STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-3663E
	)	
BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

On February 4-5, 2013, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Lauderdale, Florida.

APPEARANCES

Petitioner: Robert M. Pickett, Esquire
Legal Aid Society of
Palm Beach County, Inc.
423 Fern Street, Suite 200
West Palm Beach, Florida 33401

Respondent: Barbara J. Myrick, Esquire
Office of the School Board Attorney
K.C. Wright Administration Building
600 Southeast Third Avenue--11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

The issue is whether Respondent has provided Petitioner with a free appropriate public education (FAPE). Specifically, the issues are whether, when Petitioner transferred from the Palm Beach County School District to Respondent's school

district at the start of the 2012-13 school year, Respondent timely implemented an existing Palm Beach County individual education plan (IEP), developed a new IEP, or otherwise provided comparable services to the existing IEP; whether Respondent changed Petitioner's placement during the 25 days that [redacted] was suspended during the first semester of the 2012-13 school year; if so, whether Petitioner timely conducted a manifestation determination to identify any relationship between Petitioner's disability and [redacted] behaviors that resulted in the suspensions; if the behaviors were a manifestation of Petitioner's disability, whether Respondent timely revised an existing Palm Beach County behavior intervention plan (BIP) or developed its own BIP to deescalate Petitioner's behaviors and help [redacted] self-regulate; and whether Petitioner met all procedural requirements in scheduling and conducting a reevaluation and two IEP meetings in November and December 2012.

PRELIMINARY STATEMENT

By Request for Due Process Hearing filed November 14, 2012, Petitioner alleged that [redacted] is a [redacted], intellectually disabled student attending [redacted] grade at [redacted] High School. On September 4, 2012, Petitioner allegedly received a five-day suspension for defiance and was removed to an interim alternative educational setting (IAES). On September 12, 2012, Petitioner allegedly received a ten-day suspension for profanity

to staff and was removed to an IAES. On November 7, 2012, after Petitioner had allegedly informed Respondent that it had violated [redacted] procedural safeguards and asked Respondent to address academic issues, Petitioner allegedly received a second ten-day suspension for profanity to staff and was removed to an IAES.

The Request for Due Process Hearing alleges that Respondent violated the Individuals with Disabilities Education Act (IDEA) when it failed to conduct a manifestation determination before suspending Petitioner for more than ten days during the 2012-13 school year. The Request for Due Process Hearing alleges that Petitioner is missing too much class time and is in danger of failing to earn credits during the present term. The Request for Due Process Hearing asks for compensatory education equivalent to the 15 days' suspension in excess of the maximum allowable limit of ten days' suspension.

The Request for Due Process Hearing alleges that Respondent failed to develop an IEP with services and accommodations to address Petitioner's disabilities, which include emotional/behavioral disability, attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder, and mild mental retardation. The Request for Due Process Hearing alleges that Respondent did not have an effective plan to deescalate behavioral episodes with Petitioner, even though Petitioner had

allegedly requested such a plan before the November 7 suspension. The Request for Due Process Hearing alleges that Respondent needed to revise Petitioner's BIP to include strategies for Petitioner to self-regulate [redacted] behavior, and Respondent should have provided counseling, as a related service, to teach Petitioner how to implement these strategies.

The Request for Due Process Hearing states that no action would be necessary if Respondent, among other things, provided 90 hours of compensatory tutoring in math and reading, prepared a psychoeducational reevaluation to include behavioral components, convened an IEP team meeting to consider Petitioner's eligibility for emotional/behavioral disability, prepared an individualized crisis plan for Petitioner, prepared an individualized plan for Petitioner to recover scores or credits that resulted from [redacted] exclusions from the classroom, provided counseling as a related service, conducted a manifestation determination review before issuing additional out-of-school suspensions, trained [redacted] High School staff on suspension and placement-removal strategies for students with disabilities, and paid reasonable attorneys' fees of Petitioner's counsel.

By Amended Request for Due Process Hearing filed December 21, 2012, Petitioner restated the above-cited factual allegations and added that [redacted] has been a dependent of the State

of Florida for most of [redacted] life and currently resides in a group home in Broward County. Petitioner alleged that the multiple suspensions have decreased [redacted] desire to attend school.

The Amended Request for Due Process Hearing alleges that Respondent has obstructed the efforts of Petitioner's mother to obtain an appropriate education for Petitioner. Upon filing the Request for Due Process Hearing, Petitioner expected Respondent to promptly arrange a resolution meeting or mediation, but Respondent instead conducted an IEP meeting. Also, on November 26, 2012, Petitioner allegedly received Respondent's response to the Request for Due Process Hearing, which stated that Respondent had scheduled an IEP team meeting for December 3, 2012, but Respondent allegedly failed to coordinate this date with the office of Petitioner's counsel. The Amended Request for Due Process Hearing adds that no action would be necessary if, in addition to the previously cited relief, Respondent revised its policies that conflict with IDEA.

At the unopposed request of Petitioner, the Administrative Law Judge continued the final hearing, which had been initially set for January 23-24, 2013, to the above-mentioned dates. On February 1, 2013, the parties filed a Joint Stipulation of Agreed Upon Facts. On February 6, 2013, the Administrative Law Judge entered an Order Granting Specific Extension of Time of 46

Days for Issuance of Final Order, which sets forth the grounds for extending the deadline for issuing the Final Order to March 18, 2013.

At the hearing, Petitioner called six witnesses and offered into evidence one exhibit: Petitioner Exhibit 17. Respondent called four witnesses and offered into evidence 34 exhibits: Respondent Exhibits 1-28 and 32-37. All exhibits were admitted.

The court reporter filed the transcript on February 21, 2013. The parties filed proposed final orders on March 4, 2013.

FINDINGS OF FACT

1. Petitioner was born on [redacted]. At about [redacted] years of age, Petitioner was removed from [redacted] mother and adjudicated a dependent. The local lead agency in Palm Beach County--presently, Child Net--provides dependency services to Petitioner, but the court has never terminated the mother's parental rights.

2. Petitioner subsequently lived mostly with [redacted] mother's sister. Petitioner resided with [redacted] aunt from 2005 until sometime between March 1 and May 14, 2012.

3. Petitioner often changed schools while in Palm Beach County. [redacted] attended third grade at [redacted] Elementary School for the 2005-06 school year, fifth grade at [redacted] Elementary School for the 2008-09 school year, sixth grade at [redacted]

Middle School for the 2009-10 school year, and eighth grade at [redacted] Middle School for the 2011-12 school year.

4. In March 2012, Petitioner was assigned guardians-ad-litem, [redacted]. Because Ms. [redacted] provided nearly all of the testimony from the guardians and may have been more involved in the case, references to the guardian-ad-litem are to her.

5. When Petitioner was removed from the home of [redacted] aunt, [redacted] was placed to live with an adult cousin. This change was prompted, at least in part, by the fact that Petitioner had not been attending school, and [redacted] aunt had been unable to manage [redacted] behavior.

6. When Petitioner moved in with [redacted] cousin, [redacted] transferred to [redacted] Middle School. To improve Petitioner's school attendance, a judge required [redacted] to wear an ankle bracelet, so that [redacted] location could be constantly monitored. The ankle bracelet produced improvements in attendance and academics. After attending [redacted] Middle School for the rest of the school year and summer school, Petitioner was promoted to ninth grade for the following school year.

7. At the end of summer school, in August 2012, Petitioner was removed from [redacted] cousin's home and placed in licensed foster care. Through a contractual arrangement with Child Net,

Children's Home Society (CHS) of Palm Beach County assumed responsibility for providing foster-care services to Petitioner.

8. After a brief stay in a crowded CHS group home in Palm Beach County, Petitioner was transferred to a CHS group home in Broward County. On the first day of school in Broward County--August 20, 2012--Petitioner reported to be enrolled in ninth grade at [redacted] High School, whose attendance zone included the CHS group home to which Petitioner had been sent a few days earlier.

9. This was a difficult situation for Petitioner, Respondent, and CHS. Partly due to [redacted] significant intellectual disability, Petitioner lacks an understanding of the full consequences of [redacted] behaviors and is not easily managed and educated. At the start of the 2012-13 school year, CHS in Palm Beach County had limited familiarity with Petitioner, and CHS in Broward County and Respondent had none.

