STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ORANGE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 18-5683EDM

**,

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), in Altamonte Springs, Florida, on [redacted], and [redacted] through [redacted]. A fourth day of hearing was held on [redacted], by video-teleconference with sites in Altamonte Springs, Florida, and Tallahassee, Florida.

APPEARANCES

For Petitioner: [redacted], Esquire
Orange County Public Schools
445 West Amelia Street
Orlando, Florida 32801

For Respondent: [redacted], Qualified Representative
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STATEMENT OF THE ISSUE

Whether the placement recommended by the Individualized Education Plan (IEP) team, which is in a [redacted] school, is the [redacted] ([redacted]) for the student.

PRELIMINARY STATEMENT

A request for an expedited due process hearing was filed on [redacted]. On [redacted], Respondent filed a motion to accept [redacted] as a Qualified Representative, and the Orange County School Board (School Board) did not object to the granting of the motion. On [redacted], the undersigned entered an Order granting the request to accept [redacted] as a Qualified Representative. On that same date, a hearing was scheduled for [redacted]. On [redacted], Respondent filed an Emergency Motion for Continuance, which was opposed by the School Board. An Order Granting Continuance was entered on [redacted], setting the hearing date for [redacted].

On [redacted], Petitioner filed a Motion to Establish and Continue Stay Put. The School Board filed its Opposition to Respondent's Request to Establish and Continue Stay Put on [redacted], arguing that the student presented a [redacted] to the faculty and other students of School A. A motion hearing was held on [redacted]. During the telephone

conference, the School Board stated that the recommended change in placement was not [redacted]-related; rather, it was based on an IEP team's recommendation, which was focused on the student's [redacted]. Since the School Board argued that the change in placement was not [redacted]-related, and was not a recommendation for placement in an interim alternative educational setting, the undersigned ordered that the student remain in the last agreed upon placement, which was School A. In Florida, a school district may not place a student in an exceptional student education [redacted], which is what the School Board here is seeking, 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. Accordingly, the Motion to Establish and Continue Stay Put was granted.

The hearing was held on November 29, and December 5, 6, and 11, [redacted]. At the due process hearing, the parties called [redacted] witnesses to testify. Joint Exhibits 1, 2, 6, 8, 11, and 13 were admitted. School Board Exhibits 3, page 35 of Exhibit 4, page 37 of Exhibit 5, and 7 were admitted. Respondent Exhibits 9 through 13, 15, 16, 19 through 24, and 26 through 32 were admitted.

The transcript of the due process hearing was not filed with DOAH; thus, this Final Order was prepared without the benefit of a transcript. At the conclusion of the due process hearing, the parties agreed to file proposed orders by [redacted], [redacted]. The final order was to be entered [redacted] school days after the conclusion of the due process hearing, which, based on the school calendar, required entry of the final order by no later than [redacted],[redacted].

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 [redacted] pronouns in this Final Order when referring to Respondent. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to Respondent's actual gender.

FINDINGS OF FACT

1. The student is a [redacted]-year-old [redacted] grader eligible for exceptional student education (ESE) under the categories of [redacted] ([redacted]) and [redacted]([redacted]). [redacted] is educated in a [redacted] classroom, which consists of [redacted] to [redacted] adults serving [redacted] students.

2. The student is described as [redacted], [redacted], and [redacted]. [redacted] is unlike [redacted] peers in that [redacted] frequently exhibits [redacted], including [redacted] and [redacted]

[redacted] so [redacted] in nature that they often result in [redacted] [redacted] students or staff. [redacted] [redacted] have involved [redacted] of [redacted], and are described as much more [redacted] and [redacted] to the classroom than [redacted] peers' [redacted]. [redacted] [redacted] behaviors are present across all settings during the school day, and are present on a [redacted] basis.

