STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted],

Petitioner,

vs. Case No. 15-4141E

SUMTER COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH") in [redacted], on August 27, 2015.

APPEARANCES

For Petitioner: Stephanie Moore, Esquire
Disability Rights Florida
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Hollywood, Florida 33020

For Respondent: Amy J. Pitsch, Esquire
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STATEMENT OF THE ISSUES

The issues for determination in this proceeding are: (1) whether the individualized education program ("IEP") team violated the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., by predetermining the amount

of specialized instruction; (2) whether the IEP team violated the IDEA by failing to consider if Petitioner's specialized instruction could be furnished in a general setting with the use of supplementary aids and supports; and (3) whether the School Board failed to timely identify Petitioner as a student eligible to receive IDEA services.

PRELIMINARY STATEMENT

On July 16, 2015, Petitioner filed a Request for Due Process Hearing ("Complaint") in this matter, which the School Board promptly forwarded to DOAH for further proceedings. The Complaint alleges, first, that the School Board predetermined the Petitioner's need for [redacted] in [redacted]. It is further asserted that the IEP team failed to give thorough consideration to whether the use of supplementary aids and services would enable Petitioner to receive [redacted][1/] specialized instruction in a regular classroom. Finally, the Complaint alleges that the School Board untimely identified Petitioner as a student eligible to receive IDEA services.

As noted above, the final hearing was held on August 27, 2015, during which testimony was heard from nine witnesses: Petitioner's father; [redacted], Petitioner's [redacted] math and science teacher; [redacted], Petitioner's [redacted] language arts teacher; [redacted], school counselor; [redacted], ESE specialist; [redacted], school principal; [redacted]

[redacted], curriculum specialist; [redacted], the School Board's ESE director; and [redacted], the School Board's director of curriculum. Each of the parties' proposed exhibits (Petitioner's exhibits 1 through 59; and Respondent's exhibits 1 through 13) were received in evidence without objection.

The court reporter filed the Transcript on September 8, 2015. The parties thereafter submitted proposed final orders, which the undersigned has considered.

Unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations are to the current codifications.

FINDINGS OF FACT

I. Background

1. Petitioner is an [redacted] child who has resided with [redacted] parents in [redacted], since [redacted].

2. Petitioner began [redacted] educational career in the [redacted], where [redacted] received IDEA services pursuant to the eligibility category of [redacted].

3. Although the record does not disclose when Petitioner's IDEA services were first initiated, it is undisputed that the child had an active IEP during the entirety of [redacted] (2012-2013), and that [redacted] IEP team updated the IEP on [redacted]. Significantly for present purposes, the IEP created on that occasion included specialized instruction in

math and reading totaling 319 to 638 minutes per week, to be furnished in a separate resource room outside of the general education environment. The IEP also included a host of accommodations, such as the use of visual aids, study guides, and modified assignments; the administration of tests and quizzes in a small group, with the instructions read aloud by the teacher; and the provision of extra time to complete tests and assignments.

4. Approximately one year later, on [redacted], the [redacted] IEP team reconvened to examine Petitioner's educational progress. At that time, the team acknowledged that the results of various evaluative tools "indicate[d] [redacted] with the general education curriculum." For instance, Petitioner had [redacted] on [redacted] writing prompt, earning a score of [redacted] for content and ideas, and scores of [redacted] in the areas of [redacted]. The team also noted that the results of the [redacted], which had been administered to Petitioner roughly one week earlier, had yielded standard scores [redacted] the mean of 100: [redacted] in the area of [redacted]; [redacted] for [redacted]; [redacted] in the area of processing speed; and a full scale IQ of [redacted]. Moreover, the team acknowledged that, on the most recent administration of the [redacted]

[redacted], Petitioner had received scores of "[redacted]" in the areas of mathematics and reading. Finally, Petitioner's [redacted] test scores indicated, in the team's estimation, a "[redacted]."[2/]

5. Notwithstanding the foregoing, the [redacted] IEP team inexplicably terminated all of Petitioner's IDEA services, ostensibly because the child was "[redacted]."[3/]

6. Unfortunately, Petitioner's performance over the next six months did little to validate the team's decision. Indeed, Petitioner's final progress report indicated, inter alia, that [redacted] "[redacted] the [redacted] on the task at hand in the classroom." The report further reveals that Petitioner ended the year at a "[redacted]" level ([redacted]) in [redacted] out of 30 math concepts, and at a "[redacted]" level in the remaining [redacted] concepts.[4/] Although Petitioner's final marks in language arts were not quite as grim, the child [redacted] to receive a mastery level of "[redacted]" ([redacted]) in any of the 24 reading and writing concepts identified in the report. More ominously still, the progress report reveals that Petitioner earned these [redacted] marks

in spite of "[redacted] in writing, reading, and math" from [redacted] teachers.

