

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs.

Case No. 16-6642E

HILLSBOROUGH COUNTY SCHOOL
BOARD,

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 December 14 and 15, 2016, in Tampa, Florida.

APPEARANCES

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

For Respondent: LaKisha Kinsey-Sallis, Esquire
Thompson, Sizemore, Gonzalez &
Hearing, P.A.
[REDACTED]

STATEMENT OF THE ISSUES

Whether Respondent failed to implement certain aspects of Petitioner's Individualized Education Plan ("IEP") of April 12, 2016; and whether the proposed change of Petitioner's placement, as contained in the IEP of October 31, 2016, was the result of

predetermination by Respondent and violates the least restrictive environment requirement of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq.; and, if so, to what remedy is Petitioner entitled.

PRELIMINARY STATEMENT

On November 14, 2016, Respondent School Board received Petitioner's due process complaint. Petitioner's complaint was forwarded to DOAH on the same date, and assigned to Administrative Law Judge Diane Cleavinger. This matter was transferred to the undersigned on December 1, 2016.

The final hearing was scheduled for December 14 and 15, 2016, and was conducted as scheduled. Prior to the final hearing, the parties filed a Joint Statement of Undisputed Facts and stipulated to certain facts contained therein. To the extent relevant, those facts have been incorporated in this Final Order.

The final hearing Transcript was filed on December 30, 2016. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. At the conclusion of the hearing, the parties stipulated that proposed final orders would be filed 14 days after the transcript was filed; and that the final order would be issued on or before January 30, 2016. Post-hearing, Petitioner filed a motion for an extension of time to submit proposed final orders on or before January 17, 2017. The motion was granted and the parties timely

filed proposed orders which have been considered in issuing this Final Order.

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 presently a [REDACTED] student attending a public elementary school (hereinafter School A) in Lithia, Hillsborough County, Florida.

2. Petitioner has been enrolled at School A since the 2014-2015 school year, where [REDACTED] began as a [REDACTED] student.

3. At all times relevant to this matter, Petitioner has been eligible to and has received exceptional student education ("ESE") services under the [REDACTED], [REDACTED], and [REDACTED] eligibility categories.^{1/}

April 2016 IEP

4. On April 7 and 12, 2016, Petitioner's IEP team met to conduct an annual review of Petitioner's IEP.^{2/} At that time, Petitioner was attending School A three days a week, for four hours, and receiving all of [REDACTED] core instruction in an individual

classroom setting with the assistance of an ESE teacher, and a private behavior therapist. Petitioner was also receiving behavior support, in varying degrees, from a district resource teacher, a contracted behavior assistant, and various district-level and school-based personnel who were charged with collecting and analyzing behavioral data.

5. The IEP team had previously determined and, on April 12, 2016, continued to opine that Petitioner exhibited behaviors that impeded [REDACTED] learning and/or the learning of others.

6. Petitioner's targeted behaviors that had been identified by the Functional Behavioral Assessment team included aggression to others, elopement, and materials destruction. As documented in the IEP developed on April 12, 2016 (herein after the "April 2016 IEP"), "[i]n this very controlled and intensive support setting, [Petitioner] has shown significant improvement in [REDACTED] daily behavior and [REDACTED] total academic engagement and work production during the school day."

7. Specifically, from December 2015 to April 2016, Petitioner's average daily occurrence for aggression had decreased from 98 to 1; elopement had decreased from 7 to 0; out of assigned seat/area had declined from 4 to 2; and materials destruction from 21 to 1.

8. With respect to Petitioner's desired behaviors, the April 2016 IEP documented that Petitioner's average percent of

interactions with peers. For the most part, Petitioner expressed little interest in engaging in social interactions with [REDACTED] peers, and when prompted to engage with peers and adults not of [REDACTED] choice, [REDACTED] would, at times, respond with comments indicating that [REDACTED] does not like the person and would not self-correct even when prompted to do so by an adult. However, an interest in the activities of [REDACTED] peers during unstructured activities, such as recess, was emerging.

11. The April 2016 IEP identified Petitioner's priority educational needs as:

[REDACTED]
[REDACTED]
[REDACTED].

Goals and objectives were drafted to address said needs and accommodations were provided for instructional delivery.

12. Accommodations itemized on the April 2016 IEP included the following: more time for completing assignments, more instructional time, use of manipulatives, assistance with note taking, shortened assignments, adjust pacing, reduce written work, graphic organizers, proximity control, reminder of rules, cueing and prompting, oral planning for written tasks/oral response, visual supports, and sensory strategies and supports.

13. The IEP further identified numerous behavioral supports for Petitioner including a classroom behavior management system,

an individual student behavior management system, a behavior contract, and a Functional Behavioral Assessment ("FBA) /Positive Behavior Intervention Plan ("PBIP"). It was further documented by the IEP team that Petitioner "requires continuous adult support across all settings to address behavioral needs and implementation of behavioral interventions." The IEP team agreed that ■■■ PBIP should be revised and that ■■■ current crisis and individualized supervision plans needed revision. The FBA/PBIP team agreed that it would meet monthly to update behavior plan information and fidelity checks would be reviewed. The behavioral support section of the IEP further documented "[c]ontinue to collaborate with the private behaviorist." Finally, the IEP provided that daily home notes would be provided to the parents.

