

**BEFORE THE DEPARTMENT OF EDUCATION
OF THE STATE OF ALABAMA**

T. S.)	
Petitioner,)	Special Education No. 18-144
v.)	
)	
Jefferson County)	
Board of Education)	
Respondent.)	

DUE PROCESS DECISION

I. Procedural History

This matter is before the undersigned pursuant to a due process request dated December 4th, but showing filed on December 5, 2018 by the Honorable James D. Sears on behalf of [REDACTED] parent and legal guardian of *T. S.* (“Petitioner”), a student in the Jefferson County School District. Thereafter, pursuant to a letter dated December 5, 2018 issued by the State Superintendent of Education, the undersigned was asked to serve as the Impartial Hearing Officer in this proceeding. The undersigned issued correspondence dated also December 5, 2018 setting a status conference for December 20, 2018.

Thereafter on December 6th the Petitioner filed a *Motion to Permit Amendment to Due Process Hearing Complaint*. On December 14th the Respondent filed an *Answer to Due Process Complaint*. The undersigned conducted the December 20th, 2018 status hearing and determined that it would be appropriate to allow the Complaint to be amended. Accordingly, on December

20th the Complaint was deemed amended. The Respondent then filed a *Response to Amended Due Process Hearing Complaint* on December 28th.

On January 4th the parties convened for a second status conference and advised that they were working to conduct the follow up to the earlier conducted resolution meeting that had to be continued. To that end they asked that the hearing schedule be put in place, but provide in the schedule sufficient time with which they could exhaust resolution efforts and any other efforts to possibly settle this matter without the need for testimony. A Due Process Hearing schedule was then set and outlined in the Pre-hearing Order dated January 7, 2019.

Following the Pre-hearing Conference conducted on February 6, 2019 the undersigned confirmed for the parties in correspondence dated February 7, 2019 further details for the hearing. The parties then offered up their pre-hearing disclosures which were copied to the undersigned evidencing a timely disclosure made as of February 14, 2019. The hearing then ensued over two days on February 21st and 22nd, 2019. Then in correspondence dated February 27, 2019 issued by the undersigned, guidelines for filing of post hearing briefs were outlined.

Subsequently in response to the joint request of the parties, the deadline for a decision was extended one week and the deadline for post hearing briefs was extended a week in order to allow the parties to review the entire transcript and record before filing post hearing briefs.

During the course of the 2 days of the hearing, each party presented evidence and offered the testimony of witnesses in support of their respective position. Each party was allowed to cross examine witnesses as provided for under the applicable rules. The hearing was conducted as a closed hearing, with both parties represented by their counsel. The Petitioner was represented by the Honorable James T. Sears with [REDACTED] parents of the Petitioner,

present during the entire process. The Respondent was represented by the Honorable Carl E. Johnson, Jr. with [REDACTED] Director of Exceptional Education, serving as the corporate representative for the District.

II. Exhibits & Witnesses

By agreement placed on the record, the parties stipulated that the Exhibit 1 would comprise a bates stamped collection of 590 pages marked JCBE Doc(page) 1-590 which comprised the child's educational records offered by the Respondent. As such, when Exhibit 1 is referenced below, the bates-stamped page number is listed as [Doc _] within this administrative record. As the hearing transcripts are not numbered consecutively by the two separate court reporters, Day 1 (February 21) of the Transcript is hereinafter referred to as [Vol. 1 p._] and Day 2 of the Transcript is hereinafter referred to as [Vol. 2 p._]. Finally, there was one other exhibit offered up and it is referenced below as Ex 2.

Petitioner's Exhibits

As stated, the parties stipulated to utilize the Respondents' bates stamped collection of the child's educational records.

Respondent's Exhibits

R Ex 1: Notebook, child's school records, Bates-stamped 1 through 590 with the exception of pages 189 through 207 deleted.

R Ex 2: Handwriting samples

Witnesses (in order of initial appearance)

██████████ Mother of the Petitioner

██████████ Special Education Teacher, ██████████ Elementary School

██████████ Grade Teacher, ██████████ Elementary

██████████ Principal, ██████████ Elementary

██████████ Special Education Specialist, Jefferson County BOE

██████████ Teacher, ██████████ Elementary

██████████ Director of Exceptional Education, Jefferson County BOE

The exhibits submitted have been kept and maintained by the undersigned during the course of this hearing. On February 21, 2019, the testimony taken was transcribed by ██████████ ██████████ Certified Court Reporter and Commissioner for the State of Alabama at Large. On February 22, 2019, the testimony taken was transcribed by ██████████ ██████████ Certified Court Reporter and Commissioner for the State of Alabama at Large. Each took down all testimony and dialogue. Subsequently the undersigned was able to review the transcript in the consideration of, and in the drafting of, the decision set out below. Finally, the various post hearing briefs submitted by the parties at the completion of the hearing were also taken into account by the undersigned.

