

HEARING DECISION

CHILD: []

PARENTS: []

REPRESENTATIVE: Honorable Deborah A. Mattison
[]

LOCAL EDUCATION AGENCY: C. C. B. E.

REPRESENTATIVE: Honorable Katherine C. Watkins
[]

HEARING DATES: January 17, 2013;
February 1, 2013;
February 8, 2013; and
March 8, 2013

DATE OF DECISION: July 15, 2013

HEARING OFFICER: P. Michael Cole
[]

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HEARING DECISION

I. PROCEDURAL HISTORY

This Due Process Hearing was conducted under the authorization of the Individuals with Disabilities Education Act (“IDEA”) at 20 U.S.C. § 1400 et. seq. and implementing Federal Regulations at 34 C.F.R. Part 300, and implementing State regulations, at the Rules of the Alabama Board of Education, Chapter 290-080-090.

This case involves claims by Petitioner, on behalf of her son, [] against the Chilton County Board of Education (referred to herein as “the Board”). A general statement of Petitioner’s claims, as well as the procedural history of the case, is set forth in *Jennifer B. v. Chilton County Board of Education*, 891 F. Supp. 2d 1313 (M.D. Ala. 2012).

On June 6, 2011, the Petitioner requested a due process hearing under the IDEA in order to challenge the Board’s alleged discrimination of her and her son under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (§ 504). This Hearing Officer was duly appointed by Joseph B. Morton, Superintendent of the State of Alabama Department of Education, on June 7, 2011.

The parties waived the Resolution Meeting. On July 11, 2011, pursuant to this Hearing Officer’s request, the Petitioner submitted a 2-page letter brief which outlined the facts underlying her discrimination claims under Section 504 and ADA. In lieu of testimony at a Due Process Hearing the Petitioner informed this Hearing Officer that the purpose of her letter was to determine if the Alabama Department of Education had jurisdiction over her claims. In her brief, the Petitioner took the position that “irrespective of whether [] requires a full time placement at the [] in order to secure a FAPE under IDEA, the District has excluded [] from such full time participation in the program due to his status as a child with a disability. The Petitioner sought a ruling from this Hearing Officer that he lacked jurisdiction over her claims

and that she had exhausted, or had attempted to exhaust, her administrative remedies under the IDEA. The Petitioner reiterated her claims that [] had been harmed by not being able to benefit from the same socialization and activities as the non-disabled children, and that she had been forced to provide alternative services to [].

The Board responded to the Petitioner's letter brief. The Board argued that by failing to allege a violation of the IDEA and taking the position that the Alabama Department of Education lacked jurisdiction over her claim, the Petitioner's hearing request was a "nullity" and thus, she had failed to exhaust her administrative remedies under the IDEA. The Board further argued that if the Hearing Officer concluded that he lacked jurisdiction he would have no authority to rule that the Petitioner had exhausted her remedies under the IDEA.

After conducting a conference call with the two attorneys on the jurisdictional issue, this Hearing Officer dismissed the case in a three page Order on August 16, 2011. The Order was based on the letter briefs, the telephone conference, and applicable state and federal laws. This Hearing Officer also ruled that he lacked jurisdiction to rule on Petitioner's §504 and ADA claims and that the Petitioner had exhausted her administrative remedies under the IDEA.

On October 6, 2011, Petitioner filed a federal Complaint in the United States District Court for the Middle District of Alabama, Northern Division, against the Board. The Complaint alleged disability discrimination and retaliation in violation of the ADA and § 504. The Complaint does not allege any violation by the Board of the IDEA. After the conclusion of discovery, Petitioner and the Board filed Cross-Motions for Summary Judgment. As part of the Board's Motion for Summary Judgment, the Board argued that Petitioner had failed to exhaust her administrative remedies under IDEA.

On September 19, 2012, the U.S. District Court issued a Memorandum Opinion and Order relevant to the parties' Cross-Motions for Summary Judgment. The Court concluded that Petitioner was required to exhaust her administrative remedies through the IDEA procedural framework before filing suit. As a result, the Court ordered the Petitioner's action be stayed, and the case be remanded to the Alabama Department of Education for resolution of the IDEA-based issues and claims. Particularly relevant to the Court's holding was its finding that exhaustion served many important purposes, including the development of factual record. The Court also found that at least some of the relief sought by Petitioner in the litigation was potentially available via IDEA's administrative procedures. Finally, the Court opined that at least some of the Petitioner's claims included claims under IDEA.

On October 15, 2012, Petitioner filed a second due process hearing complaint with the Alabama Department of Education. In her second complaint, Petitioner alleges that the Board failed to provide [] with a free appropriate public education in the least restrictive environment. The Petitioner went on to reiterate the claims that were alleged in the first due process complaint that the Board discriminated against her and [] under the ADA and § 504. The matter was initially assigned to Hearing Officer Steve Morton. A Resolution Meeting was conducted on October 29, 2012, but the matter was not resolved. On October 30, 2012, the Board filed a Motion to Dismiss.

On December 14, 2012, Hearing Officer Steve Morton entered an Order reassigning the case to this Hearing Officer. The matter was set for a due process hearing, which convened on January 17, 2013. The hearing reconvened for further testimony on February 1, 2013, February 8, 2013 and March 8, 2013. Present at the hearing were the following:

1. Petitioner;

2. Petitioner's husband was present for the first day of the hearing, January 17, 2013;
3. Honorable Deborah Mattison, attorney for Petitioner;
4. [], a representative of the Board; and,
5. Honorable Katherine H. Watkins, attorney for the Board.

Prior to the hearing, a determination was made by this Hearing Officer that the Board had complied with all aspects of procedural safeguards necessary to have a fair due process hearing. Petitioner was advised of her right to have the hearing open or closed. Petitioner advised this Hearing Officer that it was Petitioner's desire that the hearing be closed. In addition, Petitioner advised this Hearing Officer that she was waiving the child's presence at said hearing. After being advised of their right to do so, the parties elected to "invoke the rule." All witnesses, other than Petitioner, her husband, and a representative of the Board, were excluded from the hearing room. The parties elected to give opening statements, with the Board electing to give its opening statement after the close of Petitioner's case.

At the beginning of the hearing, before testimony was taken, this Hearing Officer denied the Board's Motion to Dismiss, with leave to take up parts of it later in the proceeding.

At the conclusion of the testimony, this Hearing Officer requested that both parties prepare and forward a proposed decision. The parties prepared proposed decisions and submitted them to this Hearing Officer in a timely manner. This Hearing Officer has carefully reviewed the documents submitted by both parties. In rendering this decision, this Hearing Officer has considered all the exhibits introduced into evidence and all testimony offered as evidence at the hearing. No party has brought any procedural defect in any pre-hearing proceeding to the attention of this Hearing Officer and this Hearing Officer has determined that all parties have timely complied with exchange of witness list.

II. EXHIBITS ADMITTED INTO EVIDENCE

There were numerous exhibits submitted by the parties and accepted into evidence by this Hearing Officer. These exhibits have been examined by this Hearing Officer subsequent to the due process hearing in light of the testimony presented at said hearing. These documents and materials have been in the constant possession of this Hearing Officer until the rendering of this decision. Hereafter, they will be delivered to the State of Alabama Department of Education.

This Hearing Officer places no weight on the fact that any particular matter was offered by either party since the purpose was to get all of the appropriate documents produced for consideration by this Hearing Officer, so long as they were not prejudicial to the other party participating in the due process hearing based upon objection. The documents were examined and the weight given to each was based upon the contents of the document which was submitted and not on which party introduced said document. This Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of making a decision in this matter.

A. Petitioner's Exhibits

Petitioner's Exhibit 1	[], [], Document
Petitioner's Exhibit 2	[] Program Registration Form
Petitioner's Exhibit 3	Notice and Eligibility Decision Regarding Special Education Services
Petitioner's Exhibit 4	2009-10 IEP
Petitioner's Exhibit 5	January 22, 2012 Document to all Parents of Special Education Students
Petitioner's Exhibit 6	January 26 through January 29, 2010 E-mails between Petitioner and []

Petitioner's Exhibit 7	Petitioner's personal notes of a meeting on February 2, 2010 at 11:30 a.m.
Petitioner's Exhibit 8	March 12, 2010 Petitioner E-mail
Petitioner's Exhibit 9	March 23 [] E-Mail
Petitioner's Exhibit 10	March 24, 2010 Petitioner E-mail to []Petitioner's
Exhibit 11	March 24, 2010 []to Petitioner E-mail Petitioner's
Exhibit 12	March 26, 2010 [] Therapy Service Letter to Petitioner
Petitioner's Exhibit 13	April 20, 2010 Conference Record
Petitioner's Exhibit 14	[] to Petitioner E-mail
Petitioner's Exhibit 15	2010-2011 IEP
Petitioner's Exhibit 16	[] Report Dated 7/12, 7/30/2010
Petitioner's Exhibit 17	Criteria for Typically Developing Peers for [] Program, 2011-2012
Petitioner's Exhibit 18	[] for []
Petitioner's Exhibit 19	Deb Mattison to [] Letter dated March 15, 2011
Petitioner's Exhibit 20	May 9, 2011 Deb Mattison to [] Letter
Petitioner's Exhibit 21	June 21, 2011 Kate Watkins to Deb Mattison Letter
Petitioner's Exhibit 22	Monies Paid to [] from Petitioner
Petitioner's Exhibit 23	Curriculum Vitae for []
Petitioner's Exhibit 24	Occupational Therapy Report
Petitioner's Exhibit 25	[].'s 2009-2010 Class
Petitioner's Exhibit 26	August 27, 2012 Letter
Petitioner's Exhibit 27	Memorandum from the State Department of Education dated July 12, 2010

Petitioner's Exhibit 28	February 29, 2012 Letter from Special Education Office, Rehabilitative Services
Petitioner's Exhibit 29	Curriculum Vitae for []
Petitioner's Exhibit 30	[] Neuropsychology Report
Petitioner's Exhibit 31	Defendant Chilton County Board of Education's Objection and Responses to Plaintiff's First Set of Interrogatories
Petitioner's Exhibit 32	SDE Standards
Petitioner's Exhibit 33	Alabama Developmental Standards for [] Children
Petitioner's Exhibit 34	IDEA Requirements for [] with Disabilities
Petitioner's Exhibit 35	April 2012 Deposition of []
Petitioner's Exhibit 36	[]'s Class 2008-2009 School Year

B. Respondent's Exhibits

Respondent's Exhibit 1	Record of Access to Student's Records
Respondent's Exhibit 2	Notice of IEP Team's Decision Regarding Reevaluation
Respondent's Exhibit 3	IFSP Paperwork
Respondent's Exhibit 4	[] to [] Planning Meeting Documentation
Respondent's Exhibit 5	Notice of Proposed Meeting/Consent for Agency Participation
Respondent's Exhibit 6	Special Education Rights Under IDEA
Respondent's Exhibit 7	Notice and Consent for Initial Evaluation
Respondent's Exhibit 8	Family Focus Interview
Respondent's Exhibit 9	Natural Environment Survey

Respondent's Exhibit 10	Notification to Administer Diagnostic Tests
Respondent's Exhibit 11	Developmental Assessment of Young Children
Respondent's Exhibit 12	Developmental Assessment of Young Children, Profile Examiner's Summary Sheet
Respondent's Exhibit 13	Notice of Proposed Meeting/Consent for Agency Participation
Respondent's Exhibit 14	Notice and Eligibility Decision Regarding Special Education Services
Respondent's Exhibit 15	Notice and Consent for the Provision of Special Education Services
Respondent's Exhibit 16	Notice of Proposed Meeting/Consent for Agency Participation
Respondent's Exhibit 17	Notice of IEP Team's Decision Regarding Reevaluation
Respondent's Exhibit 18	Notice and Consent of Reevaluation
Respondent's Exhibit 19	2/24/10 Easter Seals Pediatric Therapy
Respondent's Exhibit 20	March 25, 2010 [] Pediatrics
Respondent's Exhibit 21	March 29, 2010 Document from [], RN
Respondent's Exhibit 22	University of Alabama in Birmingham Document
Respondent's Exhibit 23	Notice of Proposed Meeting/Consent for Agency Participation
Respondent's Exhibit 24	October 12, 2010 IEP Signature Page
Respondent's Exhibit 25	11/30/2009 through 5/27/2010 Annual Goal Progress Report
Respondent's Exhibit 26	Annual Goal Progress Report
Respondent's Exhibit 27	Determine Days/Times for []ers With Special Needs, 2011-2012

Respondent's Exhibit 28	Early Morning Data
Respondent's Exhibit 29	Parent/Teacher Correspondence
Respondent's Exhibit 30	Annual Goal Progress Report
Respondent's Exhibit 31	Records of Access to Students' Records

III. WITNESSES

A. Petitioner's Witnesses

1. Petitioner []
2. [].
3. []
4. []
5. [] (recalled)

B. Respondent's Witnesses

1. []
2. []
3. []

IV. BURDEN OF PROOF

The burden of proof in this matter is upon the Petitioner as the Petitioner is the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 57-58, (2005); *Ala. Admin. Code R.* 290-8-9.08(9)(c).