14. The April 2016 IEP identified Petitioner's daily ESE services to include the following: reading skills and strategies (to be provided in the ESE classroom during the 90-minute ELA block), written language skills and strategies (to be provided in the ESE classroom during the 90-minute ELA block), behavior management strategies (to be provided in the regular education classroom), self-determination/self-advocacy skills and strategies (60 to 90 minutes as determined by level of frustration and response to non-preferred activities in the ESE classroom), speech/language therapy (90 minutes weekly in the ESE

classroom), communication skills (60 to 90 minutes as determined by level of frustration and response to non-preferred activities in the ESE classroom), social skills (60 to 90 minutes as determined by level of frustration and response to non-preferred activities in the ESE classroom), self-determination (regular education classroom), social skills (regular education classroom), behavioral intervention strategies (60 to 90 minutes as determined by level of frustration and response to non-preferred activities in the ESE classroom), and communication skills (regular education classroom).

15. The April 2016 IEP provided that Petitioner's ESE placement would be in a "[r]egular class with resource services (special education services provided outside regular class 21% to 60% of the time) or as otherwise documented in the IEP "[w]ith nondisabled students for more than 40% of the time, but less than or equal to 79% of the time." The IEP further documented that the initiation of the IEP would "occur fully with the inclusion of a period of two to three weeks to implement a transition plan for [Petitioner] transitioning from a one to one setting to the full implementation of this IEP."

April 2016 PBIP

16. On April 28, 2016, a meeting was held to review and revise Petitioner's FBA/PBIP. Based on the team's functional assessments, which included record reviews, consultations and

interviews, and observations, the team developed a hypothesis as to potential behavioral antecedents. The identified antecedents included: not getting desired attention/reaction from adults, correction/redirection, not getting access to preferred item/activity, and non-preferred academics (long writing assignments, assessments/tests).

17. The team further determined when Petitioner was not provided the attention ■■■ desires (positive or negative), ■■■ will engage in aggressive, destructive, and/or unsafe behaviors in order to obtain the desired attention or reaction from others. When presented with a non-preferred task, ■■■ will attempt to physically escape the task through elopement or become aggressive and/or destructive to avoid the task. Similarly, when denied access to a preferred item or activity, ■■■ may again become aggressive and/or destructive to obtain the item or activity.

18. The team also identified several other variables that appeared to be affecting ■■■ behavior, including ■■■ diagnosis of ■■■, anxiety, medication changes, reactions to sensory input, and unexpected changes to ■■■ schedule.

19. To address Petitioner's targeted behaviors (physical aggression, elopement, out of area, material/property destruction, and inappropriate vocalizations) and increase Petitioner's positive behavior of being on-task, the PBIP set

forth approximately 20 proactive, educative, and functional intervention strategies.

20. To "insure safety and de-escalation of the student's behavior in emergency situations," an Individual Crisis Management Plan was also developed. The Plan provided strategies to be implemented in the following phases: triggering phase (when Petitioner first shows signs of difficulty), escalation phase, behavior phase, transition phase, and recovery phase.

21. The team determined that Petitioner's current one-to-one setting would be decreased and time across all settings would be increased "as [Petitioner] is able" to function at school with decreased aggressive behavior.^{3/} A plan to increase time with peers and time at school was to be developed and implemented. The team determined that the intensity of the plan (reinforcement schedule, physical guidance/prompting, verbal prompting, use of visual supports) would be faded as Petitioner is able to complete work and demonstrate compliance more independently.

22. The proposed "fade-in plan" documented in the April 28, 2016, [REDACTED] provided that, beginning in May 2016, Petitioner's hours in the school day would progress from 4.5 to 6 hours in June; [REDACTED] days per week would progress from 5 to 6 in June; [REDACTED] would be included with peers in science/social studies and be added in general education and math; and the proximity of adults would be reduced to one ESE instructor and general education

teacher. The fade-in plan also provided that the private behavior therapist would be faded to a District behavior support school-based data collector.

23. The [REDACTED] provided that each person that worked with Petitioner would be provide a copy of the [REDACTED] and crisis plan, and provided an opportunity to review the same with the team. Feedback and additional training would be provided based on weekly fidelity checks.

24. The team determined that data collection on Petitioner's target behaviors and desired behaviors would be obtained or documented through the use of a daily behavior chart and a daily home note. To monitor progress, the team determined that on a daily basis, Petitioner's behavior would be monitored using a daily behavior frequency chart/monitoring form, and Petitioner's parents would receive a daily debriefing of [REDACTED] day via the use of a daily home note.

25. Monitoring would further take place in a monthly meeting designed to review data and make changes, if necessary, to the plan. A comprehensive fidelity check would be completed using a targeted fidelity observation checklist, and graphs of the collected data from Petitioner's daily behavior charts would be provided to the team and to the Petitioner's parents at least monthly, or more frequently, as needed.

26. Petitioner's parents did not and do not have any dispute concerning the propriety/design of either the April 2016 IEP or PBIP. Petitioner's parents do not assert any allegations regarding implementation of either the April 2016 IEP or PBIP throughout the balance of the 2015-2016 school year.

June 2016 Progress Review

27. On June 8, 2016, a meeting was held to review and revise, if necessary, Petitioner's FBA/PBIP, fade-in plan, and to conduct educational planning. At that time, Petitioner was attending full school days with the ELA block spent in a resource room setting and the remainder of [REDACTED] day spent in the general education setting with adult support. The private behavior analyst, [REDACTED], had decreased [REDACTED] presence and interactions with Petitioner and a school-district behavior assistant had been faded in to work with Petitioner to provide support for components of [REDACTED] PBIP throughout the day.

