STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ORANGE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 20-4487E

**,

Respondent.
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FINAL ORDER

A final hearing was held in this case before Diane Cleavinger, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), by Zoom video conference, on November 16, 2020.

APPEARANCES

For Petitioner: Sarah Wallerstein Koren, Esquire
Orange County Public Schools
445 West Amelia Street
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For Respondent: Respondent, pro se
(Address of Record)

STATEMENT OF THE ISSUE

Whether the placement of the Student in a separate day school represents comparable services in 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 October 8, 2020, Petitioner Orange 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) center (special day school).[1] Petitioner's hearing request was necessitated by the Student's parent's refusal to provide consent to the proposed placement as recommended in the Student's IEP dated May 25, 2018, and continued to be recommended by the School Board when the parent re-enrolled the Student in the public school system for the [redacted]-[redacted] school year.

On October 16, 2020, a Notice of Hearing was issued scheduling the final hearing via Zoom teleconference for November 16 and 17, 2020. The hearing proceeded as scheduled with all parties present.

During the hearing, Petitioner presented the testimony of five witnesses and introduced four exhibits into evidence. Respondent presented the testimony of the parent but did not introduce any 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 December 16, 2020, and the undersigned's final order would be issued on or before January 19, 2021. The schedule was memorialized by the undersigned's November 16, 2020, Order on Post Hearing Submissions as amended by Order dated December 28, 2020.

After the hearing, Petitioner filed a Proposed Final Order on December 16, 2020. Respondent filed a Proposed Final Order on

[1] Special day school means a separate public school to which nondisabled peers do not have access. § 1003.57(1)(a)1.a., Fla. Stat.

December 17, 2020. Both parties' proposed orders were 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, male pronouns are used in the Final Order when referring to the Student. The male 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 May 25, [redacted]. At the time of the hearing the Student was in [redacted]-grade. He is eligible for ESE under the categories of Other Health Impaired (OHI), Autism Spectrum Disorder (ASD), and Language Impairment (LI).

2. For the [redacted]-[redacted] school year the Student was enrolled in School A, a public middle school in Petitioner's school district. The last agreed upon IEP for the Student was dated October 5, [redacted], and amended on February 2, [redacted]. Both versions of the IEP were implemented at School A. Notably, the district's middle schools provide for separate, small group class placements in the general educational environment for students with maladaptive behaviors. Such a placement was recommended for the Student at School A along with a variety of accommodations.

3. The February amendment was necessitated because the Student exhibited multiple and severe maladaptive behaviors, including noncompliance, violence towards others, and property destruction. His behaviors resulted in hurting other students or staff, as well as causing the classroom to be cleared multiple times to protect others from the Student's

violence. The Student's behaviors were frequent and occurred across all settings during the school day. The behaviors were also disruptive to the education of the Student's peers.

4. The Student's behavior did not improve. Therefore, on May 25, [redacted], after multiple discussions with the parent and other members of the IEP team, the IEP team developed another IEP and recommended the Student be placed in a separate day school. The parent did not agree with the IEP team's placement and the District filed a due process complaint seeking approval for the placement.

5. In the summer of [redacted] before the District's complaint could be heard, the parent withdrew the Student from School A and enrolled him in School B, a private school. The complaint was dismissed since there was no longer jurisdiction to hear the case due to the Student's disenrollment.

6. School B functions as a separate day school for students with severe behavior issues. While there, the Student received his education in a small class setting with intense social skills training. The program included both in-class and out-of-class calm down areas where, among other things, playing on an Xbox was used as a calming tool. The calm down area also had a mat and soft foam cushions so that the Student would not hurt himself while in the calm down area. The small setting permitted the Student to work in an academic setting where he could gradually pick up the pace. The private school also had staff trained in crisis management and restraint techniques called Safety Care, as well as staff trained in counseling.

