for the reasons set forth in the Conclusions of Law, [redacted] concerns about Petitioner's emerging pattern of behavior constituted a suspicion that Petitioner was a student with a disability under the child-find issue and knowledge on the part of Respondent that Petitioner was a student with a disability under the discipline issue. As noted in the Preliminary Statement, Respondent has conceded as much as to the disciplinary issue, implying that Respondent possessed this knowledge at all material times during [redacted] grade, likely on the ground that Respondent obviously knew of Petitioner's [redacted] prior to the start of [redacted] grade.

28. MTSS interventions were futile in Petitioner's case, and [redacted] should have known so. As [redacted] pointed out at the hearing, at least as Respondent implemented it in this case, MTSS features classroom-based interventions, and Petitioner's defining problems were behavioral, not academic, and occurred entirely outside of the classroom.

29. MTSS provides a classroom teacher with interventions to assist a student without the need for more intensive services, such as might be provided after a referral for special education and related services. MTSS comprises three tiers of

interventions. As [redacted] testified, all students receive Tier 1 interventions, which constitute what typically takes place in a general education classroom, so [redacted] initiated Tier 2 interventions.

30. [redacted] described some Tier 2 academic interventions, such as pullout tutoring in groups of five or six students and one-on-one assistance. It does not appear that these interventions were implemented. The sole Tier 2 intervention implemented was "alternate passing." For a student unable to handle the challenges of the transitions between classes, "alternate passing" requires a teacher to retain the student in her classroom until the tardy bell rings and the hallways empty, at which time the student is released to get to [redacted] next class, where [redacted] would not be marked tardy.

31. As MTSS was futile for the reason noted above, "alternate passing" was of almost no value because it addressed only one of many nonclassroom settings at school where Petitioner misbehaved. Unless Respondent implemented "alternate restroom breaks," "alternate recess," "alternate lunch," and "alternate transportation," "alternate passing" would, at most, reduce the opportunities for misbehavior by removing one of the potential settings--the hallways between classes. As valuable as "alternate passing" might be to spare a child subject to sensory overload or overstimulation from the chaos of hundreds of

students changing classes in long, narrow hallways with poor acoustics and uneven lighting, the evidence does not establish that Petitioner suffers from such a condition.

32. It is unclear how long Respondent attempted "alternate passing," but probably not long. The intervention was useless for an entirely different reason: Petitioner would disappear from the empty halls, rather than report to [redacted] next class, and a staffperson would have to be sent to find [redacted]. It does not appear that [redacted] bothered to implement any Tier 3 interventions, whatever they might have entailed. Typically, though, Respondent does not refer a student from evaluation for placement in special education and related services until Tier 3 interventions have been tried and found unsuccessful.

33. As will be seen below, the two months that elapsed between Respondent's futile implementation of MTSS interventions and its obtaining of the parents' consent to an evaluation featured three more incidents, six days' ISS, ten days' OSS, and no more than seven school days separating the completion of the preceding suspension from the occurrence of the next incident. The most worrisome incident was the fifth incident, which is described below, and it took place on the very day that Petitioner returned to class after serving five days' ISS. This was a very long and very eventful time for [redacted] to be

trying "alternate passing," or not implementing any MTSS intervention at all.

34. There is no evidence of any thought or preparation in the MTSS program initiated by [redacted]. The record does not disclose how [redacted] chose "alternate passing," how [redacted] intended to assess the efficacy of "alternate passing," or how [redacted] planned to communicate this work to the parents. Neither [redacted] nor anyone else collected or analyzed any behavioral data before or after initiating any Tier 2 intervention, including when the MTSS program was discontinued. On these facts, Respondent's implementation of MTSS in Petitioner's case appears to have been a formulaic exercise, whose practical effect was only to delay the point at which staff would have to undertake the work to evaluate Petitioner for placement in special education and related services.

35. The third incident took place four school days after Respondent returned to school from OSS for the second incident. The third incident occurred on October 17 when a staffperson overheard Petitioner say "[redacted]" in the hallway to another student, who, Petitioner claimed, had been making [redacted] mad. Possibly due to the timely intervention of the staffperson, this is the only incident in this case that does not involve an HTP.

36. [redacted]

[redacted]

37. From [redacted] perspective, prohibiting Petitioner's attendance at the game was important because compliance with the Student Code was emerging as a critically important challenge for Petitioner, and this prohibition, under normal circumstances, provides an appropriate disincentive to student misbehavior, at least among students inclined to watch a football game. [redacted]

38. The fourth incident took place seven school days after Respondent returned to class after ISS for the third incident. The fourth incident took place on October 30, 2014, in the boys' restroom. Petitioner and [redacted] entered the restroom without any visible problems, but, while in the restroom, Petitioner and one of the [redacted] got into an argument. Although the sequence is unclear, Petitioner struck one [redacted] in the torso, and the [redacted] struck Petitioner in the face. After a few moments, the [redacted] ran from the restroom as though nothing had happened, but another student in the restroom reported the incident.

39. [redacted] spoke to the [redacted], who calmly admitted to the facts reported by the other student. Instead of five days' OSS, [redacted] offered Petitioner the option of five days' ISS and the [redacted] program, which is described below. Petitioner chose the [redacted] option and attended ISS on October 31 and November 3 through 6.

40. Upon completing the ISS for the fourth incident, Petitioner had been suspended in ISS and OSS for a total of 11 days. As noted above, by this point, Respondent had knowledge that Petitioner was a student with a disability. The removals that had taken place as a result of the first four incidents constitute a pattern because Petitioner's behavior was substantially similar in all four incidents--three HTPs and one near-HTP; the removals total more than ten school days; and the

four incidents occurred in such close proximity to each other that Respondent had suspended Petitioner for about one-quarter of the school days that had elapsed to this point. The removals disrupted the delivery of instruction to Petitioner, who, as a result of [redacted] misbehavior and Respondent's inability to manage it, was unable to access [redacted] curriculum. For these reasons, as explained in the Conclusions of Law, at the time of the suspension for the fourth incident, Respondent was required to conduct a manifestation determination hearing. But Respondent did not do so.