28. At that time, the daily data sheet and home communication had been simplified substantially as the team no longer felt it was necessary to keep track of all the previous components, due to the positive and consistent trend in the data, when reviewed. Indeed, as of June 8, 2016, Petitioner was making good progress in [REDACTED] behaviors. It was noted that over the last 10 school days attended, [REDACTED] had only had two days where significant behavior problems had occurred.

29. The team noted that Petitioner continued to benefit from an additional adult available to support the behavior plan. For the next school year, the team recommended that as the data shows ■ is able to be successful, the adult support would be faded to increase ■ independence. It was agreed that there would be an internal staff meeting once teachers and staff had been identified for the 2016-2017 school year and those individuals would be trained on implementation of the PBIP. The last day of school was June 10, 2016.

Summer Review

30. Having determined Petitioner's personnel for the 2016-2017 school year, on August 8, 2016, an internal meeting was held with those who had previously worked with Petitioner or were slated to work with ■, to plan, prepare, and receive or provide training for Petitioner's upcoming year.^{4/} Following the internal meeting, on the same day, Petitioner's IEP/PBIP team (including Petitioner's ■) met to notify Petitioner's ■ of the training provided, and to provide an opportunity to meet those who would be assisting Petitioner in the upcoming year, and to discuss the supports to be provided.

31. During this meeting, Petitioner's ■ notified the team that Petitioner had been receiving intense therapies over the summer, with success, and, therefore, if a person was being brought in that was properly trained in behavior support, a

behavior aide/assistant would likely be unnecessary. Respondent did not contract to secure a behavioral therapist to work with Petitioner at that time.

2016-2017 School Year

32. The 2016-2017 school year began on August 10, 2016. Respondent provided Petitioner with numerous staff and personnel to implement the April 2016 IEP and PBIP. A review of their respective duties and responsibilities is instructive in this proceeding.

Personnel

33. [REDACTED] is Petitioner's [REDACTED] homeroom general education teacher. In addition to homeroom, [REDACTED] teaches Petitioner math, which is one of Petitioner's preferred topics, and science. Additionally, [REDACTED] designs Petitioner's social studies curriculum, which can be implemented by [REDACTED] or other personnel.

34. Although not responsible for Petitioner's schedule, [REDACTED] explained that Petitioner, according to [REDACTED] IEP, receives ELA (English/language arts) in the ESE classroom. Additionally, [REDACTED] schedule was adjusted to receive ELA (as it is a non-preferred activity determined to increase [REDACTED] target behaviors) in the morning, where [REDACTED] typically manifests better behavior. As a result, Petitioner is not with [REDACTED] homeroom class for math, social studies, and science.^{5/} Petitioner's schedule

has been adapted such that after the ELA block, [REDACTED] attends lunch, then a preferred activity in the ESE classroom, followed by teacher-directed PE, and then returns to [REDACTED] classroom for math and science until school is dismissed.

35. On a daily basis, [REDACTED] coordinates Petitioner's instruction with [REDACTED], who teaches language arts and social studies and with whom [REDACTED] shares an adjoining classroom.

[REDACTED] also coordinates with [REDACTED], Petitioner's ESE teacher, and [REDACTED], a paraprofessional assigned to Petitioner who provides behavioral support and collects data regarding Petitioner's behavior.

36. [REDACTED] is an ESE teacher specifically assigned to Petitioner. [REDACTED] has received training on Petitioner's IEP and [REDACTED]. Academically, [REDACTED] works with Petitioner in the ELA block. With respect to ELA, [REDACTED] collaborates on a daily and weekly basis with [REDACTED] and [REDACTED], an ESE teacher and case manager at School A. During the ELA block, Petitioner is the only pupil; however, [REDACTED] is accompanied by [REDACTED].

37. While teaching Petitioner in the ELA block, [REDACTED] credibly testified that [REDACTED] provides the following: "chunking" learning, additional time, assistance with note taking, shortened assignments, pacing, reduced written work, graphic organizers,

proximity control, cueing and prompting, and sensory strategies and support.

38. Additionally, [REDACTED] is assigned to Petitioner when [REDACTED] enters [REDACTED] room in the morning for homeroom. Upon arrival, [REDACTED] routine includes, but is not limited to, providing social stories, transitional warnings, schedule changes, visual schedules, visual supports, reward breaks, the behavior contract, and the goals for the day. [REDACTED] also accompanies Petitioner as [REDACTED] transitions to and from [REDACTED] "specials" throughout the day.

39. [REDACTED] is primarily responsible for drafting the daily home note that is provided to Petitioner's parents. The format of the note has been changed and modified over time based on collaboration with the IEP team. [REDACTED] credibly testified that the information contained therein is accurate.

40. [REDACTED], although possessing no specific training or education in behavior therapy, was trained, coached, and received modeling on the particulars of Petitioner's PBIP. Specifically, [REDACTED] was trained to understand the definitions of the target behaviors [REDACTED] was tasked with observing and documenting. [REDACTED] is with Petitioner throughout the entire day. At times, [REDACTED] completes Petitioner's home note as well as a separate data sheet. [REDACTED] is also responsible for documenting Petitioner's behaviors when [REDACTED] is in crisis mode.

41. Respondent engaged [REDACTED], school psychologist, member of the Functional Assessment Consultant Team, and a Board Certified Behavior Analyst, to begin working with the Petitioner in August 2016. [REDACTED] conducted observations of Petitioner on September 9 and 20, 2016, and made recommendations regarding the implementation of Petitioner's PBIP, assisted with data review, modified the data sheets to include target behaviors for reduction and home notes with increased breaks, attended meetings, and assisted in revisions to the PBIP throughout September and October 2016.

