STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs. Case No. 18-0936E

NASSAU COUNTY SCHOOL BOARD,

Respondent.
_________________________________/

FINAL ORDER

A final hearing was held in this matter before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative hearings (DOAH), on ███ ██ and ██, ████, in Yulee, Florida.

APPEARANCES

For Petitioner: ███████ ██████ █████, Esquire
Three Rivers Legal Services, Inc.
3225 University Boulevard South, Suite 220
Jacksonville, Florida 32216

For Respondent: █. ███ █████, Esquire
Nassau County School Board
1201 Atlantic Avenue
Fernandina Beach, Florida 32034

STATEMENT OF THE ISSUES

Whether Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., as alleged in Petitioner's due process complaint (Complaint); and, if so, to what remedy is Petitioner entitled.

PRELIMINARY STATEMENT

On or about [redacted] [redacted], [redacted], Respondent received Petitioner's Complaint. Respondent forwarded Petitioner's Complaint to DOAH on [redacted] [redacted], [redacted].

On [redacted] [redacted], [redacted], the parties filed a Joint Motion to Request Extension of Due Process Timelines. The same day, the undersigned issued an Order granting the parties' joint motion allowing the parties to conduct a resolution session on or before [redacted] [redacted], [redacted], and extending all due process timelines commensurate with the extension.

After being advised that the parties were unable to amicably resolve the matter, a final hearing was scheduled for [redacted] [redacted] through [redacted], [redacted]. On [redacted] [redacted], [redacted], in response to the undersigned's Order of Pre-hearing Instructions, the parties filed a Joint Pre-hearing Stipulation, wherein the parties stipulated to certain facts as admitted and requiring no further proof at hearing. The parties further delineated those issues that remained to be determined at the final hearing. Per the parties' stipulation said issues are:

> Whether the continued placement in the [redacted]-[redacted] classroom at [School A] would likely result in limited benefit to Petitioner based upon [[redacted]] [redacted] circumstances.
>
> Whether the District failed to consider a [redacted] and, if so, whether that constitutes a lack of consideration of

the continuum of placements options (least restrictive environment in which the student can be successful) and a denial of a free and appropriate public education (FAPE).

Whether [School A's] Exceptional Student Education Program setting, self-contained/separate classroom, is an appropriate placement for a student with Petitioner's [redacted] [redacted].

Whether the District failed to include and/or implement [redacted] [redacted] targeting [redacted] from [[redacted]] area and from the classroom and, if so, whether that constitutes a safety risk that is a denial of FAPE.

Whether the District has failed to increase and/or effectively implement [redacted] [redacted] services ([redacted] [redacted]) and, if so, whether that constitutes a denial of FAPE.

The final hearing was conducted as scheduled. The final hearing Transcript was filed on [redacted] [redacted], [redacted]. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. Upon the conclusion of the final hearing, the parties stipulated that proposed final orders would be filed within 21 days after the filing of the transcript and that this Final Order would issue 42 days after the filing of the transcript. The parties timely filed proposed final orders, which have been considered in issuing this Final Order.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned

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

FINDINGS OF FACT

Stipulated Facts

As noted above, pursuant to the parties' Joint Pre-Hearing Stipulation, the following facts were admitted without further proof at the final hearing, and are set forth below:

1. Petitioner is an -year, -month-old student currently enrolled at [School B], a public school in the Nassau County School District.

2. Petitioner is being served in an Exceptional Student Education (ESE) Program under the eligibility categories of and .

3. Petitioner receives the related services of Therapy, , , and Services.

4. In addition to the aforementioned disabilities, Petitioner also presents with a disorder.

5. Petitioner receives the and service of , which is a collaborative service between a and a .

6. Petitioner is , with a diagnosis of .

7. Petitioner uses the [redacted] [redacted] [redacted] system, a [redacted] schedule, and a [redacted] [redacted] [redacted] ([redacted] [redacted]).

