STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 16-6309E

DUVAL COUNTY SCHOOL BOARD,

Respondent.
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DUVAL COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 16-6573EDM

**,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on July 31 through August 3, 2017, and August 24 through 25, 2017, in Jacksonville, Florida.

APPEARANCES

For Petitioner: Beverly Oviatt Brown, Esquire
Three Rivers Legal Services, Inc.
3225 University Boulevard South, Suite 220
Jacksonville, Florida 32216

For Respondent: Sonya Hoener, Esquire
Michael Wedner, Esquire
Office of General Counsel
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

STATEMENT OF THE ISSUES

Whether Respondent violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., and Section 504 of the Rehabilitation Act of 1973 (Section 504), as alleged in Petitioner's due process complaint; and whether the appropriate placement for Petitioner is a separate class placement, as proposed in the most recent individualized education plan (IEP).

PRELIMINARY STATEMENT

On October 26, 2016, Respondent School Board received Petitioner's due process complaint. The complaint was forwarded to DOAH on October 27, 2017, and assigned to the undersigned as DOAH Case No. 16-6309E. On November 1, 2016, Petitioner filed a Motion to Determine Stay Put. Respondent filed its opposition to the same on November 11, 2016.

On November 9, 2016, Respondent filed an expedited due process hearing to move the Student to an interim alternative education setting (IAES) during the pendency and completion of Case No. 16-6309E. Respondent's complaint was assigned to the undersigned as DOAH Case No. 16-6573EDM. The final hearing was scheduled in that matter for November 29 and 30, 2016.

On November 17, 2016, the School Board filed an unopposed motion to continue the final hearing date previously scheduled. The motion for continuance was granted on November 22, 2016, and the final hearing was rescheduled for December 1 and 2, 2016.

On November 28, 2016, a telephonic conference was conducted with the parties. The parties represented that they were actively engaged in the resolution process in DOAH Case Nos. 16-6309E and 16-6573EDM and requested that both matters be placed in abeyance to preserve resources and focus on resolution. On that same date, the undersigned issued an order placing the cases in abeyance. The cases were continued in abeyance, at the request of the parties, on January 4, 2017, and February 13, 2017.[1/]

On February 27, 2017, the undersigned conducted a telephonic status conference with the parties. During the conference the parties advised that the matters could not be resolved and requested the matters consolidated. On February 28, 2017, the matters were consolidated and scheduled for final hearing on April 10 through 13, 2017.

On March 22, 2017, the parties filed a joint motion for continuance of the final hearing date. Said motion was granted and the final hearing was rescheduled for May 9 through 12, 2017. On April 21, 2017, Respondent filed an emergency motion for continuing the final hearing. Respondent's motion was granted on

April 28, 2017, and the final hearing was rescheduled for May 31 through June 2, 2017.

On May 30, 2017, the parties filed an emergency joint motion for postponement of the hearing. Said motion was granted and the final hearing was again rescheduled for July 31 through August 3, 2017.

The final hearing was conducted as scheduled, however, the hearing was not concluded on August 3, 2017. Accordingly, the parties reconvened and the final hearing was further conducted on August 24 and 25, 2017. The final hearing Transcript was filed on September 14, 2017. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. At the conclusion of the hearings, the parties stipulated, based upon the anticipated completion of the Transcript, to submit proposed final orders on or before September 29, 2017, and that the undersigned would issue a final order on or before October 13, 2017.

On September 22, 2017, the parties filed an Agreed Joint Motion to Confirm Deadline for Proposed Final Orders. Said filing requested, due to the impact of Hurricane Irma, to extend the filing date for proposed final orders to October 4, 2017. Said motion was granted and the undersigned's deadline for issuing the final order was extended to October 18, 2017. The

parties filed proposed final orders, which have been considered in issuing this Final Order.[2/]

Unless otherwise indicated all rule and statutory references are to the version in effect at the time of the alleged violations. For stylistic convenience, the undersigned will use [redacted] pronouns in the Final Order when referring to Petitioner. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. Petitioner is currently [redacted] years old. When [redacted] was [redacted] years old, due to behavioral issues, [redacted] was referred to [redacted] ([redacted]) for counseling services. While at [redacted], [redacted] received counseling services and was diagnosed with [redacted] ([redacted]) and [redacted] ([redacted]). Petitioner voluntarily attended [redacted] at [redacted]. During that time, [redacted] was on several medications related to [redacted] [redacted] and [redacted]. [redacted]

2. For [redacted] [redacted] year (2015-2016 school year), Petitioner was enrolled in School A, a public elementary school in Duval County. Just prior to the first day of school, Petitioner's mother admitted [redacted] to the [redacted] due to an increase in aggressive behavior against [redacted]. [redacted] remained in the facility from August 21 through 23, 2015, and, therefore, missed the first day of school. During the course of [redacted]

admission, [redacted] received a diagnosis of [redacted] ([redacted]), and [redacted] medications were changed.