41. The [redacted] program consists of four classes taught one night per week with each two-hour class devoted to some aspect of behavior management. When a student and parent accept Respondent's offer of [redacted] as an alternative to suspension, the student and parent sign a contract agreeing to attend the four classes, as did Petitioner and [redacted] father. In Petitioner's case, [redacted] and [redacted] mother attended only one of the classes--anger management. They did not attend the classes on respect, attitude, and communication skills; consequences of misbehavior; and moral reasoning skills. Upon the failure of Petitioner and [redacted] parents to comply with the [redacted] contract, [redacted] was supposed to impose an additional suspension, but [redacted] did not to spare Petitioner from missing more school.

42. While discussing the [redacted] program, the father asked [redacted] to remove Petitioner from the general education classroom and place [redacted] in a more restrictive setting without the "ESE label." The father wondered whether, if [redacted] [redacted] focused more on academics, [redacted] would be better able to control [redacted]. This was a hypothesis worthy of consideration. Not entirely responsively, [redacted] dismissed the father's suggestion on the ground that Petitioner's behavioral problem was not in the classroom. [redacted] pointed out that, as [redacted] had told Petitioner after each incident, Petitioner needed to learn not to strike other children. [redacted] also told the father that Respondent could not merely place Petitioner in ESE classes, but had to try the MTSS interventions first. At some point, though, [redacted] admitted to the father that [redacted] was concerned because Respondent had not succeeded in changing Petitioner's HTP behavior, and usually a student stopped this behavior after the first OSS.

43. The fifth incident took place on the first day that Petitioner returned to class after ISS for the fourth incident. On November 7 in a picnic area on school grounds, Petitioner approached another [redacted] and pushed [redacted] hard enough that the other [redacted] fell to the ground. This was an intensification of misbehavior because Petitioner did not know the [redacted], and the [redacted] had never had any problems at school, so [redacted] clearly had done

nothing to draw Petitioner's attention. The fifth incident was worse than the second incident, where Petitioner also did not know [redacted], because the [redacted] in the second incident evidently would have been able to deal with Petitioner [redacted], if he had caught [redacted]. Another [redacted] came to the aid of the [redacted] whom Petitioner had pushed to the ground. When the second [redacted] demanded to know why Petitioner had pushed the first [redacted], Petitioner pushed the second [redacted], who pushed Petitioner back, and the two [redacted] engaged in a scuffle.

44. Speaking to Petitioner immediately after the fifth incident, [redacted] asked why Petitioner had pushed the first child. [redacted] was more forceful with Petitioner at this time due to the growing number of incidents, the occurrence of the fifth incident on the first day that Petitioner had returned to school after the fourth incident, and [redacted] recent willingness to overlook the failure of Petitioner and [redacted] parents to live up to their undertakings in the [redacted] contract. But, underscoring the deterioration that [redacted] had undergone since the start of the school year, Petitioner presented an attitude of apathy coupled with a belligerent refusal to explain [redacted] obviously indefensible behavior.

45. [redacted] was justly concerned about Petitioner's utter lack of insight into [redacted] own behavior, [redacted] complete lack of remorse, and [redacted] overall lack of caring. [redacted] had

consistently spoken to Petitioner informally when [redacted] saw [redacted] around school in an attempt to build rapport and see how [redacted] was doing. At all times, [redacted] has dealt with Petitioner in a tactful and sensitive manner, while still addressing the safety and wellbeing of the students and staff at the [redacted] School. But all [redacted] saw was an accelerating cycle of misbehavior and suspension that was leading to worse behavior and graver discipline, which would ultimately result in expulsion. For the fifth behavioral incident, [redacted] imposed ten days' OSS, as required by the Student Code. Petitioner served this OSS on November 10 through 14 and 17 through 21.

46. At this point, [redacted] called the District office to find out what they should do next about Petitioner. [redacted] is the guidance person who handles section 504 matters; another guidance person handles IDEA matters. But [redacted] was the guidance person in charge of this IDEA matter, possibly because Petitioner also had a 504 Plan. Replying to [redacted] request for help, someone in the District office told [redacted] to conduct a manifestation determination. Accordingly, on November 7, as Section 504 Coordinator, [redacted] mailed Petitioner's parents a Notice of Section 504 Meeting on November 10. The form notice contains a check beside a line stating that the purpose of the meeting is a "Manifestation Determination (prior to disciplinary removal constituting a change in placement)."

47. The meeting took place on November 10, 2014. According to the Section 504 Manifestation Determination Evaluation, the members of the Section 504 Committee were [redacted], [redacted], the assistant principal of the Middle School, and Petitioner's parents. [redacted] testified that [redacted] was in attendance, but [redacted] testified that [redacted] was not. The form states that the "Committee reviewed and carefully considered data gathered from a variety of sources, including the Referral Document." Checked below this statement were "Parent input," "Grade reports," "Teacher/Administrator Input," and "Disciplinary records/referrals." Clearly, the group had the written referrals and could obtain parent input, but it had no teacher input and could not have any input from anyone with direct knowledge of Petitioner's behaviors unless, contrary to [redacted] testimony, [redacted] attended the meeting.

48. If the group examined the referrals closely, they would have seen that the last three incidents had taken place, respectively, four school days after returning from ISS, seven school days after returning from ISS, and the day of returning from ISS; and the third of these incidents--i.e., the fifth incident--was the most serious yet. But notably missing from the meeting was any behavioral data or analysis. Nor did anyone in the group discuss the types of behaviors associated with [redacted] or any other disability from which Petitioner might suffer

49. Instead, [redacted] asked the father if the incident at the picnic area was a manifestation of [redacted] disability of [redacted]. The father answered that it was not. He said that [redacted] sometimes "did stuff" like that, [redacted]. [redacted] seized upon this admission and concluded: 1) the behavior in the fifth incident was not a manifestation of Petitioner's disability, 2) Petitioner needed to be moved immediately to Tier 2 in MTSS, and 3) the parents needed to change pediatricians and medications. The second and third conclusions require no discussion beyond noting that Petitioner had already been in Tier 2, and Respondent's educational expertise ends well short of recommendations as to physicians and medications--although perhaps [redacted] was merely documenting the stated intentions of the parents.