III. Summary of Facts

T. is a [REDACTED] grade student attending [REDACTED] Elementary School, [REDACTED] home school zone [Vol. 1 p. 6,7]. T has been eligible for special education since the first grade [Vol. I, pp. 7-8, 22] and has attended [REDACTED] Elementary from [REDACTED] through [REDACTED] grade. [REDACTED] has been diagnosed with [REDACTED] [Vol. II, pp. 215, 265; Doc 238]. T's mother also explained that during the summer of 2015 they took T to the [REDACTED] for testing [Vol. I pg. 184]

T.S.'s teachers report that [REDACTED] is a typical [REDACTED] grade student other than [REDACTED] struggles with reading: [REDACTED] is able to answer questions about stories that are read to [REDACTED] participates in group activities, is an active member of the classroom, and works well with [REDACTED] peers [Vol. II, p. 166]. In October 2015 T.S. was given the Stanford-Binet Intelligence Scales-Fifth Edition (SP5) and scored a full-scale IQ of [REDACTED].

When T.S. was initially found eligible for special education in the first grade, [REDACTED] qualified for special education under the category of [REDACTED] and [REDACTED] and [REDACTED] were more pronounced than they are currently [Vol. I, p. 207]. [REDACTED] made progress toward grade-level standards in reading [Vol. I, p. 207] in the first grade after being provided specialized reading instruction 3 times weekly for 30 minutes each session (90 minutes per week) pursuant to [REDACTED] IEP [Doc 300, 306]. However, with second, third and fourth grade T.S. was not able to make substantial progress toward meeting the grade level standards for reading, which is attributed to the rising difficulty level in work by [REDACTED] Special Education teacher [Vol. I, p. 207].

As of the time of the hearing, school personnel had estimated T's reading abilities fall in the pre-primer, primer, early first grade range; [REDACTED] had difficulty retaining information; and [REDACTED]

functioning level in reading has not changed significantly [Vol. 1 p. 310; Vol. 2 p. 15, 16; Vol. 2 p. 76, Vol. 2, p. 124; Vol. 2 p. 263]. See also [Doc pgs. 300-308 (IEP for 11/06/2015-11/05/2016); pgs. 270-277 (IEP for 10/27/2016-10/26/2017); pgs. 252-261 (IEP for 10/23/2017-10/22/2018); and, pgs. 166-175 (IEP for 10/19/2018-10/18/2019)].

The following pertinent facts pertaining to reading are extracted from T.S.' Eligibility Reports and Individualized Educational Plans (IEPs):

Initial Eligibility 10/23/2015

Stanford-Binet Intelligence Scales – Fifth Edition

Verbal Intelligence Quotient [REDACTED]

Nonverbal Intelligence Quotient [REDACTED]

Full Scale [REDACTED] [Doc 182]

KTEA-3/Form B

Letter/Word Recognition – [REDACTED] Reading Comprehension – [REDACTED] Reading Composite – [REDACTED] [Doc [REDACTED]]

IEP Input Form 11/2/15

Other comments or concerns...difficulty retaining information (can practice word but forgets the next day) [Doc 312]

IEP initiation dates 11/06/2015 to 11/05/2016

According to the Qualitative Reading Inventory-5 (QRI), T's instructional reading level is on a Pre-Primer 1. When given an informal assessment, [REDACTED] was able to read 58% of all Pre-primer words. [Doc 290]

Services:

Student will receive specialized instruction in reading targeting blending from the exceptional education teacher 3 times per week for 30 minutes each session in the general and exceptional education classroom. [Doc 296]

Goal(s):

Area-Reading-

By November 2016, T will apply grade level phonics to decode single syllable words in a text 4 out of 5 trials with 80% accuracy. (ELA 1.21.3, ELA 2.20c.20 [Doc 294])

IEP initiation dates 10/27/2016 to 10/26/2017

On the most recent Scantron Performance series testing, T fell below grade level in reading. Based on the informal Inventory, T is reading on a [REDACTED]. When given an informal sight word assessment, T was able to recall 78% of Pre-Primer sight words and 40% of Primer sight words.....T struggles with [REDACTED] and [REDACTED] word recognition....T also has difficulty retaining skills once [REDACTED] moves on to a different concept... [Doc 270]

Services:

Student will receive specialized instruction in sight word recognition from the exceptional education teacher 4 times per week for 30 minutes each session in the general and exceptional education classroom. [Doc 275]

Goal(s):

Area-Reading-

By October [REDACTED], T will consistently and fluently recall 80% of Dolch [REDACTED] sight words and 70% of Dolch [REDACTED] sight words 4 out of 5 trials. (ELA 2.21.4, ELA 3.21.6) [Doc 273]

IEP initiation dates 10/23/2017 to 10/22/2018

T was given a Functional Reading Assessment on 9/18/17. [REDACTED] was given a Pre-Primer passage to read. [REDACTED] read 11 words per minute on this passage. [REDACTED] read the passage with 60% accuracy and answered 5 out of 8 questions correctly. T was also asked to read a group of sight words (Pre-primer). [REDACTED] read 29 out of 40 words correctly.¹ On the Phonics Skills Survey T named 26 out of 26 Lower Case Letter Names, 26 out of 26 Upper Case Letter Names, and [REDACTED] knew 20 out of 23 Consonant Sounds. Also, on the Phonic Skills Survey [REDACTED] knew 2 out of 5 long vowel sounds (I and a) and 5 out of 5 short vowel sounds. T recognized 3 out of 5 consonant digraphs and 1 out of 10 consonant blends. [Doc 252]