7. However, despite extensive behavior management at School B, the Student's troubling behaviors continued. The evidence demonstrated that approximately once per week, the Student could not be safely removed from the classroom because of the severity of his maladaptive behaviors. During those times, the other students in the classroom had to leave the room to protect them from the Student's maladaptive behaviors and to allow staff to address the Student's behaviors in situ. Additionally, for the time period of

August 12, [redacted], through February 4, [redacted], the Student engaged in 45 acts of aggression, 47 acts of elopement, 400 instances of property destruction, 798 acts of noncompliance, 221 tantrums, and 458 inappropriate vocalizations resulting in a total of 1,969 behaviors during the time period. Property destruction ranged from breaking pencils to kicking holes in walls that resulted in damage to drywall, which had to be patched, sanded, and repainted.

8. The Student also exhibited tantrum behaviors that lasted 105 minutes, 300 minutes, and 360 minutes. During his tantrums, the Student exhibited some very dangerous behaviors towards staff and peers.

9. At School B, the Student did not require the most restrictive of supine restraints but did require a two-person stability hold to be escorted to a calm down/relaxation area. Once calm the Student could return to the classroom. The Student utilized the calm down area approximately once per week. However, up to four staff members were often necessary to de-escalate the Student. The evidence was clear that the Student's behavior affected the education of his peers.

10. In general, the Student's noncompliance resulted from the teacher or staff member making instructional demands on the Student. When asked to do an assignment, the Student often went to the relaxation area and refused to participate in the assignment.

11. The evidence was clear that the Student requires education in a school that can bridge the gap between School B and a typical classroom setting. The Student also requires a separate, small classroom with intense social skills and behavioral training, as well as, an academic setting where he can gradually pick up the pace of learning. Additionally, he also requires a calm down area both in the classroom and out of the classroom. The evidence was clear that the above described accommodations are not available in a regular, nonspecialized high school setting in the District.

12. Around August 18, [redacted], the Student's parent attempted to re-register the Student in School C, the Student's locally zoned High School. The attempt to register does not appear to have been complete until late September.

13. School C is a very large regular education high school. It does not have a smaller class setting for students that are on a general education track. The special education services available include but are not limited to support facilitation, consultation, and self-advocacy instruction. Core academic classes contain 25 students and elective classes can contain up to 50 students. The school does not utilize a restraint protocol that would provide an appropriate level of restraint support as needed by the Student. The school also does not have personnel trained in the use of such restraint protocols. A calm down area is not available to a general education student in the classroom; nor would an Xbox be available for use as an incentive. The evidence was clear that School C cannot appropriately serve the Student's educational, social, or behavioral needs.

14. When the Student registered at School C it was the responsibility of the staffing specialist to initially identify an appropriate and comparable placement for the Student. In reviewing the Student's last agreed upon IEP and the last unimplemented team developed IEP, the staffing specialist noted that the Student required services that could not be provided at School C. Indeed, the evidence demonstrated that the only school within the District that did offer comparable services was School D, a separate day school. The staffing specialist proposed that the Student attend School D.

15. The evidence was not clear why after the initial review by the staffing specialist, a meeting was not held with the parent to gain parent input into the provision of comparable services or the placement of the Student in an appropriate school. Such parental input is required under IDEA on both the issues of comparable services and appropriate placement. The evidence was clear that the District was aware of the parent's objection to placement at a

special day school, which objection was voiced at the hearing. However, instead of meeting with the parent, the District chose to immediately file a due process complaint to gain approval for the Student's placement in a special day school. Given the facts of this case and the numerous earlier inputs of the parent on the issue of placement, the evidence did not demonstrate that the District's highly irregular deviation from the requirements of IDEA caused a denial of free appropriate public education (FAPE) to the Student or significantly impacted the parent's input into the education of the Student.

