STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],

Petitioner,

vs. Case No. 14-4917E

HIGHLANDS COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

Administrative Law Judge, John D. C. Newton, II, of the Division of Administrative Hearings, conducted the final hearing in this case on November 18 and 19, 2014, in Sebring, Florida.

APPEARANCES

For Petitioner: [redacted], Qualified Representative
(Address of Record)

and

Parent of Petitioner
(Address of Record)

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

1. Does the [redacted], individual education plan (IEP) provide a free and appropriate public education (FAPE) for the student?

2. Is the student incorrectly classified as having an [redacted]?

3. Is a new [redacted] required in order to provide a FAPE for the student?

4. Do the IEP and the school's consequences for the student's disruptive behavior deny a FAPE?

PRELIMINARY STATEMENT

On October 16, 2014, the parent of Petitioner filed a Request for Due Process Hearing with the Highlands County School Board (Board). The Board referred the request to the Division of Administrative Hearings (Division) for conduct of a due process hearing. The Board filed a Motion to Dismiss or in the Alternative a Notice of Insufficiency. By Order dated November 6, 2014, the undersigned determined the due process hearing request sufficient to raise the issues identified above. Petitioner's Disagreement with ALJ's Interpretation of the Issues of the Due Process Hearing was filed on November 10, 2014.

The due process hearing request demanded information about the undersigned, including information about education, experience, and previous rulings. By Order dated November 6, 2014, the demand was treated as a motion to disqualify the undersigned and was denied.

At the start of the hearing, Petitioner's parent asked for [redacted] to participate as Petitioner's qualified

representative. Over the Board's repeated objections, the undersigned permitted [redacted] to serve as qualified representative. As requested by Petitioner's parent, Petitioner attended the hearing, and the proceeding was open to the public.

Petitioner offered the testimony of Petitioner, [redacted], and [redacted]. Petitioner's Exhibits 1 through 42, 44 through 68, and 72 were received into evidence.

The Board relied on the testimony of the foregoing witnesses. It also provided testimony from [redacted]. Without objections, Board Exhibits 1 through 39 were received into evidence. In addition, the undersigned took official notice, at the request of the Board, of the Final Order in P.G. v. Highlands County School Board, Case No. 14-2628E (Fla. DOAH Sept. 10, 2014).

The Board conducted an [redacted] assessment of Petitioner. It was not completed until the [redacted] before the final hearing began on [redacted]. At that time the assessment had not been reduced to writing in a report, and was not until the second day of the hearing when its author testified. When this information was revealed at the hearing, the undersigned offered the parties the opportunity to

abate the proceeding to consider the new information and determine if they could work together in the collaborative manner contemplated by the IDEA to develop a satisfactory IEP using the new information. See O.L. v. Miami-Dade Co. Sch'l Bd., 757 F.3d 1173 (11th Cir. 2014). The offer was declined.

The Transcript was filed on [redacted]. Specific extensions of time were granted to provide the parties and the undersigned time necessary for complete review of the Transcript, Exhibits, and relevant legal authorities. The parties timely filed proposed orders (PFOs). Petitioner's parent, not [redacted], filed Petitioner's PFO. The PFOs have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The parties to this proceeding were parties to DOAH Case No. 14-2628E, Final Order issued [redacted]. The undersigned took official notice of the Final Order in that case, as permitted by section 90.902, Florida Statutes (2014). The dispute in that proceeding involved whether the IEPs that the Board prepared for Petitioner in the 2013-2014 school year provided a FAPE and otherwise satisfied the requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, and corresponding Florida Statutes and Florida Administrative Code provisions. The Final Order determined that Petitioner's IEPs for [redacted],

[redacted], provided a FAPE to Petitioner. The [redacted], IEP issued just before the final day of the school year. The Final Order also directed the Board to offer Petitioner a re-evaluation in compliance with 34 C.F.R. § 300.304, and Florida Administrative Code Rule 6A-6.0331(5).

[redacted], IEP

2. The Board conducted a five-and-one-half hour IEP team meeting for Petitioner on [redacted]. Petitioner's parent and [redacted] advocate, [redacted], participated. The Board's representative, [redacted], and other school personnel attended, including Petitioner's exceptional student education (ESE) and regular teachers (for part of the time), and [redacted], a behavioral specialist.

