STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

█████,

Petitioner,

vs. Case No. 14-0293E

ORANGE COUNTY SCHOOL BOARD,

Respondent.
_________________________________/

FINAL ORDER

Pursuant to stipulation, this cause came on for final disposition by Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH), upon a stipulated evidentiary record and cross-motions for entry of a final order.

APPEARANCES

For Petitioner: Jamison Jessup
Qualified Representative
557 Noremac Avenue
Deltona, Florida 32738

For Respondent: Sarah Wallerstein Koren, Esquire
Orange County Public Schools
445 West Amelia Street
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue in this expedited due process proceeding is whether Respondent was authorized to change the placement of a high school student with disabilities (Student) to an interim alternative educational setting (IAES) as additional discipline

following a ten-day suspension for Student's violation of the Code of Student Conduct.

PRELIMINARY STATEMENT

On January 15, 2014, representatives of the Orange County School Board (School Board or Respondent) invoked the authority of Florida Administrative Code Rule 6A-6.03312(6) to change Student's placement to an IAES for 45 school days. The change of placement was imposed as additional discipline, following a ten-day suspension, for Student's violation of the Code of Student Conduct by giving a single dose of Student's prescription medication to another student on school campus.

Disagreeing with the change of placement, Student's parent (Petitioner) filed an expedited due process hearing request on behalf of Student on January 16, 2014.[1/] On January 21, 2014, Respondent referred the hearing request to DOAH, where the case was assigned to the undersigned.

By Notice of Hearing issued on January 22, 2014, an evidentiary hearing was scheduled for February 13, 2014, to meet the expedited parameters set forth in rule 6A-6.03312(7)(c).

Respondent filed a Motion for Continuance/Extend Timelines on January 22, 2014. Petitioner filed a response opposing the motion on January 27, 2014. As announced in a telephonic pre-hearing conference held on January 27, 2014, Respondent's motion

is denied as moot, due to the parties' agreement as to how this proceeding would be conducted, described below.

On January 23, 2014, Petitioner filed a motion to accept Jamison Jessup as Petitioner's qualified representative. Respondent did not oppose the motion. As announced in the pre-hearing conference, Petitioner's motion is granted; Mr. Jessup shall remain Petitioner's qualified representative of record.

On January 23 and January 24, 2014, the parties each filed a Motion for Summary Final Order. Each motion relied on documents attached as exhibits; in many instances, the same documents were attached to both motions.

A telephonic pre-hearing conference was arranged and held on January 27, 2014, to discuss how the parties wanted to proceed, in light of their filings. Both parties were represented, with Petitioner's qualified representative and counsel for Respondent in attendance. The parties confirmed that they had agreed to dispense with a resolution meeting. Discussion then ensued regarding whether the parties wanted to present additional evidence at an evidentiary hearing, or whether, as the cross-motions tended to suggest, the parties believed that all of the material facts could be determined from the documentary evidence attached to their motions.

Following a discussion of the options, the parties agreed that the documentary evidence attached to their motions

constitutes all of their evidence, and neither party wanted an evidentiary hearing in which to present additional evidence. The parties agreed that the issue presented by the expedited due process hearing request should be resolved on the basis of a stipulated evidentiary record in lieu of an evidentiary hearing. The specific documents to be encompassed within the stipulated record were identified, discussed, and assigned exhibit numbers 1 through 12. The parties stipulated to the authenticity and admissibility of Stipulated Exhibits 1 through 12, which were admitted in evidence as the stipulated evidentiary record. An index to the stipulated evidentiary record is provided in the attached Final Order Appendix.

Based on the parties' agreement to proceed on the basis of the stipulated record in lieu of an evidentiary hearing, the evidentiary hearing noticed for February 13, 2014, is cancelled.

The parties were offered the opportunity to submit proposed final orders, with proposed findings of fact and conclusions of law. The parties agreed to dispense with any additional written submissions, noting that their cross-motions for summary final order adequately set forth their respective views of the facts gleaned from the stipulated evidentiary record and the legal conclusions that they contend should be reached.

