

Florida School For The Deaf and Blind
No. 07-5617E
Initiated By: Parent
Hearing Officer: P. Michael Ruff
Date Of Final Order: March 24, 2009

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 07-5617E
)
FLORIDA SCHOOL FOR THE DEAF AND)
THE BLIND,)
)
Respondent.)
_____)

FINAL ORDER

This cause came on for a duly-noticed final hearing before P. Michael Ruff, the designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted on July 30, 31, and August 1, as well as October 28, 2008, in St. Augustine, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Doris L. Raskin, Esquire
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For Respondent: Charles L. Weatherly, Esquire
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STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Florida School for the Deaf and Blind (FSDB) correctly determined that the Petitioner, [REDACTED] was ineligible for continued enrollment at FSDB because of being a danger to self or to others and a disruption to the educational process. The Petitioner also contends that FSDB is the only appropriate placement where a Free Appropriate Public Education (FAPE) can be provided to [REDACTED] and states that it must be determined what services [REDACTED] requires in order to attain a FAPE. If the proposed dis-enrollment constitutes a change of placement that triggers procedural safeguards, it must be determined whether a manifestation determination should have been made.

PRELIMINARY STATEMENT

This cause arose upon the filing of a due-process hearing request by the Petitioner, [REDACTED]. The Petitioner challenged the FSDB's determination that [REDACTED] was no longer eligible for continued enrollment at FSDB pursuant to the FSDB's enrollment eligibility rule, referenced below. The due-process complaint was filed, transmitted to the undersigned Administrative Law Judge, a pre-hearing conference was conducted and the resolution process commenced between the Petitioner and the Respondent. The parties extended/waived the 45-day period for resolution of this dispute. The child [REDACTED] has continued to be enrolled at

FSDB throughout this proceeding under "stay put" status.

A Motion to Dismiss the Petition was filed alleging failure to state a claim arising under 20 U.S.C. Section 1415(b)(7) ("the IDEA") and for alleging issues that were non-jurisdictional under the IDEA or under Section 1003.57, Florida Statutes (2007), such as a claim involving alleged wrongful referral of the Petitioner pursuant to Florida's Baker Act, Section 394.463, Florida Statutes (2007), and an attempted civil rights claim under 7 U.S.C. Section 1983. The motion to dismiss was granted concerning claims not arising under the IDEA or Section 1003.57, Florida Statutes (2007). The Petitioner was given leave to amend the due process complaint and an amended complaint was filed on January 29, 2008.

A motion to dismiss the amended complaint was filed based upon alleged insufficiency in meeting the requirements for specificity of claims set forth in the IDEA (see also 34 C.F.R. Section 300.508). After entertaining argument on the motion and the response thereto, a second order dismissing the amended due process complaint was entered, but once again the Petitioner was given leave to make amendment. Ultimately, the second amended complaint was filed by the Petitioner on March 24, 2008, advancing, in essence, the issues referenced above. Thus this case is proceeding under the second amended complaint, which was the third complaint for due process filed in this proceeding.

Thereafter, the parties engaged in extensive discovery efforts. A number of disputes arose through the discovery process which had to be resolved. Perhaps the most salient of the discovery-related disputes involved the parties' engagement in multi-month litigation focused on the issue of the discovery of the Petitioner's psychotherapy records. These were the subject of disputed discovery requests and resultant motions to compel by the Respondent, countered by a Motion for Protective Order by the Petitioner. Ultimately, after motions and response time elapsed, and after conduct of oral argument concerning the matter, the undersigned ruled, by Order of May 1, 2008, that the Petitioner had waived the psychotherapist-patient privilege with regard to her psychotherapy records, by placing the matter of [REDACTED] emotional or mental health at issue. Consequently, that Order required disclosure to the Respondent of the psychotherapy-patient records, subject to conditions and restrictions referenced in that Order, chiefly involving continued protection of those records to the extent they concerned financial matters regarding the Petitioner's family, or psychotherapist-patient privileged matters related to the Petitioner's family members. The Petitioner subsequently filed a Petition for Writ of Certiorari to the First District Court of Appeal. That Petition was denied on the merits by Order of the Court entered July 17, 2008. (First District Court of Appeal

Per Curiam Opinion, July 17, 2008).

In the meantime, after several attempts to set the matter for hearing on the merits, the hearing had been scheduled, by agreement of the parties for July 30, 31, and August 1, 2008.

The hearing was therefore commenced on July 30. Testimony and evidence was taken for three days, July 30, 31, and August 1, 2008. The hearing could not be finished on August 1, 2008, and therefore had to be continued. The undersigned attempted, through conferring with the parties, to reschedule the remaining portion of the hearing for August or September 2008. Ultimately, the first date at which all parties could be in attendance at a rescheduled hearing was October 28, 2008. The matter was therefore scheduled for October 28 and 29, 2008, and was concluded on October 28, 2008.

The Respondent FSDB, offered an extensive array of documents from the Petitioner's educational record, contained in notebooks entitled Volumes I through IV. An objection that these records constituted hearsay was made at the hearing and an extensive argument was heard on the issue of whether the educational records came within an exception to the hearsay rule. Ultimately it was determined by the undersigned that those educational records fell within the ambit of the "business

records exception" to the hearsay rule, codified at Section 90.803(6), Florida Statutes. (See also Federal Rule of Evidence 803(6)). The undersigned also ruled that some of the documents would also come within the "party statement" exception appearing at Section 90.803(18), Florida Statutes, (Federal Rule of Evidence 801). It was also determined that a substantial portion of those exhibits were corroborative or explanatory hearsay, for purposes of Section 120.57(1)(c), Florida Statutes (2008). Therefore Volumes 1 through IV were admitted with the exception of Tab 261, pages 2415 through 2429, 2436 through 2446, and page 2472: tabs 262, 264 through 265, under those exceptions to the hearsay rule. Tab 267 is the deposition transcript of Dr. Michael DeLaHunt and the Respondent's admitted Exhibits 1-6 are exhibits attached to that deposition. Tabs 264 and 265 consist of the deposition transcript of Dr. Christy Monaghan. Those depositions and exhibits are admitted into evidence for the Respondent in accordance with Florida Rules of Civil Procedure Rule 1.330(a)(3). The tab numbers equate to the Respondent's exhibit numbers.

The Respondent presented 12 witnesses: Dr. Karin Belsito, M.D.; Dr. Marie Stivers, Ph.D.; Jane Leazer, Staffing Specialist at FSDB and Records Custodian; Joan Mathis, R.N. at FSDB; Brent Bechtold, Supervising Teacher for the Deaf High School department; Lia Ferrante teacher in the Deaf High School;

Crystal Raiser, Dormitory Supervisor at FSDB; Sandy Acuff, School Social Worker; Wendy Williams, Human Services counselor; Eric Rosen, Ph.D., psychologist; David Rostetter, M.A. and Ph.D. in Educational Administration and Special Education; and Michael DeLaHunt, M.D., Pediatric Psychiatrist. The Petitioner presented seven witnesses: Dr. Silke Parl-Douglas (also known as Dr. Silke Parl during most of the events related to the facts in this case), Linnea Aldridge, School Psychologist at FSDB; Theodore (Ted) Lombardo, Psychologist at FSDB; Jane Leazer, Staffing Specialist at FSDB; Walt Davis, Behavior Specialist at FSDB; Dr. Christy Monaghan, Ph.D., Psychologist for the Petitioner; and [REDACTED] Ph.D. (psychology) ([REDACTED] and legal guardian of [REDACTED]). The Petitioner presented and had admitted Petitioner's Exhibits 1, 2, 3, 5, 6, 7, and 8.

Upon conclusion of the proceeding the parties had the testimony transcribed and stipulated to an extended briefing schedule. They later requested and were granted an extension of the time period for filing proposed final orders. They also requested and were granted a waiver of the 40-page limitation on proposed final orders. Accordingly, Proposed Final Orders were timely filed and have been considered in the rendition of this Final Order.

FINDINGS OF FACT

[REDACTED]'s Background

1. [REDACTED] (Petitioner) is a student at the FSDB. Currently, [REDACTED] is a day student, continuing to be educated at FSDB pursuant to the stay-put provisions of the IDEA, 20 U.S.C. Section 1415(j). [REDACTED] is hearing impaired, speech impaired, and language impaired. [REDACTED] communicates using sign language. [REDACTED] first became a student at FSDB at the age of [REDACTED] years. [REDACTED] will be [REDACTED] on the next birthday. [REDACTED] has been treated for attention deficit hyperactivity disorder (ADHD) since the [REDACTED] grade at FSDB and was treated for a time by Dr. Belsito, for depression, by the use of Prozac. [REDACTED]'s parents are divorced and [REDACTED] has not seen [REDACTED] [REDACTED] since the age of [REDACTED]. [REDACTED]'s [REDACTED] comes in and out of [REDACTED]'s life unexpectedly, but basically abandoned [REDACTED] in the care of the maternal [REDACTED], [REDACTED] who is also [REDACTED]'s guardian. [REDACTED] and [REDACTED] reside in [REDACTED], Florida. Both of [REDACTED]'s parents are profoundly deaf.

2. [REDACTED] applied for and was accepted for enrollment in the deaf kindergarten program at FSDB in August [REDACTED] at the age of [REDACTED]. [REDACTED] was given various relevant evaluations at the time and the results indicated that [REDACTED] met the eligibility criteria for enrollment at FSDB.

3. The FSDB is a public school institution available for eligible sensory-impaired students. See § 1002.36, Fla. Stat. (2007). It is not a local educational agency, it is a state educational agency (SEA). Its mission is to provide an academic

program for sensory-impaired students who are eligible for enrollment as referenced in the above-cited statute. Only those students who satisfy the enrollment criteria contained in Florida Administrative Code Rule 6D-3.002 may enroll in and attend FSDB.