42. Respondent also contacted Engage Behavioral Health, Inc., an outside provider, regarding providing a registered behavior technician to work with Petitioner at School A. Thereafter, [REDACTED], Ph.D., who serves as Engage's Clinical Director, came to School A to conduct observations of Petitioner to obtain more information, and to properly determine which registered behavior technician in Engage's employ would best serve Petitioner's needs. [REDACTED] reviewed Petitioner's history, [REDACTED] IEP and PBIP, and was debriefed concerning Petitioner's behaviors with [REDACTED], ESE teacher and case manager at School A. On October 4, 2016, [REDACTED] conducted an observation of Petitioner in the afternoon during a time and setting wherein Petitioner was most likely to demonstrate

negative target behaviors. [REDACTED] again observed Petitioner on October 11, 13, and 19, 2016. Following her observations, [REDACTED] provided [REDACTED], Ph.D., Respondent's District Supervisor who oversees programs for [REDACTED] students, a summary of [REDACTED] recommendations to assist the school in meeting Petitioner's behavioral needs. Moreover, as requested by Respondent, [REDACTED] ultimately engaged a registered behavioral technician to work with Petitioner.

43. [REDACTED] is a certified behavioral analyst that has been working privately with Petitioner for approximately two years, providing [REDACTED] behavioral therapy in the home, school, and community setting. Although [REDACTED] was frequently engaged with Petitioner in the school setting in the 2015-2016 school year, per the IEP and PBIP, and fade-in plan, Respondent was to continue to collaborate with [REDACTED]; however, [REDACTED] conceded that the plan was to fade [REDACTED] out.

44. Nevertheless, on October 19, 2016, [REDACTED] participated in a joint observation of Petitioner with [REDACTED] and was present at all of the PBIP review meetings.

Petitioner's Targeted Behaviors

45. The first day of school for the 2016-2017 school year was August 10, 2016. By all accounts, during the first week of school, Petitioner's behaviors were not pronounced. [REDACTED] testified that during this first week, the [REDACTED] [REDACTED] are

essentially getting used to the new class routine and little work demands are made upon the pupils.

46. As the school year progressed [REDACTED] observed a substantial increase in the frequency and severity of Petitioner's targeted behaviors. [REDACTED] observed Petitioner hitting, pinching, biting, kicking, yelling, and destroying classroom property. Property destruction ranged from damaging bookcases, pulling cords from computers and sockets, pulling down and knocking down numerous items throughout the classroom, dumping glue all over the floor, swinging a meter stick, etc. Additionally, [REDACTED] has observed and has had to intervene when Petitioner put items in [REDACTED] mouth that could lead to choking. [REDACTED] has also been required, at times, to zip-tie the cabinets used for supplies to prevent Petitioner from inappropriately using or destroying the same.

47. [REDACTED] credibly testified that Petitioner's behaviors, although always present, began to escalate approximately one month into the school year. [REDACTED] observed Petitioner engage in inappropriate behaviors including improper vocalizations, throwing items, climbing or attempting to climb out the window, running out of the door of the classroom, running with scissors, pulling down items from the bulletin board, biting, spitting, kicking, pushing, and hitting others.

48. The evidentiary record contains documentation of several behavioral incidents resulting in a student referral, which are summarily itemized below. On September 13, 2016, it was reported that Petitioner hit a teacher in the chest, bit a different teacher on the arm and hit [REDACTED] on the head with a book, kicked a paraprofessional, eloped from [REDACTED] area, and damaged school property by writing on walls and throwing school objects and resources. On September 15, 2016, it was reported that Petitioner bit a teacher in the leg, hit the Assistant Principal in the face, eloped from [REDACTED] area, and damaged school property.

49. The following day, on September 16, 2016, it was reported that Petitioner eloped from [REDACTED] area and damaged school property in two separate rooms. On September 20, 2016, it was reported that Petitioner eloped from [REDACTED] area, threw classroom objects, engaged in classroom destruction, and kicked, bit, and hit teachers with objects. On September 29, 2016, it was reported that Petitioner eloped from [REDACTED] area (including going out of the emergency window), threw and destroyed school property, and hit, kicked, groped, and bit school personnel.

50. Petitioner's targeted behaviors continued to be the subject of student referrals in October 2016. On October 3, 2016, it was reported that [REDACTED] eloped from [REDACTED] area, wrote on walls and floors, climbed on furniture, and inappropriately grabbed at the teacher's chest. On October 5, 2016, it was

reported that Petitioner eloped from ■■■ area, threw school property, and attempted to go out all three classroom windows. On October 6, 2016, it was reported that Petitioner eloped from ■■■ classroom and ran out to the playground. Once back in the classroom, Petitioner continued to elope from ■■■ area, throw school property, climb on school furniture, try to escape out of the window, hit and kick school staff, and yelled "I'm going to kill you."