Services:

T will receive specialized instruction using multi-sensory research-based strategies including modeling and repeated practice, targeting decoding strategies, from special education teacher 120 minutes weekly in the special education and general education classroom. [Doc 259]

T will receive multi-sensory specialized instruction including modeling and repeated practice, targeting sight word recognition from the exceptional education teacher 45 minutes weekly in the general education or exceptional education classroom. [Doc 259]

Goal(s):

Area-Reading/Decoding-

By October 2018, after direct instruction and practice, T will apply phonics skills to decode

¹ Another way to identify this result so that it comports with the writing utilized in the prior two IEPs, and the one for the 4th grade year, would indicate the child had read 'Pre-Primer' words with a 72.5% accuracy.

CVC² words in text and in isolation with 80% accuracy 4 out of 5 trials. (ELA 3.20.7, ELA 4.20.5)

Area-Reading/Sight Words-

By October 2018, after direct instruction and repeated practice, T will recall Dolch Primer sight words in isolation and/or in text with 80% accuracy in 4 out of 5 trials. (ELA 3.21.6, ELA 4.21.6)

Reevaluation Eligibility 10/17/2018

Stanford-Binet Intelligence Scales – Fifth Edition

Verbal Intelligence Quotient [REDACTED]

Nonverbal Intelligence Quotient [REDACTED]

Full Scale [REDACTED] [Doc 399]

Reynolds Intellectual Assessment Scales, Second Edition (RIAS-2)

Verbal – [REDACTED] Nonverbal – [REDACTED] Composite – [REDACTED] Memory – [REDACTED] [Doc 399]

RIAS Interpretative Report - T earned a Composite Memory Index (CMX) of [REDACTED] which falls within the significantly below average range of working memory skills. This exceeds the performance of 1% of individuals T's age. [Doc 409]

Diagnostic Achievement Battery – 4

(DBA-4) Listening Comprehension – [REDACTED] Spoken Language Composite – [REDACTED] Alphabet/Word Identification – [REDACTED] Reading Comprehension – [REDACTED] Reading Composite – [REDACTED] Writing – [REDACTED]

Mathematics Reasoning – [REDACTED] Mathematics Calculation – [REDACTED] Mathematics Composite – [REDACTED] [Doc [REDACTED]]

Area of Disability: [REDACTED] [Doc 404]

IEP initiation dates 10/19/2018 to 10/18/2019

T was given an Informal Reading Inventory at the end of August. On the Phonics Skills Survey, T named 26 out of 26 lower case letters and 26 out of 26 upper case letters. [REDACTED] knew 18 out of 23 consonant sounds...Also on the Phonics Skill Survey [REDACTED] knew 0 out of 5 long vowel sounds, 5 out of 5 short vowel sounds, 4 out of 5 consonant digraphs, and 4 out of 10 consonant blends. T read a Pre-primer passage with 78% accuracy and answered 7 out of 8 questions correctly. [REDACTED] was also asked to read a group of sight words... [REDACTED] read 32 out of 40 Pre-primer words and 30 out of 52 Primer sight words. [Doc 166]

² The term 'CVC' words, or 'consonant vowel consonant' would be 'Pre-Primer' and indicates that [REDACTED] goal in this IEP for the [REDACTED] grade, like that of the second grade, is for [REDACTED] to read with an 80% success, BUT it seems that this goal continued a goal into the [REDACTED] grade where, in effect, a [REDACTED] grader had a goal to read successfully at the 'Pre-Primer' level.

Services:

T will receive specialized instruction using multi-sensory research-based strategies including modeling, repeated practice, targeting decoding strategies from the exceptional education teacher 150 minutes weekly in the special and general education classroom. [Doc 173]

T will receive multi-sensory specialized instruction including modeling and repeated practice, targeting sight word recognition from the exceptional education teacher 50 minutes weekly in the special and general education classrooms. [Doc 173]

Goal(s):

Area-Reading/Decoding-

By October 2019, after direct instruction and repeated practice, T will apply phonics skills to decode short vowel words, including words with blends and digraphs, in texts and/or in isolation with 80% accuracy in 4 out of 5 trials. (ELA 4.20.5, ELA 5.20.6) [Doc 170]

Area-Reading/Sight Words-

By October 2019, after direct instruction and repeated practice, T will correctly read a list of Dolch Primer sight words with at least 80% accuracy in 4 out of 5 trials. (ELA 4.21.6, ELA 5.21.5) [Doc 172]

