

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 18-2004E

\*\* ,

Respondent.

\_\_\_\_\_ /

FINAL ORDER

A due process hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), by video teleconference with sites in Tallahassee and Fort Lauderdale, Florida, on [REDACTED] [REDACTED], [REDACTED].

APPEARANCES

For Petitioner: [REDACTED] [REDACTED] [REDACTED], Esquire  
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For Respondent: [REDACTED] [REDACTED], Esquire  
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STATEMENT OF THE ISSUE

Whether the placement recommended by the Individualized Education Plan (IEP) team on [REDACTED] [REDACTED], [REDACTED], which is an

exceptional student education center, is the least restrictive environment (LRE) for the student.

PRELIMINARY STATEMENT

A request for due process hearing was filed on [REDACTED] [REDACTED], [REDACTED]. That same day, a Case Management Order was issued, establishing deadlines for a sufficiency review, as well as the mandatory resolution session. On [REDACTED] [REDACTED], [REDACTED], a hearing was scheduled for [REDACTED] [REDACTED], [REDACTED], to be held by video teleconference. On [REDACTED] [REDACTED], [REDACTED], the School Board filed a Motion for Continuance, indicating that the parties had agreed to request a stay of the due process hearing. An Order Granting Continuance and Rescheduling Hearing by Video Teleconference was entered on [REDACTED] [REDACTED], [REDACTED], setting the hearing date for [REDACTED] [REDACTED], [REDACTED]. On [REDACTED] [REDACTED], [REDACTED], counsel for Respondent filed a Notice of Appearance. On [REDACTED] [REDACTED], [REDACTED], Respondent filed a Motion for Continuance, seeking additional time to review discovery information and seek alternative resolution methods; the School Board objected to the continuance. An Order Denying Continuance was entered on [REDACTED] [REDACTED], [REDACTED]. The hearing was held on [REDACTED] [REDACTED], [REDACTED].

At the due process hearing, the School Board presented testimony from [REDACTED] [REDACTED], [REDACTED] Coach; [REDACTED] [REDACTED], Exceptional Student Education (ESE) teacher; [REDACTED] [REDACTED], [REDACTED] [REDACTED] Specialist; [REDACTED] [REDACTED], ESE Specialist;

██████████ ██████████, School Psychologist; ██████████ ██████████, ESE Specialist; and ██████████ ██████████, ██████████ Coach. School Board Exhibits 1 through 10, 21 through 24, 26, 28, 32 through 34 (pp. 536, 537, and 539), 42, and 47 (pp. 834 and 835) were admitted into the record. Respondent presented the testimony of the student's ██████████ and ██████████.

The Transcript of the due process hearing was filed on ██████████ ██████████, ██████████. On ██████████ ██████████, ██████████, an Order Establishing Deadlines for Proposed Orders and Final Order was entered; it memorialized the agreement made by the parties at the conclusion of the due process hearing. Proposed orders were due no later than ██████████ ██████████, ██████████, and the final order was to be entered no later than ██████████ ██████████, ██████████.

Unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations, are to the current codifications. For stylistic convenience, the undersigned will use ██████████ pronouns in this Final Order when referring to Respondent. The ██████████ pronouns are neither intended, nor should be interpreted, as a reference to Respondent's actual gender.

#### FINDINGS OF FACT

1. The student is a ██████████-year-old ██████████-grader eligible for ESE under the categories of ██████████ ██████████ ██████████ (██████████) and ██████████ ██████████ ██████████ (██████████). ██████████ is educated in a ██████████-

classroom, which consists of adults with students.

2. In addition to , has been with ( ), and .

3. Every educator who has worked with the student described as . is unlike peers in that consistently exhibits - behaviors, including - and that were so in that they resulted in the in order to the . was described as a child who constantly the of both peers and the adults at the school, enjoys in others, rarely shows for others, and does not respond to any for more than a brief time. are present across all settings during the school day, and are present on a daily basis.

4. were documented in IEPs; the following is a sampling from an IEP developed in :

Between the months of and , was placed in a separate area in the classroom to work on [ ] before any academic demands could be placed. With constant , and , and , learned to comply with sitting in [ ] seat for within . At this time, was inconsistent with

attending specials and participating in group  
[redacted]. [redacted] days were spent [redacted]  
[redacted] ( [redacted] , [redacted] , [redacted] ,  
[redacted] , [redacted] to [redacted] ), [redacted] ,  
[redacted] , [redacted] of [redacted] ,  
and [redacted] , saying things  
such as, " [redacted] ! " and  
[redacted] to [redacted] staff with [redacted] objects,  
such as [redacted] and [redacted] , at this time,  
[redacted] was not allowed any [redacted] or [redacted]  
objects. Staff were [redacted] [redacted] responses  
for [redacted] or cutting responses out for [redacted]  
to paste on [redacted] worksheet using a glue  
stick.