3. The August IEP resulting from that meeting accurately identified Petitioner's goals as:

> Petitioner wants to attain better grades with each nine weeks for high school. Within 6 months of graduating high school [Petitioner] will attend college to pursue the field of information technology. [Petitioner] will continue to live at home during college. Within 2 months of graduating college, [Petitioner] will be working in a field dealing with computers and technology.

4. At the parent's request, the team implemented an informed notice and consent for re-evaluation with the following evaluations to be performed: [redacted]; [redacted]; [redacted]; [redacted];

[redacted]; [redacted] and [redacted], and [redacted] ([redacted]) evaluation.

5. The team reviewed Petitioner's earlier IEPs, data previously provided from the Massachusetts school Petitioner attended before moving to Highlands County, and Petitioner's records in Highlands County.

6. That review included 2011 scores on the [redacted] showing variations between the average areas, with administrator's notes indicating that the test performance might be lower than Petitioner's actual performance. Petitioner's results on the [redacted] from that time period were also in the average range.

7. The team also reviewed Petitioner's grades and [redacted] assessment scores.

8. The [redacted] scores showed Petitioner [redacted] in math and one or two points [redacted] being [redacted] in reading.

9. Because of the reading score, the team established a domain in the IEP for reading instruction.

10. Petitioner's parent expressed concern about Petitioner's behavior and requested an appropriate [redacted] based on a [redacted] and other evaluations. The Board agreed.

11. Since school had not been in session since the [redacted], IEP, the team adopted the previous [redacted] pending completion of the new [redacted]. Consequently, the new IEP continued to identify social and emotional behavior as factors to be served.

12. There is no evidence that circumstances changed materially over the summer break.

13. Petitioner's parent expressed concerns about counseling and a belief that Petitioner needed more counseling time. Petitioner's parent and [redacted] also insisted that Petitioner had [redacted] and should be evaluated for it.

14. The IEP identified a need for [redacted] strategies as a special factor for consideration.

15. The IEP provided for counseling service from [redacted], once a week for a minimum of 20 minutes per week to be provided on campus.

16. The IEP established the following program accommodations and modifications to occur daily on campus: provide the opportunity to paraphrase or repeat directions to show understanding; repeat, summarize, or clarify directions; provide information to staff about Petitioner's disability; extended time for test sessions; administer tests in individual or small group settings; monitor to determine if student is marking in the correct space and sequence; use verbal

encouragement; allow extra time to complete assignments (not allowed for FCAT); use note-taking options (not allowed for FCAT); implement an individualized behavior plan (not allowed for FCAT); and allow legitimate movement or short breaks between assignments (not allowed for FCAT).

17. The IEP placed Petitioner in regular classes with more than 79 percent of fellow students being non-ESE. It also provided for 100 percent of [redacted] participation settings to be with non-disabled persons.

18. In the domain of [redacted], the IEP concluded that Petitioner's [redacted] was that when interested in a particular academic subject, Petitioner is willing to help others and remain on task. But due to Petitioner's [redacted], Petitioner can be easily frustrated in class. The frustration may lead to off-task behavior with other students. The IEP identified as a priority "educational need support from the special education staff to guide [Petitioner] in expressing . . . frustrations in an appropriate manner."

19. To address the issues identified in the [redacted] domain, the IEP established measurable annual goal 2.2. It states: "In the school setting, [Petitioner] will communicate . . . need for assistance when frustrated or upset on 3 out of 5 occasions as evidenced by weekly counseling sessions."

20. The IEP established three short-term objectives to help Petitioner progress toward the goal.

21. Short-term objective 1 for goal 2.2 said Petitioner would identify two counseling goals to work on during counseling sessions. Short-term objective 2 was to "learn and practice 4 self-calming techniques." Short-term objective 3 was to "increase self-awareness during stressful situations and apply techniques."

22. All were to be measured by teacher observation every 4.5 weeks.

23. The IEP also established measurable annual goal 1.2 in the instruction domain/area. The student and the mental health counselor were responsible for the goal. It identified Petitioner's [redacted] as a [redacted] in [redacted] and remaining on task when interested in those subjects. It identified the effects of Petitioner's disability as becoming "[redacted] during times of reading and or writing."

24. The priority educational need for that goal stated: "[Petitioner] is capable of applying self-determination skills in the classroom to set . . . goals. [Petitioner] needs to recognize . . . strengths and weaknesses when determining these goals."