3. Petitioner's mother engaged in some discussions with the staff and administrators at School A prior to or at the beginning of the 2015-2016 school year concerning Petitioner's history and diagnoses. Exactly what information was provided by Petitioner's mother is vague; however, it appears undisputed that [redacted] informed School A that Petitioner had been recently hospitalized and that [redacted] had a diagnosis of [redacted].

4. On August 25, 2015, Petitioner's mother met with [redacted], School A's guidance counselor. During that meeting Petitioner's mother "talked about [[redacted]] [redacted] and other things [redacted] believes [[redacted]] may be diagnosed with." At that time, Petitioner's mother requested that School A provide [redacted] [redacted] with an IEP—thus, requesting exceptional student education (ESE) services for Petitioner. During that meeting [redacted] "explained the RTI process to her and gave [redacted] a copy of the parent brochure."[3/] On the same date, [redacted] advised Petitioner's teacher, [redacted], of the meeting via email and noted that "we will be starting some type of process on [[redacted]]." [redacted] advised that [redacted] had only been in class one day and that [redacted] had not noticed anything to document, and requested further instruction. [redacted] thereafter kept an anecdotal log in which [redacted] "ended up logging mostly problem behaviors."

5. On August 31, 2015, [redacted] emailed [redacted], a guidance counselor at School A, and noted the following:

> I met with [the Student's] mom today after school. [redacted] does have [redacted] and is on 2 medications for that. [redacted] has been told before that [redacted] had [redacted] but this past weekend the hospital said they didn't think it was [redacted]. They told mom that [redacted] had [redacted]. [redacted] has an appointment with a psychiatrist in 3 weeks. [redacted] will also be going to the [redacted] for further evaluation. I am keeping a record of the problem behaviors.

6. On August 31, 2015, Petitioner was referred by [redacted] to [redacted]. After receiving consent from Petitioner's mother on September 8, 2015, [redacted] provided several Simon Says videos to Petitioner over the course of the month regarding keeping [redacted] hands to [redacted]. [redacted] also did daily "check-ins" with Petitioner in the morning.

7. In response to Petitioner's mothers' request for an IEP, on September 14, 2015, a Multi-Disciplinary Referral Team (MRT) meeting was held at School A. By the time of this meeting, [redacted]'s log had documented multiple behavioral episodes including hitting a [redacted]; fighting/pinching a [redacted] and making [redacted] cry; scratching and squeezing a [redacted] cheek; not keeping hands to self; playing rough on playground; punching people in their chest; leaving time out to push the same child again; hitting a [redacted] with a toy; locking [redacted] in the bathroom when teacher

calls for assistance; minor property destruction; and inappropriate noises.

8. Documentation from the MRT meeting reflects that [redacted] believed Petitioner to be a bright child who sometimes has difficulty keeping [redacted] hands to [redacted], had good days and bad days, was often off task, and could be aggressive. Ultimately, the MRT team issued a written Notice of Refusal to Take a Specific Action (NOR), wherein it was documented the school-based team members believed that no further evaluation was warranted; however, further intervention and behavior plans needed to be implemented. The NOR further documented the option of considering a Section 504 plan, if needed.[4/]

9. One of Respondent's school psychologists, [redacted], credibly testified that further evaluation was denied, at that time, because, "we thought that being that it was so new in the school year, we would give [redacted] time." Specifically, Respondent needed time to observe and collect data concerning Petitioner's behavior. Additionally, Respondent understandably needed time to determine whether Petitioner's behavior was simply a byproduct of being a new student and adapting to the structure and environment found in [redacted].

10. On October 1, 2015, a behavior intervention documentation sheet was created for Petitioner. The desired replacement behavior noted as "remov[ing] [redacted] from the

whole group setting to a designated cool down area in the general education classroom when verbally prompted by [redacted]." The document provided long and short-term goals. Pursuant to the document, [redacted] was responsible for implementing the intervention plan. The desired replacement behavior was to be taught by verbal reminders of behavioral expectations and demonstration of the cool-down area. Prevention strategies included preferential seating and proximity control. The interventions were to be utilized during the daily morning whole group lesson, and [redacted] was to keep an anecdotal log to monitor [redacted] progress.

