STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 17-6686EDM

ORANGE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH) in Orlando, Florida, on January 16, 2018.

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative
1642 North Volusia Avenue, Suite 201
Orange City, Florida 32763

For Respondent: Sarah Wallerstein Koren, Esquire
Orange County Public Schools
445 West Amelia Street
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STATEMENT OF THE ISSUE

Whether the student's behavior on November 26, 2017, was a manifestation of [redacted] disability.

PRELIMINARY STATEMENT

On December 8, 2017, Orange County Public Schools (Respondent) conducted a Manifestation Determination Review (MDR), at the conclusion of which the team determined that the student's November 26, 2017, act of misconduct--which consisted of threatening to "[redacted]" [redacted]--did not constitute a manifestation of [redacted] disability. The student's parents disagreed with the determination, and, on December 13, 2017, requested an expedited due process hearing. The request was forwarded to DOAH the following day. Given the number of school days in December and January, the hearing was scheduled for January 16 and 17, 2018.

At the hearing, which was completed on January 16, 2018, testimony was heard from seven witnesses: [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted]. Petitioner Exhibits 1B; 2B (pp. 15, 16, 25, 26, and 30-40); 2C (pp. 52-58, 60-62, and 63-70); 2D (pp. 97-125); 4; 5A; 5D; and 5E were admitted in evidence. Respondent offered no exhibits.

Both parties timely submitted Proposed Final Orders on January 29, 2018, which were reviewed and considered in preparation of this Final Order. The transcript of the due process hearing was not produced prior to the writing of this Final Order.

Unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations are to the current codifications. For stylistic convenience, the undersigned will use [redacted] pronouns in this Final Order when referring to the student. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to the student's actual gender.

FINDINGS OF FACT

1. The student in this case is a [redacted]-year-old [redacted] in [redacted] school, who at all times relevant to this proceeding, received exceptional student education (ESE) services pursuant to the [redacted] ([redacted]) category.

2. The student attended [redacted] school in a different state, where [redacted] underwent a psychological evaluation that was intended to evaluate whether [redacted] met the criteria for ESE services due to the educational disability of [redacted] ([redacted]), [redacted] ([redacted]), [redacted], [redacted] ([redacted]) or [redacted] and [redacted]. [redacted] had been found eligible for ESE services pursuant to a [redacted] and [redacted] when [redacted] was a [redacted], but was dismissed from ESE services in 2007.

3. The 2013 psychological evaluation revealed significant levels of [redacted], [redacted], and [redacted] across both home and school settings. These symptoms were found to have a significant impact on the student's [redacted] performance. Some

[redacted] behaviors included [redacted] types of behavior under [redacted] circumstances, as well as an inability to [redacted] or [redacted] with [redacted] and teachers. The school psychologist found that the student did not appear to meet the criteria for the [redacted] category; rather, it seemed that [redacted] had symptoms indicating [redacted] ([redacted]) or that [redacted] met the criteria for [redacted] eligibility.

4. The record evidence contains no information as to when the student's family moved to Florida, or whether the student was found to meet the criteria for any other eligibilities as a result of the 2013 psychological evaluation.

5. In August of 2017, the student started to see a licensed psychologist, [redacted] on a [redacted] basis.

6. On September 21, 2017, the student emailed [redacted] [redacted] teacher, stating:

> [redacted] was originally going to tell you right after class but because of the fact that more than one person was there and [redacted] hold this information tight because of how personal this is to [redacted], but to get straight to the point, [redacted] have mild [redacted], which by itself isn't a problem, BUT because it was only acknowledged recently (3 weeks ago), [redacted] never got the proper assistance for it ([redacted] once went to a [redacted] because [redacted] couldn't have [redacted] in general, as far as [redacted] aware [redacted] still have a [redacted]), which lead [sic] to [redacted] not [redacted], and which gave way to [redacted] ([redacted] having [redacted] isn't the only factor, the others have to do with [redacted] [redacted] giving [redacted] a lot of stress). [redacted] may have also saw how [redacted]'ve acted in class or

> seen [redacted] facial expressions during class, especially today because [redacted] was holding back a lot of tears due to how even if [redacted] think of something it'll just build more and more stress until [redacted] have to completely redirect [redacted] thinking elsewhere, which doesn't help [redacted] at all when some of what was [redacted] thinking about ties into what [redacted]'re talking about. [redacted] not sure what else to say due to how emotional this is getting for [redacted], so [redacted]'ll end it here, once again, this information isn't something [redacted] want to admit, but because it would help more for you to know than to keep it to [redacted], [redacted] think it becomes more relevant to share.

7. Despite the student's eligibility to receive ESE services since at least [redacted] school, the only Individualized Educational Plan (IEP) entered into evidence was the most recent one, dated October 6, 2017. It contains only one goal, in the area of [redacted], and notes that the student's behaviors did not [redacted] learning or the learning of others. The IEP addresses only [redacted]; it does not address behavior in any manner.