50. Nor is any more weight assigned to [redacted] conclusion that Petitioner's behavior was not a manifestation of [redacted] disability. [redacted] manifestation determination was a sham. First, the meeting proceeded on notice that [redacted] had mailed to the parents three days in advance of the meeting without even a phone call. Second, [redacted] failed to give the parents the required notice of the discipline that [redacted] had proposed to impose, as discussed in the Conclusions of Law. Third, also as noted in the Conclusions of Law, the meeting lacked required staff. In addition to the parents, the meeting

consisted of two or three administrators without an ESE or general education teacher. If [redacted] did not attend, the meeting lacked anyone with direct knowledge of Petitioner's school-based behavior. Fourth, [redacted] failed to conduct the meeting in a good-faith effort to address the extent to which, if any, the behavior bore a relationship to Petitioner's disability. Rather than conduct a meaningful discussion of the matter at hand--a daunting prospect, given the personnel present and lack of behavioral information available to the attendees--[redacted] drew the admission from the father and concluded the meeting. [redacted] would not have displayed such deference to the behavioral insight of the father, if he had replied that the behavior was a manifestation.

51. [redacted] handling of the manifestation determination meeting could have been the product of ignorance of the requirements of law, although Respondent is obviously accountable for the personnel to whom it assigns important responsibilities. However, failing to have a single teacher attend the meeting, failing to facilitate an informed discussion of the behavior and the disability, and seizing upon the [redacted] father's "admission" that the behavior was not a manifestation of a disability leaves the clear impression that [redacted] had predetermined that Petitioner's behavior was not a manifestation of any disability, and the manifestation

determination process was another formality, like the MTSS process.

52. After serving the ten-day OSS for the fifth behavior incident, Petitioner returned to school on December 1. On December 5, after wasting 60 days on the MTSS process, [redacted] finally asked for and, without delay, obtained the signature of one of Petitioner's parents to a Consent for Formal Individual Evaluation. The form indicates that, among the educational strategies that have been considered or used, were a change in the level of instruction, a change in instructional methods, and the 504 Plan, but, among the educational strategies not considered or used, was behavior management. It is doubtful that [redacted] considered or changed the level or method of instruction or the 504 Plan because these focused on Petitioner's classroom experience, which was not the setting of [redacted] misbehavior. Given the behavioral nature of the problem, it is jarring that [redacted] did not even consider behavior management. Either [redacted] was not paying attention to the form as [redacted] filled it out, or [redacted] had a different student in mind. On a more positive note, the form states that Respondent intended to evaluate Petitioner for psycho-educational, speech/language, social, and FBA. For these items, [redacted] at least consulted with others, although, it seems, primarily with [redacted] and [redacted].

53. [redacted] began the evaluation at that time. [redacted] promptly administered the Woodcock-Johnson to Petitioner on December 9, as mentioned above, and arranged for other individual evaluations of Petitioner. [redacted] also circulated assessments for teachers and [redacted] to complete. Obviously, [redacted] progress was slowed by the approaching two-week winter break. As set forth in the Conclusions of Law, Respondent has 60 school days to complete the evaluation under rule 6A-6.03311. Excluding school holidays, but not periods of ISS and OSS and the period during which Respondent assigned Petitioner to the Academy, this deadline did not expire until March 24, which was after the hearing.

54. The sixth behavior incident occurred ten school days after Petitioner returned to school from the OSS for the fifth incident. On December 12, [redacted] happened to be passing by the [redacted] restroom when Petitioner and [redacted]. The [redacted] approached [redacted] and angrily complained that, for no reason, Petitioner had spit [redacted]. [redacted] directed the student to go to the school nurse to remove the large amount of spittle that was visible on [redacted] face.

55. Screaming, Petitioner denied that [redacted] had spit [redacted], but, inconsistently, claimed that they were just engaged in horseplay. [redacted] continued to speak to Petitioner, who, although not out of control, was elevated and belligerent, more

in general and not toward [redacted]. As compared to the start of the school year, though, Petitioner had become more defensive, and [redacted] behavior had taken on more of an edge. When [redacted] spoke with the father about this incident, the father dismissed the seriousness of the incident, [redacted].

56. [redacted] imposed ten days' suspension and recommended expulsion, as required by the Student Code. Respondent did not conduct a manifestation determination meeting, but, instead of expulsion, offered Petitioner a chance to attend for three weeks the [redacted], which is a disciplinary program under the direction of [redacted]. [redacted] was formerly a Dean of Students at another of Respondent's [redacted] schools and, before that, had been a physical education teacher and football coach, as well as ESE teacher, at another of Respondent's schools.

57. The [redacted] is a day program that serves students who are in sixth through twelfth grades. [redacted] described the [redacted] as: [redacted]

[redacted]

58. Petitioner satisfactorily completed [redacted] three weeks' assignment in the [redacted] and returned to the [redacted] School on or about January 13, 2015. For about one month, [redacted] behavior seems to have improved. [redacted] father noted as much to [redacted].

59. However, the seventh incident occurred 20 school days after Petitioner's return to the [redacted] School. On February 16, Petitioner and [redacted], whom [redacted] had known for years from [redacted] neighborhood, got into a fight on a school bus before it departed from school. There was a video of the entire incident, but Respondent either failed to preserve the video or elected not to produce it at the hearing. [redacted] watched the video closely and testified that it showed [redacted] talking, neither of whom was Petitioner. According to [redacted], they were talking as though in preparation for something that was about to happen. Petitioner walked by one [redacted], brushing [redacted] as [redacted] passed, although it was impossible to characterize the contact as intentional or inadvertent. The other [redacted] leaped up and struck Petitioner, who then struck [redacted], and the ensuing

fight continued until the bus driver walked back and separated the [redacted].

60. The bus driver brought Petitioner and the other [redacted] to [redacted]. Both [redacted] were calm and no longer combative, as they described the incident more or less factually. [redacted] [redacted] imposed ten days' OSS and reported the matter to law enforcement. Petitioner served the OSS on February 17 through 20 and 23 through 27 and March 2.

