

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

HILLSBOROUGH COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 21-2690E

**,

Respondent.

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FINAL ORDER

A due process hearing was held in this case before Brittany O. Finkbeiner, an Administrative Law Judge of the Division of Administrative Hearings (“DOAH”), in Tampa, Florida, on October 26 and 27, 2021.

APPEARANCES

For Petitioner: Lakisha M. Kinsey-Sallis, Esquire
 Marisol Ruiz, Esquire
 Fisher & Phillips LLP
 101 East Kennedy Boulevard, Suite 2350
 Tampa, Florida 33602

For Respondent: Respondent, pro se
 (Address of Record)

STATEMENT OF THE ISSUE

The issue in this case is whether the placement recommended by the educational staff on the Individual Education Plan (“IEP”) team, which is an exceptional student education (“ESE”) center, is the least restrictive environment (“LRE”) for the student.

PRELIMINARY STATEMENT

The Hillsborough County School Board (“School Board”) filed a request for due process hearing (“Complaint”) on September 3, 2021. Through its Complaint, the School Board seeks approval to place Respondent in an ESE center, despite her parent’s refusal to consent to the proposed placement.

A Case Management Order was issued on September 7, 2021. Pursuant to written notice, a telephonic conference was held for the purpose of scheduling the due process hearing. The hearing took place on October 26 and 27, 2021.

At the due process hearing, the School Board presented the live testimony of the following witnesses, all of whom are employed with the Hillsborough County School District (“District”): [REDACTED] (former ESE Specialist at School 2 during the 2020-2021 school year); [REDACTED] (ESE Specialist at School 2 during the 2021-2022 school year); [REDACTED] (ESE Teacher at School 2); [REDACTED] (ESE Teacher at School 2); [REDACTED] (ESE Teacher and ESE Department Head at School 2); [REDACTED] (Speech Language Pathologist (“SLP”) at School 2); [REDACTED] (District Board Certified Behavioral Analyst (“BCBA”)); and [REDACTED] (ESE Specialist at School 3). The School Board’s Exhibits 1 through 15 and 17 through 21 were admitted into evidence. Respondent presented the testimony of her parent, but did not introduce any exhibits into evidence. The Transcript was filed with DOAH on November 19, 2021. Petitioner timely filed a Proposed Final Order, which has been considered in the preparation of this Final Order. Respondent did not file a proposed final order.

For stylistic convenience, the undersigned will use female pronouns in the Final Order when referring to Respondent. The female pronouns are neither intended, nor should be interpreted, as a reference to Respondent’s actual gender.

FINDINGS OF FACT

1. Respondent is a student with a disability. At the time this case was initiated, she was a 12th-grade student at School 2. Respondent is, and was at all relevant times, receiving ESE services under the Intellectually Disabled and Language Impaired areas of eligibility.

2. Respondent is non-verbal.

3. Respondent enrolled at School 2 in Hillsborough County during the spring semester of the 2020-2021 school year. Prior to that, she attended a public school in ██████ County (“School 1”).

Respondent’s History in ██████ County

4. In ██████ County, Respondent received instruction in a separate class placement at School 1. During her time there, she was instructed on the Access Points curriculum.

5. According to documents the District received from ██████ County, at the time of Respondent’s transfer into the District, she had an IEP dated January 21, 2020, which had most recently been amended on September 24, 2020, and December 16, 2020.

6. According to Respondent’s IEP from ██████ County, “[a]t least 3 or 4 days out of the week [she] will have a bad period and go after a staff member (grab, reach for feet, scratch). It is known that [Respondent] is unable to properly communicate [her] wants and needs which initiates the inappropriate grabbing and hitting.” Further, the ██████ County IEP states that Respondent “requires an adult at arm’s length at all times to maintain a safe environment, as [her] aggression toward others includes attempts to pull tracheostomy or feeding tubes out of other students or attempts to tip over wheelchairs, pull masks from students faces, or attack (scratch and or pull) their feet or arms.”

7. Based on the behaviors she displayed in ██████ County, Respondent had a Behavior Intervention Plan (“BIP”), which was created on September 16, 2020.

8. The BIP reported that during Respondent’s baseline assessment, behaviors such as pinching, pushing or grabbing others, and other forms of aggression occurred an average of two times per hour. The behaviors were categorized as being of major severity because of their likelihood to create a dangerous environment for Respondent or those around her. Antecedents to the behaviors, according to the BIP, were the presentation of academic tasks, transitions from one activity to another, transitions from one location to another, and denial of access to a desired activity or object.