8. Petitioner receives instruction in the state standards [redacted] curriculum and participates in the Florida [redacted] Assessment.

9. Petitioner scored a Level [redacted] on both the [redacted] and [redacted] administrations of the Florida State [redacted] Assessment; this does not demonstrate an [redacted] level of success with the Florida Standards [redacted].

10. A student performing at Level [redacted] of the Florida State [redacted] Assessment does not demonstrate an adequate level of success with the Florida Standards [redacted].[1/]

11. Petitioner exhibits [redacted], which impede [redacted] learning and/or that of others.

12. Petitioner will [redacted] [redacted] [redacted] [redacted] than [redacted] minutes in [redacted] [redacted] setting; if Petitioner does not have [redacted] [redacted], Petitioner will leave [redacted] work area.

13. Petitioner's behaviors also include [redacted] of items and materials in the classroom.

14. Petitioner fails to make [redacted] [redacted] and is often [redacted] in the [redacted], and [redacted] [redacted] [redacted] adult [redacted].

15. Petitioner's are a within the classroom and around the entire school campus.

16. Petitioner's Individual Education Plan (IEP) provides services on a , basis.

17. Petitioner often requires to to complete tasks.

18. Due to the of Petitioner's disabilities and need for , Petitioner receives in a , classroom.

19. Petitioner spends an day at school.

<u>Non-Stipulated Facts</u>

20. On or about , , Petitioner was attending School A, a public school in Respondent's school district. At that time, a was completed wherein Petitioner's was noted as . As documented in the referral, Petitioner will " , , trying [sic] to , and ." The referral further documented that this occurred " " and that the best time to observe this was " ."

21. On , , , analyst for Respondent, conducted a classroom observation of Petitioner. During -minute observation, noted the following : , ,

, " " , , , , and .

22. Another observation was conducted by on , . On this occasion, observed the following over a -minute period of time: , , , " " , , , , and .

23. On , , an IEP team meeting was held. At that time, it was documented that Petitioner exhibited learning or that of others. It was further documented that had a ( ) and/or a ( ).

24. Nothwithstanding the above-noted , the developed on , , only addressed one , ( ). The addressed the protocols needed to teach Petitioner appropriate skills. was also the only noted on Petitioner's IEP goals under the domain of . IEP was amended to include . Although said services are not specifically delineated they were to occur two to four times per month at " ." .

testified that believed the issue to be the most pressing, and, therefore, the reason for the singular approach on the . As noted above, Petitioner's educational placement was that of a class setting wherein spends percent or less of school day with nondisabled peers.

25. Petitioner's annual IEP review for the school year was conducted on , . At this time, it was noted that continued to impede and/or that of others. present levels of performance documented that the staff "have seen a in ." Indeed, it was noted that had only once thus far in the school year.

26. At this time, the IEP team further documented that was frequently when addressed by teachers or paraprofessionals. Often, when was told to , the area or activity. The IEP documented that " in the classroom and on the school campus." On the positive side, was noted to demonstrate an increase in with peers and was demonstrating . Although had demonstrated improvement in issues, was still having some issues with .[2/]

27. Petitioner's IEP goals were modified on , , to reflect issues. For example, the IEP

included a goal for ███ to "█████ █████ in following █████ from adults by doing what █████ █████, █████ or █████ or █████ adult █████." The goal contained short-term objectives or benchmarks to be measured by random observation and daily █████ logs. An additional goal was included concerning █████ with similar short-term objectives or benchmarks and monitoring. The █████ IEP was amended to reduce the █████ services to a monthly basis.

28. On █████ █, █████, an IEP meeting was conducted to address a change in Petitioner's educational placement. Specifically, the team considered, and initiated, a change of ███ placement to a "█████." For all that appears, the change was necessitated or requested due to Petitioner's █████ █████. The IEP addendum notes that during said █████, Petitioner would remain at home and all absences would be excused.