Accordingly, this Final Order is entered on the basis of the stipulated evidentiary record, after careful consideration of the

parties' respective views of the facts and law as set forth in their motions for summary final order.

FINDINGS OF FACT

1. Student is a -year-old student in grade at a public high school operated by Respondent. Student is classified as a student with a disability within the meaning of the Individuals with Disabilities Education Act (IDEA). Student's disability falls within the category. Based on this classification, Student has received exceptional student education services, pursuant to an individual education plan (IEP).

2. Student's most recent IEP, prior to the incident giving rise to this proceeding, was completed on June 7, 2013. The June 2013 IEP described the ways in which Student's disability affects Student's involvement and progress in the general curriculum, by noting that Student's lack of attention to details and lack of concentration/focus may impede progress in timely completing assignments. Accordingly, classroom strategies and accommodations were incorporated into the IEP, such as giving assignments in writing, repeating directions, providing advance notice and directions for lengthy projects, and extending the time allowed for taking tests. The IEP reviewed Student's class schedule, which included several honors classes. Student's performance was reviewed; and as a result of Student's struggles

in one subject--Algebra 2--the IEP called for specially designed consultation for Student in that subject. The IEP also provided for monthly counseling as a related service.

3. The conference notes included in the June 2013 IEP noted that Student's behavioral needs were discussed, and it was determined that a behavioral intervention plan developed on June 1, 2012, should be discontinued, because Student had transitioned well into high school and "none of the behaviors or concerns that were observed in middle school have been evidenced [in high school]."

4. As of the June 2013 IEP, the IEP team determined that the least restrictive environment in which Student should be educated was in regular general education classes with non-disabled peers 100 percent of the time.

5. On December 17, 2013, Student went to school with a 30 milligram ███ pill in Student's possession. The parties do not dispute that this medication was properly prescribed to Student to treat ███.

6. Although Student may have had a valid prescription for this medication, the parties also do not dispute that Student's possession of the controlled substance on school campus was a violation of the Code of Student Conduct for Orange County Schools. All medication must be submitted to the school office by a parent and administered in the office. Students are not

allowed to maintain and administer their own prescription medications. Student was aware of the requirements of the Code of Student Conduct.

7. Student committed a second violation of the Code of Student Conduct when Student gave the pill to another student (referred to herein and in the health room log as student X). There is no evidence suggesting that Student sold the pill to student X for money or anything of monetary value. Nonetheless, the Student Code of Conduct equally prohibits the sale or the distribution of drugs. Thus, Student violated the Code of Student Conduct by distributing a controlled substance to student X.

8. Not feeling well after ingesting the pill, student X went to the high school's health room. Student X signed in at 9:21 a.m. and was signed out at 10:45 a.m. after being turned over to deputies and school officials.[2/]

9. Both student X and Student were questioned by school officials and they both gave written statements, which they signed and dated December 17, 2013. Student X's statement was that student X was outside the lunch room in a courtyard that morning, when Student, a friend of student X, "offered me" a pill, . Student X took the medication, and it "made me feel strange."

10. Student's written statement admitted that Student gave a 30 milligram capsule of [redacted] to student X. The statement indicated that Student forgot to take Student's pill that morning at home, and that Student does not like to take it.

11. Witness statements completed on December 17, 2013, by two school administrators confirmed the essential facts in the two student statements. One administrator observed student X in the health room shortly after (less than two class periods after) student X ingested the prescription pill, and described student X as acting very erratic and incoherent. Upon learning from student X that the pill was given to student X by Student, the administrator had Student removed from class and brought to an administrative office, where Student was searched and questioned. The search revealed that Student did not have any more prescription medication in Student's possession.

