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Petitioner,

Case No. 24-2768E

vs.

HIGHLANDS COUNTY SCHOOL  
BOARD,

Respondent.

## FINAL ORDER

This case came before Administrative Law Judge (ALJ) Sara Marken of the Division of Administrative Hearings (DOAH) for a final hearing held via Zoom conference on September 12 and 13, 2024.

## APPEARANCES

For Petitioner:

Petitioner, pro se  
(Address of Record)

For Respondent: Amy J. Pitsch, Esquire  
Sniffen & Spellman, P.A.  
123 North Monroe Street  
Tallahassee, Florida 32301

## STATEMENT OF THE ISSUES

Whether the District failed to implement the student's Behavior Intervention Plan (BIP);

Whether that failure resulted in a denial of a free and appropriate public education (FAPE); and

Whether the student requires residential placement to receive FAPE.<sup>1</sup>

### PRELIMINARY STATEMENT

A request for a due process hearing by Petitioner was filed with DOAH on July 25, 2024, and a Case Management Order was issued on the same date. A telephonic scheduling conference was held on August 8, 2024. The parties agreed to schedule the hearing on September 12 and 13, 2024. On August 2, 2024, the School Board filed a Motion to Dismiss in Part and Response to Due Process Request. The School Board moved to dismiss portions of the complaint because the complaint sought redress for allegations made in a previous case, allegations that the parties resolved through a settlement agreement. On August 16, 2024, the undersigned issued an Order determining that the issues for the final hearing would not include allegations previously addressed and resolved in a separate matter.

The final hearing was held on September 12 and 13, 2024, by Zoom conference. Petitioner presented the testimony of these witnesses: [REDACTED]; [REDACTED]; Petitioner's mother; [REDACTED], Exceptional Student Education (ESE) Teacher; and [REDACTED], ESE Teacher. The School Board presented the testimony of these witnesses: [REDACTED], Board-Certified Behavior Analyst; [REDACTED], Occupational Therapist; [REDACTED], Occupational Therapist; [REDACTED], Principal; [REDACTED], Speech-language Pathologist; [REDACTED], Physical Education Teacher; [REDACTED], Program Staffing Specialist; and [REDACTED], ESE Director. Petitioner's Exhibits 21 through 30 and 33 through 41 were admitted into evidence. The School Board's Exhibits A through J were also admitted.

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<sup>1</sup> In its proposed final order, Petitioner addressed additional issues beyond those noticed for final hearing. These issues are not addressed in this Final Order.

The final hearing Transcript was filed at DOAH on September 30, 2024. An Order Extending Deadline for Final Order was issued on October 1, 2024, indicating that the proposed final orders were due by October 14, 2024, and the Final Order would be entered no later than October 28, 2024. On October 14, 2024, Petitioner requested to extend the proposed final order deadline to October 21, 2024. On the same day, the undersigned issued an Order granting Petitioner's request and extending the final order deadline to November 4, 2024. Both parties filed timely proposed orders, which were considered in preparing this Final Order.

Unless otherwise indicated, all rule and statutory references are to the version in effect at the time of the challenge to the continued placement. For stylistic convenience, the undersigned will use male pronouns in this Final Order when referring to the student. The male pronouns are neither intended nor should be interpreted as a reference to the student's actual gender.

#### FINDINGS OF FACT<sup>2</sup>

1. At the time of the due process hearing, the student was a [REDACTED] at School B, a school within the Highlands County School Board. During the [REDACTED] school year, the student was a [REDACTED] at School A, an [REDACTED] school within the Highlands County School Board.

2. The student is eligible for ESE in the categories of Autism Spectrum Disorder (ASD) and Language Impairment (LI). He accesses his education on a modified curriculum, Access Points.

3. The student is very quiet and observant. He enjoys nature and being outdoors.

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<sup>2</sup> The Findings of Fact do not refer to every witness who testified, but all testimony and all exhibits entered into the record were considered.

4. The student's disability affects his behavior. When exposed to loud noises or prompted to complete academic demands, he engages in maladaptive behaviors. The student has a BIP to assist with his behaviors. His current educational placement is an ESE classroom for students with intellectual disabilities.

5. Along with his individualized education plan (IEP) and BIP, the student has a sensory plan to teach him how to use sensory techniques to improve his self-regulation skills. The student also receives occupational and language therapies as related services.