10. Complicating matters, Petitioner was attempting to negotiate the transition from middle school to high school without the support of family and friends. Also, Petitioner had been introduced to institutional living only a few weeks prior to the start of school and had been forced to adjust to a second institutional setting immediately before the start of school.

11. While in school in Palm Beach County, Petitioner had been determined to be eligible for exceptional student education

(ESE) as a student with an Intellectual Disability (ID). Following 10 days' out-of-school suspensions and 15 days' absences early in the 2009-10 school year and unspecified academic problems, the Palm Beach County School Board obtained a psychoeducational reevaluation, which was prepared on December 9, 2009, by a school psychologist employed by the School Board. This is the only such evaluation in the evidentiary record, and it is credited in its entirety.

12. According to the reevaluation, Petitioner has problems with too little structure. Not effectively controlled by [redacted] aunt, Petitioner was staying out late at night. According to [redacted] classroom teacher, Petitioner displayed good manners when [redacted] chose to do so, but tended to be noncompliant when [redacted] had "too much freedom." In class, Petitioner was confrontational, disorganized, and easily distracted, and [redacted] used profanity at times.

13. Although capable of completing [redacted] work, Petitioner was not turning in [redacted] homework. Petitioner was doing "very well" in physical education, although, at times, [redacted] was impulsive and disruptive and sometimes skipped class. The school had structured [redacted] educational program by providing Petitioner with afternoon tutoring and afterschool sports four days per week.

14. More recently, according to the reevaluation, [redacted] Middle School officials had implemented a "prevention plan" to provide 1:1 supervision during transitions. Although the reevaluation did not so state, based on Petitioner's below-described IEP prepared in early 2012 and behavior during the 2012-13 school year, close supervision was necessary to prevent Petitioner from impulsively leaving the school grounds when the opportunity presented itself. Thus, as part of this prevention plan, in the morning, an aide escorted Petitioner from the bus to the cafeteria and later walked [redacted] to class. At lunch, the classroom teacher accompanied Petitioner to and from lunch. And, at the end of the day, an aide or an ESE employee escorted Petitioner to [redacted] bus.

15. The reevaluation notes that Petitioner was under the care of a child psychiatrist, but the evidentiary record does not detail any treatment that Petitioner was receiving then or now. The reevaluation states that Petitioner had taken Strattera on school days during the prior school year and that school officials had asked for Petitioner to start taking [redacted] medicine at school during the 2009-10 school year, but that Petitioner sometimes refused to take it, even when [redacted] aunt brought the medicine to school.

16. During the prior school year, according to the reevaluation, [redacted] Elementary School officials had conducted

a Functional Behavioral Assessment (FBA). The reevaluation notes that this FBA was currently being updated with relevant rewards and consequences to help increase positive behaviors and the completion of classroom assignments.

17. According to assessments performed at the time of the reevaluation, Petitioner's cognitive ability is in the "Extremely Low" range; [redacted] earned a WISC-IV score of 64, which is two standard deviations below the mean. The child's overall intellectual functioning is "very low"--at the first percentile of U.S. children [redacted] age. Specifically, [redacted] performance of tasks requiring logical analysis and inductive reasoning is "very low," and [redacted] performance of tasks involving visual perception, visual-spatial reasoning, and visual-motor integration is "low."

18. Petitioner's reading and math skills were several grades below sixth grade, [redacted] academic skills were "significantly below grade level," and [redacted] written expression skills were the equivalent of early second grade. However, Petitioner's academic skills were roughly commensurate with [redacted] cognitive ability, except that [redacted] math achievement was above [redacted] measured cognitive ability. Petitioner's visual perception and finger-hand movements are in the "very low" range, suggesting that [redacted] might benefit from help in writing and notetaking. An emotional assessment confirmed that Petitioner

demonstrates poor insight and social judgment related to [redacted] low cognitive functioning.

19. Based on information provided by Petitioner's classroom teacher, the school psychologist concluded that Petitioner's rule-breaking behaviors were in the clinical range and [redacted] social problems, attention problems, and aggressive behaviors were in the borderline clinical range. The teacher had reported "more problems than are typically reported by teachers of boys aged 12 to 18." Petitioner's physical education teacher had stated that Petitioner was "happy about average" in her class, and [redacted] rule-breaking behaviors and attention problems were in the normal range. But the physical education teacher had noted that Petitioner had been notably aggressive at times.

20. The school psychologist diagnosed Petitioner with ADHD, adjustment disorder, and mild mental retardation. Among her recommendations were individual and family counseling, regular communication between home and school to facilitate academic progress and social adjustment, the designation of an adult male mentor to facilitate prosocial behavior, and "[a]ge appropriate extracurricular activities, particularly sports[--] related, [that] may increase/maintain [Petitioner's] self-esteem and confidence in non-academic areas." The school psychologist advised that the school "continually monitor. . ." Petitioner's

"emotional/behavioral adjustment at school," and she concluded that the Child Study Team should make use of all available data when "making recommendations for appropriate educational programming."

21. Two years later, in early 2012, Bear Lake Middle School officials prepared an IEP and BIP for Petitioner. The IEP that resulted from IEP team meetings that took place on January 11, 2012, March 1, 2012, and May 14, 2012 will be referred to as the "Early 2012 IEP." As is evident from the dates of preparation, the Early 2012 IEP was quite current at the start of the 2012-13 school year.

22. Because the IEP team answered "yes" to the question of whether the student's behavior impeded [redacted] learning or the learning of others, the Early 2012 IEP requires the IEP team to consider the use of positive behavioral interventions, strategies, and supports. For present levels of performance, the Early 2012 IEP notes that Petitioner was reading at a mid third grade level, as of May 14, 2012, and was working in math at a first grade level, as of, or shortly before, January 11, 2012. These data demonstrate academic progress in reading, but not math, since the December 2009 psychoeducational reevaluation. For independent functioning, the Early 2012 IEP states that Petitioner "continues to need support and monitoring for success."

23. The Early 2012 IEP provides all of Petitioner's direct instruction in ESE classes and provides one hour per week of language therapy as a related service, as well as a wide range of accommodations and modifications that are detailed below. The Early 2012 IEP provides Petitioner with extended school year services in reading, math, language therapy, supervision for safety, and assistance for all learning. Although the Early 2012 IEP states that Petitioner was classified as ID, working toward a special diploma, using State Standards Access Points, and subject to alternate assessment rather than FCAT, surprisingly the Early 2012 IEP answers with a "no" the question of whether the "student has a significant cognitive disability." This was clearly a mistake.

24. As for the BIP, the cover sheet bears the "current" date of February 28, 2011, but the year is incorrect, given the fact that the form was last revised on January 13, 2012. The BIP was created on February 28 and March 1, 2012. The resulting BIP will referred to as the "Early 2012 BIP." As is evident from the dates of preparation, the Early 2012 BIP was also quite current at the start of the 2012-13 school year.

25. The stated goal of behavioral intervention in the Early 2012 BIP is for Petitioner to "appropriately express [redacted] frustration by refraining from physically striking adults and peers." The strategies for achieving this goal include

providing the child with reminders of appropriate ways of exhibiting frustration during difficult situations, visually monitoring the child when [redacted] exits the bus, and keeping the child "within arms['] reach observation during class and observations."

26. The sole target behavior in the Early 2012 BIP is Petitioner's escaping difficult academic tasks. By speaking to [redacted] ESE teachers and a speech language pathologist daily for guidance as to how to interact appropriately with other persons, Petitioner would learn to use signals to obtain breaks from teachers and a cool-off area as needed. The Early 2012 BIP requires the use of behavior tracking logs during every period.

27. As difficult as Petitioner's transition to [redacted] High School was already, for the reasons noted above, the transition became more fraught when Petitioner reported for [redacted] first day of school at [redacted] High School without the ankle bracelet and without the even-numbered pages of [redacted] Early 2012 IEP. Perhaps due to an oversight by a CHS employee, [redacted] High School officials initially received only the odd-numbered pages of the Early 2012 IEP.

28. [redacted] High School officials made a bad situation much worse when they placed Petitioner in all ninth grade, regular education classes. This placement decision meant that Petitioner did not receive comparable services to those

described in even the odd-numbered pages of the Early 2012 IEP, which are detailed below. This placement decision was also in direct disregard of the Early 2012 BIP, which school officials obtained in its entirety at the start of the school year. Although it was obvious from the pagination of the Early 2012 IEP that they had received a partial copy, [redacted] High School officials never tried to obtain the rest of the IEP from CHS, Child Net, or the Palm Beach County School Board.