12. According to the second administrator's written statement, student X's parent was called in and student X was questioned in the presence of student X's parent. Student X admitted to ingesting Student's [redacted] pill called [redacted]. Student X stated that student X started to feel ill, so student X went to the health attendant office for assistance. This administrator's written statement described student X as experiencing irregular thought patterns, jumping from question to question without answering, and speaking inappropriately.

13. No evidence was offered to establish that student X's condition was viewed as serious enough to warrant emergency medical services, as there is no indication in the record that an ambulance was summoned or that student X was taken to a medical facility for treatment. Instead, administrators summoned student X's parent, carried out their questioning of student X with student X's parent present, and collected student X's written statement, which student X signed on December 17, 2013.

14. No evidence was offered to establish that student X experienced any lingering effects, beyond the morning of December 17, 2013, from ingesting one 30 milligram pill. No evidence of any kind was offered to establish what student X's condition was beyond the immediate aftermath of ingesting the pill on December 17, 2013.

15. In sum, then, the evidence establishes that student X experienced some immediate adverse effects from ingesting a single dose of Student's prescription medication. However, there was no competent evidence establishing that these adverse effects were serious enough to warrant summoning medical personnel, or serious enough to be life-threatening. Although the adverse effects may have been serious to a degree immediately after the drug was ingested, there was no evidence that student X experienced any protracted after-effects from ingesting the pill.

16. As a result of having given student X one of Student's prescription pills while on campus, Student received a discipline referral.

17. By letter dated December 18, 2013, the school principal informed Petitioner that because "Student gave another student prescription medicine (30 mg) on campus[,]" Student was suspended for ten days. The ten-day suspension was broken down into five days of out-of-school suspension plus five days in an alternate classroom. The principal informed Petitioner that in addition to the suspension punishment, because of the seriousness of Student's offense, the principal was also recommending removal of Student under conditions set by Respondent. In bold print, the letter notified Petitioner as follows: "You and your child are requested to attend a Discipline IEP Team Meeting at [High School] on 1/7/2014 at 8:30 a.m., which will inform you of your child's rights to continue the educational process within Orange County Public Schools."

18. Prior to the discipline team meeting, a "student background report" was prepared. The report identified the Student Code of Conduct infraction at issue as a level 4U offense, "Drug Distribution/Sale." A detailed summary of the offense was set forth, drawn from the four witness statements summarized above.

19. Petitioner's representative, Mr. Jessup, requested that the January 7, 2014, meeting be rescheduled. To accommodate Mr. Jessup's request, the meeting was rescheduled to January 15, 2014.

20. As the first order of business on January 15, 2014, a discipline team meeting was conducted to verify that a "level IV offense" under the Code of Student Conduct had occurred. A level IV offense, identified by the discipline team as "4U - Drugs/ Distribution/Selling/Buying", was verified.

21. Based on the verified level IV offense, the discipline team recommended "[r]eferral to the IEP Team for consideration of program/placement per IDEA guidelines."

22. The next step was to convene a meeting of the discipline IEP team, which took place immediately after the discipline team referral, also on January 15, 2014. According to the conference notes of the discipline IEP team meeting, the purpose was to conduct a manifestation determination and complete an IEP amendment if appropriate. The conference notes acknowledge that the team was "addressing a 4 U infraction; Drug Distribution." According to the conference notes, the result of the manifestation determination was "that the behavior may be a Manifestation of the Disability due to the procedural violation of not providing [counseling] services on a monthly basis."

23. The discipline IEP team completed the required Discipline IEP Team Meeting form. The first part of this form addressed the team's manifestation determination. The form set forth a matrix that guides consideration of whether the behavior is a manifestation of the student's disability. The team checked the option that found that ESE services, related services, and behavioral interventions were "NOT being implemented" consistent with the IEP and appropriate to meet the student's need.

24. The next part of the form set forth the "Decision" of the manifestation determination, and required the selection of one of two options, based on how the matrix in the prior section is completed. As a consequence of selecting the "NOT being implemented" option in the prior section, the Decision section of the form instructed the IEP team to select option 2: **"One or more statements under Column 2 are checked: the student's behavior IS a manifestation of the disability**. Describe appropriate interventions in behavioral intervention plan." (emphasis in original form).

