

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

Case No. 22-2555E

vs.

PALM BEACH COUNTY SCHOOL BOARD,

Respondent,

and

PALM BEACH SCHOOL FOR AUTISM,

Intervenor.

_____ /

FINAL ORDER

A due process hearing was held, by agreement of the parties, on April 29 and 30, 2024, before Administrative Law Judge Jessica E. Varn, via Zoom conference.

APPEARANCES

For Petitioner: Nathan Soowal, Esquire
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3140 Northeast 9th Avenue
Lighthouse Point, Florida 33064

For Respondent: Laura E. Pincus, Esquire
School Board of Palm Beach County, Florida
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For Intervenor: John P. Leombruno, Esquire
The Arnold Law Firm, LLC
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STATEMENT OF THE ISSUES

Whether the School Board failed to provide the student with a free and appropriate public education (FAPE) by violating the mandate to place the student in the least restrictive environment (LRE) and by placing the student on a modified curriculum (Access Points curriculum); and,

Whether, if Petitioner proved the alleged violations, Petitioner is entitled to any relief.

PRELIMINARY STATEMENT

The request for a due process hearing (Complaint) was filed on August 26, 2022. At this point, Petitioner was represented by Qualified Representatives Jamison Jessup and Krista Barth. On November 15, 2022, Petitioner filed a motion to withdraw as Qualified Representatives, which was granted.

A scheduling conference was held on December 1, 2022; and, by agreement of the parties, a Notice of Hearing by Zoom Conference was issued for February 16 and 17, 2023.

On January 24, 2023, Attorney Shahar Pasch filed a Notice of Appearance on behalf of Petitioner. On January 31, 2023, Petitioner requested a continuance of the hearing, which was granted.

Petitioner filed a Motion to File an Amended Request for Due Process Hearing on February 16, 2023, which was granted on the same day. On March 1, 2023, Petitioner filed a Motion for Extension of Time due to illness, which was granted. The undersigned issued an Order Requiring a Response on April 5, 2023, requiring a status update no later than April 12, 2023.

The School Board filed a Status Report on April 10, 2023. Four days later, Petitioner filed an Amended Request for Due Process Hearing. On April 24, 2023, an Amended Case Management Order was issued to remind the parties of the deadlines and extensions. The following day, the School Board filed a Response to the Amended Complaint, indicating that a resolution meeting would be held on May 2, 2023.

An Order Requiring Response regarding the resolution meeting was issued on May 15, 2023. By agreement of the parties, a scheduling conference was set for May 26, 2023. During the conference, the parties agreed to reschedule the due process hearing for August 23 and 24, 2023.

On June 29, 2023, the School Board filed a Motion for Continuance, indicating that both parties agreed to the extension and the rescheduling of the hearing to September 27 and 28, 2023. The request was granted.

On September 15, 2023, a Joint Motion to Cancel Hearing and Placing Case in Abeyance was filed. The motion was granted, and the parties were ordered to file a status report no later than September 29, 2023.

On October 2, 2023, the School Board filed a Status Report, indicating that both parties requested an extension of the abeyance. An Order Continuing Case in Abeyance until October 16, 2023, was issued. An Order Requiring Status Report was issued on October 31, 2023.

On November 3, 2023, Petitioner's counsel filed a Motion to Withdraw, which was granted, and a status conference was set for November 15, 2023. Only Petitioner made appeared for the status conference.

On November 17, 2023, Mr. Soowal filed a Notice of Appearance on behalf of Petitioner. On the same day, the School Board filed a Status Report, indicating mutually agreeable dates for the due process hearing. On November 21, 2023, a Notice of Hearing was issued, setting the case for February 20 and 21, 2024.

On February 5, 2024, a Joint Motion to Continue Hearing was filed. On February 6, 2024, an Order Rescheduling Hearing by Zoom Conference was issued, for April 25 and 26, 2024. On February 8, 2024, another Joint Motion to Continue Hearing was filed. On February 12, 2024, by agreement of the parties, the hearing was scheduled for April 29 and 30, 2024.

On April 23, 2024, the School Board filed a Motion to Dismiss, and on the same day, Petitioner filed a Response. Petitioner filed a Motion to Compel Discovery on April 24, 2024. A Motion Hearing for the School Board's Motion to Dismiss and Motion to Compel Discovery was held on April 26, 2024. The Motion to Dismiss was denied, but the Motion to Compel Discovery was granted.

The due process hearing was held on April 29 and 30, 2024. Petitioner presented the testimony of [REDACTED], an expert in pediatric and clinical neuropsychology; and the student's mother. The School Board presented the testimony of [REDACTED], Executive Director for Palm Beach School for Autism (PBSA); [REDACTED], the student's private tutor; [REDACTED], PBSA's behavior analyst; and [REDACTED], Special Education Coordinator at [REDACTED] High School.

