

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

Case No. 23-2028E

vs.

ST. JOHNS COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

A due process hearing was held on August 28 and October 9, 11, and 12, 2023. Administrative Law Judge Jessica E. Varn, from Florida's Division of Administrative Hearings (DOAH), presided over the hearing. By agreement of the parties, the hearing was conducted via Zoom conference.

APPEARANCES

For Petitioner: Stephanie Langer, Esquire
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Palmetto Bay, Florida 33157

For Respondent: Kristine Shrode, Esquire
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STATEMENT OF THE ISSUES

Whether the student's conduct that resulted in discipline violated the code of student conduct;¹ and, if so,

¹ In Petitioner's request for due process hearing, Petitioner alleged as follows:

Essentially this student was placed in an Interim alternative educational setting (IAES). [**] was placed in a different

Whether the student's conduct was a manifestation of the student's disability;

Whether the decision reached at the manifestation determination review (MDR) was predetermined;

Whether the St. Johns County School Board (School Board) failed to identify the student as eligible for exceptional student education (ESE) services; and, lastly,

Whether the School Board discriminated against the student based on his disability, in violation of Section 504.²

PRELIMINARY STATEMENT

The request for due process hearing was filed on or about May 23, 2023. Petitioner was eligible for a Section 504 Plan (504 Plan), had been disciplined for an alleged violation of the code of student conduct, and an MDR had been conducted. The MDR team found that the conduct which resulted in discipline was not a manifestation of the student's disability.

location for a specific time period due to disciplinary reasons but he does not meet and never met the requirements of an IAES placement pursuant to 6A-6.03312, F.A.C. The incident did not involve drugs, a weapon and [**] did not commit serious bodily injury. *The allegation was unfounded and not supported by competent substantial evidence. The questioning of [**] by the school administration is shocking to the conscious. Assuming arguendo that the conduct occurred as the district states, there is no justification for the level of offense selected by the district.* There is also no justification for the removal to an alternative school as the consequence for what is alleged to have occurred. (emphasis added).

² The Rehabilitation Act of 1973, 29 U.S.C. § 795, *et seq.* (Section 504).

On June 7, 2023, the School Board filed a status report, indicating that the parties had waived a resolution session, but were making efforts to settle the issues. Two days later, a telephonic conference was held with the parties. The parties agreed to schedule the due process hearing for August 28 through 31, 2023. The hearing began on August 28, 2023, but the parties agreed to continue the hearing because of an emergency. The parties selected the dates to reconvene; they chose October 9 and 11 through 13, 2023.

The hearing was reconvened as scheduled. Petitioner presented the testimony of the student's mother and father; Jennifer Wojcik, an expert in ESE policies and procedures; Dr. Gayle Fay, a neuropsychologist; Doug McClosky, the student's private mental health therapist; Cynthia Casper, School Bookkeeper; Alexis Coryel, a school psychologist; Andrew Williams, a teacher; Caryn Patterson, School Counselor; and Linda Carnall, Principal. Petitioner's Exhibits 16 through 19; 26; page 169 of Exhibit 29; pages 171, 172, 194, and 195 of Exhibit 31; 33; 36; and 37 were admitted into evidence.

The School Board presented the testimony of Cheryl Kaleda, a teacher; Kevin Millington, a teacher; Gregg Laino, a teacher; Casey Jolliff, a teacher; John Partin, a teacher; Kelly Gibian, Dean of Students; James Puckett, Dean of Students; and Earl Brown, who had served as Assistant Principal and the local education agency (LEA) during the relevant period. All of the School Board's proposed exhibits were admitted into evidence, by stipulation.

At the end of the hearing, the parties agreed to file proposed final orders 15 days after the transcript was filed with DOAH. The parties also agreed that the final order deadline would be extended to 15 days after the parties filed proposed final orders. The Transcript was filed on November 1, 2023. The deadline for proposed orders was November 16, 2023; but the parties

agreed to extend that deadline to November 27, 2023. Accordingly, the final order deadline was extended to December 12, 2023.

