STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 21-3525E

VOLUSIA COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

A due process hearing was held in this matter before Brittany O. Finkbeiner, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on January 13, 2022, via Zoom video conference.

APPEARANCES

For Petitioner: Barbara Joanne Myrick, Esquire
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Wilton Manors, Florida 33305

For Respondent: Adam Warren, Esquire
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Daytona Beach, Florida 32118

STATEMENT OF THE ISSUE(S)

The issues in this case are whether Respondent failed to provide Petitioner with a free and appropriate public education ("FAPE") in the least restrictive environment ("LRE"); whether Respondent made a placement decision that was not based on Petitioner's individualized education program ("IEP") and was not approved by his mother; and whether Respondent failed to implement the operative IEP with respect to Petitioner's educational placement.

PRELIMINARY STATEMENT

Petitioner, through his mother, filed a request for due process hearing ("Due Process Complaint") on November 14, 2021. In his Due Process Complaint, Petitioner alleges that Respondent failed to implement Petitioner's February 11, 2021, IEP; and failed to provide him with a FAPE in the LRE. More specifically, Petitioner argues that Respondent made a placement decision not based on Petitioner's IEP, and without his mother's consent, when it failed to return him to the classroom of a specific teacher, [redacted], and instead "[redacted]." Petitioner's proposed remedy, as stated in the Due Process Complaint, is "to remove [Petitioner] from [redacted] and to place him in transitional program that was outlined in [Petitioner's] [redacted]."

The due process hearing took place on January 13, 2022. Petitioner called the following witnesses: [redacted], IEP Facilitator, [redacted], Volusia County Public Schools; [redacted], Exceptional Student Education ("ESE") Teacher, Volusia County Public Schools; [redacted], ESE Teacher, Flagler County Public Schools; and Petitioner's mother. Petitioner's Exhibits A through H were admitted into evidence.

Respondent called the following witnesses: [redacted], [redacted], Department of Exceptional Student Education, Volusia County Public Schools; [redacted], ESE Administrator, High School A, Volusia County Public Schools; [redacted], ESE Teacher, High School A, Volusia County Public Schools; and, [redacted], [redacted], Volusia County Public Schools. Respondent's Exhibits 1 through 6 were admitted into evidence.

The due process hearing Transcript was filed with DOAH on [redacted].[1] The parties timely filed proposed orders, which were 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 male pronouns in this Final Order when referring to Petitioner. The male pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. Petitioner meets eligibility requirements to receive services under the Individuals with Disabilities Education Act ("IDEA") as a student with an Intellectual Disability and Language Impairment. He has Down Syndrome. By all accounts, he is a good student with no behavioral problems in school.

2. Petitioner's mother is his court-appointed Guardian Advocate.

3. Petitioner is [redacted] years old. He attended High School A, a public high school in Respondent's school district, for grades 9-12 and met all requirements for graduation with a standard diploma as of June 2021. Thereafter, Petitioner deferred his diploma to return to High School A to participate in a transition program.

4. In [redacted], Petitioner's IEP team agreed, with the consent of Petitioner's mother, that Petitioner would participate in the transition program at High School A in the 2021-22 school year. At the request of Petitioner's mother, the IEP team agreed to schedule Petitioner to attend elective classes in the morning in the 2021-22 school year. Students in the transition program generally do not attend elective classes.

[1] Page 78, lines 9-11 of the Transcript, erroneously attribute a witness statement to the undersigned.

5. The transition program at High School A is available to any student with an IEP who defers receipt of his or her diploma and needs additional supports and services to meet career and life goals. In the transition program, students receive supported instruction both in the classroom and on actual job sites in the community to help them gain skills to find and maintain employment.

6. During the 2020-21 school year, Petitioner was in a [redacted] classroom for most of his academic subjects. He attended general education classes for his electives.

7. In addition to [redacted] classrooms, High School A also has classroom settings that are designated as [redacted]. [redacted] and [redacted] settings are separate class settings. Both are small group classrooms, taught by certified ESE teachers, where the students are on a modified curriculum working toward a standard diploma via ACCESS points.

8. The difference between a [redacted] and a [redacted] classroom is the level of support and the teacher/student ratio. A [redacted] classroom has [redacted] to [redacted] students with a teacher and at least one paraprofessional. A [redacted] classroom has one adult for every three students. A [redacted] classroom is not more restrictive than a [redacted] classroom, but simply provides more support.