25. The IEP created the following measurable annual goal 1.2: "Given a reading passage, [Petitioner] will apply

previously learned reading strategies to answer questions from the text with 75% accuracy on 4 out of 5 attempts." The ESE teacher, ESE aide, regular education teacher, and the student are identified as responsible for the goal.

26. For this goal, the IEP established three short-term objectives. The first was to locate context clues when reading to determine the author's point of view. The second was to identify the main idea of the text and analyze its development. The third was to "re-visit the text several times when answering reading comprehension questions."

27. The IEP indicated that no services were needed for the following domains: functional/vocational evaluation; employment; instructional/academic area; related services; post-school adult living; daily living skills; and community experiences.

28. It recommended a standard diploma.

29. The IEP team also continued the existing behavioral improvement plan pending completion of the evaluations requested by Petitioner's parent.

30. The requested evaluations that the Board agreed to provide were [redacted].

31. Petitioner's parent signed this and other IEPs. The Board repeatedly seeks to infer that by signing the IEPs, the parent was agreeing that they were correct. That is factually and legally incorrect. The parent only signed to indicate [redacted] attendance and willingness to support Petitioner in school. The parent's participation and signature do not support any inference of agreement that an IEP is adequate.

32. The 2014-2015 school year began with Petitioner receiving the supports and services of the IEP and the behavioral plan developed on August 14, 2014.

33. The August 14, 2014, IEP was reasonably calculated to provide some educational benefit to Petitioner. It identified [redacted] disability, consistent with previous IEPs in Highlands County and in [redacted]. It provided supports and accommodations designed to help Petitioner manage the effects of [redacted] disability while still progressing educationally.

[redacted], IEP

34. The next IEP meeting was [redacted]. At that time, the Board had not completed all of the re-evaluation and tests approved during the [redacted] IEP, including the [redacted]. The [redacted] and [redacted] evaluations had been completed. Each of them determined that neither [redacted] was

necessary to provide Petitioner with a FAPE. By this time, Petitioner had already started this proceeding.

35. Like earlier IEPs, the [redacted] IEP identified Petitioner's "exceptionalities" as "[redacted]." IEP participants included: Petitioner's parent; Petitioner; [redacted], as the Board representative; a guidance counselor; an ESE teacher; and [redacted], a behavioral specialist. The plan was similar to the [redacted] IEP.

36. As in earlier meetings, Petitioner's parent insisted that Petitioner had [redacted] and should be evaluated for it.

37. The [redacted], IEP identified Petitioner's desired outcomes as attaining better grades each nine weeks of high school, attending college to study information technology within six months of high school graduation, living at home during college, and obtaining employment in the computer and technology field within two months of college graduation.

38. The IEP recorded Petitioner's parent's concerns about behaviors [redacted] believes are a manifestation of Petitioner's disability. The parent sought appropriate goals for counseling, a qualified counselor, and an "appropriate functional behavior plan to be followed based on an functional behavior assessment and other evaluations."

39. The IEP also reported that Petitioner scored level [redacted] in [redacted] tests and level [redacted] in [redacted] and on [redacted].

40. The IEP indicated that Petitioner needed "positive behavior intervention strategies." The IEP provided for a minimum of 20 minutes of counseling per week.

41. It included the earlier program accommodations and modifications of: allowing the opportunity to paraphrase or repeat directions to show understanding; having directions repeated, summarized, or clarified; advising staff of Petitioner's disability; allowing extended test-taking time; monitoring to determine if student is marking in the correct space and sequence; getting verbal encouragement; having extra time to complete assignments; getting frequent breaks during tests; using note-taking options; implementing an individualized behavior plan; allowing "legitimate movement" or short breaks between assignments; and allowing permission to go to the behavior classroom for cool-down periods as needed. These are all positive behavior intervention strategies.

42. To implement this last accommodation, the school provided Petitioner a laminated card that functioned as automatic permission to leave whatever activity Petitioner was engaged in and go to [redacted] classroom, the behavior intervention classroom. Within the classroom is a smaller room, to which

Petitioner could retreat. The room is austere, with plain carpet, no furnishings other than the single desk, no door, and cinderblock or tile walls.

43. Through questioning, Petitioner's representative repeatedly tried to cast this "cooling off" option as a punishment, rather than an accommodation. The facts do not fit the characterization despite the austerity of the room. The room was not a place where Petitioner was sent as punishment. It was an unattractive place. However, Petitioner could choose to go at any time if [redacted] needed a change of surroundings and some isolation to "cool off."

