

State of Florida

DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

Case No. 20-0061E

vs.

BROWARD COUNTY SCHOOL BOARD,

Respondent.

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FINAL ORDER

A due process hearing was held in this matter before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on [REDACTED], in Lauderdale Lakes, Florida.

APPEARANCES

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

For Respondent: [REDACTED], Esquire  
School Board of Broward County  
K. C. Wright Administration Building  
600 Southeast Third Avenue, 11th Floor  
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

Whether the School Board failed to provide a free and appropriate public education (FAPE) by improperly identifying the student's eligibility category and by not placing the student in the least restrictive environment (LRE), in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*

PRELIMINARY STATEMENT

Petitioner filed a Request for Due Process Hearing (Complaint) on [REDACTED]. On that same date, the School Board forwarded the Complaint to DOAH, and the Complaint was assigned to the undersigned for all further proceedings. On [REDACTED], the School Board filed a status report indicating that the student's parent had, in writing, waived the resolution session and wanted to proceed directly to the due process hearing. The School Board also agreed to waive the resolution session. Petitioner requested, and the School Board agreed to provide, a [REDACTED] interpreter for all proceedings.

A telephonic pre-hearing conference with the parties was held on [REDACTED]. The parties agreed to schedule the due process hearing for [REDACTED]. The due process hearing was conducted, as scheduled, on [REDACTED]. [REDACTED] served as the certified [REDACTED] interpreter during the due process hearing.

Petitioner's Exhibits 1 through 5 were admitted without objection. Petitioner presented one witness: the student's [REDACTED]. School Board Exhibits 1 through 6, 8, 9, 12 through 16, and 28 were admitted. The School Board presented the testimony of [REDACTED], an exceptional student education (ESE) specialist; [REDACTED], a bilingual school psychologist; [REDACTED], a speech language pathology program specialist; and [REDACTED], a due process coordinator.

At the conclusion of the due process hearing, the parties agreed to file proposed final orders ten days after the filing of the Transcript with DOAH. The due process hearing Transcript was filed on [REDACTED]; accordingly, the parties had the opportunity to file proposed final orders no later than [REDACTED], and the Final Order would issue no later than [REDACTED]. The School Board timely filed a proposed order, which was considered in the preparation of 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 this 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. The student, who attended the due process hearing, was born [REDACTED] in December [REDACTED] and diagnosed with [REDACTED]. [REDACTED] developmental milestones were [REDACTED]; for example, [REDACTED] did not begin [REDACTED] until age [REDACTED]. [REDACTED] began to receive early intervention services in March of [REDACTED].

2. When the student was [REDACTED], [REDACTED] was evaluated by a multi-disciplinary team in order to assess [REDACTED] level of functioning. A summary review of the results reflected significant delays in areas of [REDACTED], [REDACTED], [REDACTED], [REDACTED], and overall [REDACTED]. Since the primary language spoken in the student's home is [REDACTED], [REDACTED] was also assessed for [REDACTED] [REDACTED] [REDACTED] learning. In this regard, the team was unable to assess [REDACTED], because [REDACTED] did not answer any of the questions during the language classification test.

3. In [REDACTED], when the student was approaching age [REDACTED] and attending [REDACTED], a reevaluation plan was prepared, noting that the student had [REDACTED]. While [REDACTED] could say "no," "stop it," "me," "bye," "shut up," and "all done," [REDACTED] primarily communicated using signs, gestures, and jibberish.

4. [REDACTED] required hand-over-hand assistance to access toys, but showed little interest in them or in the various centers in the classroom. [REDACTED] preferred to be alone or with an adult, and needed maximum prompting to play appropriately with the other children.

5. ■ did, however, enjoy musical instruments, dancing in front of a mirror, circle time, and music class. Television or other technology, such as a computer or tablet, also engaged ■ for longer periods of time.

6. Negative behaviors emerged, such as getting out of ■ seat, spitting, hitting, pushing, slapping, and yelling when ■ did not want to do something. ■ often smiled or laughed while engaging in these behaviors.

7. At school, the student was dependent on adults for all toileting and dressing needs, was eating only pureed food, and required hand-over-hand assistance to eat.

8. Although both ■ ■ and ■ teacher believed that the student enjoyed school, ■ had no friends, ■ did not want to participate in any organized activities, ■ would hurt others on purpose, ■ did not follow most directions, ■ resisted behavioral limits, ■ communicated mostly with gestures and sounds, and ■ was ■ with objects, other children, and adults.