61. On February 19, Petitioner filed the Request. On February 20, [redacted] conducted another manifestation determination meeting, which is discussed below. On March 4--the second day after returning to school after the OSS for the seventh incident--Petitioner brought to school a hunting knife with an eight-inch curved blade, a six-inch ornate handle featuring a dragon, and a matching sheath. [redacted]

62. The February 20 manifestation determination meeting was attended by the parents; their two advocates, [redacted] and [redacted] and [redacted]. The meeting was remarkably similar to the preceding manifestation determination meeting, although, judging

from the record, it was better documented than the first meeting. Again, there was no discussion of behaviors associated with Petitioner's known disability and whether the bus incident may be a manifestation of this disability. Again, [redacted] asked the father if [redacted] behavior on the bus was a manifestation of [redacted] disability, and, again, the father replied that it was not, adding that his [redacted] was merely defending [redacted].

63. Petitioner's primary advocate, [redacted], insisted that the behavior on the bus was a manifestation of Petitioner's disability. The principal played the video four times, but would not allow Petitioner's advocates to watch it on the ground of student confidentiality. Eventually, [redacted] stated that Petitioner would receive ten days' OSS and have to return to the Academy. [redacted] replied that Petitioner had filed the Request the prior day, so a change in placement would violate [redacted] stay-put right. Respondent's staff agreed to this and did not remove Petitioner from the [redacted] School.

64. [redacted] asked why Respondent's staff had not yet referred Petitioner to ESE. Staff answered that they had not completed the evaluations, but added that they had 60 school days from the filing of the Request to complete their evaluations, and Petitioner had not been in school much since Respondent had obtained the parental consent to conduct an evaluation.

65. Through March 2, when Petitioner completed [redacted] OSS for the seventh incident, Petitioner had served 23 days of OSS, eight days of ISS, and 15 days at the [redacted]. [redacted] had thus been removed from [redacted] classroom and [redacted] regular program of instruction for 46 of the 118 days of school through March 2, or about 39% of school. If the 15 days at the [redacted] are excluded, then Petitioner was removed from [redacted] classroom and [redacted] regular program of instruction for about 26% of school.

66. Petitioner's instruction ceased during OSSs. Strictly speaking, it also ceased during ISS in which the paraprofessional supervised, but did not teach, the students in the ISS room. On the occasions that [redacted] teachers may have supplied the day's materials to the ISS room, Petitioner's deficient reading skills, especially in story-recall skills, left [redacted] ill-equipped to keep up with [redacted] classmates.

67. The [redacted] was a more promising alternative. First, the [redacted] therapeutic component represents the only time, other than [redacted], that anyone associated with Respondent addressed directly Petitioner's urgent behavioral needs--and certainly the only time that these needs were addressed by a mental health professional. Second, the [redacted] component seems a good match for Petitioner due to its similarity to organized football in their emphasis on uniformed discipline and respect through kinesthetic activities, [redacted]

[redacted]

68. The lone shortcoming of the [redacted] program is that its academic component provides only 12 hours weekly instruction, which does not meet the 21.25 hours weekly instruction at the [redacted] School--4.25 hours per day times five days per week--or the 25 hours weekly recommended by law for disciplinary programs, as discussed in the Conclusions of Law. However, this deficiency, which is easily remediated, is overshadowed by the [redacted] components, which directly addressed Petitioner's urgent behavior problems that have increasingly impeded [redacted] ability to access [redacted] curriculum.

CONCLUSIONS OF LAW

69. DOAH has jurisdiction. § 1003.57(1)(c), Fla. Stat.; Florida Administrative Code Rules 6A-6.03311(9)(u) and 6A-6.03312(7)(c).

70. A parent may challenge in a due process hearing "matters related to the identification, evaluation, eligibility determination, or educational placement of a student or the provision of FAPE to the student" typically within two years prior to the filing of the due process hearing request. Rule 6A-6.03311(9)(a). Although the Request mentions the two-year limitations period, the evidence at the hearing revealed that Petitioner's focus was essentially limited to [redacted] grade.

71. Respondent's obligation to provide FAPE is broad:

> FAPE shall be made available to students with disabilities, including students who have been suspended or expelled, and any individual student with a disability who needs special education and related services, even though the student has not failed or been retained in a course or grade, and is advancing from grade to grade.

Rule 6A-6.03028(1).

72. This case represents something of a hybrid. The first issue concerns the identification and evaluation of Petitioner. This child-find issue arises under rule 6A-6.03311. The second issue concerns the discipline of Petitioner and whether multiple removals of Petitioner constitute a change in placement. This disciplinary issue arises under rule 6A-6.03312.

73. Although arising under separate rules, the two issues overlap and share common elements. Most obviously, because Respondent has not yet determined that Petitioner is eligible to

receive special education and related services, [redacted] must meet special eligibility criteria, not for the provision of special education and related services, but for the right to undergo identification, evaluation, and, if appropriate, placement under child-find and for the protections of rule 6A-6.03312 for discipline.

74. On the facts of this case, these issues share another element: due to the failure of Respondent to timely collect and analyze behavioral data, it is impossible to determine whether Petitioner suffers from a disability under IDEA, as distinct from section 504, and whether Petitioner's misbehavior is a manifestation of this disability. Complicating matters, these two issues also overlap. For instance, the failure of Respondent to timely identify and evaluate Petitioner deprived the persons making the manifestation determinations of the information that they required to make an informed determination.

75. As to all matters in this case, Petitioner bears the burden of proof. Schaeffer v. Weast, 546 U.S. 49, 62 (2005).

76. The first issue in this case concerns the identification and evaluation of Petitioner. These child-find obligations were triggered no later than the second incident. A school board "must" seek consent from a parent to conduct an evaluation whenever the school board "suspects" that a student "is a student with a disability and needs special education and

related services." Generally, MTSS general education interventions must precede an evaluation, but not when the "nature or severity of the student's areas of concern make the general education intervention procedures inappropriate in addressing the immediate needs of the student." Rule 6A-6.0331(3)(d)3. For this reason alone, Respondent was required to bypass MTSS in Petitioner's case; by failing to do so, Respondent ran the real risk that Petitioner would be expelled before [redacted] had satisfied [redacted] that MTSS interventions would not work and before an evaluation had even been commenced.

