

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

N.P.,

Petitioner,

v.

A.C.B.O.E.,

Respondent.

Special Education Case No. 18-15

FINAL ORDER

I. PROCEDURAL HISTORY

This due process hearing was conducted under the authorization of the Individuals with Disabilities Education Improvement Act (“IDEA”), 2004 reauthorization, 20 U.S.C. § 1400, *et. seq.* implementing federal regulations at 34 C.F.R. Part 300, and implementing State regulations, the Rules of the Alabama State Board of Education Chapter 290-8-9, *et seq.* The undersigned Hearing Officer was appointed by the State Superintendent of Education to hear this matter.

This matter originated with Petitioner’s January 18, 2018 filing of a due process complaint. Petitioner’s filing alleged that the Respondent/District had failed to provide N.P. with a free appropriate public education (FAPE) under the IDEA by:

1. Failing to evaluate N.P. in all areas of suspected disability in a timely manner;
2. Failing to consider the parents equal participants in the development and implementation of N.P.’s IEP;

3. Failing to develop and implement an IEP that (1) complies with state and federal regulations; (2) addresses the individual needs of the Petitioner; and (3) is based upon professional practices as determined by peer reviewed research; and,
4. Failing to develop and implement a current behavior intervention plan developed by a board-certified behavior analyst based upon peer reviewed research and a functional behavior assessment.

Respondent filed a response to the due process complaint on January 29, 2018.

Respondent denied the allegations and asserted various defenses.

A Resolution Meeting was held on February 28, 2018 but did not result in an agreement on all issues. On March 1, 2018, Petitioner requested a 30-day extension to give the parties additional time for negotiation. A deadline for a decision in the case was established for April 4, 2018.

An additional request for an extension was made by Respondent to provide an opportunity for the parties to enter mediation. The decision deadline was extended to June 5, 2018.

The hearing was reset for July, 2018. After continuing discussions, the parties filed a joint motion to continue the hearing to allow a settlement conference to occur on August 6, 2018. After resolving scheduling conflicts, the hearing date was reset for November 7th and 8th 2018.

The due process administrative hearing was held in this matter on November 7th and 8th, 2018. Petitioner was represented by the Honorable James Sears. Respondent was represented by the Honorable Rodney C. Lewis.

Prior to the commencement of the hearing, a determination was made by this Hearing Officer that both parties had complied with all aspects of procedural safeguards

and requirements necessary to have a fair due process hearing. Petitioner was advised of the right to have the hearing open or closed. The Petitioner invoked the rule as to witnesses but declared the hearing would be open otherwise. Petitioner also waived N.P.'s presence at the hearing. Both parties waived Opening Statements.

At the conclusion of the hearing, both parties were given the opportunity to forward to the Hearing Officer proposed Orders and/or Briefs by December 10, 2018. A joint request was made to extend that date to December 17, 2018. Both parties submitted to this Hearing Officer proposed Orders.

Although the Petitioner waived the presence of the Child at this hearing. The Child did attend the hearing for a short time. This gave to the Hearing Officer an opportunity to observe the Child and the actions of the Child for a short period of time.

II. EXHIBITS ADMITTED INTO EVIDENCE

Both parties submitted binders containing various documents. The contents of both binders were admitted into evidence without objection, and both binders were used throughout the hearing during the examination of witnesses. The documents have been examined by this Hearing Officer in light of the testimony presented at hearing. The exhibits 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 placed no weight on the fact that any exhibit was offered by either party so long as they were not prejudicial to the other party participating in the due process hearing based upon objection. The exhibits were examined, and the weight given

to each was based upon the contents of the exhibit which was submitted and not on which party introduced said exhibit. This Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of making a decision in this matter.

III. WITNESSES

Both parties were permitted to offer testimony at the hearing by way of witnesses under oath. The testimony from these witnesses has been considered by this Hearing officer in light of the issues heard at the due process hearing. The testimony of the witnesses was recorded, and transcripts have been provided to this Hearing Officer, counsel for both parties, and the State of Alabama Department of Education.