Both parties filed timely proposed orders, which were considered in preparing this Final Order. Unless otherwise indicated, all rules and statutory references are to the version in effect at the time of the alleged violations.

FINDINGS OF FACT

1. This student is a 12-year-old boy, who had been found eligible for a 504 Plan while in elementary school in Washington state. His disabilities were listed as attention deficit disorder (ADD), anxiety, and social pragmatic communication disorder. He excels academically across all subject matters.

2. School records from Washington, from the Spring of 2020, describe the student as having trouble processing auditory information; specifically, the 504 Plan characterized this deficiency as “much slower than his peers.” The plan also detailed the student’s anxiety, which caused him to rock back and forth or move his body in some manner. He has trouble making eye contact with others, even when he was being spoken to. His anxiety heightened when his idiosyncrasies were called out or corrected in front of his peers. His social and pragmatic disorder caused him to have difficulties talking socially. He often talked for too long, he struggled with allowing his peers to share their ideas, he had trouble hearing what his peers had to say, and he had trouble accepting solutions to problems offered by his peers. The Washington 504 Plan, as to necessary accommodations, included reminders of social norms and expectations when dealing with his peers.

3. The Washington 504 Plan was written with help from a private neuropsychological evaluation, conducted by Dr. Gail Fay, who had evaluated the student in 2016 and in 2020. Dr. Fay found that the student had significant ADD issues, had trouble with facial recognition, as well as social

and pragmatic issues that required his immediate return to a clinic, to focus on social skills. Since his time living in Washington, the student saw a mental health therapist, Mr. McClosky, regularly. He never stopped seeing Mr. McClosky, even after moving to Florida.

4. The student had moved to Florida for fifth grade, where the 504 Plan, unlike the Washington plan, gave no detail on how his disabilities manifested themselves at school; but it did provide for accommodations on reducing stimuli, allowing the use of fidgets, and repeated auditory instructions to address his difficulty in processing auditory information.

5. In the Fall of 2022, when the student was now a sixth grader, he started school at Switzerland Point Middle School, in a different city in Florida. The school staff adopted the fifth grade 504 Plan without a formal meeting with the parents, but offered to meet with the parents if they thought it would be helpful.

6. In February 2023, the mother of a girl in the student's computer class reported to the guidance counselor that her daughter felt uncomfortable at school because the student had touched her daughter's breast while they were in computer class. Dean Puckett immediately began an investigation, which resulted in gathering a student victim written statement, which reads:

WHAT HAPPENED? the [sic] first time he touched me I really didnt [sic] feel anything and it could have easily been a mistake but then it started happening again and again and you could tell that it was on purpose even if it was just a joke and now i'm [sic] really uncomfortable [sic] with it

WHY DID IT HAPPEN? I think it's really obvious that he has a crush on me but that still doesn't make it okay and I don't like him back

Dean Puckett recalled that the victim showed him, by motioning with her hands, that the student had touched her breast.

7. Dean Puckett next chatted with the computer teacher, but the teacher had not witnessed any such touching during his class periods. In fact, even though this conduct occurred in the middle of a busy classroom, and occurred “again and again,” no adult witnessed it and there was only one student witness. Dean Puckett asked the student witness to provide a written statement, which reads:

WHAT HAPPENED? [**] touched (victim) around the stomach and private part area. She said to not touch there but [**] did it again. WHY DID IT HAPPEN? Not sure.

8. The student’s written statement was drafted while he was in Dean Puckett’s office. Dean Puckett, who had only had one other interaction with the student before this meeting, described the meeting in this way:

So I started to question him about what happened in his ICP class. *He really wasn’t speaking to me, and he wouldn’t answer any of my questions.* So then I got the statement that the victim had written down, and I was asking questions from the statement. (emphasis added).

9. In other words, the student seemed unaware of what incident Dean Puckett was questioning him about—until Dean Puckett decided to ask the student specific questions using the victim’s written statement, which included the word “crush.”

10. After hearing what he was accused of, the student wrote this statement:

WHAT HAPPENED? I may have carelessly touched her breast because I may be developing a crush

WHY DID IT HAPPEN? I might be developing a crush but we are just friends.

