STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 17-2582E

BROWARD COUNTY SCHOOL BOARD,

Respondent.
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FINAL ORDER

A final hearing was held in this case before Diane Cleavinger, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on June 28, 2017, in Fort Lauderdale, Florida.

APPEARANCES

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

For Respondent: Susan J. Hofstetter, Esquire
Broward County School Board
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether the individualized education plan (IEP) promulgated on March 6, 2017, was reasonably calculated to provide Petitioner a free appropriate public education (FAPE) where the placement was not in a 24-hour residential treatment center, as requested by Petitioner.

PRELIMINARY STATEMENT

On May 3, 2017, Respondent Broward County School Board received Petitioner's Due Process Complaint. Petitioner's complaint was forwarded to DOAH on May 3, 2017, and assigned to the undersigned.

After discussion with the parties, the final hearing was scheduled for June 28, 2017. The parties did not file a Joint Statement of Undisputed Facts.

The final hearing was conducted as scheduled. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. At the conclusion of the final hearing, the post-hearing schedule was discussed. Based on that discussion, it was determined that proposed final orders would be filed on or before August 4, 2017. Further, the undersigned's final order would be issued on or before September 8, 2017. The schedule was memorialized by the undersigned's July 3, 2017, Order Memorializing Deadlines for Proposed Orders and the Final Order and the September 1, 2017, Order of Specific Extension of Time for Final Order.

After the hearing, Petitioner filed a Proposed Final Order on July 5, 2017. Respondent filed a Proposed Final Order on August 4, 2017. Both parties' proposed orders were accepted and considered in preparing this Final Order. Additionally, unless otherwise indicated, all rule and statutory references contained

in this Final Order are to the version in effect at the time the subject IEP was drafted. Finally, for stylistic convenience, [redacted] pronouns are used in the Final Order when referring to the Student. The [redacted] pronouns are neither intended, nor should be interpreted, as a reference to the Student's actual gender.

FINDINGS OF FACT

1. The Student is an [redacted], [redacted] child, with considerable [redacted] ability, but the Student can be [redacted]. Early on Petitioner began to exhibit [redacted] and [redacted] behavior, as well as [redacted] and [redacted] aggression. Because of such behaviors, Petitioner was involuntarily committed for the first time at age [redacted], diagnosed with [redacted] [redacted]/[redacted] [redacted] ([redacted]) and a [redacted] [redacted], and placed on [redacted].

2. The Student receives [redacted] at home. However, there are some times when the Student does not take the [redacted] because either the parent or the parent's roommate forgets to administer the [redacted] to the Student. Over the years, the Student has been on several [redacted] including [redacted], [redacted], and [redacted], and since a [redacted] [redacted] in April of 2017, the Student has been taking [redacted] ([redacted]) and [redacted] ([redacted]). [redacted] is a [redacted] [redacted] used for the treatment of [redacted]. [redacted] is an [redacted] medication used to control [redacted] similar

to those exhibited by Petitioner, such as [redacted], [redacted], [redacted], [redacted], and [redacted] behavior.

3. The Student has reported to the parent that the new [redacted] keeps [redacted] calm when the Student becomes upset and that [redacted] is able to stay calm and breathe. Such improved behavior and mood is a positive result of the new [redacted] and as a result the Student, with the exception of one day, had [redacted] perfect days at the end of the 2016-2017 school year. The evidence showed that [redacted] management is critical for the Student to be successful and that without such [redacted], the Student struggles [redacted].

4. The Student's parent is a loving parent and very concerned about Petitioner. However, the parent is extremely [redacted] as a single parent, raising [redacted] and trying to make a better life for the family by working full-time and going to school to [redacted] with the goal of attending [redacted] school. As a result, the parent is extremely [redacted] after work and school and monitoring the Student's education or educational paperwork has not been a priority. The parent has also been [redacted] in the Student's education and IEP process. Additionally, as was evidenced after the filing of the due process complaint, the parent is difficult to easily or quickly

communicate with due to the parent's very busy work and school schedule and full voice messaging system.