29. Respondent attempts to justify its failure to place Petitioner in ESE classes with specialized instruction, related services, accommodations, and modifications comparable to those contained in the odd-numbered pages of the Early 2012 IEP by citing the obvious mistake on the final of the odd-numbered pages of this IEP--i.e., that Petitioner does not have a significant cognitive disability. The same page, though, informs the reader that Petitioner is on Alternate Assessment, rather than FCAT. More importantly, though, there is ample material within the odd-numbered pages to preclude a determination that these services are comparable the services that could be provided by a regular education placement.

30. The odd-numbered pages of the Early 2012 IEP reveal that Petitioner's eligibility is ID, [redacted] "involvement and progress in the regular curriculum would be adversely affected [by [redacted] cognitive deficits]," [redacted] math goal is to make change,

[redacted] written expression skills are so poorly developed that [redacted]needs to respond orally and demonstrate [redacted] knowledge by drawing, [redacted] behavior impedes [redacted] learning or the learning of others, [redacted] compliance with school rules depends upon support and monitoring, [redacted] aggression requires clearly identified escape measures that [redacted] can activate, and [redacted] behavior requires a BIP and "continuous supervision for safety."

31. Responding to this detailed, if incomplete, portrait of Petitioner, the odd-numbered pages of the Early 2012 IEP state that, for all nonelectives, Petitioner receives specialized instruction in ESE classes. Accommodations, modifications, aids, and services include positive praise for specific behaviors, increased use of hands-on learning experiences, extended time for tests and assignments, short breaks between assignments, tactile presentation of subject matter, use of a spelling guide for written work, a BIP, and a designated safe person or place. In fact, aside from some goals, the only material omissions from the odd-numbered pages are language therapy and extended school year--and the Early 2012 alludes to the language therapy.

32. From the Early 2012 BIP, [redacted] High School officials learned that Petitioner's goal was not to hit adults and peers, school staff helped Petitioner meet this goal by staying within arm's length of [redacted] during class, and Petitioner

engaged in escape behaviors to avoid difficult academic tasks. The reference to daily contact with a speech language pathologist, the BIP alludes to the related service of language therapy that is omitted from the odd-numbered pages, so the only material omission from the combined documents is extended school year.

33. As [redacted] testified, Petitioner presented as a friendly, likeable [redacted], given to nervous laughter, especially when embarrassed, such as when [redacted] did not understand something asked of [redacted]. Although there are some indications in the record of angry defiance on the part of Petitioner at [redacted] High School and some indications in the Early 2012 IEP of physical aggression in one or more prior schools, there are no suggestions whatsoever of violence or even of a serious threat of bodily injury from Petitioner at [redacted] High School. The main drivers of Petitioner's misbehavior are escape, such as from confusing and embarrassing academic tasks or perceptions that [redacted] is perceived as ID, and immaturity. Trying to escape stress, but not fully understanding the consequences of [redacted] behavior, Petitioner routinely has refused to attend school or, once at school, refused to apply [redacted], exhibited defiance, left school when [redacted] pleases, and, of course, been disciplined.

34. Placed in the regular education curriculum without any supports, Petitioner wasted no time displaying escape and

immature behaviors. For the last ten days of August, Petitioner was tardy a couple of days and absent without excuse a couple of days. For 15 school days of September, Petitioner was suspended from school--with but a single day separating a five-day suspension from a ten-day suspension. Petitioner was not suspended at all in October, although [redacted] received some minor discipline, as noted below, but [redacted] was absent without excuse 17 days and tardy on two of the remaining days. In November, Petitioner was suspended ten days and absent without excuse eight days. In December, Petitioner was suspended five days and absent without excuse six days. In January, Petitioner was absent without excuse eight days.

35. The suspensions are of two types. The 25 days of suspension in September and November were alternative-to-external-suspension (AES) suspensions. The five days of suspension in December was in-school suspension (ISS). AES is discussed in more detail below, but, given the findings and conclusions as to the AES suspensions, it is unnecessary to consider the ISS suspension.

36. Both AES and ISS share one feature, though: at the time of each suspension, a [redacted] High School official entered into the student database that the suspension was "with FAPE."

37. The September suspensions were for defiance of authority and profanity to, or in the presence of, staff. The AES paperwork completed by [redacted] High School officials at the time of these suspensions reveals their poor grasp of basic information necessary for the education of Petitioner. For the AES paperwork bearing the date of September 4, 2012, Respondent described Petitioner as a nonESE student without a BIP. The ESE status is consistent with Respondent's placement of Petitioner in regular education placement at the time, but not with Respondent's receipt of a partial Early 2012 IEP. Respondent's failure to implement the Early 2012 BIP in its possession lends support to the statement that [redacted] had no BIP. Also, the AES paperwork listed no one as [redacted] parent or guardian. None of the boxes for assigned classwork, such as for "reading," "science," "language arts," and "math," was checked.

38. As is true with all of the AES suspensions, a Notice of Suspension advises the "Parent or Guardian" to whom the form is addressed that the child "may" attend the AES over the dates in question. This is the role of AES: it gives the student (or [redacted] parent) an alternative to straight suspension, so that, if AES is chosen, the student may perform academic work to earn academic credit at the AES site.

39. For the AES paperwork bearing the date of September 11, 2012, Respondent described Petitioner as an ESE

student, but without a BIP. The change in ESE status suggests that school officials may have read the odd-numbered pages of the Early 2012 IEP, but is inconsistent with the fact that Petitioner remained in regular education without any support. Again, the AES paperwork listed no one as [redacted] parent or guardian, and none of the boxes for assigned classwork was checked. None of the AES paperwork addresses that Petitioner had only been back in school for a single day after serving the first September suspension of five days before [redacted] started serving the second September suspension of ten days.

40. On September 28, 2012, shortly after Petitioner's completion of the second September suspension, the ESE Specialist at [redacted] High School, Gregory Hart, removed Petitioner from [redacted] regular education classes and placed [redacted] in ESE classes. As Mr. Hart testified, Petitioner clearly needed more support in behavior and academics than [redacted] was receiving in the regular education curriculum. This much-needed change also permitted teachers to instruct Petitioner using materials that [redacted] would more likely understand and methods to which [redacted] would more likely respond.

41. Consistent with the above-noted recommendation in the 2009 psychoeducational reevaluation, Mr. Hart crafted for Petitioner a "sweet" schedule that included classes that would likely appeal to [redacted] due to their emphasis on physical

activity. These classes were ROTC, physical education, and weightlifting. Although Petitioner did not earn a passing grade in any of these classes, this is indicative, not of their unsuitability, but of the complete disengagement of Petitioner from school following a bad start to the 2012-13 school year.

42. Mr. Hart was an informative and, at times, candid witness. His credibility suffered, though, when he linked the receipt of the complete Early 2012 IEP with the much-needed change in schedule that occurred in late September, implying that Respondent could not have recognized Petitioner's ESE needs until school officials had obtained the even-numbered pages of the Early 2012 IEP. First, the change in schedule appears to have preceded by a few days the receipt of the complete Early 2012 IEP.

43. Second, and more importantly, Mr. Hart's attempt to blame Respondent's misplacement of Petitioner in regular education on the receipt of only the odd-numbered pages of the Early 2012 IEP ignores the fact that all of the specialized instruction, accommodations, and modifications--except language therapy and extended school year--are in the odd-numbered pages, and the language therapy is referenced indirectly in the Early 2012 BIP. In particular, Mr. Hart's contention fails to account for the fact that the odd-numbered pages clearly state that Respondent is to receive specialized instruction in ESE classes

and warn that Petitioner's cognitive deficits adversely affect [redacted] progress in the regular curriculum. (Mr. Hart's alternate justification offered at hearing--that he placed Petitioner in regular education as the least restrictive environment--requires no analysis, as it would allow the principle of least restrictive environment to supersede the provision of specialized instruction and related services.)

44. The first time that [redacted] High School officials acted upon their duty to provide Petitioner with FAPE took place about September 18 when, as noted below, they began the process to prepare an IEP for Petitioner. Under the circumstances, this was too little, too late--and even too slow, at least until, as described below, Mr. Hart's ESE supervisor conveyed to [redacted] a greater sense of urgency than [redacted] had been displaying in scheduling the necessary meetings.