44. Petitioner exercised [redacted] right to use this cooling off option once. [redacted] did not choose to use it again. [redacted] was never required to use it.

45. The [redacted] IEP placed Petitioner in regular classes. It provided for participation with non-disabled students at lunch, during transition times, at physical education, in elective classes, and in academic classes.

46. The [redacted] IEP included "Measurable Annual Goals and Short-Term Instructional Objectives or Benchmarks."

47. In the "[redacted]" domain it stated:

> [Petitioner's] [redacted] impairment affects . . . ability to properly [redacted] . . . [redacted]; [Petitioner] also struggles to [redacted] . . . [redacted] and has difficulty asking for help when struggling in

> any class academically. Several teachers have indicated problems with work completion. This normally happens when the task is undesired or [Petitioner] feels it's a waste of . . . time. [Petitioner] has stated on several occasions that [Petitioner] does not like school and does not want to be here. [Petitioner] has also stated that [Petitioner] would prefer to attend the [redacted] and work in the [redacted]. [Petitioner] is permitted to go to the behavior classroom for cool down periods of 15-20 minutes at a time. Self-determination skills and strategies will be reviewed with [Petitioner] in order for [Petitioner] to [self-]advocate.

48. This section identifies Petitioner's [redacted] as excelling in areas which Petitioner finds interesting or chooses to be compliant in. Petitioner also socialized well with peers in un-structured environments.

49. The IEP identifies the effects of Petitioner's disability as not liking to complete "non-preferred" tasks, which leads to "refusal or non-communicative responses."

50. One resulting "Priority Educational Need" identified in the IEP states that Petitioner "requires support from the special and general education staff to guide . . . in effectively communicating in the appropriate manner when asked to complete non-preferred task."

51. The resulting measurable annual goal 2.2 for serving the identified need was that Petitioner communicates the need for assistance when frustrated or upset on three-out-of-five

occasions "as evidenced by weekly counseling sessions." The implementing short-term objectives were: increasing self-awareness under stress and "apply techniques", Petitioner utilizing self-advocacy strategies; and Petitioner learning and practicing three self-calming techniques.

52. The second priority educational need states that one of Petitioner's strengths is a strong interest in math and science and remaining on task when interested.

53. One effect of Petitioner's disability is that Petitioner "can become easily frustrated during times of reading and or writing."

54. The concomitant educational need is that Petitioner must become capable of "applying self-determination skills in the classroom" and need to recognize 'strengths and weaknesses' when determining these goals."

55. The IEP establishes three short-term objectives for this priority educational need. The first is use of "word attack strategies to locate specific words, phrases, [and] word patterns" and to recognize unknown vocabulary.

56. The second is to review text by skimming, scanning, and careful reading to locate information and clarify meaning.

57. The third is to "identify sequence of events, main ideas, and details of facts in literary and informational text."

58. The Board also developed a new functional behavior assessment and intervention plan for Petitioner. It included the personnel to be involved in assessment and intervention, the targeted behaviors, the intervention goals, the assessment methods, and a behavior intervention plan summary.

59. The behavior plan included the opportunities described above for breaks, the ability to remove to a different location, and assistance with tasks and instructions.

60. The [redacted], IEP is reasonably calculated to provide some educational benefit to Petitioner. It identified [redacted] disability, consistent with previous IEPs in Highlands County and in [redacted]. It provides supports and accommodations designed to help Petitioner manage the effects of [redacted] disability while still progressing educationally. Petitioner's first semester grades demonstrate academic progress: [redacted] (Resp. Ex 33).

61. The accompanying behavior plan is likewise calculated to support providing a FAPE. In addition, the school prepared and distributed to Petitioner's teachers a summary of the behavior intervention strategies. It includes use of the pass to the cooling off room, sitting to calm, allowing time for a

preferred activity, and calling Petitioner's [redacted]. (Resp. Ex. 26)

[redacted]

62. The core of this continuing dispute is the unwavering belief of Petitioner's parent that Petitioner's disability is [redacted] or at least some disorder on the [redacted]. The competent, persuasive evidence admitted at the hearing does not support this belief.