During the IEP meeting for T in October 2016, T's Second [REDACTED] grade year, T's mother expressed concern with T's reading fluency [Doc 270]. T's mother testified that T had failed in reading, literature and mathematics in [REDACTED] grade year [Vol. I pgs. 22-23], that during T's [REDACTED] year T's mother went to bi-weekly meetings with the teacher and that during [REDACTED] T had trouble with reading comprehension, sight words and some math [Vol. I pg. 28]. T's mother also testified that [REDACTED] regularly interacted with T's teachers from K forward, and during second grade utilized the Class DoJo app through which they shared information [Vol. I pgs. 31-34]. According to T's mother, while T was in [REDACTED] grade, T's homework in reading was at a [REDACTED] grade level, but that [REDACTED] did not feel T could actually read at the first (1st) grade level even though they worked at breaking down the sounds and letters for 'a good thirty minutes' [Vol. I pg38-39]. T's mother indicated that T continued to work at home on [REDACTED] reading and was currently reading a level 1 book which in effect is a first-grade book. Both T's

mother and [REDACTED] referenced the intense effort T and [REDACTED] mother had undertaken at times on homework, including the time they tried to have T take on the work level of [REDACTED] peers, i.e. correct grade level homework during third (3rd) grade, and ended up spending three hours on homework. At the recommendation of [REDACTED] they discontinued such effort [Vol. I pgs. 116, 322-323, 330-332].

Further, T's mother explained that though T had been on medication for [REDACTED] they had adjusted the levels and somewhat recently T's doctor had switched to a different medicine, [REDACTED] which seemed to help [Vol. I pgs. 68-69]. For T's 2018-2019 IEP, there was no longer a notation that the child had behavior ‘..which impedes his/her learning or the learning of others..’ [Doc. 168]. T's mother also identified T's handwriting under direct examination by Petitioner's counsel [Doc. 4 et seq.] and said that no one had ever discussed the possibility that T might need an occupational therapist [Vol. I pgs. 69-70]. However, [REDACTED], T's reading teacher for [REDACTED] grade testified under direct examination by Respondent's counsel that T's ‘has beautiful handwriting. Letter formations, number formations are all age appropriate’ [Vol. II pg. 172]. Under cross-examination by Petitioner's counsel, when asked about the various misplaced capital letters and uneven letters, [REDACTED] affirmed that this was [REDACTED] grade writing, “I have students that write this way. Yes, sir, I do.” When pressed further, [REDACTED] stated ‘I accept this writing as [REDACTED] grade writing. Yes, sir’ [Vol. II pgs. 183-186]. (Also, see [R Ex 2] which are 5 pages of additional work samples taken from T's various work samples for [REDACTED] grade which were examined and reviewed by [REDACTED] and about which she testified.)

T's mother indicated that one of the reasons [REDACTED] had felt compelled to file a complaint for due process was that [REDACTED] was having socialization problems due to the peer-assistance

system utilized in the classroom where T's peers would at times assist [REDACTED] with projects and class work and further, that this process was not serving [REDACTED] interest in learning, possibly hindering [REDACTED] learning [Vol. I pgs. 20-21; 80-88]. [REDACTED] explained that 'peer to peer' or 'peer helpers' served a larger role in [REDACTED] and [REDACTED] grade mostly in group projects but that it was not supposed to be a substitute for direct teacher instruction [Vol. I pgs.254-256]. Testimony by [REDACTED] as to T's [REDACTED] grade experience indicates that other than the fact that [REDACTED] has made minimal progress in reading, [REDACTED] activity and interactions with [REDACTED]-grade peers is typical [Vol. II pg. 166].

IV. Issues Presented

Issue A. Is the Petitioner's Complaint for Due Process moot due to what the District suggest was a lack of opportunity to address the Petitioner's concerns before the complaint was filed?

Issue B. Was the Petitioner denied a free appropriate public education (FAPE) due to the failure of the Petitioner to make more than minimal progress in reading pursuant to services provided under the IEPs in place by the School for T during the 24 months prior to the filing of the Due Process Complaint?

V. Discussion

Introduction:

The Individuals with Disabilities Education Act (the "IDEA" or "Act") established certain basic entitlements, including a free, appropriate public education ("FAPE"), for children between the ages of three and twenty-one years old with specified disabilities. *20 U.S.C. §§ 1400, 1412(a)(1)(A) (2004)*. Now called the IDEIA (Individuals with Disabilities Improvement Act),

the act defines “free appropriate public education” (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 pre-school, elementary or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title” 20 U.S.C. § 1401 (18). In order to be eligible for Federal financial services under IDEIA, a state must therefore assure that “all children with disabilities who are between the ages of three and twenty-one receive a Free Appropriate Public Education (FAPE).”

The point of service whereby a FAPE is provided to children eligible for services, is at the local level, the school district or local educational agency, where a child resides. With this matter of course, Jefferson County Schools is this Local Educational Agency. The State of Alabama implements this law via the directives found in the Rules of the Alabama State Board of Education, State Department of Education, Special Education Services, codified in The *Alabama Administrative Code* § 290-8-9-.00 et seq. Additionally, the Federal Regulations that provide guidance for the implementation of IDEIA are found in the Code of Federal Regulation, 34 CFR 300.101, et seq. What follows is a discussion of the general issues raised and identified by the parties during this Due Process Hearing in light of the applicable law and the facts relevant to the matter, as presented during the hearing.

Issues: A.

In the *Respondent's Post-Hearing Brief*, counsel for the Respondent states:

“Alternatively, even if petitioner had been able to show that T.S.’s IEP was not adequate,

testimony at the hearing revealed that the school system was in the process of scheduling a meeting to address the parent's concerns when it received the due process complaint. However, the school system was never given opportunity to address those concerns (and to amend T.S.'s IEP accordingly) before the complaint was filed—a circumstance that is also fatal to petitioner's claim.”