All of the School Board's exhibits were stipulated into the record. Petitioner's Exhibit 1, pages 1 through 29 and 37; Exhibit 2, pages 30 through 34; Exhibit 3; and Exhibit 5 were admitted into evidence.

At the conclusion of the hearing, the parties mutually agreed to extend the deadline for the proposed final orders (PFOs) to 21 days after the Transcript was filed. The Transcript was filed on May 15, 2024. The PFOs were due on June 4, 2024; likewise, the Final Order was due on June 25, 2024. On June 3, 2024, the Petitioner filed an Unopposed Motion for Extension of Time to File PFOs. On the same day, an Order Extending the Deadline for Final Order was issued. By agreement of the parties, the deadline for the PFOs was extended to June 18, 2024; likewise, the deadline for the Final Order was extended to July 9, 2024.

Both parties filed proposed final orders, which were considered in preparing this Final Order. Unless otherwise indicated, all rules and statutory references are to the version in effect at the time of the alleged violations.

FINDINGS OF FACT

1. The student recently completed [REDACTED] grade at [REDACTED] High School, a traditional high school. Previously, he attended Palm Beach School for Autism (PBSA), a charter school that only serves students with a primary exceptionality of Autism Spectrum Disorder (ASD), from pre-kindergarten through eighth grade.

2. The student was diagnosed with autism at two-and a-half years old and by age three, he was found eligible for exceptional student education (ESE) under the eligibilities of ASD, Language Impairment (LI), Speech Impairment (SI), and Occupational Therapy (OT).

3. While at PBSA, he was described in his Individualized Education Plans (IEPs) as a student with autism who struggles with emotional regulation, which resulted in significant maladaptive behaviors such as swearing inappropriately, screaming, crude or inappropriate language and gesturing,

insulting peers and staff, destroying work, shutting down, and frequent non-compliance.

4. He was enrolled, after his parents researched the best program for his exceptionality, into the Preschool Program at PBSA. During the process of choosing PBSA, the student's mother made a phone call to find out about the school, spoke to the school's director, was invited to see the school, and visited the school three to four times. PBSA only serves students who are eligible for ESE; therefore, the PBSA campus has no general education, or non-disabled, students.

5. The student's mother was told about the school's focus on Applied Behavior Analysis (ABA) therapy, and how it was infused in their approach to students with ASD; and, naturally, that all students at PBSA had IEPs that would be faithfully implemented and amended as needed.

6. Up until 2021, PBSA offered only an Access Points curriculum to its students. Prior to [REDACTED], when parents approached the subject of college opportunities, they were referred to the School Board, as the charter school did not offer instruction on general education standards.

7. PBSA utilizes a curriculum called Unique Learning System, which aligns to the state standards, but is broken down into smaller lessons. Data is kept to track a student's progress or academic struggles. For students who surpass the Unique Learning System curriculum, a separate curriculum was utilized to expose those students to general education standards.

8. The record establishes that from [REDACTED] through [REDACTED], the student's parents, annually, consented to the student's placement at PBSA, and the Access Points curriculum. At the hearing, the student's mother testified that during this entire time period, she had no idea that her son was being educated on an Access Points curriculum. Her testimony is not found to be credible on this issue; the greater weight of the evidence, including the testimony of the staff, the IEPs, and the annual forms that the mother signed, establish her annual consent to an Access Points curriculum.

9. Every three years, the annual IEPs reflect that the team considered re-evaluations, and, with parental consent, chose not to.

10. When the student was in grades [REDACTED] through [REDACTED], the parents were notified that the student would not be participating in the statewide assessment and the implications that followed. This notification, required by Section 1008.22(3)(c)6., Florida Statutes, included the following disclosure: “If your child continues to receive an alternate assessment, your child will receive a Special Diploma or Special Certificate of Completion upon graduation. Neither graduation option permits entry into a degree seeking program at a community college or four-year university, nor the armed services.”

11. In [REDACTED], the statutory notification was revised to include a statutorily required consent form for instruction in the Access Points curriculum. The parents, year after year, consented to the Access Points curriculum.

12. Due to the global pandemic that began in the Spring of [REDACTED], the student attended school virtually for the entire [REDACTED] school year.

13. In July of [REDACTED], Florida Administrative Code Rule 6A-1.0943¹(f) was amended to require that only students with a specific intelligence quotient (IQ) be placed on an Access Points curriculum.

14. In October [REDACTED], when the student had returned to brick and mortar school and was in eighth grade, the IEP team agreed to re-evaluate the student. PBSA at that point was also pivoting, given the change in the law, to offer a general education curriculum starting in the [REDACTED] school year—which would be the start of high school for this student.