V. SUMMARY OF THE TESTIMONY

The following is a summary of some of the pertinent testimony presented to this Hearing Officer during the course of this four day hearing. These facts are not the only facts considered by this Hearing Officer in making this decision. The Hearing Officer has heard all testimony

presented at this hearing and has reviewed the transcript of said testimony. This decision is based on all testimony presented at this hearing, as well as the exhibits submitted into evidence during the hearing.

A. Witness Petitioner []

Petitioner [], is the mother of [] She is a teacher employed by the Respondent, Chilton County Board of Education. She began her employment in 1998. She teaches English to [] at [] County High School. She graduated from [] University in [] with a Bachelor's degree in secondary language arts. She has a Master's degree in secondary education and a Master's degree in English from the University of [].

Petitioner has [] children, one of whom is [] who is currently in kindergarten. [] is a special education student with disabilities as the result of []. []'s disabilities include issues with feeding, speech, fine motor skills, weakness on his left side, and across-the- board development. His most severe issue is with speech. In general, it takes more time and effort for him to learn to do things. In describing his strengths, Petitioner described [] as fun, social, and very happy.

The [] program is a [] program where students with special needs are educated in an integrated setting with typically developing peers. Petitioner first learned about the [] [] program in the summer of 2007, when her daughter was enrolled in the program. Petitioner's daughter does not have a disability, and she was enrolled in the program as a typical child in the class of []. Petitioner understands that the "typical" children in the [] program serve as peer models for the students with special needs. The typical children must apply for and be selected for a spot in the program. Petitioner further understands that

employees of the Board receive preferential status for first placement in the slots for “typical” children in the program. During her time in the [] program, Petitioner’s daughter attended school on a full-time basis, five days a week, from approximately 7:30 a.m. to 3:00 p.m. Petitioner was pleased with her daughter’s education while she was in the [] program, and she believes that her daughter benefitted from the program. The [] program operates five days a week from (depending on the year) approximately 7:30 a.m. to 2:00 p.m. However, children of teachers who attend the [] can stay until 3:00 p.m. for an additional \$1.00 per day. One of the reasons for having the program span an entire day (versus only a half-day) was so that the “typical children” could get accustomed to a full day of school. The children of teachers were allowed to stay the extra hour as an added employment benefit, so that the teachers would not have to make other arrangements for their children at the end of the day.

Prior to his [] birthday, [] received services from []. [] turned three on [], 2009, at which time he began to receive services from the Board. Prior to his enrollment, the Board convened a meeting to develop an IEP for [] for the 2009-2010 school year. [] initial IEP stated that he would attend the [] program three days per week, from 8:00 a.m. to 11:30 a.m. each day. Initially, the Board offered [] two days per week, until 10:30 each day, but Petitioner asked that he be afforded more time in the program. After some deliberation, the Board agreed to allow [] to attend three days per week, with an extra hour each day. Although the IEP stated that [] would attend from 8:00 to 11:30, he was actually allowed to be dropped off at 7:30 due to Petitioner’s schedule as a teacher. The Board never offered to place [] in a program for five days per week. Petitioner testified that there was no discussion regarding [] least restrictive environment during the initial IEP meeting.

[] was assigned to the classroom of [] for the 2009-2010 school year. [] is a former student of Petitioner, and they enjoy a good relationship. It was Petitioner's belief that [] would be in the [] program. Petitioner denies that she received any indication that [] was not in the [] program. Her presumption was that []'s class was part of the [] program. Petitioner disputes the testimony of [] with regard to what happened at the first IEP meeting, and she denies that she requested that [] be placed in []'s classroom instead of []'s classroom. Petitioner claims that the IEP Team suggested that [] be placed in [] class because that would be a smaller class and the setting would allow for more one-on-one instruction and more direct supervision of []. Petitioner testified that []'s class was suggested to her, and she agreed to it.

On January 26, 2010, Petitioner e-mailed [] and requested an IEP meeting within the next two weeks to discuss [] schedule. Petitioner was concerned about [] missing days because of holidays or school being cancelled. Several e-mails were exchanged between Petitioner and []. In the course of those e-mails, [] stated that she had no problem with [] coming to make up for any missed days. [] also stated that [] IEP did not specify which particular days he was to attend; therefore, his schedule could be adjusted without holding an IEP meeting. Petitioner inquired whether [] knew of any reason why [] could not attend five days per week. Subsequently, [] responded that she had spoken with the [] coordinator, [], who wanted to go ahead and schedule a meeting.

Petitioner testified that she is not aware of anything about [] disability that would have prevented him from attending school five mornings per week, or five full days per week. The Board never told Petitioner that there was anything about [] unique needs that would prevent him from attending the program full time.

Petitioner met with [], [], and [] speech therapist on February 2, 2010. At the meeting, Petitioner stated that her concern was that [] could attend the program more and be able to get the therapies he needed. Petitioner saw no reason why [] could not attend five days per week like her daughter had done previously. Petitioner expressed her belief that [] was showing progress, and therefore he was demonstrating that he was ready for more. Petitioner asked why [] was only allowed to come three days when the typical students were allowed to attend five days. Petitioner alleges that she was told that the typical students were allowed to stay all day long because they paid tuition for the program. Petitioner testified that she offered to pay tuition for [] but the Board never took her up on that offer. Petitioner expressed her belief that [] was being treated unfairly and inequitably, but [] stated that she had to consider what was best for the overall program and not just one child. Petitioner reminded [] that the IEP was about [] and [] reported that [] was already getting more time than other special needs three year olds because he attended three days a week and stayed one hour longer than they do.

After the February 2, 2010 meeting, Petitioner contacted the State Department of Education and spoke with []. After several back-and-forth phone calls, [] could not provide Petitioner with any written information as to how the [] program was to be administered according to the State. Petitioner testified that [] told her that she had legitimate concerns and that she could call the Board's special education supervisor, []. During this time, Petitioner also contacted the Alabama Disabilities Advocacy Program ("ADAP").

On March 12, 2010, per the recommendation of [], Petitioner contacted [] via telephone and explained the situation. Petitioner testified that, during this phone conversation, [] stated that they would likely have to do some paperwork and change the IEP, but otherwise

she saw no reason why [] could not attend school five days per week on a half day basis for the remainder of the year, and for a full day the next year. On the same day, Petitioner wrote to [], confirming their conversation, and thanking her for her assistance in addressing the issue. In response, [] wrote back asking if Petitioner could give them until Wednesday after spring break to “begin.” Petitioner took this to mean that [] would begin attending school five days per week after spring break.

On March 23, 2010, Petitioner received an e-mail from [] indicating that [] had met with [] and [], and that they had decided, (without Petitioner), that there would be no change in [] time in the program. [] indicated to Petitioner that, if [] stopped showing progress, then they would reevaluate the situation to determine whether he might get more time in the program. Upon receipt of this letter, Petitioner called [] and expressed her confusion that the issue had been decided without her and without an IEP meeting.

On March 24, 2010, Petitioner wrote to [], again requesting an IEP meeting. Petitioner stated that she was deeply troubled because she believed her concerns were not being heard and because decisions about [] IEP were being made without her presence or knowledge. On the same day, Petitioner received any e-mail from [] in which [] defended the program and cautioned Petitioner that there were funding shortages, and if complaints arose about “equal accessibility,” the Board might choose to rethink the services and delivery model. [] told Petitioner to “do what you need and feel led to do keeping in mind that the overall program could be hurt and instead of helped.”

After the discussions with [], Petitioner began contacting [] doctors and service providers to get opinions about how to help []. She contacted [] from [].

[] provided a letter stating that [] should receive consistent daily intervention to facilitate the continued cognitive development necessary to enter [] grade with minimal assistance.

On April 20, 2010, Petitioner attended a meeting with representatives of the Board, including [], [], and []. Petitioner testified that this meeting was identified to her as a “conference,” not an IEP meeting. At the meeting, there was discussion about conducting further speech and language assessments, and assistive technology. [] indicated that the State Department did not mandate a specific number of days for [] and, so long as [] was progressing, his services would remain as they were. [] explained that if Petitioner wanted to take [] out of the [] program and put him at a church daycare or another daycare or keep him at home, the Board would provide services to him at some other location; however, Petitioner testified that the Board did not offer to pay for a private daycare. In support of her position, Petitioner provided the letters that she had obtained from [] various service providers, including a letter from [], and letters from [] neurologist, pediatrician, orthopedist, and speech therapist.

After the meeting, Petitioner testified that she was not sure what to do or how to proceed. Approximately one week later, she was at technology in-service meeting when she met [] in the hallway. [] stated that she needed to talk to Petitioner, and she brought her into one of the staff rooms for a conversation. [] stated that, off the record, she had received some information, investigated how things were being done, and that she realized that there were some things that were being done that she had not understood to the full extent. At the end of the conversation, [] offered to let [] attend the program four days per week for a half day.

After this conversation, on April 26, 2010, Petitioner received an e-mail from [] stating that [] was supposed to have called Petitioner to let her know that they felt [] should

be able to come four days per week due to the new information that Petitioner had submitted from his doctors. Thereafter, [] began attending school four days per week. Petitioner contends that this decision was not made by an IEP Team.

On May 18, 2010, Petitioner met with the IEP Team to develop an IEP for the 2010-2011 school year. The IEP stated that, for the 2010-2011 school year, [] would attend the [] [] program, four days per week, from 8:00 until 11:30. There was no discussion of whether [] could attend the program five days per week. It was not offered as a possibility, although Petitioner continued to want [] to be in school full time, five days per week.

In the summer of 2010, Petitioner took [] to see [], a pediatric neuropsychologist, for an expert's opinion and advice on education planning and services. Petitioner testified that she provided a copy of []'s report to [] and [] in September, 2010.

Prior to the start of the 2010-2011 school year, Petitioner had a parent meeting with [], who would be [] teacher for the year. At that time, [] advised Petitioner that the other special needs students were being dismissed at 11:00, and she asked Petitioner's permission to let [] leave with them when they left. Since Petitioner did not want [] to leave alone, she agreed that [] would leave at 11:00.

Eventually, Petitioner retained attorney Deborah A. Mattison to assist her with the situation. On March 15, 2011, Petitioner's counsel wrote a letter to [] describing her concerns with [] program. Petitioner did not receive any contact from the Board to provide [] with additional services. As a result, Petitioner's counsel sent [] a second letter, dated May 9, 2011, reiterating these issues.