The testimony at hearing confirmed that the mother (The mother is the only one to have testified but it was very apparent that the father was also involved and was present for both days of the hearing. Accordingly, the reference hereinafter to the mother as the parent advocate does not exclude the fact that the father was also an advocate, rather is used due to the fact she is the only one to have testified) has been a very active advocate for her child. Further, it is clear that ■ had regularly interacted at times with various board employees over her concerns, including her continuing concern over her child's progress in reading. The three-year reevaluation concluded by the District on October 17, 2018 and its eligibility decision of the same date [Doc 399-404] preceded T's IEP for 2018-2019 by only 2 days [Doc 166-175].

While it is clear that the testimony of the District employees at hearing evidenced a true concern for T and as well, evidenced a high level of skill and knowledge, even the District's staff recognized the minimal amount of progress that T had made in reading and decoding. This is clearly something that the mother had been tuned into and had asked about, if not at the October 2018 IEP meeting, at various other times. Accordingly, it would seem disingenuous for the District to now state that the Due Process Complaint was filed before they could have a chance to address her concerns. Further, it is odd for the District to make a defense of the Complaint by stating that the current Due Process Complaint is due to be mooted because they had a pending

IEP meeting when the Due Process Complaint landed just at 45 days after the IEP had just been formalized by the very skilled District staff and involved parent. This is an IEP that on its face cited that the [REDACTED] grade child read 'pre-primer passage with a 78% accuracy' while the prior year's IEP goal on Reading-Decoding had been that by 'October 2018, after direct instruction and practice, T will apply phonic skills to decode CVC words in text and in isolation with 80% accuracy 4 out of 5 trials' [Doc 255]. Considering the fact that the child at the time of [REDACTED] current IEP being put in place was continuing to struggle with pre-primer words and decoding as [REDACTED] had in 2nd and 3rd grade, and clearly had a problem with working memory as evidenced by the testing, the District's argument that they were denied a chance to address the parents' concern due to the timing of the filing of the Due Process Complaint is not valid and in no way would make moot the pending Due Process Complaint.

Issue B:

In recognition of [REDACTED] struggles with reading, to the District's credit, T's IEP team consistently reviewed and modified [REDACTED] IEP and steadily increased the amount of reading instruction [REDACTED] receives every year [Doc 173, 259, 275].

In addition to increasing the amount of time that T was provided reading instruction, the school system also implemented various different methods to increase [REDACTED] reading skills [Vol. II, p. 108-109]. [REDACTED] who has provided T special education services in reading since the [REDACTED] grade, testified that [REDACTED] implemented any number of research-based programs for T and consulted the reading specialists at [REDACTED] school and at the county level to assist her in

implementing a successful reading program for T [Vol. I, pp. 212-217; Vol II, pp. 102-105]. In essence, each year ██████████ created an individualized reading program for T comprised of the what ██████ thought were the most potentially effective components of the various reading programs that were available to her based on T's current needs [Vol. I, p. 267-271]. She also collaborated with T's regular classroom teachers to provide guidance to them regarding what instructional techniques they could use in the classroom to assist T, as did the school and county reading specialists [Vol. I, p. 320-321; Vol. II, 159, 171, 176-177]. T's regular education teachers also worked with T.S. on specific reading skills such as sight words and decoding in their classes [Vol. I, p. 311; Vol II, p. 166]. Special education supervisors from the central office observed T in the classroom [Vol. II, pp. 91, 107], provided ██████ teachers with feedback about how to best serve ██████ [Vol. II, 102-105], and communicated with T's parents regarding ██████ program [Vol. II, pp. 96-97, 87-90, 106].

When questioned by ██████████ about her thought process as she evaluated T's progress, ██████████ replied: "In ██████ grade, we started the Foundations Wilson program. ██████ IEP goal in ██████ grade was geared more towards sight words. But that doesn't mean that I cancel out working on decoding and blending. We still worked on all aspects of reading. And that program has a sight word component as well as blending and a phonics portion to it. It does a multisensory approach....so in ██████ grade, we continued the same program because ██████ had only been using it for a year" [Vol. 1, p. 268, 269].

In addition, ██████████ has engaged in more direct one-on-one instruction with T as the curriculum has become more challenging in the ██████ and ██████ grade [Vol. I, p. 247-48], and she received five days of training to implement a new reading program for T's ██████████

year—the Phonics First Program (a multisensory Orton-Gillingham-based program)—that resulted in T making more progress toward [REDACTED] IEP goals in the [REDACTED] grade than [REDACTED] had previously [Vol. I, p. 206].

There is no doubt that the Jefferson County Board of Education has thoroughly trained teachers and has multiple programs for teachers to use in teaching all aspects of reading and language arts. The teachers were very dedicated to the success of all their students. The Board has also provided highly trained support personnel to assist teachers with the learning process. YET, despite all the resources and efforts of the teachers and support personnel, in reading the Petitioner has remained at the pre-primer-primer level in reading abilities, reading goals have been repeated, and reading goals have not been mastered.