9. Respondent’s transferring documents from ██████ County to Hillsborough County reflect that Respondent’s IEP team proposed that Respondent be served in the “Access Points Behavior Communication Unit,” which is tantamount to a center-based placement. The IEP team believed that such a setting would align with Respondent’s needs and IEP goals with respect to instruction, social behavior, communication, and independent skills. The transferring documents also indicate that the regular Access Points unit at School 1 was unable to meet Respondent’s needs and that she required an environment with more intensive supports in order to make progress.

Respondent’s Transition to Hillsborough County

10. School 2 is a traditional public high school. In the 2020-2021 school year, School 2 had an overall student population of about 2,█████ students, including about 3█████ students with disabilities. The campus is large and open with two floors.

11. Approximately 6█████ students at School 2 were served in the Access Points program in the 2020-2021 school year. All Access Points students were educated in a self-contained environment, which consists of six classrooms. The classrooms were located close to necessities, such as bathrooms and the cafeteria. The students had opportunities to transition in two shared hallways within the Access Points unit and participate in electives, such as physical education, music, arts, and culinary. Access Points

classrooms at School 2 were typically staffed with one teacher and one or two paraprofessionals, depending on the extent of the students' needs. Students in the Access Points program were supported by their in-classroom staff, School 2's ESE Specialist, and other service providers as needed.

12. During the spring semester of the 2020-2021 school year, Respondent and her parent came to School 2's campus to look into enrolling Respondent there. When Respondent and her parent were at School 2 seeking information about registration, they ran into a paraprofessional who contacted [REDACTED] because Respondent was in "crisis mode" at the time. [REDACTED] testified that she used the term "crisis mode" in this situation to describe Respondent becoming physical with her parent and [REDACTED]. More specifically, Respondent was attempting to poke [REDACTED] toes through her open-toed shoes; laying on the ground; kicking her parent; and trying to move around the area, which consisted of stairs and other potential dangers. Based on her conversation with Respondent's parent, [REDACTED] believed that the crisis was triggered because Respondent was uncomfortable and nervous in an unfamiliar setting. A few weeks later, Respondent's parent returned to School 2 with a completed registration packet.

13. Upon receiving the completed registration paperwork, [REDACTED] followed her normal process when it comes to transferring an out-of-county student with a disability, including reviewing the transfer IEP, requesting records, and assessing whether Respondent's needs could be met at School 2.

14. As part of the transfer process, [REDACTED] requested and received various documents from [REDACTED] County and spoke to personnel there, such as School 1's assistant principal, who aided her in her review and processing of Respondent's transferring documents and later, the development of a Hillsborough County IEP. The documents included the [REDACTED] County IEP dated January 21, 2020, amended on September 24, 2020, and December 16, 2020; an Integrity Checklist for Consideration of Change of Placement ("Checklist"); emails concerning [REDACTED]'s purported attempts to communicate

with Respondent's parent regarding Respondent's behaviors and placement; a Student Event and Discipline Report; and Respondent's schedule. The Checklist reports much of the same information reflected on the [REDACTED] County IEPs and BIP but also specifically states that:

[Respondent's] aggression poses a safety risk to students who, because of their disabilities, are unable to discern and move away from a dangerous situation. To maintain a safe environment, [Respondent] spends some time in a supported level class (with an IA within arm's reach), as those students are better able to discern a dangerous situation and move away from it. [Respondent] requires individualized intensive interventions. ... [Respondent's] problem behavior has decreased since putting the interventions in place. However, the range of [her] aggression toward others is still between 0 and 11 times a day.

15. Based on information that she received from School 1's assistant principal, [REDACTED] documented on the Verification of Previous ESE Placement she prepared for Respondent that prior to transferring to School 2, Respondent was being taught in a self-contained classroom where she remained all day; ate her lunch alone; and when she displayed behaviors, she was isolated from peers for her own safety and the safety of others.

16. After reviewing Respondent's transfer documents from [REDACTED] County, [REDACTED], in consultation with Respondent's parent, determined that Respondent had a current IEP and that an initial ESE evaluation and/or eligibility staffing was not necessary. Accordingly, the school-based personnel at School 2 developed an Individualized Supervision Plan and Functional Behavior Assessment/Positive Behavior Intervention Plan ("FBA/PBIP") for Respondent.