Prior to his [] birthday, Petitioner employed [] to watch [] after [] doctor recommended that [] be removed from regular daycare because he had been sick repeatedly

and the doctor wanted to give him a [] shot. [] was working as a substitute teacher for the Board at the time and had worked as a substitute for Petitioner. Petitioner asked [] whether he would be willing to help take care of [], and he agreed. [] stayed home with [] during the late summer and fall of 2009. [] took [] to the YMCA for gymnastics, an Easter Seals program in [] where he attended therapy, and to the park or playground when weather permitted. Petitioner testified that it was her intent for [] to provide [] with additional opportunities to practice motor movement, socialization, and communication skills.

[] was responsible for watching [] at home, feeding him, taking him to therapies, and administering medications. Petitioner paid [] \$50 per day for these services. Petitioner testified that, if the Board has allowed [] to attend the [] program full time, she would not have needed to continue employing [].

Petitioner testified that had [] been allowed to be in the program full-time that he would have benefitted. Petitioner has spoken with [] service providers and they have explained to her that it will take [] longer to learn some things. In Petitioner's experience, [] learns a great deal from being with other children and talking with other children. Petitioner wanted him to have the opportunity to be engaged in play and socialization with other children so that he would be able to practice and use the skills that he had learned from his instructors.

At the end of the 2010-2011 school year, Petitioner entered [] in a lottery for the Office of School Readiness ("[]") Program at []. [] was selected for the program, and Petitioner elected to enroll him in the program because it would let him attend school five days per week for full days. Petitioner attended the [] program full-time, and he was able to handle the full-time schedule. He is now in a full-time kindergarten program.

B. Witness []

[] is an Occupational Therapist who conducted an evaluation of [][] received her Bachelor's Degree as an occupational therapist in 1982 or 1983 from the University of []. In 1990, she received a Master's Degree in public health from []. In 2004, she completed her Doctorate Degree in occupational therapy from [] University in []. She is retired from []'s Department of Occupational Therapy where she was a faculty member for 25 years.

[] did an evaluation of [] in his school in December, 2011. In preparing her report, [] reviewed evaluations of [], including medical records and other evaluations that had taken place. She reviewed [] past IEPs and educational records. She observed [] in the [] classroom setting. He was five years old at the time. [] described [] as the life of the classroom and full of personality. [] further described [] as being "very, very social" and she noted that he "has lots of friends in the classroom that I visited" and is "just easily engaged." Overall, she states that [] was doing "a real nice job."

[] testified it was beneficial for [] to attend a program with typically developing children. She stated that it is beneficial anytime a child can be around typically developing children as this gives opportunities, exposure, support, and practice. According to [], children challenge other children in ways that adults cannot. She testified that [] is a child that needs to be engaged and participate in every aspect of life. In []'s opinion, "more is better" for children who have delays or who have actual deficits because they have to have time to practice and develop new skills. She was not aware of any behavior or cautionary issues that would have precluded [] exposure to typically developing children.

[] was asked about her opinion with regard to the appropriateness of [] attendance of the [] program for three days per week, on a half day basis. [] testified that she believes [] would have benefitted by staying in the program for a full day. She reiterated that [] needs as many opportunities as possible to learn and practice new skills. She acknowledged that there was nothing necessarily wrong with [] being picked up and taken home at 11:30; however, she opined that it would have been better for [] to be in a structured program where he would have been around his friends who were engaging him. [] referenced various research studies supporting the effectiveness of [] in both typical children and children with learning disabilities. From an occupational therapist's perspective, [] was not aware of anything about [] unique needs which would have precluded him from full-time placement in the [] program.

[] provided four specific recommendations in her 2011 report. The first recommendation was that [] continues to receive direct occupational therapy services 30 minutes per week. The second recommendation was that [] sit in a different chair during lunch while in the [] class so that he was not easily recognized as having special needs. The [] recommendation was that [] have scheduled toilet training. The fourth recommendation was that fine motor and visuomotor coordination through OT should continue. There was nothing in []'s report that recommended to the Board that [] receive additional time for occupational therapy services.

[] further testified regarding possible compensatory opportunities from her perspective as an occupational therapist. She believes that [] would benefit from participation in local "Child's Play" summer camp, where he would have opportunities to work on feeding skills, socialization, and visual motor integration. She also proposed other programs such as group

swim class, which would give him opportunities for socialization, strengthening, and coordination, and a therapeutic horseback riding class, which would give him opportunities for full body strengthening and coordination.

C. Witness []

[] is a substitute teacher who Petitioner hired to care for [][] is not a certified educator or a certified [] teacher in the state of Alabama. He is not a licensed physical therapist, occupational therapist, or speech pathologist.

During the time that [] was in the [] program, [] would pick [] up around 11:00 or 11:30 every day that he was in school. After [] picked up [] from school, they would have lunch, and he would give [] his medicine. Some days they would go to [] house. Some days they would go elsewhere. [] would feed him, do exercises with him, go outside, and go to the park, weather permitting. [] also took [] to therapy at Easter Seals once per week. He also transported [] to the YMCA once per week so that [] could attend a gymnastics class. [] attended the field trips at school with [][]'s focus in caring for [] was to keep him active and busy. Petitioner paid [] at a rate of \$50 per day for his services.

D. Witness []

[] is retired as the [] Coordinator for the Board. She worked in the field of education for 28 years. She previously served as a Speech Language Pathologist for [] Board of Education and subsequently for the Respondent Board. She became the Board's [] Coordinator in 2006, and she served in said position for six years. Her immediate supervisor was the Board's Special Education Coordinator, []

[] was involved in the initial design and development of the [] program. [] testified that the [] program started in 2007 with classrooms at [] and []. The

program was developed such that students with special needs would be educated in an integrated classroom with typically developing peers. Board employees were given first priority to apply for the full-time typically developing peer spots in the program. [] is aware that Petitioner applied for and received one of the typically developing spots for her daughter, [] older sister, during the first year of the [] program. [] is aware that [] was provided services through [] prior to his [] birthday.

She testified that [] was provided physical therapy services for one hour two times per month and speech language services for one hour two times per month in the home through Early Intervention. According to []'s interpretation of the results of the [] given to [] by [] in April 2009, the assessment showed [] to have a greater than or equal to [] delay in communication, cognition, physical motor and adaptive motor, which indicated a need for services. His social/emotional domain showed a less than [] delay.

A Family Focus Interview was completed based upon information from Petitioner prior to [] transition from [] to the Board. According to []'s interpretation of the interview, Petitioner felt that [] socialization skills were fine, but she had concerns with speech and language and motor skills. Petitioner also indicated that [] had some difficulties with self-help, toileting, feeding, dressing, and tantrums. The Natural Environment Survey, also completed by Petitioner, indicates that Petitioner had concerns with [] communication, but his receptive language was good. Petitioner also indicated that [] had challenges with adaptive behavior and daily living developments. Petitioner indicated that social/emotional development was good, with some occasional two-year-old tantrums. Petitioner also indicated concerns with motor development and cognitive development in the survey.

The DAYC was given to [] again after the referral meeting by [], who is qualified to give the assessment. [] was advised by the State Department that, if the standard score is 77 or below, there is an area of concern, and if the general development quotient is 70 or below, there is a reason for concern. []'s testing of [] showed a cognitive score of [], indicating that it was an issue which needed to be considered. Communication was also a significant deficit. The score on social/emotional was above [], indicating that [] was doing fairly well in that area. Physical development was significantly below [], and adaptive behavior was also below that score. [] testified that the eligibility team considered []vision screening, hearing screening, [] language scales, fourth edition, as the comprehensive language assessment, DAYC, physician's report, Peabody developmental motor skills, observation, and information gathered from the natural environment survey. The eligibility team, of which [] was a member, looked at all of the information and determined, because [] had delays in several developmental areas, developmental delay was the most accurate category for his eligibility for special education and related services.

Petitioner gave permission for the Board to provide special education services to [] An IEP was prepared for [] for the 2009-2010 school year beginning on his [] birthday, which was November 30, 2009. The initial IEP was drafted prior to the IEP meeting by speech language pathologist [] and []. The initial IEP meeting occurred on November 20, 2009.

[]'s understanding of guidance from the Alabama Department of Education for standards which apply to [] IEPs is that the IEP Team should begin with the expectation that all students can access, be involved in, and hopefully progress in the general curriculum or natural environment. It is also her understanding of guidance from the Alabama Department of Education that removal from the general education setting must be justified. []'s

understanding of the Board's responsibility to educate [] with special needs is to educate those students to meet their needs within the school's environment. []'s understanding of the continuum for the least restrictive environment for a [] is that the least restrictive environment is the natural environment. A more restrictive environment would be some services being provided outside of the classroom. A more restrictive environment beyond that would be for the student to not be included with typically developing peers very much, and finally, the most restrictive environment would be the home, hospitalization or institutionalization.

[] testified that, when she participated in the drafting of [] initial IEP, the proposed least restrictive environment was the integrated [] program in []'s class. According to [], Petitioner requested that [] be placed in []'s class during the November 20, 2009 IEP meeting. [] testified that []'s segregated classroom would have been considered a more restrictive environment, but not the most restrictive environment. [] had been in a more restrictive environment when he was removed from the daycare setting and placed in the home setting by Petitioner prior to his [] birthday. [] felt []'s class was an appropriate placement for [] given Petitioner's concerns about his instability and his being more fragile than some of the other students. [] remembers that Petitioner was advised of the types of students in []'s class so she would understand where [] would receive his special education services. According to [], the IEP Team agreed with Petitioner's request for placement in []'s class and revised the IEP to show that he would be in the [] program.

[] testified as to her belief that the standards that were used in preparing [] IEPs for the 2009-10 and 2010-11 school years were the appropriate standards to have been used during that time frame according to her understanding from the State Department. [] was the

person responsible for making changes to the draft IEP during the IEP meetings and remembers doing that during [] initial IEP meeting. [] testified that the printed IEP documents looked different on the computer than they do on paper. It is her belief that, during [] initial IEP meeting, certain changes were not made to the IEP as the meeting progressed. [] confirmed that she failed to remove the word “[]” before “[] program” on each of the pages that discussed [] special education-related services. She also failed to change the LRE code to reflect the correct amount of time [] would be interacting with his typically developing peers.

[] was a member of the initial IEP Team, as well as the IEP Team which met to prepare the 2010-11 IEP. According to [], no professional advised her that [] needed additional time in the [] program for practice on skills he was acquiring. [] IEP Team began with the expectation during the initial IEP meeting that [] could access, be involved in, and hopefully progress in the general curriculum for []. According to [], it was Petitioner’s suggestion and request that changed the initial expectation and caused the IEP Team to then agree that [] be placed in []’s class. In []’s opinion, the 2009-10 IEP for [] was age and developmentally appropriate.

According to [], the meeting on April 20, 2010 was held to discuss Petitioner’s concerns about whether [] was making progress with his language skills. The team looked at [] previous scores and agreed to do additional testing through the [] to determine whether there had been a change in his language skills. There was also a discussion during that meeting about [] use of the Tech/Speak device to help with transitions and learning more symbols. During the same meeting, the reason given to Petitioner that [] was not provided with a full-time program was that he was making progress.

[] testified that there are at least two private [] programs in [] with programs from 8:30 to 11:30 a.m. and the number of the days the students attend is dependent on their ages.

[] remembers seeing the letters from [] various service providers. According to [], a majority of those letters recommended that [] receive consistent interventions focused on his developmental and educational needs. In []'s opinion, the Board provided [] with consistent interventions. One of the five letters, the one from [], recommended daily services to []. In []'s experience with [], this was her standard recommendation for [] transitioning in from [].