11. Following the MRT meeting and the behavior intervention sheet, Petitioner's maladaptive behaviors continued. The following excerpts from [redacted]'s log from September 15 through December 4, 2015, are a representative sample: slapped a [redacted] face in line for dismissal then slapped the back of [redacted] head so hard that it went forward; grabbed [redacted] arm and snatched a game piece out of [redacted] hand——hurt [redacted] and made [redacted] cry—— punched same [redacted] in nose later on carpet during group time; kicking and punching [redacted] in back on carpet; hit [redacted] in nose with [redacted] ice pack at lunch; punched [redacted] on playground; hit [redacted] in cafeteria at table; hit [redacted] and kicked when [redacted] walked past [redacted]; spitting on a [redacted]; hurting others; needed assistance from office—throwing chairs, spinning scissors; hurting others and

disruptive noises; tickling [redacted] down the back of [redacted] pants inside [redacted] panties; kicked a [redacted]; rammed [redacted] head into the [redacted] chest so hard it made the [redacted] cry; hit [redacted] in head with scissors; elbowed [redacted] in [redacted] side and made [redacted] cry; kicked [redacted] when sitting on carpet; and threw sand on [redacted] face on playground.[5/]

12. During this time, Respondent was implementing the strategies and interventions set forth in the behavior intervention documentation sheet, and utilizing the typical behavior plan for a regular education classroom. Petitioner would also see [redacted] for assistance with coping strategies. It is undisputed that the interventions and strategies being utilized at this time produced very limited success. Indeed, during a progress review of the behavior intervention documentation sheet conducted on November 13, 2015, it was noted that the behavioral interventions continued "to be ineffective in changing [Petitioner's] behavior." Accordingly, additional interventions were to be developed and implemented on that date.

13. On December 7, 2015, based upon a request from Petitioner's father, a Referral/Request for Services meeting was held.[6/] The meeting form indicates that the reasons for the father's referral/request for services were social/behavioral difficulties, and attention difficulties. The school-based members of the Multidisciplinary Team noted that Petitioner was

"on medication for [redacted]," and that "[redacted] can refuse to comply with school rules and be aggressive with other [sic]." Notwithstanding, the team determined that appropriate general education interventions had been implemented, screenings and observations completed, and that evaluation was not recommended. The team did, however, agree to "start FBA and BIP."[7/]

14. Over two months later, on February 11, 2016, [redacted] started utilizing a different behavior tracking sheet to monitor three targeted behaviors: keeping hands and feet to self, disruptive, and hurting others. On April 1, 2016, based on the data collected by [redacted] from February 11 through March 8, 2016, [redacted] created a FBA, wherein [redacted] hypothesized that Petitioner's targeted behaviors were to avoid non-preferred tasks. From the record evidence, it does not appear that a new BIP was created at that time.

15. Petitioner's behaviors continued throughout the spring semester of 2016. In January 2016, [redacted] received disciplinary referrals for punching a student in the face, throwing sand in one student's eye and slapping another, and punching a student in the stomach. In February 2016, [redacted] received disciplinary referrals for hitting a student in the hand with a puzzle piece and jerking another student out of [redacted] chair; hitting and punching a student in the head and stomach; and hitting a student in the face and stomach and splitting [redacted] lip for not "following

[redacted] jacket rules." In March 2016, Petitioner received disciplinary referrals for scratching three [redacted] in the face and hitting a fourth [redacted] in the lip; and head butting a student for trying to sit in the adjacent seat.

16. On April 4, 2016, another Referral/Request for Services meeting was conducted. On this occasion, the referring person or agency was [redacted] and the documented reason for the referral was social/behavior difficulties. The team reviewed the social/developmental data and discussed the current interventions. It was noted that Petitioner was currently receiving tiered intervention for behavior and had a FBA and BIP. It was further noted that Petitioner has "[d]ifficulty staying on task and accepting redirection," and that [redacted] "is aggressive toward other students and does not cooperate with adult direction." Again, the form from the meeting documents that the team determined that evaluation was not recommended.

17. Incongruously, at the April 4, 2016, meeting, Petitioner's parents executed an Informed Notice/Consent for Evaluation.[8/] This form provides that the MRT "requests your consent to review information and/or to conduct the following evaluation(s)": [redacted] Evaluation, [redacted] Evaluation, [redacted] Evaluation, [redacted] Observation(s), [redacted] Checklist, Functional Behavior Assessment, [redacted] Evaluation, [redacted] Evaluation, [redacted] History, and [redacted].[9/]

18. Thereafter, [redacted], a licensed school social worker, conducted a social history concerning Petitioner vis-à-vis parental interviews on May 12 and June 1, 2016. [redacted] authored [redacted] report on June 14, 2016.

19. Following the April 4, 2016, MRT meeting, due to [redacted] behavioral difficulties, the MRT team referred Petitioner to [redacted] to conduct a [redacted] evaluation. [redacted] administered the [redacted] ([redacted]) to Petitioner on May 12, 2016. The [redacted] [redacted] is a wide-range, comprehensive set of individually administered tests used to measure academic skills. On May 27, 2016, the [redacted], [redacted] ([redacted]) was administered. The [redacted] is a semi-structured, standardized observation instrument used to assess social and communication behaviors of individuals suspected of having [redacted] or a disorder in the [redacted].

20. As part of the evaluation, [redacted] also conducted observations of Petitioner in the classroom and cafeteria setting; and Petitioner's parents were asked to complete the [redacted] ([redacted]). The [redacted] is an integrated system designed to facilitate the differential diagnosis and classification of a variety of [redacted] and [redacted] disorders of children and to aid in the design of treatment plans. [redacted]'s report was finalized on June 13, 2016.

