STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 19-0737E

**,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on [redacted], [redacted], before Administrative Law Judge Diane Cleavinger of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

The issue in this proceeding is whether the Student's placement in an [redacted] violated Respondent's right to receive a free appropriate public education (FAPE) in the [redacted] ([redacted]).

PRELIMINARY STATEMENT

On [redacted], [redacted], the Palm Beach County School Board (School Board) filed a Request for Expedited Exceptional Student Education Due Process Hearing pursuant to 20 U.S.C. § 1415(k) and rules promulgated thereunder. On the same day, a Case Management Order was issued.

On [redacted], [redacted], the Student filed a response and counterclaim. The counterclaim alleged violations of FAPE, child-find and [redacted]. Thereafter, on [redacted], [redacted], after a telephonic conference with all parties present, a Notice of Hearing was issued scheduling the final hearing for [redacted], [redacted].

On [redacted], [redacted], the School Board filed a Motion to Withdraw Its Request for Expedited Due Process Hearing Due to Lack of Subject Matter Jurisdiction and Motion to Dismiss Respondent's Counterclaim. Subsequently, the parties reached an agreement on the Student's Counterclaim resolving the issues related to FAPE and child-find. The parties informed the undersigned of the same in a Joint Status report filed on [redacted], [redacted].

On [redacted], a telephonic conference was held with all parties in attendance. After the teleconference, an Order was entered dismissing the School Board's Petition and denying the School Board's request to dismiss the remaining issues in

Respondent's counterclaim. Additionally, based on the parties' settlement of the FAPE and child-find issues contained in Respondent's counterclaim, the post-conference Order identified the issue in Respondent's counterclaim related to [redacted] as the only remaining issue for determination in this matter.

The hearing was held as scheduled with all parties present. During the final hearing, Respondent presented the testimony of: [redacted], principal of [redacted] School; [redacted], school psychologist; [redacted], speech and language pathologist; [redacted], Central Region ESE compliance resource teacher; [redacted], ESE contact at [redacted] School; and [redacted], assistant principal, [redacted] School. Petitioner presented the testimony of: [redacted], assistant superintendent, Choice and Innovation; and [redacted], chief, School Board Police. Additionally, Petitioner's Exhibits 3, 5 through 6,
and 9 were received into evidence. Respondent' Exhibits 1 through 6, 8, 12 through 14 were received into evidence.

At the conclusion of the final hearing a post-hearing schedule was discussed. Based on that discussion, on [redacted], [redacted], an Order on Post-hearing Submissions was issued, establishing the deadline for proposed orders with proposed

final orders due on or before [redacted], [redacted]. The final order deadline was also extended to [redacted], [redacted].

Thereafter, Petitioner filed a Proposed Final Order on [redacted], [redacted]. Similarly, Respondent also filed a Proposed Final Order on [redacted], [redacted]. 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, [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. Respondent is an [redacted] year-old, [redacted]-grade student eligible for exceptional student education (ESE) services under the eligibility category of [redacted]([redacted]). While not involved in athletics at present, Respondent has been involved in school athletics in the past and desires to continue such involvement in the future. Further, until [redacted], [redacted], Respondent attended School A, a regular, comprehensive, general education school. There was no evidence that demonstrated

Respondent required a more restrictive school environment in order to receive [redacted] education or [redacted] ESE services.

2. On Saturday evening [redacted], [redacted], Respondent attended a party in the community with several of [redacted] friends. The party was unrelated to school and included students from other schools around the school district, as well as adults.

3. Sometime after the party, either that night or early Sunday morning, one former student and one current student from School A were shot and killed. Both had attended the party. Additionally, it was rumored, but not true, that Respondent had been one of the students who had been killed or wounded. The false rumor had been reported to School A administrators as true.

4. Much to the surprise of school administration, Respondent, in good health, came to school on Monday, [redacted], [redacted]. While walking on campus, [redacted] was intercepted by school administrators. [redacted] spoke with the school principal and shared that [redacted] was at the party, but had left the party to go to the fast food restaurant, Wendy's. [redacted] indicated [redacted] had trouble with the student who was killed, but did not otherwise know more about the shooting. Respondent cooperated and gave administration additional names of people who may have more information. That day Respondent was sent home from school. Since Respondent had not violated the Code of Student Conduct or otherwise committed

any act which would cause [redacted] to be subject to discipline at School A, Respondent was not suspended and was not sent home for disciplinary reasons. However, Respondent has not been permitted to return to School A since being sent home on [redacted], [redacted], and has been attending a [redacted] school that by statute is a public school within the school district.