3. [redacted] [redacted] [redacted] were well documented; the following is a sampling from an IEP developed in September [redacted]:

> [**] is currently in a [redacted] class in a [redacted] [redacted] setting with [redacted] other students. [redacted] [redacted] [redacted] [redacted] ([redacted]) [redacted] have been implemented for [**] since the beginning of the [redacted]-[redacted] school year. Based on data from [redacted]-[redacted] school year, [**] has had [redacted][1/] incidents of [redacted] [redacted], [redacted] incident of [redacted]-[redacted] [redacted], [redacted] incidents of [redacted], [redacted] incidents of [redacted] and [redacted] incidents of [redacted].
>
> [**] has shown a [redacted] [redacted] for [redacted] [redacted] and becomes [redacted] [sic] on specific students' [redacted]. One of the [redacted] [redacted] currently for [**] is a [redacted] student located in a class nearby. [redacted] modifications to the classroom environment have been made to [redacted] the [redacted] from being present. [**] is directed to wear [redacted] and [redacted] [redacted] is played in the classroom when the [redacted] student is [redacted] in the [redacted]. Based on collected data, [**] has now begun [redacted] in search of the [redacted] student even when the [redacted] is not present. The classroom door of the [redacted] classroom must [redacted] [redacted] to [redacted] the [redacted] of all [redacted]. Staff has created a system which allows [redacted] students to [redacted] ([redacted]/[redacted]

the [redacted]) without [redacted] any [redacted] with one [redacted].

Another [redacted] for [**] that has been observed in the classroom is the [redacted] of [redacted] phrases by staff. [**] has a [redacted] for the phrases "[redacted]", "[redacted]", and "[redacted]." When these phrases are used towards another [redacted], [**} has been observed to [redacted] from [redacted] assigned area to show [redacted] towards staff.

The presence of these [redacted] frequently leads to [redacted] aggression [redacted] staff or students ([redacted], [redacted], [redacted], [redacted], [redacted], [redacted]). [**] can be prompted with coping strategies at times, but often these strategies do not work when the [redacted] has begun.

When [**] is engaging in [redacted] [redacted] [redacted] [redacted] is directed to have "[redacted]," which is a required relaxation by having [redacted] lay prone on a [redacted] on the floor. During this time, [redacted] trained professionals [redacted] [**]'s [redacted] and [redacted] to [redacted] any attempts at [redacted]. [redacted] trained professionals are required during a [redacted]. [redacted] trained professionals to implement the [redacted] and [redacted] trained professional to [redacted] with a [redacted] and compliance during the [redacted]. While a [redacted] is being implemented, [redacted] other adults are required to come into the classroom to [redacted] [redacted] of the other students.

The average [redacted] is [redacted] to [redacted] long. Once [**] has met the [redacted] during the [redacted](lie in the prone position [redacted] in [redacted] for [redacted] minute), [redacted] is provided 3 simple compliance tasks (i.e. touch nose, touch head, etc.). Once [**]

> has demonstrated compliance [redacted] is directed to a [redacted] in the [redacted] area where [redacted] must complete a [redacted] task. Once this task is completed, [**] is returned to the task [redacted] was at before the [redacted]. The [redacted] typically lasts an average of [redacted]. Once [**] returns to [redacted] task, [redacted] often [redacted] on the [redacted] and requires continuous [redacted] and [redacted] strategies.
>
> [**] often displays an [redacted] with an unavailable activity (i.e. [redacted], [redacted]) or an item ([redacted]). When [redacted] this unavailable item or activity, [**] often becomes [redacted]. [**] can sometimes be [redacted] with [redacted] and [redacted]. Other times this [redacted] will result in [redacted].

4. Every educator also observed that [redacted] were a [redacted] to [redacted] access to education; that is, [redacted] is unable to learn skills due to [redacted], and [redacted] to non-preferred tasks. In the September [redacted] IEP, the following is stated:

> [**]'s [redacted] to ask for assistance, navigate the campus, and need for [redacted] and [redacted] to [redacted] on task [redacted] effects [sic] [redacted] ability to [redacted] access the general education curriculum. [redacted] requires continuous [redacted] to ensure [redacted] safety. [**]'s disability effects [sic] [redacted] with [redacted] and staff and [redacted] ability to independently participate in or complete non-preferred activities.

Further, the evidence showed the student's responses to [redacted] were unlike [redacted] peers at School A; [redacted] essentially [redacted] the

classroom in such a manner that [redacted] demanded the [redacted] of [redacted] adults, [redacted] affecting the other students in the classroom and [redacted] the [redacted] of all in [redacted] vicinity.