5. Every educator also felt that [redacted] [redacted] [redacted]  
were a daily impediment to [redacted] access to education; [redacted] is not  
able to learn anything due to [redacted] [redacted] [redacted] . In  
[redacted] of [redacted] , the following is documented in another IEP:

Based on classroom observation and IEP data  
collected, [redacted] is absolutely inconsistent  
from day to day with [redacted] [redacted] . [redacted]  
[redacted] can be as little as verbally  
rebutting to being really [redacted] where [redacted]  
is [redacted] and [redacted] objects in the  
classroom. [redacted] requires [redacted] support  
and constant redirection to ensure that [redacted]  
is following teacher directives, and being  
appropriate. [redacted] requires an adult in [redacted]  
[redacted] at all times for the [redacted] of  
[redacted] [redacted] and others. [redacted]'s [redacted]  
[redacted] include [redacted] without being  
provoked, [redacted] of [redacted] , [redacted]  
to the floor, immersing [redacted] [redacted] in  
[redacted] [redacted] , for example, [redacted]  
as if [redacted] is a [redacted] , [redacted] on the [redacted] ,  
[redacted] and [redacted] other students. These  
[redacted] occur when [redacted] wants to avoid a non-  
preferred activity, or when [redacted] feels like  
[redacted] "authority/control" is being  
compromised . . . The behaviors [redacted]  
[redacted] [redacted] [redacted] the momentum of the classroom, and  
[redacted] [redacted] [redacted] [redacted] all the students in

the classroom . . . [redacted] has difficulty with personal space and will attempt to [redacted] or [redacted] preferred adults on the [redacted]. [redacted] has escalated to now [redacted] [redacted] adults in [redacted] areas of their [redacted], and will make [redacted] comments about parts of a [redacted] [redacted] . . . [redacted] [redacted] are [redacted] and [redacted].

6. School A, where [redacted] had been since [redacted] grade, addressed [redacted] behaviors in multiple ways. [redacted] ESE teacher and aide implemented different interventions daily, and an [redacted] coach worked with the student daily. A [redacted] [redacted] [redacted] was also assigned to observe [redacted] and develop strategies to assist the classroom teachers and the [redacted] coach. The staff gathered data on the student's [redacted], to attempt to identify the function of the [redacted] [redacted]; they concluded that the student was seeking attention and avoiding academic tasks.

7. A variety of [redacted] and [redacted] learning strategies were employed, including [redacted] thinking, [redacted], first/then options, teaching [redacted] as appropriate based on context rather than "right and wrong," token board, and role playing. The student's [redacted]-[redacted] [redacted] [redacted] to [redacted] [redacted] were unlike [redacted] peers at School A; [redacted] essentially [redacted] the classroom in such a manner that [redacted] demanded the attention of the adults, [redacted] affecting the other students in the classroom.

8. The student's [REDACTED] [REDACTED] [REDACTED] ([REDACTED]) was revised by the staff [REDACTED] times, with no meaningful improvement seen in the student's [REDACTED]. During [REDACTED] time at School A, the student was placed with different teachers, different assistants, and different peers. Nothing improved [REDACTED] behavior.

9. On [REDACTED] [REDACTED], [REDACTED], the IEP team gathered and ultimately recommended placement in an [REDACTED] [REDACTED] [REDACTED] [REDACTED] (also known as a [REDACTED] [REDACTED] school) because the student was not making progress in the [REDACTED]-[REDACTED] classroom, despite the variety of [REDACTED] supports that had been employed. The student's [REDACTED] provided consent to the recommended placement at the IEP meeting, but a month later, revoked [REDACTED] consent. The following is a sampling of the [REDACTED] [REDACTED] described in the March [REDACTED] IEP:

[REDACTED] [REDACTED] impact the classroom and the learning environment when [REDACTED] is not [REDACTED]. [He] will say, "[REDACTED] [REDACTED] [REDACTED] [REDACTED] the [REDACTED] [REDACTED]" to get the adults attention from the other students to [REDACTED]. [REDACTED] does not initially feel any empathy when [REDACTED] hurts [REDACTED] peers. [REDACTED] does not observe personal space and [REDACTED] goes directly into the students' personal space and in some cases, [REDACTED] will become [REDACTED] and [REDACTED] or [REDACTED] the student.

\* \* \*

This duration of non-compliance [sic] behavior is the same as the previous year. Non-compliance can last on average from

■ minutes to ■ hours, to on and off throughout the entire school day. During this time, [■] is ■ and ■ adults, ■, ■ and ■ in peer's faces, ■ around the classroom, ■ classroom items from others, and ■ the furniture. During these episodes, [■] has asked questions such as, "■?", "■?", "■ [■] has also asked teachers, "■?"