25. Thus, while the IEP team conference notes indicate only that the team determined that Student's conduct "may be" a manifestation of Student's disability, the team completed the manifestation determination form by setting forth their decision that "the student's behavior IS a manifestation of the disability."

26. In the next section of the discipline IEP team meeting form, the team was allowed to indicate whether the behavior at issue involved "Weapon/Drug Offenses," in which case the form instructed as follows: "Principal can order an immediate 45-day removal without parental consent." The team wrote "Yes" next to this description.

27. The next section in the form addressed "Injurious/ Dangerous Behavior." The form instructed the team that it could consider this option for "dangerous students," and that "if a due process hearing request is filed, an Administrative Law Judge (ALJ) may order a transfer to an alternative setting only if both statements under *Injurious/Dangerous Behavior* are 'Yes.'" The first of these two questions was as follows: "Beyond a preponderance of evidence, there is a substantial likelihood that the student will injure him/herself or others." The team selected "No." The second inquiry, answered "Yes," was whether "[s]taff have made reasonable efforts to minimize the student's risk of harm to him/herself or others." The team explained as follows: "The school has provided adequate supervision."

28. The discipline IEP team completed the remainder of the meeting form to indicate that an alternative setting would be appropriate for Student. The team indicated that Student should undergo a change of placement through the IEP process. The team

selected the following recommendation: "transfer to [IAES] to receive educational program."

29. The discipline IEP team also completed an amended IEP dated January 15, 2014. There were no changes to the IEP descriptions of Student's test results, classroom performance, or how Student's disability affected Student's progress, nor were there any changes to Student's educational program, goals, or objectives. Instead, the only components changed in the IEP were a change in Student's placement to an IAES from January 16, 2014, through June 7, 2014, and an increase of counseling services from monthly to 30 minutes per week. In addition, transportation services were added, with this explanation: "Student was sent to an Interim Alternative Setting for a 45 school day period and will require Transportation."

30. The "Least Restrictive Environment" (LRE) portion of Student's IEP was bifurcated in Student's amended IEP, to reflect the change of placement. The first part of the LRE discussion was as follows:

> This student is participating in all general education classes.
>
> This placement's initiation date is 06/07/2013.
>
> This placement's duration date is 01/15/2014.
>
> The student's time in total school week is 2010 minutes.

> The student's time with nondisabled peers is 2010 minutes.

The second part of the LRE discussion in the amended IEP was as follows:

> The student has been placed at an Interim Alternative Education Setting for a 45 day school day placement. This placement is an all ESE site. The student will not have interaction with non-disabled peers.
>
> This placement's initiation date is 01/16/2014.
>
> This placement's duration date is 06/07/2014.
>
> The student's time in total school week is 1650 minutes.
>
> The student's time with nondisabled peers is 0 minutes.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.65 and 1003.57(1), Fla. Stat. (2013); Fla. Admin. Code R. 6A-6.03312(7)(c).

32. Petitioner initiated this proceeding to contest Respondent's change of Student's placement by reassigning Student to an IAES as a disciplinary measure. As the party seeking relief, Petitioner bears the burden of proof in this case.

Schaffer v. Weast, 546 U.S. 49, 57-58, 126 S. Ct. 528, 535, 163 L. Ed. 2d 387, 397 (2005). The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

33. There is no dispute that Student is entitled to exceptional student education and related services, in accordance with the IDEA and Florida counterpart laws. See §§ 1003.57(1) and 1003.01(3)(a), Fla. Stat.

34. There is likewise no dispute that Student violated the Code of Student Conduct when Student came to school on December 17, 2013, in possession of a 30 milligram [redacted] pill and when Student gave that pill to student X.