This Hearing Officer placed no weight on the fact that any particular testimony was offered by either party since the purpose was to provide all of the appropriate and admissible testimony for consideration by this Hearing Officer. The witnesses at hearing were examined and weight given to each was based upon the substantive nature contained therein for the purpose of making a decision in this matter. The witnesses at hearing were as follows:

1. [REDACTED] of N.P.
2. [REDACTED] Special Education Teacher
3. [REDACTED] Special Education Coordinator
4. [REDACTED] Board-Certified Behavior Analyst

IV. BURDEN OF PROOF

The burden of proof in this matter is upon Petitioner as the party seeking relief. *Schaffer v Weast*, 546 U.S. 49 (2005); *Ala. Admin. Code* 290-8-9.08(9)(c)(1). The applicable standard of proof is proof by a preponderance of the evidence.

V. SUMMARY OF THE TESTIMONY AND EVIDENCE

This section is a brief summary of some of the pertinent facts presented to this Hearing Officer during the course of this two-day hearing. These facts are not the only facts considered by this Hearing Officer in making this decision. This Hearing Officer has reviewed all exhibits, heard all testimony presented at this hearing, and has also reviewed the transcript of the testimony from the hearing. This decision is based on a review of all testimony presented at this hearing as well as a review of all exhibits admitted into evidence during the hearing.

1. [REDACTED]

[REDACTED] is N.P.'s [REDACTED]. [REDACTED] testified that N.P. is [REDACTED] years old and is profoundly affected by [REDACTED]. N.P. needs help with almost everything in life: dressing, toileting, and walking across the street. [REDACTED] cannot be left unattended at any time. Other than [REDACTED], N.P. is physically healthy and without medical problems. N.P. has been tested and is not affected by any hearing or vision impairments.

[REDACTED] expressed safety concerns about N.P.'s "elopement" behavior at school. N.P. is in the 99th percentile for [REDACTED] age group in both height and weight. Not only is N.P. large, [REDACTED] is quick and will try to escape classroom staff. [REDACTED] is concerned, for safety reasons, because N.P. does not recognize dangers, such as the risk of being hit by a vehicle.

By way of background, N.P. entered early intervention at approximately two years old. N.P. received speech therapy, occupational therapy, and private ABA (Applied Behavior Analysis) services. The ABA services were provided at a private facility in [REDACTED] until N.P. was about [REDACTED] and half years old.

N.P. resides in [REDACTED] County but attends [REDACTED] through its open enrollment program. Prior to [REDACTED] enrollment, N.P. underwent an evaluation by the [REDACTED] resulting in his diagnosis of [REDACTED]. According to [REDACTED], the District accepted that evaluation and offered special education services to N.P. from the beginning of [REDACTED] enrollment.

Prior to [REDACTED], N.P. participated in the District's [REDACTED] program, from 8:00 to 10:00 a.m., twice per week. While in the [REDACTED] program, N.P. received speech and occupational therapy services from the District.

For [REDACTED], N.P. attended [REDACTED]. According to [REDACTED], N.P. was able to participate in the general education classroom with the assistance of a one-on-one aide. According to [REDACTED], the aide attended to N.P. in the general education classroom throughout the day. During kindergarten, N.P. also received thirty minutes of daily special instruction, as well as speech and occupational therapy services throughout the week.

For the 2016-17 school year, N.P. attended [REDACTED] grade at [REDACTED]. During [REDACTED] grade, N.P. was in a self-contained classroom for most of the day but was taken to the general education classroom to participate in certain activities. According to [REDACTED], N.P. no longer received a designated one-on-one aide. Instead, the self-contained classroom is staffed by three adults for eight children with [REDACTED].

After Christmas of the 2016-17 school year, N.P. began to experience issues with elopement. This occurred in two ways: (1) elopement by trying to leave the table, and (2) elopement by trying to leave the classroom. The District recorded data on both types of attempted behavior. (R. Ex. 14).

In addition to elopement, [REDACTED] testified that N.P. experiences issues at home with [REDACTED] and [REDACTED]. However, according to the District, these behaviors were not prevalent at school. N.P. also engages in “flopping,” where [REDACTED] will fall on the floor and become totally immobile.

