

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

ORANGE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 22-2311EDM

**,

Respondent.

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”), via Zoom conference on August 18, 2022.

APPEARANCES

For Petitioner: Sarah Wallerstein Koren, Esquire
Orange County School Board
445 West Amelia Street
Orlando, Florida 32801

For Respondent: No appearance

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 a day school for students with behavioral needs, is the least restrictive environment (“LRE”) for the student.

PRELIMINARY STATEMENT

The Orange County School Board (“School Board”) filed a request for an expedited due process hearing (“Due Process Complaint”) on [REDACTED], 2022.

The student's behaviors were extremely intensive in comparison to other students.

4. Documented maladaptive behaviors included numerous occurrences of physical violence and threats of physical violence against peers; non-consensual touching and threats of sexual violence against peers; verbal and physical sexual harassment of peers; and a threat on social media that he might "shoot up the school."

5. To address the student's behaviors, a variety of interventions were proposed and implemented through both the IEP and disciplinary processes.

6. Due to an initial escalation of behaviors, the IEP team reconvened on [REDACTED], 2021. The IEP team added additional supports to the IEP, including additional support of district behavior coach, [REDACTED]. In the same meeting, the IEP team noted that the student's behaviors negatively impacted his learning and that a supervision plan would be necessary to ensure the safety of the student and others, including arranging the student's transitions to occur outside of the regular schedule when other students would be in the hallways.

7. Further, the IEP team included specialized instructional services to address the student's academic and behavioral needs. The student also received [REDACTED] per week.

8. Following another increase in consistent maladaptive behaviors, the IEP team reconvened on [REDACTED], 2021, to put a new Behavior Intervention Plan ("BIP") in place.

9. The BIP identified behaviors, targets for reduction, and supports to reduce the behaviors documented, as follows in the IEP notes:

The behaviors to be reduced include inappropriate topics and gestures, as well as inappropriate touch. At this time, [the student] will not have use of hallway restrooms and must use 1 person/individual stall restrooms in one of the offices or media center with adult escort to and from. He is to ride only an [REDACTED] bus to and from

school, with any after school activities pre arranged by the parent. This supervision plan is due to the nature and severity of behaviors that [the student] exhibits, as they have caused multiple [REDACTED] students to feel threatened or uncomfortable when in proximity to [the student]. Furthermore, he has physically harmed [REDACTED] peers while on campus during less structured times.

10. The IEP team convened with the parent on [REDACTED], 2022, to address continued academic and behavioral concerns. The IEP meeting notes state:

[The student] has a grade of [REDACTED] or less in every class with the exception of social skills. ... [T]his is a sharp decrease in performance compared to [the student's] [REDACTED] grade year at [previous school]. ... [U]nless those grades improve dramatically he is likely to require [REDACTED] school.

[B]ehavioral data taken after implementing the BIP shows that behaviors that were previously occurring at transition times are now happening in the classroom. ... [B]ehaviors are mitigated by changes to [the student's] plan, but only for a short while. ... [The student] still needs constant supervision especially in any movement in the classroom to assist in maintaining personal space and safety of himself and others. He requires constant supervision in all areas of the school and classroom, no access to unsupervised time with peers which includes larger groups before school, during large lunchroom times, transitions, and/or after school. He requires constant prompts and limits to what topics, language, tones, and proximity that is appropriate to these areas. These interventions have also now extended to just within the classroom periods as well.

The team discussed what is needed for [the student] to be successful academically, make progress on goals and bridge learning gaps. The data showed that he is only completing work [REDACTED] of the time, and completing work [REDACTED] of the time.

[School A] does not have the continuum of services that [the student] requires in order to receive FAPE. [School B] does have the continuum of services.

11. Another IEP team meeting convened on [REDACTED], 2022, after the student threatened to [REDACTED] on social media. The student was required to attend [REDACTED] as part of an intervention program, but he refused to attend the sessions.

12. At the [REDACTED], 2022, meeting, the IEP team renewed its recommended plan that the student attend School B. The student's parent refused consent to his placement at School B.

13. School B is a [REDACTED] school for students with [REDACTED]. It has an enrollment of [REDACTED] students in its secondary program, as opposed to over 1,000 students at School A. School B has [REDACTED] staff members to serve the [REDACTED] students, with individual class sizes ranging from three to ten students. There are [REDACTED] officers in the hallways at School B. There are also [REDACTED] guidance counselors and [REDACTED] behavior specialists there. School B strives to give students the support and resources they need to access their education and eventually transition back to their home-zoned schools.

CONCLUSIONS OF LAW

14. 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).

15. 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).

16. At all relevant times, the student 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).

17. 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 (“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); *See Phillip C. v. Jefferson Cnty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012).

18. 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 available a FAPE to the student. *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).

19. In addition to requiring that school districts provide students with a 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.

20. Pursuant to the IDEA’s implementing regulations, states must have in effect policies and procedures to ensure that public agencies in the state meet the LRE requirements. 34 C.F.R. § 300.114(a). Additionally, each public

agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the above-referenced mandates concerning LRE and providing a continuum of alternative placements. *See* Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

21. In Florida, a school district may not place a student in a separate 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, Florida Statutes, does not abrogate any parental right identified in the IDEA and its implementing regulations. § 1003.5715(7), Fla. Stat.

22. 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).

23. With the LRE directive, Congress created a statutory preference for educating children with disabilities alongside children who do not have disabilities to the maximum extent appropriate. *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).

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

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

Id. at 1048.

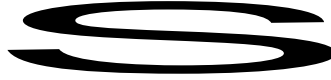
25. Here, the greater weight of the evidence established that the student cannot be satisfactorily educated in the [REDACTED] classroom, with the use of supplemental aids and services. Accordingly, the present case turns on the second part of the test—whether the student has been mainstreamed to the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

26. During his time at School A, the student’s behaviors did not improve, but instead escalated. Additionally, his behaviors pose a significant safety risk to himself and others and adversely impacted his 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 the student’s behaviors have been aggressive, sexually inappropriate, and violent, which warrants such a result. The School Board’s proposed placement mainstreams the student to the maximum extent appropriate and offers him a FAPE.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that that the Orange County School Board's proposed change of the student’s placement to a special day school is approved. Effective as of the date of this Final Order, the student shall be assigned to School B, or such other special day school identified to meet the student’s needs.

DONE AND ORDERED this 7th day of September, 2022, in Tallahassee, Leon County, Florida.



BRITTANY O. FINKBEINER
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of September, 2022.

COPIES FURNISHED:

Amanda W. Gay, Esquire
(eServed)

Sarah Wallerstein Koren, Esquire
(eServed)

Michael Newsome, M.Ed.
(eServed)

Respondent
(Address of Record)

James Richmond, Acting General Counsel
(eServed)

Dr. Maria Vazquez, Superintendent
(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).