In her review of the annual progress report for the 2009-10 school year, [] described [] as having mastered two of his five goals and making progress toward the other three. The goals which were not mastered were included in the 2010-11 IEP, and new goals were also added. [] opined that the May 18, 2010 IEP and goals were age and developmentally appropriate. The annual goal progress report for the 2010-11 school year showed that [] mastered a majority of his goals and made progress in the other goals.

E. Witness []

[] is a Pediatric Neuropsychologist who performed an evaluation of [][] has a PhD in clinical child psychology from the University of Alabama. He did an internship at [] VA and at [] Children's Hospital with a specialty in neuropsychology. He did a fellowship at [] Hospital at [] University School of Medicine in neuropsychology. The vast majority of his clients are school aged. He is the senior clinician and clinical director at [].

[] conducted a neuropsychology evaluation of [] in July 2010. He requested and received education records, and Petitioner filled out an intake packet, including a development questionnaire and a family history questionnaire. He obtained medical records from [] doctor, and he reviewed [] IEP.

[]'s evaluation of [] occurred on two days in July 2010. [] was only present for the first day, when he was tested. The testing was administered by []'s assistant, who is a Master's level psychologist. On the first day, Petitioner sat with [] during the testing process. On the second day, [] conducted a clinical interview with Petitioner. [] interpreted the test results and provided Petitioner with specific verbal feedback about the test results. [] and Petitioner used a collaborative treatment planning approach, and [] provided a written report.

[] described [] medical condition as [], a [] which caused an abnormally formed brain. [] noted that he was pleased to see that, despite this condition, [] was relatively high functioning for that population and did not have a history of epilepsy. [] appeared to be medically stable when [] saw him. According to [], [] presented with moderate developmental delays across multiple areas. [] described [] as having a bright affect and as a delightful, charming young boy. He thinks one of [] assets is that he is very engaging with a good personality. [] testified that his purpose in conducting the neuropsychological evaluation for [] was to understand his current level of functioning and to help with treatment planning.

In []'s opinion, it was important for [], during his first two years in [], to have opportunities to communicate with typical peers. He had the same opinion in regard to motor skills and cognition/pre-academics. [] opined that there was no reason, based on his knowledge of [], that [] would not have been able to stay for the full day, and he would

have benefitted from staying a full day because of the opportunities it would have given him to practice his skills. Further, [] testified that children between age 3 and 5 have a critical window of opportunity for development and learning to occur.

[] acknowledged that he never evaluated or tested [] in the classroom setting. He also admitted that he never observed [] in [] or []'s classroom. He is not licensed as an early elementary teacher in the state of Alabama, and he has never participated in the development of a [] program.

[] testified that Petitioner reported to him, in July 2010, that she was happy with [] educational program, but wanted to make sure that [] was receiving all of the appropriate interventions. [] asked Petitioner whether she was generally satisfied with the therapies and the services that [] was getting, and her answer was yes. [] determined that [] interest and play behavior were developmentally appropriate. [] acknowledged that [] socialization scores on the Vineland II were not within the borderline deficient range, reflecting [] relatively intact social and play skills. [] also noted that the ratings from the caregiver failed to generate any clinically significant concerns regarding [] behavioral and emotional functioning.

As a result of his July 2010 evaluation of [], []'s report provided the following four primary recommendations:

1. [] should continue to receive specialty medical care with Dr. [] as well as his regular well-child check-ups to monitor his developmental progress over time;
2. [] should continue to receive specialized therapies and educational interventions, including PT, OT, and speech language therapy;

3. There was no need for psychological interventions at that time because [] appeared generally happy and well-adjusted; and

4. [] should receive a follow-up neuropsychological evaluation in three years to track his neuro-developmental progress over time and assist with any ongoing treatment planning needs.

The second recommendation was essentially to continue what [] was doing. [] confirmed that, in his second recommendation, he was addressing both the educational program as a whole and the special education therapies. There is no mention in his report that [] needed additional opportunities to practice with typically developing peers skills which he was acquiring through his therapies. [] never participated in any IEP meeting for [].

F. Witness []

[] was [] teacher during the 2009-2010 school year. In the spring of 2009, [] had a temporary position at [] in a special education classroom. During the 2009-2010 school year, she taught a [] through second grade, self-contained special education class at []. During the 2010-2011 school year, she taught a sixth through eighth grade self- contained, special education class at []. She also taught a fifth and sixth grade self- contained special education class at [] during the 2011-12 school year. During the 2012-13 school year, [] taught general education seventh grade math at C.M.S.

[] graduated from []. in 2005 and received her Bachelor's Degree in elementary and special education at the University of []. She is presently working toward her Master's Degree in secondary special education at [].

The first time [] was made aware that there was a student named [] was at the initial eligibility/IEP meeting for [], which she attended. []'s recollection of how the IEP

meetings were conducted at [] was that everyone would either have a hard copy of the draft IEP or it would be projected onto the wall and the draft would be discussed with the parent during the meeting. If any changes were agreed to during the meeting, the changes would be made then, and when the process was completed, the parties would sign the IEP. At the initial IEP meeting, it was []'s understanding that the proposed placement for [] was in one of the [] classrooms. This proposed placement was discussed with Petitioner during the initial IEP meeting. [] recollects that Petitioner's response was that she was afraid that her son would be hurt in the other classrooms because he was a small []-year-old and she requested that he be in a smaller setting, which was []'s classroom. She remembers Petitioner specifically asking for []'s classroom, and she was surprised by that request. According to [], the IEP Team explained to Petitioner the make-up of []'s classroom - that it was a self-contained, special education classroom and only serviced students with disabilities, including some students who would be considered medically fragile and students with more severe special needs. Petitioner did not change her request after the discussion of the make-up of []'s classroom. The IEP Team took Petitioner's concerns into consideration and agreed that [] would be placed in []'s classroom. Toward the end of the school year, [] averaged roughly ten students per day, but not all students came every day. Even though she had four kindergarten through second grade students, not all of them attended school for a full day five days per week if their IEPs only provided that they would come on certain days. [] had an aide who was in her class for approximately 45 minutes throughout the school day. While in []'s class, [] was exposed to typically developing peers when his class would attend art class and music class with []'s [] class. []'s class would also go to the playground for recess with both [] classes. There would also be times when one of the [] classes would join []'s class in the sensory

room. []'s class went on field trips with the [] classes. Recess was every day, weather permitting. Music class was held one time per week, and art class was also held one time per week. []'s class would go to the sensory room at least one or two times per week, but would also have sensory time every day in their classroom.

[] began to attend [] in []'s class on his [] birthday, []. He typically got to school at 7:00 in the morning, and [] would work one-on-one with him until the other students arrived at approximately 7:30. While [] and [] worked one-on-one,

[] collected data on his skills which were a part of the goals listed in his IEP and other [] standards not in his IEP. As [] mastered a skill with [], she would add additional skills to his daily instruction. The data sheets which were copied as part of [] special education record stop on March 24, 2010 because [] requested that [] provide copies of records to [] up to that point. However, [] continued to fill-out the data sheets from March 24, 2010 until the end of the school year. Once [] mastered a skill or concept, then that skill or concept would be discontinued on an everyday basis, but would be done less frequently to see if [] was maintaining the skill, and additional skills would be added.

When the other students arrived at the beginning of the school day, the students would engage in socialization and center play. During this time, some of the students would dance on the carpet in front of the radio, play dress-up or play with the sand table. After morning announcements, the Pledge of Allegiance, and the news, [] would sit the students in circle time where they would discuss the weather and sing the alphabet, numbers and weather songs. Her class learned a letter and a number each week. The students were expected to recognize their names as they were written down on a card and point to which card had his or her name on it.

[]'s class also participated in sensory time. During sensory time, either the students participated in sensory stations in the classroom, designed by the occupational therapist and [], or the class would go to the sensory room. The students also had independent work/data collection during the day when each student worked on work from their individual work box, which was a three-drawer cart. The work in the work boxes was based on the students' IEP goals and additional standards that were not in their IEPs. [] pulled in a lot of occupational therapy skills during that time. The students also participated in art time every day in the classroom except for the days they actually had art class. The art projects would typically revolve around information from circle time. There was also a structured snack time, which involved each student requesting, because the students were working on speech and language, to take a sip of drink or have a bite of snack. The students would request either by signing, using board maker symbols or using another augmentative communication device. The students in []'s classroom had recess typically with one or both of the [] classes.

Students would typically have their therapy sessions in the classroom. The occupational therapist worked with [] to demonstrate activities to do with the students in her class. The physical therapist would also come into the classroom and watch. The students were pulled from class for these services sometimes. The therapists provided consultation to [] regarding what skills they were working on with the students so that she could work on those same skills in the classroom. The speech language pathologist worked with her on the Tech/Speak to help her use it with [] in the classroom.

Each student had a daily schedule made from board maker symbols. [] would ask the students to go check their schedules, and they would have to take the symbol from each activity and put it in a folder before each activity would begin. The work box was something that []

prepared for each child in her class on a daily basis. The Tech/Speak was used during speech therapy and also in her classroom.

Petitioner asked [] if [] could come early in the morning, because she had to be at work by 7:30. [] agreed, but ultimately the Petitioner's husband was the one who brought him to school and [] was the one who picked him up. There was a time during the school year when [] began picking up [] before the 11:30 dismissal time, and when it became a habit, [] requested that [] check [] out in the office, rather than walking down to her classroom. After [] and [] resolved that issue, [] stayed until the 11:30 dismissal.

During the time that []'s class interacted with the [] [] classes, [] participated with the other students during those classes. He would interact with the students more so during recess and music than in art, since art is an individual activity. If the students were playing something that [] wanted to play on the playground, he would participate with the other students. When []'s class participated in music and art with []'s class, there was no differentiation between the students in the two classes. [] interacted with the typically developing peers in music class. Both the occupational therapist and physical therapist would join []'s class in the sensory room to work on skills with []. Students also worked on computers in []'s class. [] provided information to the parents on the progress that was being made by the students in her classroom in the form of progress reports and daily home notes. On the first daily home note sent to Petitioner, [] wrote that “[] had a fabulous day. He initiated play with other students. He is adjusting so well.” Even though the last daily home note in [] file is dated March 12, 2010, [] remembered that at some point Petitioner requested that [] e-mail information to her. Thus, some of the forms may have been sent to Petitioner by e-mail or she may have just e-mailed Petitioner information on [] day.

In regard to snack time, [] snack was different from the other students' snacks as Petitioner sent the snacks for him to eat and drink. In []'s opinion, [] was not a behavior problem in her class. When asked to describe [] socially, [] testified that [] liked to interact with other students, not only in her class, but in the other classes. Even if the other students may not have always understood [] sign language, [] always found a way to interact with them.

At some point in January 2010, Petitioner contacted [] regarding [] missing some time because holidays were falling on some of the days that he was scheduled to be in class. In response to the mother's concern, [] made up those days. Petitioner subsequently requested that [] days at school be changed. [] and Petitioner then changed the days that [] attended.

In regard to the nine week progress reports that were sent home to the parents, [] printed those out and sent them home. She would read them after she printed them out, but she knew most of the information before it got inputted into the form because she spoke with the therapists after their sessions with []. [] testified that all of the data showed that [] made progress on the skills in his IEP goals in her class.

When asked how many meetings she attended with Petitioner, [] testified that they had a parent-teacher conference, a meeting at the central office and the end-of-the-year IEP meeting at the elementary school. [] met with [] and [] at different points in the school year to discuss progress on all of her students. She and the administrators would look at the data collection sheets from each student's binder. They would also look at work samples and discuss []'s observation of each of the students in the classroom.