63. The historical records and reports do not identify Petitioner as having [redacted] or being on the [redacted]. The [redacted], Psy.D., from [redacted] dated [redacted], mentions [redacted]. (Pet. Ex. 11). That document, which is also hearsay, summarizes a number of other historical records and test results. On page three, it states:

> A [redacted] assessment by [redacted] found for: a variety of behavioral issues typical with students on the [redacted]. It was noted that [Petitioner] may have a [redacted] for others and [redacted] to take responsibility for [Petitioner's] own behavior. [Petitioner's] behavior seemed less responsive to processing information and modifying [Petitioner's] behavior in terms of what is right and wrong.

64. This statement, because it is hearsay reporting hearsay, because there is no information about [redacted] credentials, and because it is old, is not sufficient to prove

Petitioner has a disorder on the [redacted] or to corroborate the information described below.

65. Petitioner's parent presented a completed Board form dated [redacted], titled, "Physician's Medical Examination and Recommendation for Placement of [redacted]." (Pet. Ex. 44). On the section of the form labeled, "Diagnosis and Description of Student's Impairment and any medical implications for instruction or effect the impairment will have on the student's academic performance," the completing physician wrote "[redacted]" and nothing more. The "[redacted]" section reads "[redacted]." For the "[redacted]" and "[redacted]" sections, the physician wrote "[redacted]." The form was signed and presumably completed, by [redacted], M.D., of [redacted], P.A.

66. Petitioner's parent presented the same form, this one completed by [redacted], Ph.D., dated [redacted]. (Pet. Ex. 45). For the "[redacted]" section, the form states "[redacted] without [redacted]." The completed "[redacted]" section states: "[redacted]." The section titled, "[redacted]" reads: "There are no medications to

treat [redacted] per se. Should [Petitioner] ever evidence aggressiveness in the academic setting [Petitioner's] mother may wish to consult with a pediatric psychiatrist about possible treatment with a [redacted]."

67. The completed forms are hearsay, out-of-court statements by someone who did not testify. § 90.801, Fla. Stat. (2014). Consequently, the Board did not have an opportunity to examine the authors, determine their qualifications, or learn the basis for the statements. The forms are not records of information provided for purposes of medical diagnosis or treatment describing medical history, symptoms, pain, or sensations. Nor are they a record of a regularly conducted business activity. There is also no sufficiently specific evidence of [redacted] or [redacted] training or experience, including in the subjects of [redacted] and [redacted]. There is no evidence showing the facts or data [redacted] or [redacted] relied on or the principles and methods applied to result in the answers provided on the forms. For these reasons, the forms are not subject to the hearsay exceptions created by sections 90.803(4) or (6).

68. In addition, the brevity of the information provided, the lack of information about [redacted] and [redacted], and the information available to them means that the information on the forms is not the sort commonly relied upon by reasonably prudent

persons in the conduct of their affairs. Consequently, the forms are not sufficiently persuasive for fact-finding under section 120.569(2)(g), Florida Statutes (2014).

69. In contrast, the Board presented credible, detailed testimony from school psychologist, [redacted]. [redacted] has extensive experience as a school psychologist, is certified as a Florida school psychologist, and is certified by the National Association of School Psychologists, and has a post-master's degree specialist degree. [redacted] has worked as a regular education and a special education teacher. [redacted] holds bachelor degrees in education and psychology.

70. [redacted] led a team that conducted a thorough examination to evaluate Petitioner for [redacted]. The team was assembled according to an existing [redacted] protocol developed by the Florida Department of Education. [redacted] was trained in the protocol. [redacted] has over ten years of experience with the process.

71. The team members were: [redacted]; [redacted], the school district's behavior specialist; [redacted], the [redacted] scale disorder program specialist; [redacted], the occupational therapist; and [redacted], the speech and language pathologist. The team followed an established and careful process that included obtaining, compiling, and reviewing a significant amount of data. It also included a 90-minute interview of Petitioner by [redacted] observed by all team members.

72. The data included [redacted] reading scale questionnaires completed by five of Petitioner's high school teachers and Petitioner's parent. They also included a [redacted] evaluation.

73. The data included the [redacted] evaluation of [redacted] from middle school at the parent's request. It was completed by Petitioner's middle school language arts teacher and an American history teacher.

74. The data also included an [redacted] assessment. That assessment includes evaluation of [redacted]. It, too, was from the middle school years.

75. In addition, the team reviewed Petitioner's Highlands County school record, including [redacted] disciplinary record.

