STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 16-2617E

BROWARD COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal administrative hearing was held in Fort Lauderdale, Florida, on June 27, 2016, before Administrative Law Judge Jessica Varn of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Barbara Joanne Myrick, Esquire
Broward County School Board
[redacted]

STATEMENT OF THE ISSUES

Whether the student was denied a free and appropriate public education (FAPE) from April 29, 2016, through May 16, 2016, a period in which the student did not attend [redacted] school for a total of eleven (11) school days.

Whether the School Board failed to implement the Individual Educational Plan (IEP), thereby denying the student FAPE.

Whether the fact that the resolution session was not held within 15 days of the filing of the due process complaint, but instead held later, (1) impeded the student's right to FAPE; (2) significantly impeded the [redacted] opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or (3) caused a deprivation of educational benefits.

PRELIMINARY STATEMENT

The student in the instant case was attending a public high school in Broward County, Florida, during the fall semester of the 2015-2016 school year. On or about September 2, 2015, the student's IEP team convened an IEP meeting. At this meeting, the team proposed administering to the student an alternate assessment pursuant to section 1008.22, Florida Statutes, and providing the student instruction in the state standards access points curriculum (which was the same curriculum that had been administered to the student for years). The student's [redacted] did not consent to the proposal.

As the [redacted] did not provide consent, on September 4, 2015, the Broward County School Board (School Board), pursuant to section 1003.5715, Florida Statutes, filed a due process complaint seeking approval to administer to the student an alternate assessment and provide instruction in the state standards access

points curriculum, which was the curriculum that had been used for the previous six years.

The School Board's due process complaint proceeded to a final hearing on October 7, 2015, before Administrative Law Judge T. Resavage; however, the hearing was suspended at the request of the [redacted]. The conclusion of the hearing was scheduled for November 5, 2015.

On October 27, 2015, the [redacted] filed a Motion to Dismiss stating:

> We the [redacted] of the petitioner [redacted] do hereby make known to you that the respondent no longer lives nor attends any school in the Broward County District, and is outside of Broward County attending a school that is not affiliated to any Broward County School/District nor is under the John McKay Scholarship as of October 26, 2015 [redacted] is enrolled & attending a High School.
>
> We ask that this serves as notification for the record on this case, and request that we be notified upon this our immediate request for a complete dismissal of this case and that it be dismissed with prejudice.

On October 29, 2015, Judge Resavage granted the [redacted] request, over the School Board's objection, but did so without prejudice for the School Board to reopen the case should the student return to the jurisdiction of the Broward County School Board. The second day of hearing was canceled, and never held. Since the hearing was never completed, the transcript of the first day of the hearing was never prepared or filed with DOAH.[1/]

On May 13, 2016, the student's [redacted] (Petitioner) filed a request for a due process hearing (Complaint) requesting relief for the prior two years, but failing to provide any specific details of any alleged violations prior to April 29, 2016. On May 19, 2016, the School Board filed a Notice of Insufficiency, which was partially granted by Order on Notice of Insufficiency dated May 20, 2016. Petitioner was granted leave to amend the deficiencies in the Complaint by no later than May 27, 2016.

On May 23, 2016, Petitioner filed a pleading which was considered by the undersigned as an Amended Complaint, simply reiterating the allegations in the original Complaint, adding no specific details as to any alleged violations prior to April 29, 2016. On May 31, 2016, the undersigned entered an Order on Motion to Dismiss, denying the Motion to Dismiss and noting that the Amended Complaint would be deemed sufficient if its sufficiency was not challenged by the School Board.

On June 6, 2016, the School Board timely filed a Motion to Dismiss arguing that the Amended Complaint remained insufficient. On June 7, 2016, the undersigned entered a second Order on Notice of Insufficiency, ruling that because the noted deficiencies regarding a lack of specific details as to any alleged allegations prior to April 29, 2016, were not corrected, the scope of the hearing would be limited to any alleged violations that occurred after April 29, 2016.

Three days later, on June 9, 2016, the School Board contacted the [redacted] to schedule a resolution session on June 22, 2016. The resolution session was held the week before the due process hearing, and the parties were unable to resolve the dispute. Neither party requested that the hearing be rescheduled or delayed due to the delay in the convening of the resolution session.

The hearing was scheduled for June 27, 2016, from 9 a.m. to 5 p.m. at a neutral hearing site. The Notice of Hearing originally issued on May 18, 2016, stated as follows:

> The parties shall arrange to have all witnesses and evidence present at the time and place of hearing. The Administrative Law Judge will issue subpoenas upon the request of any party. Registered e-filers shall request subpoenas through eALJ. All parties have the right to present oral argument and evidence and to cross-examine opposing witnesses. All parties have the right to be represented by counsel or other qualified representative in accordance with Florida Administrative Code Rules 28-106.106 and 28-106.107 or to be accompanied and advised by individuals with special knowledge or training with respect to the problems of students with disabilities, or any combination of such persons.