51. The following behavioral incidents resulted in out-of-school suspensions. On October 11, 2016, it was reported that Petitioner eloped from the guidance suite and ran to another room. During this time, Petitioner showed aggression towards staff to include attempted biting on the head, and displayed additional unsafe behavior by climbing on furniture. On October 13, 2016, it was reported that Petitioner displayed unsafe behaviors such as climbing on desks, tables, and bookshelves, physical aggression (striking, biting, pulling hair, and spitting on staff), and throwing school property. On October 17, 2016, it was reported that Petitioner displayed unsafe behavior such as destroying school property, jumping on and off of tables and desks, and spitting at and hitting staff members. On October 19, 2016, it was reported that Petitioner eloped from the room, and upon return ■■■ hit, spit at, and kicked staff members, then attempted to elope through the fire

escape window and destroyed school property. Finally, on October 25, 2016, it was reported that Petitioner eloped from [REDACTED] area, bit a teacher such that it broke the skin, and spit, hit, and pulled hair of staff members. It was also reported that [REDACTED] placed open markers in the teacher's water and engaged in classroom material and resource destruction.

52. Petitioner's behavioral incidents have disrupted and impeded the learning environment of other students. [REDACTED] credibly testified that [REDACTED] behaviors often impact [REDACTED] instruction as [REDACTED] is forced to stop [REDACTED] teaching and redirect or de-escalate Petitioner in the classroom. Similarly, [REDACTED] is required to refocus the other students' attention as they become distracted by Petitioner's inappropriate behaviors.

[REDACTED] has received approximately 20 verbal complaints from other [REDACTED] expressing concerns of general safety and lack of instruction. [REDACTED] and [REDACTED] credibly testified that the entire classroom has been evacuated approximately 15 to 20 times over the course of the school year related to Petitioner's negative behaviors. When this occurs, the other students are required to obtain their belongings and items needed for instruction and relocate to another available space for their safety and Petitioner's.

De-escalation Techniques

53. Petitioner avers that Respondent failed to implement the [REDACTED] in that "no de-escalation actions" were taken by school staff. Particularly, Petitioner avers that school staff did not use physical guidance and/or prompting. In support of that position, Petitioner's [REDACTED] testified that, in reference to the September 15, 2016, incident noted above, [REDACTED] was notified by School A to pick up Petitioner. Petitioner's [REDACTED] testified that upon arrival in the classroom, [REDACTED] found [REDACTED] in a swivel chair spinning around eating a lollipop with several adults observing Petitioner. Additionally, [REDACTED] testified that with respect to the October 17, 2016, incident referenced above, upon arrival in the [REDACTED] room, [REDACTED] found Petitioner to be sweaty, with no socks or shoes and running in a circle while the adults in the room observed. Petitioner's [REDACTED] limited observations upon arrival concerning these incidents is credited.

54. [REDACTED], Petitioner's private behavior analyst, testified that when requested by the [REDACTED] to pick up Petitioner from School A (due to a behavioral incident) on September 29, 2016, [REDACTED] did not, upon arrival, observe the staff implementing response blocking and physical guidance strategies, as set forth in the [REDACTED].

55. On October 6, 2016, [REDACTED] conducted an observation of Petitioner. During that observation, [REDACTED] observed Petitioner initially working on an academic task, however, [REDACTED] started to

escalate, getting out of [REDACTED] chair and going towards other materials in the classroom. [REDACTED] further observed [REDACTED] intervene and successfully de-escalate Petitioner and move [REDACTED] to [REDACTED] cool-off area where [REDACTED] and Petitioner reviewed a social story before Petitioner returned to [REDACTED] seat.

56. On October 13, 2016, [REDACTED] again observed Petitioner while in a behavioral crisis. [REDACTED] was called upon to provide input and suggestions. On this occasion, [REDACTED] observed personnel attempting to de-escalate Petitioner's behavior, blocking materials, and attempting to communicate with Petitioner. [REDACTED] was able to de-escalate Petitioner after approximately 30 minutes utilizing "safety care," a crisis management program, and a combination of strategies to make [REDACTED] compliant.

57. On October 19, 2016, [REDACTED] conducted a joint observation with [REDACTED] while Petitioner was in crisis in the general education class setting. Despite [REDACTED] best efforts, [REDACTED] was unable to de-escalate Petitioner on this occasion. [REDACTED] could not provide any additional solutions to Petitioner's behavior on this occasion.

Meetings/Revisions/Data

58. Throughout the fall of 2016, numerous meetings were conducted to review and revise Petitioner's various plans. On September 19, 2016, the IEP team met to review and or revise

Petitioner's IEP. At this meeting, it was determined that Petitioner qualified for eligibility as an academically [REDACTED] student. Petitioner's IEP was updated to include this additional eligibility category and reflect the addition of a goal for [REDACTED] students in math.

59. A meeting was scheduled to occur on October 7, 2016, however, the same was cancelled due to adverse weather conditions. The meeting was rescheduled for October 17, 2016, for the stated purpose of review/revise the current IEP and consider increasing ESE services. At that meeting, it was noted that since the September 19, 2016, meeting, behavior and safety concerns had arisen, and, therefore, the IEP/FBA team was reconvening to address additional supports to meet Petitioner's needs. This meeting concluded without any modifications to Petitioner's PBIP or IEP, and the team agreed to continue the meeting to October 27, 2016.

60. When the team reconvened on October 27, 2016, the team discussed Petitioner's escalation of behaviors and the data collected by staff in support thereof. As documented in the [REDACTED] review meeting:

As shown in the graphs below [Petitioner] began the school year with very few target behaviors needing to be decreased and was earning 80% or more of [REDACTED] daily checks for behavior goals on [REDACTED] Home Note. All target behaviors have shown a significant accelerating trend since the fifth week of

school. Elopement ranges from 0 to 25 per day. Materials and/or Property Destruction ranges from 0 to 54 per day. Out of Area ranges from 0 to 82 per day. Inappropriate Vocalizations range from 0 to 50 per day. The frequency of Unsafe Behaviors ranges from 0 to 88 incidents per day. The rate of Unsafe Behaviors is, on average, greater than one per minute. Since the beginning of the school year [Petitioner] has engaged in 664 unsafe behaviors, 345 of which have occurred over the last 10 days, that necessitated parent pickup to maintain the safety of [REDACTED] and school staff.