77. Rule 6A-6.0331(1) sets forth the MTSS, "which integrates a continuum of academic and behavioral interventions for students who need additional support to succeed in the general education environment." By law, the MTSS is "a data-based problem solving process designed to develop, implement and evaluate a coordinated continuum of evidence-based instruction and intervention practices." However, the MTSS interventions in the general education setting are not required for a student "suspected of having a disability" if a team of qualified professionals and the parents determine that such interventions are not appropriate for a student who demonstrates " severe social/behavioral deficits that require immediate

intensive intervention to prevent harm to the student or others." Id.

78. In implementing MTSS, the school must make available to the parents an opportunity "to be involved in a data-based problem solving process to address the student's areas of concern." The school must discuss with the parents the "data to be used to identify the problem and monitor student progress, the student's response to instruction and interventions, modification of the interventions, and anticipated future action to address the student's learning and/or behavioral needs." The school must also document parental involvement and communication. Rule 6A-6.0331(1)(a). School staff must observe the student in the "educational environment and, as appropriate, other settings to document the student's learning or behavioral areas of concern." Rule 6A-6.0331(1)(b). And school staff must review existing data, including anecdotal, social, psychological, medical, achievement, and attendance--the last "as one indicator of a student's access to instruction." "Evidence-based interventions . . . should be developed by a team through a data-based problem solving process that uses student performance data to identify and analyze the area(s) of concern, select and implement interventions, and monitor the effectiveness of the interventions." Rule 6A-6.0331(1)(e). Further, "[i]nterventions shall be implemented as designed for a period of time sufficient

to determine effectiveness, and with a level of intensity that matches the student's needs," and the school must collect and communicate to the parents in an understandable format "[p]re-intervention and ongoing progress monitoring measures of academic and/or behavioral areas of concern."

79. Respondent's resort to MTSS was wholly inappropriate and wasted 60 days. During these 60 days, three more incidents occurred in rapid succession, culminating in the fifth incident in the picnic area, which, as noted above, occurred on the first day that Petitioner returned to class after the five-day ISS for the fourth incident. Just three days after [redacted] obtained the consent of the parents for an evaluation, the sixth incident occurred. As the child's behavior collapsed, [redacted] initiated an MTSS intervention in noncompliance with nearly all of the MTSS requirements--most notably, without data collection, data analysis, coordination with parents, monitoring, or any apparent thought toward customizing the MTSS interventions to Petitioner's clear needs.

80. Rule 6A-6.0331(1)(f) warns: "Nothing in this section should be construed to . . . limit . . . a right to FAPE under Rules 6A-6.03011 through 6A-6.0361, F.A.C., or to delay appropriate evaluation of a student suspected of having a disability." On the present facts, even if Respondent's initiation of MTSS had been justified, its manner of

implementation of the MTSS process was unlawful and constitutes a second reason why its initiation of the evaluation process was untimely.

81. For a signed consent for evaluation received by a school board on or before June 30, 2015, the school board shall complete its initial evaluation of a student suspected of having a disability within sixty "school days," as defined in rule 6A-6.03411(1)(h), that the student "is in attendance" after the school's receipt of parental consent for the evaluation. Rule 6A-6.0331(3)(f). No provision in rule 6A-6.0331 requires the school to complete its evaluations in a shorter period of time, say, under exigent circumstances. Assuming that Petitioner was in attendance during the periods of assignment to ISS and the [redacted], but not during periods of assignment to OSS, the 60 school days ran to March 24, which occurred after the end of the hearing. Respondent's evaluation was timely when considered from the actual date of parental consent on December 4, but its completion was untimely because, as noted above, the obtaining of consent was improperly delayed for the MTSS process.

82. Largely due to the untimeliness of Respondent's evaluation, including in particular the pyscho-educational evaluation of Petitioner, there is no basis in the record to determine that Petitioner has a disability under IDEA and order the preparation and implementation of an IEP. [redacted] may be eligible

for special education and related services under [redacted], which includes [redacted], but this requires "limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment." Rule 6A-6.030152(1). The record does not suggest the existence of such a condition.

83. Petitioner may be eligible under EBD, which requires "persistent (is not sufficiently responsive to implemented evidence based interventions) and consistent emotional or behavioral responses that adversely affect performance in the educational environment that cannot be attributed to age, culture, gender, or ethnicity." Rule 6A-6.03016(1). Doubtlessly, Petitioner satisfies the criterion that [redacted] be unable to maintain satisfactory interpersonal relationships with peers and adults, as required by rule 6A-6.03016(4)(b)1., and this inability has persisted for more than six months and in at least two settings, including school, transitions to and from school, and home, as required by rule 6A-6.03016(4)(c). If he meets the remaining criteria, Petitioner likely satisfies the criterion that he requires special education and related services, as required by rules 6A-6.03016(4)(d) and 6A-6.03411(1)(kk).

84. But this determination is also precluded by Respondent's failure to timely evaluate Petitioner. On the present record, it is impossible to determine if Petitioner meets

the criterion that [redacted] has "an inability to maintain adequate performance in the educational environment that cannot be explained by physical, sensory, socio-cultural, developmental, medical, or health (with the exception of mental health) factors," as required by rule 6A-6.03016(4). Other critical requirements for an EBD eligibility determination include an FBA and a psychological evaluation, as required by rule 6A-6.03016(3)(a) and (d)--both of which should have been completed before the hearing, but were not.

85. For these reasons, Petitioner has proved that Respondent failed timely to identify and evaluate Petitioner, but not that Petitioner is eligible for special education and related services under OHI, EBD, or some other eligibility, such as "Specific Learning Disability" (SLD), possibly dyslexia to account for [redacted] above-grade-level achievement in math and [redacted] much-below-grade-level achievement in aspects of reading, as reflected on [redacted] Woodcock-Johnson scores. Rule 6A-6.03018(1).