11. According to Dean Puckett, the student did not know that his touching of the girl was wrong until Dean Puckett “told him what the student code of

conduct was and then what that falls under and that I was going to have to call his parents.” Dean Puckett decided to code this inappropriate touching as sexual harassment. The School Board’s Levels of Discipline lists sexual harassment as a Level IV infraction, which are acts of misconduct that are the most serious. Sexual harassment is defined as:

[A]ny unwelcome sexual advance, requests for sexual favors, and other inappropriate verbal, non-verbal, or physical conduct of a sexual nature.

At the startling news that he had “sexually harassed” a friend, he broke down and started to cry.

12. After the investigation was completed, the school team decided to hold an MDR meeting, and began that process. When the LEA, Mr. Brown, reached out to the student’s teachers for feedback, he received multiple responses from the student’s teachers.

13. The student’s English and Language Arts (ELA) teacher noted that the student was “a bit socially awkward and sometimes missed social cues. A few times he has tried to be funny when it wasn’t necessary/appropriate. I would say that he is not as socially mature as most of his peers.” The ELA teacher, though, was not present at the MDR meeting.

14. The student’s science teacher loved having him in class, and testified that he was her favorite student. She also recalled that he rocked back and forth when chatting with her after class, which he did often, and that he “would come a little close” when he approached her. The science teacher was also not present at the MDR meeting.

15. The physical education teacher also testified that the student was quirky and socially awkward. He also was not a part of the MDR team.

16. Oddly, the MDR team, in terms of school personnel, included only one staff member who had daily interactions with the student—his math teacher. He stated that the student was immature as compared to his peers and socially skewed, but he was a rule follower and never a behavior problem.

The rest of the school staff members of the MDR team were the ESE Director, who knew nothing about the student; Dean Gibian, who had only briefly interacted with the student; and the guidance counselor, who met the student on the day the student was interviewed for this alleged infraction.

17. The parents attended the MDR meeting with legal counsel and with Dr. Fay. The parents had also asked the student's therapist, Mr. McClosky, to write a letter to the MDR team. He did so:

A sampling of the topics covered in therapy yields a list that is entirely consistent with ASD, ADHD, and Anxiety. *Therapy has covered repeated sadness and anxiety over [**]'s limited ability to have friendships. We have focused on reading emotions in himself and others, seeing things from the point of view of others, noticing when he is talking way too long about his latest passion (and stopping), controlling rapidly escalating feelings (panic and sadness), controlling rigid expectations, having melt downs at school and public, taking turns, blurting out answers in class, obsessive rocking at home and school, repeatedly making loud random noises, taking what teachers and others say too literally, being too loud in school, picking his nose in public, telling stories that are way too long and way too detailed, panic over social interactions, fear of being alone, anxious fixation on the safety of his family, taking turns, hyper focus / anxiety over grades, and being picked-on and targeted by peers at school.*

These are classic topics for Autistic Children.

* * *

In the previous session he mentioned girls for the first time in 3 years. (I had probed his interest in girls numerous times before, and got nothing.) He happily announced that two girls were actually speaking to him. This had never happened before and he was clearly surprised. He did not express any particular interest in either girl, and I suspected that they were merely being civil.

As previously mentioned, I have experience treating sexually aggressive youth, and juvenile offenders in the state of Washington. I also have extensive experience with children and teens who have been sexualized through abuse.

[**] first noticed girls about two weeks ago. *He is not sexualized or sexually motivated. He clearly broke boundaries and failed to notice the social cues of a new social situation. This is entirely consistent with Autism. In fact his behavior is central to what it means to be Autistic; people with ASD fail to notice or “read” social cues, especially in new situations. In new situations they tend to get over energized due to social anxiety and then say and do things that are out of place or odd in the eyes of others. They do this while being oblivious to how they appear to others.* (emphasis added).