These behaviors typically occur in a cluster during times of high escalation/crisis, which typically begin after lunch or teacher directed P.E. (11:30-12:00). [Petitioner] has had a crisis episode involving long periods of time with a high frequency of the target behaviors during 17 out of 45 days of attendance (as of 10/26/16), which have resulted in 5 days, 5 hours and 45 minutes of suspension.

61. During the meeting, [REDACTED] expressed grave concern regarding the severity and intensity of Petitioner's behaviors, particularly during [REDACTED] time with the general education classroom setting with the additional adult support. Petitioner's behavior plan and crisis management plan were modified.

62. On October 31, 2016, an IEP team meeting was convened with all pertinent and required members in attendance.

[REDACTED], Respondent's Supervisor for ESE staffing, credibly testified, in detail, that the IEP utilized a facilitated IEP meeting model that provided all members, including Petitioner's [REDACTED], with a meaningful opportunity to

participate in each phase of the IEP process, including placement. [REDACTED] testimony is bolstered by the conference notes from the meeting itself.

63. Petitioner's Complaint contends that the October 31, 2016, IEP was predetermined and unilateral. Petitioner failed to produce any competent evidence to support said claim. The record reflects that Petitioner's [REDACTED] were full participants in the IEP process.

64. Ultimately, Petitioner's IEP was modified on October 31, 2016, in several respects. Of import to this proceeding, the IEP team, excluding the [REDACTED], concluded that Petitioner's appropriate placement was now a separate class, wherein [REDACTED] would be with non-disabled peers 39% or less of the week. This conclusion was reached after reviewing and addressing each section of the IEP. The IEP was modified in several respects, including, but not limited to, the following broad changes: a change from a large group to a small group setting for purposes of implementing Petitioner's goals (due to the difficulty Petitioner was having sustaining [REDACTED] in a large group setting); a change from regular education to an ESE classroom for [REDACTED] services; and an increase in the level of services provided.

65. Petitioner contends also that Respondent failed to implement Petitioner's [REDACTED] in its failure to provide

Petitioner's [REDACTED] with data sheets and fidelity checks, as indicated in the [REDACTED]. Although the record is not a model of clarity on this point, the evidence demonstrates that data was reviewed at each IEP meeting; data was reported to the [REDACTED] in the form of a daily home note; fidelity checks were conducted; and inter-observer reliability checks were conducted—all with the goal of ensuring proper implementation of the IEP and [REDACTED].

66. [REDACTED] testified that, in conducting [REDACTED] observations, [REDACTED] did not use a specific fidelity observation checklist. Petitioner contends fidelity observation checklists were not presented at the monthly meetings. Petitioner's testimony is credited on this point.

Proposed Placement

67. As noted above, the October 31, 2016, IEP provided that Petitioner's services were to be provided in a separate class, wherein [REDACTED] would be with non-disabled peers 39% or less of the week. Specifically, the IEP conference notes indicate that the recommendation was for a small group setting at a separate class level of supports and services on a regular school campus. School B was recommended as the assigned school, with the related service of transportation. [REDACTED] has a Ph.D. in special education with emphasis on students with [REDACTED]. [REDACTED] testified as to the features and benefits of the suggested placement/school, as set forth below.

68. For students who are [REDACTED] eligible, School B provides a full continuum of services wherein students are provided their level of support in a self-contained classroom for students with [REDACTED]. School B provides a specialized program referred to as [REDACTED]. The [REDACTED] program includes a speech language pathologist who works on social pragmatic language. Additionally, the [REDACTED] program provides a school social worker (a licensed mental health worker) who provides therapy looking at any co-occurring or any co-existing mental health disorders like [REDACTED]. The social worker provides explicit instruction along with the teacher in the area of social skills. The [REDACTED] program also provides for an ESE specialist, who provides additional supports, if needed, and assists with follow-up and carry-through with regards to behavioral strategies and approaches implemented in the classroom.

69. At School B, [REDACTED] program students have the ability for inclusion with non-disabled peers depending on the individual needs of the students.

70. School A does not have the full continuum of services or the added layers of support described above. Typically, students at School A access their ESE services through a consult or a co-teach model and School A does not have an ESE unit assigned to it for resource services.

CONCLUSIONS OF LAW

71. 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).

72. 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).

73. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

74. 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).

75. Local school systems must also satisfy the IDEA's substantive requirements by providing all eligible students with a free appropriate public education ("FAPE"), which is defined as:

Special education services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

76. "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).

77. 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).

78. 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).

79. 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).

80. In this matter, Petitioner's Complaint sets forth two specific procedural violations. Petitioner first contends that the placement determination, as set forth in the October 31, 2016, IEP, was unilateral and predetermined. 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.