86. The second issue in this case concerns Respondent's disciplining of Petitioner. A general education student who has violated the Student Code "may assert any of the protections afforded to a student with a disability under this rule if the school district had knowledge of the student's disability before the behavior that precipitated the disciplinary action occurred." Rule 6A-6.03312(10).

87. As discussed above, Respondent has conceded that it had knowledge of Petitioner's disability, presumably at all material times. It is true that Respondent knew of Petitioner's section 504 disability for several years. By the second incident, Respondent also had knowledge of a disability under IDEA under the special rule applicable to rule 6A-6.03312. It was at this time that [redacted], who was among Respondent's supervisory personnel, had "specific concerns about a pattern of behavior demonstrated by the student," as provided by rule 6A-6.03312(10)(a)3. For the purpose of activating the protections of rule 6A-6.03312, by the second incident, Respondent had knowledge of disabilities affecting Petitioner's behavior.

88. Among the protections of rule 6A-6.03312 extended to Petitioner is the right to notice of the removal decision that constitutes a change in placement with a copy of the procedural safeguards--both to be provided on the date of the removal decision. Rule 6A-6.03312(4). The removal decision precedes the manifestation determination because it triggers it. Respondent failed to provide this notice prior to any removal decision that constituted a change in placement, which would be the discipline imposed for all incidents starting with the fourth incident.

89. A more significant protection extended to Petitioner is a manifestation determination each time Respondent changes [redacted]

placement. Rule 6A-6.03312(3). For the purpose of this rule, a change in placement occurs when a child is subjected to a disciplinary removal for more than ten consecutive school days or:

> The student has been subjected to a series of removals that constitutes a pattern that is a change of placement because the removals cumulate to more than ten (10) school days in a school year, because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals, and because of additional factors, such as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another. A school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement, and this determination is subject to review through due process and judicial proceedings.

Rule 6A-6.03312(1)(a).

90. For the reasons noted in the Findings of Fact, a change in placement under this rule occurred at the time of the fourth incident when Petitioner's total suspensions exceeded ten days, at which time a pattern of removals had emerged that satisfied the requirements of the above-cited rule. Respondent was required to make manifestation determinations at the time of the fourth, fifth, sixth, and seventh incidents. Respondent made manifestation determinations only after the fifth and seventh

incidents--i.e., on November 10 and February 20--and these two were so flawed as to be ineffectual.

91. A "manifestation determination" is "a process by which the relationship between the student's disability and a specific behavior that may result in disciplinary action is examined." Rule 6A-6.03312(1)(f). The manifestation determination must take place within ten days of any decision to change the placement of a student with a disability. Rule 6A-6.03312(3). More particularly, there are basically two requirements of the manifestation determination:

> In conducting the review, the school district, the parent, and relevant members of the IEP Team (as determined by the parent and the school district) must:
>
> 1. Review all relevant information in the student's file, including any information supplied by the parents of the student, any teacher observations of the student, and the student's current IEP; and
>
> 2. Determine whether the conduct in question was caused by, or had a direct and substantial relationship to the student's disability or whether the conduct in question was the direct result of the school district's failure to implement the IEP.

Rule 6A-6.03312(3)(a).

92. At the two manifestation determination meetings that [redacted] conducted, [redacted] neither conducted nor facilitated an examination of the relationship of Petitioner's behavior to [redacted] disability, nor did the small group of administrators and the

parents have any information on which to base a discussion of this important matter. Twice, seizing upon the concession of an overmatched parent, [redacted] steamrolled [redacted] way to what [redacted] believed to have been true before the meeting had even started: Petitioner's behavior was not a manifestation of [redacted] disability.

93. Because Petitioner would not have an IEP or IEP team, requirements concerning these matters must be applied with some flexibility. There could be no IEP to review, nor could Respondent be found to have failed to implement a nonexistent IEP. But nothing prevented [redacted] from ensuring that attendees would meet the requirements imposed on an IEP team, as set required by rule 6A-6.03411(1)(v), which states that an IEP team must meet the requirements of rules 6A-6.03011 through 6A-6.0361.

94. Under these rules, an IEP team is required to have a "reasonable number of participants," including:

> 1. The parents of the student;
>
> 2. Not less than one (1) regular education teacher of the student, if the student is or may be participating in the regular education environment. The regular education teacher of a student with a disability, as a member of the IEP Team, must to the extent appropriate, participate in the development, review, and revision of the student's IEP, including assisting in the determination of:
>
> a. Appropriate positive behavioral interventions and supports and other strategies for the student; and

b. Supplementary aids and services, classroom accommodations, modifications or supports for school personnel that will be provided for the student consistent with this rule.

3. Not less than one (1) special education teacher of the student, or where appropriate, not less than one special education provider of the student;

4. A representative of the school district who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of students with disabilities, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the school district. At the discretion of the school district, the student's special education teacher may be designated to also serve as the representative of the school district if the teacher meets the requirements described in this paragraph;

5. An individual who can interpret the instructional implications of evaluation results who may be a member of the IEP Team as described in subparagraph (3)(c)3. or (3)(c)(4). of this rule; [and]

6. At the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate. The determination of the knowledge or special expertise of any such individual shall be made by the party who invited the individual to be a member of the IEP Team[.]

Rule 6A-6.03028(3)(c). The group must include either a general education teacher with the ability to help fashion behavioral supports and an ESE teacher--neither of whom attended either

meeting. The presence of either of these professionals would have added much-needed expertise and insight to the administrators present at these meetings. If, as [redacted] testified, [redacted] did not attend the first meeting, no one present at either meeting had direct knowledge of Petitioner's school-based behaviors or much knowledge of the requirements of IDEA.

95. The manifestation determinations made on November 10 and February 20 result from a process so fundamentally flawed and unfair that they must be vacated. But, similar to the child-find issue, the record in this case does not permit a determination that Petitioner's behaviors were manifestations of [redacted] disabilities--again because Respondent did not timely collect and analyze behavioral data.

96. Assuming, strictly for discussion, that Petitioner's behavior in the last four incidents was not a manifestation of any disability, Respondent nevertheless committed additional, material violations of the protections afforded to Petitioner. Even if the behavior were not a manifestation of the disability, the school must provide the services described in rule 6A-6.03312(5). Rule 6A-6.03312(3)(d).