18. In sum, the MDR team heard the insight of Dr. Fay, and read the letter from Mr. McClosky, who knew the student quite well. They stated that the student was still in a developmental stage of latency, with no ability to have sexual intentions, and that his social development is best described as an 8-year-old, not a neurotypical 12-year-old. No other experts were there to dispute these opinions. Mr. McClosky, during his testimony, also persuasively pointed out that when sexual intent is present, the conduct occurs in private, because the actor knows it is wrong. Here, the touching occurred in a busy classroom with many peers and an adult present.

19. Dr. Fay had explained to the MDR team that this student could not possibly have sexual intentions or feel sexual gratification from touching any other person, anywhere on their body. Thus, charging him with sexual harassment required a nonsensical inference; that is, that this student had sexual intent when he touched the girl.

20. Setting aside an uncontroverted expert opinion from Dr. Fay, and a compelling and corroborating letter from the student’s own therapist, coupled with the parents’ explanation that the student has always struggled with

personal space (the family often calls him their “space invader”), the MDR team found that this touching, which had been inappropriately labeled as sexual harassment, was not a manifestation of the student’s disability.

21. Despite the fact that this student was new to the school, and had only been there one full semester and a month before this inappropriate conduct, the MDR school team members focused on spotting a pattern of behavior, and seemed to believe that a pattern of sexual harassment, or of inappropriate touching, needed to be established before they could find that the conduct was a manifestation of the student’s disability. The meeting notes reflect that legal counsel for the family pointed out that misinterpretation during the MDR meeting, but sadly, his opinion was also set aside. Several MDR team members, when they testified, echoed the incorrect notion that since this was a first-time offense, it could not possibly be a manifestation of his disability.

22. The more persuasive evidence is that the MDR team considered, but rejected, the uncontroverted opinions of the parents, their attorney, Dr. Fay, and Mr. McClosky, during an hours-long MDR meeting. There was no persuasive evidence that the outcome was predetermined, but overwhelming evidence that the student was not capable of sexually harassing the victim, as charged, and that his inappropriate conduct was a manifestation of his disability.

23. Stated another way, the inappropriate touching, as reported to the MDR team, may indeed violate the code of student conduct, but it does not meet the necessary elements of sexual harassment—because the student had no sexual intent. The overwhelming weight of the evidence established that the inappropriate touching was, though, a manifestation of the student’s disability.

24. Lastly, there is no persuasive evidence that the parents ever asked for an evaluation for ESE eligibility under the Autism Spectrum Disorder (ASD) category or any other category other than Gifted. There is also no evidence that any school personnel sought an evaluation for ESE eligibility. Up until

this maladaptive conduct occurred in February 2023, there was no reason for the school staff to suspect that this student needed ESE services.

25. In fact, once the MDR meeting took place, the school staff appropriately drafted a consent form for a full evaluation for ESE eligibility, and sent it to the parents. Thus, there was no persuasive evidence of a child find violation.

CONCLUSIONS OF LAW

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

27. Petitioner bears the burden of proof on each of the claims raised in the Complaint. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); Dep't of Educ., Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46724 (Aug. 14, 2006)(explaining that the parent bears the burden of proof in a proceeding challenging a school district's manifestation determination).

504 MDR Determination

28. Section 504 is an antidiscrimination statute. The statutory text is short and straightforward and provides:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the

Rehabilitation, Comprehensive Services, and
Developmental Disabilities Act of 1978.

29 U.S.C. § 794(a).

29. Section 504 incorporates the Americans with Disabilities Act (ADA).³
29 U.S.C. § 794(d). The Department of Education has promulgated
regulations to implement Section 504. First, 34 C.F.R. § 104.4(a) reiterates
Section 504's textual prohibition by providing that “[n]o qualified
handicapped person shall, on the basis of handicap, be excluded from
participation in, be denied the benefits of, or otherwise be subjected to
discrimination under any program or activity which receives Federal
financial assistance.”