9. From ■ through ■ of ■, a comprehensive psycho-educational evaluation was conducted, with the goal of planning ahead for entering ■ in the fall. The school psychologist observed the student in the classroom over the course of three days in three different months. The student demonstrated consistent behaviors throughout the three observations.

10. ■ often stared blankly, ■ attention span was limited, and he was easily distracted. When ■ did not want to complete tasks, ■ would grunt, throw items, push things away, or wave ■ hand in a hitting motion toward the adult helping ■. The psychologist never saw the student play cooperatively with other children, or communicate without using gestures and grunting.

11. Based on Behavior Scales and Global Index Scales, the student had elevated levels of ■ and ■ behaviors, ■ and ■, and maladaptive social functioning. Specifically, ■ frequently had ■



18. In the area of academics, the student had learned how to follow simple directions with prompts, such as taking out [REDACTED] folder, placing [REDACTED] backpack in a cubby, and following the schedule of the class. In reading, [REDACTED] was able to point to pictures when requested, and was learning the alphabet. In math, [REDACTED] was learning the numbers 1 through 5. [REDACTED] had learned to pick up a pencil but could not yet form letters.

19. Socially, [REDACTED] had [REDACTED] some. [REDACTED] was able to hold eye contact when someone spoke to [REDACTED], [REDACTED] enjoyed socializing with the other children, and [REDACTED] could sometimes play with [REDACTED]. [REDACTED] continued to struggle with [REDACTED], and would sometimes [REDACTED], [REDACTED], and [REDACTED] at the other children. [REDACTED] also continued to [REDACTED] when exhibiting negative behaviors.

20. As to [REDACTED] adaptive skills, [REDACTED] could hold a spoon and feed [REDACTED], and [REDACTED] could independently drink from a cup. [REDACTED] was starting the process of toilet training, and [REDACTED] could walk [REDACTED] tray to the garbage and dispose of things properly.

21. The IEP team determined that there was no need to conduct formal assessments because the student continued to meet the criteria for the [REDACTED] eligibility category, and [REDACTED] placement remained unchanged. The [REDACTED] did not object to the student's eligibility or [REDACTED] placement.

22. In October of [REDACTED], the IEP team finalized an IEP for the student's [REDACTED] year. In this IEP, [REDACTED] was described as a [REDACTED] and [REDACTED] student who enjoyed playing with the other children, singing and dancing, and using an iPad. [REDACTED] required constant attention, and would [REDACTED], including negative behaviors. This [REDACTED] seeking behavior hindered [REDACTED] ability to perform academic tasks. Despite [REDACTED] ability to independently complete many tasks during the school day, he often [REDACTED] to do so without [REDACTED] and [REDACTED].

23. In the area of math, [REDACTED] could independently count to 5, but often [REDACTED] with number [REDACTED] skipping number [REDACTED]. [REDACTED] could also identify basic colors and shapes, and the month, day, and date with verbal prompting. In



27. The [REDACTED] IEP continued to identify the student's eligibility category as [REDACTED]; and, based on [REDACTED] educational needs, [REDACTED] placement continued in a [REDACTED]. The parent did not object to the student's eligibility or [REDACTED] placement.

28. On [REDACTED], the IEP, with the parent's consent, was amended to include Extended School Year (ESY) services.

29. In September of [REDACTED], when the student was in [REDACTED] grade, the IEP team revisited the student's IEP. The student was described as a playful student who could not differentiate between playing and structured activities. Throughout the school day, [REDACTED] had to be constantly reminded that it was not playing time. [REDACTED] laughed at everything, and required constant redirection. [REDACTED] [REDACTED] and [REDACTED] challenges, which included not just [REDACTED], but also [REDACTED] and [REDACTED] behaviors toward peers and adults, hindered [REDACTED] ability to focus on academic endeavors. [REDACTED] completed no academic tasks without constant prompting and redirection. [REDACTED] did not seem to retain the academic lessons when [REDACTED] was assessed, and progressed minimally in all academic areas.

30. [REDACTED] did, however, make strides in many areas of daily living. [REDACTED] had learned how to independently follow the morning routine in the classroom; [REDACTED] used the restroom with only verbal reminders to flush the toilet and wash [REDACTED] hands; and [REDACTED] walked through the cafeteria line, chose [REDACTED] food, and walked to the correct table with minimal direction.