5. School A, where [redacted] has been for the last [redacted] school years, addressed [redacted] [redacted] in multiple ways. [redacted] ESE teacher and aides implemented different [redacted], and [redacted] coaches were actively involved in implementing [redacted] [redacted] [redacted] [redacted] ([redacted]). A [redacted] Trainer and [redacted] Analysts were also assigned to observe [redacted], to work with the student, and to develop strategies to assist the classroom teachers and the student's [redacted]. The staff gathered data on the student's [redacted] to attempt to identify the [redacted] of the [redacted] [redacted], ultimately concluding that the student was seeking [redacted] to preferred items and [redacted] to [redacted] and avoid non-preferred activities.

6. A variety of [redacted] and [redacted] learning strategies were employed, including social thinking, positive reinforcement, first/then options, teaching [redacted] as appropriate based on context rather than "right and wrong," token board, visual schedule, a timer, counting to 10 to manage [redacted], and graphic directions.

7. The student's [redacted] was revised by the staff a few times, with no meaningful [redacted] seen in the student's [redacted].

During [redacted] time at School A, [redacted] peers and staff on a [redacted] basis.

8. On [redacted], the IEP team gathered and ultimately recommended placement in a [redacted] school because the student was not making progress in the [redacted] classroom, despite the variety of [redacted] supports that had been employed. The student's [redacted] did not provide consent to the recommended placement at the IEP meeting, and requested time to review the recommended placement.

9. On [redacted], the IEP team reconvened. The parent's advocate requested that the student have a [redacted] Technician ([redacted]) serve as [redacted]-on-[redacted]; that the [redacted] train all staff at School A who are working with the student, and that a [redacted] Analyst ([redacted]) provide direct services to the student for [redacted] percent of the time.

10. School B, which is the [redacted] school recommended for the student, is a [redacted] school, designed to meet the needs of students with [redacted]. The School Board has agreed to [redacted] the [redacted] for the student's placement at School B. School B employs a [redacted] trained [redacted] staff and [redacted] personnel.

11. Respondent presented the testimony of [redacted], who works with the student [redacted] and observed the student [redacted] while in the classroom, and [redacted] who observed the student for [redacted] day at school. Both analysts agreed that [redacted] ([redacted]) techniques are helpful to the student, and that the student seems to be making some progress at home and at school. To the extent that the [redacted] testimony is inconsistent with that of the School Board witnesses, the undersigned finds the testimony of the educators more reliable and consistent with the record as a whole. The record is replete with [redacted] reports, as well as written records and oral statements of [redacted] by the staff due to the student's [redacted], [redacted], and [redacted].

12. In this case, the evidence clearly demonstrated that the student cannot be satisfactorily educated in the [redacted] 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] school is necessary due to the student's [redacted]. Given these facts, placement in the [redacted] school 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)(b) 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 IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education [FAPE] 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).

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 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 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:

[redacted]

> 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 [redacted] 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 [redacted] and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).[2/]

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 [redacted] 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). "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, 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.

26. Here, the undisputed evidence establishes that the student [redacted] 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 [redacted] sought to have the student educated in a [redacted] 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 most of [redacted] educational life, the student has received [redacted] education in a [redacted] environment. For years [redacted] were [redacted], but in the last [redacted] years, those [redacted] have become [redacted] to [redacted], and have subjected [redacted] and [redacted] to [redacted]. The staff has utilized all appropriate interventions and strategies, but the [redacted] continue. As discussed above in the Findings of Fact, due to the [redacted] and [redacted] of [redacted] disability, [redacted] did not, or could not receive an educational benefit from said interventions and strategies in a [redacted] placement. Additionally, [redacted] posed a [redacted] and [redacted] to [redacted] and others, and [redacted] impacted [redacted]classmates' ability to learn and remain safe.

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] school 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 proposed change of the student's placement to the next point (in terms of [redacted]) on the continuum of possible placements is a [redacted] school, and the School Board is agreeing to pay the [redacted]. While it is undisputed that the proposed placement offers [redacted] potential for interaction with [redacted] peers, the totality of the record evidence demonstrated that the student's [redacted] and [redacted] warrant such a result. The School Board's proposed placement of the student in a [redacted]

[redacted] 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 the School Board's proposed change of the student's placement from a [redacted] class to an [redacted] school is approved.

DONE AND ORDERED this 4th day of January, 2019, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of January, 2019.

ENDNOTES

[1/] This is a scrivener's error. The number should be 237.

[2/] As previously noted in the Preliminary Statement, a Florida school district may not place a student in an [redacted], without

parental consent. Where the parent does not consent to the placement, 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).