35. Respondent's actions taken to discipline Student for Student's violation of the Code of Student Conduct are subject to the IDEA's disciplinary procedures for students with disabilities. These procedures are set forth in the IDEA itself. See 20 U.S.C. § 1415(k), providing as follows:

> (k) Placement in alternative educational setting.
>
> (1) Authority of school personnel.
>
> (A) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.
>
> (B) Authority. School personnel under this subsection may remove a child with a disability who violates a code of student

conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).
(C) Additional authority. If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) [20 U.S.C. § 1412(a)(1)] although it may be provided in an interim alternative educational setting.

(D) Services. A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall--

(i) continue to receive educational services, as provided in section 612(a)(1) [20 U.S.C. § 1412(a)(1)] to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination.

(i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation. If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation. If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall--

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

> (ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and
>
> (iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.
>
> (G) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child--
>
> (i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;
>
> (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or
>
> (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

See also § 1003.57(1)(h), Fla. Stat. The federal regulation that expands on the IDEA's disciplinary requirements, including by codifying definitions of some of the key terms, is 34 C.F.R.

§ 300.530. Rule 6A-6.03312 is Florida's rule counterpart to the federal regulation, codifying the IDEA's disciplinary procedures for students with disabilities, as mirrored in Florida law and as amplified by the federal regulation. For ease of reference, the citations that follow will be to the Florida rule; however, it should be kept in mind that the Florida rule mirrors the federal regulation, and that the IDEA itself is the ultimate source of key provisions at issue in this proceeding.

36. Pursuant to the disciplinary procedures, Respondent exercised its authority to suspend Student for ten school days for Student's violation of the Code of Student Conduct. The ten-school-day suspension was permissible, and is not at issue in this proceeding.

37. However, when the disciplinary removal of a student with disabilities from the student's current placement exceeds ten consecutive school days, the removal constitutes a "change of placement," and more elaborate procedures are required. There is no dispute that Respondent's decision to remove Student to an IAES for 45 school days, as further discipline following Student's ten-day suspension, was a "change of placement" as defined in rule 6A-6.03312(1)(a)1., triggering the rule procedures that must be adhered to for changes of placement.

38. A key requirement that will shape what options are available to school personnel is the manifestation determination,

defined as "a process by which the relationship between the student's disability and a specific behavior that may result in disciplinary action is examined." Fla. Admin. Code R. 6A-6.03312(1)(f). In accordance with the discipline procedure rule, Respondent properly conducted a manifestation determination meeting. The result of that meeting was Respondent's determination that Student's conduct at issue was a manifestation of Student's disability.[3/]

39. By virtue of Respondent's manifestation determination, Respondent's authority and options under the discipline procedure rule were limited, as follows:

> If the school district, the parent, and relevant members of the IEP Team determine that the conduct was a manifestation of the student's disability, the IEP Team must either:
>
> 1. Conduct a functional behavioral assessment, unless the school district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or
>
> 2. If a behavioral intervention plan already has been developed, review it and modify it, as necessary, to address the behavior; and
>
> 3. <u>Except as provided in subsection (6) of this rule</u>, return the student to the placement from which the student was removed, unless the parent and the school district agree to a change in placement as part of the modification of the behavior intervention plan.

Fla. Admin. Code R. 6A-6.03312(3)(c) (emphasis added).

40. As indicated on the Discipline IEP Team Meeting form, the team chose the option authorizing an immediate 45-school-day removal without parental consent, by indicating that the conduct at issue fell into the category of "**Weapon/Drug Offenses**." Respondent does not contend that any weapon was involved. Thus, the question is whether Respondent was authorized by rule 6A-6.03312(6) to change Student's placement, instead of returning Student to the placement from which Student was removed, because the student code violation at issue was a drug offense.

41. Rule 6A-6.03312(6) provides as follows:

> Special Circumstances and Interim Alternative Educational Setting (IAES).
>
> (a) School personnel may remove a student to an IAES for not more than forty-five (45) school days without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student:
>
> 1. Carries a weapon to or possesses a weapon at school, on school premises, or to a school function under the jurisdiction of a state education agency or a school district;
>
> 2. Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a state education agency or a school district; or
>
> 3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the

> jurisdiction of a state education agency or a school district.