¹ (f) “Most significant cognitive disability” means a global cognitive impairment that adversely impacts multiple areas of functioning across many settings and is a result of a congenital, acquired or traumatic brain injury or syndrome and is verified by either:

1. A statistically significant below average global cognitive score that falls within the first percentile rank (i.e., a standard, full-scale score of sixty-seven (67) or under); or
2. In the extraordinary circumstance when a global, full-scale intelligent quotient score is unattainable, a school district-determined procedure that has been approved by the Florida Department of Education under paragraph (5)(e) of this rule.

15. At the end of [REDACTED] grade, the IEP team, after re-evaluation, met again. Given that the student's IQ no longer qualified him for the Access Points curriculum, the IEP team removed him from the Access Points curriculum and shifted his track to a standard high school diploma. The parent was given advice on possible high schools, including a private high school. The student could have also remained at PBSA for high school, since PBSA would also be providing a general education curriculum starting in the [REDACTED] school year.

16. The parents chose to place the student at a private high school, but due to his maladaptive behavior, he was only there briefly. He was then enrolled at [REDACTED]. Since then, he has found great success, passing all of his classes and participating in extracurricular activities.

17. In preparation for the final hearing in this matter, the student was evaluated by [REDACTED]. She diagnosed the student with Level Two severity autism, with marked deficits in verbal and nonverbal social communications, as well as restricted, repetitive, and frequent behaviors obvious to the casual observer. These behaviors interfere with functioning in a variety of contexts. She also diagnosed him with Attention-Deficit/Hyperactivity Disorder (ADHD) and anxiety.

18. [REDACTED] opined that if the student had been re-evaluated every three years, he likely would have been placed on a general education curriculum years before entering high school. She also opined that he should not have remained at PBSA for as long as he did. Even if [REDACTED] is correct, the evidence as a whole reflects that the student, despite exhibiting troubling maladaptive behavior while at PBSA, progressed academically and behaviorally, and is able to access grade level work satisfactorily in high school. Stated another way, the student received FAPE while at PBSA, which is why he is able to succeed at a general education high school now.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 1003.57(1)(b) and 1003.5715(5), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

20. The burden of proof is on Petitioner to prove the claims by a preponderance of the evidence. *See Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

21. The Individuals with Disabilities Education Act (IDEA) provides directives on a student's placement 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.

22. 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). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the [IDEA], 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).

23. 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.

24. In *Greer*, 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.

25. The preponderance of the evidence demonstrated that the student required levels of support and services that were offered to him at PBSA. The focus on ABA therapy to address his maladaptive behaviors was key to his current success in a general high school, and was a priority educational need to access FAPE. Year after year, the IEP teams, which included the parents, agreed that placement at PBSA was the proper placement for the student to receive FAPE. Fortunately, placement at PBSA offered the student FAPE, evidenced by his current success in a mainstreamed environment.

26. The same analysis applies to the Access Points curriculum; that is, the student received FAPE on that curriculum, evidenced by his ability to achieve satisfactory grades in high school, while being instructed using grade level material.

27. Additionally, deference should be paid to the educators involved in education and administration of the school system. *A.K. v. Gwinnett Cnty. Sch. Dist.*, 556 Fed. Appx. 790, 792 (11th Cir. 2014) (“In determining whether the IEP is substantively adequate, we ‘pay great deference to the educators who develop the IEP.’”) (quoting *Todd D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991)). As noted in *Daniel*, “[the undersigned’s] task is not to second guess state and local policy decisions; rather, it is the narrow one of determining whether state and local officials have complied with the [IDEA].” *Daniel*, 874 F.2d at 1048.

28. The evidence in this case establishes that the IEP teams designed appropriate IEPs annually, addressing the student’s priority educational and behavioral needs, placing him in the LRE, and utilizing a curriculum which prepared him for high school success, on grade level.

29. Therefore, placement at PBSA mainstreamed the student to the maximum extent possible, and complied with the mandate that the student be educated in the LRE. *See Orange Cnty. Sch. Bd. v. ***, Case No. 20-4487E, at *14 (Fla. DOAH Jan. 19, 2021) (finding that the student’s continuous disruptive and aggressive behavior warranted placement at the special day school). The use of an Access Points curriculum, tailored specifically to the student’s strengths and weaknesses, was appropriate and prepared the student to transition to a general education track today.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner failed to establish that the School Board denied the student FAPE by continuing his placement at PBSA and by utilizing an Access Points curriculum.

DONE AND ORDERED this 2nd day of July, 2024, in Tallahassee, Leon
County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
DOAH Tallahassee Office

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Filed with the Clerk of the
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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).