45. For the first critical month of school, [redacted] High School officials had already AES suspended Petitioner nearly every school day that Petitioner had not skipped. These suspensions reflected their clear understanding of the Student Code, which Petitioner repeatedly violated, and the Disciplinary Matrix, which prescribed penalties for each violation, but a misunderstanding of how their obligation to enforce these important policies must be harmonized with their obligation to provide FAPE to Petitioner.

46. Mr. Hart, in particular, did not totally ignore Petitioner's needs. He occasionally persuaded administrators to transform AES assignments to ISS or Saturday School assignments, obtained dispensation for Petitioner's tardies, and belatedly launched an education-planning process. But these are, at most, half-measures relative to what Respondent was obligated to provide Petitioner. As noted in the Conclusions of Law, Respondent was obligated to provide comparable services to those described in the odd-numbered pages of the Early 2012 IEP, obtain without delay the complete Early 2012 IEP, determine that the AES program was a change in placement for Petitioner, conduct a manifestation determination prior to the second AES suspension, and implement the Early 2012 BIP no later than after the first AEA suspension.

47. Returning to the chronology of Petitioner's disciplinary history during the first semester of the 2012-13 school year, as noted above, Petitioner attended very little school in October, so [redacted] did not incur any suspensions. But mid month [redacted] received a referral to Saturday School due to an unserved detention for an unspecified offense and two days' ISS for leaving campus with another student.

48. For the last of the AES suspensions, the AES paperwork bearing the date of November 7, 2012, describes Petitioner as an ESE student without a BIP. CHS caseworker Jenise McKeaver was

listed as [redacted] parent or guardian, and none of the boxes for assigned classwork was checked.

49. The November suspension was for profanity to staff--specifically, the principal. This incident received considerable attention at the hearing and illustrates eight themes that are listed in ascending order of importance.

50. First, [redacted] High School officials seemed to have genuine concern for Petitioner and did not appear ever to lose patience with [redacted]. In describing the November incident, the principal testified matter of factly, without any signs of rancor, even as she recounted the profanities uttered by Petitioner. By this time, Mr. Hart had assigned Petitioner an escort to walk [redacted] from the bus area to class and obtained dispensation for Petitioner's tardies. For whatever reasons [redacted] High School officials may have failed to discharge their obligations under IDEA, ill will toward Petitioner was not among them.

51. Second, the CHS caseworker responsible for Petitioner was generally unavailable to speak to school officials. At critical times, including the November incident with the principal, the CHS caseworker failed to respond--timely or even at all--to school requests to coordinate efforts to find an effective way of dealing with Petitioner. This failure might have explained a lack of educational progress, if [redacted]

High School officials had been implementing a well-designed IEP. But school officials were not implementing anything, so the failure of CHS does not preclude a finding that Respondent was not providing FAPE to Petitioner, even though, given Petitioner's pronounced needs, the decision by CHS to abruptly transfer [redacted] to Broward County days prior to the start of ninth grade, without any support, including the ankle bracelet, imposed great stress on [redacted] and [redacted] new educators.

52. In this incident, the principal had summoned Petitioner into her office and telephoned the group home to speak to Petitioner's caseworker to try to arrange a meeting at school. This element of the November incident reveals that [redacted] High School officials were well aware of Petitioner's obvious cognitive limitations. The principal testified that she and Petitioner had some rapport, so her ordering [redacted] to her office would not have caused [redacted] to think [redacted] was in trouble. Obviously, the principal could provide this assurance to a child of Petitioner's age, without a cognitive deficit and severe behavioral issues, merely by telling the student that she was not in trouble, but this would not have been enough for Petitioner.

53. Speaking to an employee at the group home, the principal learned that the caseworker was not available. As the employee and principal were talking, Petitioner became angry and

said to the principal that she was calling [redacted] stupid. This reaction by Petitioner demonstrates two important themes--Petitioner's tendency toward a confused understanding of events that would not have been misconstrued by a peer without severe cognitive and behavioral problems and Petitioner's sensitivity to being perceived or treated as intellectually disabled. The principal justly denied that she was calling Petitioner stupid and instead tried to assure [redacted] that the school and CHS needed to work together to help [redacted].

54. Illustrating [redacted] readiness to engage in escape behaviors to avoid stressful situations--Petitioner responded to the principal's attempt to reassure [redacted] by saying, "fuck this, fuck, I don't care[.] [A]ll you [according to the Administrative Law Judge's notes, "these"] people are fucking assholes." The principal replied to Petitioner, "honey, you can't talk like that, now you're going to wind up in trouble again." The principal added, to the CHS employee with whom she was speaking, "do you hear this? We need to work together. There isn't a link between the school and [redacted] home and . . . we can't do this alone." Tr. 236.

55. Still on the phone, the principal told the CHS employee that she would have to suspend Petitioner again due to [redacted] violation of the Student Code. The principal advised the CHS employee of the penalty called for by Respondent's

disciplinary matrix, but offered that, if the CHS caseworker came in, perhaps the principal could reduce the penalty. (Again, the Administrative Law Judge's notes vary from the transcript. The Administrative Law Judge's notes indicate that the principal offered to meet and rescind the last eight days of the ten-day suspension. This version of her testimony is confirmed by the next reported question, which mentions "the last eight days," even though, according to the transcript, the principal did not mention "eight days" in her preceding responses.) In a second instance of the second theme, the CHS caseworker never called the principal.

56. These statements of the principal to Petitioner and the CHS employee reveal two final themes that are essential to understanding this case. First, despite her clear knowledge of Petitioner's significant cognitive limitations, the principal, as well as the other school officials, enforced the Student Code and Disciplinary Matrix without any informed consideration of their obligations toward Petitioner under IDEA. Second, when the principal testified--regretfully, not vindictively--that Petitioner was going to wind up in "trouble" again, she implicitly revealed AES for what it was, at least for Petitioner: a punitive removal of a misbehaving child from [redacted] classmates, [redacted] teachers and administrators, and [redacted] education, including FAPE.

57. The principal did not disclose the grounds for her misgiving about sending Petitioner to the AES site, again. Nor did Mr. Hart. The evidentiary record, though, establishes that the AES program features self-teaching rather than teacher-led instruction, and, if a student is not a self-starter or productive in [redacted] High School educational program, [redacted] will not likely be a self-starter or productive in the AES program. Despite the understandable reluctance of either administrator to say that Petitioner could not obtain FAPE in the AES program, it is at least clear that the source of their misgivings was not that Petitioner would receive FAPE in a different setting--i.e., the AES site.

58. At hearing, Mr. Hart was unable to provide much detail about the AES program that serves [redacted] High School. The evidentiary record does not suggest that other [redacted] High School officials had much greater knowledge of the program. More to the point, regardless of staff's level of knowledge about the AES program, no one at [redacted] High School ever analyzed the extent to which the AES program matched up with the individual educational and behavioral needs of Petitioner.

59. Using the self-taught model, the AES program does not provide specialized instruction; this is its most basic deficiency. The AES program does not provide the accommodation

of oral, rather than written, delivery of instructional material or opportunities for tactile, hands-on learning. As a last-chance placement, the AES program would not provide close supervision to ensure that, for example, Petitioner managed to get from the bus area to the classroom; there is some evidence that the sole response of the AES program to Petitioner's nonattendance may have been to terminate [redacted] from the program.

60. It is not entirely clear whether the AES program provides the same activity-based classes, such as ROTC, that Mr. Hart selected to "sweeten" Petitioner's schedule. But the record provides more detail as to the selection of AES program materials. The AES program uses whatever textbooks are available, thus precluding, among other things, careful selection or modification of curriculum. The casual selection of instructional materials for the AES program is nicely captured in the following email to AES staff from [redacted] High School staff dated November 7, 2012:

> Should [Petitioner] show the following is what [redacted] should do:
>
> Science--If you have the AGS Biology Cycles of Li[f]e book pages 169-93. If not, anything science related that you do have will be fine.
>
> English/reading--If you have the Life Skills English by AGS pages 157-177. If not, anything having to do with English, reading, grammar will be fine.

> If [redacted] does show and produces work, please let me know so I can give [redacted] credit for doing so (emphasis added).

61. Lastly, AES is an option to straight suspension, as noted above. Petitioner's cognitive, academic, and behavioral deficits constantly feed [redacted] escape and immature behaviors--necessitating a prevention plan, as described above, that provides close supervision during transitions to ensure that Petitioner does not escape the school grounds. To present such a student with a choice of straight suspension or AES, especially given the lack of family and institutional support, is not a choice at all. Petitioner would readily opt for the option that allowed [redacted] lawfully to stay out of school during the term of [redacted] suspension.