5. On Monday evening, [redacted], [redacted], another student from another school who allegedly had ties with the first shooting was involved in a separate shooting. The incident did not happen around a school campus. Moreover, the evidence did not demonstrate that these students, including Respondent, were [redacted] members. Similarly, the evidence did not demonstrate that the incidents were related to [redacted] activities.

6. In the aftermath of these shootings and homicides, one student came forward with [redacted] parents. [redacted] was afraid to return to school because [redacted] was concerned about retaliation. The student has since returned to School A. However, the student did not testify at the hearing and this otherwise hearsay evidence regarding this student's report is being used only for the purpose of showing the reasons school administrators were concerned.

7. Another student claimed that Respondent punched [redacted] and that [redacted] stayed away from campus for a couple of weeks. [redacted] has since returned to School A but has reported that [redacted] has

received death threats from unknown persons. This student did not testify at the hearing and, as with the student referenced above, this student's report is being used only for the purpose of showing the reasons school administrators were concerned. Additionally, there was no evidence that Respondent made any threats regarding this student.

8. During the course of the school's investigation, many students were interviewed, including the above-referenced students. There were rumors of retaliation. Indeed, among the students at School A, the shootings and murders were of high interest. As such, the situation with the double homicide caused concern for school administration regarding safety of the students. However, the evidence showed that such administrative concern arose out of rumors. There was no evidence that actual threats were made against the school or Respondent. Similarly, there was no evidence that actual threats were made that any rumored retaliation would occur at the school.

9. Based upon the information administration received about the party, a decision was made to transfer seven [redacted]- [redacted] to [redacted] in order to protect them. The administration based its decision on its fear that these students might have been in danger while on campus due to their rumored involvement with the deceased and/or the individuals who were affiliated with the homicides and/or shootings.

10. However, because Respondent was an [redacted] student and in spite of the fact that there was no disciplinary action with regard to Respondent, the school decided to conduct a manifestation determination review (MDR) under the Individuals with Disabilities Education Act (IDEA) regulations governing disciplinary actions related to disabled students and involuntary transfers to an [redacted] school. Such rules do not apply in non-disciplinary actions, such as is the case here, and it is puzzling why the school proceeded in such a manner except to try to justify its ultimate decision to involuntarily transfer Respondent to an [redacted] school environment.

11. The notice for the meeting dated [redacted], [redacted], indicated that the meeting was being held to "(1) determine appropriate placement educational program/placement-[redacted] education (2) consider postsecondary goals (3) manifestation and (4) IEP." The MDR meeting was held on [redacted], [redacted]. The parent attended the meeting.

12. At the meeting, the MDR team determined that the behavior was not a manifestation of Respondent's disability. After the MDR team meeting, the IEP team met and informed the parent that Respondent would attend an [redacted] school. The IEP team did not change Respondent's [redacted] services of [redacted]-[redacted] per week of [redacted]

[redacted]. The team did add [redacted] as an "[redacted]" on the IEP. However, there was no substantial evidence that [redacted] related to anything that Respondent needed due to [redacted] disability or needed to receive FAPE under [redacted] IEP. Indeed, the evidence showed that the safety accommodation was added to justify Respondent's involuntary transfer to an [redacted] school.

13. More importantly, in regards to the transfer to the [redacted] school, the evidence was clear that the decision to transfer Respondent to such a school had already been predetermined by school administrators. The IEP team did not consider transferring Respondent to another of the many [redacted], [redacted] in the district prior to determining Respondent would attend a district [redacted] school; nor did the IEP team consider what other accommodation could be implemented to address the school's safety concerns. The team's decision was limited solely to which [redacted] school in the school district would be able to implement Respondent's IEP. As a result, the IEP team determined that Respondent be transferred to School B, an [redacted]. Such predetermined decision and failure to consider alternatives violated IDEA. The parent and Respondent both objected to the team's recommendation.

14. The evidence relative to School B demonstrated that it is a very secure, highly restricted campus where students can be checked for anything that is potentially dangerous. Everyone entering the campus is searched. Additionally, School B is an [redacted] school for [redacted] ([redacted]) and [redacted] ([redacted]- [redacted] or [redacted]). As such, it has a higher student-to-teacher ratio and offers educational and behavior strategies for students who have not been successful in a [redacted], [redacted] school environment. Further, the students receive more supervision due to a higher adult presence on campus. The school does offer a core curriculum to meet Florida standards for graduation. However, it does not offer the wider range of electives available at a larger comprehensive school such as School A. Additionally, it does not have athletic programs, but does offer some nonathletic extra-curricular programs. The evidence demonstrated that School B was a significantly more [redacted] school environment than School A or any other regular, comprehensive, general education campus. As a more [redacted] setting and given the fact that Respondent can receive FAPE at a regular, comprehensive, general education school, School B does not meet the [redacted] requirement under IDEA and Respondent should be immediately returned to a [redacted], [redacted] school.

