

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 16-2892E

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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), on June 28, 2016, by video teleconference between Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Laura E. Pincus, Esquire
Palm Beach County School Board
Post Office Box 19239
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For Respondent: Respondent, pro se
(Address of Record)

STATEMENT OF THE ISSUE

Whether the proposed change of the subject Student's placement to a separate day 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 May 25, 2016, Petitioner Palm Beach 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 center (special day school).^{1/} Petitioner's hearing request was necessitated by the Student's [REDACTED] (Respondent) refusal to provide consent to the proposed education center placement as recommended in the Student's IEP dated June 1, 2016.

On May 25, 2016, a Notice of Hearing was issued. On June 21, 2016, the parties filed a Joint Statement of Undisputed Facts. To the extent relevant, those facts have been incorporated in this Final Order.

At the final hearing, Petitioner School Board presented the testimony of 6 witnesses and introduced 17 exhibits numbered 1 through 16 and 20 into evidence. The [REDACTED] testified on the Student's behalf, but did not offer any exhibits into evidence.

At the conclusion of the final hearing and after discussion of post-hearing timelines, the deadline for the filing of proposed final orders was established for July 29, 2016, with the Final Order to follow by August 15, 2016. All timelines were extended by Order dated June 29, 2016.

After the hearing, Petitioner timely filed a Proposed Final Order. Respondent did not file a proposed final order. To the

extent relevant the filed proposed order was considered in preparing this Final Order.

Further in this Final Order, unless otherwise indicated, all rule and statutory references are to the version in effect at the time the subject IEP was drafted. Additionally, for stylistic convenience, [REDACTED] pronouns in the Final Order will be used when referring to the Student. The [REDACTED] pronouns are neither, intended, nor should be interpreted, as a reference to the Student's gender.

FINDINGS OF FACT

1. The Student who is the subject of this proceeding was born on [REDACTED], and was a [REDACTED]-grade Student during the 2015-2016 school year. [REDACTED] has been recognized as eligible for exceptional Student education (ESE) in the exceptionality categories of [REDACTED] and [REDACTED]. As a Student, Respondent was eager to learn. However, [REDACTED] frequently was off-task, running away, engaging in disruptive, attention-seeking behavior, and/or aggressive behavior towards peers and staff. At the time of the hearing, the Student was enrolled in School A, a Palm Beach County Public School.

2. A Functional Behavior Assessment (FBA) was conducted in May 2015, and reviewed at scheduled individualized education plan (IEP) meetings on May 13 and October 29, 2015. The assessment

noted that the Student had difficulties with transitions, was inflexible, had poor anger control, had difficulty communicating █ needs, would tantrum if told "no," and would hit and kick staff and peers. █ often refused to complete academic work and became disruptive to the point of having to be removed from the class. It was also noted that the Student did not like to take █ medication, which may have, in part, triggered █ behavior. The FBA identified two target behaviors: aggressive behavior as defined by screaming, kicking, throwing objects, hitting and kicking Students and staff members; and leaving the room without permission.

3. Based on the FBA, a behavior plan was developed in May 2015 and reviewed on May 13 and October 29, 2015. The plan appropriately targeted the Student's behaviors noted above and used a variety of reinforcements.

4. During the 2015-2016 school year at School A, the Student was placed in a special █ class of about eight Students, with one ESE teacher and a paraprofessional. In class, █ participated in the developed behavior management program under which targeted educationally-related behaviors were monitored and rewarded on a daily 30-minute interval basis. Continuous adult visual monitoring and proximity were provided. Additionally, the Student initially received individual

counseling for 30 minutes per week and group counseling for 30 minutes per week.

5. From the beginning of school through October, the Student ran out of class or during transitions to or from lunch or specials on August 19, 27, 28, and 31; September 2, 10, 11, 15, 16, 18 and 29; and October 1, 2, 6, 8, 12, 13 and 21. With each elopement, the guidance counselor, ESE coordinator, principal or Behavior Intervention Associate would be called to locate the Student, who would be running up and down the steps or around the building.

