STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 21-1298E

LEE COUNTY SCHOOL BOARD,

Respondent.
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FINAL ORDER

Pursuant to notice, a due process hearing was held via Zoom before Administrative Law Judge Diane Cleavinger of the Division of Administrative Hearings (DOAH) on June 2 and 3, 2021.

APPEARANCES

For Petitioner: Petitioner, pro se
(Address of Record)

For Respondent: Kristine Schrode, Esquire
School Board of Lee County
2855 Colonial Boulevard
Fort Myers, Florida 33966

STATEMENT OF THE ISSUES

The issues in this proceeding are:

a. Whether, during the 2020-2021 school year, the Lee County School Board (District or School Board) failed to evaluate Petitioner (Student) for eligibility under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 795, *et. seq*. (Section 504) or 20 U.S.C. § 1400, *et seq*. (IDEA); and

b. Whether, during the 2020-2021 school year, the School Board failed to develop an appropriate Section 504 plan or individualized education program

(IEP) for the Student, thereby failing to provide appropriate accommodations for the Student related to the requirement to wear a mask in school due to the COVID-19 pandemic.

PRELIMINARY STATEMENT

The Student, through her parent, filed a request for a due process hearing (Petition) with Respondent, the School Board, on April 8, 2021. On April 13, 2021, the School Board forwarded the Petition to DOAH for hearing. A Case Management Order was issued on the same day, establishing deadlines for a sufficiency review, as well as for the mandatory resolution session. Thereafter, a telephone conference was held with the parties to discuss setting this case for hearing. Based on that discussion, on April 29, 2021, a Notice of Hearing was issued setting the hearing for June 2 and 3, 2021.

The hearing was held as scheduled. At the final hearing, Petitioner offered the testimony of 14 witnesses. Respondent offered the testimony of two witnesses. Additionally, Petitioner's Exhibits numbered 2, page 3; 3; 4, pages 12 and 13; 5, pages 14 through 16; 6, pages 17 through 20; 7, page 21; and 8, pages 22 through 24 were admitted into evidence. Respondent's Exhibits numbered 1 through 6; 8, 9,10 and 12 were also admitted into evidence.

Following the conclusion of the hearing, a discussion was held with the parties regarding the post-hearing schedule. Based on that discussion an Order establishing deadlines for proposed orders and this Final Order was entered on June 3, 2021. The Order established the deadline for filing proposed final orders as July 1, 2021. The deadline for entering this Final Order was extended to August 2, 2021.

After the hearing, Petitioner timely filed a Proposed Final Order on July 1, 2021. Likewise, Respondent filed a Proposed Final Order on the same date. To the extent relevant, the filed proposed orders were considered in preparing this Final Order.

Additionally, unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations are to the current codifications.

Further, for stylistic convenience, the undersigned will use female pronouns in this Final Order when referring to Petitioner. The female pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. Petitioner is a [redacted]-year-old student who, at all times relevant to this proceeding, attended School A, a public elementary school in Lee County. She has attended Lee County public schools since kindergarten. At the time of the hearing the Student was in [redacted]th grade.

2. The uncontroverted evidence demonstrated that Petitioner is a high-performing, conscientious student who is well liked by her teachers and peers. The Student has excellent grades, good attendance, and high standardized test scores. She has been in an accelerated class since her kindergarten year and has mostly received As, Bs and Ss (satisfactory). Additionally, the Student has been involved in several athletic sports and continues to play volleyball.

3. As noted above, the Student was enrolled in Lee County schools for her [redacted]th-grade year (2020-2021). At the time, the Student's parent submitted enrollment materials to the District, which included health information and a physical completed by a medical doctor. None of these forms indicated that

the Student had asthma. Similarly, none of the Student's health information forms submitted in prior school years indicated the Student had asthma. Also, during her time in school, the evidence showed that Petitioner never exhibited any symptoms that would have alerted school personnel that she had asthma.[1] Indeed, the evidence demonstrated that the Student's asthma did not significantly impact a major life activity or rise to the level of a disability. As such, the Student is not currently identified as a student with a disability under either IDEA or Section 504. Further, the evidence was clear that the Student's asthma never impacted her education or receipt of a free appropriate public education (FAPE).