97. Rule 6A-6.03312(5) provides in relevant part:

> (b) Students with disabilities who are suspended or expelled from school or placed in an IAES must continue to receive educational services, including homework assignments in accordance with Section

> 1003.01, F.S., so as to enable the student to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals in the student's IEP and receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur.
>
> (c) After a student with a disability has been removed from the current placement for ten (10) school days in the school year, if the current removal is not more than ten (10) consecutive school days and is not a change of placement under this rule, school personnel, in consultation with at least one of the student's special education teacher(s), shall determine the extent to which services are needed so as to enable the student to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals in the student's IEP.
>
> (d) If the removal is a change of placement under this rule, the student's IEP Team determines appropriate services under paragraph (b) of this subsection.

98. Respondent violated at least three of these crucial protections. First, following a removal that constituted a change in placement, in violation of rule 6A-6.03312(5)(b), Respondent discontinued all educational services to Petitioner while [redacted] was on OSS for 20 days for the fifth and seventh incidents; effectively discontinued educational services to Petitioner while [redacted] was in ISS for five days after the fourth incident due to the lack of instruction, limited availability of

class assignments, and Petitioner's poor reading skills; and reduced educational services to Petitioner while [redacted] was in the [redacted] for 15 days after the sixth incident. As noted in the Findings of Fact, the Student Code and [redacted] School handbook preclude a student's making up work that [redacted] missed while in OSS. As noted in the Findings of Fact, no instruction and limited educational services were delivered to Petitioner while in ISS; additionally, section 1012.32(1) requires a teacher to hold an educator certificate. As noted in the Findings of Fact, the 12 hours' weekly instruction at the [redacted] falls short of the 21.25 hours' weekly instruction at the [redacted] School; it also falls short of the 25 hours' weekly instruction that "should" be provided by a disciplinary program, such as the [redacted], where Petitioner has been placed for more than ten days' duration. Rule 6A-6.0527(3).

99. Second, on the facts of this case, an FBA and BIP were indisputably "appropriate" by the time of the fourth incident, which was the first removal that constituted a change in placement. An FBA is:

> a systematic process for defining a student's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior. The purpose of conducting an FBA is to

> determine whether a behavioral intervention plan should be developed.

Rule 6A-6.03411(1)(q). A BIP is:

> a plan for a student which uses positive behavior interventions, supports and other strategies to address challenging behaviors and enables the student to learn socially appropriate and responsible behavior in school and/or educational settings.

Rule 6A-6.03411(1)(d).

100. Third, at the time of the fourth incident, under rule 6A-6.03312(5)(d) (or (c), if the four removals for the four last incidents had not been changes in placement), someone with ESE expertise--not [redacted]--was required to consider the necessity of an FBA, behavioral intervention services, and modifications for Petitioner to access and progress in the general curriculum, meaning, most basically, to stay in school. Given the obvious urgency of the situation, behavioral intervention services had to include a BIP, individual or group counseling, an expedited collection and analysis of behavioral data, and an expedited evaluation process.

101. Rule 6A-6.03311(9)(v)4. authorizes an Administrative Law Judge to determine that a student has been denied FAPE on substantive grounds or on procedural grounds, if the procedural violations deprive a student of FAPE, significantly impede a parent's participation in the decisionmaking process regarding the provision of FAPE to the student, or cause a deprivation of

educational benefit. The only procedural violations that were insignificant enough not to be cognizable under this rule were the lack of notice of the intended removal decisions; all other procedural violations were substantial and deprived Petitioner of FAPE.

102. Rule 6A-6.03311(9)(v)4. authorizes an Administrative Law Judge to order "a school district to comply with the procedural safeguards set forth in Rules 6A-6.03011 through 6A-6.0361."

103. Rule 6A-6.03312(7)(a)1. authorizes a parent to request a due process hearing "if the parent disagrees with a manifestation determination or with any decision not made by an administrative law judge regarding a change of placement under this rule," and rule 6A-6.03312(8) authorizes an Administrative Law Judge to "make . . . a determination regarding a [parent's] appeal," including, under rule 6A-6.03312(8)(a), returning a student to a placement from which [redacted] was removed if the Administrative Law Judge determines that the removal violated rule 6A-6.03312 or that the student's behavior was a manifestation of [redacted] disability.

104. Rule 6A-6.03311(7)(c) provides that, for a student who has previously received special education and related services from the school board in question, a "court or an administrative law judge" may award private school tuition reimbursement under

appropriate circumstances. Compensatory education is educational services to be provided by a school board to compensate for required educational services not provided in the past due to the school board's failure to provide FAPE. See, e.g., G. v. Fort Bragg Dependent Sch., 343 F.3d 295, 308-09 (4th Cir. 2003) (lists similar holdings in other circuits). Compensatory education builds on the remedy of the reimbursement of private school tuition because, if a school board may be ordered to reimburse private school tuition, it may also be ordered to provide the educational services otherwise provided by the private school. See, e.g., Reid v. Dist. of Columbia, 401 F.3d 516, 522-23 (D.C. Cir. 2005) (if this remedy were not available to "courts and hearing officers," then "children's access to appropriate education could depend on their parents' capacity to front" tuition costs).

105. As stated in Reid, federal courts routinely do not differentiate between state hearing officers or administrative law judges, on the one hand, and courts, on the other hand. This is true at the highest judicial levels when it comes to ordering private school reimbursement, even for a child who has never previously received special education and related services from the school board in question. See, e.g., Forest Grove Sch. Dist. v. T. A., 557 U.S. 230, 247 ("When a court or hearing officer concludes that a school district failed to provide a FAPE and the

private placement was suitable, it must consider all relevant factors . . . in determining whether reimbursement for some or all of the cost of the child's private education is warranted.") (dictum as to hearing officer); M. M. v. School Board of Miami-Dade County, 437 F.3d 1085, 1101 (11th Cir. 2006) ("the ALJ and the district court did have jurisdiction to award C.M.'s parents reimbursement for tuition and related services" for a child who had never enrolled in the Dade County public school system, but had been denied FAPE) (alternate holding as to never-enrolled student; dictum as to ALJ).