Specifically, the pattern to the IEP's for T's [REDACTED] grade years clearly evidenced an ongoing issue with reading and decoding and the IEP's do evidence an effort to address this. The concern is that the level of the reading and decoding, along with the goals, remained at the pre-primer level. Clearly this low level of reading concerned the parent, but it is not as clear that the District's staff felt that the child could do much better. While testimony of [REDACTED] indicates she too was frustrated and doing her best to assist the child, the continued reading level at the pre-primer level going in the [REDACTED] grade and more significantly, on into the [REDACTED] grade in the IEP fashioned in October [REDACTED] seems to have pointed out something else may need to be done.

Both parties refer to the United States Supreme Court case of *Endrew vs. Douglas County School District* in their respective Post-hearing briefs. *Endrew vs. Douglas County Sch District* (137 S.Ct. 988, 2017) While the District urges that they had in fact complied with the anticipated standards set out in *Endrew*, the Petitioner urges that the District had not in fact designed and

implemented an IEP that allowed the child ‘to make progress appropriate in light of the child’s circumstances’ as called for under *Endrew*. *Id.* at 6.

In *Endrew* the Court interpreted the scope of the free appropriate public education (FAPE) requirements in the Individuals with Disabilities Education Act (IDEA). The Court overturned the Tenth Circuit’s decision that *Endrew*, a child with autism, was only entitled to an educational program that was calculated to provide “merely more than de minimis” educational benefit. In rejecting the Tenth Circuit’s reasoning, the Supreme Court determined that, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP [individualized education program] that is reasonably calculated to enable a child to make progress appropriate *in light of the child’s circumstances*.” [Emphasis added]. To meet its substantive obligation under the Individuals with Disabilities Education Act, 20 U.S.C.S. § 1400 et seq., a school must offer an individualized education program (IEP) reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Further insight as to the implication of the Court’s decision with *Endrew* is offered by the United States Department of Education at 71 IDELR 68, (December 2017) where ‘Questions and Answers on *Endrew F. v. Douglas County School District*’ are provided. Within this guidance question # 11 addresses “What does ‘progress appropriate in light of the child’s circumstances’ mean?” The Department of Education indicates that ‘the decision emphasized the individualized decision-making required in the IEP process and the need to ensure that every child should have a chance to meet challenging objectives.’ Question 12 covers “How can an IEP Team ensure that every child has the chance to meet challenging objectives?” Part of the answer provided by the Department of Education is that “Determining an appropriate and challenging level of progress is

an individualized determination that is unique to each child. When making this determination, each child's IEP Team must consider the child's present levels of performance and other factors such as the child's previous rate of progress and any information provided by the child's parents."

While it is quite obvious that the special education teacher was doing her level best to construct methods to assist the child, it is also obvious that the child was not making true progress in reading, in effect only progress at a *de minimus* level. A simple review of the goals in reading-decoding for the IEPs covering [REDACTED] and [REDACTED] grades make that clear since all are focused on pre-primer reading skills. The Petitioner urges that the facts of this case are all directed to the realization that the Petitioner has not benefitted, pursuant to *Endrew*, from special education while a student of the Jefferson County Board of Education. Further, the Petitioner contends that there has been absolutely no testimony or evidence presented to indicate that all of the efforts of the Respondent have produced an increase in the reading ability of the Petitioner.

On the other hand, the District accurately points out that with *Endrew* the United States Supreme Court held that "the IDEA cannot and does not promise 'any particular [educational] outcome.' The District also urges that by virtue of the Supreme Courts' determination in *Endrew*, the central question is whether or not 'any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.* pg.7 However, in the following paragraph in *Endrew* the Court immediately shifts to the question of the child's progress under the IEP. "The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. See *U.S.C.S. Sections 1414(d)(1)(A)(i)(I)-(IV)*" *Id.* pg 7.

The question posed then to the undersigned in this hearing is whether or not the IEP provided T, was not only reasonable, but whether or not it enabled the child to make progress. As discussed above, the undersigned is convinced by the evidence presented that the District employed qualified personnel who had a sincere interest in providing services for the child. While not discussed in either brief, the evidence also reflected that T was not mistreated or treated indifferently by virtue of the use of peer-to-peer type support. However, there is a disconnect between the crafting of the IEP employed by the District in providing services to T and the results from that IEP for T as to [REDACTED] reading and decoding skills. Despite significant effort by the team, T failed to make progress, or in the words of [REDACTED] T's [REDACTED] grade reading instructor:

T has made minimal progress. [REDACTED] is a very auditory learner. [REDACTED] does well answering all questions about stories that are read to [REDACTED]. [REDACTED] participates in each of the group activities that we do. [REDACTED]—you know, [REDACTED]—I know [REDACTED] struggles with decoding. We work in small group with decoding which is learning to word call. But [REDACTED] auditory comprehension is very good. [REDACTED] is an active member in our classroom [REDACTED] works well with [REDACTED] peers. They work well with [REDACTED] [REDACTED] other than struggles with reading is a typical [REDACTED] grade student. [Vol. II pg. 166]

The Petitioner suggest that the fact of the failure to make anything but *de minimus* progress is sufficient evidence to support a finding that a FAPE was denied T. In other words, regardless of a sincere effort by the District and its staff, T's failure to progress reveals that the District denied a FAPE to T. The Petitioner suggest that at some point before now, the District should have seen that there was something else at issue and sought an expert opinion in learning disabilities to assist in crafting a program that could address T's particular disabilities. Alternatively, the District points out that the IDEA does not specifically call for such a step, i.e., bringing in an expert. Though the District appears correct in its position that an expert is not

generally required under the IDEA, T's lack of progress as to reading and decoding, and the apparent working memory deficit [REDACTED] testing reveals, would pose the question of what should the District have done in order to put in place a program that would allow for progress, and in effect deliver a FAPE to T.

