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Case No. 23-4197E

VS.

Respondent.

FINAL ORDER

APPEARANCES

For Respondent: LaKisha M. Kinsey-Sallis, Esquire
Fisher & Phillips, LLP
101 East Kennedy Boulevard, Suite 2350
Tampa, Florida 33602

Whether the student’s recommended placement at an exceptional student education (“ESE”) center school is the least restrictive environment (“LRE”), as required by the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.*

PRELIMINARY STATEMENT

A request for a due process hearing by Petitioner was filed with DOAH on October 25, 2023. A Case Management Order was issued on October 26, 2023. A telephonic scheduling conference was held on November 27, 2023. The parties agreed to schedule the hearing on January 23, 2024, and to waive the final order deadline.

The final hearing was held on January 23, 2024, by Zoom conference. Petitioner presented the testimony of these witnesses: Petitioner's father; Petitioner's mother; and [REDACTED], Board Certified Behavioral Analyst.

Respondent presented the testimony of these witnesses: [REDACTED], ESE Teacher; [REDACTED], Behavior Specialist; and [REDACTED], Behavioral Analyst Coordinator. Respondent's Exhibits 2 through 13, 15, 16, and 18 through 22 were admitted into evidence.

The final hearing Transcript was filed at DOAH on February 7, 2024. An Order Extending Deadline for Final Order was issued on February 8, 2024, indicating that the final order would be entered no later than February 27, 2024.

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 female pronouns in this Final Order when referring to Petitioner. The female pronouns are neither intended, nor should be interpreted, as a reference to Petitioner's actual gender.

FINDINGS OF FACT

1. At the time of the due process hearing, the student was a [REDACTED]-grade student at School A, a school within the Hillsborough County School Board.

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

3. The student's disability affects [REDACTED] behavior. The student has a positive behavior intervention plan. The plan addresses the maladaptive behaviors of physical aggression, self-injury, and wandering. The student communicates [REDACTED] wants and needs using one-word phrases and gestures.

4. The student began the [REDACTED]-[REDACTED] school year at School A, a traditional school servicing students from [REDACTED] to [REDACTED]-grade. The School has about 1,000 students.

5. The student's educational setting was a separate class. The student's class had about six to ten ESE students. The students were supported by a paraprofessional and the teacher. All of the students in the separate class setting were educated on a modified curriculum.

6. Students in the separate class setting changed classrooms every period like their non-disabled peers. Additionally, the students in this setting interacted with their non-disabled peers during electives and in the cafeteria during breakfast and lunch.

7. When the school year began, the student would follow the same schedule as [REDACTED] peers. The student would attend [REDACTED] homeroom, then the cafeteria for breakfast, and then would transition from class to class.

8. The student began to exhibit maladaptive behaviors. The behaviors ranged from inflicting self-injury to physical aggression towards others. The student's crisis could last from several minutes to an hour and 45 minutes. On average, the student would experience crises three to four

times per week. In almost every instance when the student experienced a crisis, someone would be physically injured.

9. The student's behavior significantly impacted the learning environment. Often the entire class would need to be evacuated in order to ensure their safety. Sometimes, the student's aggression would be directed at ■■■ peers. The student would be triggered by their noisiness or would feel that they were invading ■■■ space within the classroom. During these instances, staff would have to intervene to prevent any injury.

10. School staff realized that the student did not respond well to transitions, noisiness, or to environments where there were large amounts of students. These environments would trigger the student to enter into crisis.

11. As a result, school staff began to modify the student's daily routine. At first, the student began to eat ■■■ breakfast in the classroom as opposed to the cafeteria. Then the student's schedule was modified further where ■■■ would no longer attend specials, like Physical Education, to avoid interaction with a large number of students. Eventually, the school removed all transitions from the student's daily schedule. The student would spend the entire school day in the same classroom with the same teacher and paraprofessional.

12. In addition to the schedule modifications, the school created a space within the classroom that was only accessible to the student. This was created to avoid the student from engaging in physical aggression with other students. School staff also contacted a district behavioral specialist and an occupational therapist to come observe the student and provide greater support.