4. In order to be eligible for enrollment students must have a sensory impairment, either auditory, visual, or both, which meets the sensory impairment criteria of FSDB under the referenced rule. Applicants must also satisfy general enrollment requirements of age (between the ages of 3 and 21 for day students or between 5 and 21 for boarding students). In order to be eligible to enroll in the Deaf Department of the school, it must be shown, upon evaluation, that a student's hearing impairment is of 30 decibels or greater; (2) that the hearing impairment has the potential to adversely affect academic performance, social development, language development, communication skills or intellectual functioning; and (3) that the applicant is not functioning in either the trainable or profoundly handicapped range. See Fla. Admin. Code R. 6D-3.002(2)(h).

5. If an applicant or a student already enrolled is determined to be a danger to self or others, or a disruption to the educational process or other students, then the child is not

qualified for admission or continued enrollment Fla. Admin. Code R. 6D-3.002(2)(k).

6. Deafness is a communication disorder which creates a substantial impediment to a deaf person's learning language. The Deaf Department of FSDB therefore has a primary objective of creating a language-rich environment for its students, in order to enable them to acquire and master language. Language is the key to all other learning, both for academics and socialization.

7. The supervising teacher over the Deaf High School Department at FSDB is Brent Bechtold. He described how the school provides for and promotes language acquisition and socialization as important parts of the educational process. The goal of the school is to teach deaf students to communicate and express themselves well, and to have good social skills so they can develop and maintain positive relationships with others and with future employers. In order for deaf students to become proficient in language and communication skills, they must engage in visual attention, so they can assimilate the material from the visual teaching methods.

Mental-Emotional Health Policies and Evaluations

8. If a student engages in acts of "self harm" which may either be life-threatening or non-life threatening, the school policies set forth procedures for intervention or evaluation of such students. A life-threatening, self-harm situation would be

one in which a student has deliberately injured himself or herself in a way that warrants immediate medical attention. A non-life threatening situation of self-harm can include talking of self-harm, threats, gestures or actual attempts. In that situation a student may not be in immediate danger of physical harm, but the situation warrants attention and evaluation to determine the seriousness of the situation and how it may evolve. The FSDB's responses and procedures concerning such situations are set forth in its self-harm Operational Policy 10.08. If a student is engaged in either a life-threatening or non-life threatening self-harm situation, the student is evaluated by qualified FSDB staff, who might be psychologists, counselors, or medical staff, or all of the above, depending on the situation. If the student is determined to have a serious intent for self-injury a "Level One" rating is assigned to that student's situation. The student is then transported to a medical or psychiatric facility for further inpatient evaluation, pursuant to Florida's Baker Act. A student can be referred under the Baker Act even if the student has not actually attempted self-harm.

9. A student who has been referred under the Baker Act is not automatically dis-enrolled from FSDB. It is often possible that such a student can return to school and be successful under a care plan provided by the school staff (mental health plan) or

other appropriate response provided by the school to the student's emotional, mental situation and the student can function in a way that is not dangerous to self or others.

10. If a student does not demonstrate a serious intent for self-injury, in a non-life threatening situation, such that inpatient evaluation is not deemed required by the FSDB staff, a "Level 2" rating is assigned. Other services are then provided to that student, typically counseling, or enhanced counseling, from that already being received.

11. █████ received counseling during the elementary school years by Dr. Christy Monaghan, who at that time was a psychologist employed by FSDB. There were some behaviors of concern during those years. In fact, in December 2002 the █████'s concerns about the Petitioner's belligerent; aggressive behavior resulted in the adding of counseling to the Petitioner's IEP for █████ socialization and self-esteem issues. The IEP team at that time had concerns about continuing eligibility for enrollment. A paramount concern was █████'s tendency to "mouth" foreign inedible objects. This behavior progressed as █████ grew older. It occurred in the fall of 2002, such that the Respondent's personnel would check on █████ every 30 minutes or so for objects that █████ might put in the mouth. In April of 2003, a report documents █████'s admission of eating a piece of hearing-aid ear mold. A report in November of 2003 showed that █████ continued to

have emotional problems and issues, stress, and the question of depression had been raised by staff members. At that point, an additional psychological evaluation was recommended, as described by a witness, Crystal Raisor, in her testimony. During ■■■'s ■■■-grade year, ■■■ was observed in the dorm chewing on staples, push pins, or a soda can, screaming at peers if they bothered ■■■'s possessions or sat in ■■■'s seat.

12. ■■■ was seen by Dr. Karin Belsito, the FSDB medical director during the ■■■-grade year, the 2005-2006 school year. After seeing ■■■ at the beginning of the school year Dr. Belsito described ■■■ as "depressed/angry." Dr. Belsito found that ■■■ was anguished and was imploring Dr. Belsito to help. Dr. Belsito was concerned enough to schedule weekly follow-up visits. ■■■ remained angry and irritable and confided in Dr. Belsito of worrying so much that it interfered with sleep. She diagnosed ■■■ with depression in September of 2005, and with the ■■■ and guardian's permission, Dr. Belsito prescribed Prozac for ■■■ designed to alleviate depression. Dr. Belsito described ■■■ as appearing sad and possessing low self-esteem, and ■■■ described a feeling of being "disconnected."

13. Dr. Belsito found that ■■■ had multiple medical conditions of ADHD, depression, as well as the hearing impairment and oral/tactile hypo-sensitivities. She described these multiple conditions as "co-morbid conditions."

Dr. Belsito established that if co-morbid conditions are related, the complexity of the student's disorder would be dramatically increased, and much more difficult to treat. In the case of the Petitioner, the conditions all shared a common relationship of being neurologically based, which makes the disorders difficult to treat.

14. During ■■■'s ■■■ grade year, the 2005-2006 school year, ■■■ participated in a year-long group counseling effort at FSDB, lead by mental health counselor Wendy Williams. The Petitioner was recommended for the group counseling by the faculty and dorm staff who observed ■■■ to be often alone and observed that ■■■ often discussed not having friends. There was a staff consensus that social skills training would benefit ■■■'s problem-solving, communication, anger management, coping skills, and positive interaction ability with peers and with the staff.

15. Ms. Williams presented group therapy which consisted of "adventure based counseling" which promotes team building and trust building. In such a situation a group is presented with a problem which it must work together to resolve. During most of those group sessions, however, ■■■ would demonstrate irritability by banging on the table, yelling and crawling under the podium. Ms. Williams had multiple concerns about ■■■ during this time, which included observing ■■■ "chew on ■■■ hands" and

listening to ■■■ talk about seeing ghosts, feeling alone and depressed, and not having friends.

16. On January 20, 2006, ■■■ was referred for an emergency evaluation because of being found in the dorm room poking ■■■ head with a thumb tack, multiple times. The Petitioner told Dr. Theodore Lombardo (Ted) the evaluating psychologist for FSDB of being ridiculed for being ugly and of having no friends. When he asked ■■■ if ■■■ was attempting suicide ■■■ responded affirmatively, but, based upon his observations and assessment of ■■■ he found that ■■■ did not demonstrate a serious intent for self-injury at that time, so he assessed ■■■ as a "Level 2."

17. In February 2006 Dr. Belsito described her concerns to the mental health director for the Respondent, Dr. Silke Parl (now known as Dr. Silke Parl-Douglas). She described to Dr. Parl her concerns about ■■■'s depression, and articulation of thoughts involving "not wanting to be alive." Dr. Belsito also recommended to Dr. ■■■ the Petitioner's ■■■ and guardian, that the family consider a pediatric psychiatrist for a higher level of treatment than could be provided at FSDB. A pediatric psychiatrist, as opposed to a clinical psychologist, can prescribe medication and is specially trained in the management of various mental health disorders, including depression. Dr. Belsito recommended that Dr. Parl monitor ■■■ and recommended that an involuntary commitment to a mental health or psychiatric

facility for assessment, regarding possible harmful statements or risk of self-harm, pursuant to the Baker Act, should be considered, in the absence of improvement.

18. In March 2006 the Petitioner complained of pain in the gums to the FSDB's dental clinic. An examination revealed a piece of a metal staple stuck in ■■■'s gums. ■■■ admitted poking the staple into mouth or gums but there is some evidence to indicate that ■■■ did that to remove food particles that were stuck in the teeth, rather than doing that as an act of self-harm. The staff also discovered, in March of 2006, that ■■■ had chewed paper torn from many books which ■■■ kept in the dorm room. ■■■ commented to staff members that ■■■ "ate them" in referring to books in the dorm room.

19. During this period of time ■■■'s ■■■ was expressing concern to the FSDB about the behaviors both at school and at home. Approximately a week after ■■■ was treated regarding the staple in the gums, on March 16, 2006, ■■■ complained of throat pain, upon swallowing. This was not pain due to a sore throat from illness. Therefore, ■■■ was recommended for an X-ray to rule out a foreign body lodged in the throat, given the history of mouthing foreign objects. Dr. Belsito placed the Petitioner on medical leave that day to address both the medical and mental health issues. ■■■ was required to see a physician while on medical leave, and to get an X-ray to rule out the ingestion of

any foreign body. ■■■ was also required to be evaluated by a psychiatrist with regard to medication management and mental health care.

20. Dr. Belsito was concerned that ■■■'s depression with the other conditions and the history of the comments about not wanting to be alive could evolve into a more serious situation, if ■■■ did not receive psychiatric treatment. Therefore, the FSDB submitted some questions to the Petitioner's private psychologist and psychiatrist concerning its concerns about inappropriate "mouthing" of inedible objects, as well as other behaviors involving incidents or statements regarding self-harm, physical aggression toward other students and staff, and sleep walking.

21. In response to those concerns, Dr. Christy Monaghan, the private psychologist, and Dr. Odalys Brito, the Petitioner's private psychiatrist, apparently attributed the mouthing behaviors to a sensory processing disorder or suggested that such might be the case. Neither of them tested the Petitioner for this disorder, however. Dr. Monaghan relied on her historic knowledge of the Petitioner regarding this issue from approximately ■■■ years before, when she was an employee psychologist for FSDB. Additionally, despite Dr. Monaghan's diagnosis of ADHD, mood disorder, not otherwise specified (NOS), and adjustment disorder, with mixed depression and anxiety, both

Dr. Monaghan and Dr. Brito recommended group social skills training only.