29. For the █████ school year, Petitioner attended School B, another public █████ school in Respondent's school district. At the beginning of the █████ school year, the record evidence establishes that Petitioner remained on a █████ school day. Under this █████ day, Petitioner was █████ from school at █████, █████, █████, and █████; █████. Due to this █████

schedule, Petitioner required specialized transportation to transport home. While on campus, Petitioner remained in a class setting.

30. In the fall of , Petitioner sustained . As a result, was for weeks and out of school for a period of time. After returning to school in of , demonstrated appropriate ; however, training program remained in place and required daily progress monitoring.

31. Petitioner's annual IEP review meeting occurred on , . The IEP team again documented that learning or that of others. Specifically, the following were documented:

> when in a setting . not minutes when in an setting. . can also demonstrate that lead to items/materials in the classroom. For example, , , etc. especially later in the day.
>
> * * *
>
> When [ ] is addressed by teachers or paraprofessionals, [ ] is often . [ ] is told to , but will leave . When given

an assignment to do at desk,

. If [

,

out of the .

in the classroom and on the school campus.

32. At the time of the annual review, Petitioner's advised that Petitioner was having "." As a result, Petitioner's provided a Petitioner ( ) the school day. Petitioner's also requested ( ) services.[3/]

33. The IEP provided two goals. The first goal provided that, "[b]y the end of the IEP, after the teacher gives a classroom activity, and and/or necessary materials, [the Student] will follow the within seconds, with no more than or from the teacher, in out of trials." The second goal provided that "[b]y the end of the IEP, when asked to show during whole-group instruction and provided with a or , will previously- (instruction, questions,) for no less than minutes in out of

opportunities." Both goals contained short-term objectives or benchmarks to be monitored with logs.

34. Based upon the evidentiary presentation, it is difficult to discern the efficacy of Respondent's implementation of the IEP goals directed towards Petitioner's , and whether Petitioner made reasonable progress concerning the same given , . The limited evidence establishes that Petitioner made significant progress on goals over the course of the school years. Concerning Petitioner's , the evidence supports a finding that, although not completely abated, Petitioner's was limited to days during the school year, and only one occasion during the school year. There was no evidence presented to support a finding that any by Petitioner resulted in a .[4/]

35. It is undisputed that Petitioner's , that appeared to be , remained from through the time of the filing of the Complaint. It is further undisputed that Petitioner's was not modified during this time period to address the . Respondent did, however, amend Petitioner's IEP goals and benchmarks to address this concern. The limited documentary evidence presented supports a finding

that Respondent was monitoring and that was making progress in this respect.

36. Petitioner presented the expert testimony of , who has a master's degree in and is a Analyst (). . was privately retained on or about , , to conduct an assessment of Petitioner. At that time, the assessment revealed that Petitioner has and , resulting in an inability to benefit from most educational activities. The assessment further showed signs that Petitioner can exhibit , and . The assessment further found that Petitioner .

37. has been providing therapy to Petitioner to address the above-noted concerns. Initially, the were times per week; however, following and , and , those are now times per week. opined that Petitioner has made progress in the areas of concern; however, has not mastered those concerns.

38. offered no opinions regarding the utility of the design nor the implementation of the IEPs or for Petitioner. Additionally, presented no criticism of

Respondent's approach to Petitioner's issues in an educational setting.

39. When questioned regarding the utility of therapy to Petitioner, opined as follows:

> I think if [ ] could be in , it would be beneficial. Because although [ ] is making progress, [ ] progress is a little slow because [ ] only getting hours times a week. If [ ] could be in , that would be great, if that and [ ] wasn't in school and there wasn't conflicting schedules. I think [ ] would certainly benefit from at least hours of a week.

40. credibly testified that there are some private schools in the , Florida, area wherein is incorporated into the classroom and where there are analysts in the classroom. frequently recommends the for the families works with. According to , the provides of the school day; behavior analysts to assess and work on skills and to decrease ; vocational programs to address skills; and programs to work on in the home and community.