[] and [] met around March 22, 2010 to discuss [] progress in []'s class. Based on all the data that [] had in March 2010, [] was making progress in her class. At the time she attended the May 18, 2010 IEP meeting, [] felt [] had made progress in her class over the course of the prior six months. [] testified to the various occasions during the school day when [] had the opportunities to practice the skills he was acquiring in the educational setting. In music class, [] had to practice sitting and waiting until it was his turn to use an instrument. He also had to practice motions to go along with songs, which meant he had to learn to follow directions. [] also learned to walk down the hallway, enter a room and sit on the carpet, as opposed to wandering to the back of the classroom and playing in another teacher's centers. [] was required to work on the skills that the other children were working on, including: following directions; taking turns; sharing; not taking something from someone else; and waiting in line. Out on the playground, [] learned to initiate play with other students. If he was playing with something, [] would bring other students to where he was. He would join other groups of students. [] learned that if someone was on the slide, he could not break in line, but had to wait.

[] testified that [] was in a class with approximately 10 students, all of whom had significant disabilities. She was asked about times when [] had the opportunity to interact with typical peers. [] attended art class, music class, and recess with typical students from the [] program, and he would also sometimes participate in circle time and sensory time with those students. [] estimates that [] spent at least three hours per week with typical peers.

[] tried several times during the year at different times during the day for [] to spend time in []'s classroom. She found it was more effective to transition [] slowly and let him get

used to being in that environment. [] and [] would collaborate as to whether [] would go into []'s classroom for circle time.

[] acknowledged that she signed [] IEP, which states that he was to attend the [] [] program, even though her classroom is not a [] classroom. [] testified that this was at the Petitioner's request. She could not recall whether there was any discussion of [] least restrictive environment at the initial IEP meeting.

[] is aware that Petitioner began to ask for additional time for [] to be in the program. In response to these requests, [] spoke with [] and [], and each time they discussed [] progress, determined that he was making progress, so there was nothing to warrant that he needed additional time. [] received a copy of a memo from [] indicating that [] was in the [] program. She did not take any steps to inform [] that [] had incorrectly designated [] as being in the [] program. [] is not aware of whether her segregated [] program had an official title such as the [] program.

[] attended the meeting on April 20, 2010, at which Petitioner was informed that [] would remain at three days in the program. There was no discussion at that meeting as to whether [] had been incorrectly designated as being in the [] program during the previous year.

G. Witness []

[] is the Special Education Coordinator for the Board. She has an elementary certificate with an emphasis in special education from [], a Master's Degree in specific learning disability with an emphasis in elementary education, and a Doctorate Degree in mild learning disabilities and administration from the []. []'s initial employment as a teacher was in a class for students with mild disabilities, specific learning

disabilities, and emotional conflict in an elementary school for 11 years. She then worked for the Alabama Department of Education for six years as a regional specialist. [] subsequently was employed as a professor at Mississippi State University for six years where she taught classes in special education. She then came back to the Respondent school system where she was employed as a program supervisor for the special education director. She has been in education for a total of 33 years. As the special education director, [] directly supervised nine staff in the central office, including [] coordinator, [], 80 teachers and 45 teacher assistants.

In 2006, [] worked with [] to develop the service delivery model for the []ers Acquiring Learning Strategies (“[]”) [] program for the Board. [] testified that the State Department of Education did not provide any standards to assist in their development of the [] program. The 2007-08 school year was the first year of the [] program. During the 2008-09 school year, [], [] Coordinator, and [], Speech and Language Coordinator, for the State Department personally visited the [] [] program.

As Special Education Coordinator, [] attends some, but not all, of the IEP meetings for the students in the [] program. She has never attended a transition meeting with []. [] works with the [] teachers on issues that arise with the students with IEPs in their classes, including discipline issues, behavior management problems, compliance issues, training issues, and instructional strategies. As the Special Education Coordinator, [] is responsible for monitoring the special education of students ages 3-21 years old. In her role as the Special Education Coordinator, [] assists in monitoring the data of the students with IEPs in the [] classes to determine progress or the lack thereof.

[] did not participate in the initial IEP meeting for [] in November, 2009. Prior to the IEP meeting, it was expected that [] would be placed in []’s [] classroom since they

thought it would be a nice opportunity to continue the family's relationship with that teacher since Petitioner's daughter had previously been taught by [] However, [] was informed by [] that the IEP was changed when Petitioner requested that [] be placed in []'s class. [] voiced her concern to [] about the requested placement because []'s separate class is more restrictive placement on the continuum. However, since [] had been on homebound services because of a compromised immune system and was medically fragile, [] agreed that is made sense for [] to be placed in []'s class. In []'s opinion, []'s class was an appropriate placement for [] at that time.

The first time that [] was made aware that Petitioner was raising issues on behalf of [] was on March 11, 2010, when [] called to say that Petitioner was concerned about the amount of time that [] received in his program. During that call, [] requested that [] investigate, by looking at the data, to determine whether [] was making progress and if the Board could substantiate whether the amount of time that [] was educated was sufficient for him to make progress. [] agreed to do as [] requested. [] then contacted Petitioner on March 12, 2010 to inform her that [] had called and [] was trying to investigate the situation. [] disputes Petitioner's testimony as to Petitioner's claims that [] promised Petitioner during that March 12, 2010 telephone call that [] would begin attending [] five days per week after spring break. [] testified that she could not make a decision like that by herself because those are IEP Team decisions. [] knew that [] was in []'s class at the time of that conversation, but she did not have [] student records or special education file in front of her when she called Petitioner. [] does not remember specifically whether Petitioner mentioned during that initial March 12 phone call or whether it was at a later point, but [] remembers that Petitioner stated one of her desires was for [] to "close the gap." []'s

recollection of the phone call before spring break with Petitioner was that she asked Petitioner for more time to investigate how much progress [] was making. She asked if Petitioner could give her until the Wednesday after spring break because she wanted to speak to the therapists who did not come to the school on a daily basis.

After that phone call with Petitioner, [] went to []'s classroom where she and [] pulled all of the data on [] progress. They looked at the activities that [] was doing with []. They also looked at his benchmark goals. Out of five goals on his IEP, [] saw that [] was making sufficient progress on three at that time. [] also spoke with the occupational and physical therapists, as well as []. After [] had gathered information, she and [] looked at the data sheets which are Respondent's Exhibits 28, 29 and 30. [] testified that [] was a very good advocate for children, since she was very vocal about and fought for what she felt were the individualized needs of students. [] never expressed any opinion to [] that [] needed to attend either for a longer amount of time on the days he came or for additional days. None of [] related service providers ever expressed an opinion to [] that [] needed to attend for a longer period of time or additional days. [] nor any of [] service providers ever expressed an opinion to [] that [] needed additional practice on his skills.

The result of []'s investigation of [] progress after spring break was her conclusion that the amount of time that [] was receiving was sufficient for [] to make progress. [] sent an e-mail to Petitioner advising her of the results of her review. The e-mail stated that [] time in the [] program would remain three days per week from 8:00 until 11:30 on those days. [] also contacted [] to report her findings. [] informed [] that Petitioner had already contacted ADAP, and [] suggested that mediation was another avenue Petitioner could take if she did not want to go to ADAP. []'s second email to Petitioner, dated March

23, was not intended to be a threat to Petitioner, but to communicate with a fellow educator that the reality of the program was that the Board was trying to provide best practice.

The next contact [] had with Petitioner was the April 20, 2010 IEP meeting which she facilitated. [] remembered that the reason for the meeting was because Petitioner wanted more time for []. During the meeting, the IEP Team reviewed the documentation, and Petitioner wanted an explanation as to how they would know whether or not [] needed extra services. [] testified that part of the decision at that meeting was to get additional data from Petitioner. She stated that an agreement was reached wherein another [] would be done on []. Petitioner provided documents from [] independent service providers for review by the IEP Team. According to [], only one of the providers recommended that [] needed daily intervention, and the other providers recommended consistent intervention. [] felt that the Board was providing consistent interventions to [] at the time that the IEP Team was provided the documents by the Petitioner. After consideration of documents provided by Petitioner, [] offered for [] to attend [] for a fourth day per week, and Petitioner agreed to this additional time. [] had a discussion with [] that [] would begin attending four days per week due to the information that was provided by Petitioner. [] then e-mailed this information to Petitioner.

On May 18, 2010, [] attended an IEP meeting for []. In []'s recollection, the May 18, 2010 was a typical IEP meeting; however, she remembers it was very long. As a result of the meeting, it was decided that [] would be in []'s class for the 2010-2011 school year. Petitioner signed the IEP. The Board agreed to pay for [] to attend therapy during the summer through Easter Seals. [] does not remember receiving a report from [] during the next

school year. [] testified that [] was in []'s classroom during the 2010-2011 school year, and [] never voiced to [] the opinion that [] needed additional time in her classroom.

[] did not receive any additional communication from Petitioner requesting additional time for [] either on the four days he was already attending or on any other days during the 2010-11 school year, except when she received correspondence from the Petitioner's attorney late in the school year. She was never informed by anyone who she supervised that Petitioner had requested additional time for [] during that school year. In her review of [] educational records and her interaction with the various service providers and educators who worked with [], [] was never provided by any professional a recommendation that stated an hourly amount of time that [] should be accessing the [] classroom.

In []'s opinion, she believes that [] was educated successfully in his least restrictive environment during the 2009-2010 school year. She bases that opinion upon the progress that [] made on his goals. [] also believes that [] was educated successfully in his least restrictive environment during the 2010-2011 school year based upon her review of documents showing that he mastered six of ten goals for that year. In []'s opinion that documents show that [] made substantial progress over the course of his time in []'s class. When asked whether "more is better" in regard to [] children ages three and four, [] testified that a lot depends on the developmental level of the child and the capacity of the child as far as strengths and needs whether "more is better." Her position is that more is not always better and it would be based on the needs of the child and the capacity of the child. Her observation of both [] and []'s classrooms showed that both classes provided [] time to repetitively work on skills since the skills were imbedded within the curriculum and within the day. In her opinion,

[] had more than ample time to work on his goals during the day. She also believes that [] was allowed time to practice the skills he learned in therapies.

[] testified that [] program was individualized for him and the instruction that he was given was specially designed instruction. In her opinion, there is no evidence that [] would have benefitted if he stayed in school for the entire school day while in those classrooms. In []'s opinion, [] was receiving a free appropriate public education in the least restrictive environment when he was three and four years old.

During the May 18, 2010 IEP meeting, the IEP Team discussed the progress made by [] and the fact that he made progress in all areas. The Team considered goals that would be more developmentally appropriate for []. The IEP Team discussed the least restrictive environment during the IEP meeting. Typically [] reads the general factors to be considered for a least restrictive environment out loud. Those factors are: has the team considered the strengths of the child; the concerns of the parent for enhancing the education of the child; the results of the initial or most recent evaluations of the child, and as appropriate, the results of performance of any state or district test; the academic, developmental and functional needs of the child; the need for extended school year service; does the student attend the school, or for a [] aged student, participate in the environment, that he or she would attend if non- disabled; and does the student receive all special education services with non-disabled peers. In []'s opinion, the analysis which was performed during the May 18, 2010 IEP meeting was the appropriate analysis for the least restrictive environment of a [] that needs to occur during an IEP meeting. [] testified that in considering the least restrictive environment, the IEP Team looks at the factors at the back of the IEP, along with data from the profile page and input from the general education teacher, special education teacher and other members of the IEP

Team and the Team attempts to place the student in the class in which he or she would typically be. [] felt she was being proactive in offering four days per week in []'s class to Petitioner prior to the May 18th IEP meeting.

On cross-examination, [] testified that she is aware that the least restrictive environment applies to [] children in the same manner as all Part B children. [] admitted that she referred to []'s class as part of the [] program in her communications with Petitioner, that the IEP reflected that his placement as being in the [] program, and she agreed that Petitioner could have also thought as much. [] testified as to her current belief that the designation of the [] program, as well as the least restrictive environment, are incorrectly stated on the 2009-2010 IEP. She testified again with regard to her discussion with Petitioner about her investigation of the situation of [] time in the program. She testified that she discussed the issue of [] progress in the program. She was aware that Petitioner wanted [] to have more time in []'s class. She testified that the substance of her communication with Petitioner was that Petitioner wanted her son to attend school for a longer period of time.