6. On August 14, [REDACTED], the school district contracted [REDACTED] and [REDACTED] company, [REDACTED], to develop the student's BIP. The plan focuses on reducing five maladaptive behaviors: physical aggression, inappropriate behavior, property destruction, classroom disruptions, and non-compliance. In April [REDACTED], the IEP team added spitting as a target behavior for intervention.

7. Throughout the [REDACTED] school year, [REDACTED] worked directly with the student to implement the BIP and provided training and modeling techniques for the staff at School A. A registered behavior technician from [REDACTED] supported the student with plan implementation and helped train school staff. During this period, his teachers effectively managed his behaviors in the classroom and consistently implemented the BIP.

8. In the fall semester of [REDACTED], [REDACTED] gradually reduced his hands-on involvement because of the plan's success up to that point. However, in January [REDACTED], the student's behaviors increased in response to staff changes in his classroom and greater academic demands. [REDACTED] and his company took a more hands-on approach and began monitoring maladaptive behaviors in February [REDACTED] through the end of the extended school year (ESY) in June [REDACTED].

9. From February to June [REDACTED], staff documented a decrease in all targeted behaviors. The student's mother also reported a decrease in the student's physical aggression at home.

10. The student has also exhibited increased replacement behaviors, such as requesting breaks rather than engaging in maladaptive behaviors. Overall, the student's behavior improved during the [REDACTED] school year.

11. Additionally, the student made academic progress. By April [REDACTED], he had mastered two of his three curriculum and learning goals from his [REDACTED] IEP. This prompted his teacher to increase the number of goals and their difficulty in the [REDACTED] IEP.

12. The preponderance of the evidence establishes that the student has made adequate progress in light of his circumstances. Thus, the student is mainstreamed to the maximum extent appropriate, and a more restrictive setting is unwarranted.

### CONCLUSIONS OF LAW

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

14. 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); *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1313 (11th Cir. 2003); *Devine v. Indian River Cnty. Sch. Bd.*, 249 F.3d 1289, 1291 (11th Cir. 2001).

15. In enacting the Individuals with Disabilities Education Act (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, 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).

16. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with FAPE, which is defined as:

[S]pecial 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).

17. 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 to be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "The IEP is the centerpiece of the statute's education delivery system for disabled children." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 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 *Bd. of Educ. v. Rowley*, 458 U.S. at 181).

18. Additionally, “in the case of a child whose behavior impedes the child's learning or that of others, [the IEP must] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. § 300.324.

19. In this case, these interventions, and supports are recorded in the student’s BIP. Petitioner alleges that the School Board failed to implement the BIP with fidelity during the [REDACTED] school year.

20. In *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit confronted, for the first time, 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.

*Id.* at 1211.

21. While declining to map out every detail of the implementation standard, the court provided a few principles to guide the analysis. *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 the context of the goal and import of the specific service 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 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.*

22. 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, the question 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.

23. Guided by these principles, the record in this case shows the student’s BIP was implemented during the school year. Staff applied the interventions outlined in the plan to decrease maladaptive behaviors, as shown by the student’s academic and behavior progress over the school year.

24. In sum, Petitioner failed to prove, by a preponderance of the evidence, that the School Board denied the student FAPE during the [REDACTED] school year.

25. Turning now to the issue of placement, the IDEA provides directives on students’ placements or education environments 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.

26. 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 his special needs.” *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989).

27. 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.

28. 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.

29. In this matter, Petitioner argues that a more restrictive placement, residential placement, is required to provide FAPE and meet the LRE directive. The preponderance of the evidence, however, demonstrated that the student is accessing his education in his current setting.

30. Petitioner's mother argues that the student requires residential placement due to his dangerous behavior and fears the student will be arrested at school if he continues to exhibit maladaptive behaviors. The better evidence is that the mother's fears are unwarranted and that the student is making adequate progress in light of his circumstances.

31. Here, Petitioner presented no evidence establishing that placement at the student's current placement violates the LRE mandate. Instead, the School Board presented persuasive evidence that the placement was appropriate and mainstreamed the student to the maximum extent possible.

### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the request for relief is denied, and the Complaint is dismissed.

DONE AND ORDERED this 1st day of November, 2024, in Miami, Dade County, Florida.

  
Case No. 24-2768E

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SARA M. MARKEN  
Administrative Law Judge  
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Filed with the Clerk of the  
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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).