42. Comparing Respondent's Discipline IEP Team Meeting form to the rule, despite the impression given in the form, rule 6A-6.03312(6)(a)2. does not convey authority for 45-school-day removals to an IAES for <u>any</u> drug offense. Instead, the rule defines very specific types of drug offenses that trigger the limited authority to remove students with disabilities to an IAES for 45 school days without regard to the manifestation determination. This provision applies only when a student with disabilities "[k]nowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance" in school or on school campus.

43. There is no dispute that Student's conduct at issue occurred on school campus; that portion of the rule is met. However, Petitioner persuasively argues that Student's violation does not otherwise fall within the narrow parameters of the rule.

44. Petitioner contends, and Respondent does not dispute, that the prescription medication that was in Student's possession on December 17, 2013, was a "controlled substance" as defined by rule 6A-6.03312(1)(b). In Student's possession, the medication was not an "illegal drug," as defined by rule 6A-6.03312(1)(c), because the medication was properly prescribed for Student's use.

45. Student's violation did not meet the first part of the

rule description that applies when a student with disabilities "knowingly possesses or uses illegal drugs." Respondent does not argue otherwise; Respondent does not argue that Student's admitted (and knowing) possession of a [redacted] pill on school campus constituted the knowing possession of illegal drugs.

46. The crux of the dispute between the parties is whether Student's violation fell within the second part of the rule description that applies when a student with disabilities "sells or solicits the sale of a controlled substance[.]"

47. Petitioner's argument is simple: it is undisputed that Student gave a controlled substance to student X. Giving is different from selling. Student did not sell a controlled substance, nor did Student solicit the sale of a controlled substance.

48. Respondent's argument is convoluted. While acknowledging that this is the rule language on which Respondent's change of placement decision was predicated, Respondent urges that as a matter of public policy, Student's "distribution" or "delivery" of a controlled substance should be treated as the equivalent of a sale. Respondent argues that there are state and federal laws that are worded more like Respondent's Code of Student Conduct, by extending the scope of a prohibition to not only sales, but also, to delivery or distribution. However, rather than supporting an expansive

interpretation of rule 6A-6.03312(6)(a)2., Respondent's argument is just that different word choices made elsewhere require different interpretations. The language chosen in other laws, codes, and rules may extend their reach to not only sales, but also, distribution or delivery in addition to sales or instead of sales. That choice simply emphasizes that selling and distributing or delivering are different activities, so that the additional words are needed to reach the different activities. Indeed, that point is illustrated by Respondent's Code of Student Conduct, which identifies "Drugs/Distribution/Selling/Buying" as a violation, and describes that violation as "[g]iving, buying or selling any drug or contraband substance . . . ." Thus, while it is clear that the student code is equally violated by selling a controlled substance or by giving/distributing a controlled substance, it is also clear from the code's description of that violation that giving and selling a drug are different activities.

49. What Respondent does not argue, and could not reasonably argue, is that Student was guilty of selling a controlled substance. Instead, Respondent is left to argue that giving or distributing a controlled substance should be viewed as the equivalent of selling.

50. Respondent's argument must be rejected as contrary to basic tenets of statutory and regulatory interpretation. The

word "sells" used in the rule is clear. Just as clearly, the undersigned can not expand the plain language of the rule as if it says "sells or gives (or distributes or delivers)."

51. Respondent argues that Student's conduct constitutes a felony under criminal laws, and as such, it would send the wrong message to allow that conduct to escape punishment. Respondent overlooks the fact that it has already punished Student by imposing a ten-day suspension, which Student has already served. Thus, the issue in this proceeding is whether Respondent has authority under the IDEA to impose additional punishment. The issue is not whether Student's conduct may have fallen within a felony statute; instead, the issue is whether Student's conduct falls within the narrow categories of conduct that trigger the authority for a 45-school-day disciplinary removal without regard to a manifestation determination.