II. 2014-2015 School Year

7. Shortly thereafter, in [redacted], Petitioner relocated to [redacted], where [redacted] parents enrolled [redacted] at a [redacted] as an incoming [redacted] student. The following month, the school principal, [redacted], received some of Petitioner's school records, including copies of the documents associated with the termination of IDEA services in [redacted]. As [redacted] credibly recounted during the final hearing, [redacted] promptly reviewed the [redacted] records and determined without hesitation that Petitioner's IDEA services should not have been dismissed:

> Q. But did [the parents] share with you that they felt the resource room placement was good for [redacted]?
>
> A. Yes, absolutely.
>
> Q. Do you think that the student was done a disservice in [redacted] when [redacted] was dismissed from ESE?
>
> A. According to this data in this dismissed IEP on [redacted] report card, yes.
>
> Q. Is it your opinion as a professional educator, that [redacted] should have come into the State of Florida with an active IEP based on [redacted] performance in [redacted] in the [redacted] grade?

A. Yes. And [redacted] parents told us that they were puzzled why it was dismissed as well.[5/]

(Emphasis added).

8. It bears noting that as the [redacted] academic year approached, [redacted] was not the only school employee to develop concerns about Petitioner's need for special education. During school orientation on [redacted], the parents advised [redacted] Petitioner's soon-to-be math and science teacher, that their child had previously received IDEA services in a resource room. The parents further informed [redacted] that subsequent to the termination of IDEA services, Petitioner had continued to struggle with math. At that point, as [redacted] freely conceded during the final hearing, "red flags went up in [redacted] head to make sure that [redacted] would check into this."[6/]

9. [redacted] instincts were soon confirmed: by the first full week of school—[redacted]—[redacted] noticed that Petitioner was [redacted] homework on a consistent basis and, in [redacted] words, was "[redacted]."[7/] In response, [redacted] contacted the parents and offered several suggestions as to how they could assist Petitioner with [redacted] nightly homework assignments.

10. However, it quickly became apparent that Petitioner needed more help in math than [redacted] parents could offer. To compound matters, the language arts teacher, [redacted],

observed during the early weeks of the school year that Petitioner was [redacted] in the areas of writing and reading comprehension. In particular, [redacted] credibly testified that Petitioner's benchmark writing sample was an "[redacted] piece . . . that showed some [redacted]," and that the child also "showed some [redacted] with [redacted]"——issues [redacted] attempted to remediate, unsuccessfully, by providing the child with [redacted].[8/]

11. By this point, the confluence of Petitioner's [redacted] academic performance and recent educational history——i.e., the [redacted] termination of IDEA services, including resource room instruction, less than a year earlier——should have prompted the School Board to begin the IDEA evaluation process, but it [redacted] to do so. Nor did it initiate [redacted], [redacted], in part because the charter school's ESE specialist, [redacted], did not review the child's [redacted] ESE records until later in the school year. Had [redacted] examined these records earlier (say, in [redacted], as [redacted] had done) formal interventions would have begun almost immediately, a point [redacted] conceded during the final hearing:

> Q. [redacted], having looked at [the [redacted] IEP dismissal records], if you had received [these] at the beginning of the school year, when would you have begun RTI, given this language?

A. Probably, I would think September, October.[9/]

12. In lieu of requesting parental consent for an evaluation or initiating formal interventions, the School Board instead elected to begin informal, modest supports totaling 80 minutes per week. This assistance, which began on [redacted], and was furnished on [redacted] and [redacted], consisted of interactive sessions with the "[redacted]" computer program. Per [redacted], "[redacted]" pinpoints a child's reading and math [redacted] and, utilizing that information, designs questions to remediate any identified [redacted].

13. Regrettably, the "[redacted]" sessions [redacted] to [redacted] Petitioner's performance, as demonstrated by a series of e-mails exchanged during the third week of [redacted]. Indeed, on [redacted], Petitioner's [redacted] reported to [redacted] that [redacted] child was "not [redacted] with" the math instruction, which was "[redacted]." In [redacted] reply the following day, [redacted] agreed with the [redacted] assessment and noted that the child was "[redacted]."[10/] The record reflects that [redacted] forwarded a copy of this message to [redacted], who quickly responded that Petitioner was "[redacted] in [redacted] subjects too."[11/] [redacted] also sent a copy of [redacted] e-mail to [redacted]

[redacted], the school counselor, who replied on September 19 that formal interventions would likely begin "very soon":

> Thanks for keeping me in the loop. Will probably need to start [redacted] very soon! I will put forms in your box and [redacted] box if you think it is warranted.

(Emphasis added).