6. On September 10, 2015, the IEP team met at the request of the Student's [REDACTED]. At that time, the [REDACTED] expressed concern that the program was not working for the Student. The [REDACTED] requested the behavior point sheets to share with the Student's doctor. The Team requested the [REDACTED] have the doctor complete paperwork so the Student's medications could be given at school to achieve consistent dosage levels.

7. On October 29, 2015, the IEP team met again to discuss the Student's behaviors. At that time, the team reviewed [REDACTED] behaviors and discussed the possibility of a smaller, more therapeutic setting. The team recommended a [REDACTED] evaluation, as well as behavior rating scales, but the [REDACTED] declined to consent.

8. On November 2, 2015, the Student intentionally turned over a lunch table with an attached bench while other peers and staff were sitting around it. The table landed on another Student, fracturing ■■■ leg. The incident also injured the Student's teacher when ■■■ lifted the table from the Student's leg.

9. On November 10, 2015, the IEP Team met to review the incident that occurred on November 2, 2015. The ■■■ attended the meeting. The Student's individual behavior therapy was increased to 60 minutes per week. The Student was also moved to School B, an alternative education school located in Petitioner's school district for a 45-day interim alternative education setting where the Student received an intense behavior modification program in a smaller setting with more therapy incorporated throughout the day, similar to a therapeutic center or special day school.

10. The evidence showed that initially the Student made some behavioral progress while in the smaller more structured and therapeutic setting at the alternative school. However, towards the end of ■■■ assignment to the alternative school, the Student began to engage in some of ■■■ previous behaviors, albeit to a lesser extent.

11. On February 9, 2016, after proper notice the IEP Team met at School B and discussed placement at a special day school

with therapeutic support. The [REDACTED] did not attend the meeting to provide the necessary consent for the center school placement. Therefore, around mid-February 2016, the Student returned to School A where [REDACTED] was placed in a different [REDACTED] classroom.

12. When [REDACTED] returned to School A, the Student continued to have behavioral difficulties with increasing frequency, duration and seriousness. [REDACTED] teacher implemented the individualized behavior intervention plan, but [REDACTED] still ran away, disrupted class, screamed, tantrumed, threw furniture, and hit or kicked peers. Such behaviors significantly increased in March.

13. On March 15, 2016, after proper notice, a follow-up IEP meeting was held to again discuss the Student's educational placement in a therapeutic center school. A representative from School C, a special day or center school which is administratively separate from regular schools and is organized to serve one or more types of exceptional Students, attended the meeting. See Fla. Admin. Code R. 6A-6.0311(1)(d). The [REDACTED] did not attend the March meeting and did not consent to the special day school placement. The Student remained at School A through the end of the school year, where [REDACTED] inappropriate behavior continued.

14. On June 2, 2016, another, properly noticed, IEP meeting took place. On that day, the Student's [REDACTED] picked [REDACTED] and [REDACTED]

██████████ up early. When asked by the ESE contact if ██████████ was coming back for the meeting, the ██████████ responded that ██████████ was not going to make it, but to proceed without ██████████. At the meeting, the team noted the Student's continuous struggle with compliance and physical aggression. The team again recommended placement in a therapeutic center school and the Student's IEP was updated to reflect such a placement due to ██████████ need for therapeutic and behavior support infused throughout the school day. The evidence demonstrated that the IEP team (excluding the Student's ██████████) recommended School C for placement because School C allowed for increased support in the classroom to provide greater individual attention and to work on the Student's interventions. Additionally, School C was recommended because the behavioral staff at the School has the ability to work with the Student's behavioral concerns on a daily, more consistent and integrated basis.