30. Section 504's regulations further set forth the discriminatory actions
prohibited. Title 34 C.F.R. § 104.4(b) delineates the prohibited
discriminatory actions:

(1) A recipient, in providing any aid, benefit, or
service, may not, directly or through contractual,
licensing, or other arrangements, on the basis of
handicap:

(i) Deny a qualified handicapped person the
opportunity to participate in or benefit from the
aid, benefit, or service;

(ii) Afford a qualified handicapped person an
opportunity to participate in or benefit from the
aid, benefit, or service that is not equal to that
afforded others;

(iii) Provide a qualified handicapped person with an
aid, benefit, or service that is not as effective as
that provided to others;

(iv) Provide different or separate aid, benefits, or
services to handicapped persons or to any class of
handicapped persons unless such action is
necessary to provide qualified handicapped persons

³ 42 U.S.C. § 12101, *et seq.*

with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

31. In making placement decisions, schools receiving federal funding must:

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

* * *

(c) *Placement procedures.* ...

- (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior,
- (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered,

(3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and

(4) ensure that the placement decision is made in conformity with § 104.34.

34 C.F.R. § 104.35(a) and (c).

32. In addition, Section 504 requires a school district to provide a free appropriate public education (FAPE) to each qualified disabled student who is in the school district's jurisdiction, regardless of the nature or severity of the student's disability. For the purpose of this subpart, the provision of FAPE is the provision of regular or special education and related aids and services that are designed to meet the student's educational needs as adequately as the needs of nondisabled students are met. *See* 34 C.F.R. § 104.33(a) and (b)(1)(i).

33. School districts have certain limitations on their ability to remove disabled children from their educational placement following a behavioral transgression. Although the term "manifestation determination" does not appear in the regulatory language of Section 504, the Office for Civil Rights has interpreted Section 504 as requiring an MDR in connection with disciplinary actions that constitute a "significant change in placement" under 34 C.F.R. § 104.35, and Respondent's "Implementation Guide for Section 504" provides the same.

34. The process and relevant inquiry when conducting an MDR is in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(k)(1)(E):

Manifestation determination.

(i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the

parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

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

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

35. As adapted for Section 504, if the LEA, the parent, and relevant members of the MDR team determine that either subclause (I) or (II) of clause (i) applies, the conduct must be determined a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E)(ii). If the conduct is deemed a manifestation of the child's disability, the student must be returned to the educational placement from which he or she was removed. 20 U.S.C. § 1415(k)(1)(F)(iii). Additionally, if no behavioral intervention plan (BIP) was in place at the time of the misconduct, the school district is obligated to “conduct a functional behavioral assessment, and implement a [BIP] for such child.” 20 U.S.C. § 1415(k)(1)(F)(i).

36. If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the school district may apply the relevant disciplinary procedures in the same manner and duration as would be applied to children without disabilities. 34 C.F.R. § 300.530(c).

37. Against this backdrop, the pertinent determination is whether the misconduct under review, the inappropriate touching, was caused by, or had a direct and substantial relationship to, Petitioner’s disabilities. The criteria to be considered in resolving this question must be “broad and flexible,” and must include an analysis of the “child's behavior as demonstrated across

settings and across time.” See Dep't of Educ., Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46720 (Aug. 14, 2016).

38. Here, the maladaptive behavior of inappropriate touching was not, as charged, a violation of the school code. The uncontroverted expert testimony established that this student was incapable of sexually harassing another student because the necessary element of sexual intent was absent. The conduct may have violated the school code, but it did not meet the elements of a Level IV sexual harassment charge.

39. But, even if this student did sexual harass the victim, the overwhelming weight of the evidence established that this conduct was a manifestation of his disability. Both Dr. Fay and Mr. McClosky gave persuasive explanations of how this behavior stems from his disabilities, noting his difficulty with making friends, his struggles with picking up on social cues, his difficulty with seeing things from another’s perspective, and his weakness in processing auditory responses. This was corroborated by not only his parents, who described the student’s ongoing struggle with respecting personal space, but also the statements made by many of his teachers. The behaviors across settings reflected a socially immature, awkward but brilliant boy, who struggles with personal boundaries and with reading social cues.

40. The School Board has therefore disciplined this student for disability-related misconduct, in violation of Section 504. See 34 C.F.R. §§ 104.4(a); 104.33(a), (b)(1)(i); and 104.35(a), (c).