[REDACTED] believes N.P. needs a one-on-one aide due to safety concerns. Additionally, [REDACTED] believes that a one-on-one aide could assist with classroom activities such as discrete trial training. [REDACTED] testified that [REDACTED] would also like N.P. to have goals that are more independence-related.

2. [REDACTED]

[REDACTED] has been N.P.’s teacher for the past three years. [REDACTED] graduated from [REDACTED] with a degree in [REDACTED]

[REDACTED]’s classroom has [REDACTED] students with [REDACTED] and [REDACTED] is assisted by two aides. The students in the classroom range from [REDACTED] grade to [REDACTED] grade. The classroom is organized under a three-year ABA program. All of the classroom personnel receive weekly training from [REDACTED], under a contract with the District. They are trained to implement a number of behavior strategies including “mand” training, discrete trial training, natural environment teaching, and ABA group lessons.

█ testified that N.P. uses an iPad to help with communication. █ testified that N.P. is very friendly but has difficulty interacting with █ peers.

█ acknowledged that there have been occasions when the N.P. has eloped from the classroom. However, █ testified that the school grounds are fenced. There was no testimony that N.P. has ever eloped from school grounds.

█ referred to an incident where the Parent asked about bruises and “pinch” marks on N.P. █ stated that school personnel examined N.P., reviewed video footage from the classroom, and determined that the bruises were most likely caused by N.P. jumping into a ball storage pit in the classroom.

3. █

█ is the District’s █ █ has served in that position for the past █ years and oversees the administrative aspects of the District’s special education program. █ duties include reviewing IEPs, ensuring timelines for testing, ensuring timely reports to the State Department of Education, communicating with parents and teachers and guiding them in the academic success of their students. █ has a bachelor’s degree in education from █ University, and a master’s degree in diverse learners, and a master’s degree in administration, both from University █

█ testified that N.P.’s IEP was sufficient to meet the “stranger test.” █ also testified that avoiding a hyper-specific level of detail provides flexibility to implement goals in a way that best suits N.P.’s individual needs. █ testified that N.P.’s IEP addresses █ need to have close contact with staff throughout the day.

█████ testified that N.P. did not have a one-on-one aide in ██████. ██████ testified that there was an aide assigned to the general education classroom, but ██████ was not N.P.'s one-on-one aide.

█████ testified that the durations and dates in N.P.'s IEP are written in accordance with the Master the Maze program, adopted by the District. ██████ also testified that they were based on the ABA methodologies.

As to N.P.'s 2016-17 IEP, ██████ testified that N.P. mastered one classroom goal and two speech-related goals. N.P. generally made progress but did not master four of ██████ classroom goals.

During the 2017-18 school year, N.P. mastered four of ██████ five goals, and made progress toward the fifth. N.P.'s behaviors impacted ██████ ability to master the fifth goal, which involved following a verbal one-step direction with 80% accuracy.

4. ██████

█████ is a board-certified behavior analyst ("BCBA"). ██████ has an undergraduate degree in special education and master's degree in applied behavior analysis from the University ██████ ██████ is the owner of ██████, and was previously employed by ██████

█████ testified that N.P.'s 2016-17 program was based upon ABA methodology. ABA is a peer-reviewed behavioral methodology that addresses the core deficits associated with autism. ABA is one of the most researched strategies that have been proven effective in addressing these core deficits. ABA consist of core behavior analytic strategies based upon analyzing what happens before targeted behaviors occur; what happens during the

occurrence of target behaviors; and the manner of using this information to increase the likelihood that appropriate behaviors occur or that challenging behaviors decrease.

ABA encompasses many types of intervention strategies. Examples include discrete trial training (which can be done in a one-on-one setting, or a group setting), natural environment training, prompting and reinforcement, and use of a picture exchange communication system. As a BCBA, [REDACTED] is responsible for designing individualized programs to either increase socially relevant behaviors and/or decrease mal-adaptive behaviors. The BCBA will conduct a functional behavior assessment to determine why challenging behaviors are occurring. From the assessment, a plan is developed on how to reduce those challenging behaviors. School staff are then trained on how to implement the plan to fidelity. In addition to behavior reduction supports, staff are trained on skill acquisition supports.