21. [redacted]'s summary and recommendations, in pertinent part, noted that [redacted] cognitive ability was within the [redacted] range, [redacted] reading skills within the [redacted] range, and [redacted] math skills within the [redacted]. [redacted] further concluded that the testing to address the possible presence of [redacted] was variable. Additionally, [redacted] concluded that testing to address concerns related to [redacted] emotional/behavior development indicated the presence of a [redacted]. Among other recommendations, [redacted] opined that Petitioner may benefit from a lower student-teacher ratio, as well as differentiated instruction.

22. Following the April 5, 2016, MRT meeting, Petitioner's behaviors remained consistently disruptive and aggressive. In April 2016, [redacted] received disciplinary referrals for hitting a student with a toy, after previously hitting the same student in the stomach; poking two students with a pencil; making disruptive noises; calling children's names and silly or nasty words; and engaging in property destruction.

23. May 2016 brought additional maladaptive behaviors. On May 9, 2016, Petitioner was disciplined for banging [redacted] chair loudly on the floor after being redirected, hitting tables with a 2 x 4 block, throwing chairs, and throwing a tray at [redacted] and plates at the computer screen. Such were [redacted] behaviors that, on May 10, 2016, [redacted] authored the following email to Principal [redacted]:

> Please be advised that [Petitioner's] behavior is such that the other children in this class are at risk of injury. Please accept this as a formal request for immediate corrective action to protect our children and this child. A special needs provision needs to be made immediately.

24. [redacted] could not identify the triggers for Petitioner's behaviors. Concerned for [redacted] wellbeing and that of the other students, on June 6, 2016, [redacted] again emailed Principal [redacted] and provided as follows:

> I am writing to let you know that I refuse to have [Petitioner] in my class for the rest of the school year. [redacted] is very disruptive and constantly threatening and hurting other children and me. It is not a safe learning environment with [Petitioner] in my classroom. For the safety and protection of the students and myself I am requesting that [redacted] not be allowed back in my class.

25. In [redacted] 28 years of teaching, [redacted] has never requested another student to be precluded from attending [redacted] class. [redacted]'s request was denied, and for the final week of school Petitioner's parents kept [redacted] at home.

26. Notwithstanding [redacted] behavioral issues, Petitioner did well academically in [redacted] and was willing to complete work except during those occasions when [redacted] was having behavioral outbursts. [redacted] earned [redacted] ([redacted]) in language arts and mathematics throughout the year, but earned [redacted] ([redacted]) in social growth and development. Petitioner was promoted to [redacted] grade.

[redacted] Grade

27. For the 2016-2017 school year, Petitioner was assigned to [redacted]'s general education class. Before the first day of class, Principal [redacted], [redacted], Ph.D. (an instructional program supporter for Respondent), and [redacted] met to have a plan in place for Petitioner's behavior. The plan included positive reinforcement sheets, trying to keep [redacted] on track, and providing positive rewards for staying on task.

28. [redacted] met with the parents during pre-planning to discuss possible interventions for [redacted] grade. [redacted] also conducted two intervention modeling sessions on August 15 and 16, 2016, for [redacted] teacher and school counselor. Those interventions included check-in and check-out with the teacher, as well as break (alone-time) cards.[10/]

29. Despite these interventions, Petitioner continued to demonstrate lack of compliance and aggression. As early as August 24, 2016, Petitioner was wandering around the classroom hitting students and [redacted] with a headphone cord. Ultimately, Principal [redacted] was called to the room. Despite [redacted] efforts to calm [redacted], [redacted] would not comply, and Principal [redacted] picked [redacted] up and carried [redacted] out of the room. Petitioner received two more disciplinary referrals in August 2016 resulting in four days of out-of-school suspension.

30. On September 6, 2016, Petitioner's behavior escalated significantly. On this date, [redacted] aggressive behaviors and [redacted] level of property destructions rose to such a level, that after all reasonable efforts had been made to calm [redacted], a decision was made to contact Respondent's Crisis Hotline. The Crisis team then accessed Petitioner and made the determination that Petitioner needed to be Baker Acted. The Crisis team then contacted the [redacted], and Petitioner was committed under the Baker Act for several days.

31. On the heels of this incident, on September 12, 2016, a meeting was held to review evaluation information, determine eligibility, and develop an IEP. On this date, Petitioner was found eligible for ESE services as a student with an [redacted] ([redacted]), as well as [redacted].

32. Pursuant to the IEP, Petitioner remained placed at School A in a regular class, with social skills instruction (three times per week) and differentiated curriculum (once per week) occurring in an ESE resource classroom. Additionally, [redacted] was to be transported once per week to the [redacted] school, School B.[11/]

33. The IEP provided appropriate goals, services, and accommodations. Petitioner's parents were able to meaningfully participate in the formulation of the IEP, and the IEP was not the product of predetermination by Respondent. On September 12,

2016, Petitioner's parent also provided consent to reevaluate Petitioner for consideration for other programs.