76. After this preparation, [redacted] conducted a 90-minute assessment interview of Petitioner with the other team members observing, but not present in the room. The interview involved a great deal of communication between [redacted] and Petitioner, as well as several exercises for Petitioner to complete.

77. One example of the exercises is one in which [redacted] gave Petitioner pieces of a picture design and asked [redacted] to put the pieces together. The pieces [redacted] gave Petitioner were not sufficient to complete the picture. The purpose of the exercise is to see how the subject reacts to not having enough

pieces and to see if and how the subject asks for additional pieces.

78. Petitioner did not behave abnormally. [redacted] asked directly for what [redacted] needed, looking [redacted] in the eye. This was true for several other exercises designed to evaluate the subject's communication skills, composure, and ability to work with others.

79. For instance, Petitioner completed a gaming exercise where the subject is given several toys, such as soldiers and dinosaurs, and asked to create a commercial. Petitioner created a commercial involving the soldiers and dinosaurs attending a funeral. When [redacted] asked if [redacted] could join in the commercial, [redacted] was welcomed.

80. Petitioner was communicative during the exercise. During discussions of behavior in school, including listening to music when it was not allowed, Petitioner made it clear that Petitioner thought the rule was stupid, and Petitioner chose not to follow it.

81. Another part of the interview involved questions and discussions about Petitioner's friends and relationships. That portion indicated Petitioner was engaged in social relationships and could discuss feelings and emotions.

82. After the interview was over, team members independently coded their impression on a scale of zero (nothing

atypical) to three (significantly abnormal). Then the team met to review each other's coding and discuss the impressions with [redacted].

83. The team reasonably concluded that Petitioner was not on the [redacted]. It further reasonably concluded that Petitioner is correctly classified as having an [redacted].

84. The [redacted] process is a recognized, thoughtful, and reasonable way to evaluate whether a student is on the [redacted]. The preponderance of the evidence proves Petitioner is correctly classified as having an [redacted].

85. There is also no evidence indicating that if Petitioner was on the [redacted] the supports and services needed would be different than those established by the [redacted] IEP.

Discipline in the [redacted] School Year

86. As of the hearing date, Petitioner had not received any out-of-school suspensions for [redacted] behaviors.

87. On [redacted], Petitioner received a referral for improper use of the school intranet to message another student. For this offense, the school imposed a warning.

88. On [redacted], Petitioner received a lunch period detention for excessive talking after repeated requests to stop. Petitioner refused to sign the detention form. The

Petitioner did not exercise [redacted] right to take a "time out." School staff met with the parents about this infraction.

89. On [redacted], Petitioner was referred for discipline because Petitioner refused to remove [redacted] ear buds when asked by [redacted]. Petitioner also refused to reveal Petitioner's name when [redacted] asked. There was no persuasive evidence to establish that Petitioner's behavior was the likely result of frustration or an [redacted]. In addition, listening to music is forbidden by school rules. And it is not identified on Petitioner's IEPs as a suggested or approved mechanism for dealing with frustration during the day.

90. For this disciplinary offense Petitioner received one day of Individualized Study Services (ISS). ISS removes a student from the class room but keeps the student in school in a separate room with other students overseen by a teacher to assist with school work. While serving ISS students receive assignments and class work and are expected to complete them.

91. The morning of [redacted], Petitioner was in the school courtyard wearing a horse head mask. [redacted] refused to stop walking or to respond to requests from [redacted] to stop and remove the mask. [redacted] also refused to sign the referral form. For this Petitioner received three days of ISS.

92. Having a disability does not excuse a student from complying with school rules. All of the actions for which

Petitioner was disciplined violated the school's Code of Student Conduct. In addition there is no persuasive evidence that these actions were related to Petitioner's disability rather than a conscious choice, as Petitioner described in the interview with [redacted], to disregard dis-liked rules. There is also no persuasive evidence that the disciplines interfered with Petitioner's education.

CONCLUSIONS OF LAW

93. This case arises under the IDEA, 20 U.S.C. § 1400, and corresponding Florida Statutes and Florida Administrative Code provisions.

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

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

96. The purpose of the IDEA is to offer students with disabilities a public education on appropriate terms. Schools must provide an IEP that is likely to produce progress, not regression, and provides a greater opportunity than trivial

advancement. S.F. v. N.Y. City Dep't of Educ., 2011 U.S. Dist. LEXIS 129672; 57 IDELR 287; 111 LRP 70544 (S.D.N.Y. 2011). A school must provide an appropriate education reasonably calculated to allow the student to receive a meaningful educational benefit. Id.