8. Five days after the IEP annual team meeting, the student emailed [redacted] teacher stating:

> So as a [sic] important side note/reminder [redacted] go to see a [redacted] every [redacted] after school. When [redacted] was talking to [redacted], [redacted] got very emotional, and in response to what [redacted] said ([redacted] going to say what [redacted] said then, but it had to do with [redacted] perception), [redacted] told [redacted] that [redacted] not only affects how [redacted] feel in general/about [redacted], but also how [redacted] think people perceive [redacted], and since [redacted] had [redacted] for [redacted] years, [redacted] also asked [redacted] the question (because "[redacted] required to ask [redacted]") "[redacted]?", [redacted] said "[redacted]". this [sic] was yesterday, and [redacted]

> parents know and [redacted] trying to figure out the best course of action, [redacted] said [redacted] have the requirements for getting [redacted], but [redacted] parents know a lot about [redacted] and [redacted], so don't know what [sic] going to happen to [redacted] but please don't be surprised if [redacted] [sic] don't say much for awhile in class.

9. Once again, on October 26, 2017, the student confided in [redacted] teacher through an email, stating:

> [redacted] just gonna get to the point on this, when it comes to [redacted], what seems to be [redacted] biggest source is how [redacted] have no [redacted], or [redacted], or someone [redacted] regularly talk to about the things [sic] [redacted] out daily, as [redacted] showed [redacted], [redacted] [sic] like an hourglass that more and more sand gets added to, but it stays on the top, never going down slowly and subtly, instead it can only go all at once when pressed on enough.

10. The [redacted] teacher, on the same day, replied as follows:

> [redacted] completely understand this. Being able to confide and vent to a trustworthy and understanding person is important. Do [redacted] want to talk to [redacted] in person or continue sharing via email?
>
> [redacted] also want [redacted] to know that even though [redacted] are speaking with a [redacted], [redacted] need to share this with our [redacted] coordinator due to the sensitive nature of the situation. [redacted] am professionally obligated to share this with the appropriate person. Our [redacted] coordinator here is so approachable and understanding. [redacted] think [redacted] is qualified to listen and help you.
>
> Of course, [redacted] can continue talking too.

11. The [redacted] teacher credibly testified at the hearing that [redacted] referred the student to the [redacted] coordinator, whose job was described at the hearing as being a counselor who talks to students who are experiencing difficult situations. No evidence was presented establishing that the [redacted] coordinator ever contacted the student.

12. A month later, on November 5, 2017, the student once again reached out to [redacted] [redacted] teacher, writing, in part:

> But every time [redacted] walk out of [redacted] room, [redacted] can't leave without [redacted] [redacted] to other people, to the point where if someone were to ask [redacted] "what do you want?" then unless [redacted] were to have a bodily need to [redacted] urging [redacted] to do something, all [redacted] can say is "[redacted] don't know" and that doesn't just mean "[redacted] unsure if [redacted] want to be X or Y" it means "[redacted] unsure if [redacted] want a [redacted]."

13. The student's teachers (through written statements) noted that [redacted] was [redacted] [redacted] classes, which include [redacted] [redacted] and [redacted] level classes, and that [redacted] is [redacted], [redacted] does not respond well to [redacted], [redacted] can become [redacted] and "[redacted]," [redacted] has difficulty staying [redacted], [redacted] is struggling with personal issues "that possibly affected" [redacted] [redacted] progress, [redacted] did not [redacted] with [redacted], and [redacted] exhibited [redacted] and [redacted].

14. On November 26, 2017, the student, while speaking with another [redacted] school student on the telephone, mentioned "[redacted]" the [redacted] by entering into a classroom full of

students and [redacted]. [redacted] friend notified law enforcement, who visited with the student that same day at [redacted] home. During the visit with law enforcement, the student confirmed that [redacted] had made the statements, and added that [redacted] had intense guilt over thoughts and dreams [redacted] has, which included [redacted] and [redacted] and [redacted] them. Based on these statements made to law enforcement, the officers determined that the student met the criteria found in section 394.463(2), Florida Statutes, also known as the Baker Act, took the student into custody, and transported [redacted] to the [redacted] ([redacted]).

15. Upon arriving at [redacted], the student underwent a [redacted] evaluation. As a result of the student's [redacted], [redacted], [redacted], [redacted], and [redacted], [redacted] was held at the facility. During the evaluation, the student described feeling [redacted], [redacted], and [redacted] over past [redacted]; [redacted] also sometimes felt like [redacted] did not want to [redacted].

16. On November 29, 2017, the school's threat assessment team gathered to evaluate the reported incident. The team documented that the student had shown a decline in [redacted] progress, had revealed [redacted] or [redacted] [redacted], appeared to be a [redacted], had revealed feelings of [redacted] and [redacted], and had made a verbal threat to act out violently. The team recommended that the [redacted] coordinator supervise the

student, and noted that "[redacted]" was a contributing factor of the threat.