22. ■ saw Dr. Monaghan from April 4, 2006, forward. Their therapeutic relationship focused a great deal on "familial issues" or "relational issues" regarding ■'s family and specifically on the issues surrounding ■'s history of abandoning ■.

23. In April 2006, in making the above-referenced diagnosis, Dr. Monaghan found that there had been adjustment issues, with mixed anxiety and depression, with regard to family relational issues for many years. She stated that the Petitioner had continuing emotional effects from the history of abandonment, rejection, and insecure attachment to the ■, which contributes to the Petitioner's self-esteem issues.

24. The Petitioner's ■ grade school year was 2006-2007. The Petitioner was taken off the antidepressant medication Prozac during the summer of 2006. Because the Petitioner had some success in the group counseling sessions during the 2005-2006 school year, the Petitioner continued with the group counseling the following school year 2006-2007. During this ■-grade year, however, the Petitioner's interaction with the therapy group and the Petitioner's willingness to apply the strategies that were taught in these sessions declined. The

Petitioner talked about seeing ghosts, not being happy and feeling like things were not improving, of not having friends.

25. During the early part of that school year the Petitioner continued to demonstrate the same behaviors as the past year, banging hands on the table, hiding under the podium and talking more frequently to █████self, with mumbling. The Petitioner's language became less understandable, a bit more incoherent and the Petitioner's grooming and interest in appearance also declined such that █████ looked disheveled. █████ also displayed a rather unusual behavior, according to Brent Bechtold. There were occasions during that school year when █████ would approach and "mouth" a message to him he could not understand. He would ask the Petitioner to communicate by sign which the Petitioner was capable of doing, but the Petitioner would not do it. Mr. Bechtold had never encountered this behavior in any other student.

26. In April 2007, an incident occurred where the Petitioner became very angry with another student who took the Petitioner's seat next to the Petitioner's friend. In response to this occurrence the Petitioner wrote several statements using the words "death," "my feelings are dying," and several statements referencing the other student as being the "enemy." FSDB psychologist Dr. Lombardo and Wendy Williams met to evaluate the Petitioner. Upon concluding the evaluation,

Dr. Lombardo assigned a Level 2 rating to the Petitioner and the incident, which under the Respondent's policies, did not necessitate an involuntary reference for psychiatric evaluation under the Baker Act.

27. Ms. Wendy Williams is appropriately licensed and qualified to refer students for involuntary psychiatric evaluation under the Florida Baker Act, but under the FSDB policies and procedures applicable to her, as an employee, she was not allowed to do so on the occasion referenced next above. Ms. Williams opined, however, that over a long span of time ■■■ exhibited symptoms of not thinking clearly, that ■■■ had expressed, many times, feelings of hopelessness and "feelings of isolation" and that ■■■ continued to have difficulty in managing emotions over a long span of time. Consequently, with regard to the occasion of April 18, 2007, Ms. Williams would have opted for a Baker Act referral at that time, although Dr. Lombardo's rating of a Level 2 status for ■■■ and the incident, precluded such a referral.

28. Ms. Williams believed, upon conclusion of the ■■■-grade year, that ■■■'s issues could not be properly addressed with the group therapy sessions because the Petitioner needed intensive counseling with ■■■ private therapist. Ms. Williams, however, established that the ■■■ and guardian, ■■■ did not want

the FSDB providing one-on-one counseling, preferring that the private provider, Dr. Monaghan provide counseling for [REDACTED]

29. The 2007-2008 school year was [REDACTED]'s [REDACTED]-grade year. A series of events began occurring in early September 2007, with regard to [REDACTED] that engendered considerable concern on the part of personnel of FSDB. On Sunday, September 9, 2007, a dormitory supervisor, Crystal Raisor, noticed "quite a few scratches on [REDACTED]'s arms." Ms. Raisor questioned [REDACTED] about the scratches and [REDACTED] told her to "mind her own business." The Petitioner then told Ms. Raisor that [REDACTED] was practicing evil black magic and had summoned "a demon from hell to kill someone, but it didn't work, so [REDACTED] had to practice some more." Ms. Raisor became concerned at this and notified the infirmary and Wendy Williams concerning the scratches and [REDACTED]'s comments.

30. The next day, September 10, 2007, Brent Bechtold observed [REDACTED] showing another student a shard of broken glass that [REDACTED] was carrying around in a pocket. He confronted [REDACTED] about this and insisted that [REDACTED] discard the glass shard. He reported the incident to his supervisor and to Wendy Williams and completed an incident report. This was the first time that Mr. Bechtold had ever observed a student carrying broken glass.

31. As a result of this, Ms. Raisor searched the Petitioner's dormitory room and found that a vanity mirror had been shattered. The pieces of the broken mirror were laid out

on a desk all facing in the same direction as if they had been purposely arranged. The Petitioner admitted breaking the mirror.

32. On Tuesday September 11, 2007, one of the teachers in the high school reported to school psychologist, Linnea Aldridge, that the Petitioner had been ". . . talking to [self] and acting like [redacted] was in another world." Ms. Williams was informed of this and met with the Petitioner. The Petitioner told her that the Petitioner had broken the mirror because of feeling "like [the] soul was shattered."

33. The result of this series of events was that Ms. Aldridge and Ms. Williams met with the Petitioner on Wednesday, September 12, 2007. The Petitioner discussed issues with them involving a [redacted] the Petitioner liked; of having nightmares and difficulty sleeping. The Petitioner also described feeling "dark in [the] world," and feelings of "emptiness" and of "disappearing from the world." The Petitioner also admitted to breaking the vanity mirror with the hand and of drawing a "black magic star symbol" on the hand. The Petitioner admitted "[trying] to sacrifice (self)" and was "waiting to be summoned." The Petitioner was also upset on this occasion by not having more frequent contact with the private therapist.

34. Ms. Aldridge assigned a Level 2 rating concerning this incident, at the conclusion of the evaluation. Ms. Aldridge felt that due to the Petitioner's difficulty with sleeping, and feelings of being overwhelmed with stress and depression, that Dr. Monaghan, the private therapist, needed to provide more therapeutic support. She felt that further psychiatric follow-up was needed to address depression and anxiety.

35. In 2007 the dormitory staff noticed [REDACTED] scratching and inflicting deep scratch marks described as "claw marks" on the arms, according to Registered Nurse Joan Mathis. Ms. Mathis treated [REDACTED] that night for the scratch marks where [REDACTED] dug fingernails into the skin. Ms. Mathis observed 75-to-100 such half-moon shaped marks that were bloody. The Petitioner had blood beneath the fingernails. Upon being asked the reason for doing so, the Petitioner described feeling stressed and that the scratching made the Petitioner feel better.

36. The situation with [REDACTED] on that night made Ms. Mathis feel that [REDACTED] posed a substantial risk of self-harm. Ms. Mathis had been a school nurse for some seven years and had seen many students over that period of time. She had never seen a child who had self-inflicted such injuries. Because of her concerns for the Petitioner's safety, Ms. Mathis alerted Sandy Acuff, in the Mental Health Department at FSDB, who notified the [REDACTED]/guardian. She also wrote a mental health referral.

37. The [REDACTED]/guardian, [REDACTED], told Ms. Mathis that [REDACTED] did not want the Mental Health Department involved, but Ms. Mathis explained to [REDACTED] that she was required to do so when she perceived that a child was in danger in this manner.

38. On September 13, 2007, the Petitioner was referred to FSDB psychologist Dr. Paree Stivers for emergency evaluation. Dr. Stivers reviewed the Petitioner's mental health file and obtained historical information from Wendy Williams. Ms. Williams thus informed Dr. Stivers of the Petitioner's long-term depression and sleep difficulties, the Petitioner's statement concerning the soul being "shattered" and the multiple events of concern that had happened in the days preceding the evaluations.

39. Ms. Williams attended the evaluations as well, and during the evaluation the Petitioner admitted to being sad, with sleep difficulties, and belief about not being liked. Dr. Stivers found the admissions by the Petitioner to be "congruent with a mood disorder."

40. During the evaluation the Petitioner expressed an interest in witchcraft, demons, and "evil" magic. The Petitioner apparently believed or expressed a belief that "people did not see the Petitioner," also describing seeing "white lights" during the day. Dr. Stivers observed the Petitioner yelling incoherently, grimacing, clinching of the

hand and "tensing up" and sometimes turning the head from side-to-side to mumble or to apparently speak to someone not present in the room. Other staff reported that the Petitioner was talking to inanimate objects or talking to self. Moreover, the Petitioner was not signing clearly that day. Ms. Williams observed that the Petitioner's thoughts did not seem to be clearly organized and thought she observed some "processing problems." Dr. Stivers believed there was some evidence of "psychotic features" evidenced by a disorganization in thinking. In addition to the display of disorganized thinking and "lability of mood," the references by the Petitioner to magic, and to attempts to summon a demon to kill people, were alarming behaviors and evidenced psychotic characteristics.

41. In light of the Petitioner's comparison of the soul to a shattered mirror, of the belief regarding being unnoticed by others, ■■■'s intermittent use of sign language, mixed with incoherent yelling, and based upon a deterioration in functioning over several days, Dr. Stivers determined that the Petitioner was not "in touch with reality."

42. Dr. Stivers also observed the significant number of scratches on ■■■'s arms that looked as though they might have been bleeding the night before. In consideration of the reports from the health care center about the physical and emotional presentation ■■■ made the night before, and based upon

observation of the scratch marks, Dr. Stivers concluded that the intentional, purposeful scratching was self-abusive behavior, as defined under school policies.

43. Dr. Stivers also observed that [REDACTED] was "equivocal" concerning a response to a question about whether [REDACTED] would self-harm. Such a response or failure to clearly respond to a question about self-harm is a warning sign regarding an internal struggle and inability to decide the course of potential future harmful action.