52. Respondent urges that interpreting "sells" to mean "sells or gives (or distributes or delivers)" would constitute good public policy, but that is an argument for a policymaking body. In this context, the policymaking body that is the source for the language at issue is Congress. See 20 U.S.C. § 1415(k)(1)(G)(ii).

53. As a final attempt to justify Student's 45-school-day disciplinary removal, Respondent offers an alternative argument that Student's removal to an IAES also can be justified under

rule 6A-6.03312(6)(a)3., because Student "inflicted serious bodily injury" on student X.[4/] However, the evidence does not support a finding that student X suffered "serious bodily injury" as defined in rule 6A-6.03312(1)(d), as follows:

> Serious bodily injury means bodily injury which involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Based on the record evidence, there was no substantial risk of death to student X; student X did not suffer extreme physical pain; student X did not suffer any disfigurement, much less protracted or obvious disfigurement; and student X did not suffer protracted loss or impairment of the function of a bodily member, organ, or mental faculty. At most, there was some evidence that student X may have experienced a temporary impairment of mental faculty; however, student X's condition was not viewed as very serious by those encountering student X in the hours immediately after student X ingested a single dose of Student's prescription ████ medication. No evidence of any kind was offered to prove what student X's condition was beyond the hours immediately after student X ingested the medication, so there is no evidence of any protracted impairment of any kind. Based on the evidence, therefore, it must be concluded that Student did not inflict serious bodily injury on student X.

54. Based on the foregoing findings of fact and conclusions of law, it must be concluded that Student's removal to an IAES for 45 school days was a violation of rule 6A-6.03312. Respondent improperly attempted to invoke the limited authority in rule 6A-6.03312(6). Petitioner proved that the limited provisions in paragraph (6) do not apply here.

55. As a consequence of the foregoing determination, the appropriate result is dictated by rule 6A-6.03312(8), which provides as follows:

> (8) Authority of an ALJ. An ALJ hears and makes a determination regarding an appeal and request for expedited due process hearing under this subsection and, in making the determination:
>
> (a) An ALJ may return the student with a disability to the placement from which the student was removed if the ALJ determines that the removal was a violation of this rule or that the student's behavior was a manifestation of the student's disability; or
>
> (b) Order a change of placement of the student with a disability to an appropriate IAES for not more than forty-five (45) school days if the ALJ determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

56. Under the authority of paragraph (8)(a), the undersigned concludes that Student should be returned to the placement from which Student was removed.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent, Orange County School Board, return Student to the placement from which Student was removed.

DONE AND ORDERED this 7th day of February, 2014, in Tallahassee, Leon County, Florida.

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ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of February, 2014.

ENDNOTES

[1/] The record reflects that the expedited due process hearing request was transmitted after hours (at 5:38 p.m.) by email on January 15, 2014, to counsel for the School Board. The School Board's counsel was not present or available to receive the email or to open the attached hearing request until January 21, 2014, which is when the document was stamped in as received. However, when Petitioner received an auto-reply to the email transmission, indicating that counsel was unavailable, Petitioner transmitted the expedited due process hearing request to other School Board representatives on January 16, 2014. The hearing request is deemed filed with the School Board on January 16, 2014.

[2/] The health room log report in evidence contains a description of the "reason of visit" for student X. All other descriptions of visits by other students were redacted by the undersigned with

the parties' permission, to make clear which description was for student X while obliterating irrelevant information about other students' visits to the health room. The description of student X's visit appears to relay in cryptic shorthand what student X reported to the health room attendant. However, in part because of the cryptic style, it is difficult to discern many clear details regarding the student's actual condition. For example, the description notes that student X said that ██ had "been given ████████ . . . can't remember anything this morning - different stages of seizures. Mentally ill - ██ is cutting." The description ends with this statement: ". . . got deputies, ██████████ and ██████████ involved. ██ said ██ prides █████ on lying." It is not clear whether the description was taken entirely from what student X said as opposed to what was observed in the health room; it is not clear who made the statement about lying, to whom that statement was directed, and whether the statement was intended to question the credibility of all prior statements regarding student X. In sum, then, there is little that can be deemed reliably established from this record. It does appear clear from the record that student X was logged into the health room at 9:21 a.m. and was logged out at 10:45 a.m. on December 17, 2013.