17. The IEP team convened a meeting on February 16, 2021, to develop a Hillsborough County IEP for Respondent.

18. At the February 16 meeting, which Respondent's parent and brother attended, the IEP team discussed the fact that Respondent had been served in a self-contained Access Points classroom; that prior to Respondent's transfer she had been recommended to a more restrictive setting with behavioral supports; the supports and services available at School 2; and the types of behaviors Respondent had shown in her prior educational setting. With input from Respondent's parent, the IEP team developed a District IEP for Respondent.

19. Ultimately, after reviewing and discussing the information in the transferring documents from ██████ County, the IEP team ultimately recommended a center-based placement for Respondent at School 3. Respondent's parent disagreed with the recommendation and did not provide consent.

20. When Respondent's parent did not consent to the center-based placement at School 3, the IEP team met with Respondent's parent again on March 2, 2021, and agreed to give Respondent the opportunity to demonstrate success in School 2's Access Points unit.

Efforts at School 2 to Support Respondent

21. Personnel at School 2 created a classroom environment tailored specifically to Respondent, with the goal of ensuring the safety of Respondent, her classmates, and personnel. In order to gradually acclimate Respondent to her new environment, when she began at School 2, she was alone in the classroom with ██████ and a paraprofessional. Personnel working with Respondent had a written plan, entitled "501 Changes," which provided directions with respect to providing supervision for Respondent at all times, collecting and communicating data, signs before a behavior, and reasons to evacuate along with an evacuation plan. Knowing that Respondent had a fondness for open skin and a history of biting, personnel working with her wore Kevlar sleeves, pulled back their hair, wore sneakers, and did not wear necklaces or lanyards.

22. Inside Respondent's classroom, there was a safe space for her with sensory-friendly items, which was separated from the area where she completed her academic tasks by a row of desks to create a visual barrier between the two spaces. Items that could be thrown were preventatively removed from the classroom. In an attempt to meet Respondent's needs, personnel at School 2 took specific steps to replicate a center-based environment to the maximum extent possible with the classroom where Respondent was receiving her instructions.

23. When Respondent was integrated with her peers, School 2 personnel ensured that there were never more than five to six students, and three adults, in the classroom to limit movement and activity thereby avoiding some of Respondent's known triggers. Respondent could not be positioned too close to her peers in the classroom because if she was in close proximity to another student, she would physically attack them.

24. Respondent was provided with visual supports to help her communicate, such as a visual schedule; a thumbs up and thumbs down picture on her desk to indicate "yes" or "no;" and a picture-exchange system.

25. ██████████ worked with Respondent on academic activities, such as answering questions about a visual story by cutting and pasting, coloring, or circling her responses. From the beginning of her time at School 2, however, ██████████ found that Respondent's continuity of instruction was frequently interrupted because she exhibited aggressive behaviors. The aggressive behaviors included grabbing at ██████████ face mask, clothing, and skin; and on one occasion charging at her into a wall resulting in an injury necessitating physical therapy; running at the paraprofessional and attempting to scratch her; trying to pull off personnel's Kevlar sleeves; grabbing students; grabbing at the genitalia of others; punching, kicking, and biting personnel; pulling hair; and bending back personnel's hand causing swelling and bruising. At times, the behavioral outbursts would last only a

few minutes; but other times, they lasted for up to four hours, spanning multiple class periods.

26. Based on [REDACTED] credible testimony, Respondent typically had 11 outbursts per day over the course of seven class periods.

27. Other students often had to be evacuated from the classroom during Respondent's outbursts for the safety of both Respondent and the other students. The change in routine and environment, along with witnessing Respondent's acts of aggression towards others, resulted in an instructional disruption and even a level of trauma for Respondent's peers. Additionally, when Respondent had a severe outburst or was in "crisis mode," teachers and paraprofessionals from other classrooms would have to come in to assist in attempting to deescalate the situation and maintain the safety of all involved. This meant scrambling to divide students into other classrooms where they could be supervised. As a result, Respondent's peers were deprived of the supports that they would typically have during their school day. School 2 personnel were impacted in their ability to carry out their duties and support the instructional environment due to the substantial amount of time they needed to devote to Respondent.

28. Because of her behaviors, Respondent's school day during the 2020-2021 school year looked considerably different than the other Access Points students. Typically, in Access Points classrooms, there is a lot of movement and learning centers. Students engage in various hands-on activities. For Respondent, however, her day had to be highly structured, limited in noise, and slower in terms of the classroom pace.