In January 2017, [REDACTED] provided an individualized skills assessment of N.P. utilizing the [REDACTED] Assessment and [REDACTED] assessment. The [REDACTED] is one of the most empirically supported standardized assessments in the behavior analytic field. The [REDACTED] assesses a student in multiple domains or categories (mand, tact, play, social, imitation, echolic, and vocal) identified by research as core deficits of students diagnosed with autism. The [REDACTED] is a multi-method, multi-component, criterion referenced assessment and skills tracking system. The categories identified by the [REDACTED] as deficits for a student can in turn be correlated to the Alabama Course of Study Standards for utilization in the development of a student's

IEP goals. Accordingly, the deficits identified on a student's [REDACTED] assessment allow for the development of an IEP based on the specific and individualized needs of a student.

School staff members providing services to N.P. during the 2016-17 school year received training from the BCBA as to specific data collection methods and procedures to be used in the tracking N.P.'s progress. [REDACTED] implemented the use of the [REDACTED] daily data collection system during the 2016-17 school year. This data collection system provided N.P.'s parents with the ability to monitor classroom data and track [REDACTED] progress on a daily basis.

[REDACTED] testified that N.P.'s behavior included two different types of elopement: (1) elopement from the table, and (2) elopement from the classroom. It was determined that there were different motivations for each type of elopement. Elopement from the table was motivated primarily by escape from demand. In other words, when N.P. was presented with task demands, N.P. would try to run away as a form of escape. In contrast, when N.P. would elope from the classroom or from staff, it was typically associated with attempting to gain access to a tangible item that [REDACTED] was attempting to obtain.

Given this assessment, each form of elopement necessitated a different response. It was determined that a picture exchange communication system could help develop a way for N.P. to request access to things and thereby reduce instances of access-motivated elopement. [REDACTED] testified that staff were trained on how to use this system and to increase the amount of "wait" time. At the beginning of the 2017-18 school year, N.P.'s baseline wait time was 20 seconds. Through implementation of the program, N.P.'s wait time was

increased to 360 seconds, showing that [REDACTED] acquired the ability to wait when presented with instruction.

[REDACTED] testified that the IEP team received a toileting protocol from N.P.'s private BCBA, which included an intensive 30-minute toileting interval. When the parent proposed to use this protocol at school, the staff tracked data on N.P.'s toileting behavior at school. Upon reviewing the data, [REDACTED] recommended that it was not necessary to decrease N.P.'s toileting interval to 30 minutes. N.P.'s private BCBA agreed that the reduced interval should not be implemented in the school setting. The IEP team decided not to reduce N.P.'s toileting interval but to continue tracking data in the event a problem arose. According to [REDACTED], the data suggests that N.P. does not have continence issues at an hour-and-a-half to two-hour intervals at school.

In addition to toileting, [REDACTED] raised a concern about N.P.'s [REDACTED] and [REDACTED]. However, [REDACTED] testified those issues seemed to correlate with illness and did not occur at rates high enough to address other than the use of blocking the behavior when it was observed. Nevertheless, in response to the Parent's concerns, [REDACTED] was added as a tracked behavior in the [REDACTED] monitoring system.

[REDACTED] continued as BCBA for the 2017-18 school year. During the 2017-18 school year, the District agreed to adopt the [REDACTED]'s ABA Classroom program. The classroom staff are trained and supervised by a BCBA on ABA procedures including behavior map assessments, skill acquisition assessments, data collection and entry, and implementation of discrete trial training and other intervention methodologies. [REDACTED] was the primary BCBA overseeing the ABA classroom.

The staff members of the ABA Classroom were trained by [REDACTED] “on all of what we consider to be the kind of cornerstone of an effective and efficient behavior analytic classroom environment”. Specifically, program staff members were trained to fidelity by in the implementation of ABA behavior analytic strategies. [REDACTED] provided fidelity checks of staff members during the 2017-18 school year to ensure that staff members continued to appropriately implement ABA strategies within the program.

Program staff members were further trained on specific data collection methods and procedures to be used in the program for the purpose of tracking progress of a student. The ABA Classroom incorporated the use of the [REDACTED] daily data collection system.