44. Dr. Stivers assigned [REDACTED] a Level 1 rating upon concluding the evaluation. She determined that, for the Petitioner's safety, further evaluation and comprehensive assessment was needed at a secure, appropriate facility, pursuant to the Baker Act. This conclusion by Dr. Stivers was based upon a number of concerns, including her observations of the Petitioner during the evaluation, the reports of behaviors over the course of several days preceding the evaluation, and the fact that the Petitioner was exhibiting the behavior on the day of the evaluation, despite all the counseling and behavior interventions that had been provided before. Dr. Stivers stated that after reviewing the history and observing the manner in which [REDACTED] was presenting, that she became concerned that the Petitioner was a risk to self or others.

45. The Petitioner was evaluated at the [REDACTED] ([REDACTED]) in Jacksonville, Florida. Dr. Quinones was the evaluating psychiatrist at that facility. He noted the constant scratching of [REDACTED]'s arms and scalp, with the resulting physical injuries. He diagnosed the Petitioner with a mood disorder, NOS and ADHD. He prescribed Seroquel, which is an anti-psychotic medication. He recommended four or five days of therapy, but instead [REDACTED] was discharged the next day. [REDACTED] was discharged on September 14, 2007, based upon the [REDACTED]/guardian's request. Six days thereafter the private therapist, Dr. Monaghan, met with [REDACTED] and wrote a letter to FSDB indicating that [REDACTED] did not currently exhibit indicators of risk of self-harm or harm to others.

46. All students with any medical condition at the school are assigned a "medical acuity rating" to describe the severity of their medical condition. Level 1 is the least severe and Level 5 the most severe. When a student is given a health acuity rating of five that student is no longer eligible for continued enrollment at FSDB, because of the medical issues requiring care and treatment beyond the scope of FSDB's medical staff.

47. Upon becoming aware of [REDACTED]'s behaviors referenced above, and for the previous two years, Dr. Belsito would have given [REDACTED] a health acuity rating of "five" had she been medical director at this time.

48. The FSDB's Operational Policy 10.8 requires that a mental health plan be developed for any student if that student has had a referral pursuant to the Baker Act. The plan is designed to help ensure the student's safety. A mental health plan was developed for [REDACTED].^{1/}

49. The mental health plan required the staff to conduct regular skin checks of [REDACTED] to monitor for harmful scratching or other behaviors and any attempts by [REDACTED] for deliberate self-injury, verbal or physical aggression, threatening of others or property destruction. The plan also required [REDACTED], the guardian, to provide a release of the medical records from private providers to FSDB and to consent to a full exchange of information between the Petitioner's mental health providers at FSDB and the private providers. [REDACTED] did not agree to the plan and refused to consent to the release of information and records between [REDACTED]'s private and school mental health providers.

50. [REDACTED]'s refusal to allow a full exchange of information and records between the school's therapist and the private therapist for [REDACTED] posed a hindrance to the ability to address [REDACTED]'s needs collaboratively with private therapists. This would have been helpful to ensure continuity and consistency in [REDACTED]'s care or therapy. Since [REDACTED] was a boarding student at this time, and was with the FSDB staff around the clock for six days per week, it was critical to the school that it be able to share

with the primary private therapist the information concerning [REDACTED] and [REDACTED]'s behavior and progress at the school. This would have provided a more clear picture to an outside provider of what was really occurring at the school, to balance what [REDACTED] might be reporting to the private therapist.

51. The refusal to allow the providers to exchange their therapy records could result in [REDACTED] not receiving appropriate therapy to address all of [REDACTED]'s needs. The school has extensive documentation regarding the issues of self-harm and the availability of that information to the private therapist might have allowed the care and therapy to become more individualized. Incorporating that information from the school would help the therapist arrive at strategies to help [REDACTED] in [REDACTED] life at the school.

52. On October 12, 2007, [REDACTED] refused to allow FSDB to counsel or treat [REDACTED] regarding mental health issues, but did agree to allow Social Worker, Sandy Acuff to work with [REDACTED]. Ms. Acuff began working with [REDACTED] both in regularly scheduled sessions and on other occasions when [REDACTED] had outbursts, which Ms. Acuff helped to deescalate. In Ms. Acuff's experience, when [REDACTED] became agitated [REDACTED] did not want to discuss the precipitating problem which caused an outburst or concerning behavior. Such discussion was essential to Ms. Acuff's therapy. She found that when [REDACTED] became agitated [REDACTED] did not really want

to hear a discussion of the precipitating problem. ■■■'s language would become disoriented, erratic, and difficult to understand. If any subject was one ■■■ did not want to talk about, then ■■■ became resistant and Ms. Acuff was unable to employ counseling techniques under those circumstances.

53. ■■■'s problems continued. Approximately two weeks after the Baker Act referral, or about October 1, 2007, a circumstance occurred where ■■■ became very agitated and upset with the computer teacher, Ms. Vaccaro. Ms. Vaccaro was working with another student and would not immediately stop and come to help ■■■ as ■■■ demanded. ■■■ became agitated and belligerent toward Ms. Vaccaro. The supervising teacher, Brent Bechtold, was notified and ■■■ was brought to his office to calm down which took nearly an hour.

54. Some 10 days later, Mr. Bechtold was again requested to intervene when ■■■ refused to follow directions in Ms. Vaccaro's class and became very agitated and upset. With the help of School Psychologist, Linnea Aldridge, and Social Worker Sandy Acuff, it took approximately two hours to calm ■■■ from this incident.

55. Another incident occurred in Ms. Vaccaro's class on October 27, 2007. ■■■ refused to follow a directive given by Ms. Vaccaro and demanded to see the principal. Apparently Ms. Vaccaro had directed ■■■ to stand in front of the class to

present a project, which ■■■ had not yet finished. ■■■ was embarrassed to attempt to present an unfinished project and thus became upset and agitated toward Ms. Vacarro. After ■■■ requested to see the principal Ms. Vacarro told ■■■ to calm down and pay attention to other student presentations. The Petitioner banged on the table, but was ignored by Ms. Vacarro, so ■■■ wrote two notes to Ms. Vacarro. One asked to be sent to the principal's office "before I get blow-up [sic]!" The second note stated "I don't want to hurt you, OK!" After this episode occurred, the Behavioral Specialist, Walt Davis, Mental Health Director Dr. Parl-Douglas, and the school principal, Hugh Lewis, as well as Mr. Bechtold, worked with ■■■ to calm ■■■ down. This took nearly two and one-half hours.

56. An emergency evaluation was conducted on November 13, 2007, after ■■■ made a statement to the effect that ■■■ would rather die than go with a staff member off-campus. This was described by the evaluators as histrionic in nature and not meant to be a literal statement. Accordingly, ■■■ was given a Level 2 rating. Nevertheless, based upon the past history of volatility, and the past behaviors which caused concern as to ■■■'s mental stability, the dorm staff removed a razor and other sharp objects from ■■■'s bathroom.

57. A staffing committee meeting was held on November 15, 2007, to determine if ■■■ met the eligibility requirements for

continued enrollment. The FSDB determined after that meeting that ■ no longer met the eligibility criteria for enrollment, due to being a danger to self and others, and to being a disruption to the educational process.

58. The due-process hearing request followed in due course. ■ however, remained enrolled at the FSDB as a day student under the "stay-put" provision of the IDEA. See 34 C.F.R. § 300.518.

59. Other behaviors of concern were displayed by ■ thereafter. ■ threatened another student who attempted to touch or pick up ■'s laptop computer on January 30, 2008. Apparently the student was trying to remind ■ to close the laptop during class to avoid "getting in trouble." ■ however, grabbed the student's hand and warned him not to touch the computer or ■ would "kill him." ■ was taken to the office in a very angry state. It took the assistance of Walt Davis, Dr. Parl-Douglas, Principal Lewis, Mr. Bechtold, and two FSDB police officers to finally calm ■ down after over two hours elapsed.

60. On February 12, 2008, while walking across campus, ■ was carrying and typing on the laptop computer. This was in violation of school rules regarding proper care of computers. Mr. Bechtold observed this and told ■ to put the computer in its bag. ■ became rude, which resulted in ■'s losing the

laptop the next day. When a laptop is taken from a student for disciplinary purposes, the education is not impacted, as the teachers ensure that the student is still able to complete assignments.

61. After turning in the laptop on February 13, 2008, in response to complaints of teachers that ■■■ was accessing inappropriate web sites, the internet history on ■■■'s laptop was reviewed. Some of the web pages showed images which were interpreted by school personnel to depict violence or suicide. One showed a character choking another character.

62. An emergency evaluation of ■■■ was conducted by Dr. Parl-Douglas. She scheduled the evaluation because she had reviewed the laptop web pages. ■■■ told Dr. Parl-Douglas that ■■■ "hated" all people. Apparently some reference was made to a gun at ■■■'s residence (■■■ grandparents' residence) with ■■■ making a statement to the effect that ■■■ would not use the gun on ■■■ but might shoot another person with it. A rating of Level 1 was assigned to this incident and evaluation by Dr. Parl-Douglas, and ■■■ was again referred to the ■■■ for further evaluation pursuant to the Baker Act.

63. When ■■■ returned to FSDB after this second Baker Act referral, ■■■ was assigned a one-to-one instructional assistant, to ensure ■■■ safety by monitoring ■■■ behavior throughout the day.

64. Over the course of that Spring semester of the 2007-2008 school year, ■■■ continued to engage in concerning behaviors: ■■■ told a classmate that if he did not leave ■■■ alone ■■■ would "murder him dead"; on April 3, 2008, while arguing with another student, ■■■ threatened to stab the student in the eye (apparently with a pencil); and on April 14, 2008, when told to close the laptop during class ■■■ became very angry and threw it to the floor. This was the third laptop violation at the school by ■■■. After three such violations, under the school's rules, students lose their laptop for the rest of the year. Because ■■■ had been assigned a personal aide, ■■■ was allowed to use the laptop when absolutely necessary for class work, but not for free time or for "surfing the net." When informed of these consequences concerning the laptop, ■■■ became extremely angry and upset, and tried to barricade ■■■ in Mr. Bechtold's conference room. Even after an hour had elapsed ■■■ would not accept the punishment and had to be referred to in-school suspension for the remainder of the day.