14. As it happens, [redacted] did not begin "very soon" but, rather, were initiated some six weeks later, on [redacted]. Curiously, this [redacted] occurred despite ample evidence that Petitioner [redacted]. In particular, on September 26, 2015, [redacted] and [redacted] each submitted forms titled "[redacted]," which [redacted] received on the same date. Among other things, the requests indicated that Petitioner was earning [redacted] grades of [redacted] and [redacted], respectively, in the subjects of math and language arts. Significantly, [redacted] also recorded in [redacted] request that Petitioner had "[redacted] in math – fact skills, rounding, and remembering practiced concepts," and needed to be "[redacted]."[12/] For [redacted] part, [redacted] reported that Petitioner was reading at a [redacted] level; that [redacted] was [redacted] with [redacted]; and that [redacted] "[redacted]" and "[redacted]."[13/]

15. Notwithstanding the foregoing, the School Board did not convene a meeting to discuss formal educational interventions until [redacted], nearly three months after the first day of school [redacted]. During the course of the meeting, which was attended by [redacted], [redacted], the parents, [redacted], and [redacted], the team examined Petitioner's current levels of performance in the areas of math problem solving, math facts (i.e., rote addition, subtraction, multiplication, and division), and reading comprehension. Specifically, the record reflects that, as of the date of the meeting, Petitioner was performing at [redacted] in the area of math problem solving ([redacted] the class average); [redacted] in math facts ([redacted] the class average); and [redacted] in reading comprehension ([redacted] the class average).[14/]

16. In light of these [redacted], the team elected to begin Petitioner on "[redacted]," the [redacted] of general education [redacted] Specifically, the team decided that, beginning [redacted], Petitioner would receive [redacted], [redacted] on the "[redacted]" math program; [redacted], [redacted] sessions per [redacted] of [redacted] direct math instruction; [redacted], [redacted] sessions per [redacted] on "[redacted]"; [redacted], [redacted] sessions per [redacted] on the "[redacted]" reading program; and [redacted], [redacted] sessions of [redacted] direct reading

instruction. Finally, the team determined that each of these interventions would be furnished during the mornings [redacted], and that Petitioner's progress would be reviewed in six to eight weeks.

17. Shortly thereafter, on [redacted], [redacted] conducted an observation of Petitioner during [redacted] math class. [redacted] noticed, among other things, that Petitioner was "[redacted] to react to and follow directions," [redacted], and [redacted]; that [redacted] basic computational skills; that [redacted] was [redacted] to volunteer; and that [redacted] had [redacted] working [redacted].

18. Petitioner's intervention team thereafter reconvened on [redacted]—more than eight weeks after the first meeting—to examine Petitioner's levels of performance. Save for Petitioner's grade in social studies, the results were [redacted]: [redacted] in math; [redacted] in language arts; and [redacted] in science. Most [redacted] was the fact that, in the area of math problem solving, the gap between Petitioner's [redacted] and [redacted] had actually [redacted]. This data prompted the team, at long last, to request consent to evaluate Petitioner for IDEA services, which the parents granted at the conclusion of the meeting.

19. As the evaluation process proceeded, the School Board conducted a second classroom observation, this time by a speech

and language pathologist, [redacted]. Throughout the course of the observation, which was conducted during language arts class on [redacted], [redacted] noted that Petitioner had [redacted] and [redacted]. As documented in [redacted] report, [redacted] also observed that Petitioner was apt to "[redacted][] [redacted] with peers."

20. Thereafter, on [redacted], Petitioner's intervention team met for a third and final time. The team's examination of available data revealed that, notwithstanding the ongoing provision of general education interventions, Petitioner was earning grades of [redacted] and [redacted], respectively, in the subjects of math and language arts. Not surprisingly, the team further concluded that [redacted] of the interventions had yielded [redacted] responses; that is, there was no evidence that Petitioner's performance gaps were [redacted] at a [redacted]. Most [redacted] was Petitioner's [redacted] in the area of math problem solving, which had [redacted] to a [redacted].

21. Subsequently, on [redacted], a mere four days before the end of the school year, the school psychologist issued Petitioner's evaluation report.[15/] A review of the report reveals that the psychologist utilized a variety of assessment tools, including the [redacted]

[redacted]; a review of input from [redacted] and [redacted]; a review of the observations conducted on [redacted], and [redacted]; and an examination of the various educational interventions that had been attempted.

22. In light of the relatively narrow issues raised in this proceeding, it is enough to acknowledge two of the psychologist's conclusions: first, that the general education interventions [redacted] to produce any [redacted]; and, second, that Petitioner was [redacted] at "[redacted] levels" in the areas of reading and math calculation.

23. Armed with these findings, the School Board scheduled a staffing/IEP meeting for [redacted]. Several days beforehand, however, [redacted] notified the parents by telephone that, due to [redacted] academic performance, Petitioner would be [redacted] in [redacted]. As one might expect, this information was [redacted], and may have [redacted] to a [redacted] that later manifested itself at the conclusion of the IEP meeting (more about this in a moment).

24. In the wake of this news, the IEP team convened as scheduled on [redacted]. In attendance were the parents; [redacted], the school psychologist who performed the evaluation; [redacted], the school's ESE specialist; [redacted]; Petitioner's teachers ([redacted] and [redacted]); [redacted], the speech and language pathologist who conducted the [redacted]

observation; [redacted], an ESE teacher; and [redacted], the school's assistant principal. Upon a review of the evaluation report and other available data, the team determined, first, that Petitioner should receive IDEA services pursuant to the [redacted] Disability eligibility category.