Discrete Trial Training (DTT) was one of the ABA instructional strategies utilized as part of N.P.’s program. DTT can be implemented in either a one-on-one or group setting. [REDACTED] monitored the DTT provided to N.P. throughout the 2017-18 school year to ensure appropriate implementation of this instructional strategy. [REDACTED] testified that DTT was utilized in an appropriate manner and frequency with N.P. during the 2017-18 school year.

The 2017-18 ABA Classroom consisted of [REDACTED] students and three adult service providers. [REDACTED] testified that the student-to-staff ratio within the ABA program was appropriate. [REDACTED] further testified that N.P. did not exhibit a need for a one-to-one aide during the 2017-18 school year in order to progress within the ABA Classroom.

A repeat [REDACTED] assessment was administered in April 2018. According to [REDACTED] the results of the [REDACTED] indicated that N.P. made appropriate progress in light of his unique circumstances and characteristics. [REDACTED] testified that N.P. acquired skills across all domains, specifically within [REDACTED] visual performance and communication skill set.

█████ testified that N.P.'s program provides █████ with a functional and life skills-based program. The domain areas indicated on the █████ are in fact functional life skills individualized to be provided at a functional developmentally appropriate level. According to █████ N.P.'s 2017-2018 IEP addressed developmentally appropriate prerequisite functional and life skills designed to provide N.P. with the subsequent opportunity to pursue employment.

According to █████, N.P.'s assessments show that █████ acquired skills across all domains, specifically within █████ visual performance and communication skill set.

With regard to elopement, █████ testified that the goal was to reduce these episodes by 50%. Although elopement was not completely extinguished, █████ testified that N.P. met the goal of reducing the frequency of the incidents. According to █████, the episodes of elopement have been reduced to a manageable rate for the Child to gain access to skill acquisition program.

VI. ISSUES PRESENTED

ISSUE ONE: Whether Respondent failed to evaluate N.P. in all areas of suspected disability in a timely manner.

ISSUE TWO: Whether Respondent considered the parents an equal participant in the development and implementation of N.P.'s IEPs.

ISSUE THREE: Whether Respondent failed to develop and implement an IEP that (1) complies with the requirements of the IDEA and its implementing regulations; (2) addresses the individual needs of N.P.; and (3) is based upon professional practices as determined by peer reviewed research.

ISSUE FOUR: Whether Respondent failed to develop and implement a current behavior intervention plan developed by a board-certified behavior analyst based upon peer reviewed research and a functional behavior assessment.

VII. LEGAL CITATION AND DISCUSSION OF THE ISSUES

A. IDEA OVERVIEW

The Individuals with Disabilities Education Act (IDEA) was enacted to provide a free appropriate public education (FAPE) by public school systems to students with disabilities. 20 U.S.C 1400 *et. seq.* 20 U.S.C. § 1412(a)(1)(A). “The IDEA is a comprehensive educational scheme, conferring on disabled students a substantive right to public education and providing financial assistance to enable states to meet their educational needs.” *Hoelt ex rel. Hoelt v. Tuscon Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir.1992) (citing *Honig v. Doe*, 484 U.S. 305, 310, 108 S.Ct. 592, 597, 98 L.Ed.2d 686 (1988)). The IDEA ensures that “all children with disabilities have available to them a free appropriate public education 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. § 1400(d)(1)(A). The IDEA defines FAPE as: special education and related services that:

- have been provided at public expense, under public supervision and direction, and without charge;
- meet the standards of the State educational agency;
- include an appropriate preschool, elementary school, or secondary school education in the State involved; and

- are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9). To provide a FAPE in compliance with the IDEA, a state educational agency receiving federal funds must evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP. *See generally* 20 U.S.C. § 1414. The IEP is to be developed by an IEP team composed of, *inter alia*, school officials, parents, teachers and other persons knowledgeable about the child. 20 U.S.C. § 1414(d)(1)(B).

“Procedural flaws in the IEP process do not always amount to the denial of a FAPE.” *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009). Once a procedural violation of the IDEA is identified, the court “must determine whether that violation affected the substantive rights of the parent or child.” *Id.* “[P]rocedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE.” *Id.* An IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. *Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (stating that the IDEA does not provide for an education...designed according to the parent's desires).

