STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 18-0233EDM

PALM BEACH COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, an expedited due process hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on February 2, 2018, via video-teleconference with sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Erica Leigh Sonn, Esquire
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For Respondent: Laura E. Pincus, Esquire
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STATEMENT OF THE ISSUES

Whether the removal of the student to an alternative educational setting was improper, and whether maintaining the

student at a comprehensive [redacted] school is substantially likely to result in [redacted].

PRELIMINARY STATEMENT

On [redacted], Petitioner filed a request for a due process hearing, alleging procedural and substantive violations that occurred when the student's placement was changed. On [redacted], the School Board filed a request for an expedited hearing pursuant to 34 C.F.R. § 300.532, based on its belief that maintaining the student's placement was substantially likely to result in [redacted]. The expedited due process hearing was scheduled, after consultation with the parties, for [redacted].

At the hearing, testimony was heard from the student's mother; the student's grandmother; [redacted], Exceptional Student Education (ESE) Coordinator; [redacted], Support Services Liason for School B; [redacted], Instructional Support Team Leader; [redacted], Principal of School B; and [redacted], Regional ESE Coordinator. Joint Exhibits 1 through 13 and Petitioner Exhibit 1 were admitted into the record.

The transcript of the hearing was not prepared prior to the writing of this Final Order. The parties filed proposed final orders on [redacted]. 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 is a [redacted], who is eligible for ESE services under the category of [redacted] ([redacted]). [redacted] has been diagnosed with [redacted] ([redacted]). [redacted] receives direct instruction in [redacted], [redacted], and [redacted] in an [redacted] classroom.

2. The student was a [redacted] grader attending School A, which is a comprehensive [redacted] school, and had never received any type of [redacted] prior to [redacted], [redacted].

3. On [redacted], [redacted], the student was [redacted] for an incident which involved an [redacted] and [redacted]. The [redacted] of the incident was another student at School A. This alleged incident did not occur on school property or during a school function.

4. A couple of days before [redacted], [redacted], the school staff contacted the student's mother to coordinate a time for a manifestation determination meeting and an IEP team meeting, with the intent to discuss possible changes to the IEP. The student's mother credibly testified that [redacted] was surprised at the shortened time frame, and [redacted] asked whether [redacted] could bring guests, including the student's [redacted]. Ultimately, the

student's mother indicated that [redacted] could attend a meeting on [redacted].

5. On [redacted], the IEP team met, and the student joined them. The student's teachers had been asked to provide feedback; none of them expressed concerns over the student being dangerous; in fact, the only concerns were that [redacted] sometimes "[redacted]" or did not [redacted]. No teacher reported feeling threatened in any manner by the student. The team found that the incident was not a manifestation of the student's disability, and discussed possible placements for the student.

6. The student asked what options were available to [redacted] in terms of alternative schools, and [redacted] was told that the options included [redacted], home schooling, virtual school, charter schools, or teleclass; however, in those settings, the student was told [redacted] would not receive ESE services. Another comprehensive [redacted] school was not offered as an option.

7. Based solely on the nature of the [redacted], the School Board members of the IEP team decided that the student should be placed at [redacted], which is a much smaller [redacted] school. [redacted] has one point of entry, where the students go through [redacted] prior to entry into the building ([redacted], a [redacted], and a [redacted]); [redacted] has [redacted] classrooms where the student would receive the services required on [redacted] individualized education plan (IEP).

8. At the meeting, the student's mother signed a form titled "Eligibility/Consent for Placement," indicating that [redacted] agreed with the proposed placement at [redacted]. The student's mother testified that [redacted] did not understand what [redacted] was signing, and that [redacted] believed [redacted] had more time to make a decision regarding which school [redacted] [redacted] would attend. The undersigned does not find the mother's testimony in this regard to be credible. School Board members of the IEP team credibly testified that the placement was explained at the meeting, which was attended by the mother, the student's grandmother, and two other family members (as well as the student).

9. In fact, the student's mother toured [redacted] and left the impression with the staff at [redacted] that the student would soon be enrolling. The student's [redacted] had attended [redacted]; therefore, the family was actually revisiting the school.

10. Despite signing the consent form, the parent never enrolled the student at [redacted], or at any other school.

11. On [redacted] [redacted], [redacted], the student was [redacted] with [redacted] [redacted] and [redacted], and was held secure. On [redacted] [redacted], [redacted], a circuit judge released the student from custody and ordered the student to return to school as long as it was not the same school the [redacted] attended, which was School A.

12. On [redacted] [redacted], [redacted], the student's attorney emailed the School Board, revoking the consent that had been given by the

student's mother for placement at [redacted]; the email also stated that the student would be enrolling at [redacted], on a temporary basis, while the matter could be resolved.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rules 6A-6.03312(1)(c) and 6A-6.03311(9)(u).

14. 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).

15. 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 alternative 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 his or her disability. 20 U.S.C. § 1415(k)(1)(C).

School Board's Request for a Hearing Pursuant to 34 C.F.R. § 300.532

16. Here, the School Board found that the behavior was not a manifestation of the student's disability and the IEP team has placed the student in an alternative school based solely on the nature of an [redacted]; the IEP team is of the belief that the student is substantially likely to [redacted], seeking to maintain this alternative placement pursuant to 34 C.F.R. § 300.532, which states:

> (a) General. The parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).