41. Neither nor any other witness provided any further evidence concerning the specifics of the educational programming at the . While

did not express any opinions as to whether Petitioner can or cannot receive a free appropriate public education (FAPE) in Respondent's school district or whether current placement is inappropriate, did opine that the benefits and/or programming like those found at the for are necessary for Petitioner.

42. Respondent presented the testimony of . received degree in , with a concentration in . was previously employed as the clinical director school for . Currently, is a consultant for Respondent and, inter alia, oversees Petitioner's services. was initially consulted concerning Petitioner's issues. After said issue was satisfactorily managed, observed no other issues that required services. credibly testified that Petitioner's current educational programming is consistent with and that the techniques being used with Petitioner, at School B, are similar to those used when served as . ultimately opined that, from an " standpoint" Respondent is providing the services that Petitioner requires to provide an appropriate education in the public school setting.[5/]

CONCLUSIONS OF LAW

43. DOAH has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 1003.57(1)(b) and 1003.5715(5), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

44. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

45. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson 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 is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

46. Parents and children with disabilities are accorded 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 are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1), (b)(3), (b)(6).

47. Local school systems must satisfy the IDEA's substantive requirements by providing all eligible students with FAPE, which is defined as:

> Special education services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

48. "Special education," as that term is used in the IDEA, is defined as:

> [S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--
>
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings . . . .

20 U.S.C. § 1401(29).

49. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance"; establishes measurable annual goals; addresses the services and accommodations to be provided to the child, and whether the child will attend mainstream classes; and specifies the measurement tools and periodic reports that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

50. "The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 13 S. Ct. 988, 994 (2017) (quoting Honig v. Doe, 108 S. Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the

unique needs' of a particular child." Id. (quoting Rowley, 102 S. Ct. at 3034).

51. The IDEA further provides that, in developing each child's IEP, the IEP team must, "[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(emphasis added).

52. In Rowley, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Rowley, 458 U.S. at 206-207. Here, Petitioner's Complaint does not raise any procedural claims.

53. Pursuant to the second step of the Rowley test, it must be determined if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive "educational benefits." Rowley, 458 U.S. at 206-07. Recently, in Endrew F., the Supreme Court addressed the "more difficult problem" of determining a standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." Endrew F., 13 S. Ct. at 993. In doing so, the Court held that, "[t]o meet its substantive obligation

under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 999. As discussed in Endrew F., "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." Id.

54. The determination of whether an IEP is sufficient to meet this standard differs according to the individual circumstances of each student. For a student who is "fully integrated in the regular classroom," an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Id. (quoting Rowley, 102 S. Ct. 3034). For a student not fully integrated in the regular classroom, an IEP must aim for progress that is "appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." Id. at 1000.

55. The assessment of an IEP's substantive propriety is further guided by several principles, the first of which is that

it must be analyzed in light of circumstances as they existed at the time of the IEP's formulation; in other words, an IEP is not to be judged in hindsight. M.B. v. Hamilton Se. Sch., 668 F.3d 851, 863 (7th Cir. 2011)(holding that an IEP can only be evaluated by examining what was objectively reasonable at the time of its creation); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990)("An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."). Second, an assessment of an IEP must be limited to the terms of the document itself. Knable v. Bexley Cty. Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001); Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1315-16 (8th Cir. 2008)(holding that an IEP must be evaluated as written). Third, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See Endrew F., 13 S. Ct. at 1001 ("This absence of a bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review" and explaining that "deference is based on the application of expertise and the exercise of judgment by school authorities."); A.K. v. Gwinnett Cnty. v. Sch. Dist., 556 Fed. Appx. 790, 792 (11th Cir. 2014)("In determining

whether the IEP is substantively adequate, we 'pay great deference to the educators who develop the IEP.'")(quoting Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991)). As noted in Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1048 (5th Cir. 1989), "[the undersigned's] task is not to second guess state and local policy decisions; rather, it is the narrow one of determining whether state and local officials have complied with the Act."