4. Due to the COVID-19 pandemic, Lee Home Connect was offered to students as an alternative to attending brick-and-mortar schools. Lee Home Connect allowed students to remain attached to their home school, while still receiving live instruction via an online platform. Students could also choose to attend Lee Virtual or Florida Virtual School, which allowed students to receive their education in a virtual setting.

5. When the 2020-2021 school year began, approximately one-third of the students in the District were enrolled in Home Connect. In October of 2020 at School A, there were approximately 140 Home Connect students and 686 students attending in person. Notably, with the number of students attending in person, Petitioner's classes at School A were at maximum

[1] The Student only had an issue with congestion once in school in [redacted]. During this incident, the Student reportedly had a cough and congestion, and was short of breath, but did not require medical intervention. The school nurse contacted the parent who indicated the Student was having allergy symptoms and could remain at school. After resting in the nurse's office, the Student returned to class and finished her school day. Additionally, during her years at school, the Student's teachers, including her physical education teacher never witnessed the Student having any difficulty breathing in school, learning in school, socializing in school, or accessing her curriculum any differently than her typical peers. Indeed, the parent admitted that the student's asthma did not impact her in the school setting and she was able to participate just as the other kids in her class participated. The parent testified that the Student's asthma occasionally affected her at night and that the Student had never been hospitalized for asthma. There was some very confusing testimony that the Student had an inhaler, but that testimony did not demonstrate when the Student was prescribed the inhaler, that the Student used the inhaler, or that, if used, that use was significant.

capacity if appropriate social distancing was to be maintained to permit face-to-face instruction to continue. At the parent's election, the Student began the 2020-2021 school year by participating in Lee Home Connect. The evidence demonstrated that Lee Home Connect offered and provided an appropriate education to Petitioner.[2]

6. Prior to the start of school, the School Board also instituted a mandatory mask policy, Policy 1.181, for the 2020-2021 school year to provide necessary pandemic-related safety measures so that students and staff could safely return to brick-and-mortar in-person school. The policy required all students and staff who attended brick-and-mortar schools to wear a face covering/mask, unless granted an exemption via Section 504 or IDEA. The policy was created based on guidance from local health officials, the Centers for Disease Control (CDC), and the Florida Department of Health (FLDOH). Elizabeth Wipf, director of Health Services, worked closely with District administrators, the FLDOH, and local health officials to ensure that the District was employing necessary pandemic health and safety measures, including social distancing and student breaks from wearing a face mask at various times during the day.

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[2] The evidence demonstrated that the Lee Home Connect program had appropriate policies in place during teacher absences to ensure learning continued by providing substitute class personnel or providing school work to students to complete during such absences. Further, there was no evidence that Petitioner missed any instruction or any materially significant amount of instruction during her participation in Lee Home Connect. The fact that the parent helped the Student with her math school work does not indicate that education in the Home Connect program was inferior since such aide was not unusual and well within the role of being a parent. The evidence did demonstrate that while in the Home Connect program, the Student readily participated in class, asked questions of her instructors and adequately progressed in her education and attained As and Bs in her subjects. The fact that the Student's math scores on the I-ready assessments, a periodic snap-shot assessment of a student in reading and math, during this period increased but plateaued during the school year, does not demonstrate that she did not progress or that her education was inappropriate since the Student's scores remained above the grade level cut-off score for the assessments and were on grade level. Further, as with many students, the evidence demonstrated that the Student's assessment scores and comparative percentile ranks varied from assessment to assessment but were always above the grade level cut-off score for the assessments. More importantly, the Student clearly progressed in her education more than sufficiently to be promoted to 5th grade.

7. As of the date of the hearing, both the CDC and the FLDOH continued to recommend that students and staff wear face coverings in the school Setting, in addition to other precautions necessary to mitigate the spread of COVID-19. However, the mask policy will not be in effect in the Lee County School District for extended school year services during the summer or the upcoming 2021-2022 school year. Further, at the time of this Final Order, the mask policy has expired and there is no longer an issue related to the wearing of masks in Lee County District schools.