5. The Student was made eligible for exceptional student education (ESE) on April 24, 2013, as [redacted]/[redacted] [redacted] ([redacted]). On April 25, 2013, the day after the Student was made eligible for ESE, the Student was enrolled at School A in Broward County and placed in a [redacted] program for [redacted] students. The Student remained at School A through [redacted] and [redacted] grade, the [redacted] and [redacted] school years. However, the Student continued to [redacted], [redacted], [redacted], and [redacted] teachers and classmates. Petitioner, also, frequently [redacted], [redacted], [redacted] [redacted] and crawled on the classroom furniture. The Student was difficult to redirect. The evidence was clear that the Student's [redacted] interfered with [redacted] education, and the education of others, and that the Student was in need of a [redacted] school with an [redacted] program.

6. The IEP Team at School A scheduled a meeting in May of [redacted] to discuss extended school year services for the summer of [redacted] and placement in a [redacted] school for [redacted] grade, [redacted] school year. The parent attended the May meeting briefly by telephone, but consented to the meeting proceeding without the parent's attendance or participation. The IEP team concluded that the Student should attend School B, a [redacted]

school, due to the Student's [redacted] at School A. Beginning in the summer of 2015, the Student was placed at School B with the consent of the parent.

7. School B is a [redacted] school for ESE students only. It has a population of about [redacted] students and a very low student to teacher ratio. The school provides students with access to a therapist daily, an on-campus psychiatrist, a full-time nurse, and a behavior team to address behaviors. It also institutes a behavior management program to teach appropriate behaviors and coping skills.

8. Each year when a student registers at School B, the parent is provided with a letter informing them that the student will be receiving a home note daily and that such note is the default method of communication between the parent and the school. The home note informs the parent about their student's day, including any behavior issues a student may have. It also includes any notices from the school regarding upcoming meetings, like parent/teacher meetings, or IEP meetings (parent participation forms). The parent has the option to sign the note daily. The parent also has the option to choose a desired method of communication (home note, email, or regular U.S. Mail) with the school. At the time of enrollment, the parent, in this case, did not request to receive communication by email or U.S. Mail

and was aware the daily home note was the mode of communication between the school and the parent for parental notices.

9. The Student's teacher testified that it was [redacted] responsibility to attach notices to the home note, to ensure that the daily note was placed into the Student's backpack, and to review the signed and returned documents throughout the school year. The evidence showed that the Parent received these daily notes and regularly signed the [redacted] contract that was sent home attached to the notes. The [redacted] contract was used to assist the Student in moving through the [redacted] system at the school and by assignment to School B, was part of the Student's IEP.

10. School B's [redacted] system has five levels. The beginning level is the training level. A student is generally on the training level for a minimum of 25 consecutive days. However, as with each of the five levels, there are specific behavior criteria or goals that a student must meet to move to the next level. As is the case here, individual behavior contracts are often used in the program. All students and parents are informed, in writing, of these criteria and the criteria for each level. The second level is the evolving level. A student is on the evolving level for a minimum of 30 to 45 days. After the evolving level, there are three more levels, achieving level 1, achieving level 2, and mastering level.

11. The different levels allow a student to participate in different activities within the school setting and receive rewards for appropriate [redacted] over time. The purpose of the level system is to provide the student with a foundation to learn what behaviors are appropriate and ways to better regulate their inappropriate [redacted].

12. In this case, Petitioner was on the training level for the [redacted] school year. Petitioner never achieved [redacted] consecutive days of appropriate [redacted] during the year. The evidence showed that the Student's inability to graduate to the next level was a result of the Student's [redacted] and [redacted] [redacted] and a lack of consistent [redacted] management.[1]

13. Additionally, School B has [redacted] systems in place to address student [redacted] in the classroom and, by virtue of assignment to School B, is part of a student's IEP and [redacted] ([redacted]). Under the school's [redacted] systems, if a student begins to exhibit minor [redacted], the teacher will first have the student serve a two-minute time-out in the classroom in a study carrel. If the minor [redacted] continue, staff will add an additional five minutes to the study carrel time-out. Throughout, a student is reminded to use [redacted] strategies and coping skills to calm themselves.

14. If a student's behavior continues and escalates to a higher level of disruption to the classroom, the staff will call the [redacted] ([redacted]) team. At School B, there are [redacted] behavior technicians on the [redacted] team: [redacted] for high school and [redacted] for elementary and middle school. [redacted] team members are trained annually in [redacted] ([redacted]) and receive ongoing training throughout the school year. The call to the [redacted] team by staff is known as a [redacted] call and there are three levels of [redacted] calls.

