STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 17-3956E

**,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Diane Cleavinger, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on August 14, 2017, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Kevin Pendley, Esquire
Resolution in Special Education
10661 Airport Pulling Road
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For Respondent: Respondent, pro se
(No appearance)
(Address of Record)

STATEMENT OF THE ISSUE

Whether the proposed change of the subject student's (Student) placement to a [redacted] school represents the least restrictive environment (LRE) within the meaning of the

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq.

PRELIMINARY STATEMENT

On July 14, 2017, Petitioner Lee County School Board, pursuant to section 1003.5715, Florida Statutes, filed a request for a due process hearing that sought approval to place the Student in an exceptional student education (ESE) [redacted]([redacted] [redacted] [redacted]).[1/] Petitioner's hearing request was necessitated by the Student's parent's (Respondent) refusal to provide consent to the proposed placement as recommended in the Student's IEP dated March and May 2017.

On July 27, 2017, a Notice of Hearing was issued providing reasonable notice and scheduling the final hearing for August 14, 2017. The Notice was also provided to Respondent's guardian via voicemail left on the guardian's phone at the number the guardian provided. Said notice was received by Respondent and Respondent's guardian.

The hearing proceeded as scheduled. Neither Respondent nor Respondent's guardian attended the hearing. Petitioner School Board attended the hearing.

During the hearing, Petitioner presented the testimony of seven witnesses. Additionally, Petitioner introduced 3 exhibits into evidence.

At the conclusion of the final hearing, the post-hearing schedule was discussed. Based on that discussion, it was determined that proposed final orders would be filed on or before September 5, 2017, and the undersigned's final order would be issued on or before October 6, 2017. The schedule was memorialized by the undersigned's August 16, 2017, Order Memorializing Deadline for Proposed Orders and Final Order.

After the hearing, Petitioner filed a Proposed Final Order on September 11, 2017. Respondent did not file a Proposed Final Order. Petitioner's proposed order was accepted and considered in preparing this Final Order. Additionally, unless otherwise indicated, all rule and statutory references contained in this Final Order are to the version in effect at the time the subject individualized education plan (IEP) was drafted. Finally, for stylistic convenience, [redacted] pronouns are used in the Final Order when referring to the Student. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to the Student's actual gender.

FINDINGS OF FACT

1. The Student was born on [redacted]. [redacted] is [redacted] guardian and has represented [redacted] in all educational matters. The Student was found eligible for ESE services in the eligibility categories of [redacted] ([redacted]). [redacted] also was eligible to receive [redacted] services.

2. The Student enrolled in the Lee County Public Schools (School A) in the 2015-2016 school year as a [redacted]-grade student. [redacted] the year the Student frequently exhibited a variety of [redacted] and [redacted] behaviors such as [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted] the room. [redacted] exhibited [redacted] and [redacted] behaviors towards both staff and peers. Because of these behaviors, the [redacted] ([redacted]) was appropriately updated on November 18, 2015, and February 12, 2016. Additionally, consent to re-evaluate for a functional behavioral assessment (FBA) was provided by the Student's guardian at the end of the school year on May 27, 2016. On June 2, 2016, towards the end of the school year, the Student's IEP for the next year was finalized. The Student's [redacted] was also updated on June 2, 2016.

3. The Student re-enrolled at School A at the beginning of the 2016-2017 school year as a [redacted]-grade student. [redacted] has not been withdrawn from Lee County Public School System since that time. Throughout [redacted] time in school the Student primarily received [redacted] education in an [redacted] and [redacted] classroom, [redacted] spending time with nondisabled peers during [redacted], [redacted] [redacted], or [redacted].

4. In October 2016, with the consent of the guardian, the Student was given a FBA. As a result of the FBA, an appropriate

[redacted] was developed. Both documents set forth the Student's target behaviors, a hypothesis as to the function of the problem behaviors, and recommended replacement behaviors.

5. During the 2016-2017 school year, the Student, was again enrolled in a [redacted] and [redacted] program at School A. At that time, the Student exhibited behaviors including, but not limited to [redacted], [redacted], [redacted] students and adults, [redacted] teachers and adults in [redacted], intentionally [redacted] and [redacted] on [redacted], [redacted], [redacted] [redacted] [redacted] in the [redacted], and [redacted] from the classroom.

6. Following [redacted] placement in the [redacted] program, the Student's behavior did not [redacted]. As a result, in January 2017, the school noticed a meeting to consider a change of placement to a more restrictive setting. The Student's guardian immediately withdrew the Student from School A. The guardian later enrolled the Student at School B around February 13, 2017.[2/]

7. While attending School B, the Student continued to exhibit the same [redacted] behaviors as at School A. The Student's behaviors included [redacted] and [redacted] peers and adults, [redacted] furniture, [redacted] and [redacted] other children, [redacted] from the classroom, [redacted] of property, intentionally [redacted] and/or [redacted] [redacted], [redacted], and

engaging in [redacted] behaviors of [redacted] and [redacted] [redacted].

8. These behaviors lasted from the time the Student arrived on the bus until the last bell of the school-day. Data collection by staff through March 2017 reflected [redacted] total number of incidents of [redacted], with an average number of incidents of [redacted] per day. Additionally, the longest the Student was able to [redacted] and receive academic instruction during the school-day was about [redacted] to [redacted] at the longest. The Student also required the assistance of a 1:1 [redacted] throughout the school day, as well as, [redacted] by school staff for [redacted] behaviors.