62. Nor is it difficult to understand why, if [redacted] gave the choice any thought, Petitioner would not bother with the AES program, even discounting escape and immature behaviors. Petitioner had nothing to gain by attending the AES program because [redacted] had no prospect of earning academic credits. While in regular education classes, passing any course outside of special area was out of the question. By the time that Mr. Hart reassigned Petitioner to ESE classes, the pattern of missing school due to unexcused absences and suspensions and failing courses was firmly established.

63. In any event, the AES paperwork bearing the date of November 7, 2012, describes Petitioner again as an ESE student without a BIP. This time, though, the parent or guardian space was filled in with the name of Ms. McKeaver, who was the CHS employee with whom Mr. Hart spoke the most. As with the other paperwork, none of the boxes for assigned classwork was checked.

64. The evidentiary record provides little description of the December behavior, except to describe it as unruly or disruptive. Petitioner essentially did not report back to school after winter break. A couple of weeks prior to the hearing, over the objection of Child Net, the judge reunited Petitioner and [redacted] siblings with [redacted] mother. Petitioner thus withdrew from Respondent's schools on January 29, 2013, and reenrolled in the Palm Beach County School District.

65. The lone remaining issues involve meetings that took place in November and December. The facts surrounding these meetings do not support Petitioner's allegations of procedural violations.

66. On September 18, 2012, Respondent's employees prepared a Parent Participation Form (PPF) addressed to Petitioner's "parents." Mr. Hart sent the PPF to Child Net and CHS, hoping that they would forward it to the parents, whose names [redacted] did not know. The PPF advised of an IEP meeting scheduled for October 2, 2012.

67. The September 18 PPF generated a response from the Legal Aid Society of Palm Beach County (Legal Aid), which, through Mr. Pickett, perhaps among others, had represented Petitioner in educational matters. By email dated September 25, 2012, a Legal Aid paralegal emailed Mr. Hart with a copy of a court order appointing Legal Aid as the attorney-ad-litem for Petitioner and asking for copies of any disciplinary materials.

68. By email reply dated October 1, Mr. Hart informed the paralegal that they had received only every other page of the Early 2012 IEP, but provided her a copy of this material. Mr. Hart asked if her office knew about the October 2 IEP meeting and if she had received the disciplinary information that she had requested. In response, the paralegal asked Mr. Hart if Respondent had generated any paperwork, probably meaning an IEP. In response, Mr. Hart informed the paralegal that they could have operated under the Early 2012 IEP, but implied that they had not due to Respondent's receipt "of an unusual bit of paperwork from Palm Beach County." [redacted] also offered to postpone the October 1 IEP meeting, if necessary.

69. Possibly by telephone later on October 1, the paralegal informed Mr. Hart that Mr. Pickett wanted to be present at the IEP meeting, but could not make the meeting set for October 2. To accommodate Mr. Pickett, Mr. Hart canceled the October 2 IEP meeting.

70. By email dated October 9, Mr. Hart provided the paralegal with copies of disciplinary materials. By email dated October 19, Mr. Hart provided the paralegal with copies of attendance and grades.

71. Subsequent communications between Mr. Hart and Mr. Pickett covered various matters, including ISS and AES. In one email dated November 7, Mr. Hart explained to Mr. Pickett that Respondent wanted to initiate a new FBA/BIP, but its policy required first that Mr. Hart conduct a reevaluation meeting to obtain the mother's permission to reevaluate Petitioner's behavior. By email response to this email, Mr. Pickett objected to the removal of Petitioner to the AES site or home for more than ten days without a manifestation determination. This email asserts that Petitioner's behaviors were a manifestation of [redacted] disability, and [redacted] requires several modifications to the Early 2012 IEP.

72. By email dated November 9, Felicia Starke, Respondent's Due Process Coordinator and Mr. Hart's ESE supervisor, asked Mr. Pickett to contact her at his earliest opportunity to discuss Petitioner. Ms. Starke suggested that Mr. Pickett call before 9:00 a.m. on the next day.

73. At some point, the paralegal and either Mr. Hart or his secretary tentatively agreed to December 7 for an IEP meeting. But, aware of the urgency of the situation, Ms. Starke

told Mr. Hart to find an earlier date. After much coordination of dates, by email dated November 9, Mr. Hart selected November 19 at 1:00 p.m., which was a date and time that had been offered by the paralegal. Mr. Hart spoke with Child Net case manager Jessica McLymont to confirm that she could transport the mother to the meeting at that time. Mr. Hart telephoned the mother to obtain a waiver of the ten-day notice, but was unable to speak with her at that time.

74. By email dated November 13 to, among others, the paralegal, Mr. Hart advised that he hoped to conduct an IEP meeting on November 19 at 1:00 p.m. at [redacted] High School, but was waiting to hear back from the mother as to the waiver of the ten-day notice. Later that day, Mr. Hart spoke with the mother, who agreed to waive the notice and attend the November 19 meeting. Replying to Mr. Hart's email, the paralegal replied by asking if they still needed to reserve December 7 for a meeting. Ms. Starke told the parties to keep December 7 available for a possible followup meeting.

75. On the morning of November 14, Mr. Pickett filed the Request for Due Process Hearing that commenced this case. Later that day, Mr. Hart advised the paralegal that the mother had waived the ten-day notice and an IEP meeting would take place on November 19 at 1:00 p.m., pursuant to an attached PPF.

76. By email the next day to Mr. Hart, Mr. Pickett advised that Petitioner wanted mediation before an IEP meeting was held. Elaborating on an email to Ms. Starke also on November 15, Mr. Pickett advised that he had requested an IEP meeting in a letter dated October 17, 2012, in response to which Respondent had initially scheduled one for December 7, but had warned Mr. Pickett that it would first have to conduct a response to intervention process and that the 25 days' suspension without a manifestation determination was lawful. Evidently wary of delay, Mr. Pickett suggested that mediation should precede any IEP meeting.

77. By email later in the day, Ms. Starke advised Mr. Pickett that Respondent had an obligation to continue to conduct IEP meetings, regardless of a pending due process hearing. Additionally, Respondent's obligation was to coordinate meetings with a parent with courtesy copies to Legal Aid and Child Net.

78. By email dated November 16, Mr. Hart provided Mr. Pickett with a partial draft of an IEP, which contained present levels of performance and goals and objectives. The email also provides detailed parking instructions in anticipation of his attendance at the November 19 meeting.

79. School officials and Petitioner's mother and brother reported to the school on November 19 at 1:00 p.m. for the

scheduled meeting. After waiting one hour for Mr. Pickett, who neither appeared nor telephoned, the participants proceeded, first, with the reevaluation meeting. Petitioner's mother and brother participated. They said that Petitioner helped at home, wanted to be "top dog," and enjoyed physical activities, such as sports. The parties decided that Respondent would assess Petitioner in expressive and receptive language, academic achievement, personality and emotional functioning, adaptive behavior and behavioral functioning, and FBA. The participants next addressed Mr. Hart's draft IEP, but ran out of time. At the end of the meeting, they agreed to meet again on December 3.

80. Mr. Hart issued a PPF on November 20 for the December 3 IEP meeting. Counsel for both parties exchanged emails that, among other things, mentioned this meeting. However, neither Mr. Pickett nor Petitioner's mother attended the meeting, although the guardian-ad-litem appeared and participated. The participants did not want to proceed without the mother, but, after waiting 30 minutes for her arrival, felt compelled to do so. At the meeting, the assembled IEP team adopted an IEP for Petitioner. But the participants agreed to have an "interim IEP" meeting on the already-reserved date of December 7, so as to give Petitioner's mother and Mr. Pickett another opportunity to discuss matters.

81. Also on December 3, Respondent or the IEP team conducted a manifestation determination and determined that the behaviors that had resulted in the suspensions were manifestations of Petitioner's disability and that Respondent had failed to implement the Early 2012 IEP.

82. In preparing the December 3 IEP, Mr. Hart relied on the Early 2012 IEP. The December 3 IEP closely resembles the Early 2012 IEP.

83. To the extent that Respondent's violations of IDEA are procedural, they are material because these violations precluded the provision of FAPE from the start of school through the filing of the Due Process Hearing Request.

