STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Broward COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 16-3097E

[redacted]

Respondent.
_____/

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 July 20, 2016, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Barbara Joanne Myrick, Esquire
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Fort Lauderdale, Florida 33301

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

STATEMENT OF THE ISSUE

Whether the proposed change of the subject student's (Student) 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 June 6, 2016, Petitioner Broward 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 [redacted].[1/] Petitioner's hearing request was necessitated by the Student's parent's (Respondent) refusal to provide consent to the proposed placement as recommended in the Student's IEP dated [redacted].

On June 7, 2016, a Notice of Hearing was issued scheduling the final hearing for July 7, 2016. However, prior to the date of the final hearing, it came to the undersigned's attention that Respondent's address of record was incorrect and that Respondent may not have received notice of the final hearing from DOAH. An amended notice of hearing for the July 7th hearing date and with the correct address was mailed to Respondent. Additionally, a telephone conference was held regarding the address issue, and it was determined that Respondent did not receive the original Notice of Hearing, but had recently received the Amended Notice of Hearing. It was also determined that Respondent would not be ready for hearing on July 7. Accordingly, the hearing was continued to allow Respondent sufficient time to properly prepare for hearing and an amended notice rescheduling the final hearing for July 20, 2016, was issued.

The hearing proceeded as rescheduled with all parties present. During the hearing, Petitioner presented the testimony of eight witnesses, including the parent of the student and introduced 77 exhibits into evidence. The parent testified on the student's behalf. Respondent did not present additional witnesses and did not introduce any exhibits into evidence.

At the conclusion of the final hearing, the post-hearing schedule was discussed. Based on that discussion, it was determined that proposed final orders would be filed on or before September 2, 2016, and the undersigned's final order would be issued on or before October 3, 2016. The schedule was memorialized by the undersigned's July 21, 2016, Order Extending Final Order Deadline and Establishing Deadline for Proposed Orders.

After the hearing, Petitioner filed a Proposed Final Order on September 6, 2016. Respondent filed a Proposed Final Order on August 26, 2016. 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.