34. On September 29, 2016, the IEP team reconvened for the purposes of completing a FBA and BIP. Petitioner's parent was in attendance and provided consent for the same. In essence, the FBA hypothesized that the function or purpose of Petitioner's targeted behaviors was to obtain attention or control and to avoid or escape. The BIP set forth replacement behaviors, identified positive reinforcements, and provided suggested intervention strategies.

35. Despite the interventions and behavioral strategies as set forth in the IEP and BIP, throughout September and October 2016, Petitioner continued to exhibit maladaptive behaviors similar to those described previously. On October 17, 2016, the IEP team reconvened to discuss Petitioner's potential eligibility for [redacted] ([redacted]) and for an additional eligibility category, [redacted] ([redacted]). The IEP team concluded that [redacted] was not eligible for [redacted]; however, [redacted] did meet the requirements for [redacted] eligibility.

36. Significantly, the school-based members of the IEP team, ultimately recommended changing Petitioner's placement from a general education classroom to a separate class placement, wherein Petitioner would spend less than 40 percent of [redacted] day with non-ESE students. Respondent credibly testified that the

rationale for the same was that Petitioner requires additional services in the area of behavior with a social worker, anger management, de-escalation support, and smaller student-to-teacher ratio. Respondent recommended that Petitioner attend a self-contained setting (behavior support setting) in School C, a public school in Duval County, Florida.

37. Petitioner objected to this placement and requested that [redacted] remain in a general education classroom with the support of a 1:1 paraprofessional assigned to Petitioner and behavior intervention support. Petitioner further objected to the continued eligibility category of [redacted]. On October 17, 2016, Respondent issued a written Notice of Refusal addressing those points of contention.

38. [redacted] was the principal at School C for all times pertinent to this matter. [redacted] credibly explained two potential programs for Petitioner at School C. Specifically, the behavior support program is designed to support the student with their behavioral needs while still providing an academically rich environment. This program addresses social skills of the student embedded in academics; the students have individualized behavior plans; the class size is smaller——usually 6 to 9 students in a classroom; and there is always at least two adults in the classroom. The behavior support program schedule provides for students to take breaks and earn different rewards and incentives.

Additionally, it provides a calming room or “boring room,” wherein a student may be transported when demonstrating physically aggressive, high magnitude behaviors. A “chill-out” room (this is actually adjacent to class with no door) is also provided whereby the student is taught to identify their feelings and use the room to take a break before coming back to instruction or task at hand. This program utilizes staff trained in de-escalation and behavioral strategies, with a behavioral interventionist onsite that is available to the classroom.

39. School C also has what is known as the [redacted] program. This program is designed for more severe behavior. The class size is typically 6 to 8 students, there is a social worker or therapist to work with the student, with therapy designed to meet the student’s individual needs. Additionally, the [redacted] program possesses a behavioral interventionist or site coach.

40. The focus of both programs is to provide the student necessary support to ultimately transition from the separate class setting back into a general education setting. There are [redacted] students in both programs and the [redacted] students have access to the [redacted] curriculum and support.

41. After the October 17, 2016, IEP, Petitioner last attended School A on October 19, 2016. Petitioner’s due process complaint was filed on October 24, 2016. On November 9, 2016, Respondent School Board filed its expedited due process hearing

to move Petitioner to an IAES during the pendency and completion of Petitioner's due process complaint.

CONCLUSIONS OF LAW

42. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 1003.57(1)(b) and 1003.5715(5), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

43. 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).

44. 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).

45. The IDEA contains "an affirmative obligation of every [local] public school system to identify students who might be disabled and evaluate those students to determine whether they are indeed eligible." L.C. V. Tuscaloosa Cnty. Bd. of Educ., 2016 U.S. Dist. LEXIS 52059 at *12 (N.D. Ala. 2016) quoting N.G. v. D.C., 556 F. Supp. 2d 11, 16 (D.D.C. 2008)(citing 20 U.S.C. § 1412(a)(3)(A)). This obligation is referred to as "Child Find," and a local school system's "[f]ailure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." Id. Thus, each state must put policies and procedures in place to ensure that all children with disabilities residing in the state, regardless of the severity of their disability, and who need special education and related services, are identified, located, and evaluated. 34 C.F.R. § 300.111(a).

46. Florida Administrative Code Rule 6A-6.0331 sets forth the school districts responsibilities regarding students suspected of having a disability. This rule provides that school districts have the responsibility to ensure that students suspected of having a disability are subject to general education intervention procedures. As an initial matter, the school district has the "responsibility to develop and implement a muti-tiered system of support ("MTSS") which integrates a continuum of

academic and behavioral interventions for students who need additional support to succeed in the general education environment." Fla. Admin. Code R. 6A-6.0331(1).