56. Petitioner's Complaint alleges that Petitioner's IEPs were not reasonably calculated to allow ███ to make ██████████ progress in light of ███ circumstances. The undersigned agrees with Petitioner that the IEP developed on ███████████, ████, failed to adequately address Petitioner's █████████ concerns as noted during the professional observations and documented in the IEP. From the evidence presented, although Respondent adequately addressed Petitioner's ████████ concerns, Respondent failed to appropriately address ████ ███████████ concerns of ███████████, which, as noted on ████ IEP, ████████████████████████████████████ █████████. Thus, it is concluded that Respondent denied this student FAPE from ██████████, ████, through █████████, ████.

57. It is further concluded, however, that Petitioner's subsequent IEPs were reasonably calculated to enable ████ to make appropriate ██████████ progress in light of ███ circumstances. While the evidence suggests that Petitioner may very well benefit

from additional ███ services, Petitioner failed to meet ███ burden of proof that the IEPs developed in January of █████ and ████ violated the IDEA.

58. Petitioner's Complaint further alleges that the educational placement decisions run afoul of the IDEA. In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on students' placements or education environment in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A), provides as follows:

> Least restrictive environment.
>
> (A) In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

59. Pursuant to the IDEA's implementing regulations, states must have in effect policies and procedures to ensure that public agencies in the state meet the LRE requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. In turn, the Florida

Department of Education has enacted rules to comply with the above-referenced mandates concerning LRE and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

60. In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1). Additionally, the child's placement must be determined at least annually, based on the child's IEP, and as close as possible to the child's home. 34 C.F.R. § 300.116(b).

61. With the LRE directive, "Congress created a statutory preference for educating handicapped children with non-handicapped children." Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991)(opinion withdrawn on procedural grounds and reinstated in pertinent part; see 956 F.2d 1025, 1026-27; see also 967 F.2d 470). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act, school districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to special needs." Daniel R.R., 874 F.2d at 1044.

62. In Daniel, the Fifth Circuit set forth a two-part test for determining compliance with the mainstreaming requirement:

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. See § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Id. at 1048.

63. In Greer, infra, the Eleventh Circuit adopted the Daniel two-part inquiry. In determining the first step, whether a school district can satisfactorily educate a student in the regular classroom, several factors are to be considered: 1) a comparison of the educational benefits the student would receive in a regular classroom, supplemented by aids and services, with the benefits ██ will receive in a self-contained special education environment; 2) what effect the presence of the student in a regular classroom would have on the education of other students in that classroom; and 3) the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the student in a regular classroom. Id. at 697.

64. Here, Petitioner does not appear to argue that ███ can be educated in a regular classroom setting, with the use of

supplemental aids and services. To the extent Petitioner's Complaint can be so construed, Petitioner failed to present sufficient evidence to support such a claim.

65. Accordingly, the instant proceeding turns on the second part of the test: whether Petitioner has been mainstreamed to the maximum extent appropriate. In determining this issue, the Daniel court provided the following general guidance:

> The [IDEA] and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation under the [IDEA].

Daniel, 874 F.2d at 1050 (internal citations omitted).

66. Here, Petitioner seeks a placement that is even more restrictive on the continuum of potential placements--a private placement serving only students with ███.[6/] Petitioner's requested placement is not supported by the evidence. First, Petitioner failed to present sufficient evidence to establish

that the current placement is inappropriate. Second, assuming, arguendo, that Petitioner had done so, the evidence is wholly insufficient for the undersigned to conclude that the proposed private school placement is appropriate. Indeed, the only evidence presented concerning the subject school was that from [REDACTED], who testified generally that [REDACTED] had referred clients to the [REDACTED] and provided broad testimony as to the types of services that may be available. No evidence was presented, in any detail, regarding the particular educational programming at said school proposed for this specific student.