25. Having resolved the issue of eligibility, the team proceeded to identify Petitioner's priority educational needs, namely, [redacted], [redacted], and [redacted].[16/] In relevant part, the team summarized Petitioner's issues in these areas as follows:

> [Petitioner's] teacher reports [redacted] knows [redacted] basic facts including multiplication but [redacted] with division as an inverse operation of multiplication. [redacted] works hard and shows effort in class but [redacted] with concepts and procedures. When given an assessment [Petitioner] shows operations but they are [redacted] to solving the problem. [redacted] also [redacted] with operations involving multi-digits. [redacted] final math grade [was] [redacted]. . . . [Petitioner] scored [redacted] or [redacted] in all domains. [redacted] in math procedures and problem solving is needed for [Petitioner] to be successful in the general education classroom and on standardized tests.
>
> * * *
>
> [Petitioner's] area of [redacted] is reading comprehension. [redacted] [redacted] with inferring meaning from the text and analyzing text structure to gain meaning from comparing and contrasting, fact and opinion, cause and effect and main idea.

> [redacted] final reading grade is [redacted]. [Petitioner] needs [redacted] in reading comprehension to be successful in the general education classroom and on standardized testing.

26. In the hope of addressing these deficits, the team formulated three annual goals: for Petitioner to calculate a "set of multi-digit math problems involving addition, subtraction, multiplication or division" with 70 percent accuracy in three out of four trials; to [redacted]; and to answer literal or inferential comprehension questions on a "guided reading passage" with [redacted] for [redacted] trials.

27. Next, the team determined that the provision of [redacted] in math and reading was essential in order for Petitioner to meet [redacted] goals. At that point, the team was confronted with the principal questions raised herein: how much [redacted] did Petitioner [redacted], and in [redacted]?

28. As for the necessary quantity of services, [redacted] and [redacted] recommended, reasonably in light of Petitioner's [redacted] performance gaps, that the child receive at least as much instruction as was furnished during the [redacted] school year, i.e., 80 and 120 minutes, respectively, in the subjects of math and reading.[17/] With respect to the

issue of setting, [redacted] and [redacted] expressed to the other team members that Petitioner was more [redacted] when working in [redacted] and, consequently, more [redacted] to [redacted] when [redacted] a particular concept. [redacted] and [redacted] further explained to the team that, in their opinion, such [redacted] group instruction should be [redacted] in a [redacted] setting due to Petitioner's [redacted] and [redacted] issues. Based upon this input, the team determined that it would be "[redacted]" for the ESE instruction to be provided in a separate classroom.

29. Significantly, however, the record demonstrates that the IEP team reached the latter of these conclusions without thoroughly considering whether the use of [redacted] could enable Petitioner to [redacted] specialized instruction in a general setting.[18/] Instead, the team summarily determined that, because the educators' efforts up to that point had been [redacted], i.e., the use of [redacted] education interventions, which Petitioner received in the [redacted] classes began, all of the specialized math and reading instruction should be provided in [redacted] setting. As explained shortly, the team's [redacted] to give serious consideration to the feasibility of educating Petitioner in a [redacted] classroom necessitates a new IEP meeting.

30. As the [redacted] IEP meeting wound to a close, the team determined that Petitioner would participate with [redacted] non-disabled peers during [redacted] other courses (that is, all subjects save for math and reading), physical education, and lunch. All told, the IEP contemplated that Petitioner would spend [redacted] of [redacted] day with [redacted] non-disabled classmates, a level of participation known as a "resource room" placement.[19/] The team memorialized this decision in a document titled "Consent for Placement," which the parents signed.

31. Before proceeding further, it is critical to note that "placement" generally refers to a child's educational program, and not the particular school site where that program is implemented. Perhaps for that reason, the "Consent for Placement" document did not indicate whether Petitioner would continue to receive [redacted] education at the [redacted] school or, instead, at a different location within the school district.

32. After the parents signed the "Consent for Placement," but before the IEP meeting adjourned, [redacted] advised the parents that Petitioner's current institution, the [redacted] school, provided ESE instruction in academic areas exclusively through an "inclusion" model; in other words, the [redacted] school did not offer a separate ESE classroom. The implication of this announcement was not lost on the parents: for the IEP to be implemented, Petitioner would need to be

reassigned from the [redacted] school (an "[redacted]" school pursuant to Florida Department of Education's grading methodology) to [redacted] neighborhood public school (an institution the child had never attended), which offered a more complete array of ESE services.

33. Suffice it to say that the parents were [redacted] and [redacted] by the imminent school change, so much so that they began to [redacted] that the other team members had [redacted] their recommendations to [redacted] Petitioner's withdrawal from the [redacted] school. As the [redacted] explained during the final hearing, [redacted] felt that the other team members had violated [redacted] trust and sold [redacted] a "bill of goods."