[] was asked what she meant in her March 12 e-mail when she asked Petitioner to "give us until Wednesday to begin." [] initially testified that she was referring to beginning the process of collecting data; however, she then changed her testimony, stating that she wanted until Wednesday to give feedback to Petitioner. [] testified that she contacted Petitioner and told her that she had been with [] and [] and decided that [] placement would remain three days per week. [] admits that this decision was made without an IEP meeting.

[] further testified about the April 20, 2010 IEP meeting. She testified that, at the end of the meeting, a decision was made that [] would remain three days a week, but she was going to look at the data and investigate. After the meeting, [] had communications with []

and [] and, based on the evidence presented by Petitioner at the meeting, decided that [] could attend four days per week. [] authorized [] to communicate this to Petitioner. [] testified that the decision to allow [] to come four days per week was not an IEP Team decision.

[] testified that the “We Can” curriculum is research-based and is beneficial to typical children. She acknowledged that she has no reason to believe that [] has any less need to develop than typical children.

Plaintiff’s Exhibit 28 is a *Dear Colleague* letter from the United States Department of Education. The first sentence indicates that the purpose of the letter is to reiterate that the least restrictive environment requirements in Section 612(a)(5) of the Individuals with Disabilities Education Act applied to the placement of [] children with disabilities. It also states that the LEA requirements apply to all children with disabilities who have served under Part B including [] children with disabilities aged three through five. Almost all of the children with IEPs in 2009-2010 school year only attended the [] program for half-a-day. Most of the children with IEPs did not attend five days a week. [] admitted that the only reason that [] could not stay at the program all the day long was simply because the amount of time that he was to be in the program was stated in his IEP. She acknowledged that there was nothing other than his IEP that would have prevented him from staying all day. She further acknowledged that there was no reason that [] could not have stayed in the [] program all day long, five days a week even if he wasn’t receiving special education and related services other than the fact that his IEP had a limited amount of time stated.

VI. FINDINGS OF FACT

This Child lives with the Petitioner in the jurisdiction of the Respondent. This Child is now and has been at all times material to this action, a child with disabilities within the meaning of IDEA.

The Respondent is now, and has been at all times material to this action, a County Board of Education organized and existing under the laws of the State of Alabama.

The Respondent receives federal funds from the United States Department of Education pursuant to IDEA and is required to provide special education services to students with disabilities within their jurisdiction.

This Child's Mother is a [] employed by the Respondent. She has [] children, one of who is [], who is currently in kindergarten. [] is a special education student with disabilities as the result of a [] [] disabilities include issues with feeding, speech, fine motor skill, weakness on his left side, and across-the-board development. His most severe issue is with speech.

The [] program is a [] program where students with special needs are educated in an integrated setting with typically developing peers. Petitioner first learned about the [] [] program in the summer of 2007 when her daughter was enrolled in the program. The Petitioner's daughter does not have a disability and was enrolled in the program as a typical child in the class of []. The typical children must apply for and be selected for a spot in the program. Employees of the Board receive preferential status for first placement in the slots for "typical" children in the program. During her time in the [] program, the

Petitioner's daughter attended school on a full-time basis, five days a week, from approximately 7:30 a.m. to 3:00 p.m. The Petitioner was pleased with her daughter's education while she was in the [] program and believes her daughter benefited from the program.

Prior to this Child's [] birthday, he received services from []. [] turned three on [], at which time he began to receive services from the Board. Prior to his enrollment, the Board convened a meeting to develop an IEP for [] for the 2009- 2010 school year. [] initial IEP stated that he would attend the [] program three days a week, from 8:00 a.m. until 11:30 a.m. each day. Initially, the Board offered [] two days per week until 10:30 each day, but the Petitioner asked he be afforded more time in the program. After some deliberation, the Board agreed to allow [] to attend three days per week, with an extra hour each day.

Although the IEP stated that [] would attend from 8:00 a.m. until 11:30 a.m., he was actually allowed to be dropped off at 7:30 a.m. due to the Petitioner's schedule as a teacher. The Board never offered to place [] in a program for five days a week.

[] was assigned to the classroom of [] for the 2009-2010 school year. [] is a former student of the Petitioner. It is the Petitioner's belief that [] would be in the [] program.

In January 26, 2010, the Petitioner e-mailed [] and requested an IEP meeting within the next two weeks to discuss [] schedule. Petitioner was concerned about [] missing days because of holidays or schools being cancelled. Several e-mails were exchanged between Petitioner and []. In the course of those e-mails, [] stated that she had no problem with [] coming to make up for any missed days. [] also stated that [] IEP did not specify which particular days he was to attend; therefore, his schedule could be adjusted without holding

an IEP meeting. Petitioner inquired whether [] knew of any reason why [] could not attend five days per week. Subsequently, [] responded that she had spoken with the [] coordinator, [], who wanted to go ahead and schedule a meeting.

The Petitioner is not aware of anything about [] disability that would have prevented him from attending school five mornings per week or five full days per week. The Board never told the Petitioner that there was anything about [] unique needs that would prevent him from attending the program full time.

Petitioner met with [], [], and [] speech therapist on February 2, 2010. At the meeting the Petitioner stated that her concern was [] could attend the program more and be able to get the therapies he needed. Petitioner saw no reason why [] could not attend five days per week like her daughter had done previously. Petitioner expressed her belief that [] was showing progress, and therefore he was demonstrating that he was ready for more. Petitioner asked why [] was only allowed to come three days when typical students were allowed to attend five days. Petitioner expressed her belief that [] was being treated unfairly and inequitably but [] stated that she had to consider what was best for the overall program and not just one child. Petitioner reminded [] that the IEP was about [], and [] responded that [] was already getting more time than any other special needs three year olds because he attended three days a week and stayed one hour longer than they do.

On March 23, 2010, Petitioner received an e-mail from [] indicating that [] had met with [] and [], and that they had decided (without the Petitioner) that there would be no change in [] time in the program. [] indicated to the Petitioner that, if [] stopped showing progress, then they would reevaluate the situation to determine whether he might get

more time in the program. Upon receipt of the e-mail Petitioner called [] and expressed her confusion that the issue had been decided without her and without an IEP meeting.

On March 24, 2010, the Petitioner wrote to [] again requesting an IEP meeting. Petitioner stated that she was deeply troubled because she believes her concerns were not being heard and because decisions about [] IEP were being made without her presence or knowledge. On the same day Petitioner received an e-mail from [] in which [] defended the program and cautioned the Petitioner that there were funding shortages and if complaints arose about “equal accessibility”, the Board might choose to rethink the services and delivery model. [] told Petitioner to “do what you need and feel led to do keeping in mind that the overall program could be hurt and instead of helped.”

On April 20, 2010, Petitioner attended a meeting with representatives of the Board including [], [], and []. At the meeting there was discussion about conducting further speech and language assessments and assistive technology. [] indicated that the State Department did not mandate a specific number of days for [], and so long as [] was progressing, his services would remain as they were. [] explained that if the Petitioner wanted to take [] out of the [] program and put him at a church day care or another day care or keep him at home, the Board would provide services to him at some other location. Petitioner provided letters that she had obtained from [] various service providers, including a letter from [], and letters from []neurologist, pediatrician, orthopedist, and speech therapist.

After the meeting, the Petitioner ran into [] in the hallway. [] stated that she needed to talk to the Petitioner and she brought her into one of the staff rooms for a conversation. [] stated, off the record, that she had received some information, investigated how things were being done, and that she realized that there was some things that were being done that she had

not understood to the full extent. At the end of the conversation, [] offered to let [] attend the program four days per week for a half day.

After this conversation, on April 26, 2010, the Petitioner received an e-mail from [] stating that [] was supposed to have called Petitioner to let her know that they felt [] should be able to come four days per week due to the new information that Petitioner had submitted from his doctors. Thereafter, [] began attending school four days per week.

On May 18, 2010, Petitioner met with the IEP team to develop an IEP for the 2010-2011 school year. The IEP stated for the 2010-2011 school year, [] would attend the [] [] program four days per week from 8:00 a.m. until 11:30 a.m. There was no discussion of whether [] could attend the program five days per week. It was not offered as a possibility, although the Petitioner continued to want [] to be in school full time, five days per week.

Prior to the start of the 2010-2011 school year, the Petitioner had a parent meeting with [] who would be [] teacher for the year. At that time, [] advised Petitioner that the other special needs students were being dismissed at 11:00 a.m. and she asked Petitioner's permission to let [] leave with them when they left. Since the Petitioner did not want [] to leave alone she agreed that [] would leave at 11:00 a.m.

Prior to this Child's [] birthday, Petitioner employed [] to watch [] after [] doctor recommended that [] be removed from regular daycare because he had been sick repeatedly and the doctor wanted to give him a [] shot. [] was working as a substitute teacher for the Board at the time and had worked as a substitute for the Petitioner. Petitioner asked [] whether he would be willing to help take care of [] and he agreed. [] stayed home with [] during late summer and fall of 2009. Petitioner hired [] to pick up [] when he was dismissed from school at 11:00 a.m. and on days that he was not permitted to attend

because of his IEP. [] took [] to the YMCA for gymnastics and Easter Seals program in Pelham where he attended therapy, and to the park and/or playground when weather permitted. Petitioner testified that it was her intent for [] to provide [] with additional opportunities to practice motor movement, socialization, and communication skills. [] was responsible for watching [] at home, feeding him, taking him to therapies and administering medication. Petitioner paid [] fifty dollars per day for these services.

At the end of the 2010-2011 school year, Petitioner entered [] in a lottery for the [] ([]) Program at [] [] was selected for the program and Petitioner elected to enroll him in the program because it would allow him to attend school five full days per week. Petitioner attended the [] program full time, and he was able to handle the full- time schedule. He is now in a full-time kindergarten program.

The [] program operates five days a week from (depending on the year) approximately 7:30 a.m. until 2:00 p.m. However, children of teachers who attend [] can stay until 3:00 p.m. for an additional \$1.00 per day. One of the reasons for having the program span an entire day (versus only a half-day) was so that the “typical children” could get accustomed to a full day of school. The children of teachers were allowed to stay the extra hour as an added employment benefit, so that teachers would not have to make other arrangements for their children at the end of the day.

For the last three years, all of the children without disabilities admitted to the [] program were allowed to remain at the [] all day, for five days a week, during which time they received benefits of a full day of exposure to the “We Can Program” including the benefits of additional exposure to socialization, communication, pre-academic learning, reading readiness, and arts opportunities.

However, for at least the time period between August 2008 and May 2011, none of the students with disabilities including, this Child, were permitted to attend the [] all day five days a week. Instead the Board limited the attendance of the students with disabilities including this Child to the amount of time it took to deliver the instruction and related services identified in each student's IEP.

The Board's criteria regarding the admission of children in the program also differ based on whether the child is disabled or non-disabled. Students without disabilities, referred to as "typical children" accessed the program via their parents' registration of them. Children without disabilities attend the [] allegedly as "roll models" and they are afforded full time slots in the program. In contrast, children with disabilities were required to access the [] program through the special education process. The Board's written description of the program states that "children with disabilities, must go through the special education referral process and be determined eligible for [special education] services."

Plaintiff's Exhibit 28 is a Dear Colleague letter from the United States Department of Education. The first sentence indicates that the purpose of the letter is to reiterate that the least restrictive environment requirements in Section 612(a)(5) of the Individuals with Disabilities Education Act applied to the placement of [] children with disabilities. It also states that the LEA requirements apply to all children with disabilities who have served under Part B including [] children with disabilities aged 3 through 5.