17. On December 5, 2017, [redacted], after reviewing the police report and the [redacted] evaluation, wrote a letter on behalf of the student opining that the student's verbal threat had a direct correlation with [redacted] diagnosis of [redacted] with [redacted] and [redacted], and that the verbal threat was a manifestation of [redacted] disabilities. [redacted] explained at the hearing that [redacted] had reached [redacted] conclusion based on [redacted] experience with the student, and after a thorough review of the reports from the incident. [redacted] further noted that the student's [redacted] conditions substantially limit [redacted] ability to regulate [redacted] behavior and cause difficulty in [redacted]. These difficulties identified by [redacted] are reflected in the emails the student sent to [redacted] teacher, and in the written feedback given by most of [redacted] teachers.

18. The undersigned finds [redacted] testimony to be credible; and, to the extent that it conflicts with the opinions of the educators who testified, [redacted] testimony is more persuasive due to its comprehensive view of the student across all settings, coupled with the documentary evidence, largely authored by the student [redacted] and in the possession of the school, which aligns with [redacted] opinion.

19. On December 8, 2017, the MDR team met. [redacted], the Qualified Representative for the parents, attended the MDR meeting and notified [redacted], the Director of ESE Services, that [redacted] had sent [redacted] an email with attachments, which included the [redacted] [redacted] evaluation. At the hearing, [redacted] recalled receiving the email, but did not recall looking at the attachments. [redacted] admitted that the MDR team did not review the [redacted] [redacted] evaluation.

20. The evidence as a whole establishes that the student's verbal threat to "[redacted]" [redacted] [redacted] had a direct and substantial relationship to [redacted] disability.

CONCLUSIONS OF LAW

21. 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); Fla. Admin. Code R. 6A-6.03312(7).

22. Petitioner bears the burden of proof with respect to each of the issues raised herein. Schaffer v. Weast, 546 U.S. 49, 62 (2005)("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief"); Dep't of Educ., Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46724 (Aug. 14, 2006)(explaining that the parent bears the burden of proof in a

proceeding challenging a school district's manifestation determination).

23. 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 students with disabilities and to combat the exclusion of such students 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 the agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

24. Such requirements include limitations on a school district's ability to remove disabled students from their educational placements following a behavioral infraction. In particular, the IDEA provides that where, as in this case, a school district intends to place a disabled student in an [redacted] educational setting for a period of more than ten

school days, it must first determine that the student's behavior was not a manifestation of [redacted] or [redacted] disability. 20 U.S.C. § 1415(k)(1)(C).

25. In conducting this inquiry, the MDR team——comprising of the parents, relevant members of the student's IEP team, and the local educational agency——is obligated to:

> [R]eview all relevant information in the student's file, including the child's IEP, any teacher observations, **and any relevant information provided by the parents** to determine -- (I) if the conduct was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

20 U.S.C. § 1415(k)(1)(E)(i)(emphasis added).

26. Where the MDR team answers either of the above inquiries in the affirmative, the student's conduct shall be determined to be a manifestation of [redacted] or [redacted] disability and the student must be returned to the educational placement from which [redacted] or [redacted] was removed. 20 U.S.C. § 1415(k)(1)(F)(iii). Further, if no behavioral intervention plan (BIP) was in place at the time of the misconduct, the school district is obligated to "conduct a functional behavioral assessment, and implement a [BIP] for such child." 20 U.S.C. § 1415(k)(1)(F)(i).

27. In the instant case, Petitioner raises no challenge to the implementation of the IEP; as such, the sole issue for

determination is whether the conduct under review was caused by, or had a direct and substantial relationship to, the student's disability. The criteria to be considered in resolving this question shall be "broad and flexible," and must include an analysis of the "child's behavior as demonstrated across settings and across time." See Dep't of Educ., Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46720 (Aug. 14, 2006).

28. An analysis of the student's behavior based on the totality of the evidence presented at the hearing, and "across settings and time," reveals a history of significant [redacted], [redacted], [redacted], and [redacted] in [redacted], which were all seen and documented at school. The student's emails sent to [redacted] teacher reflect [redacted], as well. The evidence as a whole establishes that the student's verbal threat to "[redacted]" [redacted] had a direct and substantial relationship to [redacted] disability.

29. The MDR team should have reviewed all documentation the parents brought to the meeting, as is required. Contrary to the School Board's assertions at the hearing, the information presented to the MDR team is not limited to the educational records that had been collected before the conduct in question occurred. Nor is it limited to documentation received before the MDR meeting. The MDR team is obligated to consider all relevant

information, including information brought by the parents to the meeting. Best practice in the instant case would have been for the parents to provide hard copies of all relevant documentation to all MDR team members at the meeting; or, in the alternative, for the meeting to have been briefly postponed to allow team members to receive the parents' materials, which had been sent electronically.

ORDER

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

1. Petitioner's conduct of November 26, 2017, was a manifestation of the student's disability. The School Board shall immediately return the student to a traditional, non-alternative [redacted] school placement. Further, the School Board shall promptly conduct a functional behavioral assessment and implement a behavioral intervention plan.

2. All other requests for relief are denied.

DONE AND ORDERED this 30th day of January, 2018, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 30th day of January, 2018.

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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).