81. Second, Petitioner contends that Respondent did not provide Petitioner's parents with data sheets and fidelity check sheets. The April 2016 IEP, under the domain of social/emotional and independent function, the goal provided that, "[a]cross all settings, with additional adult assistance, [Petitioner] will exhibit appropriate behavior by utilizing Positive Behavioral Strategies for 80% of opportunities/time over a nine week period." The IEP, as noted in the Findings of Fact above, enumerated certain available behavioral supports including, inter alia, a FBA/PBIP. The April PBIP provided that, as part of the monitoring component of the numerous behavioral strategies and interventions, a daily frequency chart/data collection form would be shared with the parents during monthly meetings. Additionally, graphs of the collected data from daily behavior charts would be provided to the parents at least monthly.

82. The IDEA provides that the parents of a child with a disability must be afforded an opportunity to inspect and review all education records with respect to the identification, evaluation, and education placement of the child, and the provision of FAPE. 34 C.F.R. § 300.501(a). Additionally parents

must be afforded an opportunity to participate in meetings with respect to the same. 34 C.F.R. § 300.501(b).

83. As discussed in the Findings of Fact above, the evidence establishes that Respondent substantially complied with the monitoring requirements of the PBIP; however, certain fidelity observation checklists were not provided to the parents at the meetings. Here, the undersigned determines that, although Respondent failed to provide Petitioner's parents with some of the monitoring data set forth in the PBIP, the same did not rise to the level of impeding Petitioner's right to FAPE, significantly infringe the parents' opportunity to participate in the decision-making process, or cause an actual deprivation of educational benefits.

84. 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").

85. 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."

86. Here, Petitioner does not raise any claims regarding the propriety of the April 2016 IEP, but rather avers that Petitioner failed to implement several components of the IEP. In determining whether the failure to comply with the terms of the IEP constitutes a denial of FAPE, two primary standards have been articulated. In Houston Independent School District v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000), the following standard was set forth:

[A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those

agencies accountable for material failure and for providing the disabled child a meaningful educational benefit.

Utilizing the foregoing standard, which requires proof of "substantial or significant" implementation failures, the court in Bobby R. held that the school district's failure to provide speech services for four months—among other implementation deficiencies—did not constitute a denial of FAPE. 200 F.3d at 348-49.

87. A competing standard was set forth in Van Duyn v. Baker School District 5J, 502 F.3d 811, 822 (9th Cir. 2007). In Van Duyn, the Ninth Circuit articulated a standard that, similar to Bobby R., requires proof of a material failure to implement the child's IEP—that is, something more than a "minor discrepancy" between the services a school district provides and the services required by the IEP. However, in contrast to Bobby R., the court in Van Duyn held that its materiality standard "does *not* require that the child suffer demonstrable educational harm in order to prevail." Id. at 822 (emphasis added). Thus, under the Van Duyn standard, a material failure to implement an IEP could constitute a FAPE denial even if, despite the failure, the child received non-trivial educational benefits.

88. Petitioner claims that Respondent failed to provide visual cues, visual schedules, planners, note taking assistance, and oral planning for written tasks. In support of said claim,

Petitioner's [REDACTED] testified that the visual cueing, an individual schedule, and social stories were not in place on the first day of school. Under either of the above-articulated standards, the undersigned determines that a one-day failure to implement said interventions was not a material failure to implement the IEP. Moreover, the evidence establishes that said interventions were routinely utilized throughout the year by School A's personnel.

89. Petitioner further contends that because "written notes" have not come home to the parents, and because Petitioner [REDACTED] has informed the parents that [REDACTED] does not have the ability to do a verbal response for written planning, said components of the IEP were not implemented. Petitioner's ESE teacher credibly testified that Petitioner was provided with oral planning and provided assistance with note taking. Petitioner's evidence concerning said claims is insufficient to establish a material failure to implement the IEP.

90. Next Petitioner avers that Respondent failed to permit [REDACTED] to provide services to Petitioner in the classroom and otherwise failed to collaborate with [REDACTED]. As noted in the Findings of Fact, the April 2016 IEP documented that, under the heading of Behavioral Supports, it was noted "[c]ontinue to collaborate with the private behaviorist." The April [REDACTED] Proposed Fade-In Plan provided that in May/June 2016,

"Fade Priv. Behavior Therapist to District Behavior Support School-based Data Collector." The undersigned determines that Respondent did, in fact, continue to collaborate with the private behaviorist, [REDACTED], during all times relevant to this proceeding. Moreover, neither the IEP nor [REDACTED] provided that Respondent was obligated to permit a private behaviorist to provide services in the classroom to Petitioner during the 2016-2017 school year. Thus, Respondent did not materially fail to implement Petitioner's IEP regarding said allegations.

91. Finally, Petitioner's Complaint alleges that Respondent changed Petitioner's schedule such that School A staff removed Petitioner from the general education classroom for more time than identified in his IEP. The April 2016 IEP provided that Petitioner's ESE placement would be in a "[r]egular class with resource services (special education services provided outside regular class 21% to 60% of the time)." The evidence establishes that Petitioner's schedule was changed in several particulars. First, in an attempt to modify behaviors that were typically occurring in the later part of the day, [REDACTED] ELA block was altered to occur in the morning. Additionally, at some point in time, Petitioner started receiving [REDACTED] social studies curriculum in a one-to-one environment. Finally, at some point in time, Petitioner was precluded from attending the library with [REDACTED] non-disabled peers. Petitioner failed to present sufficient evidence

to establish that, despite these changes, [REDACTED] was not otherwise educated with [REDACTED] nondisabled students at least 40% of the school day. Accordingly, this claim must fail.