34. Although the parents' reaction to the news of the transfer is entirely understandable, the record does not bear out their claim that the School Board predetermined the amount of specialized instruction or otherwise manipulated the process to force the child's withdrawal from the [redacted] school. Indeed, the key members of the IEP team credibly testified that predetermination had not occurred, and that the quantity of services detailed in the IEP was an honest reflection of the educators' opinions.[20/] Further, the record is devoid of evidence that the parents were deprived of a meaningful opportunity to participate in the decision-making process.

35. Nevertheless, as explained above, the record demonstrates that the team [redacted] to give serious consideration

to educating Petitioner in a general setting with supplementary aids and services, a [redacted] in the process that necessitates a new IEP meeting.

CONCLUSIONS OF LAW

I. Jurisdiction and Burden of Proof

36. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. See § 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

37. Petitioner bears the burden of proof with respect to each of the issues raised herein. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

II. The IDEA

38. 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 each agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Ala. State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

39. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. Bd. of Educ. 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).

40. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

> [S]pecial 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).[21/]

41. The central mechanism by which the IDEA ensures a FAPE for each child is the development and implementation of an IEP. 20 U.S.C. § 1401(9)(D); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985)("The modus operandi of the [IDEA] is the . . . IEP.")(internal quotation marks omitted). The IEP must be developed in accordance with the procedures laid out in the IDEA, and must be "reasonably calculated to enable the child to receive educational benefits." Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982). Of particular significance to the instant case, school districts must also ensure that, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." 20 U.S.C. § 1412(a)(5)(A). In other words, the school district must endeavor to educate each disabled child in the least restrictive environment ("LRE"). A.K. v. Gwinnett Cnty. Sch. Dist., 556 Fed. Appx. 790, 792 (11th Cir. 2014).

III. Petitioner's Claims

A. Introduction

42. Against this backdrop, the undersigned turns now to Petitioner's three principal claims. First, Petitioner alleges that, with the aim of [redacted] from the [redacted]

[redacted] school, the School Board predetermined the amounts of specialized instruction in math and reading. Petitioner further contends that the IEP team violated the IDEA's LRE mandate by [redacted] to give serious consideration to whether the use of supplementary aids and services would enable [redacted] to [redacted] math and reading instruction in a [redacted] classroom. Finally, Petitioner asserts that the School Board [redacted] to timely identify [redacted] as a student eligible to receive IDEA services. Each claim is discussed sequentially below.

B. Predetermination

43. As the Eleventh Circuit recently explained, "[p]redetermination occurs when the state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team." R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1188 (11th Cir. 2014). To avoid a finding of predetermination, there must be evidence that the School Board "has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." Id. at 1188; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 (2d Cir. 2009).

44. Significantly, however, "predetermination is not synonymous with preparation." Nack v. Orange City Sch. Dist.,

454 F.3d 604, 610 (6th Cir. 2006). That is, the IDEA allows school districts to engage in "preparatory activities to develop a proposal . . . that will be discussed at a later meeting without affording the parents an opportunity to participate." T.P., 554 F.3d at 253 (internal quotation marks omitted). Accordingly, it is permissible for school employees to come to an IEP meeting with "pre-formed opinions regarding the best course of action for the child," provided that they "are willing to listen to the parents and parents have the opportunity to make objections and suggestions." N.L. v. Knox Cnty. Sch., 315 F.3d 688, 694 (6th Cir. 2003); R.L., 757 F.3d at 1188 ("This is not to say that a state may not have any pre-formed opinions about what is appropriate for a child's education. But any pre-formed opinion the state might have must not obstruct the parents' participation in the planning process.").

45. With these standards in mind, Petitioner has failed to prove that the School Board impermissibly predetermined the amount of specialized math and reading instruction. Although it may reasonably be inferred, as Petitioner argues, that [redacted] and [redacted] arrived at the IEP meeting with pre-formed opinions as to the [redacted] of instruction the child should receive, i.e., amounts equal to what the School Board furnished during the [redacted] school year, there is no evidence that any team member approached the question with a closed mind or

otherwise deprived the parents of a meaningful opportunity to participate. Further, [redacted], [redacted], [redacted], and [redacted] each testified, credibly, that the decision to furnish a total of 200 minutes daily of specialized instruction was in no way intended to force Petitioner's withdrawal from the public [redacted] school. For these reasons, Petitioner's claim of predetermination is rejected.

C. Least Restrictive Environment

46. Petitioner next contends that the School Board violated the IDEA's LRE mandate by failing to give thorough consideration to whether the use of supplementary aids and services would [redacted] to receive some (or all) of [redacted] specialized math and reading instruction in a [redacted] classroom.

47. The IDEA's LRE mandate is found in 20 U.S.C. § 1412(a)(5)(A), which provides that:

> 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.

(Emphasis added).