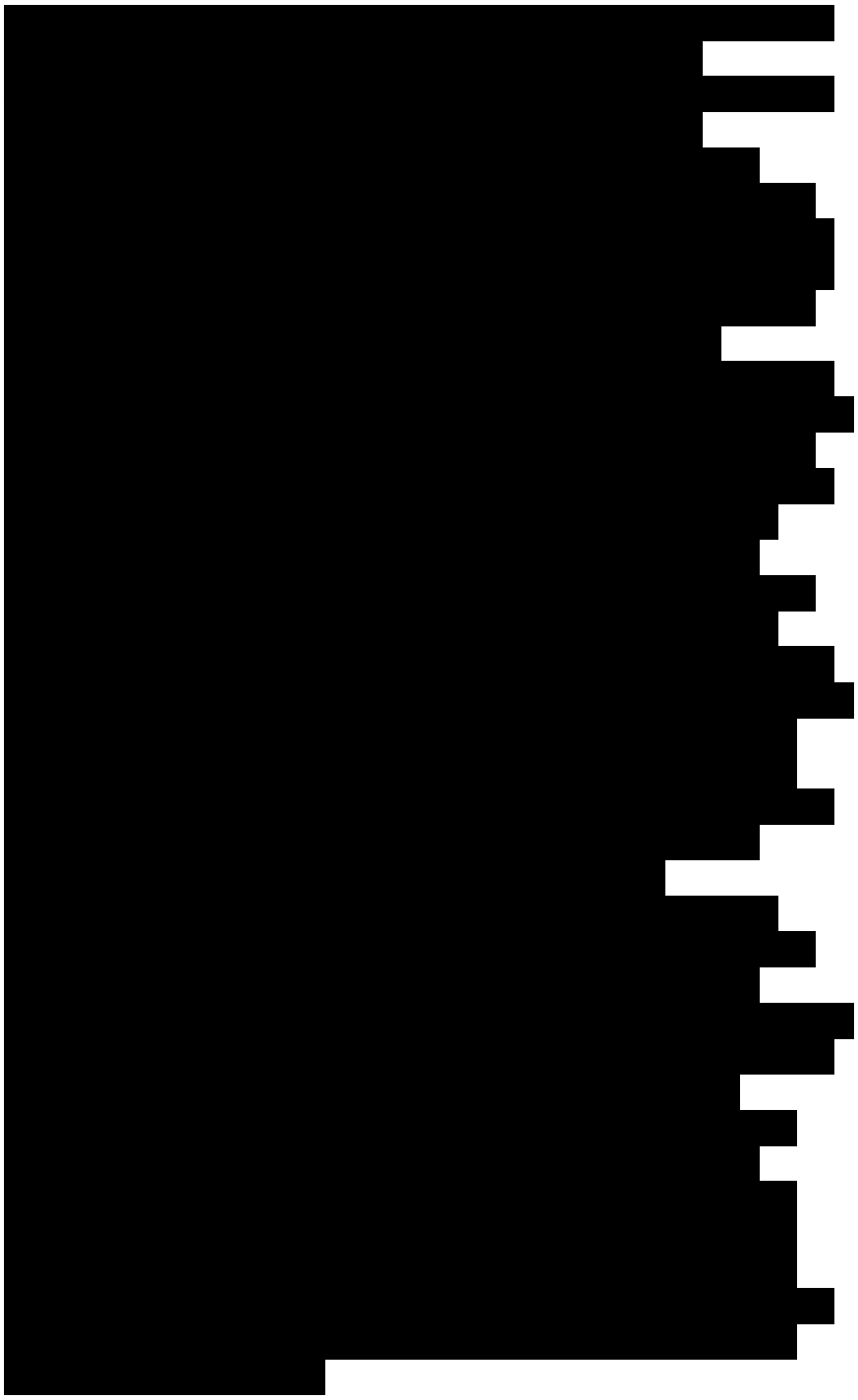
FINDINGS OF FACT

1. The Student was born on [redacted]. At an early age [redacted] was diagnosed with [redacted] and was found eligible for ESE services.

2. The Student enrolled in the Broward County Public Schools in [redacted] as a [redacted] and has been enrolled in a Broward County Public School since that time. Throughout his time in school the Student primarily received [redacted] education in an ESE classroom, only spending time with [redacted] during lunch or in [redacted] such as [redacted].

3. In the [redacted] school year, the Student was enrolled in a Broward County school (School A) as a [redacted]. The Student's IEP dated January 30, 2014, reflected that the Student was [redacted]. [redacted] present level of performance in the [redacted] domain was described in the IEP as:

[redacted]



During the [redacted] school year, the Student was in a group of two working with the [redacted] and with a [redacted] close by. Additionally, due to the [redacted] of [redacted] behaviors and with the consent of the parent, the Student was given a [redacted]

[redacted] and a [redacted]. As a result of the [redacted], on [redacted], a [redacted] was also developed that set forth the Student's [redacted], a hypothesis as to the function of the [redacted], and recommended [redacted].

4. The Student began the [redacted] school year at School A as a [redacted]. The Student was initially placed at School A in a [redacted] ESE classroom for [redacted] consisting of a [redacted]. In addition to these staff members, there were [redacted], who were regularly in the classroom. Later, during the [redacted] school year, the Student was in a classroom with [redacted], as well as the other above-mentioned professionals who were in the room on a regular basis. The Student also had a [redacted] to address [redacted] behavior that was properly reviewed and revised on [redacted] as well as implemented by the staff.

5. The initial IEP for the [redacted] school year, under the heading of "[redacted]" documented the Student's present level of performance

[redacted] in part, as follows:

6. That school year the Student was [redacted] for a while until [redacted] started to [redacted] and even [redacted] in some areas. The evidence demonstrated that the Student exhibited [redacted]. The behavior included [redacted]

[redacted]. Notably, when [redacted] head, [redacted]—[redacted]. During such behavioral manifestations, it was necessary for all three staff members in the classroom to intervene and call for additional support in the classroom. The Student was also consistently [redacted] from [redacted] due to [redacted] behaviors, which disrupted the entire classroom. Specials are classes the Student participated in with non-disabled peers.

7. During that school year, the Student's behavioral concerns [redacted] and in [redacted], after an IEP meeting, [redacted] was modified to reflect new [redacted]. Unfortunately, the modifications proved to be ineffective as the Student's [redacted] concerns escalated further. [redacted] was frequently [redacted] and [redacted] to staff members and fellow students. A Notice of Proposal was provided to the Student's parent reflecting a change in services and placement from the Student's then current placement in a separate class to [redacted]. The Student's parent was not in agreement with the IEP team's decision for the Student to receive services and placement in [redacted].

8. The IEP team reconvened again on [redacted], at a properly noticed IEP meeting. The IEP team again concluded that, due to the [redacted] of the Student's [redacted], [redacted] was [redacted] to participate in a [redacted], and recommended that [redacted] be placed [redacted] (School B), wherein the Student would have [redacted]. The Student's [redacted] was provided a parental consent form for said placement; however, the [redacted] did not consent.

9. The Student's IEP team held another interim IEP meeting on [redacted], revising [redacted] IEP to reflect that [redacted] would be receiving [redacted] ESE services in an [redacted] and agreed to implement the following: [redacted]. A technical assistance is not an evaluation but rather an observation. No standardized measures or tests for occupational needs are used during technical assistance observations. The technical assistance was necessary because the Student's parent did not provide the District with consent to evaluate the Student for [redacted].