97. Congress enacted the IDEA:

> (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected;
>
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;
>
> (2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;
>
> (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

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

20 U.S.C. § 1400(d). The IDEA requires all states to provide resident children with disabilities a FAPE designed to meet their unique needs. 20 U.S.C. § 1412(a)(1). The opinion in Maynard v. Dist. of Columbia, 701 F. Supp. 2d 116, 121 (U.S. D.C. 2010) explains:

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

> Id. § 1414(d)(1)(B) (defining an IEP Team). Because the IEP must be "tailored to the unique needs" of each child, Bd. of Educ. v. Rowley, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities, and must be amended if its objectives are not met. See 20 U.S.C. §§ 1414(b)-(d). To be sufficient to confer a FAPE upon a given child, an IEP must be "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207. Each local educational agency is required to have an IEP in effect for each child with a disability in the agency's jurisdiction at the beginning of each school year. 20 U.S.C. § 1414(d)(2)(A).

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

98. The legal analysis of the validity of an IEP has two parts. The first is whether the school complied with the procedures established by the IDEA and implementing state statutes and rules. The second is whether the school system created an IEP reasonably calculated to provide the child an educational benefit. Bd. of Educ., Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690, 712 (1982); Weiss v. Sch. Bd. Hillsborough Co., 141 F.3d 990 (11th Cir. 1998). In this case, there is no procedural issue.

[redacted], IEP

99. The Board created an IEP that recognized the educational effects of Petitioner's disability. The IEP provided accommodations and supports for Petitioner. Not surprisingly, or unreasonably, since school had not been in session since [redacted], the [redacted] IEP was substantially similar to the [redacted], IEP found sufficient in Case No. 14-2628E. The determination that the [redacted] IEP was adequate is binding here. See Mobil Oil Co. v. Shevin, 354 So. 2d 372 (Fla. 1977).

100. The Board's agreement to conduct all requested evaluations was also reasonable and in compliance with the IDEA.

[redacted] IEP

101. Like the [redacted] IEP, the [redacted] IEP and behavioral plan, created only 72 days later, recognized the educational effects of Petitioner's disability. The IEP provided accommodations and supports for Petitioner. That IEP also proved a FAPE in compliance with the IDEA. It was not informed by the information to be collected from all of the evaluations requested because the Board had not yet completed all the evaluations.

102. In any event, the education offered by both IEPs provides what the IDEA requires--a plan reasonably calculated to provide some educational benefit. Devine v. Indian River Cnty. Sch. Bd., supra. The IDEA does not require schools to provide the best possible education at public expense or to maximize a

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

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

Discipline

104. A school may remove a student with a disability who violates a student code of conduct from the student's educational placement for less than ten days. 34 C.F.R. § 300.530(b). Here the evidence proves that the individualized study services discipline maintained the essential parts of Petitioner's educational placement including class work, teacher supervision,

teacher assistance, and home work. Consequently it was not a removal from placement. Had it been a removal from placement, it would still have been lawful since the cumulative number of days was less than ten.

Classification

105. In both IEPs the Board classifies Petitioner's exceptionality as [redacted]. The Petitioner has not presented persuasive, competent evidence proving this classification is incorrect. In fact, the Board's evidence, including the comprehensive [redacted] evaluation procedure, persuasively established that the classification is correct and that classification of Petitioner on the [redacted] would be incorrect. Furthermore, the label applied to student's disability does not control. The services are what matters. Morgan v. Penn Manor Sch. Dist., 115 LRP 1997 (E.D. PA Jan. 14, 2015).

New [redacted]

106. The Board has provided the assessment and had agreed to provide it before the Petitioner filed the Request for Due Process Hearing.

Consequences for Disruptive Behavior

107. The Petitioner did not prove that the consequences imposed upon Petitioner for disruptive behavior denied a FAPE.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner has not proven that Respondent, Highlands County School Board, denied Petitioner a free and appropriate public education as required by the IDEA, 20 U.S.C. § 1400, and corresponding Florida Statutes and Florida Administrative Code provisions.

DONE AND ORDERED this 20th day of February, 2015, in Tallahassee, Leon County, Florida.

S

JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 20th day of February, 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 (2011), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

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