48. This requirement expresses the IDEA's "strong preference" for children with disabilities to be educated, to the maximum extent appropriate, together with their non-disabled peers. M.O. v. NYC Dep't of Educ., 793 F.3d 236, 239 (2d Cir. 2015); T.F. v. Special Sch. Dist., 449 F.3d 816, 820 (8th Cir. 2006). In enacting this provision, Congress sought to protect disabled children from being inappropriately segregated in special classrooms. See Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373 (1985)("Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes."). The implementing regulations require school districts to ensure that a "continuum of alternative placements is available to meet the needs of children with disabilities," including "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(a), (b)(1). After considering an appropriate continuum of alternative placements, the school district must place a disabled child in the LRE that is consistent with [redacted] or her needs.

49. Because every child is unique, determining whether a student has been placed in the LRE requires a flexible, fact-specific analysis. Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991). Pursuant to the test articulated in

Greer, it must be determined, first, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child," and, if not, then "whether the school has mainstreamed the child to the maximum extent appropriate." Id. at 696 (quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989)).

50. With respect to the first step, the Third Circuit has observed that where an IEP team "has given no serious consideration to including the child in a regular class with such supplementary aids and services . . . to accommodate the child, then it has most likely violated [the IDEA's] mainstreaming directive." Oberti v. Bd. of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993)(emphasis added); Greer v. Rome City Sch. Dist., 950 F.2d 688, 698 (11th Cir. 1991)(finding a violation of the IDEA where the IEP team failed to "consider the full range of supplemental aids and services . . . that could be provided to assist [the child] in the regular classroom").[22/] Significantly, a team's failure to give appropriate consideration to the use of supplementary aids and services constitutes a substantive, as opposed to a procedural, violation of the IDEA. H.L. v. Downingtown Area School District, 2015 U.S. App. LEXIS 9742, *9-13 (3d Cir. June 11, 2015); Greer, 950 F.2d at 698-99.

51. Turning now to the facts at hand, the IEP team determined that, due to Petitioner's [redacted], [redacted] focus, and significant performance [redacted], the child would be "[redacted]" served by receiving math and reading instruction in a [redacted] classroom. However, it is evident that the IEP team [redacted] considered, let alone [redacted] considered, whether supplementary aids and services could enable the child to receive some or all of [redacted] specialized instruction in a general classroom. As Petitioner aptly notes, the IEP team "[redacted]"[23/] on the apparent basis that the general education interventions (all of which were [redacted]) had [redacted] to produce [redacted] results. In so doing, the team [redacted] the IDEA's LRE mandate, necessitating the [redacted] of this issue at a new IEP meeting.

52. The School Board resists this conclusion, arguing that Petitioner "[redacted]," a placement "from which [redacted] [redacted] a benefit in [redacted]."[24/] That may be the case, but Petitioner [redacted] be assigned to such a placement unless and [redacted] the IEP team makes a determination that, even with the use of supplementary aids and services, the specialized instruction [redacted] be [redacted] [redacted] in a regular setting. Oberti, 995 F.2d at 1216; Greer, 950 F.2d at 698.

D. Timing of Referral for IDEA Eligibility

53. The undersigned turns now to the third and final claim, namely, that the School Board violated its child find obligation by belatedly requesting the parents' consent to conduct an initial evaluation.

54. It is a bedrock principle of the IDEA that "[a]ll children with disabilities residing in the State . . . and who are in need of special education and related services" be "identified, located, and evaluated," a process known as "child find." 20 U.S.C. § 1412(a)(3)(A). Notably, child find "does not demand that [school districts] conduct a formal evaluation of every struggling student"; rather, districts need only evaluate those students who are "reasonably suspected" of having a disability and requiring special education. D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012); Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001). The threshold for suspicion is "relatively low." Orange Unified Sch. Dist. v. C.K., 2012 U.S. Dist. LEXIS 92423, *18 (C.D. Cal. June 4, 2012); Bd. of Educ. v. L.M., 2006 U.S. Dist. LEXIS 9106, *14 (E.D. Ky. Mar. 6, 2006), rev'd in part on other grounds, 478 F.3d 307 (6th Cir. 2007); Miami-Dade Cnty. Sch. Bd. v. **, 115 LRP 5622 (Fla. DOAH May 19, 2014).

55. Against this framework, Petitioner contends, and the undersigned agrees, that the School Board's child find duty was

triggered from the start of the [redacted] school year. As detailed previously, the school principal, [redacted], thoroughly reviewed Petitioner's educational records in [redacted], at which point [redacted] determined (correctly, as it turns out) that the [redacted] IEP team had [redacted] [redacted] Petitioner's IDEA services and, consequently, that the child should have entered the [redacted] County School District with an active IEP. [redacted] conclusion in this regard constituted, at the very least, a reasonable suspicion that Petitioner was a child with a disability who required IDEA services. Accordingly, the School District should have requested parental consent to conduct an evaluation within 30 days of the start of the [redacted] school year——long before [redacted], the date the School Board ultimately requested and obtained such consent. See Fla. Admin. Code R. 6A-6.0331(3)(b).