CONCLUSIONS OF LAW

15. 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).

16. Respondent bears the burden of proof with respect to each of the claims raised in the counter-complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

17. 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).

18. 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).

19. As part of providing FAPE, school districts are required to educate students in an appropriate educational 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.

20. 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).

21. Notably, the above rules do not specifically define "alternative schools." They also do not specifically define a "regular school environment" or "regular school." However, regarding LRE, rule 6A-6.03028(3)(i)2. does indicate that LRE is an environmental consideration separate from educational placement and the continuum of placements defined more fully in rule 6A-6.0311(1).[1/] Further, under federal IDEA statutes and rules (20 U.S.C. § 1415(k)(2) and its implementing regulations

34 C.F.R. §§ 300.521-300.522) and Florida's IDEA disciplinary rules, transfer of disabled students to an alternative school is restricted. Indeed, the authority granted under 20 U.S.C. § 1415(k)(2) and its implementing regulations 34 C.F.R. §§ 300.521-300.522 to remove a student to an alternative school invokes, by definition, an extraordinary emergency proceeding. Such distinction in the rules is due to the fact that the alternative school environment is generally presumed to be and is recognized as a more restrictive environment than the regular comprehensive general education school environment.

22. Additionally, under the Florida Education Code, transfers of students to alternative education programs in non-IDEA situations have only been authorized under specific circumstances related to disciplinary action, academic intervention action and drop-out prevention. See § 1006.07(1)(a), Fla. Stat. (2015)(directing school boards to adopt rules for the "in-school suspension, [out of school] suspension, and expulsion of students"); § 1003.53, Fla. Stat. (2015)("defining dropout prevention [or] academic intervention program"); § 1003.32(5), Fla. Stat. (2015)(indicating a student removed from a classroom may be placed in in-school suspension, out-of-school suspension, assigned to a "dropout prevention [or] academic intervention program," or expelled). More importantly in this case, the evidence demonstrated that the proposed

alternative school is a more restrictive school environment when compared to a regular, comprehensive, general education environment.

23. Under IDEA, 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).

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

25. 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.

26. 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 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.

27. Here, the evidence established that the Student has been and can be satisfactorily educated in a [redacted] education school and classroom. The evidence also demonstrated that School B was a significantly

more [redacted] environment than School A or any other comprehensive, regular general education campus. As a more [redacted] and given the fact that Respondent can receive FAPE at a [redacted], [redacted], School B does not meet the [redacted] requirement under IDEA and the predetermined decision to involuntarily transfer Respondent to School B violated IDEA. Given these facts, Respondent should be immediately returned to a comprehensive, regular education school.[2/] See J.W. v.Palm Beach Co. Sch. Bd. v., 73 IDELR 110, 118 LRP 36397 (FL SEA 2018).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that The IEP as reviewed and revised on [redacted], [redacted], fails to provide Respondent with a free appropriate public education in the least restrictive environment and that Respondent should be returned immediately to a regular, comprehensive, general education school.

DONE AND ORDERED this 16th day of May, 2019, in Tallahassee, Leon County, Florida.

S

DIANE CLEAVINGER
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2019.

ENDNOTES

[1/] The rule reads as follows:

> (i) LRE and placement determinations. Placement determinations shall be made in accordance with the LRE provisions of the IDEA, as follows:
>
> 1. To the maximum extent appropriate, students with disabilities, including those in public or private institutions or other facilities, are educated with students who are not disabled;
>
> 2. Special classes, separate schooling or other removal of students with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; and,
>
> 3. A continuum of [redacted] placements must be available to meet the needs of students with disabilities for special education and related services, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions and a school district must make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. (emphasis added).

[2/] Irrespective of IDEA, the undersigned could find no statute which would permit a school to involuntarily transfer a student to an alternative school for protection of the student or to quell feared campus violence where a student has not committed an action which would subject them to discipline. Such authority of necessity would require legislative action and may involve a student's significant interest in their education at a regular, comprehensive, general education school. See S.J. v. Thomas and Escambia Cnty. Sch Bd., 233 So. 3d 490 (Fla. 1st DCA 2017)(involving an involuntary disciplinary transfer to an alternative school and rights to a hearing under Chapter 120, Fla. Stats.).

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).