8. Under the now-expired policy, the School Board provided a process for students to request an exemption from the mandatory mask policy through the Section 504 process or the IEP process to determine whether eligible students qualified for an exemption under those programs. At School A, an estimated [redacted] students had documented asthma and approximately [redacted] students required use of an inhaler at school. None of the students attending School A in person with asthma received mask exemptions and all were able to comply with the School Board's pandemic policy.

9. On September 14, 2020, Petitioner emailed the principal of School A requesting a "mask exemption" for the Student. Although the Student had seen an allergist who also treated asthma, Petitioner did not utilize the allergist for the Student's asthma, and never requested a mask exemption statement from the allergist. However, Petitioner attached a letter from a chiropractor, dated August 25, 2020, stating that the Student was being treated by the chiropractor for asthma, spinal dysfunction, and pain. The note stated that it was contraindicated for the Student to wear facial coverings due to her decreased lung capacity and breathing issues. It also stated, "we discussed her having a mask on hand, so, if there is a specific reason and short time frame where the benefit would outweigh any respiratory risk for [the Student], she would agree to utilize her own approved mask for a time period not exceeding 10 minutes."

10. The Student's chiropractor testified that [redacted] is not a medical doctor and cannot prescribe medication to treat asthma.[3] Other than a general discussion about masks referenced in [redacted] letter, the evidence showed that the chiropractor did not complete any examination of the Student's lung function or breathing capacity and only listed the diagnosis of asthma based on the parent's statement that the Student had asthma. Additionally, the chiropractor did not obtain any information about the Student's asthma, lung function or breathing capacity from a medical doctor or pulmonologist and did not refer the Student to a pulmonologist. Further, the evidence did not show that the chiropractor was treating the Student for any condition related to her asthma. The chiropractor was also not aware of how the Student's asthma impacted her in the school setting. The chiropractor did testify that for healthy individuals, [redacted] did not see how wearing a mask would be helpful to any person. Further, the chiropractor did not agree with CDC recommendations for mask wearing. [redacted] testified that [redacted] does not enforce

[3] Chapter 460, Florida Statutes, governs the practice of chiropractic medicine. Specifically, section 460.403(9)(a) defines the practice of chiropractic medicine as:

> "Practice of chiropractic medicine" means a noncombative principle and practice consisting of the science, philosophy, and art of the adjustment, manipulation, and treatment of the human body in which vertebral subluxations and other malpositioned articulations and structures that are interfering with the normal generation, transmission, and expression of nerve impulse between the brain, organs, and tissue cells of the body, thereby causing disease, are adjusted, manipulated, or treated, thus restoring the normal flow of nerve impulse which produces normal function and consequent health by chiropractic physicians using specific chiropractic adjustment or manipulation techniques taught in chiropractic colleges accredited by the Council on Chiropractic Education.

In this case, the evidence did not demonstrate that Petitioner's asthma resulted from anything involving chiropractic medicine. The evidence demonstrated that the Student's "spinal dysfunction" related to a [redacted]-degree curvature of the spine was not [redacted], was minor, caused mild pain to the Student, was insufficient to warrant referral to a specialist and was immaterial to the Student's asthma. Indeed, the only basis for the Student's chiropractor to provide a secondary diagnosis of asthma was based on statements from Petitioner's parent.

mask wearing in [redacted] clinic, but, rather, that it is the patient's choice whether to wear a mask. However, the chiropractor also testified that if someone is sick, masks could be worn, and that those who were unable to protect themselves in public should remain at home. Given these facts, the chiropractor's letter and recommendations regarding the Student's asthma are not credible.

11. On November 5, 2020, the School Board held a Section 504 meeting to discuss the email sent by the parent and the chiropractor's letter. The evidence showed that the meeting was slow to occur, but that the delay had no material impact on the Student's rights under either Section 504 or IDEA, since the Student was not eligible under either program.

12. Relative to the Section 504 meeting, the evidence showed that the Section 504 team, which included school personnel, the parent and a nurse, was comprised of appropriate members and discussed all factors related to Section 504 eligibility for the Student. The Section 504 team reviewed the Student's health records, chiropractic input, attendance records, school clinic records and grades, as well as observations and anecdotal reports from teachers, other staff and the parent. The Section 504 team appropriately determined that the Student did not have a physical or mental impairment that substantially limited a major life activity or bodily function. Except for the parent, all team members agreed with the determination of noneligibility.