65. On another occasion, on June 2, 2008, ■■■ struck a friend across the face so hard that it left a mark and brought the student to the brink of tears. On June 10, 2008, ■■■ brought metal wire cutters to school and threw them on the floor when asked to give them to the staff.

66. The FSDB staff also became concerned by a behavior trait of ■■■ involving interacting with a stuffed animal that ■■■ brought to school. When asked to choose a poster color for a class project, ■■■ turned to the toy (a stuffed dog) and solicited the toy's opinion as to its color preference. ■■■ then would recite the color that ■■■ implied that the dog had chosen.

67. Supervising Teacher Brent Bechtold was most involved in ■■■'s behavior and any resulting discipline or de-escalation efforts. ■■■ had 36 documented behavior incidents that occurred during academic days for the 2007-2008 academic year. Mr. Bechtold was personally involved in 35 of those incidents. He established that ■■■ missed the equivalent of one school day per week and, therefore, approximately 20 percent of available education time and services due to the behaviors.

68. Dr. Eric Rosen, Ph.D. testified as an expert in mental health, as related to deafness. Deafness is a communication disorder which has a significant impact on interventions for mental illness and in learning language. Language acquisition skills are an essential part of every facet of a deaf education program. If a person is profoundly deaf, language can only be acquired visually. Therefore, acute visual attention skills are crucial for a deaf person to learn effective communication. The

deaf person has to look and acutely observe where information is coming from.

69. When a deaf person has "co-morbid conditions," as established by Dr. Belsito, such a situation can obstruct the only means of assimilating language. Visual attention is inhibited. If depression, adjustment disorder, or mood disorder, etc., are operative, then the ability to observe and assimilate language is effectively stopped, because often such a person is not observing. This inhibits all therapeutic efforts, as shown by Dr. Rosen, and as Ms. Acuff discovered during her attempts to render therapy to [REDACTED]. The various co-morbid conditions exacerbate the sensory impairment.

70. Dr. Rosen established that depression affects mood and can render a person explosive or rageful. In [REDACTED] the depression, coupled with the ADHD condition, affects the ability to concentrate, stay focused and finish tasks. It manifests in a rage which causes [REDACTED] to shut out external and internal language.

71. Internal language is the "inner voice" that would help [REDACTED] to rationalize a solution to a stressful situation, to help think through an upsetting event and decide what to do next. Difficulty in accessing [REDACTED]'s inner voice, renders [REDACTED] shut-off from internal language which makes it difficult to self-regulate

behavior in stressful situations. This makes it very difficult to access language from external sources.

72. Although ■■■ is linguistically equivalent to peers in communication capability, the impact of the co-morbid conditions on ability to connect with language from external sources deprives ■■■ of the ability to socialize, to develop peer relationships, to interact appropriately with authority, to problem solve and access the services ■■■ needs at FSDB. In the words of Dr. Rostetter, Ph.D., testifying for the Respondent: "so this constellation of people . . . services and programs for the student, who desperately needs it, becomes harder and harder to access the more the co-morbid conditions of depression, mood disorder, ADHD impact . . . behavior. So the manifestation of these conditions show-up behaviorally and those behaviors detract from the advantages of being here [FSDB]. This is the kind of a cruelly-ironic conundrum that this child is in."

73. Dr. Michael DeLaHunt, M.D., is a board-certified child and adolescent psychiatrist, testifying as an expert for the Respondent. He opined, to a reasonable degree of medical certainty, based on the reported behaviors, that those behaviors represented a sufficient risk of self-injury to support a determination that ■■■ was no longer eligible for continued enrollment. He established that a diagnosis of depression increases the risk of self-harm or suicide 10-to-15-fold. He

referenced a study or project in the United Kingdom concerning risk of self-harm or suicide in deaf teenagers, which identified several factors that associate mental health concerns with the likelihood of suicide. Those factors include a family history of mental illness, family problems with relationships, peer relationships, depression, anger, self-esteem issues, academic problems and the loss of someone. Virtually all of these factors have been operative in [REDACTED]'s life.

74. The Testimony of Doctors Rosen, Rostetter, and DeLaHunt, is persuasive and credible, given the above circumstances. It is accepted.

Sensory Processing Disorder

75. The Petitioner contends that at an early age [REDACTED] was diagnosed with a sensory processing disorder. During [REDACTED]'s [REDACTED] year, the first year at FSDB, [REDACTED]'s [REDACTED] and [REDACTED] expressed concerns about certain behaviors that [REDACTED] exhibited. On or about March 26, 1999, they requested an occupational therapy assessment to assess for sensory processing disorder (SPD). (This is sometimes referred to in the record as a sensory integration disorder). The sensory integration inventory was completed by [REDACTED]'s teacher and by the [REDACTED] during that Spring.

76. SPD is a condition where sensory information comes to the brain, but either the detection or the interpretation of the information is not accurate. Therefore, the responses of an

individual are problematic either in the area of motor functioning or behavior or adaptive self-care.

77. Dr. Lucy Miller, Ph.D., testified as an expert witness on behalf of the Respondent. Dr. Miller is Executive Director and founder of the largest sensory processing disorder research program in the world. She is also a registered occupational therapist. She testified in this proceeding as an expert witness, by deposition.

78. SPD typically presents itself in young children, pre-schoolers or younger. The generally accepted best assessment tool for identifying SPD is the Sensory Integration and Praxis Test (SIPT). This test is appropriately administered to children between the ages of four and one-half and eight years and eleven months. Additionally, a Sensory Integration Inventory and Sensory Profile are parent reports designed to assist the therapist or an evaluator by providing additional information about the child's characteristics. There is not a formal diagnosis of SPD in the record for [REDACTED]. Dr. Miller stated, based upon some hand-written notes concerning [REDACTED]'s symptoms, that there was a suggestion that [REDACTED] might have met the criteria for SPD when very young, although it cannot be definitely determined. If [REDACTED] did have a sensory integration problem or disorder, it would have only been when [REDACTED] was very young, according to Dr. Miller.

79. In any event, in May of 1999 occupational therapy was added to ■■■'s IEP as a related service for the 1999-2000 school year, after the ■■■ and ■■■'s teacher completed the above-referenced inventory.

80. ■■■ received occupational therapy for two years, whereupon the therapist determined that ■■■ no longer required educationally relevant occupational therapy. ■■■ was then provided occupational therapy on a consultative basis for the 2001-2002 school year. The IEP team agreed, however, as did the family, in February 2002, that ■■■ could be discharged from occupational therapy.

81. In December 2002, the ■■■ reported concerns to the IEP team about sensory issues, and the team agreed to conduct a full sensory processing disorder battery of testing on ■■■. The SIPT was administered, as was a Vestibular Evaluation by an audiologist. Those evaluations indicated essentially normal findings. Dr. Miller opined, given these test reports and the fact that ■■■ was discharged from occupational therapy, that nothing in the records after the age of ■■■ would suggest that SPD was occurring in ■■■. Dr. Miller found that behavior such as mouthing objects was present in ■■■'s record, but nothing to suggest a syndrome involving SPD. A syndrome is made up of a variety of behaviors, not just one behavior. Dr. Miller stated that if a processing deficit were present, she would expect to

see a complex of symptoms. She was not seeing that, just a couple of behaviors such as mouthing objects which are not a sufficient body of symptoms to suggest the presence of an SPD.

82. Moreover, Dr. Miller opined that the behaviors demonstrated by ■ involving oppositional behavior, tantrums, and the other behavioral problems referenced in the above Findings of Fact, are not really consistent with a diagnosis of SPD. Dr. Miller found it highly unlikely that the behaviors of concern referenced herein can be linked to sensory issues. Dr. Miller's expert testimony in this regard is persuasive, credible, was not refuted by countervailing evidence or testimony, and is accepted.

83. Finally, it should be pointed out that based, upon the testimony of Walt Davis, Dr. Lombardo and to some extent Dr. Monaghan, the Petitioner's behavior began improving in the Fall semester of 2008, while under the "stay-put" continuation placement. There is evidence that ■'s conduct has improved significantly from August 2008 forward, and that ■ academic performance has improved markedly. There is evidence that ■ may have made "four A's and a B" in the Fall semester. This is a heartening indication. The evidence does not persuasively show that ■ thus demonstrated, in the Fall of 2008, eligibility for enrollment, but there is significant indication in the evidence that behavior and conduct have improved, as has

█'s general mood level and academic performance. These factors may, taken together, indicate an alleviation or an improvement in █'s emotional plight and a trend toward emotional stability. Even if dis-enrolled, these indicators should be thoroughly investigated by a complete psychiatric evaluation and related testing, etc., to determine if, once again or in the very near future, █ might qualify for re-enrollment.

84. In this connection although an issue was made as to whether FAPE was being provided in the Amended Petition, in reality the Petitioner did not oppose the IEP being delivered at the FSDB. In fact, the Petitioner ultimately took the position, in effect, that a FAPE could best be provided the Petitioner at the FSDB. The case devolved to the situation of the Petitioner advancing, as the thrust of the case, the opposition to the dis-enrollment of the Petitioner by the Respondent FSDB. The point is, the overall persuasive, credible evidence does not show that significant educational benefit and FAPE were not being provided by the FSDB. There is no question that, even with all the problems, progress was being made by the Petitioner during enrollment.

CONCLUSIONS OF LAW

85. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this

proceeding. § 1003.57(1)(e), Fla. Stat. (2007); Fla. Admin. Code R. 6A-6.03311.