(emphasis added).[2/] The [redacted] requested that the hearing be held after business hours, and at a local library because the student (who, according to the [redacted], would be present for the hearing and testifying) might be "set off" should the student be in an unfamiliar place. Both of those requests were denied.[3/]

At the hearing, the student's [redacted] testified on Petitioner's behalf and Petitioner's Exhibits 1 through 34 were admitted into the record. The School Board presented the testimony of [redacted], [redacted], and [redacted]; School Board Exhibits 1 through 21 were admitted into the record. A one-volume Transcript was filed on July 14, 2016. The undersigned, *sua sponte*, took official recognition of the Order of Dismissal entered by Judge Resavage on October 29, 2015.

On June 30, 2016, the undersigned entered an Order Extending Final Order Deadline, which allowed for the parties to submit proposed final orders 14 days after the transcript was filed; the final order would be filed 28 days after the transcript was filed. Once the Transcript was filed, the undersigned entered an Order of Specific Extension of Time for Final Order, establishing that the proposed orders were due no later than July 28, 2016. On July 27, 2016, the School Board filed a Motion for Extension of Time to File Proposed Final Order, specifically requesting two additional business days; Petitioner objected to the extension. On that same day, the undersigned entered an Order granting the extension for the proposed orders, setting the due date as August 1, 2016; the final order would be filed by August 15, 2016. Both parties timely submitted proposed final orders, which the undersigned has considered.

Unless otherwise noted, citations to the United States Code, Code of Federal Regulations, Florida Statutes, and Florida Administrative Code are to the current codifications. For stylistic convenience, the undersigned will use [redacted] pronouns in the Final Order to refer to the student. The [redacted] pronouns should not be interpreted to reflect the student's actual gender.

FINDINGS OF FACT

1. The student in this case is [redacted] old and was first identified as a student with a disability in elementary school, with the following eligibility categories:

[redacted] Through almost the end of [redacted] grade, [redacted] received instruction in the state standards access points curriculum.

2. In October 2015, the student stopped attending school in Broward County. During the 2015-2016 school year, [redacted] apparently moved to the Chicago, Illinois, area and enrolled in a public school. While in the Chicago area, an IEP was designed for the student which placed [redacted] in a general education setting with ESE services provided to [redacted] by an ESE teacher inside the classroom, with a standard graduation curriculum.

3. Beginning in December 2015, the student's [redacted] made numerous requests for the student's high school reassignment for

both the 2015-2016 school year, and the upcoming 2016-2017 school year. These reassignment requests were all considered based on the student's last known IEP from Broward County, which placed the student in an ESE seat, not a general education seat.

4. At one point the [redacted] request that the student be assigned to a non-neighborhood school of choice for the 2016-2017 school year was accepted, but the reassignment was based on the last known Broward County IEP, which placed the student in an ESE seat rather than a general education seat. In other words, the reassignment was awarded because there was a seat available for an ESE placement at the school of choice.

5. On April 29, 2016, the student's [redacted] reappeared in Broward County, requesting that the student be placed in a non-neighborhood school of choice for the remainder of the 2015-2016 school year. The [redacted] presented the Chicago IEP, which placed the student in a general education setting.

6. Five business days later, the School Board sent the [redacted] two letters, notifying them that the 2016-2017 reassignment to the non-neighborhood school of choice was denied (and the student was placed on a waiting list) because there were no general education seats available for reassignments, and the ESE seat (which remained available) was not a proper seat for the student given [redacted] new Chicago IEP, which placed the student in a general education seat.

7. The second letter informed the [redacted] that for the same reasons described in the previous paragraph, the request for reassignment was denied for the remainder of the 2015-2016 school year, but that the student could enroll at [redacted] neighborhood school.

8. On or around May 6, 2016, the student's [redacted] contacted [redacted], the executive director of Exceptional Student Education and Special Services Department for the School Board. Understanding that the non-neighborhood school of choice was unavailable at that point, [redacted] offered the [redacted] three high schools for immediate enrollment: [redacted] [redacted] School, [redacted] [redacted] School, and the student's neighborhood school.

9. Although three different [redacted] schools were being offered to the student, the [redacted] elected not to enroll the student in high school.

10. On or around May 13, 2016, [redacted] issued a memorandum and called the student's [redacted] to notify both the non-neighborhood school of choice administration and the [redacted] that [redacted] was administratively placing the student in the non-neighborhood school of choice and the student was given permission to enroll in the non-neighborhood school of choice. [redacted] explained that [redacted] decision, which acted as an override of the decision to place the student in the waiting pool (as any other student in a similar position would be placed), was

being motivated by [redacted] concern that the [redacted] were not sending the student to any school, and [redacted] wanted to make a quick decision to get the student enrolled and attending [redacted] school.