47. The general education intervention requirements include parental involvement, observations of the student, review of existing data, vision and hearing screenings, and evidence-based interventions. Fla. Admin. Code R. 6A-6.0331(1)(a)-(e). Rule 6A-6.0331(1)(f) cautions, however, that nothing in this section should be construed to either limit or create a right to FAPE or to delay appropriate evaluations of a student suspected of having a disability.

48. Rule 6A-6.0331(2)(a) then sets forth a non-exhaustive set of circumstances which would indicate to a school district that a student may be a student with a disability who needs special education and related services. As applicable to this case, those circumstances include the following:

> 1. When a school-based team determines that the kindergarten through grade 12 student's response to intervention data indicate that intensive interventions implemented in accordance with subsection (1) of this rule are effective but require a level of intensity and resources to sustain growth or performance that is beyond that which is accessible through general education resources; or
>
> 2. When a school-based team determines that the kindergarten through grade 12 student's response to interventions implemented in accordance with subsection (1) of this rule

> indicates that the student does not make adequate growth given effective core instruction and intensive, individualized, evidence-based interventions; . . .

49. As was done in this case, a parent may also initiate a request for initial evaluation to determine if the student is a student with a disability. Fla. Admin. Code R. 6A-6.0331(3)(a)4. and 6A-6.03018(3)(a)2. Thereafter, the school district is mandated to obtain consent for the evaluation or provide the parent with a written NOR. Fla. Admin. Code R. 6A-6.0331(3)(c). After receiving consent, the school district must complete the initial evaluation within 60 calendar days. Fla. Admin. Code R. 6A-6.0331(g).

50. Rule 6A-6.0331(3)(e) sets forth the requisite qualifications of those conducting the necessary evaluations and rule 6A-6.0331(5) sets forth the procedures for conducting the evaluations. In conducting the evaluation, the school district "must not use any single measure or assessment as the sole criterion for determining whether a student is eligible for ESE." Fla. Admin. Code R. 6A-6.0331(5)(a)(2). To the contrary, the school district "must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student." Fla. Admin. Code R. 6A-6.0331(5)(a)(1). The student shall be assessed in "all areas related to a suspected disability" and an evaluation "shall be

sufficiently comprehensive to identify all of a student's ESE needs, whether or not commonly linked to the suspected disability." Fla. Admin. Code R. 6A-6.0331(5)(f),(g).

51. Here, Petitioner's parents requested "an IEP," which the undersigned construes as a request for an initial evaluation to determine if Petitioner was a student with a disability, on or about August 25, 2015. On September 14, 2015, Respondent timely conducted a MRT meeting and issued a written NOR. By this time, it had been reported to Respondent that: (1) Petitioner had several diagnoses including [redacted], [redacted], and [redacted]; (2) [redacted] had been recently hospitalized; and (3) [redacted] was seeking future evaluation and treatment from a psychiatrist and evaluation from an [redacted] center. Additionally, [redacted] teacher had documented numerous aggressive behavioral incidents.

52. Respondent's September 14, 2015, NOR was, however, reasonable given that Petitioner was just beginning [redacted] year and Respondent had not had sufficient time to implement a muti-tiered system of support and to determine whether the interventions were effective.

53. The undersigned concludes, however, that on December 7, 2015, at the second MRT meeting requested by Petitioner's parents, Respondent failed to satisfy its affirmative obligation to properly identify and evaluate Petitioner as a potential student with a disability. By this time, Respondent had clear

and sufficient data to indicate that Petitioner, in response to the attempted interventions, was not making adequate growth with respect to [redacted] behavior (which impacts [redacted] learning and that of others) and that effective interventions would require a level of intensity and resources beyond that accessible through general education resources. No rational justification was presented by Respondent for deciding not to properly evaluate [redacted] at this point.

54. Respondent's completion of a FBA on April 1, 2016, was untimely and inadequate to satisfy its obligations as set forth immediately above. Accordingly, Respondent's failure to timely and adequately evaluate Petitioner following the December 7, 2015, MRT meeting constitutes a denial of FAPE. Assuming, arguendo, Respondent had properly completed its evaluations, and conducted an IEP meeting by April 1, 2016, Respondent's failure resulted in an approximate six month delay in determining Petitioner's proper ESE eligibility and placement whereby [redacted] could receive the appropriate mix of supports and services that [redacted] desperately needs.[12/]

55. 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).

56. 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).

57. "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).

58. 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).

59. The IDEA further provides that, in developing each child's IEP, the IEP team must, "[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(emphasis added).

60. In Rowley, 458 U.S. 176 (1982), the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. As an initial matter, it is necessary to examine whether the school

system has complied with the IDEA's procedural requirements. Rowley, 458 U.S. at 206-207. A procedural error does not automatically result in a denial of FAPE. See G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to a free appropriate public education, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. Winkelman v. Parma City Sch. Dist., 550 U.S. 5-16, 525-26 (2007).