86. Pursuant to Section 1002.36(1), Florida Statutes (2007), the Florida School for the Deaf and Blind (FSDB) is a state-supported day school and boarding school for sensory-impaired students from pre-school through 12th grade. The FSDB is required to provide "educational programs and support services appropriate to meet the education and related evaluation and counseling needs of hearing-impaired and visually-impaired students who meet enrollment criteria." Id. Although FSDB is a component of the state educational system and is one educational placement option on a continuum of placements available for sensory-impaired students, FSDB is neither a district school board nor a local educational agency (LEA). Id.; see also N.A.K. v. School for the Deaf and Blind, Case No. 05-0182E, ¶ 79, (Fla. DOAH Jan. 4, 2006). Instead, because FSDB is statutorily charged with complying with "all laws and rules applicable to state agencies," FSDB is a state educational agency (SEA). See § 1002.36(1), Fla. Stat. (2007).

87. Pursuant to Section 1002.37(4)(a), Florida Statutes (2007), the FSDB is managed by a board of trustees appointed by the governor. That statute grants the Board the authority to adopt rules and to implement provisions of law related to the school's operation. Id. at § 1002.36(4)(c), Fla. Stat. Once

rules are submitted to the State Board of Education for approval, the approved rules are filed immediately with the Department of State and become part of the Florida Administrative Code rendering them a "mandate for management of the school and the students." N.A.K. v. Florida School for the Deaf and Blind, ¶ 81 (Case No. 05-0182E).

88. The enrollment criteria were developed and appear in their present form in Florida Administrative Code Rule 6D-3.002. In addition to the enrollment criteria set forth in Florida Administrative Code Rule 6D-3.002(2)(h)(1-4), a child's continued enrollment or initial enrollment, is conditioned on a determination that the applicant or student is not a danger to self or others, and is not disruptive to other students or to the educational process. Fla. Admin. Code. R. 6D-3.002(2)(k).

89. FSDB has the authority to implement eligibility criteria to legitimately dis-enroll students who cannot adequately access the education provided by FSDB, because their needs are greater than the scope of services the school can provide. FSDB has determined that the Petitioner is ineligible for continued enrollment due to being a danger to self or others and a disruption to the educational process. In making that initial determination, the school has, in essence, effected a change in ■■■'s educational placement. This means that FSDB bears the burden of proving ■■■'s ineligibility for continued

enrollment, and, to the extent that the Petitioner has made claims regarding FAPE, the Petitioner bears the burden of proving the FAPE-related issues. Schaffer v. Weast, 126 S. Ct. 528, 537, 126 L. Ed. 2d 387 (2005).

90. It has been held previously that the FSDB eligibility criteria are valid and that FSDB's unwillingness to accommodate a student's extensive developmental disabilities, as his parents wished, "did not deny him a free appropriate public education because children not eligible for admission to FSDB must be educated by the school district in which their parents reside." N.A.K. v. Florida School for the Deaf and Blind, Case No. 05-0182E, ¶ 83 (Fla. DOAH Jan. 4, 2006) (citing Florida School for the Deaf and Blind, Case No. 95-4562E, (Fla. DOAH 1997) at page 9)). See also Eva N. v. Brock, 741 F. Supp. 626 (E.D. KY 1990), aff'd, 943 F.2d 51 (6th Cir. 1991) (the admissions criteria of the Kentucky School for the Blind did not violate IDEA or Section 504); Harrison v. Crist, Case No. 01-0293RU (DOAH 2001).

Enrollment Eligibility

91. Dr. Eric Rosen, Ph.D was an expert witness for the Respondent, as described in the Findings of Fact. He established that deafness is a communication disorder and creates difficulty in learning language. The focus of any school for the deaf is to create a "language-rich environment." The enhancement of language acquisition skills is a central part

of every facet of the educational program at such a facility.

92. If a person such as the Petitioner is profoundly deaf, language can only be acquired visually. Therefore, the hearing-impaired person must have acute visual attention skills for effective communication. This means that the deaf person has to visually look and observe where information is coming from, so visual attention in the language education and every other facet of education for a deaf person becomes obviously critical.

93. When a deaf person has "co-morbid conditions" or conditions in addition to a primary diagnosis, as established by Dr. Belsito, such a situation can obstruct the only means of connecting to and assimilating language occurring around that deaf person. In other words, the visual attention abilities or skills of the person are inhibited. This inhibits the very therapeutic efforts which might be ongoing to try to address the various co-morbid conditions a person such as the Petitioner has, which are exacerbating the sensory impairment.

94. Dr. Rosen established that depression affects mood and can render a person explosive or enraged. In [REDACTED] the depression, coupled with the ADHD condition which affects the ability to concentrate, stay focused, and finish tasks manifests in an emotional intensity or rage which causes [REDACTED] to shut-out both external and internal language.

95. A critical problem with [REDACTED] as shown in the testimony

of Ms. Acuff, is the "intentionality" or willfulness with which ■■■ avoids therapeutic resolution of stressful issues during counseling sessions. Ms. Acuff established that ■■■ engages in avoidance tactics involving hanging of the head, having hair fall over the face, refusing to look at the therapist and turning away. ■■■ has physically ignored efforts by counselors and staff to secure ■■■'s attention to console, to calm, and to deescalate. The staff uses techniques such as moving into ■■■'s visual field, but if ■■■ refuses to look then ■■■ becomes shut-off from the very therapeutic tools which might help calming and de-escalation of stressful situations. This demonstrates the impact of ■■■'s co-morbid conditions on ■■■'s ability to connect with language.

96. Dr. Rosen further established that ■■■ cannot connect with ■■■'s own internal language whereby ■■■ could rationalize and think through resolutions to problems. If ■■■ has difficulty accessing ■■■'s "internal voice" then ■■■ is shut-off from internal language which makes it difficult to self-regulate reaction to stressing situations. This, in turn, makes it difficult to access the language coming from external sources.

97. The impact of ■■■'s co-morbid conditions on ability to connect with language from external sources deprives ■■■ of the ability to socialize, to develop peer relationships, to interact

appropriately with authority, to problem solve, respond to discipline and access services ■■■ needs at the FSDB.

98. In addition to the co-morbid conditions inhibiting ■■■'s access to therapeutic interventions, they also significantly hamper ability to socialize appropriately with peers. Socialization is an important part of the educational process at FSDB. In fact, under the 2004 revisions to the IDEA, IEP's must now include a statement of a child's present level of academic achievement and functional performance including "how the child's disability affects the child's involvement and progress in the general education curriculum." 34 C.F.R. § 300.320(a)(1)(i). The broader language in the 2004 revision expanding the term "general curriculum" to "general education curriculum" emphasizes the need for schools to address more than academics, that students have other areas of development, including social development, which may require intervention and services from an IEP team and the IEP process. This concept of required services has been upheld in the case of Mr. I. and Mrs. I. ex rel. L.I. v. Maine School Administration District, 480 F.3d 1, 11-13 (1st Cir. 2007) ("we have likewise held that the IDEA entitles qualifying children to services that 'target all of [their] special needs,' whether they be academic, physical, emotional or social.") (Citations omitted). Florida law also contemplates the provision of services for needs other than

academic needs, including consideration of "the academic, developmental, and functional needs of the students" in developing an IEP. Fla. Admin. Code R. 6A-6.03028(g).

99. ■■■'s extreme mood changes impact the desire and ability to socialize. ■■■ can become very agitated and angry one minute and the next minute be happy, so the mood and the mood changes are very unpredictable as established by Mr. Bechtold in his testimony, and people tend to avoid ■■■ when ■■■ is very angry or upset. ■■■ also will frequently isolate from peers during social opportunities during the school day. ■■■ is observed to sit a table either alone or with peers, but still in a withdrawn state, preferring to draw, or simply not to interact with peers, even sitting at the same table. Often ■■■ will become upset at something said by someone else on such occasions, walk away and sit alone. ■■■ thus does not take advantage of many opportunities for socialization, preferring to self-isolate quite often. Mr. Bechtold established that such behavior is quite unusual in the FSDB student population.

100. ■■■ is receiving counseling from the private psychologist, Dr. Christy Monaghan. The record, however, demonstrates, as shown by Dr. Rosen, that ■■■ needs additional medical treatment which ■■■ is not receiving, in terms of needing more direct treatment for depressive mood disorder, as well as some manifestation of psychotic features, according to

Dr. Rosen.

101. Since FSDB placed [REDACTED] on medical leave in April 2006, and Dr. Monaghan first evaluated [REDACTED]'s mental status and conducted a risk assessment, there has been insufficient communication between FSDB personnel and [REDACTED]'s private providers, especially Dr. Monaghan. In April 2007, Dr. Belsito, who had diagnosed [REDACTED] with depression and prescribed Prozac, documented serious concerns and placed [REDACTED] on medical leave. There was no attempt by Dr. Monaghan to communicate with Dr. Belsito, however, nor did Dr. Monaghan request educational or health care records from FSDB. She did not communicate with the mental health director, Dr. Silke Parl-Douglas after receiving an e-mail describing [REDACTED]'s behaviors of concern. Dr. Monaghan apparently relied more on information provided by [REDACTED] the [REDACTED]/guardian to determine that there did not appear a clinical risk for self-harm or harm to others.

102. Dr. Rosen felt that the therapy sessions with [REDACTED] by Dr. Monaghan were weighted toward addressing familial relationship issues, and that while her therapy approach was good, it did not work adequately on coping skills and ability to self-regulate. It did not provide enough attention to issues such as impulsivity, depression, and the consideration that [REDACTED] might be capable of self-harm.

103. In fact, there is a notable lack of communication

shown in this record between Dr. Monaghan and other private providers and the FSDB staff therapists and other staff members. Collaboration and communication between service providers and the school is critical. Dr. Belsito found that communication between providers is important, but so is sharing copies of a child's records. Such is absolutely critical in a situation such as the one at hand ". . . where we've got some instability and unstable behaviors are getting worse." Free exchange of information between providers is necessary to make a good assessment and to make a comprehensive treatment plan in the best interests of the child. Much of the problem with lack of communication with school personnel and Dr. Monaghan, and other private providers, apparently is attributable to ■■■'s refusal to allow sharing of records and information between the private and the school providers. That has also impacted the ability of ■■■'s private psychiatrist to make better decisions concerning treatment and medications.