9. Petitioner's IEP team reconvened in [redacted] of [redacted] at the request of Petitioner's mother to create an Amended IEP. Petitioner's mother attended the IEP meeting and consented to the Amended IEP. The meeting minutes for the Amended IEP state that Petitioner would "continue to defer his diploma in order to work towards post-secondary goals in the [redacted] setting with a focus on daily living skills and vocational skills." However, the record is clear that the reference to the [redacted] setting is erroneous and does not accurately reflect Petitioner's classroom setting, despite Petitioner's argument to the contrary.

10. [redacted] persuasively and credibly testified that reference to a [redacted] setting could not be accurate because there is no [redacted] setting within

the transition program. Such classifications do not exist in the program. Students in the transition program are not separated according to their abilities or disabilities at all. Instead, the program focuses on developing the students' skills needed for employment. The transition program is designed this way, according to [redacted], because employers do not look at a person's disability and categorize jobs accordingly. Employers look to whether the person has the appropriate skills necessary to maintain employment.

11. Petitioner falls somewhere in the middle in terms of his level of functionality in comparison to the other students in the transition program.

12. The record is devoid of any evidence that Petitioner is in a [redacted] setting or that such a setting was ever contemplated by the Amended IEP, or otherwise, at any time relevant to this case.

13. [redacted] taught in the transition program in the 2020-21 school year at High School A. At the beginning of the 2021-22 school year, [redacted] taught in the [redacted] classroom. At the February IEP meeting, Petitioner's mother expressed her preference for Petitioner to be in [redacted] class. However, no commitment was made that Petitioner would have a specific teacher. An IEP generally does not specify a teacher because individual teachers may leave the school or move to a different position.

14. At the time of the final hearing, [redacted] was no longer a teacher at High School A.

15. Petitioner's mother thought that there were two transition programs at High School A—one in [redacted] and one in [redacted] classroom. However, there is only one transition program at High School A.

16. Although the program was previously conducted in [redacted], it was moved to [redacted] in the 2021-22 school year. The only difference in the transition program between the 2020-21 and 2021-22 school years is in the physical location of the classroom itself.

17. Petitioner's mother requested an emergency IEP meeting resulting in the Amended IEP in [redacted] of [redacted] after she found out that Petitioner's transition class was in [redacted]. She was concerned because Petitioner had several meltdowns when she picked him up from school. Petitioner's mother believed that Petitioner's meltdowns were the result of the environment in [redacted] and on the bus ride from High School A to job sites.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 1003.57(1)(a) and 1003.5715(5), Fla. Stat., and Fla. Admin. Code R. 6A-6.03311(9)(u).

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

20. At all times relevant to the Due Process Complaint, Petitioner was a student with a disability as defined under 34 C.F.R. § 300.8(a)(1); 20 U.S.C. § 1401(3)(A)(i); and Florida Administrative Code Rule 6A-6.03411(1)(f).

21. Respondent is a local educational agency ("LEA"), as defined under 20 U.S.C. § 1401(19)(A). By virtue of receipt of federal funding, Respondent is required to comply with certain provisions of the IDEA, 20 U.S.C. § 1401, *et seq*. As an LEA, under the IDEA, Respondent was required to make a FAPE available to Petitioner. *Sch. Bd. of Lee Cnty. v. E.S.*, 561 F. Supp. 2d 1282, 1291 (M.D. Fla. 2008) (citing *M.M. v. Sch. Bd. of Miami-Dade Cnty.*, 437 F. 3d 1085, 1095 (11th Cir. 2006)); *M.H. v. Nassau Cnty. Sch. Bd.*, 918 So. 2d 316, 318 (Fla. 1st DCA 2005).

22. 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); *See 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); *See also Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

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

> Special education and related 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).

24. "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).

The IEP

25. 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, 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.

26. "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F.*, 137 S. Ct. (quoting *Honig v. Doe*, 484 U.S. 305, 311 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Id.* (*Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 181 n.4 (1982)).

27. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a student with FAPE. As an initial matter, it is necessary to examine whether the school district has complied with the IDEA's procedural requirements. In this case, there are no alleged procedural violations.

28. 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, 207. In *Endrew F.*, the Supreme 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."

137 S. Ct. 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.*

29. In this case, Petitioner alleged that the Amended IEP did not provide the student with a FAPE and that the IEP was not properly implemented with respect to Petitioner's placement. Although Petitioner argues that Petitioner's IEP intentionally placed him in a [redacted] setting, the argument is entirely without merit. The record is clear that any reference to a [redacted] setting was the result of a scrivener's error and that no such setting was ever contemplated under Petitioner's IEP. The undersigned, based on a full review of the record, finds no defect with the design of the IEP and that the IEP afforded Petitioner a FAPE.