[3/] The manifestation determination decision is set forth on Respondent's form, in which the following option was selected: **"One or more statements under Column II are checked: the student's behavior IS a manifestation of the disability.** Describe appropriate interventions in behavioral intervention plan (BIP)." (emphasis in original form). The Column II statement that triggered the manifestation determination decision was that ESE services, related services, and behavioral interventions were "NOT being implemented" consistent with the IEP and appropriate to meet the student's need. As the conference notes from this meeting reflect, the IEP team determined that Student had not been receiving the counseling services as required by the IEP, and based on this failure to implement the IEP, the Student's conduct "may be" a manifestation of Student's disability. "May be" is not a decision option for a manifestation determination, so Respondent determined that Student's conduct was a manifestation of Student's disability. What is not clear, because of the way in which the manifestation determination form only paraphrases the rule language, is whether the team actually determined that Student's "conduct in question was the direct result of the school district's failure to implement the IEP." Fla. Admin. Code R. 6A-6.03312(3)(a)2. (emphasis added). Regardless of any confusion caused by the abbreviated language in Respondent's form, the manifestation

determination decision was clearly expressed in writing, and is not subject to debate. That decision is not at issue in this proceeding because only a parent may challenge a manifestation determination decision. Petitioner did not contest the manifestation determination decision; Respondent cannot collaterally challenge its own manifestation determination decision. Respondent may want to review its forms and consider revision to more fully capture the rule standards.

[4/] There is nothing in the documentation of the January 15, 2014, discipline IEP team meeting to suggest that the 45-school-day removal option was selected because of the team's belief that Student inflicted serious bodily injury; indeed, it does not appear that the team even considered any evidence of student X's condition beyond the immediate aftermath of ingesting Student's [redacted] pill. Instead, the team wrote "yes" next to the option authorizing a 45-school-day removal for "Weapon/Drug Offenses." The team also determined that there was not a substantial likelihood that Student will injure him/herself or others.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes (2011), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

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

14-0293E FINAL ORDER APPENDIX

The parties stipulated to the authenticity and admissibility of the following documents, which constitutes their evidence submitted as the stipulated evidentiary record, and which have been marked as Stipulated Exhibits 1 through 12 and received in evidence.

Stipulated Exhibit 1:	June 2013 IEP for Student, pages 1 of 8 through 8 of 8, plus signature page of IEP Team meeting attendees
Stipulated Exhibit 2:	Student Background Report
Stipulated Exhibit 3:	Safety/Discipline Referral Form
Stipulated Exhibit 4:	Four written, signed statements dated 12-17-2013, by Student and others
Stipulated Exhibit 5:	Code of Student Conduct for 2013-14
Stipulated Exhibit 6:	Notice to Student regarding Code of Student Conduct
Stipulated Exhibit 7:	December 18, 2013, letter to Student's parent from principal regarding suspension and notice of discipline IEP team meeting
Stipulated Exhibit 8:	January 15, 2014, discipline team meeting report verifying violation and referring matter to IEP team
Stipulated Exhibit 9:	January 15, 2014, discipline IEP team conference notes
Stipulated Exhibit 10:	January 15, 2014, discipline IEP team meeting report with manifestation determination decision
Stipulated Exhibit 11:	January 15, 2014, amended IEP for Student
Stipulated Exhibit 12:	Health Room Log Sheet for December 17, 2013 [entries for others besides "student X," the recipient of Student's prescription medication, are redacted]