T's IEP for 2018-2019 reflects that in October [REDACTED] was able to correctly decode 10 of 10 and 9 of 10 CVC (pre-primer) words during informal assessments given over the course of two weeks, but [REDACTED] was only able to decode 53% of words containing blends and digraphs. And, the IEP included language as follows: 'This inconsistency has an impact of T comprehending tests read. T's need for additional support in decoding adversely affects [REDACTED] ability to be independently successful with grade level material in the general education classroom.' [Doc 170] While the percentage of decoding pre-primer words has improved based on these assessments, T's reading instructor testified that [REDACTED] had made 'minimal progress' under direct examination by the District's counsel. This testimony was given at a point in time that was almost three-fourths of the way through T's [REDACTED] grade year while the success was as to pre-primer words, or words normally learned in kindergarten.³ Further, as of October 2018 [REDACTED] testified that T 'had difficulty retaining the pre-primer and primer words' [Vol. I pg. 210].

In the Petitioner's post-hearing brief, the Petitioner accurately identifies the concern for T that 'the gap between Petitioner's (T's) reading ability and [REDACTED] peers will only continue to grow'. Conversely, the District's post-hearing brief takes the position that the actions of the District's staff have been thorough and significant as if such actions did the best that could be done for T. This in turn leads to the possible observation that T must have somehow plateaued

³ Ms. Reeves explained in her testimony that pre-primer means kindergarten, actually words learned during both pre-kindergarten and kindergarten. [Vol. I pgs. 208-209]

and is reaching a point where [REDACTED] can no longer increase or improve [REDACTED] reading and decoding skills.

Though there was no direct testimony that T's reading skill level had plateaued, the evidence would either indicate such a plateau, or that some other strategy or other quantity of service would be needed to allow for T's reading skills to improve. A review of T's IEP reveals that [REDACTED] reading-decoding goals for [REDACTED] and [REDACTED] grade are remarkably similar and the [REDACTED] grade reading goals for T are not much more ambitious. [REDACTED] lack of progress and the similarity between the reading goals from [REDACTED] and [REDACTED] grade, and then on to [REDACTED] grade raise concern. In answer to questions posed by Petitioner's counsel regarding T's annual progress reports for the [REDACTED] grade [REDACTED] confirmed that according to the IEPs, T had not mastered but one goal the entire year [Vol. I pg. 230].

In *Damarcus v. District of Columbia*, (67 IDELR 239, 2016) the District Court reviewed the concern of repetitious IEP goals and their impact on a child receiving a FAPE. While in the *Damarcus* case the Plaintiffs make multiple allegations about defects with the child's IEP, both procedurally and substantively, almost none of which would apply in the present situation, the Court does have concern with a 'repetition of goals and objectives' which is a concern in a way with T's IEPs.

The wholesale repetition of goals and objectives across multiple IEPs is of far greater concern, however, as it indicates an ongoing failure to respond to Demarcus's difficulties. See *Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32,44(D.D.C. 2006) ("Academic success is an important factor in determining whether an IEP is reasonably calculated to provide education benefits.") *Id.*pg..1342.

While in *Damarcus* case the court was concerned with the apparent cut-and-pasted type of repetition, the court noted that the repetition of goals demonstrated a lack of progress. The review

by the District Court followed a finding by a Hearing Officer that the District was due to address the issue by revising the IEP. Further, the court observed that ‘At bottom, it appears that certain members of the IEP team attributed Damarcus’s lack of progress to a single data point (his FSIQ), then all but wrote him off as having ‘plateaued.’ While that is not so obvious in the case involving T, it seemed to the undersigned during the hearing that the District’s staff had some belief that T’s IQ of [REDACTED] which was testified as low-average was lurking as a justification of why [REDACTED] had not made progress, as if [REDACTED] would not be able to do so. While not specified as a main component, it certainly was a consideration in addressing T’s ‘picture’ as set out by [REDACTED] [REDACTED] who serves as Director of Exceptional Education [Vol. II pgs. 258-259].