13. The better evidence demonstrated that, during the November 5, 2020, meeting, school staff did inform the parent that the Student could return to school and if mask breaks were needed, they would be provided. School staff also advised that the Student would be closely monitored while wearing a mask if she returned to in-person classes. Additionally, the parent was advised that if more information was obtained regarding the Student's asthma, the team would reconvene to consider that information.

14. On January 11, 2021, the parent sent a second email to School A requesting a mask exemption so that the Student could return to school

without wearing a face covering. Accompanying the renewed request was correspondence from [redacted], M.D., who did not testify at the hearing. The correspondence from the doctor indicated that the Student was seen at [redacted] clinic on December 1, 2020, and was diagnosed with acute asthma, [redacted], [redacted], and [redacted]. The onset of these conditions was listed as December 1, 2020, which was the first and last time the Student visited [redacted]. The visit was also the first time the Student was formally diagnosed as having asthma.

15. [redacted] correspondence indicated that the Student was under "apractic care for known acute asthmatic exacerbations. She does have frequent attacks with wheezing and tightness of her chest, which lasts for 24 hours. Triggers include cold air, exercise and phases of the moon." Notably, apractic care relates to care for apraxia, involving treatment for the partial or complete incoordination or inability to manipulate objects in the absence of sensory or motor disease. [redacted] indicated that an inhaler "should be considered."

16. [redacted] also submitted a form stating that the Student was medically exempt from any regulation mandating face mask usage. This form was a fill in the blank form. The evidence showed that the School Board had received the same forms from [redacted] for other students attending school in the District. Notably, [redacted] did not include any information on how the Student's asthma impacted her ability to move or manipulate objects or how the Student's asthma impacted her education. There was no evidence, beyond speculation that the Student had any significant impacts due to her asthma or any significant impacts related to wearing a mask. As such and apart from the issue of hearsay, the letter and forms from [redacted] were not reliable as to the information contained within.

17. Again, there was no evidence demonstrating that the Student had any significant impacts due to her asthma or any significant impacts related to

wearing a mask. Further, there was no reliable evidence from [redacted] for [redacted] opinion regarding the medical need for the Student to be exempt from wearing a mask or to establish that the Student had a disability.

18. On February 18, 2021, another Section 504 meeting was held where the team reviewed the medical documentation from [redacted]. The evidence showed that the Section 504 team was comprised of appropriate members and again discussed all factors related to Section 504 eligibility for the Student.

19. The Section 504 team found that the Student had an impairment (asthma), but that the impairment was not substantially limiting and did not prohibit her from accessing her education equitably with her peers. The Section 504 team specifically looked at whether the Student's asthma substantially limited a major life activity or bodily function. There was a lot of discussion among the team about the Student's excellent grades, and that she never had any issues with her asthma or breathing, which substantially limited her in the school setting. The Student's Home Connect teacher for the 2020-2021 school year indicated that the Student was right on target and at or above grade level. The teacher had no concerns regarding her progress. Similarly, teachers who testified at the hearing, had no concerns regarding the Student's education or progress. The better evidence demonstrated that the team's decision was appropriate.

20. After the parent appeared at a Board meeting around March of 2021 to speak about the denial of the Student's request for a mask exemption, several school administrators contacted the parent to again offer to work with the Student to ensure she could return to school while safely wearing a face covering. District administrators offered to have Petitioner come in to do an observation of the Student if she came back to class and to provide other solutions to work with the family on allowing the Student to return to school, while wearing a mask safely. While the parent disputes how much was

explained, the evidence was clear that the parent rejected this offer and indicated that the parent did not want the Student to wear a mask.

21. No special education evaluation was ever requested for the Student, as the Student only presented information about asthma. There was no evidence that she was struggling academically or physically in terms of accessing her education. Respondent did offer to evaluate the Student per the Petitioner's request in her due process filing. However, the evaluation could not be completed because the parent insisted that the parent be in the room with the Student and the examiner during testing. Under the testing protocols, the parent's presence would have invalidated the evaluation.