If the Board had permitted this Child to attend full-time, five days per week, there would have not been a need for the Petitioner to employ [] at the rate of \$50.00 per day on days that school was in session.

[] admitted that the only reason that [] did not stay at the program all day long was simply because the amount of time that he was in the program was stated in his IEP. She acknowledged that there was nothing other than his IEP that would have prevented him from staying all day. She further acknowledged that there was no reason [] could not have stayed in the [] program all day long five days a week even if he wasn't receiving special education and related services other than the fact that his IEP had a limited amount of time stated.

VII ISSUES PRESENTED

The United States District Court remanded this case for "a substantive decision on the school district's provision of FAPE." *Jennifer B. v. Chilton County Bd of Educ.*, 891 F.Supp.2d 1313, 1325 (M.D. Al. 2012). Petitioner's post hearing submission requests consideration of the following issues: (1) whether the Board violated IDEA by failing to conduct an IEP meeting on a timely basis; (2) whether the Board failed to comply with IDEA's notice provisions, and/or unilaterally refused to increase [] placement in the program without conducting an IEP meeting; (3) whether the Board failed to implement [] November 2009 IEP; (4) whether the Board predetermined [] April 20, 2010 placement decision and/or his May 18, 2010 IEP; (5) whether the Board failed to comply with the Eleventh Circuit's decision in *Greer* when determining [] least restrictive environment; and (6) whether the Board violated IDEA, *inter alia*, by excluding [] from attending [] on a full time basis and/or excluding him from extracurricular and nonacademic activities. The Board asserts that it provided [] with FAPE in the least restrictive environment. Therefore, the Hearing Officer will consider the arguments of Petitioner and determine whether the Board provided [] with FAPE in the least restrictive environment.

VIII. DECISION AND RATIONALE

A. IDEA's Requirement to Provide Free Appropriate Public Education in the Least Restrictive Environment.

The IDEA provides state and local education agencies with funding to ensure that all children with disabilities have available to them a free appropriate public education (“FAPE”) that emphasizes 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. § 400(d)(1)(A). *See also Jennifer B. v. Chilton County Bd. of Educ.*, 891 F. Supp.2d 1312 (2012). There is no dispute that [] is a child with a disability who is entitled to a FAPE under the IDEA.

The IDEA defines FAPE as “special education and related services which (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 [], elementary or secondary education in the State involved, and (D) are provided in conformity with the individualized education program required under § 1414(d) of this Title. 20 U.S.C. § 1401(9). Special education is broadly defined to include “specially designed instruction, at no cost to the parents, to meet the unique needs of the child including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education. 34 C.F.R. 300.39(a)(1). IDEA also requires that each district assure that students with disabilities have an equal opportunity to participate in nonacademic and extracurricular services. 34 C.F.R. 300.107(a). This includes counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, and various other types of services. 34 C.F.R. 300.107(b). *See also Jennifer B. v.*

Chilton County Bd. of Educ., 891 F.Supp.2d 1312, 1323 (2012) (“Related services is a component of FAPE which includes, among other things, ‘developmental services,’ including ‘recreation.’”)

Under the IDEA, all state or local special education agencies receiving funding for their special education services are required to identify children with disabilities and develop individualized education programs (“IEPs”) that meet the unique education needs of each child.

Jennifer B. v. Chilton County Bd. of Educ., 891 F.Supp.2d at 1320 (citing 20 U.S.C. § 1414(a)(4)). The IEP is the “centerpiece” of the IDEA. *Id.* IEPs are developed by a team of the child’s parents, teachers, and school administrators. *Id.* (citing 20 U.S.C. § 1414(d)).

According to Alabama’s implementation of the IDEA, the IEP must be “based on the child’s unique needs and not on the child’s disability.” *Ala. Admin. Code R.* § 290-8-9-.05. Additionally, Alabama’s regulations provide that “special education programs must be in operation for at least the length of the regular school term and school day unless the IEP specifies a different length of time based on the individual needs of the child.” *Ala. Admin. Code R.* § 280-8-9-.05(2)(c).

The Supreme Court of the United States has developed a two-part inquiry for determining whether a school board has provided FAPE under the IDEA. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). First, the board must comply with the procedures set forth in IDEA. *Id.* at 206. Second, the IEP developed through IDEA’s procedures must be reasonably calculated to enable the child to receive educational benefits. *Id.* at 206-207. *See also Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008).

Another important feature of the IDEA is its “mainstreaming” requirement, whereby participating states must educate disabled children in an integrated environment with non-

disabled children. *Jennifer B. v. Chilton County Bd. of Educ.*, 891 F. Supp. at 1320 (citing 20 U.S.C. § 1412). This so-called “least restrictive environment” (“LRE”) provision states:

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, special schooling, or 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.

20 U.S.C. § 1412(a)(5)(A).

When creating the IEP, the IEP team must describe the extent to which a child will not participate in regular classes, extracurricular offerings, and nonacademic activities, as well as the reasons justifying removal. 20 U.S.C. § 1414(d)(1)(A)(i)(V). Under the IDEA, a child must not be removed from an education program solely because of any needed modifications in the typical program, including the need for any related service. OSEP has specifically stated that, “in implementing Part B’s LRE requirements, the overriding rule in placement is that each child’s placement must be determined on an individual basis, and may not be based on factors such as category of disability, configuration of the service delivery system, available staff, or administrative conveniences. *Letter to Fischer*, 21 IDELR 992 (OSEP 1994). See also *Dear Colleague Letter*, 58 IDELR 290 (OSEP 2012).

The LRE requirement applies equally to placement of [] children. 34 C.F.R. 300.116(b)(2); *Dear Colleague Letter*, 58 IDELR 290 (OSEP 2010)(reiterating that the LRE requirement in section 612(a)(5) of the IDEA apply to all children with disabilities including [] children with disabilities aged three through five.) The LRE requirement also applies to both academic and nonacademic or extracurricular activities. IDEA regulation 34 C.F.R. 300.117, titled “Nonacademic settings” provides as follows:

In providing or arranging for the provision of nonacademic extracurricular services and activities, including meals, recess period, and the services and activities set forth in 300.107, each public agency must ensure that each child with a disability participates with the nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

The Eleventh Circuit has adopted a two-part test for determining whether a school district has complied with the LRE requirement. *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir.1991). First, the court asks whether education in the regular classroom, with the use of supplemental aids and services can be achieved satisfactorily. *Id.* Second, if it cannot and the school intends to provide special education services outside of the regular classroom, the court must ask whether the school has mainstreamed the child to the maximum extent appropriate. *Id.* See also *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989).

B. Failure to Conduct an IEP Meeting on a Timely Basis.

The first issue presented by the Petitioner is whether the Board violated IDEA by failing to conduct an IEP team meeting on a timely basis. There does not appear to be any dispute that [] initial IEP on November 20, 2009 was conducted on a timely basis. Rather, Petitioner asserts that on January 26, 2010, several months after the initial IEP meeting, she requested another IEP team meeting within two weeks to discuss changes to [] schedule, but the Board did not convene an IEP meeting in a timely manner. In support of her argument, Petitioner cites Alabama Administrative Code Section 280-9-.05(11)(a)(3), which states:

If the parents or the child's teacher has reason to suspect that the IEP needs revision, an IEP meeting may be requested at anytime. The education agency must conduct the IEP within 30 calendar days upon receipt of the request.

Petitioner asserts that the delay in holding an IEP meeting violated the foregoing regulation and prevented her from fully participating in decisions made about [] placement using IDEA's procedural scheme.

The Hearing Officer construes Petitioner's argument as the assertion of a procedural violation as to her request for an IEP meeting. The Eleventh Circuit has instructed that the existence of a procedural defect under the IDEA does not automatically entitle a party to relief. *Sch. Bd. of Lee Cnty., Fla v. M.M.*, 348 Fed. Appx. 504, 510 (11th Cir. 2009). *See also Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651 (11th Cir. 1990) (holding that procedural deficiencies failing to impact parental involvement were not sufficient to warrant relief). "In evaluating whether a procedural defect has deprived a student of a FAPE, the court must consider the impact of the procedural defect, and not merely the defect *per se*." *Id.* Alabama's administrative regulations further define the role of the Hearing Officer with respect to procedural violations as follows:

In matters alleging a procedural violation, the hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or caused a deprivation of an educational benefit.

Ala. Admin. Code R. § 290-8-9-.08.

In this instant case, Petitioner argues that the Board's failure to hold a timely IEP meeting prevented her from fully participating in the decision-making process regarding the placement of her child. This Hearing Officer notes that there was a meeting on February 2, 2010, shortly after Petitioner's request for an IEP meeting, present at this meeting were [], [], [] and the Petitioner. At this meeting the Petitioner was given the opportunity to voice her concerns regarding [] placement. There were no notes taken during the meeting and no paperwork was completed during the meeting. Petitioner's Exhibit 7 is the Petitioner's

handwritten notes in regard to said conference. It is un-contradicted that the Petitioner was seeking an IEP team meeting to address her request that this Child be allowed to attend the program more often than he was permitted to do.

Alabama Administrative Code §280-9-.05(11)(a)(3) specifically states that an IEP team meeting must be conducted within thirty calendar days upon receipt of a request for a IEP team meeting by the parents or the Child's teacher if either of them has reason to suspect that the IEP needs revision. This does not mean that the representatives of the school can simply schedule a conference with the parent or discuss the need for revisions through e-mail correspondence or telephone. This means that there must be an IEP team meeting and the school must comply with the formality of an IEP meeting including but not limited to the notice provisions, the giving to the parents a document setting out their legal rights, and a signature page for all attendees. The evidence is very clear that the Respondent did not conduct an IEP meeting in a timely manner as required by law.

Thus, it is the FINDING of this Hearing officer that by not having an IEP team meeting within thirty days, the IEP team did not officially hear the Petitioner's request for more services for her Child. Further, it is the FINDING of this Hearing Officer that the Board did not conduct an IEP meeting in a timely manner as required by law pursuant the Petitioner's January 26, 2010 request for an IEP meeting to discuss []schedule.

C. Failure to Comply with the IDEA Notice Provision and Unilateral Refusal to Increase []'s Placement Without an IEP Meeting.

Petitioner further asserts that after the April 20, 2010 conference, the Board made a unilateral decision, without an additional meeting, that [] could attend the program four days a week. Petitioner again argues that these procedural violations denied her an opportunity to participate in decisions about [] education.

This Hearing Officer FINDS that after the initial IEP meeting, there was an “ongoing dialogue” between the Petitioner and school representatives about this Child’s IEP. This Hearing Officer notes that there were several occasions throughout the school year when Petitioner had the opportunity to voice her concerns to members of the IEP Team. This included the initial IEP meeting on November 20, 2009, additional meetings with school officials on February 2, 2010, April 20, 2010, and May 18, 2010, as well as a number of verbal and written conversations with various representatives of District.

This Hearing Officer addressed above, his Finding that the Respondent did not convene an IEP team meeting within thirty days after the Petitioner’s request for an IEP team meeting on January 26, 2010. Here, the Petitioner argues that the Board increased [] attendance in the program to four days per week after a conference on April 20, 2010. She further alleges that the increase was done without the benefit of an IEP team meeting. The record reflects that the Petitioner is correct in arguing that the change was made outside of the IEP team process. As stated above, in evaluating whether a procedural defect has deprived a student of a FAPE, the Hearing Officer must consider the impact of the procedural defect, and not merely the defect per se. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE; significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of FAPE to the child; or caused a deprivation of an educational benefit. In this case, the action of the Respondent by increasing the number of days, even though the increase actually benefited this Child, was outside of an IEP meeting and thus, said action by the Respondent violates the law which is very clear that any change in an IEP must be done by the IEP team in an IEP team meeting. No one employed by the Respondent has the authority to

change a Child's IEP in any manner whatsoever without it being the decision of an IEP team made in an IEP meeting. This is true even in the situation as we have here where the change actually benefits the Child. If an IEP team meeting had been reconvened and a discussion had occurred to change this Child's attendance from three to four days a week, the Petitioner should have been given the right to be present during that discussion and seek even additional time for her Child.