56. In an effort to efface this reasoning, the School Board contends that, because Petitioner entered Sumter County without an active IEP, [redacted] "had to [redacted]" with general education interventions "like any other general education student."[25/] This argument lacks force. First, it is well settled that general education interventions (i.e., RTI strategies) [redacted] be used to delay the provision of an initial evaluation in situations where a district reasonably suspects that a student requires IDEA services. Fla. Admin. Code R. 6A-

6.0331(1)(f)(providing that general education intervention procedures should not be applied so as to "delay appropriate evaluation of a student suspected of having a disability"); Memorandum to: State Directors of Special Education, 56 IDRLR 50 (OSEP Jan 21, 2011)(explaining that the use of [redacted] strategies [redacted] be used to delay or deny the provision of a full and individual evaluation . . . to a child suspected of having a disability"). Moreover, rule 6A-6.0331(3)(d) expressly provides that a school district may request parental consent, even where general education interventions have not been implemented, if the "nature or severity of the student's areas of concern make the general education intervention procedures inappropriate in addressing the immediate needs of the student."

57. But even assuming, arguendo, that the School Board was obliged to attempt formal interventions before seeking parental consent, it is evident that the [redacted] process was [redacted] initiated. Indeed, the record makes manifest that, from the very start of the school year, Petitioner was [redacted] in the core subjects of math and reading. Yet formal interventions [redacted] begin until [redacted], nearly three months after the first day of school. This [redacted] was [redacted], at least in part, to the fact that [redacted], the school's ESE specialist, [redacted] review Petitioner's [redacted] records at or prior to the start of the academic year.

As [redacted] candidly acknowledged during the final hearing, an earlier review likely would have led to the initiation of formal interventions in September or October.

58. The short of it is that the School Board reasonably [redacted] prior to the start of the [redacted] school year, that Petitioner was a student with a disability who needed [redacted]. Nevertheless, and despite Petitioner's [redacted], [redacted], and [redacted] [redacted] in math and reading, the School Board did not request parental consent to perform an evaluation until [redacted], some five months into the academic year. As a consequence, the entire school year came and went——culminating in the child's [redacted] in [redacted]——before the School Board made a determination of eligibility. The School Board's failing in this regard led to the untimely development of an IEP, thereby depriving Petitioner of educational benefits. See, e.g., Knable v. Bexley City Sch. Dist., 238 F.3d 755, 766-67 (6th Cir. 2001)(holding that the school district's untimely development of an IEP resulted in the loss of educational opportunity and, thus, constituted a denial of FAPE).

59. On the question of remedy, Petitioner's Complaint requests an [redacted] award of [redacted]. Curiously, however, [redacted] was neither mentioned during the final hearing nor referenced in Petitioner's Proposed

Final Order, a pleading comprising 32 pages that includes multiple requests for relief in relation to [redacted] other two claims. As such, it appears to the undersigned that the plea for [redacted] has been [redacted]. See Dep't of Health v. Yang, 2013 Fla. Div. Adm. Hear. LEXIS 425, *22 (Fla. DOAH July 18, 2013)(finding abandonment where claim was not addressed in party's proposed recommended order); see generally Sony Corp. v. Digital4Less, Inc., 2013 U.S. Dist. LEXIS 180717, *24 n.8 (M.D. Fla. Dec. 3, 2013).

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that:

1. The School Board violated IDEA by failing to give thorough consideration to whether the use of supplementary aids and services would enable Petitioner to receive some or all of [redacted] math and reading [redacted] in a [redacted] classroom. As soon as practicable, but not later than 20 days from the date of this Order, the School Board shall convene an IEP meeting and reconsider this issue.[26/]

2. The School Board violated the IDEA's child find mandate by untimely requesting parental consent to conduct an initial evaluation.

3. Petitioner's request for attorney's fees is GRANTED. Fla. Admin. Code R. 6A-6.03311(9)(x)(providing that in "any due process hearing . . . brought under this rule, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to . . . [t]he prevailing party who is the parent of a student with a disability"). Petitioner shall have 45 days from the date of this Order to file a motion for attorney's fees and costs (under this case number), to which motion Petitioner shall attach appropriate affidavits (attesting to the reasonableness of the fees) and essential documentation in support of the claim such as timesheets, bills, and receipts.

4. Petitioner's remaining claims and requests for relief are [redacted].[27/]

DONE AND ORDERED this 1st day of October, 2015, in Tallahassee, Leon County, Florida.

S

_____
Edward T. Bauer
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of October, 2015.

ENDNOTES

[1/] For stylistic convenience, the undersigned will use [redacted] pronouns in this Final Order when referring to Petitioner. The male pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

[2/] Pet'r Ex. 1, p. 4.

[3/] Pet'r Ex. 1, p. 2.

[4/] Pet'r Ex. 2, p. 13.

[5/] Tr. 245:16-25.

[6/] Tr. 59:24-25.

[7/] Tr. 60:12-15.

[8/] Tr. 101:1-4.

[9/] Tr. 261:21-25. [redacted] further testified that Petitioner's [redacted] IEP team should not have terminated the child's IDEA services. Tr. 261:1-4.

[10/] Pet'r Ex. 4, p. 15.