31. At the request of the parent, who expressed concerns over the lack of academic progress, the IEP team reconvened in February of [REDACTED] to create a reevaluation plan. The team agreed to evaluate the student in the areas of achievement, adaptive behavior, and intellectual/cognitive abilities. [REDACTED] [REDACTED], a bilingual ([REDACTED] and [REDACTED]) school psychologist was selected for the psycho-educational evaluation. [REDACTED] has a bachelor's and master's degree in psychology, and [REDACTED] is certified through the Florida Department of Education as a school psychologist for grades

██████████ through ██████████ grade. ██████████ conducted ██████████ evaluation in both languages, but reported that the student's predominant language is English.

32. ██████████ used the cognitive assessment ██████████ – ██████████ (██████████) and the ██████████ – ██████████ (██████████) to assess the student's cognitive abilities. ██████████ used the ██████████ ██████████, ██████████ ██████████ to determine what the student should know for ██████████ age and grade, and the ██████████, Parent/Teacher to help assess ██████████ independent functioning. The ██████████ ██████████ results from the parent and teacher yielded very similar results, indicating that the student functioned similarly in both the home and school setting. The assessments overall indicated that the student presented as a student with an ██████████ ██████████; specifically, ██████████ adaptive scores of ██████████ and ██████████ for the parent and teacher respectively, were more than two standard deviations from the standard scores of ██████████ to ██████████.

33. ██████████ noted that the student's medical history was significant for ██████████ and that this genetic condition has long-term effects on children's developmental outcomes. These effects include ██████████, as well as physical and ██████████ ██████████. ██████████ found that the student's current ██████████ could not be formally assessed as ██████████ was not able to demonstrate an understanding of directions, general awareness of tasks, manipulate items, or focus on task items. ██████████ abilities were best communicated by ██████████ and ██████████ adaptive abilities measured by both parent and teacher, which were within the ██████████.

34. ██████████ discussed ██████████ evaluation with the parent, speaking in both ██████████ and ██████████. ██████████ answered the parent's questions regarding the evaluation and reaffirmed that the student continued to demonstrate characteristics of a student with an ██████████ and, therefore, continued to qualify for ESE services as a student with ██████████ eligibility.

35. During a [REDACTED], review of reevaluation results meeting, the student's eligibility category and [REDACTED] placement were discussed. The team determined that the student continued to meet the criteria for [REDACTED] eligibility, and that [REDACTED] should continue receiving services in a [REDACTED] [REDACTED] to receive specialized instruction for academics, behavior, independent functioning, and communication with continued language and occupational therapy.

36. The student's parent expressed displeasure with the school IEP team's decisions solely on the basis that the IEP prevented [REDACTED] [REDACTED] enrollment at [REDACTED] school of choice. The student's [REDACTED] testified that when the preferred school reviewed the IEP, the family was informed that the IEP could not be implemented at that school. Thus, the family would like the IEP amended to allow the student to enroll in the preferred school. Following the IEP meeting, [REDACTED], the Due Process Coordinator for the School Board, assisted the parent in applying for a McKay Scholarship, a Florida State program providing school choice to qualifying students. Five school options were identified; all had an [REDACTED] program and could implement the student's IEP. The parent selected a school, and the scholarship was awarded. The parent, however, never enrolled the student at the selected school. Later, in [REDACTED], the parent once again requested assistance with the McKay Scholarship program. [REDACTED] contacted the McKay Scholarship Office and spoke with the Principal of the previously selected school to confirm that an opening remained for the student. A McKay Scholarship was offered a second time but the parent never enrolled the student.

37. At the due process hearing, the parent continued to request that the student's IEP be amended so that [REDACTED] could attend a school of [REDACTED] choice. Specifically, the parent would like the [REDACTED] eligibility removed from the IEP, as [REDACTED] believes that the [REDACTED] eligibility category is impeding [REDACTED] ability to enroll in [REDACTED] school of choice.

38. Uncontroverted evidence establishes that the student has always been properly identified as a student with [REDACTED] eligibility, and that a [REDACTED] [REDACTED] is the LRE required to meet [REDACTED] individual educational needs.

#### CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sect. 1003.57(1)(c), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9).

40. This case arises under the IDEA, which requires public schools to provide exceptional students a FAPE as a condition of receiving federal funds. 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 Cty. 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).

41. To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on each agency's compliance with the IDEA's procedural and substantive requirements. *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990). Thus, parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982).

42. 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).

43. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). That is, as applied to this case, Petitioner bears the burden of establishing, by a preponderance of the evidence, that the student’s [REDACTED] eligibility is incorrect, and that [REDACTED] placement in a [REDACTED] is not the LRE.

44. Petitioner presented one witness, the student’s [REDACTED], who testified that the [REDACTED] eligibility was keeping [REDACTED] from attending the parent’s school of choice. Petitioner presented no evidence, in any form, establishing that the IEP team incorrectly identified the student’s eligibility category or that the IEP team failed to place the student in the LRE.

45. The School Board, despite not bearing the burden of proof, presented competent and substantial evidence to support the IEP team’s identification and placement for the student.

46. In order to meet the criteria for the [REDACTED] eligibility category, a student must have significantly below average general intellectual and adaptive functioning manifested during the developmental period, with significant delays in academic skills. The developmental period refers to birth to 18 years of age. Fla. Admin. Code Rule 6A-6.03011(1).

47. More specifically, a minimum [REDACTED] eligibility evaluation must include:

- (a) A standardized individual test of [REDACTED] [REDACTED] individually administered by a professional person qualified in accordance with rule 6A-4.0311, F.A.C. or licensed under chapter 490, F.S.;
- (b) A standardized assessment of adaptive behavior to include parental or guardian input;

(c) An individually administered standardized test of academic or pre-academic achievement. A standardized developmental scale shall be used when a student's level of functioning cannot be measured by an academic or pre-academic test; and,

(d) A social-developmental history, which has been compiled directly from the parent, guardian, or primary caregiver.

Fla. Admin. Code R. 6A-6.03011(3).

48. The School Board has met the minimum evaluation requirements. As described in detail in the Findings of Fact, the evaluation was conducted by a qualified professional and the evaluations done in [REDACTED] and in [REDACTED] met all the above requirements.

49. The criteria for [REDACTED] eligibility are as follows:

(a) The measured level of intellectual functioning is more than two (2) standard deviations below the mean on an individually measured, standardized test of intellectual functioning;

(b) The level of adaptive functioning is more than two (2) standard deviations below the mean on the adaptive behavior composite or on two (2) out of three (3) domains on a standardized test of adaptive behavior. The adaptive behavior measure shall include parental or guardian input;

(c) The level of academic or pre-academic performance on a standardized test is consistent with the performance expected of a student of comparable intellectual functioning;

(d) The social/developmental history identifies the developmental, familial, medical/health, and environmental factors impacting student functioning and documents the student's functional skills outside of the school environment; and,

(e) The student needs special education as defined in rules 6A-6.0331 and 6A-6.03411, F.A.C.

Fla. Admin. Code R. 6A-6.03011(4).

50. As detailed in the Findings of Fact, the student was properly identified and meets the criteria for [REDACTED] eligibility.

51. Turning to the issue of placement, schools must consider when to educate a student in a [REDACTED] environment. 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.

52. 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.

53. 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).

54. With the LRE directive, “Congress created a statutory preference for educating handicapped children with non-handicapped children.” *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695 (11th Cir. 1991)(opinion withdrawn on procedural grounds and reinstated in pertinent part; *see* 956 F.2d 1025, 1026-27; *see also* 967 F.2d 470). “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 1036, 1044 (5th Cir. 1989).

55. 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.

*Id.* at 1048.

56. In *Greer*, the Eleventh Circuit adopted the *Daniel* two-part inquiry. *Greer*, 950 F. 2d at 696. In determining the first step, whether a school district can satisfactorily educate a student in the regular classroom, several factors are to be considered: 1) a comparison of the educational benefits the student would receive in a regular classroom, supplemented by aids and services, with the benefits [REDACTED] will receive in a [REDACTED] special education environment; 2) what effect the presence of the student in a [REDACTED] 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 [REDACTED] classroom. *Id.* at 697.

57. Here, Petitioner failed to establish that the student should be placed in a [REDACTED] environment. The uncontroverted evidence establishes that the student cannot, due to the nature and severity of [REDACTED] disability, be satisfactorily educated in a [REDACTED] classroom, and that the student has been mainstreamed to the maximum extent appropriate.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Complaint is DISMISSED and all requests for relief are DENIED.

DONE AND ORDERED this [REDACTED] day of [REDACTED], [REDACTED], in Tallahassee, Leon County, Florida.

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JESSICA E. VARN  
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Filed with the Clerk of the  
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this [REDACTED] day of [REDACTED], [REDACTED].

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).