41. Petitioner has also alleged that the MDR team predetermined the decision.

42. In *R.L., S.L., individually and on behalf of O.L. v. Miami Dade County School Board*, 757 F.3d 1173 (11th Cir. 2014), the eleventh circuit addressed the issue of predetermination for the first time; finding that the school district had predetermined the student’s placement when it foreclosed all discussion of the placement sought by the parents, relying heavily on the

sixth circuit's decision in *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004) (finding predetermination where the state “did not have open minds and were not willing to consider” a particular service the parents thought the child needed to access his education). The eleventh circuit explained that predetermination occurs when the school district makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team. *R.L.*, 757 F.3d at 1188; *see also Deal*, 392 F.3d at 857-59. The school district cannot come into a meeting with closed minds, having already decided material aspects without parental input. *R.L.*, 757 F.3d at 1188; *see also N.L. v. Knox Cnty. Schs.*, 315 F.3d 688, 694-95 (6th Cir. 2003) (finding no predetermination where school district representatives “recognized that they were to come to the meeting with suggestions and open minds, not a required course of action”).

43. This is not to say that school-based members of a team may not have any preformed opinions about what is appropriate for a child's education. *R.L.*, 757 F.3d at 1188. But any preformed opinion the school district might have must not obstruct the parents' participation in the planning process. It is not enough, the court explained, that the parents are present and given an opportunity to speak at a meeting. *Id.*

44. The court then explained that to avoid a finding of predetermination, there must be evidence that the school district has an open mind and might be swayed by the parents' opinions. *Id.* A school district can make this showing by, for example, evidence that it was receptive and responsive at all stages to the parents' position, even if it was ultimately rejected. *Id.* Those responses, though, should be meaningful responses that make it clear that the school district had an open mind about and considered the parents' concerns. *Id.* at 1189. This inquiry is inherently fact intensive, but should identify those cases in which parental participation is meaningful and those cases in which it is a mere formality. *Id.*

45. In this matter, the facts as detailed in the Findings of Fact above make abundantly clear that the School Board did not predetermine the MDR decision. The team considered Dr. Fay's input, as well as the parents' input, but ultimately rejected it. The School Board's action at the MDR, in acknowledging that the student should be evaluated for ESE eligibility under the eligibility category of ASD, and beginning to seek parental consent for that evaluation, is also persuasive evidence establishing that it had an open mind during the MDR meeting; and, fortunately, parental participation was not a mere formality. The school-based team members of the MDR team did, however, set an incorrect standard for an MDR analysis; that is, that first-time offenses cannot be manifestations of a student's disability. This incorrect notion does not constitute predetermination. Rather, it highlights the need for better training of the school staff when conducting MDRs.

Child Find

46. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *Phillip C. v. Jefferson Cnty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to 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 requires the 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).

47. Parents and children with disabilities are given substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06

(1982). Among other protections, parents have a right to examine their child's records and participate in meetings concerning their child's education; receive written notice before 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).

48. Turning first to eligibility under the IDEA, it confers the right to a FAPE only upon students with disabilities. One of the most essential purposes, if not the most essential purpose, of the IDEA is “to ensure that all *children with disabilities* have available to them a free appropriate public education,” 20 U.S.C. § 1400(d)(1)(A) (emphasis added), meaning “special education and related services,” *id.* § 1401(9). But if a student is not a “child with a disability,” then the student is not entitled to a FAPE under the IDEA.

49. In *Durbrow v. Cobb County School District*, 887 F.3d 1182, 1184 (11th Cir. 2018), the Eleventh Circuit held that to trigger a Child Find obligation and potential determination of eligibility, a student with a disability must show: (1) that the disability adversely affects the student’s academic performance; and (2) “by reason thereof,” the student needs special education. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(c)(9); *see also Alvin Indep. Sch. Dist. v. Patricia F.*, 503 F.3d 378, 383-84 (5th Cir. 2007).