10. In ■ of ■, the student's parents withdrew the student from School A and enrolled ■ at School B, another ■ school, which had an ■-■ classroom. On ■ first day, ■ surfaced, and never went away. The ■ at School B were the ■ as they had been at School A; and, although different ■ strategies were employed, nothing seemed to make a lasting difference in the student's ■.

11. School C, which is the ■ recommended for the student, has approximately ■ students placed into ■ different classrooms. School C is a ■ school, designed to meet the needs of students with ■. Each classroom has less than ■ students and ■ adults; it has the ■-■-■ in the county. Each student is assigned a counselor; the school employs a highly ■ staff and ■-■-■ personnel. Approximately ■ percent of the students are eligible for ESE



services under the [REDACTED] category. The evidence demonstrated that the [REDACTED] [REDACTED] [REDACTED] would be able to implement the student's IEP goals and [REDACTED], and would be an appropriate placement for the student.

12. In this case, the evidence clearly demonstrated that the student cannot be satisfactorily educated in the [REDACTED]-[REDACTED] ESE classroom with the use of supplemental aids and services. Further, the student has been mainstreamed to the maximum extent appropriate and placement in a [REDACTED] [REDACTED] [REDACTED] is necessary due to the student's [REDACTED]. Given these facts, placement in the [REDACTED] [REDACTED] [REDACTED] is appropriate.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 1003.57(1)(a) and 1003.5715(5), Fla. Stat., and Fla. Admin. Code R. 6A-6.03311(9)(u).

14. 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).

15. In enacting the Individuals with Disabilities Education Act (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). See also Andrew F. v. Douglas Cnty. Sch. Dist. RE-1, 197 L. Ed. 2d 335, 2017 U.S. LEXIS 2025, 137 S. Ct. 988, 85 U.S.L.W. 4109, 26 Fla. L. Weekly Fed. S 490 (U.S. Mar. 22, 2017).

16. 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 (FAPE) 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).

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

Special education and related 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).

18. "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).

19. 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.

20. 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.

21. 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).<sup>1/</sup>

22. 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).

23. 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 his special needs." Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

24. 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.

25. In Greer, the Eleventh Circuit adopted the Daniel two-part inquiry. Greer, 950 F. 2d at 696. 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 he 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.

26. Here, the undisputed evidence establishes that the student cannot be satisfactorily educated in the regular classroom, with the use of supplemental aids and services. Moreover, there is no evidence that, subsequent to the ESE eligibility determination, the student's parents sought to have the student educated in a regular classroom.

27. Accordingly, the instant proceeding turns on the second part of the test: whether the student 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 non-handicapped 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).

28. For the last few years, the student has received [REDACTED] education in a restrictive environment, to no avail. Likewise, the staff has utilized all appropriate interventions and strategies, to no avail. As discussed above in the Findings of Fact, due to the nature and severity of [REDACTED] disability, [REDACTED] did not, or could not receive an educational benefit from said interventions and strategies in a [REDACTED] [REDACTED] [REDACTED]. Additionally, [REDACTED] behaviors posed a significant health and safety risk to [REDACTED] and others and negatively impacted [REDACTED] classmates' ability to learn.

29. The student's IEP team has opined, and the School Board's witnesses uniformly testified, that FAPE cannot be provided to the student absent a [REDACTED] [REDACTED] [REDACTED] setting. The undersigned is mindful that great deference should be paid to the educators who developed the IEP. A.K. v. Gwinnett Cnty. 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, "[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." Daniel, 874 F.2d at 1048.



30. The [REDACTED] [REDACTED] IEP proposes a change of the student's placement to the next point (in terms of escalating restrictiveness) on the continuum of possible placements. While it is undisputed that the proposed placement offers [REDACTED] [REDACTED] for [REDACTED] with [REDACTED] [REDACTED], the better evidence demonstrated that the student's daily [REDACTED] and [REDACTED] [REDACTED] warrant such a result. The School Board's proposed placement of the student in a [REDACTED] [REDACTED] [REDACTED] mainstreams the student to the maximum extent appropriate and is approved.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board's proposed change of the student's placement from a [REDACTED] / [REDACTED] ESE class to an exceptional student education [REDACTED] / [REDACTED] [REDACTED] school is approved.

DONE AND ORDERED this 31st day of July, 2018, in  
Tallahassee, Leon County, Florida.

**S**

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JESSICA E. VARN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of July, 2018.

ENDNOTE

<sup>1/</sup> In Florida, a school district may not place a student in an [REDACTED] center, without parental consent. Where, as here, the parent does not consent, the school district may not proceed with such placement unless the school district obtains "approval" through a due process hearing. See § 1003.5715, Fla. Stat. Section 1003.5715 does not abrogate any parental right identified in the IDEA and its implementing regulations. § 1003.5715(7), Fla. Stat.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(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).