67. As discussed above, Respondent denied this student FAPE from [REDACTED], [REDACTED], through [REDACTED], [REDACTED], to which the student is entitled to compensatory education. In calculating an award of compensatory education, the undersigned is guided by Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 523 (D.C. Cir. 2005), wherein the D.C. Circuit emphasized that IDEA relief depends on equitable considerations, stating, "in every case . . . the inquiry must be fact specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Id. at 524. The court further observed that its "flexible approach will produce

different results in different cases depending on the child's needs." Id. at 524.

68. This qualitative approach has been adopted by the Sixth Circuit and a number of federal district courts. See Bd. of Educ. v. L.M., 478 F.3d 307, 316 (6th Cir. 2007) ("We agree with the district court . . . that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the child's] educational problems successfully.); Petrina W. v. City of Chicago Pub. Sch. Dist., 2009 U.S. Dist. LEXIS 116223, *11 (N.D. Ill. Dec. 10, 2009) ("Because a flexible, individualized approach is more consonant with the aim of the IDEA . . . this Court finds such an approach more persuasive than the Third Circuit's formulaic method."); 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); Barr-Rhoderick v. Bd. of Educ., 2006 U.S. Dist. LEXIS 72526, *83-84 (D.N.M. Apr. 3, 2006) (holding that an award of compensatory education "must be specifically tailored" and "cannot be reduced to a simple, hour-for-hour formula"); Sammons v. Polk Cnty. Sch. Bd., 2005 U.S. Dist. LEXIS 45838,

*21-22 (M.D. Fla. Oct. 7, 2005) (adopting Reid's qualitative approach).

69. Guided by the above-noted principles, Petitioner is entitled to compensatory education, in the form of ███ therapy, from ██████████, ████, through ███████████, ████ (while school is in session), to compensate ███ for the failure to address ███ ███████████████. The undersigned concludes that Petitioner is entitled to 30 minutes of ███ therapy per day during said period of time.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Respondent violated the IDEA in failing, on ███████████, ████, to offer Petitioner an IEP reasonably calculated to enable Petitioner to make appropriate ████████████████████ in light of ███ circumstances. Petitioner is entitled compensatory education of ██ minutes of ███ therapy per day from ██████████, ████, through ████████████, ████ (while school was in session).

2. The balance of Petitioner’s claims fail as a matter of fact or law, and, therefore are dismissed. Petitioner’s remaining requests for relief are denied.[7/]

DONE AND ORDERED this 1st day of August, 2018, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of August, 2018.

ENDNOTES

1/ While the undersigned notes this paragraph appears to be a restatement of the preceding paragraph, it is set forth here because both paragraphs were included in the Joint Pre-hearing Stipulation.

2/ At the time of the IEP meeting, it was documented that Petitioner had missed approximately ██ percent of the school days.

3/ ████████ is a type of therapy that focuses on ████████.

4/ Indeed, there was no evidence presented to establish the circumstances of any ████. It is unclear if the "████" merely constituted ████████.

5/ ████ further testified that Petitioner could get more ██ services; however, ██ believes "[██] is getting enough to help [██] succeed and learn the skills [██] needs."

[6/] Although no specific evidence was presented concerning the actual composition of the student body at the [redacted] [redacted], it would appear that this potential school would not include the availability of interacting with nondisabled peers.

[7/] On July 10, 2018, the United States District Court for the Southern District of Florida entered an order in Sch. Bd. of Broward Cnty., Fla. v. C.B., Case No. 0:17-cv-62371-UU, holding that administrative law judges with DOAH lack jurisdiction to award attorney's fees in due process hearings held pursuant to the IDEA.

COPIES FURNISHED:

[redacted], Esquire
Three Rivers Legal Services, Inc.
Suite 220
3225 University Boulevard South
Jacksonville, Florida 32216
(eServed)

[redacted]
Department of Education
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

[redacted], Esquire
Nassau County School Board
1201 Atlantic Avenue
Fernandina Beach, Florida 32034
(eServed)

[redacted]

[redacted], General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

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).