15. A [redacted] call occurs when a student's [redacted] causes a serious or continued disruption in the classroom. A [redacted] call occurs when a student is continuing to demonstrate destructive behavior. At this time, a student is removed from the classroom. A [redacted] call occurs when a student is being very [redacted] and may be [redacted], [redacted] items, and not [redacted]. A report is filled out every time a PIP call occurs.

16. As indicated, once the [redacted] team responds and, if necessary, the student is removed to a quieter [redacted] room for an extended time-out of 18 minutes or more, depending on the level of [redacted] and the [redacted] in which a student is [redacted]. At School B, the [redacted] room is located in [redacted]. Once the student is in the [redacted] for an hour or more, the teacher provides school work for the student that they can do independently. The classroom teacher does explain

the assignments to the student while in the [redacted]. When the student returns to the classroom after being in the [redacted] classroom, the teacher reviews the work the student missed while out.

17. Again, throughout these interventions a student is reminded to use [redacted] strategies and coping skills to calm themselves. Additionally, there is a process used to transition the students from the [redacted] back to the classroom setting known as [redacted], [redacted], [redacted], and [redacted] ([redacted]) process. The [redacted] process assists students with working through what happened, what options were available to them, and how they might handle a given situation or stressor better next time.

18. If a student elopes from the classroom, a paraprofessional shadows them, and a call is made to the [redacted] team to let the team know that a student is out of area. At that time, a [redacted] team member will take over the task of following a student and works to get them to stop. Notably, staff cannot physically touch or pull a student back to campus, when they are eloping from campus, unless they are a danger to themselves or others. Once returned to campus, a student is taken to the [redacted] to serve a time-out for leaving the classroom. Again, the [redacted] process is used to transition a student back to

the classroom. The [redacted] call and [redacted] processes were followed with the Student throughout his time at School B.

19. Staff also take preventative measures to ensure that a student with a history of elopement does not leave campus, such as not sitting the student near an exit and ensuring that a staff member is close by. The measures taken vary based on the student and the setting. In this case, there is an appropriate elopement plan in place for the Student.

20. During the Student's [redacted]-grade year ([redacted]), the Student was [redacted] or [redacted] for [redacted]. However, the evidence demonstrated the Student was doing better at School B and made progress during that school year, but continued to engage in the [redacted] described above.

21. Additionally, in the second half of the [redacted]-grade year, the next annual IEP meeting for the Student was scheduled for March 8, 2016. In February 2016, two separate written parental notices of the March 8 meeting were attached to the daily note and sent home with the Student. They were received by the parent. These notices afforded the parent a reasonable opportunity to attend the scheduled IEP meeting. However, the parent did not respond to the notices and did not attend the March 8, 2016, IEP meeting for the Student. When the parent did not attend the IEP meeting, school staff attempted to contact the parent by telephone, but were unable to leave a message as the

parent's voicemail was full. The meeting was held and the team appropriately continued the Student's placement at School B. The team also developed appropriate goals and accommodations for the Student. No issues were raised as to this IEP or placement and the parent did not object to the continued placement of the Student at School B through the end of the school year in June [redacted]. Moreover, based on the Student's progress, [redacted] was promoted to [redacted] grade.

22. The Student returned to School B in [redacted] to start the [redacted]-grade, [redacted] school year. Again, the parent did not raise any concerns about the Student's placement at School B until the end of the school year when this due process complaint was filed with the School Board on May 3, 2017.

23. The evidence demonstrated that during the [redacted] school year, the school staff complied with the Student's [redacted] plan and IEP. In general, when the Student was having a good day, the Student came to class ready to work and completed assignments with no issues or concerns. If the day began rocky, the Student's teacher (or other staff) used proactive strategies in the classroom setting and prompted the Student to use coping strategies, like a deep breath, to calm down. The teacher also reminded the Student that [redacted] could access [redacted] [redacted] if needed. The Student's response to the these interventions varied. When the Student was really [redacted], the Student would not respond at

all to the [redacted] strategies used by classroom staff. At other times, the Student would use coping strategies and take deep breaths, ask for a stress walk, or to speak with the therapist.