22. More importantly and as with all of the Student's school years, the evidence showed that the Student had very good grades. Such scores and grades demonstrate mastery of the school curriculum sufficient to advance from grade to grade. The evidence also showed that the Student continued to be well-liked by her peers, was friendly, quiet, respectful, and a good worker who generally interreacted well in class. During school, she did not exhibit any issues related to work, behavior or social skills that would have caused the school to evaluate the Student for eligibility under IDEA or Section 504. By all measures the Student was a successful student and the evidence did not demonstrate that she was in need of special education services or that the District violated its Child Find obligations. The better evidence demonstrated that the Student is able to engage in all aspects of life and that her asthma does not significantly interfere in a major life activity or bodily function. Further, the evidence was clear that the Student's asthma had no impact on her education and that she does not and never has needed special education services. In fact, the evidence showed that the Student is not disabled and has achieved excellent progress during the school year. As such, the Student is not eligible for services under either Section 504 or IDEA, and Petitioner's due process complaint is dismissed.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. *See* §§ 120.65(6) and 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

24. Petitioner bears the burden of proof with respect to each of the issues raised herein. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

25. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *Phillip C. v. Jefferson Cty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on each agency's compliance with the IDEA's procedural and substantive requirements. *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

26. Parents and students with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1), (b)(3) and (b)(6).

27. Similarly, Section 504 forbids organizations that receive federal funding, including public schools, from discriminating against people with disabilities. 29 U.S.C. § 794(b)(2)(B). In relevant part, Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" receiving Federal financial assistance. 29 U.S.C. § 794(a); *see also* 34 C.F.R. § 104.4. 21. An organization that receives federal funds violates Section 504 if it denies a qualified individual with a disability a reasonable accommodation that is necessary for the disabled individual to enjoy meaningful access to the benefits of public services. *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010*); AP v. Anoka-Hennepin Indep. Sch. Dist.* No 11, 538 F. Supp. 2d 1125, 1141 (D. Minn. 2008)(holding that school districts are required to make "reasonable and necessary" accommodations for disabled students); *McDavid v. Arthur*, 437 F. Supp. 2d 425, 428 (D. Md. 2006)("[C]ourts look first at whether the accommodation sought is reasonable and necessary").

28. As to the District's obligations to evaluate the Student for eligibility, the IDEA contains "an affirmative obligation of every [local] public school system to identify students who might be disabled and evaluate those students to determine whether they are indeed eligible." *L.C. v. Tuscaloosa Cty. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 52059, at *12 (N.D. Ala. 2016)(quoting *N.G. v. D.C.*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008)(citing 20 U.S.C. § 1412(a)(3)(A)). This obligation is referred to as "Child Find," and a local school system's "[f]ailure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." *Id.* Thus, each state must put policies and procedures in place to ensure that all children with disabilities residing in the state, regardless of the severity of their disability, and who need special education and related services, are identified, located, and evaluated. 34 C.F.R. § 300.111(a).

29. However, "Child Find does not demand that schools conduct a formal evaluation of every struggling student." *Mr. P. v. W. Hartford Bd. of Educ.,* 885 F.3d 735, 749 (2d Cir. 2018), cert. denied sub nom. *Mr. P. v. W. Hartford Bd. of Educ.*, 139 S. Ct. 322 (2018); *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3rd Cir. 2012)(quoting *J.S. v. Scarsdale Union Free Sch. Dist*., 826 F. Supp. 2d 635, 661 (S.D.N.Y. 2011))("The IDEA's child find provisions do not require district courts to evaluate as potentially 'disabled' any child who is having academic difficulties.")(internal quotation marks omitted); and *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x. 887 (5th Cir. 2012). Further, a school's failure to diagnose a disability at the earliest possible moment is not per se actionable, in part, because some disabilities "are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all." *D.K.*, 696 F.3d at 249 (quoting A.P. ex rel. *Powers v. Woodstock Bd. of Educ.,* 572 F. Supp. 2d 221, 226 (D. Conn. 2008))(internal quotation marks omitted). Notably, the label assigned to a particular student is less important than the skill areas evaluated. The issue is whether the district appropriately assessed the Student in all areas of a suspected disability. *See, e.g.*, *Avila v. Spokane Sch. Dist.* 81, 69 IDELR 204 (9th Cir. 2017, unpublished)(noting that a Washington district had assessed a student with autism for "reading and writing inefficiencies," the court ruled that it properly evaluated the student for dyslexia and dysgraphia). *See also, Lauren C. v. Lewisville Indep. Sch. Dist.*, 2017 WL 2813935, at *6, 70 IDELR 63 (E.D. Texas June 29, 2017). As discussed in greater detail below, Section 504 has a similar Child Find requirement.