30. Turning to the issue of implementation, in *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019), the court articulated the standard for claimants to prevail in a "failure-to-implement case." The court concluded that "a material deviation from the plan violates the [IDEA]." *L.J.*, 927 F.3d at 1206. The *L.J.* court expanded upon this conclusion as follows:

> Confronting this issue for the first time ourselves, we concluded that to prevail in a failure-to-implement case, a plaintiff must demonstrate that the school has materially failed to implement a child's IEP. And to do that, the plaintiff must prove more than a minor or technical gap between the plan and reality; de minimis shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child's IEP.

31. In *L.J.*, the court provided principles to guide the analysis of the implementation standard. *Id.* at 1214. To begin, the court stated that the focus in implementation cases should be on the proportion of services

mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld. In other words, the task is to compare the services that are actually delivered to the services described in the IEP itself. In turn, "courts must consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole." *Id.*

32. Additionally, the *L.J.* court noted that the analysis must consider implementation as a whole:

> We also note that courts should consider implementation as a whole in light of the IEP's overall goals. That means that reviewing courts must consider the cumulative impact of multiple implementation failures when those failures, though minor in isolation, conspire to amount to something more. In an implementation case, thequestion is not whether the school has materially failed to implement an individual provision in isolation, but rather whether the school has materially failed to implement the IEP as a whole.

Id. at 1215.

33. Here, the record does not reflect a material failure to implement Petitioner's IEP. With the consent of Petitioner's mother, Respondent's IEP reflected that Petitioner would defer his diploma to participate in the transition program, which is exactly what happened. The conclusion remains unchanged by the fact that there was a typographical error with respect to the classroom setting in Petitioner's Amended IEP.

34. In *Hill v. School Board for Pinellas County*, the district court observed that "[i]n the typical case, educational placement means a child's educational program and not the particular institution where that program is implemented." 954 F. Supp. 251, 253 (M.D. Fla. 1997)(citations omitted), aff'd 137 F.3d 1355 (11th Cir. 1998). The district court further noted the

plausibility of circumstances under which attributes of an institution, a location, a teacher-student relationship, or the like, might become so pronounced and valuable to the student and her IEP, that a change in the school is tantamount to a change in the IEP. *See also L.M. v. Pinellas Cnty. Sch. Bd.*, 2010 WL 1439103 (M.D. Fla. Apr. 11, 2010)(rejecting the argument that a particular building constituted an educational placement).

35. Applying these principles to the specific facts of this case, the changes in location and teaching staff with respect to the transitional program are not tantamount to a change in placement. There are no facts in the record establishing that any attributes of a specific building or teacher are uniquely tied to Petitioner's educational needs to rise to the level of a change in placement. The record shows that Petitioner's placement is consistent with that to which Petitioner's mother agreed. At all relevant times, Petitioner has been in the transition program, as reflected in Petitioner's [redacted] IEP and the Amended IEP. Accordingly, the IEP was implemented with respect to Petitioner's educational placement.

Least Restrictive Environment

36. 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 orseverity of the disability of a child is such that

> education in regular classes with the use of supplementary aids and services cannot beachieved satisfactorily.

37. Pursuant to the IDEA's implementing regulations, states must have policies and procedures to ensure that public agencies in the state meet the LRE requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the above-referenced mandates concerning LRE and providing a continuum of alternative placements. *See* Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).

38. With the LRE directive, Congress created a statutory preference for educating children with disabilities with children who are not disabled to the maximum extent appropriate. *Rowley*, 458 U.S. at 181 n.4. "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).

39. 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.

40. Here, Petitioner's need for a special education environment is not disputed. Accordingly, the present case turns on the second part of the test—whether Petitioner has been mainstreamed to the maximum extent appropriate.

41. The record established that Petitioner has been mainstreamed to the maximum extent appropriate. The transition program includes students with IEPs at various levels of functionality, regardless of their individual abilities or disabilities. The program supports the students in going out into the community to learn job skills, thus enhancing their future ability to be integrated into a workplace and the larger community alongside non-disabled peers. Further, School A accommodated the request of Petitioner's mother that he be allowed to attend elective classes, where he receives instruction in a general education environment.

42. The relief requested by Petitioner, "to remove [Petitioner] from [redacted] setting in [redacted] and to place him in transitional program that was outlined in [Petitioner's] [redacted] IEP," is ultimately impossible because Petitioner is not in a [redacted] setting and is, in fact, already in the transition program outlined in his February IEP.

ORDER

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

DONE AND ORDERED this 8th day of March, 2022, in Tallahassee, Leon County, Florida.

BRITTANY O. FINKBEINER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of March, 2022.

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).