> (b) Authority of hearing officer.
>
> (1) A hearing officer under § 300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.
>
> (2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—
>
> (i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability; or
>
> (ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.
>
> (3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

17. As the party seeking relief, the School Board bears the burden of proof. See Schaffer v. Weast, 546 U.S. 49, 62 (2005). The School Board must establish, by a preponderance of the evidence, that maintaining the student at School A is substantially likely to result in [redacted] [redacted] or [redacted].

18. A hearing officer needs to consider the appropriateness of the alternative placement and whether maintaining the current

placement is substantially likely to result in an [redacted]. See 71 Fed. Reg. 46,724 (2006) (August 14, 2006)(explaining that a hearing officer must have the ability to conduct the hearing and render and write the decision exercising [redacted] own judgment in the context of all the factors involved in an individual case).

19. Here, the IEP team based its belief that the student posed a substantial risk of [redacted] on one isolated incident that did not occur on school premises or at a school function, and resulted in an [redacted]. This student had no prior discipline referrals, and no school staff expressed concerns about [redacted] behavior at School A.

20. Based on the totality of the evidence, the undersigned is not convinced that it is substantially likely that the student will [redacted] if [redacted] remains at a comprehensive [redacted] school; therefore, the student's placement at [redacted] is inappropriate. The School Board failed to establish, by a preponderance of the evidence, that this student is substantially likely to [redacted].

21. Having failed to meet its burden of proof, the School Board is ordered to immediately return the student to a comprehensive [redacted] school; and in doing so, the School Board should comply with the Circuit Judge's Order and offer the student placement at a comprehensive [redacted] school that can implement the student's IEP.

Petitioner's Procedural and Substantive Claims

22. Petitioner initially filed a request for a due process hearing raising claims of procedural and substantive violations that occurred at or before the IEP meeting. Specifically, Petitioner alleges that proper notice was not provided to the student's mother before the IEP team meeting, that the actual notice of the meeting was insufficient, that the IEP had predetermined the student's placement at [redacted], and that placement at [redacted] is not the least restrictive environment for the student.

23. As to these issues, Petitioner bears the burden of proof. Schaffer, 546 U.S. at 62.

24. 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).

25. 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 a free, appropriate public education (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 a 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 a FAPE, significantly infringed the parents' 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).

26. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with a 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).

27. The central mechanism by which the IDEA ensures a FAPE for each child is the development and implementation of an IEP. 20 U.S.C. § 1401(9)(D); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985)("The modus operandi of the [IDEA] is the . . . IEP.")(internal quotation marks omitted). The IEP must be developed in accordance with the procedures laid out in the IDEA, and must be reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. Endrew F. v. Douglas Cty. Sch. Bd., 137 S. Ct. 988, 991 (2017). School districts must also ensure that, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." 20 U.S.C. § 1412(a)(5)(A). In other words, the school district must endeavor to educate each disabled child in the least restrictive environment. A.K. v. Gwinnett Cnty. Sch. Dist., 556 Fed. Appx. 790, 792 (11th Cir. 2014).

28. Lastly, IEP teams are required to conduct meetings where parents must be partners in the decision making, including the issue of placement. Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. See H.B. v. Las Virgenes Unified Sch. Dist., 239 Fed. App'x 342, 344 (9th Cir. 2007)(explaining that in finding predetermination, a

trier of fact must include findings as to the school district's predetermined plan and make findings as to the school district's unwillingness to consider other options); W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23, Missoula, Mont., 960 F.2d 1479, 1483 (9th Cir. 1992)(finding that the school district independently developed a proposed IEP that would place the student in a predetermined program, where at the IEP meeting, no alternatives were considered).

29. Turning to the procedural challenges brought by Petitioner, that is, the adequacy of the notice provided to the student's mother of the IEP meeting, and the adequacy of the actual notice, the undersigned, guided by the above stated principles, finds no procedural violation that resulted in a denial of a FAPE. First, as to the notice of the meeting, the student's mother received written and verbal notice of the IEP meeting, and was able to attend and bring guests to the meeting.

30. As to the actual written notice, although it could have been more specific and stated that placement at an alternative school would be contemplated, the totality of the evidence establishes that the student's mother knew that placement was at issue, and that the student might be moved to another school. Thus, even if the notice of the meeting was deficient, and even if the actual written notice was deficient, the student's mother's right to meaningful participation was not compromised.

31. As to the claim that the IEP team predetermined the student's placement, the undersigned is also not persuaded. Different placement options were discussed at the meeting, and although another comprehensive [redacted] school was not offered, the totality of the evidence establishes that predetermination did not occur.

32. Lastly, the undersigned agrees that the recommended placement at [redacted] is not the least restrictive environment for the student; that is, the evidence establishes that there was no educational reason for the change of placement. The sole reason articulated for placing the student in a more restrictive environment was an [redacted], which was not on school premises and did not occur at a school function.

33. Petitioner is not entitled to compensatory education because Petitioner agreed to attend [redacted] during the pendency of this proceeding and chose not to enroll.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the student be returned to a comprehensive [redacted] school that can implement the student's IEP. The request for compensatory education is DENIED.

DONE AND ORDERED this 16th day of February, 2018, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
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this 16th day of February, 2018.

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).