30. To establish a Child Find violation under either Section 504 or IDEA, Petitioner must "show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 942-43 (E.D. Va. 2010)(internal citations omitted). Further, in *Dubrow v. Cobb Cty. Sch. Dist*., 887 F.3d 1182 (11th Cir.

2018), the 11th Circuit held that to trigger a Child Find obligation and potential determination for eligibility, the petitioner had to establish that his disability had an adverse impact on his education and that the student needed special education as a result of that impact. The court also held that a student is unlikely to need special education services if: 1) the student meets academic standards, 2) teachers do not recommend special education for the student, 3) the student does not exhibit significant unusual or alarming conduct warranting special education, and 4) the student demonstrates the capacity to understand course material. *Id*.

31. If there is no reason to suspect that a student is a "child with a disability" under the IDEA or an "exceptional student" under Florida law, there is no need for the school district to evaluate the child. *See*, e.g., *Hoffman v. East Troy Cmty. Sch. Dist.*, 38 F. Supp. 2d 750, 766 (E.D. Wisc. 1999)(citing cases); *McMullen County Independent School District*, 49 IDELR 118 (Texas SEA 2007)("The IDEA requires a two-prong analysis for determining whether a child should be identified and referred for special education services. First, the student must have a specific physical or mental impairment identified through an appropriate evaluation. Identifying an impairment does not alone satisfy the eligibility test under Part B of the IDEA. Second, the district must have reason to suspect the student is in need of special education services. This is usually determined by the student's inability to progress in a regular education program."); *see also* Fla. Admin. Code R. 6A-6.0331(2) (requiring school districts to attempt to address any areas of concern in the general education environment before evaluating the student for a disability).

32. In this case, there was no credible evidence presented to show that the Student has a health impairment that adversely affects her educational performance or significantly impacts a major life activity or bodily function. Indeed, the Student has had few absences, plays sports, is an engaged student, has all As and Bs, and is performing well above average on

standardized tests. To the extent that the condition of asthma qualifies as a medical condition under "other health impaired," there is no evidence that the condition adversely affects the Student's educational performance or that she needs any type of specialized instruction to access her curriculum or make progress. Indeed, the evidence clearly demonstrated that the Student is performing well in school, is not significantly impacted by her asthma and is not in need of special education services. There was no reason to evaluate the Student under IDEA. As such, the District did not fail to meet its Child Find obligations under IDEA and the allegations of the Complaint relative thereto are dismissed.

33. Petitioner also contends that the Student should have been evaluated and found eligible under Section 504. Section 504 provides, in pertinent part, as follows: No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C. § 705 (20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

34. Title 29 U.S.C. 794(b)(2)(B), in turn, defines a "program or activity" to include a "local education agency … or other school system." Section 794(a) requires the head of each executive federal agency to promulgate such regulations as may be necessary to carry out its responsibilities under the nondiscrimination provisions of Section 504.

35. The U.S. Department of Education has promulgated regulations governing preschools, elementary schools, and secondary schools. 34 C.F.R. part 104, subpart D. Section 104.33 requires that Respondent provide FAPE to "each qualified handicapped person who is in the recipient's jurisdiction." For purposes of Section 504, an "appropriate education" is the provision of regular or special education and related aids and services that (1) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (2) are

based upon adherence to procedures that satisfy the requirements of sections 104.34, 104.35, 104.36 and 104.33(b)(1).

36. To establish a prima facie case under Section 504, Petitioner must prove that the Student (1) had an actual or perceived disability, (2) qualified for participation in the subject program, (3) was discriminated against solely because of her disability, and (4) the relevant program is receiving federal financial assistance. *Moore v. Chilton Cty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1313 (M.D. Ala. 2013)(citing *L.M.P. v. Sch. Bd. of Broward Cty.*, 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007)*; see also J.P.M. v. Palm Beach Cty. Sch. Bd.*, 916 F. Supp. 2d 1314, 1320 (S.D. Fla. 2013).