92. Petitioner's Complaint is construed as alleging that Respondent failed to implement various behavioral supports contained in the April 2016 [REDACTED]. Specifically, Petitioner alleges that Respondent failed to provide a consistency of schedule, transition warnings, and de-escalation actions (physical guidance/prompting). The undersigned rejects these allegations as they are unsupported by the evidence.^{6/}

93. Those individuals who work with Petitioner throughout the school day, [REDACTED] and [REDACTED], credibly testified that transition warnings were provided to Petitioner on a daily basis. Petitioner failed to present sufficient evidence to the contrary, and, therefore, this allegation is due to be denied.

94. Regarding the consistency of schedule, it was documented in the [REDACTED] that unexpected changes to the schedule may elicit behaviors from Petitioner. Petitioner failed to present evidence of any material failures by Respondent in notifying Petitioner of reasonably anticipated changes in [REDACTED] schedule.

95. With respect to the contention that Respondent did not use de-escalation techniques, and particularly physical guidance or prompting, the evidence does not support Petitioner's

allegation. While Petitioner's [REDACTED] and [REDACTED] credibly testified concerning what they observed, these limited observations do not provide a complete accounting of the incidents and what behavioral strategies had been attempted prior to their arrival on scene or to what techniques were being implemented on a daily basis. On balance, the testimony elicited at hearing established that the de-escalating techniques, as articulated in the [REDACTED] and crisis management plan, were utilized in an attempt to control Petitioner's targeted behaviors, which would often last for an extended period of time.

96. Petitioner's Complaint alleges that Respondent unilaterally decided to change placement and assignment of Petitioner to another school, and seeks as a resolution that Petitioner be returned to the general education classroom with proper support. Accordingly, the undersigned construes Petitioner's Complaint as challenging the student's placement as determined in the October 31, 2016, IEP.

97. In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on students' placements or education environment in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A), provides as follows:

Least restrictive environment.

(A) In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

98. 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 least restrictive environment ("LRE") and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

99. 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).

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

101. 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.

102. 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 he 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.

103. Here, the evidence establishes that Petitioner's April 2016 IEP did not call for Petitioner to be educated in a regular classroom setting, with the use of supplemental aids and services. A "regular class" instructional setting is defined as a class in which a student spends 80% or more of the school week with non-disabled peers. § 1003.57(1)(a)(c), Fla. Stat. Petitioner's IEP called for Petitioner to spend 40% to 79% of the school week with non-disabled peers. Thus, notwithstanding the

label set forth in the IEP, Petitioner's specific setting was that of a resource room instructional setting, the next point on the continuum of instructional placements. See § 1003.57(1)(a)(d), Fla. Stat. Petitioner has not challenged the April 2016 IEP setting.

104. Accordingly, the instant proceeding turns on the second part of the test: 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).

105. The evidence establishes that, at all times relevant to this proceeding, Respondent attempted to mainstream

Petitioner, in the resource room instructional setting, to the maximum extent appropriate. Indeed, Respondent made modifications to his behavior plan, altered his schedule, and assigned significant behavior supports, strategies, and personnel with the hopes of ameliorating Petitioner's targeted negative behaviors, to no avail. At the time of the October 31, 2016, IEP, Petitioner's behaviors, which at times posed a danger to [REDACTED] and others, were impeding his learning and that of his fellow students.

106. The undersigned is mindful that great deference should be paid to the educators who developed the IEP. A.K. v. Gwinnett Cnty. Sch. Dist., 556 Fed. Appx. 790, 792 (11th Cir. 2014) ("In determining whether the IEP is substantively adequate, we 'pay great deference to the educators who develop the IEP.'") (quoting Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991)). As noted in Daniel, "[the undersigned's] task is not to second-guess state and local policy decisions; rather, it is the narrow one of determining whether state and local officials have complied with the Act." Daniel, 874 F.2d at 1048.

107. The October 31, 2016, IEP proposes a change of Petitioner's placement to the next point (in terms of escalating restrictiveness) on the continuum of possible placements. While it is undisputed that the proposed placement offers less potential for interaction with non-disabled peers, from the

evidence presented, Petitioner's behaviors, at this time, warrant such a result. The undersigned concludes that Respondent's proposed placement of Petitioner in a separate class mainstreams Petitioner to the maximum extent appropriate. Accordingly, the proposed placement is approved.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is denied in all respects.

DONE AND ORDERED this 3rd day of February, 2017, in Tallahassee, Leon County, Florida.

S

TODD P. RESAVAGE
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of February, 2017.

ENDNOTES

^{1/} On or about September 16, 2016, Petitioner was further determined to meet the eligibility criteria for Academically Gifted.

^{2/} An IEP, among other things, identifies a student's "present levels of academic achievement and functional performance,"

establishes measurable annual goals, addresses the services and accommodations to be provided to the student and whether the student 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.

3/ The undersigned construes the phrase "as Petitioner is able" as a condition precedent and not as an indication of [REDACTED] present state.

4/ The individuals in attendance included [REDACTED], [REDACTED] (Area 5 ESE Supervisor), [REDACTED], [REDACTED] (Area 5 District Resource Teacher), [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

5/ Although Petitioner was in the general education classroom for social studies at the beginning of the year, [REDACTED] is no longer in that setting. The record is unclear as to when said change occurred and whether [REDACTED] receives his social studies instruction.

6/ It appears based on Petitioner's Proposed Order, that Petitioner's claims related to transitional warnings and schedule change have been abandoned as they are not included in the proposed order. Petitioner does, however, address the change of schedule as it relates to [REDACTED] educational placement.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).