24. The Student's teacher provided classwork for the Student when the Student was in the [redacted] classroom for extended periods of time greater than an hour. The teacher would take the work to the classroom and explain the assignments to the Student. [redacted] would encourage the student to take [redacted] time, work through the assignments, and that [redacted] was available to help should the Student need assistance.

25. Additionally, during the school year, [redacted], the school's licensed family [redacted] and [redacted] counselor assigned to the Student, responded to "[redacted]," when the Student requested to speak with [redacted] to de-escalate, and to "[redacted]" when an adult called for [redacted] to intervene because the Student was in crisis. The Student utilized this service consistently when [redacted] wanted to talk about something that occurred in the classroom and made [redacted] calls requesting to talk with [redacted]. [redacted] [redacted] times during the [redacted] school year. Such calls were typically due to a [redacted] peer interaction that the Student experienced. [redacted] [redacted] also [redacted] interacted with the Student daily in addition to the Student's regularly scheduled weekly [redacted] [redacted] sessions.

26. At the beginning of the [redacted] school year, the Student appeared to be receiving [redacted] prescribed [redacted]. Later in the year, there was a period of time where the Student was having more [redacted] calls due to [redacted], [redacted], [redacted], and not wanting to be [redacted]. In April 2017, the Student was [redacted]. Once the Student returned to school on different [redacted], there was a significant change for the positive in the Student's [redacted], with less [redacted] calls while remaining in class and doing the work assigned.

27. The [redacted] behavior and activity sheets for the [redacted]-[redacted] school year show the above described [redacted] and that the Student's [redacted] cycled. There were periods of time when the Student was completely successful and times when the Student was not successful. A long stretch of appropriate [redacted] occurred around [redacted] of [redacted] when the Student had [redacted] or [redacted] weeks of [redacted] success and almost graduated to the next level. However, the Student entered a cyclic period of [redacted] and again began to engage in [redacted].

28. The sheets also showed that once the Student's [redacted] was adjusted in [redacted], the Student consistently had [redacted] perfect days at the end of the school year with the exception of one day when the Student had not taken [redacted] prescribed [redacted]. The better evidence demonstrated that throughout the school year, the Student was able to earn

incentives, such as going to the market to purchase items numerous times and demonstrated that the Student could and did make progress during the school year.

29. During the [redacted] school year, the Student [redacted] four times from the campus at School B. Importantly, when the Student [redacted], [redacted] is aware of [redacted] surroundings and does not endanger [redacted] while [redacted].[2/]

30. The first [redacted] occurred on [redacted]. The Student ran from class towards the front of the school where it adjoins the high school. The Student jumped the fence onto the high school property and ran to some bleachers. At all times, school staff shadowed the Student during the [redacted]. A [redacted] call was made that the Student had [redacted] and at least two staff members followed the Student to the bleachers where the Student stopped. The evidence showed that the Student was aware of the surroundings during the [redacted] and was never in danger during this incident. The Student was asked to return to campus by staff, the Student complied and returned to campus with staff.

31. The second [redacted] occurred on [redacted], when the Student ran from class. Details regarding this [redacted] were few and it is unclear if the Student left campus. However, staff shadowed the Student during the time [redacted] was "out of area" and escorted the Student back to class or the [redacted]. There

was no evidence that the Student was in danger during this [redacted] and it is unlikely that the Student was in any danger.

32. The third [redacted] occurred on [redacted]. At that time, the Student ran to the back of the school. Staff again was following the Student as the Student jumped the gate heading through a natural area toward the [redacted]. This time, [redacted], the [redacted], climbed over the gate and convinced the Student to return to school. The entire time, at least one person had eyes on the Student. [redacted] asked the Student to come back to campus and the Student complied. Again, the Student was aware of the surroundings and was never in danger during this event.

33. The fourth incident occurred when the Student [redacted] from campus on [redacted]. The Student was on the physical education field playing a game and was asked to collect some equipment. The Student refused and was prompted again to comply with the request. Instead of complying, the Student ran toward the back of the school, jumped the gate, and stopped just outside the gate close to an adjoining subdivision area. There was no traffic and the evidence showed that the Student was aware of the surroundings. As the Student began to run, a [redacted] call was made that [redacted] was out-of-area. [redacted] was shadowing the Student to ensure [redacted] safety. At that time, [redacted], the assistant principal, and [redacted], a [redacted] technician, took the golf

cart and followed [redacted] and the Student. [redacted] opened the gate and asked the Student to return to school. The Student immediately returned to campus and was never in danger.