84. At times, Respondent has implied, in argument and testimony, that the failure of its educational efforts in the first semester of the 2012-13 rests with Petitioner: after all, the purpose of the disciplinary removals was to reshape Petitioner's misbehaviors by expecting [redacted] to learn from the assessed consequences. To work, these consequences must be adverse, so as to impose a greater cost than the perceived benefit from the misbehavior. In Petitioner's case, this expectation was unjustified by the facts.

85. It is Respondent's utter abdication of its obligation to reshape these misbehaviors in the context of providing FAPE that caused the first semester to be a waste of everyone's time.

Last year, managing and educating the same child, the Palm Beach County School Board, which presumably has a student code with consequences, obtained educational benefit--because it designed and implemented a IEP and BIP reasonably calculated to provide educational benefit to the child. If Respondent had done the same, it too would have produced some educational benefit for Petitioner.

CONCLUSIONS OF LAW

86. The Division of Administrative Hearings has jurisdiction. § 1003.57(1)(b), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9) and 6A-6.03312(7). Federal-court jurisdiction is not lost due to the fact that the child may have aged out of IDEA or relocated out of Respondent's school district. See, e.g., Jefferson Cnty B'rd of Educ. v. Breen, 853 F. 2d 853, 857-58 (11th Cir. 1988) (court sustained award of two years' compensatory education, even though the child had aged out of coverage under the Education of the Handicapped Act--the predecessor to IDEA); Neshaminy Scl. Dist. v. Karla B., 1997 U.S. Dist. LEXIS 3849 (E.D. Pa. 1997) (court denied school district's motion for summary judgment, rejecting argument that compensatory education was no longer available because child had moved out of the school district).

87. Respondent is obligated to identify, evaluate, and place appropriately ESE students, and it is obligated to provide

FAPE to these students. §§ 1003.571(1)(a) and 1003.57(1)(b), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(a). Generally, FAPE is "a free and appropriate public education that emphasizes special education and related services designed to meet [ESE students'] unique needs and prepare them for further education, employment, and independent living." § 1003.571(1)(a), Fla. Stat., FAPE includes specialized instruction that meets the standards set forth in rules 6A-6.03011 through 6A-6.0361 and is "provided in conformity with an [IEP] that meets the requirements of Rule 6A-6.03028." Rule 6A-6.03411(1)(p) 2. and 4.

88. As interpreted by case law, FAPE is well explained in the following discussion, focusing in part on the seminal case, Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 203 (1982):

> The [*Rawley*] Court began by looking directly at the IDEA statute and finding that a FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Rowley*, 458 U.S. at 188. The Court then noted that it is access to education, not so much the substance of the education received, that matters. *Id.* at 192. Indeed, "the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education." *Id.* at 195. This "specialized education" need not

provide disabled students with "every special service necessary to maximize [their] potential," but rather a "basic floor of opportunity" and "some educational benefit." *Id.* at 199-200. So long as a disabled student is able to benefit

> educationally from a school, that school has provided her with a FAPE. *Id.* at 203.
>
> The other major piece of IDEA, in addition to the FAPE requirement, is the Individualized Education Program, or IEP. This is a collaborative effort of the school system and the disabled student's parents, and the process by which a student's FAPE is conceived. *See Schaffer v. Weast*, 546 U.S. 49, 53, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). IDEA requires that all disabled students receive an IEP, 20 U.S.C. § 1414(d)(2), and it must include, among other things, "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). The IEP must be "reasonably calculated to enable the child to receive educational benefits." *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1121 (9th Cir. 2011) (quoting *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1207 (9th Cir. 2008)).

Poway Unified Sch. Dist. v. Cheng, 821 F. Supp. 2d 1197, 1199 (S.D. Cal. 2011).

89. Petitioner bears the burden of persuasion as to his claims of he has been denied FAPE. Schaffer v. Weast, 546 U.S. 49 (2005). Any denial of FAPE must be substantive. Rule 6A-6.03311(9)(v)4. explains:

> An ALJ's determination of whether a student received FAPE must be based on substantive

> grounds. In matters alleging a procedural violation, an ALJ may find that a student did not receive FAPE only if the procedural inadequacies impeded the student's right to FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or caused a deprivation of educational benefit.

90. In Florida, there is no doubt about the inception of Respondent's obligation to provide FAPE to a student who transfers into the school district with an IEP from another Florida school district. When a child with an IEP transfers from one Florida school district to another, rule 6A-6.0334(1) requires Respondent to provide FAPE, including "services comparable to those described in the child's IEP . . . from the previous Florida school district." This obligation attaches immediately and does not end until either the new school district adopts the IEP of the former school district or adopts a new IEP.

91. Respondent failed to provide FAPE to Petitioner at the start of the 2012-13 school year by failing to provide comparable services to those described even in the odd-numbered pages of the Early 2012 IEP. It is therefore unnecessary to consider the legal effect of the failure of CHS to supply Respondent with the even-numbered pages. By failing to initiate the process, without delay, to obtain these missing pages, Respondent also violated rule 6A-6.0334(3)(a), which requires it

"to take reasonable steps to promptly obtain the student's records, including the IEP . . . and supporting documents and any other records relating to the provision of special education or related services to the child."

92. Changing Petitioner's educational program from ESE to regular education at the start of the school year, [redacted] High School officials never provided the notice required by rule 6A-6.03311(1). Although Petitioner did not allege this violation, this failure by Respondent was most regrettable because any notice to Child Net or CHS would have resulted--as it later did--in an earlier intervention of Mr. Pickett and perhaps spared both parties much of the frustration and aggravation that followed.

93. Each of the three suspensions totaling 25 days constituted a change in placement. Generally, in terms of the limited teaching methods, assessment opportunities, and teaching materials, and the optional nature of the program, the AES program did not provide the specialized instruction, related services, accommodations, and modifications on which Petitioner relied to obtain FAPE.

94. Much of the case law considering a change in placement does so in the context of the issue addressed in the second preceding paragraph--i.e., whether a proposed change in educational program is sufficient to require the school to give

a parent prior written notice, as is required by rule 6A-6.03311(1).

95. Given that the resolution of the change-of-placement issue is adverse to Respondent, for the purpose of this Final Order, analysis of whether a change in placement has occurred will exclude consideration of a change in setting or location. But see P. V. v. Sch. Dist. of Phil., 2013 U.S. Dist. LEXIS 21913 (E.D. Pa. 2013) (for autistic child, change in educational placement required at least consideration of change in schools with due weight to the effect of a longer bus ride, separation from former classmates, and need to acclimate to unfamiliar environment); Hill v. Sch. Brd. of Pinellas Cnty, 954 F. Supp. 251, 253 (M.D. Fla. 1997) (typically, educational placement means educational program and not where the program is implemented, but court does not reject possibility that the attributes of an institution, location, or teacher-student relationship might be "so pronounced and valuable to the student" that their change could constitute a change in placement). For a child with the limited resources of Petitioner, who had already just undergone a jarring set of changes, the repeated reassignments--starting nearly at the start of the school year--to the AES site represented yet another set of changes, including transportation to another location and occupancy of a different building with a different

set of peers, who would likely not include as many appropriate behavior models for Petitioner. In a closer case, all of this would require careful analysis, notwithstanding Respondent's insistence that educational program invariably excludes considerations of location or setting.

96. [redacted] High School officials never determined if the AES placement constituted a change in placement for Petitioner. Instead of analyzing the services of the AES program and the individual needs of Petitioner, [redacted] High School officials checked some boxes, sent some emails, and, sometimes with misgivings, rid themselves of the burden of trying to manage, educate, and mostly discipline Petitioner for a few days each time they AES-suspended [redacted].

97. Because Petitioner's educational program changed at the end of September when Mr. Hart reassigned [redacted] from regular education to ESE classes, additional grounds exist for determining a change in placement for the last 10 days' suspension than for the first 15 days' suspension.

98. For the September suspensions, Respondent was removed from regular education classes featuring teacher-led instruction to the self-teaching method of the AES program. Because Respondent was not receiving the specialized instruction, related services, accommodations, and modifications to which he was entitled, it is somewhat harder for him to show a change in

placement when he was removed to the AES program at this time. But he still is able to satisfy this burden.