29. From the time she arrived on the School 2 campus, Respondent would be immediately supported by at least one adult. She would have breakfast by herself, and stay in her classroom for the entire day, including for lunch. Unlike the other Access Points students, Respondent did not transition from classrooms, did not navigate the campus where nondisabled peers would be located, and only left the classroom for toileting while being accompanied by

two adults for her safety. The goal of her teachers was to introduce Respondent to the campus and then gradually provide her a greater array of opportunities to transition like the other Access Points students. However, any time School 2 personnel would attempt to transition or change Respondent's environment or routine, her behaviors would escalate and become more aggressive.

30. Respondent's teachers at School 2 attempted to deliver her instruction in each of the required content areas and to implement the provisions of her IEP. As required by Respondent's IEP, she was provided with specialized instruction, social skills, set routines, break cards, and a token economy in efforts to increase her positive interactions and decrease her aggressive interactions. She was given specialized instruction and Access Points curriculum in both small groups and one-on-one settings, along with adult support, cues, prompts and visual supports to engage her in instructional time. Respondent had the benefit of behavior management strategies, specialized instruction in the area of self-determination/self-advocacy, daily living, social skills, and independent functioning through a unique skills class, as well as modeling and/or social stories.

31. To address her communication needs, Respondent was provided language therapy 120 minutes per month, in a one-on-one setting, with the SLP, Ms. Akins. Both in therapy and the classroom, personnel used communication opportunities throughout her lessons by way of picture exchange communications, pointing, matching, signing, and symbols. School 2 personnel working with Respondent also provided her with the benefit of the accommodations set forth on her IEP.

32. With these supports, Respondent was able to engage for up to five minutes in some preferred activities, such as cutting and pasting activities tailored to the substantive content. Overall, as one of Respondent's teachers described it, Respondent was hindered academically because she seemed to be in constant distress in the classroom.

33. When it became apparent that School 2 may not have adequate supports and services to manage the severity of Respondent's needs, School 2 enlisted the help of District BCBA [REDACTED]. On April 1, 2021, [REDACTED] conducted an observation of Respondent. As part of [REDACTED] observation, [REDACTED] typically examines the classroom environment; assesses the physical arrangement; determines whether the environment is safe for the student; looks at how the adults in the room are engaging with the student; and evaluates the behavioral interventions being used both at the classroom and individual level.

34. During [REDACTED] observation, [REDACTED] noted that: the classroom had a lot of visuals on the board; the environment was welcoming; Respondent was supported by a paraprofessional at all times; Respondent was physically separated from other students; and that classroom staff were using behavioral interventions with Respondent. [REDACTED] also observed that Respondent was having a difficult time transitioning back from a break area to her desk.

35. Based on her observations, [REDACTED] made recommendations to assist the school-based team in working with Respondent, including increasing the rate of reinforcement she received for desired behaviors and the consistency with which supports were used.

36. After her initial observation, [REDACTED] visited School 2 at least once per week to aid the school-based team. She conducted staff training on May 3, 2021, regarding Respondent's behavior plan and how to implement it, to make sure that all adults working with Respondent were carrying out the plan consistently.

37. [REDACTED] testified that, based on the totality of [REDACTED] observations, School 2 personnel implemented Respondent's behavior plan with "very high fidelity."

38. Throughout her time at School 2, personnel working with Respondent collected data on her behaviors consisting of handwritten notes and electronic data reported through a real-time electronic QR code system.

39. Data collected from March 10 to April 23, [REDACTED], showed that Respondent had 15 occurrences of hitting; 8 occurrences of scratching; 2 occurrences of kicking; 23 occurrences of grabbing clothing; 5 occurrences of grabbing male genitals and 10 occurrences of grabbing female genitals; and 5 occurrences of grabbing hair. Respondent was absent from school 13 out of 27 days in the above-referenced data-collection period.

40. School 2 personnel developed an updated, more robust FBA/PBIP for Respondent based on the data.

41. As a result of Respondent's ongoing behaviors and the impact they were having on Respondent, her learning, the learning of others, and the overall educational environment in School 2's Access Points unit, Respondent's IEP team reconvened on May 17, 2021, to readdress Respondent's needs and her placement. Respondent's parent attended the meeting. After the meeting, the IEP team updated Respondent's IEP. The IEP team renewed its recommendation that Respondent be educated in an ESE center, specifically School 3. The team's recommendation was rooted in continuing concerns about School 2's ability to sustain Respondent on a traditional high school campus, given her need for a higher level of supports, which could be provided for her in a center-based environment.