37. In this case, the evidence demonstrated that Petitioner does not meet the first or second factors for establishing a prima facie case of discrimination. The clear evidence demonstrated that the Student's asthma did not substantially interfere in her activities at home or school and did not impede her education. Rather, the overwhelming evidence suggests that the Student was continuing to make progress in the Lee Home Connect program, in which the parent elected to enroll the Student. There was no credible evidence presented that the Student's asthma significantly impacted a major life activity or bodily function. Indeed, the better evidence showed that the Student could participate in the same manner as her typically developing peers. Because Petitioner has failed to establish a prima facie case of discrimination, the allegations of the Complaint relative thereto are dismissed.

38. It is also a fundamental precept in litigation that every case, whether brought under IDEA or not, constitutes an actual case or controversy. Indeed, the exercise of judicial power depends upon the existence of a "case or controversy" under the U.S. Constitution, Article III, Section 2. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. A case is 'moot' when it presents no actual controversy or when the

issues have ceased to exist. A moot case generally will be dismissed." *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992)(internal citations omitted). Court's do not give opinions on moot questions or declare principles or rules of law that cannot affect the matter at issue. *Roe v. Dep't of Health*, 312 So. 3d 175, 177 (Fla. 1st DCA 2021); *see also Lund v. Dep't of Health*, 708 So. 2d 645, 646 (Fla. 1st DCA 1998)("The general rule in Florida is that a case on appeal becomes moot when a change in circumstances occurs before an appellate court's decision, thereby making it impossible for the court to provide effectual relief."). In *Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 465 (Fla. 1st DCA 2017), the Court found that the issue of whether the ordinances at issue were lawful when enacted was moot because the Legislature rendered the ordinances null and void. In *Carchio v. City of Fort Lauderdale*, 755 So. 2d 668, 669 24 (Fla. 4th DCA 1999), the Fourth District declined to reverse and direct the entry of an injunction against the enforcement of a 1996 ordinance as an invalid total ban on female nudity because the ordinance had since been amended by a 1998 ordinance that changed the definition of prohibited nudity. *See also 421 Northlake Blvd. Corp. v. Vill. of N. Palm Beach*, 753 So. 2d 754, 756 (Fla. 4th DCA 2000)("Initially, we hold that the Village's 1998 amendment of the ordinance renders appellant's challenge to the 1996 version of section 45–20 moot."); *Freni v. Collier Cty.*, 573 So. 2d 1054, 1055 (Fla. 2d DCA 1991)(concluding that the issue of whether the trial court erred in denying the motion for temporary injunction was moot where the appellants sought to enjoin a referendum that subsequently resulted in a favorable vote, and affirming the trial court's order denying the temporary injunction as being moot).

39. In this case, the School Board's pandemic policy has expired, and Petitioner is free to return to school without a mask. Moreover, it is pure speculation as to weather a future policy may be enacted in the future or what that policy may entail. At this point, there is no policy that impacts the

Student and no policy to act on. As such, the issues raised in the Complaint relative to required mask-wearing are moot and the Complaint is dismissed.

40. Finally, the balance of Petitioner's claims as asserted in the due process Complaints were not supported by the evidence, and, therefore, are dismissed.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is DISMISSED in its entirety.

DONE AND ORDERED this 2nd day of August, 2021, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of August, 2021.

COPIES FURNISHED:

Petitioner
(Address of Record)

Julian Moreira, Educational Program Director
Florida Department of Education
325 West Gaines Street
Tallahassee, Florida 32399-0400

Amanda W. Gay, Esquire
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399

Kristine Shrode, Esquire
School Board of Lee County
2855 Colonial Boulevard
Fort Myers, Florida 33966

Dr. Kenneth A. Savage
Interim Superintendent
School District of Lee County
2855 Colonial Boulevard
Fort Myers, Florida 33966-1012

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

NOTICE OF RIGHT TO JUDICIAL REVIEW

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

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

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

NOTICE OF RIGHT TO REVIEW SECTION 504 PROCEDURE

This Final Order is also subject to review procedures pursuant to 34 C.F.R. § 104.36.