50. In making this determination, the *Durbrow* Court explained that a school district must draw upon information from various sources, including aptitude and achievement tests, parent input, and teacher recommendations, pursuant to 34 C.F.R. § 300.306(c). A student is, therefore, unlikely to need special education if: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the capacity to comprehend course material. *Id.*; *see also Alvin Indep.*, 503 F.3d at 383; *Bd. of Educ. of Fayette Cnty. v.*

L.M., 478 F.3d 307, 313-14 (6th Cir. 2007); *McMullen Cnty. Indep. Sch. Dist.*, 49 IDELR 118 (Tex. 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).

51. Applying this analysis here, the student, before this maladaptive behavior in February 2023, was meeting academic standards, neither the parents nor any teachers were recommending special education, and he demonstrated the ability to comprehend grade level course material. The first occurrence of unusual or alarming conduct was the incident at issue. The School Board properly offered, when this incident occurred, to conduct a full evaluation for ESE services. Petitioner, therefore, failed to establish a child find violation.

Relief

52. Because the School Board disciplined this student for disability-related misconduct, thereby denying him a FAPE, the student is entitled to an appropriate remedy.

53. In granting relief, the court, or administrative hearing officer, has broad discretion. *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009)(observing that 20 U.S.C. § 1415(i)(2)(C)(iii) authorizes courts and hearing officers to award appropriate relief, despite the provision’s silence in relation to hearing officers).

54. Such “appropriate” relief may include reimbursing parents for the cost of private replacement therapy; transportation expenses; credit card transaction fees and interest; and, when a trained service provider is unavailable, reimbursement for the time a parent spent in providing therapy personally. *See Bucks Cnty. Dep’t of Mental Health v. Pa.*, 379 F.3d 61, 63 (3d Cir. 2004)(“[W]e hold that under the particular circumstances of this case, where a trained service provider was not available and the parent stepped in to learn and performed the duties of a trained service provider, reimbursing the parent for her time spent in providing therapy is ‘appropriate’ relief.”); *D.C. ex rel. E.B. v. N.Y.C. Dep’t of Educ.*, 950 F. Supp. 2d 494, 516 (S.D.N.Y. 2013)(awarding reimbursement for transportation costs); *J.P. v. Cnty. Sch. Bd.*, 641 F. Supp. 2d 499, 506-07 (E.D. Va. 2009)(awarding parents a reasonable rate of interest to compensate them for tuition payments made on their credit cards, as well as credit card processing fees).

55. Appropriate relief depends on equitable considerations, so that the ultimate award provides the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Reid v. Dist. of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005).

56. In addition, one type of relief that a court may provide is an award of compensatory education. *Sch. Comm. of Town of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369 (1985)(quoting 20 U.S.C. § 1415(e)(2)) Compensatory education is an award “that simply reimburses a parent for the cost of obtaining educational services that ought to have been provided free.” *Hall v. Knott Cnty. Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *see also Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1352-53 (N.D. Ga. 2007)(holding that, in formulating a compensatory education award, “the Court must consider all relevant factors and use a flexible approach to address the individual child’s needs with a qualitative, rather than quantitative focus”), *aff’d*, 518 F.3d 1275 (11th Cir. 2008).

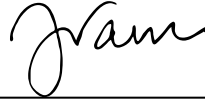
57. Guided by the above stated principles, Petitioner is entitled to compensatory education from the time the School Board changed his placement based on disability-related misconduct. The School Board must also remove the sexual harassment code on his disciplinary record, and return the student to his original placement.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner established that the School Board violated Section 504 by improperly disciplining the student for disability-related misconduct, and is ORDERED to:

1. Remove the sexual harassment discipline code from the student's disciplinary record.
2. Return the student to his prior educational placement.
3. Provide compensatory education from the time the School Board elected to inappropriately change the student's placement.
4. Within 30 days, create a behavior plan to address the maladaptive behavior to prevent its reoccurrence.
5. Within 30 days, revisit the student's 504 Plan to address the maladaptive behavior.
6. Train school staff on the proper MDR analysis.
7. All other forms of relief are denied.

DONE AND ORDERED this 8th day of December, 2023, in Tallahassee, Leon County, Florida.



JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of December, 2023.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).