99. A smaller matter for most students, Petitioner's reliance on the oral instruction typical in regular education, given [redacted] inability to read, meant that [redacted] removal to the AES program, which is characterized by self-teaching, was a substantial change in educational programming. Although Petitioner might not have understood much of what the teacher was saying, given [redacted] regular education assignment, Petitioner would have understood much less, if [redacted] were restricted to reading regular education, ninth grade textbooks.

100. The September suspensions also constituted a change in placement because the AES program was optional. Unlike attendance at regular school, attendance at AES was not mandated by law. Given Petitioner's escape behaviors, the optional nature of the AES placement meant essentially that [redacted] was suspended from school, which of course constituted a change in educational programming. However little Petitioner could learn from a placement in regular education, [redacted] could learn absolutely nothing while straight suspended from school.

101. Petitioner's burden is not as great for the last 10 days' suspension, which occurred after [redacted] was assigned to ESE and three physical-activity classes. This constituted a change in placement for the reasons set forth in the preceding

paragraphs, as well as the loss of specialized instruction and the assignment of random course materials, as reflected in the memorably cavalier email that authorized the use of any available textbooks.

102. In an abundance of caution, the Administrative Law Judge has imposed the burdens of persuasion and production on Petitioner as to all issues, including the issue of whether the disciplinary removal to the AES program was a change in placement. It is not entirely clear which party bears the burden of production or persuasion as to this issue and the subordinate issue of the nature of the AES program, whose contours may not be readily ascertainable to students and their advocates. Is it Petitioner's burden to prove the elements of the AES program to show that [redacted] could not have received FAPE in this placement? Or is it Respondent's burden to prove the elements of the AES program to show that Petitioner could have received FAPE in this placement?

103. As mentioned above, the Supreme Court held, in Schaffer v. Weast, supra, that the burden of persuasion falls on the party seeking relief, but the Court cautioned that it was not addressing the burden of production, id. at 51, which applies to "which party bears the obligation to come forward with evidence at different points in the proceeding." Id. at 56. The Court also stated that the burden of persuasion may

fall upon the defendant in the case of an affirmative defense or exemption. Id. at 57. The Court acknowledged that the strongest argument advanced by the student was that the burden should not be placed on a litigant of proving facts peculiarly within the knowledge of [redacted] adversary, id. at 60, but the Court considered this advantage to the school board somewhat offset by the student's access to [redacted] student records and right to independent educational evaluations. See also J. L. v. Ambridge Area Scl. Dist., 2008 U.S. Dist. LEXIS 54904 (W.D. Pa. 2008) (school district has burden of proof on affirmative defense of statute of limitations); Millay v. Surry Scl. Dep't, 2009 U.S. Dist. LEXIS 120,222 (D. Me. 2009) (dictum) (burden of persuasion could have been placed on school district to show that its proposed, isolating placement was appropriate).

104. By implication, due to the operation of a more specific set of provisions dealing with disciplinary removals, a school appears to be relieved of the obligation of the change-in-placement notice requirements for certain disciplinary removals, even if they would otherwise constitute changes in placement under rule 6A-6.03311(1). Rule 6A-6.03312(1)(a) provides:

> For the purpose of removing a student with a disability from the student's current educational placement as specified in the student's IEP under this rule, a change of placement occurs when:

> 1. The removal is for more than ten (10) consecutive school days, or
> 2. The student has been subjected to a series of removals that constitutes a pattern that is a change of placement because the removals cumulate to more than ten (10) school days in a school year, because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals, and because of additional factors, such as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another. A school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement, and this determination is subject to review through due process and judicial proceedings.

105. The prospect of the second removal--i.e., second AES suspension--in September triggered the requirements of rule 6A-6.03312(1)(a)2. The second AES suspension proposed a near-continuous suspension of 15 days for essentially the same defiant, escapist behavior.

106. At the time of proposing the second AES suspension, Respondent was thus obligated to take two actions. First, rule 6A-6.03312(4) requires Respondent to provide Petitioner's mother with notice of the removal decision and a copy of procedural safeguards. Respondent failed to do this, but Petitioner has not alleged this procedural violation.

107. Second, rule 6A-6.03312(3) requires Respondent to conduct a manifestation determination within ten school days of

any decision to change the placement of a disabled student due to a violation of the Student Code. Respondent failed to do this, and Petitioner has alleged this violation. The decision to change the placement, by virtue of the second AES suspension, was made no later than September 11, so the manifestation determination needed to take place by about September 25.

108. Respondent failed to conduct the required manifestation determination within the specified timeframe, and the failure deprived Petitioner of FAPE. Among other things, a manifestation determination would have resulted in Respondent's earlier realization that Petitioner's behaviors were a manifestation of [redacted] disability and that Fort Lauderdale School Officials were not implementing [redacted] Early 2012 IEP or any form of specialized instruction. As noted below, a manifestation determination in September would have resulted in an earlier implementation of the Early 2012 BIP, perhaps with revisions, or the adoption of a new BIP.

109. The determination that behaviors are a manifestation of a student's disability requires Respondent to take "immediate steps" to remedy any deficiencies in its implementation of the student's IEP, conduct an FBA and prepare a BIP or review and revise any existing BIP, and return the student to the placement from which [redacted] had been removed. Rule 6A-6.03312(3)(b) and (c). The last requirement is important because it means that, if the

alternate placement provides fewer services than the initial placement, but still manages to provide FAPE, a school board would have to return the student to [redacted] original placement, if [redacted] misbehavior was a manifestation of [redacted] disability.

110. By contrast, the determination that behaviors are not a manifestation of a disability allows Respondent to punish [redacted] like any nonESE student. Rule 6A-6.03312(3)(d). But, even in this case, after removals totaling ten school days, the student

> must continue to receive educational services, including homework assignments in accordance with Section 1003.01, F.S., so as to enable the student to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals in the student's IEP and receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur.

111. No longer entitled to FAPE as described initially above, such a student is entitled to what may be referred to as Disciplinary FAPE, which consists of educational services to enable [redacted] to participate in the general curriculum and to progress toward meeting [redacted] IEP goals. Also included in Disciplinary FAPE are targeted behavioral services in the form of an FBA, behavioral intervention services (if not a BIP), and modifications designed to prevent the recurrence of the

behavioral violation, which may not be part of FAPE in all cases.

112. There can be no doubt that Petitioner's behavior was a manifestation of [redacted] disability, but the AES program would have failed even to provide Disciplinary FAPE. For the reasons identified above, the AES program was not reasonably calculated to allow Petitioner to access [redacted] curriculum and make progress on [redacted] Early 2012 IEP goals, nor did Respondent ever formulate targeted behavioral services. Thus, regardless of how the manifestation determination turned out, Respondent's failure to conduct it timely was material.

113. Respondent did not violate any procedural safeguards in connection with the meetings in November and December. Rule 6A-6.03028(3)(a) recognizes the role of parents in preparing IEPs for their children by providing critical information, participating in discussions about the needs of their children, and expressing their concerns. Rule 6A-6.03028(3)(b) requires school districts to adopt procedures "that provide the opportunity" for parents to participate in IEP meetings, including giving adequate notice of meetings to parents, scheduling meetings at mutually agreed times and places, and using alternative means of meeting, such as telephone or video conferencing, when necessary. Rule 6A-6.03028(3)(b)7. authorizes a school district to conduct an IEP meeting without a

parent, if the school district is unable to obtain the attendance of the parent.

114. In all respects, Respondent discharged its obligations in coordinating IEP and reevaluation meetings with the mother and Petitioner's representatives, notifying the mother and the representatives of such meetings, and conducting such meetings, even when the mother or a representative failed to appear. By attending the November 19 reevaluation meeting, the mother had an ample opportunity for input into the reevaluations that Respondent was to conduct and the IEP that was under preparation.

115. As Ms. Starke asserted, Respondent's educational planning obligations did not cease once Petitioner filed a due process hearing request. See, e.g., Grant v. Ind. Scl. Dist. No. 11, 2005 U.S. Dist. LEXIS 13073 (D. Minn. 2005). Too much educational opportunity may be lost if school boards discontinue or even deemphasize educational planning for ESE students during what sometimes turn out to be protracted cases of due process litigation.