10. The school immediately implemented strategies from the occupational therapist's suggestions to include the following: [redacted]

[redacted].

11. Between [redacted], when the IEP team determined that the Student needed [redacted] and [redacted], the school continued to implement the Student's IEP, provided additional [redacted] and [redacted]. District [redacted] also observed the student in [redacted] school setting and provided additional suggestions to staff. However, during this time the Student was ill with a very serious illness that took a long time to diagnose. The illness caused the Student to miss [redacted] of the school days with full-day absences, during the [redacted] school year. In addition to the full-day absences, there were another [redacted] where [redacted] missed a portion of the school day. Given the significant amount of time that the Student was absent, late arriving and/or removed early from school by the parent, there was no [redacted] made under the [redacted].

12. The evidence demonstrated that during the [redacted] school year all IEPs, including the [redacted], IEP, established appropriate academic goals and objectives, documented the Student's [redacted] and set forth annual goals, as well as short-term objectives or benchmarks. All the

IEPs documented that the [redacted].

13. Under those IEPs, the Student was instructed in a [redacted] because the teacher observed that [redacted] was [redacted] in working towards goals with such instruction. Additionally, the student required support continuously throughout [redacted] school day. Despite such support, the Interim IEPs documented increasing behaviors to the point that self-injurious behavior increased from a [redacted]. [redacted] towards staff included [redacted].

14. In fact, [redacted].

15. The proposed [redacted] is an educational facility specially designed to meet the needs of students with [redacted]. The school includes [redacted] students and has a population of about [redacted]. The separate day school also has a [redacted]

[redacted]. The proposed class at the separate day school would consist of approximately [redacted]. The evidence demonstrated that the special day school would be able to implement the Student's IEP goals and [redacted], and would be an appropriate placement for the Student.

16. In fact, except for the April Interim IEP, the IEP team has consistently recommended a separate day school placement for the student based on the severity of [redacted] behaviors at each interim IEP meeting during the [redacted] school year. The Student's [redacted] has consistently refused such placement, in part, based on the fact that the student [redacted]. However, the evidence demonstrated that [redacted] at school is not unusual given the fact that the environment is [redacted] with more strangers, disruption, and demands. Further, the evidence did not demonstrate that the student emulates peers since [redacted] was the only student who manifested the severity of behavior in [redacted] classroom and specials during the [redacted] school year.

17. As noted above, the Student routinely required [redacted].

18. In this case, the better evidence demonstrated that the Student cannot be satisfactorily educated in the regular ESE classroom with the use of supplemental aids and services. Further, the Student has been mainstreamed by Petitioner to the maximum extent appropriate and placement in a special day school is necessary due to the Student's behavior. Given these facts, placement in the special day school is appropriate.

CONCLUSIONS OF LAW

19. 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).

20. 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).

21. 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).

22. 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).

23. 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).

24. "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).

25. 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).

26. 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:

> 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.

27. 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).[2/]

28. 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).

29. With the LRE directive, "Congress created a statutory preference for educating handicapped children with nonhandicapped children." Greer v. Rome City School Dist., 950 F.2d 688, 695 (11th Cir. 1991). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act, school districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs." Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

30. 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.

31. 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.

32. Here, the undisputed evidence establishes that the Student cannot be satisfactorily educated in the regular

classroom, with the use of supplemental aids and services. Moreover, there is no evidence that, subsequent to the ESE eligibility determination, the Student's [redacted] has sought for the Student to be educated in the regular classroom.

33. 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).

34. In the [redacted] school year, the student was removed from the regular education classroom to progressively more restrictive points on the placement continuum, to no avail. As discussed above in the Findings of Fact, due to the nature and

[redacted], [redacted] did not, or [redacted] an educational benefit from said placements. Additionally, [redacted] behaviors posed a significant health and safety risk to [redacted], and [redacted] impacted [redacted] classmates' ability to learn.

35. The majority of the Student's IEP team has opined (on multiple occasions), and Petitioner's witnesses uniformly testified, that FAPE cannot be provided to the Student absent a special day school setting. The undersigned is mindful that great deference should be paid to the educators 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.

36. The May IEP proposes a change of the Student's placement to the next point (in terms of escalating restrictiveness) on the continuum of possible placements. While it is undisputed that the proposed placement offers less potential for interaction with [redacted], the better evidence demonstrated that the Student's [redacted]

[redacted]. The 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 3rd day of October, 2016, in Tallahassee, Leon County, Florida.

S

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of October, 2016.

ENDNOTES

[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.

[2/] 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. 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).