42. Respondent's parent maintained her refusal to consent to a center-based placement for Respondent.

Respondent Returns to School 2 for the 2021-2022 School Year

43. From the beginning of the 2021-2022 school year and throughout the pendency of this case, Respondent has remained at School 2.

44. In the 2021-2022 school year, School 2 has had approximately 1, [REDACTED] students, around 3 [REDACTED] of whom are students with disabilities; and [REDACTED] Access Points units.

45. At the time of the final hearing, Respondent continued to be served in one classroom for the entire day. Respondent has maintained the same structured routine as she did in the previous school year—when she arrives on campus, she is escorted by adults to her classroom; she has breakfast and lunch in her classroom; and she has adults surrounding her at all times, including when she transitions to the bathroom. She has remained in a small classroom environment with no more than four students during a given class period.

46. Before the school year began, School 2 personnel had several meetings to plan for how Respondent’s instruction would be delivered and to ensure that the proper behavioral and other supports were in place.

47. At the beginning of the school year, Respondent was generally calm for a period of several weeks. Around September 2021, however, Respondent’s behaviors escalated. The escalation in behaviors included dropping to the floor; grabbing at the feet, legs, and other body parts of others; hitting and pushing adults; and scratching and kicking at staff. The behaviors have negatively impacted the overall learning environment for Respondent and others.

48. [REDACTED] has continued to assist School 2 personnel in addressing Respondent’s behavioral needs.

49. School 2 has continued to implement Respondent’s IEP by providing her specialized instruction, social skills, set routines, break cards and a token economy in efforts to increase her positive interactions and decrease her aggressive interactions. Respondent has also been continuously receiving the benefit of behavior management strategies, specialized instruction in the area of self-determination/self-advocacy, daily living, social skills, and independent functioning through a unique skills class, as well as modeling and/or social stories and the accommodations set forth in her IEP. Additionally, she continues to receive the same language therapy and

services that she did in the 2020-2021 school year to address her communication needs.

50. Respondent has continued to demonstrate an inability to successfully meet her goals and objectives at School 2 because of constant breaks in her continuity of instruction. Respondent's behaviors are an ongoing impediment to School 2's ability to fully implement Respondent's IEP.

51. School 2 personnel have continued to use electronic data that is reported through a checklist captured through a QR code in real time. Data collected between September 23 and October 7, 2021, illustrates that Respondent's behaviors were increasing upward despite the school-based team continuing to implement her plan with fidelity.

School Board Center-Based Recommendation

52. The School Board recommends that the appropriate placement for Respondent to receive a free and appropriate public education ("FAPE") is at School 3, which is located about 15 to 20 minutes from School 2.

53. School 3 is designed to look like a smaller version of a typical campus. At School 3, the campus is strategically laid out so that everything students need is available inside the classroom, or in close proximity, because many of the students struggle with transitions in a manner similar to Respondent. There are, however, opportunities to transition when appropriate, such as a courtyard, playground, and cafeteria.

54. The campus caters to students with disabilities who are on Access Points from grade kindergarten through age 22 and has programs tailored to meet the needs of all the students at their levels. Much like a traditional campus, School 3 offers instruction in core content areas but also offers electives such as music, art, and agriculture.

55. The student population at School 3 usually varies between 5■ and 6■ students. Every class has at least one dedicated paraprofessional, with additional support dictated by the needs of the individual students. There is a three-to-one student-to-teacher ratio, which allows for differentiated and

individualized instruction tailored to ensure that all students benefit from the learning environment. School 3 provides opportunities to be taught one-on-one, in a whole group, and in small groups depending on the needs of an individual student.

56. School 3 is a communication-rich environment in that the campus infuses various communications tools and strategies, such as large core boards in classrooms and common areas, desk size versions of the core board, a picture exchange system, a token economy system, visual schedules, visual aids, and Velcro strips on desks that can be used to communicate responses to a prompt or question.

57. In an environment where everyone is using the same visual tools to communicate, Respondent would have a more meaningful opportunity to interact with peers and learn how to appropriately engage with others.

58. For students in Respondent's age group, School 3 provides access to the core curriculum, as well as courses that assist them with developing independent functioning and/or career preparation skills.

59. Many of the students at School 3 have communication and behavioral needs similar to Respondent; and a significant portion of them have an individualized behavior management system such as an FBA/PBIP. However, unlike a traditional campus, School 3 offers a more structured and routine-based environment to help manage those behaviors. The staff at School 3 are trained in behavior management and crisis intervention strategies, thus equipping them with tools to deescalate students in crisis.