13. School staff would meet on a twice-a-month basis to discuss the student's positive behavior intervention plan and how best to support the student.

14. Once all transitions were removed from the student's schedule, the student began to experience fewer crises. Even so, the modifications made to

the student's schedule were not provided to any other student and were not part of the ESE program at the school. The student's teacher would need to forgo his planning and lunch period to accommodate the modification. Staff credibly testified that the modifications to the program at School A were not sustainable.

15. As a result, in February [REDACTED], the Individualized Education Plan ("IEP") team met to discuss the student's educational placement. The team recommended that the student access her education at an ESE center school. The student's parents disagreed with the team's recommendation and the student remained at School A.

16. During the Spring of [REDACTED], the student began to spend a significant amount of time sleeping in class, which attributed to a decrease of maladaptive behaviors; but, the student was not engaging in any academic work.

17. At the beginning of the [REDACTED]-[REDACTED] school year, the school attempted to have the student follow the same schedule and routine as [REDACTED] peers. The transitions still triggered the student's maladaptive behaviors, so staff reimplemented the modifications from the previous school year.

18. The student also began to receive private behavior therapies at home and in the school setting. The therapies have helped decrease the maladaptive behaviors, especially in the home setting. Currently, the student is absent from school every Friday in order to receive behavior therapy.

19. The parent's position is that the student could remain at School A if the school were to allow additional hours of private behavior therapy. Currently, the services are delivered during the teacher's planning period when no other students are present. The teacher testified that increasing the number of hours would mean delivering the therapies while other students are present, causing a disruption to the overall learning environment.

20. The student is still exhibiting the same behaviors, with the same frequency, as she exhibited during the spring of [REDACTED]. Despite some improvement, the student's behaviors remain a major concern and impede [REDACTED] access to an education.

21. Staff at School A credibly testified that they have exhausted all of the resources available at the school and have not made sufficient progress to curve the student's maladaptive behaviors. The concerns over staff and student safety still remain.

22. The team met again in the fall of [REDACTED] to discuss the student's educational placement. The team reviewed the student's academic and behavior data. The behavior data showed the student's maladaptive behaviors were still occurring and, as a result, [REDACTED] had been unable to meaningfully participate in academic tasks. The school-based team members recommended to change the student's educational placement to an ESE center school, School B.

23. School B has students with similar behaviors. The school has around 80-100 students. The typical classroom has a ratio of three students to one staff member. The school has additional support staff trained in non-violent crisis intervention as well as other de-escalation strategies. The school is able to handle students with challenging behaviors.

24. The preponderance of the evidence establishes that the student has been unable to make meaningful progress at School A and requires additional supports. Thus, the school-based team members recommended placement of an ESE center school would mainstream the student to the maximum extent appropriate.

CONCLUSIONS OF LAW

25. 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).

26. 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).

27. 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.

28. 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).

29. 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.

30. 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.

31. The preponderance of the evidence demonstrated that despite the significant modifications to the current educational placement, the student is not accessing her education. The student requires another level of support that is unavailable in School A. Additionally, maintaining the current educational placement would continue to severely impact the learning environment of the student's peers.

32. 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 Act." *Daniel*, 874 F.2d at 1048.

33. Staff at the current school have exhausted their available resources and the student has not made significant progress. ■■■ behaviors are impeding her ability to engage in academic tasks. The evidence demonstrated that School B can offer the student additional supports and services to enable her to access her education.

34. Here, Petitioner presented no evidence establishing that placement at School B would violate the LRE mandate. Instead, Respondent presented persuasive evidence that placement at School B mainstreams the student to the maximum extent possible, and therefore, complies 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).

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 26th day of February, 2024, in Miami, Dade County, Florida.



SARA M. MARKEN
Administrative Law Judge
DOAH Miami Office

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Filed with the Clerk of the
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this 26th day of February, 2024.

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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).