9. The above-described behaviors were demonstrated throughout the school day and within all the domains addressed in the Student's IEP. As noted above, time with nondisabled peers was [redacted] to [redacted], [redacted], [redacted], and [redacted]. Appropriate IEPs and [redacted] were amended and implemented throughout the 2016-2017 school year. However, despite implementation of appropriate intervention strategies, the Student's behavior did [redacted].

10. On or about March 28, 2017, the IEP Team at School B, at an appropriately noticed meeting, recommended that the Student receive services in School C, a [redacted] for ESE students, so that the Student could make educational progress

toward the goals and objectives of [redacted] IEP. At School C the Student would have [redacted] with nondisabled peers. Again, the Student's guardian refused to consent to placement in a [redacted] and again removed [redacted] from School B.

11. Around May 4, 2017, the Student's guardian enrolled [redacted] at School D. Following the Student's removal to School D, [redacted] behaviors continued to [redacted] [redacted] learning and the learning of others.

12. Detailed, minute-by-minute data collection from School D reflected that the Student averaged [redacted] incidents per day of [redacted] behavior in [redacted] days of school attendance. The Student's [redacted] were [redacted] and [redacted], despite the presence of specially trained personnel and services in the [redacted] program and lesser restrictive placement offerings at School D. Further, due to [redacted] behavior, the Student has made [redacted] academic progress and is expected to be [redacted] for the 2017-2018 school year.

13. On May 18, 2017, because of the Student's ongoing [redacted] and [redacted] behaviors, the IEP team met at an appropriately noticed meeting and drafted a new IEP for the Student. The IEP contained appropriate goals for the Student. The team again found that due to the [redacted] of the Student's behaviors and [redacted] need for [redacted] in all areas of [redacted] IEP, with [redacted] therapy infused throughout

the day, that the appropriate location for the Student to receive [redacted] education was a [redacted].

14. Importantly, the evidence demonstrated that during the 2016-2017 school year all IEPs, including the March and May 2017 IEPs, established appropriate academic goals and objectives; documented the Student's [redacted] or [redacted] behaviors; and set forth annual goals, as well as short-term objectives or benchmarks. All the IEPs documented that the Student's behavior [redacted] [redacted] learning and/or the learning of others.

15. The proposed [redacted] is an educational facility specially designed to meet the needs of students with [redacted], [redacted], and/or [redacted] challenges. The school has a small population of students of about [redacted]. The [redacted] also has a low student-to-teacher ratio; highly trained staff, including ESE certified teachers; access to specially trained [redacted] assistants; and various crisis management-trained personnel who can address the Student's educational and behavioral needs. The evidence demonstrated that the [redacted] would be able to implement the Student's IEP goals and [redacted], and would be an appropriate placement for the Student.

16. In this case, the evidence clearly demonstrated that the Student cannot be satisfactorily educated in the [redacted] with the use of supplemental aids and services. Further, the Student has been mainstreamed by Petitioner to the

maximum extent appropriate and placement in a [redacted] is necessary due to the Student's [redacted]. Given these facts, placement in the [redacted] is appropriate.

CONCLUSIONS OF LAW

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

18. 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).

19. 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). See also, Endrew 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).

20. 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).

21. Local school systems must also 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).

22. "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).

23. 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).

24. 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.

25. 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).[3/]

26. 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).

27. With the LRE directive, "Congress created a statutory preference for educating handicapped children with nonhandicapped children." Greer v. Rome City School Dist., 950 F.2d 688, 695 (11th Cir. 1991). "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).

28. 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.

29. 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 [redacted] 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. Greer, 950 F.2d at 697.

30. Here, the undisputed evidence establishes that the Student cannot be [redacted] educated in the [redacted] classroom, with the use of supplemental aids and services. Moreover, there is no evidence that, subsequent to the ESE eligibility determination, the Student's guardian has sought for the Student to be educated in the regular classroom.

31. 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 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).

32. In the 2016-2017 school year, the Student has received progressively more restrictive interventions and strategies on the placement continuum, 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] placement. Additionally, [redacted]

behaviors posed a significant [redacted] and [redacted] risk to [redacted] and others, and [redacted] impacted [redacted] classmates' ability to learn.

33. The Student's IEP team has opined, and Petitioner's witnesses uniformly testified, that FAPE cannot be provided to the Student absent a [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.

34. The May 2017 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 less potential for interaction with nondisabled peers, the better evidence demonstrated that the Student's daily [redacted] and [redacted] behaviors warrant such a result. Petitioner's

proposed placement of the Student in a [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 Petitioner's proposed change of the Student's placement from a [redacted] class to an exceptional student education [redacted] is approved.

DONE AND ORDERED this 3rd day of October, 2017, in Tallahassee, Leon County, Florida.

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DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of October, 2017.

ENDNOTES

[1/] "Exceptional student education center" or "special day school" means a separate public school to which nondisabled peers do not have access. § 1003.57(1)(a)1.a., Fla. Stat.

[2/] The evidence showed that the Student's guardian routinely engaged in a pattern of behavior to avoid placement in a [redacted]. When a [redacted] would be recommended, the guardian would withdraw the Student from school and later enroll the Student in another school.

[3/] In Florida, a school district may not place a student in an [redacted]

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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).