104. Dr. Belsito established that ■■■ needs further medical treatment. She observed that ■■■ was not on anti-depressant medications, when she was examining records in order to prepare for her testimony. She also observed that behaviors had worsened over time, as demonstrated by the above Findings of Fact, and she believes that there is a treatment deficit for ■■■.

105. Medical services, however, are not the responsibility of FSDB. The IDEA regulations and supporting case law have long provided that medical services other than for diagnostic and evaluative purposes, are not the responsibility of the school district. See 34 C.F.R. § 300.34 (defining "related services" with a specific limitation for medical services). Medical services are thus largely excluded from the responsibility of educational agencies. Ervin Independent School District v. Tatro, 468 U.S. 883, 892-93 (1984); Cedar Rapids Community School District v. Garret F., 526 U.S. 66, 74 (1999).

Danger to Self or Others

106. FSDB is authorized by statute to enact operating procedures to carry out its functions in accordance with its goals and mission. FSDB has developed Operational Policy 2.07, which defines the ineligibility criteria of "danger to self/others," and "disruptive to other students or to the educational process." This policy is enacted in furtherance of the above-cited rule.

107. "Danger to self" is defined in the policy as "[t]he determination by a staffing committee that a student demonstrates behaviors which put the student at risk and in danger physically and/or emotionally." (Id. at 2505). The behaviors of concern include suicidal ideation, statements, gestures or attempts, not responsive to documented therapy;

self-abusive behaviors and behaviors that require one-to-one supervision by staff "to the extent that the needs of one student interfere with the provision of a safe learning environment for others, and create an interruption in the ability of others to benefit from the academic, and/or residential programs." (Id.).

108. "Danger to others" is defined as "[t]he determination by a staffing committee that a student demonstrates behaviors which put other students and/or staff at risk physically and/or emotionally." (Id.). Such behaviors can include violent behaviors such as striking, kicking, punching, threatening or harassing other students or staff resulting in students or staff being placed in fear for their safety, as well as behaviors that require one-to-one supervision by staff members "to the extent that the needs of one student interfere with the provision of a safe learning environment for others, and create an interruption in the ability of others to benefit from the academic and/or residential programs." (Id. at 2505-07).

109. The preponderant, persuasive evidence supports the determination by FSDB, at times pertinent hereto, through the Spring of 2008, at least, that ██████'s behaviors justified the determination that ██████ might constitute a danger to self or others. In fact, concerning behaviors were demonstrated by ██████ from the time of early enrollment at FSDB. This demonstrated

the need for therapeutic intervention by FSDB which was largely done in the form of counseling.

110. In the Fall of 2005, however, [REDACTED] began demonstrating significant emotional distress. This was the [REDACTED] grade year and [REDACTED] in that fall was diagnosed with depression and prescribed Prozac by Dr. Belsito. Thereafter, [REDACTED] was placed on medical leave by Dr. Belsito in order that further medical and psychiatric evaluation might be obtained.

111. Dr. Monaghan conducted her initial assessment of [REDACTED] in April of 2006. She diagnosed [REDACTED] with ADHD, Adjustment Disorder With Mixed Depression and Anxiety and Mood Disorder NOS. Despite the interventions provided for [REDACTED] between the Spring of 2006 and Fall of 2007 there were six emergency evaluations conducted, beginning in January of 2006, due to the symptoms and presenting behaviors discussed in detail in the above Findings of Fact.

112. In addition to the emergency evaluations that were conducted between January 2006 and November of 2007, other behaviors of concern were demonstrated, including comments by [REDACTED] to Dr. Belsito that [REDACTED] did not want to be alive, chewing or eating pieces from 70 or so books kept in [REDACTED]'s room, striking other students, spitting on staff and insulting and being aggressive towards students and staff. There was a progressive decline in attentiveness to personal hygiene and grooming,

behaviors delineated in further detail in the above Findings of Fact. Indeed, during this period of time ■■■ became increasingly irritable and aggressive, as well as being despondent concerning loneliness and lack of friends. FSDB's concerns about ■■■ and ■■■'s behavior increased until ultimately a staff member had to be assigned to ■■■ to ensure one-on-one supervision during the Spring semester of the 2007-2008 school year.

113. Thus the record contains significant persuasive evidence which demonstrates that ■■■ was exhibiting behaviors indicating a lack of adequate response to documented therapies, that placed ■■■ and other students at risk both physically and emotionally. The behaviors interfered with the provision of a safe learning environment and interrupted the ability of others, as well as ■■■ to benefit from the FSDB academic program, ultimately requiring the one-to-one staff supervision of ■■■

114. Dr. Michael DeLaHunt, M.D., the child and adolescence psychiatrist, opined that the reported behaviors documented for ■■■ constituted sufficient risk of injury to support the determination that ■■■ was no longer eligible for continued enrollment. He established that a diagnosis of depression increases the risk of suicide 10-to-15-fold. He identified a number of factors, present in ■■■'s history and life that associate mental health concerns and the likelihood of self-harm

or suicide, as described in the Findings of Fact.

115. Dr. Rosen in his expert opinion concerning the appropriateness of the dis-enrollment decision found that the decompensating behaviors, referenced in the above Findings of Fact, were more intense and beyond the scope of services that FSDB is structured and authorized to provide. Dr. Rostetter concurred in this assessment and opined in terms of the educational effect of the co-morbid conditions. Dr. Rostetter stated that the FSDB environment is one in which [REDACTED] cannot succeed at this time. Because of [REDACTED]'s conditions, the FSDB educational environment is not accessible to [REDACTED] in a adequately beneficial way. He believes an educational environment must be located where [REDACTED] can be successful and which has opportunities that FSDB simply isn't obligated to provide and cannot provide. This would have to include proper therapeutic and medical treatment designed to alleviate [REDACTED] presenting conditions, referenced above, which, for the reasons delineated above, rendered the educational environment at FSDB inadequate or at least not sufficiently accessible.

Disruption to Other Students or to the Educational Process

116. Disruption to students or the educational process is defined in OP 2.07 as "[t]he determination by a staffing committee that student consistently and chronically demonstrates behaviors which are disruptive to the educational and/or

residential process." See Respondent's Exhibit Volume IV, Tab 263, at page 2506. The behaviors include threatening or harassing students or staff resulting in fear for their safety; behaviors that require one-on-one supervision by staff "to the extent that the needs of one student interfere with the provision of a safe learning environment for others and interrupt the ability of others to benefit from academic or residential programs"; behaviors resulting in a student's refusal to participate in or respond to interventions; and oppositional or defiant behaviors not responsive to documented therapy, resulting in a student's failure to follow established rules and procedures. Id. at 2506.

117. Given the behaviors discussed and determined in the above Findings of Fact, based upon preponderant, persuasive evidence, the record contains adequate documentation that ■■■ constituted a disruption to the educational process, both ■■■'s educational process and that of other students. Numerous behaviors were engaged in that were dangerous to ■■■ but also had a threatening aspect to other students and to staff. They have required multiple staff members to spend extensive periods of time working to calm ■■■ after disruptive episodes, as demonstrated more particularly in the Findings of Fact above concerning incidents occurring between September 10, 2007, and April 14, 2008.

118. Supervising Teacher Brent Bechtold was most involved with ■■■'s behavior and resulting discipline, if applicable, and the staff's attempts to calm ■■■. Of the disciplinary infractions reported concerning ■■■, ■■■ had 36 documented behavior incidents that occurred exclusively during the academic day for the 2007-2008 school year. Mr. Bechtold was personally involved in 35 of those 36 incidents. He calculated the amount of time that ■■■ missed from class due to behaviors, the time taken for ■■■ to deescalate and the consequences of those behaviors, including two Baker Act referrals. He determined that the time amounted, in effect, to one school day per week missed from educational instruction for the 2007-2008 school year. That is approximately 20 percent less education than ■■■ should have gotten due to ■■■'s behaviors. Moreover, the behaviors resulted in time taken for de-escalation of ■■■ and for ensuing suspensions. This removed ■■■ from socialization and language development opportunities.

119. Ms. Acuff described ■■■'s refusal to participate in or respond to the interventions she tried. When Ms. Acuff attempted to work with ■■■ concerning a particular behavioral problem or stressful situation, ■■■ would refuse to discuss the issue, but would engage in a discussion only when the subject would turn to art or some other topic ■■■ wanted to choose. Although Ms. Acuff tried multiple strategies to work on calming

■■■ or to address specific issues, she found that any time she tried to address something that ■■■ did not want to talk about that there was no way to process with ■■■ or to use counseling techniques. ■■■ would refuse to participate in counseling strategies such as "breathing exercises" or "role playing." The preponderant, persuasive evidence thus shows that ■■■'s behavior constituted a disruption to the educational process as that process exists and is operative at FSDB.

Manifestation Determination Issue

120. The Petitioner seems to raise in the Second Amended Complaint an allegation to the effect that a manifestation determination should have been made to determine if ■■■'s behaviors were a manifestation of disabilities. The Petitioner apparently adopts the premise that dis-enrollment was a disciplinary measure which the Petitioner equates with an expulsion, or other long-term discipline-based removal of the child from the relevant educational program.

121. FSDB's dis-enrollment proceedings, however, operate under the color of state statute which authorizes the enforcement of enrollment criteria permitting the moving of a child to another educational program, after a child has been determined to no longer meet those enrollment criteria. A manifestation determination occurs, on the other hand, under both IDEA and Florida law to prevent undue changes in placement

occasioned by an expulsion or other long-term discipline-based removal from an educational program.

122. The discussion of manifestation determinations in the regulations under the IDEA at 34 C.F.R. Sections 300.530(e-g), occur under the "discipline procedures" section. After a school seeks to impose discipline because of a violation of a code of student conduct which would change the placement of a child with a disability, a team must convene to determine whether (1) the conduct was caused by, or had a direct and substantial relationship to the child's disability; or (2) the conduct in question was the direct result of the LEA's failure to implement the IEP. See 34 C.F.R. § 300.530(e)(1); see also Fla. Admin. Code R. 6A-6.03312(i) (defining manifestation determination as the process to examine "the relationship between the student's disability and a specific behavior that may result in disciplinary action").