106. Courts similarly equate themselves, on the one hand, and hearing officers or administrative law judges, on the other hand, when addressing tuition reimbursement-derived remedy of compensatory education. Relying in part on a policy letter from the U.S. Office of Special Education Programs, the court in Harris v. District of Columbia, 1992 U.S. Dist. LEXIS 11831 (D.D.C. 1992), held that a hearing officer had the authority to order compensatory education whenever a court would be justified in doing so.

107. The equitable nature of the remedy of compensatory education precludes an award based on a straight calculation of the number of hours of the educational deficit primarily because such an approach would lend the remedy an appearance of damages, which are not available in an IDEA case. See, e.g., Reid, supra

at 523-24; Sammons v. Polk Cnty. Sch. Bd., 2005 U.S. Dist. LEXIS 45838 (M.D. Fla. 2005) (court or administrative law judge required to perform "fact-specific" analysis of the effect on the student of school board's stay-put violation).

108. As for the child-find issue, Respondent shall complete within ten days of the date of this final order all evaluations for behavior-driving disabilities, such as OHI and EBD; for all other disabilities, such as SLD, Respondent shall complete all evaluations as soon as possible; for all behavior-driving disabilities, Respondent shall not implement any MTSS or other general education interventions in determining eligibility, as authorized by rule 6A-6.0331(3)(d)3.; and, for all other disabilities, Respondent may implement appropriate MTSS or other general education interventions, but only in strict compliance with the rules set forth above and for a period of not in excess of 30 calendar days.

109. As for the disciplinary issue, Respondent shall vacate its manifestation determinations of November 10 and February 20 and any other manifestation determinations that Respondent believes that it has made concerning the fourth through seventh incidents; within ten days of this final order, Respondent shall provide Petitioner's parents with copies, at no cost, of all behavioral data and analysis concerning Petitioner and shall continue to do so, at no cost, within three days of acquiring

documentation of more such data or analysis; at a time and date mutually agreeable with Petitioner's parents and advocates, but within 30 days of this final order, unless Petitioner's parents agree to a later date, Respondent shall convene a manifestation determination hearing to address the behaviors involved in the fourth, fifth, sixth, and seventh incidents; the manifestation determination hearing shall be facilitated by someone with demonstrated expertise, by training, experience, and dedication to the principles set forth in rule 6A-6.03312, in the manifestation-determination process; the manifestation determination hearing shall be staffed with, among other persons of Respondent or Petitioner's choosing, a general education teacher with knowledge of Petitioner's behavior, an ESE teacher, a behaviorist from the District office or retained by the District at its expense as "related services personnel" within the meaning of the above-quoted rule 6A-6.03028(3)(c), [redacted] [redacted] (who shall share [redacted] insights into Petitioner's behavior in light of [redacted] substantial experience with Petitioner and the instruction of EBD students), and other such personnel as reasonably determined by Petitioner's parents to be appropriate; Respondent shall conform strictly to all requirements imposed on manifestation determination hearings, shall ensure that the team participating in the meeting issues an evidence-based written determinations as to each of the four misbehaviors, and shall

ensure that the written determinations include detailed findings, by individual incident, of whether each of the four misbehaviors was a manifestation of any behavior-driving disability of which Respondent has knowledge within the meaning of the rules set forth above; within ten days of this final order, Respondent shall commence an FBA--if Petitioner is not in school, using historic information to the extent possible--and shall complete the FBA within 30 days of this final order; using the information derived from the FBA and other sources, Respondent shall prepare and implement a BIP within 40 days of this final order; Respondent shall discharge its obligation to provide educational services to Petitioner, even while [redacted] is in ISS or OSS, for the remainder of sixth grade; Respondent shall provide Petitioner with one hour's individual or small-group counseling weekly by a qualified mental health professional, including a psychologist, for the remainder of sixth grade; and Respondent shall impose future discipline under the Student Code as though the fourth through seventh incidents had not occurred.

110. Lastly, Respondent shall provide Petitioner, as soon as practicable, including the present school year and, if Petitioner desires, the summer of 2015, compensatory education for the periods that Respondent unlawfully discontinued education after removals that constituted changes in placement.

111. In summary, 20 days' OSS at 4.25 hours' daily instruction is 85 hours, 5 days' ISS at 4.25 hours' daily instruction is 21.25 hours, and three weeks' instruction at the [redacted] at a deficit of 9.25 hours' weekly instruction--using the lower instructional amount provided by the [redacted] School, rather than the higher amount recommended by law--is 27.75 hours, for a total of 134 hours.

112. As noted in the case law discussed above, this amount must be adjusted to reflect the equities and to restore Petitioner to where [redacted] would have been if Respondent had not improperly reduced [redacted] education services, so that [redacted] could participate in the general curriculum, although in another setting, and progress toward meeting [redacted] educational goals. Petitioner and [redacted] parents missed six hours of [redacted] behavioral classes. While in ISS, Petitioner's superior math skills would have permitted [redacted] to keep up with this class without formal instruction, and [redacted] presumably received at least some of [redacted] class assignments. And the [redacted] presented academic instruction with much-needed discipline- and respect-building paramilitary activities and mental health counseling. Based on a weighing of these factors, the deficit from ISS should be halved to ten hours and the deficit from the [redacted] should be disregarded, so the adjusted total is 95 hours of compensatory education in the form of one-on-one or small-group tutoring by a

certified teacher at school, at home, or at such other place as mutually reasonably agreeable to Petitioner and Respondent.

ORDER

It is

ORDERED that: 1) Respondent has failed to timely identify and evaluate Petitioner and failed to provide [redacted] FAPE in discharging its child-find obligations and Respondent has violated numerous protections provided to Petitioner in rule 6A-6.03312 in disciplining Petitioner and removing [redacted] from [redacted] current placement, and 2) Respondent shall provide Petitioner the relief set forth in paragraphs 108 through 110 and 112 of the final order.

DONE AND ORDERED this 1st day of April, 2015, in Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of April, 2015.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes (2013), 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).