61. Here, in addition to failing to timely evaluate Petitioner, which was addressed above, Petitioner contends that the IEP team predetermined Petitioner’s placement at the October 17, 2016, meeting. The IDEA requires that each public agency must ensure that a parent of a child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. 34 C.F.R. § 300.501(c). Predetermination occurs when district members of the IEP team unilaterally decide a student's placement in advance of an IEP meeting. Here, Petitioner failed to present sufficient evidence to support such a claim. To the contrary, the evidence establishes that Respondent utilized a facilitated IEP meeting model that provided Petitioner's parents with a meaningful opportunity to participate in the placement decision.

62. Pursuant to the second step of the Rowley test, it must be determined if the IEP developed pursuant to the IDEA is reasonably calculated to enable the child to receive "educational benefits." 458 U.S. at 206-07. (1982). The Eleventh Circuit Court of Appeals has clarified that the IDEA does not require the local school system to maximize a child's potential; rather, the educational services need provide "only a 'basic floor of opportunity,' i.e., education which confers some benefit." Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991); C.P. v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1153 (11th Cir. 2007)("This standard, that the local school system must provide the child 'some educational benefit,' has become known as the Rowley 'basic floor of opportunity standard.'")(internal citations omitted); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001)("[A] student is only entitled to some educational benefit; the benefit need not be maximized to be adequate."); see also Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1313 (10th Cir. 2008)("[W]e apply the 'some benefit' standard the Supreme Court adopted in Rowley.").[13/]

63. The assessment of an IEP's substantive propriety is guided by several principles, the first of which is that it must be analyzed in light of circumstances as they existed at the time of the IEP's formulation; in other words, an IEP is not to be judged in hindsight. M.B. v. Hamilton Se. Sch., 668 F.3d 851,

863 (7th Cir. 2011)(holding that an IEP can only be evaluated by examining what was objectively reasonable at the time of its creation); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990)("An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."). Second, an assessment of an IEP must be limited to the terms of the document itself. Knable v. Bexley Cty. Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001); Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1315-16 (8th Cir. 2008)(holding that an IEP must be evaluated as written). Third, great deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See A.K. v. Gwinnett Cnty. v. 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 R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989), "[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."

64. Petitioner advances several substantive complaints. First, Petitioner contends that Respondent failed to implement an

appropriate BIP to address [redacted] needs. The undersigned disagrees. As noted above, in creating an appropriate IEP for Petitioner, Respondent was obligated to consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. Although not part of the IEP process, beginning in October 2015, Respondent considered and began implementing a BIP. While the interventions, supports, and strategies utilized were not successful in controlling or mitigating Petitioner's targeted behaviors, the evidence does not support the conclusion that the same was the result of inappropriate drafting or implementation on behalf of Respondent. Accordingly, this substantive claim fails.

65. Second, Petitioner contends that the proposed placement of Petitioner in a separate class is not the student's least restrictive environment (LRE). The IDEA provides 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.

66. 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 the LRE and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

67. 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).

68. 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 at 1044.

69. In Daniel, the Fifth Circuit set forth a two-part test for determining compliance with the mainstreaming requirement:

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. See § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school
>
> has mainstreamed the child to the maximum extent appropriate.

Daniel, 874 F.2d at 1048.

70. 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.

71. Against the above legal framework, we turn to Petitioner's placement claim. The evidence in this case clearly establishes that, upon consideration of the above noted factors, Respondent cannot satisfactorily educate Petitioner in the regular classroom setting. The benefits Petitioner would receive in a separate class placement greatly outweigh the benefits that [redacted] would receive in a general education classroom. Primarily, Petitioner's access to a lower student-to-teacher ratio and focused behavior support from trained personnel is paramount. Petitioner's aggressive behavior throughout [redacted] tenure at School A, in a regular education class, has resulted in numerous acts of aggression and injury to [redacted] fellow classmates and has resulted in those students being repeatedly evacuated from the classroom. No evidence was presented concerning cost considerations.

72. As Petitioner cannot presently be educated in a regular classroom, the analysis turns to whether Petitioner 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).

73. The October 17, 2016, IEP proposes a change of Petitioner's placement from a regular class to a separate class placement. While it is unassailable that Petitioner's formalized BIP had only been implemented for a matter of days prior to the proposed change in placement, Petitioner's behaviors continued to pose a danger to [redacted] and others. The undersigned concludes

that Respondent's proposed placement of Petitioner in a separate class mainstreams Petitioner to the maximum extent appropriate.

74. Petitioner's complaint appears to further contend that Respondent's utilization of restraints, on several occasions, was improper. Ostensibly, Petitioner is contending that the same were inappropriate approaches by Respondent in fulfilling their mandate to consider the use of positive behavioral interventions and supports, when drafting an IEP and BIP. State law and regulations generally determine the legality of using aversives, such as restraint and seclusion. In Florida, the use of restraint and seclusion on students with disabilities is addressed in section 1003.573, Florida Statutes. This section provides, in pertinent part as follows:

> (4) PROHIBITED RESTRAINT.--School personnel may not use a mechanical restraint or a manual or physical restrain that restricts a student's breathing.
>
> (5) SECLUSION.--School personnel may not close, lock, or physically block a student in a room that is unlit and does not meet the rules of the State Fire Marshal for seclusion time-out rooms.