34. [redacted], as the assistant principal, contacts parents regarding student [redacted]. Typically, parental contacts are made when a student leaves campus for a significant distance or if the student is being [redacted] toward another child.

35. The evidence showed that [redacted] and [redacted] called the parent the day the Student left the campus and headed toward the [redacted] in [redacted]. The Student was not significantly off campus during the other three [redacted] and it was unclear whether the parent was called. While troubling to the parent, the evidence did not demonstrate that the lack of calls to the parent regarding these [redacted] or other alleged poor communication by school staff to the parent materially resulted in a failure of the school to provide FAPE to the Student and did not otherwise violate the Individuals with Disabilities Education Act (IDEA).

36. Additionally, the Student's teacher, along with other staff members, reached out to the parent by telephone multiple times throughout the school year whenever there was an incident involving the Student. The teacher often would go to [redacted],

who would then make contact with the parent. The evidence showed that the parent never attempted to contact the Student's teacher.

37. Further, [redacted] and the Student's parent had contact via email, over the telephone, and in person on several occasions throughout [redacted] school year. More specifically, [redacted] provided the parent with some requested information via email; [redacted] contacted the parent by telephone or telephone message every time the Student had a [redacted] call in order to let [redacted] know what had taken place. [redacted] also spoke to the parent in person when the parent met [redacted] at the [redacted] after the Student had [redacted] and was [redacted] on [redacted]. Throughout the year, the parent's response to [redacted] contacts was inconsistent. The parent would sometimes follow-up with a return phone call to [redacted] and sometimes not. The evidence demonstrated that the school's communication with the parent was adequate to keep the parent informed about the Student's education. The evidence did not demonstrate that any alleged poor communication by school staff to the parent materially resulted in a failure of the school to provide FAPE to the Student and did not otherwise violate IDEA.

38. In [redacted] of [redacted], the parent called [redacted] because the Student had voiced [redacted] at home. During the call, the parent inquired about when the next IEP meeting for the Student would be held. In fact, the IEP meeting had not yet

been scheduled for the Student. [redacted], who was not responsible for scheduling IEP meetings, told the parent that [redacted] did not believe the IEP meeting had been scheduled, but that [redacted] believed it would be around the Student's [redacted], as previous IEP meetings had been. [redacted] advised the parent to call the staff responsible for scheduling IEP meetings. However, the parent was very busy during the months after the parent's January call and did not follow-up with the appropriate school personnel to find out if or when the meeting was scheduled.

39. On [redacted] and [redacted], IEP meeting notices, scheduling the IEP meeting for [redacted], [redacted], were attached to the daily note and sent home with the Student. This method of notifying the parent was reasonable, was the method chosen by the parent for such communication, and afforded the parent a reasonable opportunity to participate in the upcoming IEP meeting.

40. The Student's IEP meeting was held on [redacted], [redacted], a date close to the Student's [redacted] on [redacted] [redacted]. As in the past, the parent did not attend the meeting. At the meeting, the IEP team created an IEP for the Student. The better evidence demonstrated that the academic goals on the Student's IEP were commensurate with where [redacted] was functioning. The better evidence further demonstrated that the [redacted] goals appeared to be challenging, but attainable for the Student. In all respects,

the evidence showed that the IEP developed by the IEP team and the continued placement at School B was appropriate for the Student.

41. Around [redacted], well after the Student's [redacted], the parent called [redacted] and learned that the meeting had taken place. The parent was understandably upset.

42. That same day [redacted] informed staff responsible for scheduling the IEP meeting that the parent had concerns about the Student's [redacted] and was [redacted] about not being notified of the IEP meeting. School staff immediately called the parent on [redacted] and, because the parent did not respond to staff's telephone call, emailed the parent on [redacted], expressing regret that the parent was not in attendance at the [redacted] meeting and inviting the parent in for another meeting. In fact, the parent never responded to the telephone call or the email from staff. At the time, the parent did not inquire about [redacted] for the Student. If the parent had so inquired, staff would have scheduled an IEP meeting so that the IEP team along with the parent could discuss the appropriateness of [redacted].