123. There is no evidence in the record that the November 2007, dis-enrollment staffing meeting and determination constituted a disciplinary proceeding. FSDB has disciplinary procedures that must be followed when discipline is imposed on a student. See Fla. Admin. Code R. 6D-7.0073. It is true that H.P. has been disciplined in the past. But the evidence is uncontroverted that FSDB followed its procedures for determining ineligibility for enrollment in the instant situation and did not

at any time, related to the November 2007 dis-enrollment staffing and decision, pursue the imposition of disciplinary measures on ■■■.

124. There is no evidence to support the Petitioner's position that dis-enrollment equates to expulsion. Indeed, FSDB's dis-enrollment procedures set forth in Florida Administrative Code Rule 6D-3.002(5) make no mention of dis-enrollment being a disciplinary matter. Rather, the staffing committee determination of ineligibility for continued enrollment is based upon the statutorily-backed enrollment criteria contained in the above-cited rule. If the Petitioner's position equating dis-enrollment procedures with disciplinary proceedings were true, then FSDB could never dis-enroll a student under its legally recognized dis-enrollment procedures. To give effect to such an argument would vitiate Florida Administrative Code Rule 6D-3.002 and is without legal authority, See, e.g., N.A.K. v. School for the Deaf and Blind, Case No. 05-0182E, ¶¶ 78 through 84 (Fla. DOAH Jan. 4, 2006).

FAPE Claims

125. The Petitioner essentially raises two FAPE claims: the first claim in the Second Amended Complaint is that the FSDB is the only placement able to provide a FAPE to the Petitioner and thus dis-enrollment would deny FAPE to the Petitioner. The second claim raised for the first time in the Petitioner's Pre-hearing Statement concerns whether the dis-enrollment by FSDB would constitute a change of placement that triggers procedural safeguards.

126. It is well-settled that Congress enacted the IDEA, 20 U.S.C. Section 1400 et seq. 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 employment and independent living." 20 U.S.C. § 1400(d)(1)(A). The Supreme Court held that a FAPE by a state or local educational agency must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Education v. Rowley, 458 U.S. 176, 203 (1982).

127. The FSDB is a "choice school" and is a limited option also by virtue of its enrollment criteria, referenced above. In accordance with federal mandates provided in the IDEA, Florida has statutorily required each district to "provide for an appropriate program of special instruction, facilities, and services for exceptional students," Section 1003.57(1), Florida Statutes (2007). Florida has established the FSDB as a state-supported school that is a component of the delivery of public education within the Florida system, administered and funded by the DOE. § 1002.36(1), Fla. Stat. (2007). Florida allows parents of public school students to seek public school choice options that are applicable to their students and are available to students in their school district. See D.G. v. Florida School for the Deaf and Blind, Case No. 95-4562E, ¶ 80 (Fla. DOAH Sept. 5, 1997). These options may include "controlled open enrollment, lab schools, charter schools, charter technical career centers,

magnet schools, alternative schools, special programs, advanced placement, dual enrollment, [and] . . . the Florida School for the Deaf and Blind § 1002.36, Fla. Stat. (2007).

128. FSDB has an obligation to provide FAPE for its enrolled students, but is not a local educational agency (LEA), but rather is a school of choice. See N.A.K. v. Florida School for the Deaf and Blind, Case No. 05-0182E, ¶ 79 (Fla. DOAH Jan. 4, 2006). School districts are not at liberty to place students via an IEP team at FSDB, because the student must first demonstrate eligibility under the FSDB enrollment criteria. The Petitioner contends that FSDB is the least restrictive environment (LRE) for ■■■. That argument is flawed because any LRE determination would properly be made under the auspices of the Nassau County School District, which is ■■■'s LEA. FSDB, as only one placement on a continuum of alternative placements cannot make that determination. See, e.g., 34 C.F.R. § 300.115 (it is the public agency's responsibility to offer a continuum of placements to include instruction in regular classes, special classes, special schools, etc.). See also 34 C.F.R. § 300.39. FSDB only determines whether an individual meets or does not meet eligibility criteria for enrollment when the parents of a sensory-impaired child apply, by choice, for enrollment in FSDB.

129. In analyzing the claims made by the Petitioner, and the evidence adduced by the Petitioner, it is apparent that the Petitioner does not claim that FSDB actually denied a FAPE to ■■■. Rather, the Petitioner, including the Petitioner's guardian is supportive of ■■■ and the programs offered at FSDB.

The preponderant, persuasive evidence shows that ■■■ received a FAPE while at FSDB, as shown by the testimony of Dr. Rostetter and others. The Petitioner, in essence, is contending, instead, that to remove the Petitioner from enrollment at FSDB would constitute an improper change of placement and denial of FAPE.

130. The Respondent FSDB does not have the burden of proving proper placement for ■■■. Rather the Petitioner has the burden of demonstrating what the proper placement is, including placement at FSDB. Placement is defined by, but is not incorporated into, an IEP. See 34 C.F.R. § 300.116(b); see also Devine v. Indian River County School Board, 249 F.3d 1289, 1291-92 (11th Cir. 2001); Spielberg v. Henrico County Public School, 853 F.2d 256, 259 (4th Cir. 1988). In the traditional sense, with an LEA, the IEP team would determine a child's individual needs and how those needs would be addressed to provide educational benefit. The team then develops an IEP in conformity with those needs. It is only after the IEP is developed that the LEA's IEP team will consider the proper placement for implementing the IEP. The placement requirement is relative, as the team must consider multiple options with the ever-present requirement of educating a student to the maximum extent possible with non-disabled peers. See 20 U.S.C. § 1412(a)(5)(A); Beth B.v. Van Clay, 282 F.3d 493, 497 (7th Cir. cert. den., 537 U.S. 948 (2002)).

131. In developing its statutorily authorized enrollment criteria, the FSDB contemplated that there would be students who could derive educational benefit from FSDB placement, but who

exhibited behaviors that FSDB could not accommodate, e.g., danger to self or others and disruption to the educational process. When, as here, a determination is made that ■■■ does not meet those enrollment criteria, the responsibility for developing an IEP and offering an appropriate placement for ■■■ devolves upon ■■■'s home school district i.e., the Nassau County School District.

132. The Petitioner introduced no evidence that the Nassau County School District, ■■■'s LEA, cannot provide an appropriate program for ■■■. No evidence was presented concerning what programs the Nassau County School District could offer, but ■■■'s LEA has the ultimate obligation to ensure that ■■■ is provided with a FAPE, which or may or may not include its own program. Therefore, the fact that the Nassau County School District might not have a program does not end that district's obligation to ensure that ■■■ receives an appropriate education. See D.G. v. Florida School for the Deaf and Blind, Case No. 95-4562E, ¶ 51 (Fla. DOAH Sept. 5, 1997). Therefore, the Petitioner's claim that FAPE can only be provided at the FSDB, is not established by preponderant, persuasive evidence.

133. There is no question that the dis-enrollment of ■■■ constitutes a change of placement. A change of placement occurs when a proposed change "would substantially or materially alter the child's educational program." See Letter to Fisher, 21 IDELR 992 (OSEP 1994). Factors to consider in determining whether the effect of a change in location constitutes a change in placement include: whether the educational program set out in the child's

IEP would be revised; whether the child would be able to be educated with non-disabled children to the same extent; whether the child would have the same opportunities to participate in non-academic and extra curricular services; and whether the new placement option is the same option on the continuum of alternative placements. There is no question that the dis-enrollment of ■■■ constitutes a change in location and also a change in educational program affecting the factors referenced above. Therefore, in effecting a change in placement the FSDB is required to and did follow the written notice requirements set forth in 34 C.F.R. Section 300.503. Moreover, the Respondent FSDB followed its own procedures set forth in Florida Administrative Code Rule 6D-3.002. There is no evidence that FSDB failed to follow the above-referenced procedures for dis-enrolling ■■■.

134. In summary, the Respondent FSDB, has proved by preponderant, persuasive evidence that ■■■ the Petitioner does not meet the referenced criteria for continued enrollment at FSDB. It has not been established that the FSDB has failed to provide a FAPE for Petitioner ■■■ during the times of enrollment. Thus, unfortunately, the Respondent has established its case for dis-enrolling ■■■ from FSDB.

135. There is some testimony which indicates, in the Spring of 2007, but more particularly in the Fall of 2008, after the hearings were partially completed, that ■■■ is making considerably better academic progress, and that ■■■'s behavior has significantly improved. That being the case, it is strongly

urged, that should at any time in the future re-enrollment of ■■■ in FSDB be contemplated by parents/guardian, that a full psychiatric evaluation and the provision of therapy and treatment, determined to be appropriate through the results of that evaluation, be provided ■■■. Such psychiatric and psychological evaluation and the resulting therapy and treatment should be in conjunction with free exchange of patient information and records between the private providers and the relevant staff of the FSDB, should a new application to enroll ■■■ be proposed. There is substantial reason to believe that ■■■'s behaviors can be alleviated and stabilized with appropriate comprehensive therapy and treatment, after evaluation, such that ■■■ could possibly again be enrolled as a student at FSDB.

ORDER

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and the arguments of the parties, it is, therefore,

ORDERED: That the dis-enrollment decision should stand and the Petitioner's due process hearing complaint be dismissed.

DONE AND ORDERED this 24th day of March, 2009, in Tallahassee, Leon County, Florida.

S

P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of March, 2009.

ENDNOTE

^{1/} A mental health plan is not part of an IEP and is not an IEP in itself. See 34 C.F.R. §§ 300.320-28; 20 U.S.C. § 1414(d). It thus does not invoke IDEA provisions regarding IEP meetings including the procedures involved with regard to required participants in IEP meetings. According to the School Operational Policy 10.08, at 2503, "[T]he director of mental health or his/her designee and Medical Director will ensure that an appropriate mental health plan is in place utilizing the recommendation and resources available."

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(e), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(e) and 120.68, Florida Statutes.