75. Section 1003.573 does not define the term restraint. The U.S. Department of Education, however, has provided the following definition of physical and mechanical restraint:

> [A physical restraint is defined as a] personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely.

> The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location.
>
> [A mechanical restraint is defined as] the use of any device or equipment to restrict a student's freedom of movement. This term does not include devices implemented by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed.

Restraint and Seclusion: Resource Document (U.S. Dept. of Ed. 2012).

76. It is undisputed that, on several occasions during Petitioner's enrollment at School A, [redacted] was restrained. Petitioner failed to present any evidence, however, that Petitioner's utilization of restraint was violative of section 1003.573(4) and (5). Accordingly, such claims are dismissed.

77. The balance of Petitioner's claims as asserted in the due process complaint are not supported by the evidence, and, therefore, are denied.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

Respondent failed to timely locate and evaluate a potentially disabled child, Petitioner, resulting in a denial of FAPE.

Petitioner is a prevailing party and entitled to reasonable attorneys' fees consistent with Florida Administrative Code Rule 6A-6.0331(x).

Petitioner's request for compensatory education is denied, as the evidence presented fails to sufficiently set forth a nexus between Respondent's child find violation and Petitioner's behavioral and educational impediments.

The balance of Petitioner's claims fail as a matter of fact or law, and are therefore dismissed.

Respondent's proposed placement of a separate class placement is approved.

DONE AND ORDERED this 18th day of October, 2017, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675

Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of October, 2017.

ENDNOTES

[1/] The parties stipulated that Respondent's expedited due process complaint requesting placement in an IAES should be treated as a counter petition for determining whether an appropriate program and placement for Petitioner is the self-contained behavioral unit at School C.

[2/] On May 25, 2017, the parties filed a Joint Pre-Hearing Stipulation, which set forth a statement of the specific issues that remained to be determined at final hearing and a concise statement of facts which were admitted and required no additional proof at hearing. To the extent relevant, said facts are incorporated into this Final Order.

[3/] RTI is an abbreviation for response to intervention.

[4/] It is undisputed that a Section 504 plan was never drafted for Petitioner.

[5/] Petitioner received three disciplinary referrals in the fall of 2015. All three were for violence directed towards his fellow classmates.

[6/] It is unclear from the record when Petitioner's father made the request for ESE services.

[7/] FBA is an abbreviation for functional behavior assessment. BIP is an abbreviation for behavior intervention plan.

[8/] The printed date on the form was December 7, 2015 (the date of the last MRT meeting where the MRT team recommended no evaluations).

[9/] On February 9, 2016, to assist in determining whether Petitioner was eligible for [redacted], the [redacted] ([redacted]) was administered by [redacted]. The [redacted] is an individually administered, comprehensive instrument for measuring the intelligence of children aged [redacted] years [redacted] months through [redacted] years [redacted] months.

[10/] Check-in consisted of [redacted] teacher stating an expectation, asking [redacted] what [redacted] needs to do, and having [redacted] repeat it back.

[11/] Petitioner attended School B on two occasions. [redacted] engaged in the same behaviors while at School B, resulting in [redacted] parents picking [redacted] up early from school.

[12/] As the undersigned concludes that Respondent failed to timely satisfy its Child Find obligation pursuant to the IDEA, the undersigned need not address whether Respondent failed to satisfy its Child Find obligation under Section 504. It is, however, undisputed that Respondent did not conduct a separate Section 504 evaluation or create a separate Section 504 plan for Petitioner.

[13/] On March 22, 2017 (after the instant due process complaints were filed), the United States Supreme Court readdressed this prong, finding that a school board must offer an IEP that is reasonably calculated to enable a student to make progress in light of the student's circumstances. Endrew F. v. Douglas Cnty. Sch. Bd., 137 S. Ct. 988, 991 (2017). Given that this is a substantive change to the legal standard, it is not applicable to the instant cases. Assuming, arguendo, that it is applicable, application of the Endrew standard would not alter the outcome in this matter.

COPIES FURNISHED:

Beverly Oviatt Brown, Esquire
Three Rivers Legal Services, Inc.
Suite 220
3225 University Boulevard South
Jacksonville, Florida 32216
(eServed)

Michael B. Wedner, Esquire
Office of General Counsel
Suite 480
117 West Duval Street

Jacksonville, Florida 32202
(eServed)

Leanne Grillot
Department of Education
325 West Gaines Street
Tallahassee, Florida 32317
(eServed)

Sonya Hoener, Esquire
Office of General Counsel
Suite 480
117 West Duval Street
Jacksonville, Florida 32202
(eServed)

Matthew Mears, General Counsel
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400
(eServed)

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).