43. [redacted], on, the parent did not want to speak with the staff at School B and declined to engage in a resolution meeting for the Due Process Complaint the parent filed on behalf of the Student. The parent also cancelled a meeting

[redacted] had requested with the school principal after the Student was again involuntarily [redacted] on [redacted], for [redacted] days.

44. At some point around [redacted], the parent developed some concerns about personnel at School B being [redacted] towards the Student. However, the evidence did not establish that school staff [redacted] the Student. As such, the allegations regarding such abuse contained in the Due Process Complaint filed by Petitioner are dismissed.

45. As indicated, during the last quarter of the [redacted] school year, the Student was doing very well in the classroom. The first and the third quarter, the Student did not do as well. However, following the [redacted] [redacted] and [redacted] adjustment, there was only one [redacted] call for the Student in [redacted] of [redacted]. On that day, the Student had not taken [redacted] prescribed [redacted] and became [redacted] and [redacted]. Because of the Student's [redacted], school staff called the parent to pick up the Student. However, based on the assessments given at the end of the school year, the Student met criteria for promotion to the fifth grade and was promoted at the end of the school year. Such progress at the end of the year was a turn-around from the first half of the fourth grading period and showed the Student made significant educational progress during the school year.

46. As indicated earlier, [redacted] was raised by the parent for the first time when the Due Process Complaint was

filed on May 3, 2017. However, there was no evidence presented at the hearing that demonstrated what [redacted] was sought or whether such placement was appropriate for the Student. Further, the record in this case does not reflect that a more [redacted] was or would be appropriate for the Student. Such future decisions need to be made by the IEP team, hopefully with input from the parent should the parent decide to participate. As such, since the evidence in this case demonstrated that Respondent complied with the procedural requirements of IDEA and that the IEP for the Student provided FAPE, the Due Process Complaint filed by Petitioner should be dismissed.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto. §§ 1003.57(1)(b) & 1003.5715(5), Fla. Stat. and Fla. Admin. Code R. 6A-6.03311(9)(u).

48. 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).

49. 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).

50. 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).

51. Local school systems must satisfy the IDEA's substantive requirements by providing all eligible students with FAPE, which is defined as:

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

20 U.S.C. § 1401(9).

52. "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).

53. 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).

54. "The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 13 S. Ct. 988, 994 (2017)(quoting Honig v. Doe, 108 S. Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." Id. (quoting Rowley, 102 S. Ct. at 3034).

55. In Rowley, 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 or inadequacy does not automatically result in a violation of IDEA with a concomitant denial of FAPE. See G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied and a violation of IDEA occurs only if the procedural “inadequacy” or flaw materially impeded the child's right to FAPE, significantly infringed the parents' opportunity to participate in the decision-making

process, or caused an actual deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); and Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 (2007).

56. In this case, Petitioner has alleged that the parent was not properly notified of the March 2017 IEP meeting. In that regard, IDEA provides for notice to the parents of an IEP meeting in 34 C.F.R. §300.322, in pertinent part:

> (a) Public agency responsibility—general. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—
>
> (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend;

Rule 6A-6.03028(2)(b)1. incorporates the above notice requirement into Florida law.

57. In this case, the better evidence demonstrated that the parent received notice of the March 6, 2017, IEP meeting sufficient to afford the parent an opportunity to attend the meeting. The evidence demonstrated that the notice was sent by the mode of communication the parent chose for such communication. However, for reasons related to an overly busy schedule, the parent did not attend the March 6 meeting as had been the parent's practice in the past. Further, the IEP developed at the meeting by the IEP team was appropriate for

Petitioner at the time it was developed. Given these facts, the evidence did not demonstrate a material procedural violation relative to parental notice and the allegations of the Due Process Complaint relative thereto are dismissed.

58. 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." Rowley, 458 U.S. at 206-07. Recently, in Endrew F., the Supreme Court addressed the "more difficult problem" of determining a standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." Endrew F., 13 S. Ct. at 993. In doing so, the Court held that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 999. As discussed in Endrew F., "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." Id.