D. Implementation of the November 2009 IEP.

Petitioner's [] argument is that the Board failed to implement [] November, 2009 IEP, which placed him in the “[] [] program.” As an initial matter, Petitioner does not appear to challenge whether [] received all of the services he was entitled to receive under his IEP, but rather, her argument is that is that the IEP specified that he would be in the “[] [] program” when he was actually placed in []'s segregated classroom. It appears to be undisputed that all of the parties went into the initial IEP meeting expecting that [] would be placed in the [] program, and the initial IEP expressly states that [] placement would be the “[] [] program.” However, the Board contends that, at the IEP meeting, Petitioner requested that [] be placed in []'s classroom. The Hearing Officer notes that both [] and [] testified that they explained the makeup of []'s classroom to Petitioner, and Petitioner admits that she agreed to the placement. The Board contends that notation of the “[] [] program” on the initial IEP was merely an inadvertent error which remained on the IEP after the parties agreed to place the child in []'s classroom. The Petitioner denies that she was aware that [] was not in the [] program. This Hearing Officer FINDS that Petitioner agreed to the placement in []'s classroom, that she was informed that []'s classroom was not the “regular [] classroom”, that Petitioner was told at the IEP meeting by

representatives of the Board the make-up of []'s classroom, and therefore Petitioner is not entitled to relief based upon the alleged failure to include [] in the "regular [] classroom."

E. Predetermination of []'s Placement, Failure to Comply With Standards for Least Restrictive Environment, and Exclusion of [] From a Full-Time Placement.

This Hearing Officer views Petitioner's remaining arguments as interrelated and will therefore address them together. As her fourth argument, Petitioner asserts that [] placements were predetermined in April 20, 2010 and May 18, 2010. As her fifth argument, Petitioner asserts that the Board failed to comply with the correct standard for determining [] least restrictive environment. Finally, Petitioner argues that the Board violated the IDEA by excluding [] from attending school on a full-time basis. This Hearing Officer agrees with Petitioner's argument that the Board improperly excluded [] from attending the [] program on the same full-time basis afforded to the typical children in the [] program. This Hearing Officer FINDS that the Board's exclusion of [] from participating in the full-time program denied him a free appropriate public education in the least restrictive environment.

This Hearing Officer agrees that [] was improperly excluded from participating in the [] program on a full time basis. Under the procedural framework of the IDEA, the initial IEP meeting should have started with a presumption that [] could participate in the full time program in the least restrictive environment with his typically developing peers, unless something about his unique needs precluded such a placement and required his removal. Petitioner testified that, at the initial IEP meeting, the Board offered [] attendance of only two days per week, until 10:30 each day. There is no evidence that this initial offer for less than a full time placement was based on the unique needs of []. To the contrary, Petitioner testified that she asked for more time but was informed by members of the IEP Team that the Board typically did not allow three year olds with disabilities to attend for more than two days on a part

time basis. This testimony is supported by []'s testimony at the hearing that almost all of the children with IEPs in 2009-2010 school year only attended the [] program for half-day. Although the IEP meeting did result in the Board "allowing" [] to attend three days per week, until 11:30 each day, there is no evidence that the decision for less than a full time placement was based upon the unique needs of []. To the contrary, [] and [] both testified that they did not recall any specific analysis being performed to determine [] least restrictive environment, or whether he might be able to attend the full-time program. Petitioner testified that a full-time placement was never offered as an option. Therefore, this Hearing Officer FINDS that the Board failed to apply the correct standard in determining [] least restrictive environment, and []'s initial IEP did not provide a free appropriate public education in the least restrictive environment.

This Hearing Officer also agrees with Petitioner's assertion that, after the initial IEP meeting, the Board improperly excluded [] from participation in the full time program. Regardless of whatever happened at the initial IEP meeting, there can be no question that, by January, 2010, Petitioner was actively advocating for [] to be allowed to participate in the program on a full time basis, and the Board's representatives were aware of this request. Nevertheless, the Board consistently refused to consider [] for a full time placement. This Hearing Officer FINDS that there is no evidence that the exclusion had anything to do with the unique needs of []. Petitioner testified, without contradiction, that the Board never advised her of anything about [] unique needs that would have prevented him from participating in the full time program.

In response to her requests for a full time placement for [], Petitioner was repeatedly told that [] placement would not be changed so long as he was "making progress" in the

part-time program. In other words, the Board attempts to justify a more restrictive placement by arguing that the placement was sufficient for [] to make progress. Such an argument defeats the very purpose of the LRE requirement. The LRE requirement is not a function of “progress” but is intended to ensure mainstreaming of children with disabilities to the fullest extent with their typical peers. Under the LRE requirement, the Board was required to afford [] the maximum possible participation with his typical peers, unless there was some legitimate reason which he should be excluded or removed. This Hearing Officer rejects the Board’s assertion that the mere fact that [] happened to make progress in a segregated, part-time program can serve as a legitimate basis for denying him the opportunity for greater participation. If anything, the fact that [] had no problems in the part-time program should have served as evidence in support of Petitioner’s assertion that he should be allowed to attend the program full-time with his typical peers.

This Hearing Officer FINDS that the exclusion of [] from the full time program resulted in a substantive denial of a free appropriate public education in the least restrictive environment. The evidence shows that the afternoon activities, from which [] was excluded, included physical education and structured play time. These activities fall within the scope of “related services” which are a component of FAPE. *Jennifer B. v. Chilton County Bd. of Educ.*, 891 F. Supp. 2d 1313, 1324 (M.D. Al. 2012)(holding that the afternoon services in this case fall within the “related services” component of FAPE under the IDEA). Further, the evidence suggests that participation in the full time program would have afforded [] additional opportunities to participate in structured activities, interact with typical developing peers, and practice the skills that he was learning in the program, and that these opportunities would have been beneficial to [] in helping to offset or overcome developmental delay. Witness [], an

Occupational Therapist who conducted an evaluation of [] testified that she believes [] would have benefited by staying in the program for a full day. Likewise, Witness [], a Pediatric Neuropsychologist who performed an evaluation of [] testified that there was no reason that [] would not have been able to stay for a full day and that [] would have benefited from staying a full day because of opportunities it would have given him to practice his skills. Further, [] testified that children between ages 3 and 5 have a critical window of opportunity for development and learning to occur. Because [] was denied the opportunity for these services, which were afforded to his typically developing peers, he was substantively denied a free appropriate public education in the least restrictive environment.

In summary, this Hearing Officer FINDS that IDEA required the Board to allow [] to participate in the full-time program unless there was a legitimate reason which prevented such a placement. There is no evidence of any reason that [] should not have been allowed to participate in the full time [] program. Further, the specific activities from which [] was excluded fall within the related services component of FAPE under the IDEA. This Hearing Officer further FINDS that the exclusion of [] from the full-time program, both at the initial IEP meeting and in response to Petitioner's subsequent requests, resulted in the denial of a free appropriate public education in the least restrictive environment.

F. Relief.

Petitioner requests two forms of relief: (1) compensatory education and (2) reimbursement for private services. When responsible authorities fail to provide a disabled student with a free appropriate public education as required by IDEA, the Eleventh Circuit has held that compensatory education may be appropriate relief. *See Draper v. Atlanta Independent Sch. District*, 518 F.3d 1275, 1280 (11th Cir. 2008); *Todd D. ex rel. Robert D. v. Andrews*, 993

F.2d 1576, 1584 (11th Cir. 1991); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988). Compensatory education provides services prospectively to compensate for a past deficient program. *Draper*, 518 F.3d at 1289. Although ordinary educational programs need only provide “some benefit,” compensatory awards must do more -- they must *compensate*. *Id.* Compensatory awards should place children in the position they would have been in but for the violation of the Act. *Id.* Retroactive reimbursement for “private school tuition and related services” is also a form of relief available under the IDEA.

Prior to his enrollment in the Board’s [] program, [] was being cared for at home by [] Petitioner paid [] at a rate of \$50 per day to care for [] and engage him in certain activities. These activities included a gymnastics class, taking [] to play in the park with other children, and generally caring for the child and keeping him busy and engaged. In response to the Board’s exclusion of [] from the full time program, Petitioner continued to employ [] to care for [] during the afternoon in the 2009-2010 and 2010-2011 school years during the time that he would have otherwise been at school. This Hearing Officer FINDS that Petitioner hired [] to provide services which were substantially similar to the the types of activities that occurred during the afternoon of the Board’s [] program and that Petitioner’s placement of [] with [] was appropriate. As a result, this Hearing Officer further FINDS that Petitioner is entitled to reimbursement for the private services she obtained from [] during the time that [] was excluded from full-time participation in the program.

This Hearing Officer does not find that Petitioner has met her burden to establish that [] is entitled to obtain compensatory education. This Hearing Officer notes that [] is now in a full-time kindergarten program, and the evidence indicates that he is doing quite well in that program. Further, this Hearing Officer notes that the purpose of compensatory education is to

“compensate” with services that would put the child in the position he would have been in but for the violation of the Act. In that regard, this Hearing Officer has already determined that the services rendered by [] were an appropriate replacement for what [] would have received in the afternoon of the full-time program and Petitioner should be reimbursed for those services. In light of the fact that [] received services from [], this Hearing Officer does not find that Petitioner has established that further compensatory education is warranted.

IX. SPECIFIC FINDINGS

- A. The Board failed to conduct an IEP meeting on a timely basis after the Petitioner requested another IEP meeting on January 26, 2010 to discuss changes to [] schedule;
- B. The Board failed to comply with the IDEA Notice Provision and unilaterally refused to increase [] placement without an IEP meeting;
- C. The Board improperly excluded [] from participating in its [] program on a full-time basis;
- D. The exclusion of [] from participating in the full-time [] program resulted in a substantive denial of free appropriate public education in the least restrictive environment;
- E. Given the Board’s exclusion of [] from the full time [] program, Petitioner’s placement of [] with [] was appropriate; and
- F. Petitioner is the prevailing party and is entitled to reimbursement for the cost of the private services obtained from []

X. ORDER AND AWARD

The Board is ORDERED to reimburse Petitioner for the cost of the private services provided by [] during the 2009-2010 school year and the 2010-2011 school year. At

Petitioner's request, the reimbursement shall be limited to the time that school was actually in session and for the days [] attended school or would have been able to attend had he been allowed to attend five days a week.

XI. NOTICE OF APPEAL RIGHTS

Any party aggrieved by the findings and decision made herein has the right to bring a civil action in the appropriate Court under 20 U.S.C. section 1415. *The Alabama Administrative Code* 290-8-9.08(9)(c)16 provides an aggrieved party shall file a notice of intent to file a civil action with all parties to the Impartial Due Process Hearing within **thirty (30) calendar days** upon receipt of the decision of the Impartial Due Process Hearing Officer. The Code further provides that a civil action in a court of competent jurisdiction must be filed within **thirty (30) calendar days** of the filing of the notice of intent to file a civil action.

DONE and **ORDERED** this the 15th day of July, 2013

/s/P. Michael Cole
P. Michael Cole
Hearing Officer

XII. CERTIFICATE OF SERVICE

I hereby certify that a copy of this Decision has been forward to the following individuals by Certified Mail with postage prepaid and return receipt requested properly addressed as well as by electronic mail on this the 15th day of July, 2013.

1. Honorable Deborah A. Mattison []
2. Honorable Katherine C. Watkins []

/s/P. Michael Cole

P. Michael Cole
Due Process Hearing Officer