Nonetheless, with T’s reading progress appeared stagnant during [REDACTED] and [REDACTED] grade, the District would seem to have had a signal, at least towards the middle or end of [REDACTED] grade that T was failing to learn to read despite all the resources thrown at [REDACTED]. By no means does the undersigned find that the IEPs were haphazard nor does he intend to step into the shoes of the IEP team and propose to tell them what program is best, but there is ample legal authority for the conclusion that hearing officers have found stagnant progress can be seen as a denial of a FAPE. For example, in a review of an 11th grader’s complaint for due process, a hearing officer found in *Kipp Delta School District (116 LRP 34786, 2016)* that ‘the evidence indicated that the Student’s progress regarding his reading ability remains stagnant. A district’s continuation of inadequate services will almost certainly be regarded as a denial of FAPE. See, e.g. *District of Columbia Pub. Schs. 49 IDELR 267(D.D.C. 2008)* (noting that a student’s present levels of performance remained stagnant for several years); *Unionville-Chadds Ford Sch. Dist., 47 IDELR 280 (SEA PA 2007)* (finding that a district should have addressed a child’s reading deficiencies when it

became apparent that the student was not making any progress).’ Further, as indicated by the Department of Education in their guidance following the decision by the Court in *Andrew*, “The essential function of an IEP is to provide meaningful opportunities for appropriate academic and functional advancement, and to enable the child to make progress. The expectations of progress in the IEP must be appropriate in light of the child’s unique circumstances.” “Questions and Answers on *Andrew F vs. Douglas County School District*.” United States Department of Education at 71 EDELR 68, (December 2017) In short, the evidence at hearing of T’s lack of progress points to the conclusion that T was not in fact provided such a meaningful opportunity within the context of [REDACTED] IEP’s with regard to the portion concerning reading for at least [REDACTED] and [REDACTED] grade despite the efforts on the part of the District to do so.

VI. Conclusion

The issues properly before the undersigned hearing officer in this due process hearing are due to be reviewed in the manner provided for under *20 U.S.C. §1415 (f)(3)(E)*. Further, Congress directs that any decision of the undersigned is limited in this Final Order to a decision:

- (i) [Made] on substantive grounds based on a determination of whether the child received a free appropriate public education.
- (ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate education only if the procedural inadequacies-
 - (I) impeded the child’s right to a free appropriate public education; or,
 - (II) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parent’s child; or,
 - (III) caused a deprivation of educational benefits. *20 U.S.C. §1415(f)(3)(E)(I)&(ii)*

The undersigned reviews the issues in light of the fact that the burden of proof in a due

process hearing rests upon the Petitioner. Therefore, in order to prevail the Petitioner must demonstrate by a preponderance of the evidence that the Petitioner was in fact denied a FAPE by virtue of the actions, or lack thereof, by the Respondent School District. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005)

Finally, in completing a review in this matter the undersigned is mindful that it is not the job of the hearing officer to substitute his judgment for those of the educational professionals involved in the decisions made for the child. The standard as to such review does arise through the decision in *Board of Education Hendrick-Hudson v. Rowley*, 458 U.S. 176, 206 (1982). Additionally, with the guidance of the decision of *Andrew F. v. Douglas County School District*, 137 S. Ct. 988(2017), the undersigned is also due to review the programs in light of the child's progress. With this in mind the undersigned has reviewed the facts as set forth in the testimony and evidence, providing the due weight to the information provided by the Petitioners and Respondent alike. The discussion above purports to examine what the undersigned found was not only relevant to an understanding of the facts in this hearing, but the facts that were germane to an understanding of how the law would apply to the questions posed by the Petitioner's complaint and allegations. In conclusion, the undersigned finds that the Respondent District denied a FAPE to T.

VII. Specific Findings

1. That Petitioner's case was not moot and that the Petitioner has a right to proceed to a hearing.

2. That the lack of progress of T with reading and decoding, at least during the 24 months prior to the due process filing date of December 5, 2018 is evidence of a denial of FAPE by the District.
3. Within 30 days of this Order, the IEP team is due to re-convene in further efforts to determine what programs would be appropriate for the child in light of [REDACTED] reading deficits.
4. Within 30 days of this Order, the IEP Team, including pertinent District personnel, should thoroughly review all the test results and determine if there is adequate information to address why Petitioner is not making progress in reading and if not, what information is needed to address this.
5. As compensatory benefits for the time lost while the child was denied a FAPE, the District is due to find, fund and provide T with a one-on-one summer reading program that is intensive along the lines suggested by the Petitioner such as Lindamood Bell. This is due to be provided during the summer of 2019.
6. Petitioner is due compensatory services for 90 minutes per school week (presumably broken down into three 30 minute sessions) for the remainder of the 2018-2019 school year and the 2019-2020 school year in a one-on-one direct reading instruction scenario to address [REDACTED] weaknesses in decoding and sight words with a program that meets [REDACTED] unique needs.


VIII. Notice of Appeal Rights

Any party dissatisfied with the decision may bring an appeal pursuant to 20.U.S.C. §

1415(e)(2) and/or Alabama Administrative Code 290-8-9.08(9)(c)(15) and must file notice of intent to file a civil action with all other parties within thirty (30) calendar days of the receipt of this decision. Thereafter, a civil action must be initiated within thirty (30) days of the filing of the notice of intent to file a civil action.

DONE and ORDERED.

Entered this the 22nd day of March, 2019


Steve P. Morton, Jr.
Due Process Hearing Officer

A copy of this Order has been forwarded to the Honorable James D. Smith and the Honorable Carl Johnson via email and US mail first class.

cc: - Dr. DaLee Chambers