16. In regard to School D, the evidence demonstrated that it is an educational facility specially designed to meet the needs of students with behavioral challenges. The school has a small population of students. The separate day school also has a low student-to-teacher ratio; highly trained staff, including ESE certified teachers; access to specially trained behavioral assistants; and various crisis management-trained personnel who can address the Student's educational and behavioral needs. The evidence demonstrated that the special day school would be able to offer comparable services to the services provided at the private school, until an appropriate IEP can be developed for the Student. Further, the uncontroverted testimony, including the testimony of professionals from the private school, was that School D is currently "the best fit" for the Student available in the public school system and would provide a step up from the program the Student was enrolled in at the private school. The evidence was clear that School D would be an appropriate placement for the Student.

17. The Student's parent refused such placement. However, as indicated, the better evidence demonstrated that the Student cannot be satisfactorily educated in a regular classroom with the use of supplemental aids and

services.[2] Further, the Student has been mainstreamed by Petitioner to the maximum extent appropriate and placement in a special day school is necessary due to the Student's behavior. Given these facts, placement in the special day school is appropriate.

CONCLUSIONS OF LAW

18. DOAH 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).

19. 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).

20. 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 Cty. 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 Cty. 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).

[2] At hearing the parent appeared to argue for various programs including one at the private school. However, there was insufficient evidence presented at the hearing as to the specifics of those programs.

21. 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), and (b)(6).

22. 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).

23. "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).

24. 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).

25. In addition, when a student who has an IEP or education plan (EP) that was in effect in a previous Florida school district enrolls in another Florida school district, the new school district, in consultation with the parent, must provide FAPE to a student, which includes services comparable to those in a student's IEP or EP from the previous school district, until the new school district either adopts the student's IEP or EP from the previous school district, or develops and implements a new IEP or EP. 34 C.F.R. § 300.323(e) and (f); Fla. Admin. Code R. 6A-6.0334(1) and (2).

26. In regard to irregularities involving parental input, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. *Rowley*, 458 U.S. at 206-07. A procedural error or irregularity does not automatically result in a denial of FAPE. *See G.C. v. Muscogee Cty. Sch. Dist.*, 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. *Winkelman*

v. Parma City Sch. Dist., 550 U.S. 5-16, 525-26 (2007). Given the facts of this case and the numerous earlier inputs of the parent on the issue of placement, the evidence did not demonstrate that the District's highly irregular deviation from the requirements of IDEA caused a denial of FAPE to the Student or significantly impacted the parent's input into the education of the Student. Thus, the issue remaining is the placement of the Student.

27. In that regard, IDEA 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.

28. 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]

[3] In Florida, a school district may not place a student in special day school without parental consent. Where, as here, the parent does not consent, the school district may not proceed

29. 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).

30. 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).

31. 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.

32. In *Greer,* 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

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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.

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. *Greer*, 950 F.2d at 697.

33. 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, the only school within the district that offers comparable services to the services provided at the private school is the special day school proposed by the District.

34. 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).

35. In the private school, the Student was educated in what essentially was a separate day school similar to School D. During that time, the Student's behavior improved, but not to the point that the Student no longer needs more restrictive interventions and strategies on the placement continuum. As discussed above in the Findings of Fact, due to the nature and severity of his disability, he did not, or could not, receive an educational benefit from said interventions and strategies in a less restrictive placement. Additionally, his behaviors posed a significant health and safety risk to himself and others, and negatively impacted his classmates' ability to learn.

36. Petitioner's witnesses uniformly testified that FAPE cannot be provided to the Student absent a special day school setting. The undersigned is mindful that great deference should be paid to the educators involved in education and administration of the school system. *A.K. v. Gwinnett Cty. 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.

37. While it is undisputed that the proposed placement offers less potential for interaction with nondisabled peers, the better evidence demonstrated that the Student's disruptive and aggressive behaviors warrant such a result. Petitioner's proposed placement of the Student in a special day school mainstreams the Student to the maximum extent appropriate and is approved since, in this interim period between return to

public school and an IEP meeting, it offers services comparable to those the Student received in the private school he attended.

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 separate/special class to an exceptional student education center/special day school is approved.

DONE AND ORDERED this 19th day of January, 2021, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
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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).