60. ██████████, a representative of School 3, participated in the meeting held by Respondent's IEP team on February 16, ██████. Based on the information that ██████████ learned about Respondent at the meeting and subsequently, she agreed with Respondent's IEP team that School 3 would be an appropriate environment to meet Respondent's educational needs.

61. The School Board's witnesses uniformly testified that they believe that FAPE cannot be provided to Respondent absent a center-based placement.

62. The greater weight of the evidence establishes that Respondent cannot receive a FAPE at School 2, despite all supplemental aids and services provided by school-based and District personnel. Respondent would benefit significantly from the academic environment at School 3, which is specifically designed to meet her needs.

CONCLUSIONS OF LAW

63. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 1003.57(1)(a) and 1003.5715(5), Fla. Stat., and Fla. Admin. Code R. 6A-6.03311(9)(u).

64. As the party seeking relief in this case, the School Board bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

65. At all times relevant to the Due Process Complaint, Respondent was a child/student with a disability as defined under 34 C.F.R. § 300.8(a)(1); 20 U.S.C. § 1401(3)(A)(i); and Florida Administrative Code Rule 6A-6.03411(1)(f).

66. In enacting the Individuals with Disabilities Education Act (“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); *See 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*, 137 S. Ct. 988 (2017).

67. The School Board is a local educational agency (“LEA”), as defined under 20 U.S.C. § 1401(19)(A). By virtue of receipt of federal funding, the School Board is required to comply with certain provisions of the IDEA, 20 U.S.C. § 1401, et seq. As an LEA, under the IDEA, the School Board was required to make FAPE available to Respondent. *See Sch. Bd. of Lee Cnty. v. E.S.*, 561 F. Supp. 2d 1282, 1291 (M.D. Fla. 2008)(*citing M.M. v. Sch. Bd. of Miami-Dade Cnty.*, 437 F.3d 1085, 1095 (11th Cir. 2006)); *M.H. v. Nassau Cnty. Sch. Bd.*, 918 So. 2d 316, 318 (Fla. 1st DCA 2005).

68. Local school systems must also satisfy the IDEA’s substantive requirements by providing all eligible students with FAPE, which is defined as:

Special education and related 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).

69. “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).

70. 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.

71. In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on student 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.

72. 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).*

73. In Florida, a school district may not place a student in an ESE center 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.* Section 1003.5715 does not abrogate any parental right identified in the IDEA and its implementing regulations. § 1003.5715(7), Fla. Stat.

74. In determining the educational placement of a student 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 student, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1). Additionally, the student’s placement must be determined at least annually, based on the student’s IEP, and as close as possible to the student’s home. 34 C.F.R. § 300.116(b).

75. With the LRE directive, Congress created a statutory preference for educating handicapped children with children who are not handicapped to the maximum extent appropriate. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 181 n.4 (1982). “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).

76. 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.

77. Here, the greater weight of the evidence established that Respondent cannot be satisfactorily educated in the regular classroom, with the use of supplemental aids and services. Accordingly, the present case turns on the second part of the test—whether Respondent has been mainstreamed to the maximum extent appropriate.

78. In Respondent’s educational environment at School 2, her classroom was modified to essentially recreate an ESE center, but without the support, services, and design of an actual ESE center. During her time at School 2, Respondent’s behaviors did not improve. Instead, her behaviors persisted, thus demonstrating that she needs more restrictive interventions and strategies on the placement continuum. Additionally, her behaviors pose a significant safety risk to herself and others, and adversely impacted her classmates’ ability to learn. While it is undisputed that the proposed placement offers less potential for interaction with nondisabled peers, the greater weight of the evidence demonstrated that Respondent’s disruptive and aggressive behaviors warrant such a result. The School Board’s proposed placement mainstreams Respondent to the maximum extent appropriate and its offers her a FAPE.

79. The record evidence is uncontroverted that, due to the nature and severity of Respondent’s disability, she did not, or could not, receive an educational benefit from interventions and strategies in a less restrictive placement.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the School Board's proposed change of Respondent's placement to an ESE center/special day school is approved. Effective as of the date of this Final Order, Respondent shall be assigned to School 3, or such other ESE center/special day school identified to meet Respondent's needs.

DONE AND ORDERED this 17th day of December, 2021, in Tallahassee, Leon County, Florida.



BRITTANY O. FINKBEINER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2021.

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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).