[11/] Pet'r Ex. 4, p. 15.

[12/] Pet'r Ex. 6, p. 21.

[13/] Pet'r Ex. 7, p. 22.

[14/] Pet'r Ex. 14, pp. 34-36.

[15/] Pursuant to the explicit language of Florida Administrative Code Rule 6A-6.0331(3)(f), the School District was required to "complete" its evaluation of Petitioner within 60 school days of obtaining parental consent. As such, the School Board should have finished Petitioner's evaluation not later than mid-April 2015. The School Board asserts, and Petitioner concedes, that the rule's 60-day mandate was satisfied because the psychologist conducted her assessments on April 8, 2015——despite the fact that the psychologist's report, which contained the findings the

IEP team would need to make an eligibility determination, was not issued until May 18, 2015. Although the undersigned is skeptical of this reasoning——after all, how can it fairly be said that an evaluation is "complete" if the findings are not disseminated to other school personnel until well beyond the deadline?——the parties' stipulation on this point will not be disturbed. See Schrimsher v. Sch. Bd. of Palm Beach Cnty., 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations").

In any event, the parties did not stipulate to the timeliness of the School Board's request for parental consent to conduct the initial evaluation. Indeed, as discussed elsewhere in this Order, the undersigned agrees with Petitioner's assertion that the School Board violated the IDEA's child find mandate by failing to request such consent earlier in the school year.

[16/] The team also identified a fourth priority educational need, pragmatic language skills, which is not implicated by the instant Complaint.

[17/] Tr. 78:9-15; 111:12-17.

[18/] In support of this finding, the undersigned notes, first, that neither the "Consent for Placement" nor the IEP provides any explanation, save for a perfunctory notation (i.e., a "checked box") in the Consent document, of why the specially designed instruction could not be fully implemented in the regular classroom with the use of supplementary aids and services. See H.L. v. Downingtown Area Sch. Dist., 2015 U.S. App. LEXIS 9742, *11-13 (3d Cir. June 11, 2015)(holding that the absence of such an explanation within the IEP or consent for placement lent support to the finding that the IEP team failed to give serious consideration to a regular placement). In addition, Ms. Williams testified during the final hearing that she did not remember the IEP team discussing the viability of furnishing Petitioner's reading instruction in the general classroom. Tr. 116:10-18. Moreover, Ms. Yerk's description of the IEP meeting strongly indicates that the decision to furnish the specialized instruction in a separate setting was driven by the failure of the general education interventions. Tr. 195:11-196:12.

[19/] The term "resource room" is used to describe a placement in which the child spends more than 40 percent, but less than or equal to 79 percent, with non-disabled peers.

[20/] Tr. 89:14-90:12; 115:5-15; 142:18-143:6; 202:3-24.

[21/] "Special education," as that term is used in the IDEA, is defined, in relevant part, 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).

[22/] See also R.G. v. NYC Dep't of Educ., 980 F. Supp. 2d 345, 363 (E.D.N.Y. 2013)(holding that the failure to consider placing the child "in a general education classroom with supplementary aids and services compels the conclusion" that the IEP team did not give fair consideration to a mainstream placement)(emphasis in original); Waukee Cmty. Sch. Dist. v. Douglas L., 2008 U.S. Dist. LEXIS 124146, *24-26 (S.D. Iowa Aug. 7, 2008)(holding that IEP team violated the LRE mandate by failing to consider if supplementary aids and services could have enabled the child to receive some of her core academic instruction in a general setting); Blount v. Lancaster-Lebanon Intermediate Unit, 2003 U.S. Dist. LEXIS 21639, *22 (E.D. Pa. Nov. 12, 2003)("It is clear from Oberti that, in reviewing a school's actions in relation to the steps that have been taken to try and include the child in a regular classroom, a school must consider a whole range of supplemental aids and services, and that there must be proof of serious consideration, as mere token gestures are insufficient"); Letter to Cohen, 25 IDELR 516 (OSEP Aug. 6, 1996)(explaining that in "determining whether regular class placement would be appropriate . . . the team must thoroughly consider the full range of supplementary aids and services, in light of the student's abilities and needs, that could be provided to facilitate the student's placement in the regular educational environment").

[23/] Pet'r PRO, p. 23.

[24/] Resp't PRO, p. 35.

[25/] Resp't PRO, p. 30.

[26/] Once the IEP team properly revisits this issue, the School Board shall assign Petitioner to a school location that is capable of furnishing the services and placement enumerated in the amended IEP.

[27/] Petitioner's Complaint also includes a claim pursuant to Section 504 of the Rehabilitation Act of 1973, namely, that the School Board is unlawfully discriminating against disabled students by: failing to offer a separate ESE classroom at the public charter school; and/or by capping inclusion services at the public charter school in the amount of 150 minutes per week. This argument is without merit, as school districts are not required to provide a full array of IDEA services at each school location. See, e.g., Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 152 (4th Cir. 1991)("Whether a particular service or method can feasibly be provided in a specific education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make.").

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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).