59. The determination of whether an IEP is sufficient to meet this standard differs according to the individual

circumstances of each student. For a student who is "fully integrated in the regular classroom," an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Id. (quoting Rowley, 102 S. Ct. 3034). For a student not fully integrated in the regular classroom, an IEP must aim for progress that is "appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." Id. at 1000. In this case, the evidence showed that the academic and behavioral goals were appropriately ambitious in light of the Student's cyclical emotional disability.

60. Additionally, the assessment of an IEP's substantive propriety is further 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, deference should be accorded to the reasonable opinions of the professional educators who helped develop an IEP. See Endrew F., 13 S. Ct. at 1001 ("This absence of a bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review" and explaining that "deference is based on the application of expertise and the exercise of judgment by school authorities."); 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 Board of Education, 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."

61. Here, Petitioner advances one substantive claim. Specifically, Petitioner avers that the March 2017 IEP fails to provide Petitioner with FAPE in that the proposed placement is not a residential placement, as requested by Petitioner's parent. The IDEA provides directives on students' placements or education environment in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A) provides as follows:

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

62. 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 least restrictive environment (LRE) requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the above-referenced

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

63. Additionally, "[i]f placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.104.

64. 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).

65. With the LRE directive, "Congress created a statutory preference for educating handicapped children with nonhandicapped children." Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act, School districts must both seek to mainstream handicapped children and, at the same time, must

tailor each child's educational placement and program to [redacted] special needs." Daniel R.R. v. State Bd. of Educ., 874 F.2d at 1044.

66. 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.

67. 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.

68. Against the above legal framework, we turn to Petitioner's substantive claim. As indicated, Petitioner contends that the appropriate placement should be a [redacted]. Addressing the first prong, Petitioner failed to present sufficient evidence that the Student could not achieve a meaningful educational benefit in the [redacted] school classroom, as proposed in the [redacted] IEP, with the use of supplemental aids and services and that a 24-hour residential placement is necessary. Indeed, Petitioner failed to present sufficient evidence as to any proposed [redacted] and the services any such [redacted] would ostensibly provide and whether said program is primarily oriented toward enabling Petitioner to obtain an education or would be appropriately tailored to meet Petitioner's special needs.

69. Similarly, Petitioner failed to present sufficient evidence addressing the second and third prong of the Daniel/Greer inquiry. The undersigned is also mindful of the IDEA's goal of educating the student as close as possible to the Student's home. From the evidence presented, it is unclear whether Petitioner's parent desires the requested placement to be in [redacted] County, [redacted], somewhere else in [redacted], or some other [redacted].

70. In short, Petitioner failed to satisfy [redacted] burden of establishing that the [redacted] IEP was not reasonably calculated to provide Petitioner FAPE where the proposed placement was not in a 24-hour residential placement. Given this lack of evidence, the allegations regarding residential placement contained in Petitioner's Due Process Complaint are dismissed.

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 7th day of September, 2017, in Tallahassee, Leon County, Florida.

S

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of September, 2017.

ENDNOTES

[1/] During the Student's [redacted]grade year, [redacted], a licensed clinical psychologist, was the private

therapist for the Student beginning in August 2016 until the beginning of March 2017. The Student had never been observed by [redacted] in the school setting. [redacted] saw the Student approximately once a week and worked with the Student at least 20 hours to motivate [redacted] to engage in the behavior management system at School B and get off of the training level. Following the Student's April 20, 2017, commitment, [redacted], the school's licensed family therapist and mental health counselor assigned to the Student, was given an Authorization for Release of Information in order for [redacted] to communicate and share information with [redacted]. [redacted] called [redacted] to introduce [redacted] and to let [redacted] know that the parent wanted [redacted] to reach out to [redacted] for collaboration. No collaboration resulted from the call. Again, the evidence showed that the Student's behavior is cyclical and results in periodic irritable and manic-like symptoms which the school's behavior program and methods work to minimize. Based on the evidence at hearing, such a program offers the Student the opportunity to receive an appropriate education.

[2/] The evidence indicated that the Student runs during these elopements to work or burn off stress or anxiety. The IEP team might consider that an appropriate area for the Student to do a stress run instead of or in addition to, a stress walk might be an appropriate accommodation for him.

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).