116. It is true that, once an agency transmits a file to the Division of Administrative Hearings, it is normally barred from taking further action. § 120.569(2)(a), Fla. Stat. ("The referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as

long as the division has jurisdiction over the proceeding under s. 120.57(1).") However, section 1003.57(1)(b) exempts due process hearings "from ss. 120.569 [and] 120.57 . . ., except to the extent that the State Board of Education adopts rules establishing other procedures." Applying this statutory exemption, under the law then in effect, Florida courts have held that due process hearing were chapter 120 hearings for discovery and the appointment of special hearing officers. See S. T. v. School Board of Seminole County, 783 So. 2d 1231 (Fla. 5th DCA 2001) (no power to order discovery); P. J. S. v. School Board of Citrus County, 951 So. 2d 53 (Fla. 5th DCA 2003) (no authority to appoint a special hearing officer). Except for stay-put provisions, which are irrelevant to this case, there are no due-process statutes or rules requiring or authorizing Respondent to suspend any aspect of educational planning for Petitioner due to the filing of a due process hearing request.

117. On a related note, Petitioner has sought attorneys' fees in [redacted] Due Process Hearing Request and Amended Due Process Hearing Request. Rule 6A-6.03311(9)(x) authorizes a court, not an Administrative Law Judge, to award attorneys' fees for services in the administrative proceeding or subsequent judicial action--to a parent of an ESE student, if she is a prevailing party; to a school board against a parent's attorney, if he has filed a complaint that is frivolous, unreasonable, or without

foundation or has continued to litigate after litigation has clearly become frivolous, unreasonable, or without foundation; or to a school board against a parent's attorney or parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

118. In [redacted] proposed final order, Petitioner has asked to be designated the prevailing party. It is for the court to determine whether Petitioner is a prevailing party or to delegate this determination to the Administrative Law Judge, under the court's ultimate authority, by remanding the case for this purpose to the Division of Administrative Hearings.

119. On motion or sua sponte, an administrative law judge must award attorneys' fees in certain cases governed by section 57.105, Florida Statutes. In a recent DOAH case, Jackson County School Board v. A. L., DOAH Case No. 12-2386F (January 31, 2013), the Administrative Law Judge awarded due process attorneys' fees to a school board under section 57.105(5), Florida Statutes.

120. The A. L. Final Order reasons that the adoption of procedural rules in chapter 6A-6 has eliminated the above-cited statutory exemption in section 1003.57(1)(b), thus placing due process hearings under chapter 120, at least to the extent of

subjecting due process hearings to the attorneys' fees provisions of section 57.105(5). The Final Order also concludes that, although section 1003.57(1)(b) exempts due process hearings from sections 120.569 and 120.57, the legislature did not exempt due process hearings from section 57.105.

121. The undersigned Administrative Law Judge respectfully disagrees with his learned colleague. Regardless of whether there were any rules adopting procedures for due process hearings at the time of the two appellate cases cited above, the exemption from sections 120.569 and 120.57 conferred by the legislature on due process hearings is subject to exceptions, but only "to the extent" that rules are adopted subjecting due process hearings to various procedures. Nothing in section 1003.57(1)(b) implies that any procedural rulemaking covered by the statute results in the loss of the entire statutory exemption; the words "to the extent" suggest that the loss of the exemption will be only as broad in scope as is the covered procedural rulemaking. The evident purpose of the exception to the exemption in section 1003.57(1)(b) is merely to ensure that the statutory exemption does not preclude procedural rulemaking.

122. Rule 6A-6.03311(v) incorporates various procedural rules in chapter 6A-6, as well as the Uniform Rules of Procedure, chapter 28-106. Chapter 28-106 contains no provisions authorizing the awarding of attorneys' fees. As

noted above, chapter 6A-6 includes an intricate rule setting different standards, depending on the payor and payee, for the awarding of attorneys' fees in due process hearings or subsequent judicial actions. It would be an odd result if the adoption of this rule that finely balances the rights and responsibilities of parents, parents' attorneys, and school boards for attorneys' fees in due process hearings incorporated other statutory attorneys' fees provisions that are not so finely balanced. The adoption of an attorneys' fee rule in chapter 6A-6 no more incorporates the broader attorneys' fee provisions of section 57.105(1) than the adoption of the stay-put rule in rule 6A-6.03311(9)(y) incorporates the broader no-further-action provision of section 120.569(2)(a) discussed above.

123. Also, the exemption from sections 120.569 and 120.57 operates to exempt due process hearings from section 57.105. Even though section 57.105 is unmentioned in section 1003.57(1)(b), section 57.105(5) applies only to "administrative proceedings under chapter 120." Because due process hearings are not under chapter 120, section 57.105(5) is not available as a basis for awarding attorneys' fees for services provided in such proceedings.

124. Lastly, in its proposed final order, Petitioner seeks an award of compensatory education, omitting the remainder of

the relief originally sought because Petitioner has since transferred out of the Broward County School District. In a case such as this, an Administrative Law Judge's authority is largely limited to a declaration that the school board has failed to provide FAPE. School Board of Martin County v. A. S., 727 So. 2d 1021 (Fla. 4th DCA 1999). After concluding that FAPE has been denied, the Administrative Law Judge may order a school board to comply with procedural safeguards, rule 6A-6.03311(9)(v)4. But, for this case, it is all the relief that the Administrative Law Judge may order.

125. If Petitioner were still out of school on suspension, after determining that the behavior was a manifestation of [redacted] disability, the Administrative Law Judge could order a return to the original placement or a change in placement to an IAES, under rule 6A-6.03312(8)(a) and (b). But such relief is irrelevant because Respondent has already determined, although belatedly, that the behavior was a manifestation of Petitioner's disability, and Petitioner has transferred out of the Palm Beach County School District.

126. As is typically true, effective relief is only available judicially, under rule 6A-6.03311(9)(w), which recognizes that a court may "grant the relief that it deems appropriate." By declining to address relief, though, the Administrative Law Judge does not imply any view toward the

reasonableness of Petitioner's request for 90 hours of tutoring in math and reading.

ORDER

It is

ORDERED that:

Respondent failed to provide FAPE to Petitioner as follows:

1. In violation of rule 6A-6.0334(1), Respondent failed to provide Petitioner with services comparable to those described in the odd-numbered pages of the Early 2012 IEP at the time of [redacted] enrollment in [redacted] High School. By failing to provide comparable services or implement at least the odd-numbered pages of the Early 2012 IEP and the Early 2012 BIP, Respondent failed to provide Petitioner with FAPE. In violation of rule 6A-6.0334(3)(a), Respondent failed to take reasonable steps to promptly obtain the entire Early 2012 IEP. The materiality of these related failures is obvious; because of them, Respondent did not provide FAPE to Petitioner.

2. Because each AES suspension constituted a change in placement, in violation of rule 6A-6.03312, Respondent failed to conduct a manifestation determination by September 25, 2012. The materiality of this failure is also obvious. A manifestation determination would have resulted, as it later did, in an earlier recognition that the AES-producing behaviors were manifestations of Petitioner's disability and Respondent

was not implementing, or providing comparable services to, the Early 2012 IEP. At this point, Respondent would have been required immediately to implement the Early 2012 IEP and the Early 2012 BIP or prepare and implement its own similar documents and restore Petitioner to an educational placement in which all of the specified specialized instruction, related services, accommodations, and modifications could be provided. For the sake of completeness of its materiality analysis, the Final Order considers the theoretical alternative that a manifestation determination could have resulted in a finding that the AES-producing behavior was not a manifestation of Petitioner's disability; even in this theoretical case, the manifestation determination would have resulted in an earlier determination that Respondent was not providing even Disciplinary FAPE, including the targeted behavioral services required by Disciplinary FAPE.

3. Petitioner's requests for attorneys' fees and compensatory education are denied on the ground of a lack of jurisdiction.

It is further

ORDERED that:

4. For any student with an IEP transferring into a school under the jurisdiction of the Broward County School Board from a school within any other Florida school district, Broward County

school officials shall provide comparable services and promptly obtain the student's former IEP, if they do not already have it, in compliance with rule 6A-6.0334(1) and (3)(a).

5. Respondent shall provide timely notice and a timely manifestation determination for each AES suspension that constitutes a change in placement under rule 6A-6.03311(1), once the disciplinary-removal criteria of rule 6A-6.03312(1) are met. Respondent shall provide FAPE to each student whose misbehavior is a manifestation of [redacted] disability and Disciplinary FAPE to each student whose misbehavior is not a manifestation of [redacted] disability--in the latter case, after ten days' suspension of education, as permitted by rule 6A-6.03312(5)(a).

DONE AND ORDERED this 18th day of March, 2013, in Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 18th day of March, 2013.

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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).