11. As of May 16, 2016, the student attended the non-neighborhood [redacted] school of choice until the school year ended. During this time, the student's [redacted] IEP was implemented.

12. Although Petitioner argued that the [redacted] IEP was not properly implemented, Petitioner provided no credible evidence to establish this allegation. The School Board witnesses credibly testified that the non-neighborhood school of choice implemented the [redacted] IEP from May 16, 2016, through the end of the school year.

13. From April 29, 2016, through May 16, 2016, eleven school days passed. During that entire time, the student was permitted to enroll in [redacted] neighborhood school, and [redacted] was also offered two other [redacted] schools. [redacted] elected to keep the student at home, while they demanded the reassignment to a non-neighborhood school of choice, and voluntarily chose to not have their [redacted] receive an education for eleven school days. The School Board, during all of those eleven school days, offered the student FAPE and was prepared to admit the student and implement the [redacted] IEP.

14. Petitioner failed to establish that the School Board prevented the student from enrolling in [redacted] school; rather,

Petitioner succeeded in convincing the undersigned that Petitioner's [redacted] steadfastly refused the FAPE being offered by the School Board for eleven days.

15. After the [redacted] filed the request for a due process hearing, the School Board failed to convene a timely resolution session. The resolution session was held the week prior to the due process hearing; both parties participated and they were unable to resolve the dispute. Petitioner did not establish that this procedural violation impeded the student's right to FAPE; or significantly impeded the [redacted] opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or that it caused a deprivation of educational benefits.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. See § 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

17. Petitioner bears the burden of proof with respect to each of the issues raised herein. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

18. In enacting the Individuals with Disabilities Education Act (IDEA), Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services

designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on each agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Ala. State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

19. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. Bd. of Educ. v. Rowley, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

20. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

> [S]pecial education services that – (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

21. In Rowley, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. First, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Id. at 206-07. A procedural error does not automatically result in a denial of FAPE. G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to FAPE, significantly infringed the [redacted] opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 (2d Cir. 2012); Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 (2007).

22. The second step of the Rowley test, which is inapplicable here, examines whether the IEP developed pursuant to the IDEA is reasonably calculated to enable the student to receive educational benefits. 458 U.S. at 206-07 (1982).

23. Turning to the instant case, Petitioner's claim is that the student was denied FAPE because [redacted] was not permitted to enroll in the [redacted] non-neighborhood school of choice for eleven school days. The record is void of any evidence establishing that the School Board refused to enroll the student in school, or refused to provide FAPE to the student during the eleven days that the student did not attend school. During the entire time period, the School Board offered admission to the student and was ready and willing to implement the Chicago IEP. The [redacted] choice to not send their [redacted] to school does not amount to a denial of FAPE.

24. Also absent from the record is any credible evidence that the School Board failed to implement the [redacted] IEP once the student was enrolled in school.

25. Lastly, there was no evidence that the untimely resolution session impeded the student's right to FAPE, or significantly infringed the [redacted] opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Amended Request for Due Process Hearing is denied in all respects. All other requests for relief are also denied.[4/]

DONE AND ORDERED this 11th day of August, 2016, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2016.

ENDNOTES

[1/] Petitioner's request for the School Board or the undersigned to provide the parents with a free transcript of the partially held hearing in October 2015, is DENIED as that transcript is not relevant to the limited issues presented in this case.

[2/] The student's parent claimed to have no knowledge of the requirement that each party be responsible for obtaining witnesses, or of the need to subpoena witnesses should the need arise. Three separate Notices of Hearing were issued in this case prior to the hearing, all with the same language. It is worth noting that the student's parent exhibited, during the course of the extensive pre-hearing filings, an exceptional ability to file multiple legal pleadings, to navigate the

electronic filing system, and to properly cite the law relevant to the issues in this case. The student's parent was highly competent in [redacted] ability to represent the student, in all areas before and during the due process hearing--[redacted] claim that [redacted] did not have knowledge of the requirement to obtain witnesses is not found credible.

[3/] Due to this written statement made by the parents, additional security was present during the due process hearing. The undersigned notes that the student was present during the course of the hearing—[redacted] appeared calm during the entire hearing and was never called to testify.

[4/] Petitioner's parent also requested, both in writing and at the due process hearing, that the School Board reimburse Petitioner for the loss of the parents' wages while attending the due process hearing and while handling the preparation necessary to prepare for the due process hearing; transportation costs to and from the due process hearing, as well as all transportation costs incurred while preparing for the due process hearing; and lastly for the costs incurred in purchasing items necessary for the due process hearing.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

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