15. As indicated above, School C is a therapeutic day school designed to meet the needs of Students with emotional and behavioral disabilities. Class size ranges from 3 to 8 Students. The school has a very strong behavior management program with behavior intervention associates and crisis intervention teachers. Students benefit from having an on-call therapist they can access during the course of their academic day. Such therapist access allows a Student, like Respondent,

to process [REDACTED] emotional and behavioral issues immediately rather than four days later when the therapist is back on campus at School A. However, the [REDACTED] did not attend the IEP meeting or provide consent for School C. Therefore, the lack of parental co-operation and consent in the placement of the Student at School C prompted the School Board to file this request for due process on May 25, 2016.

16. In this case, the evidence demonstrated that in the Student's current class placement, the Student's availability for interaction with nondisabled peers in the academic setting was limited due to the Student's disruptive behavior. The better evidence also demonstrated that the Student's interaction with nondisabled peers in non-academic settings, such as lunch, waiting on the bus and arrival at school, was limited as well. During lunch time and in the classroom, the Student has a very difficult time sitting down and staying on task without multiple adults addressing [REDACTED] and staying in close proximity to [REDACTED]. Additionally, the Student has difficulty transitioning within the school environment, and required constant supervision and close proximity by adults to maintain [REDACTED] safety and the safety of others.

17. Further, the evidence showed that based in whole or in part on the Student's lack of emotional control and self-regulatory skills, the Student consistently demonstrated

inappropriate and aggressive behaviors, often resulting in tantrums and physical altercations, as well as, objects and furniture being thrown.

18. The evidence demonstrated that the Student made limited educational progress due to [REDACTED] behavioral issues and that School A is unable to meet the Student's unique needs.

19. As indicated earlier, School C is a school entirely composed of exceptional Students, in this case, Students with [REDACTED]. Each classroom typically consists of an ESE teacher, a behavioral technician, and two classroom assistants. In opposition to the proposed placement, Respondent's [REDACTED] wanted the Student placed closer to [REDACTED] home. The [REDACTED] agreed that the Student should not return to School A. However, the evidence was clear that, at this time, the appropriate and least restrictive placement for the Student is in a special day/center school like School C. Therefore, placement in such a school is approved.

CONCLUSIONS OF LAW

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

21. In Florida, a school district may not place a student in an exceptional student education center (special day school),

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. However, section 1003.5715 does not abrogate any parental right identified in the IDEA and its implementing regulations. § 1003.5715(7), Fla. Stat. As such, Petitioner bears the burden of proof with respect to each of the claims raised in the School Board's Due Process Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

22. 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).

23. 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).

24. Local school systems must also satisfy the IDEA's substantive requirements by providing all eligible students with a free appropriate public education (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).

25. "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).

26. 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).

27. In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on students' placements or educational environments 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).

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 student'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 Sch. 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 ■■■ 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.

Daniel, 874 F.2d at 1048.

32. 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.

Greer, 950 F.2d at 697.

33. In this case, it is undisputed that the Student cannot be satisfactorily educated in School A, with the use of supplemental aids and services.

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. During the 2015-2016 school year, the Student received all of [REDACTED] academics in the special education setting, a special class. The Student's placement did not provide the opportunity for exposure to nondisabled peers during lunch, transitioning, and when arriving and departing from the campus because of the severity of the Student's behavior.

36. The evidence demonstrated that FAPE cannot be provided to the Student absent a special day school setting. Further, great deference should be paid to the educators who developed the IEP, all of whom agreed with the special day school placement and agreed that FAPE could not be provided absent such a placement.

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.

37. The June 2, 2016, IEP proposes a change of the Student's placement to the next point (in terms of escalating restrictiveness) on the continuum of possible placements. The evidence demonstrated that the proposed placement does not offer less potential for interaction with nondisabled peers. In fact, Petitioner's proposed placement of the Student in a special day school 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 separate/special class to an exceptional Student education center/special day school is approved.

DONE AND ORDERED this 10th day of August, 2016, in
Tallahassee, Leon County, Florida.

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DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of August, 2016.

ENDNOTE

^{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.

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).