Moreover, administrative Hearing Officers and reviewing courts are to provide great deference to the educators who developed the IEP. *Todd D. v. Andrews*, 933 F.2d 1576 (11th Cir. 1991). As the Supreme Court stated in *Rowley*, “we think that congressional emphasis upon full participation of concerned parties throughout the development of the

IEP ... demonstrated the legislative conviction that adequate compliance with procedures prescribed would in most cases assure much if not all of what Congress wished in a way of substantive contents in an IEP.” *Rowley*, 458 U.S. at 206.

Pursuant to the IDEA, a public-school district is required to provide a FAPE to a qualifying student by developing an IEP for the student that is tailored to his or her individual needs. 20 U.S.C. § 1414(d) (defining IEP as a "written statement for each child with a disability that is developed, reviewed, and revised" in accordance with Section 1414). The IEP includes, *inter alia*, a statement of the child's present levels of academic achievement and functional performance; a statement of measurable, annual goals, including academic and functional goals; and a statement of how the child's progress toward the annual goals will be measured. 20 U.S.C. § 1414(d)(1)(A)(i). The purpose of the IEP is to establish a plan for the academic and functional advancement of the child in light of that child's particular circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

In determining the educational placement of a child with a disability, each public agency must ensure that:

- The placement decision -- 1) Is made by a group of people, including the parents and other people knowledgeable about the child, the meaning of the evaluation data, and the placement options; and 2) Is made in conformity with the LRE provisions of this subpart, including 34 CFR 300.114 through 34 CFR 300.118;
- The child's placement -- 1) Is determined at least annually; 2) Is based on the child's IEP; and 3) Is as close as possible to the child's home;
- Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

- In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116.

Compliance with the IDEA does not require school districts to provide the “absolutely best” or “potential-maximizing” education. *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010). Rather, school districts are required to provide only a “basic floor of opportunity”. *Id.* quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982). The program provided to a student with a disability needs only be appropriately designed and implemented so as to convey the student with a meaningful benefit in light of the student’s individual circumstances. *Andrew F.*, 137 S. Ct. at 999. The Supreme Court, in the recent decision in *Andrew F.*, noted as follows regarding a tribunal’s subsequent review of the appropriateness of a student’s IEP:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. 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. (emphasis added, internal citations and quotations omitted). While the IDEA guarantees an education program that is reasonably calculated to enable the child to receive

educational benefits it does not “guarantee any particular level of education No law could do that -- for any child.” *Id.* at 998.

The Supreme Court in *Endrew F.* further made clear that the IDEA does not provide tribunals with an invitation to substitute their own notions of sound educational policy for those of the school authorities which they review. *Id.* at 1001. Moreover, the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. Accordingly, a court should avoid any “Monday Morning Quarterbacking” in evaluating the appropriateness of a child’s educational program. *Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3rd Cir. 1993). Under this “snapshot rule,” an IEP must be reviewed in terms of what was objectively reasonable at the time the IEP was developed. *Fuhrmann v. East Hanover Bd. of Ed.*, 993 F.2d 1031, 1040 (3d Cir. 1993); *D.J.D. by & through Driver v. Madison City Bd. of Educ.*, No. 5:17-CV-00096, 2018 WL 4283058, at *5 (N.D. Ala. Sept. 7, 2018).

It is well settled that a failure to make progress under an IEP does not indicate a denial of FAPE. *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995); *G.L. v. Saucon Valley School District*, 267 F. Supp. 3d 586, 612 (E.D. Pa. 2017) (citing *J.L. v. Mercer Island Sch. Dist.*, No. Co6-494MJP, 2010 U.S. Dist. LEXIS 110782, 2010 WL 3947373 (W.D. Wash. Oct. 6, 2010) (“To suggest that failure to attain IEP goals or objectives equals an IDEA violation is to set the bar on special education far too high.”)); *L.R. v. Manheim Township School District*, 540 F. Supp. 2d 603, 619-20 (E.D. Pa. 2008). Even though an IEP must be reasonably calculated to enable a child to make appropriate progress, it can be found to do so even if the child did not meet all of his IEP goals.

Brandywine Heights Area School District v. B.M., 248 F. Supp. 3d 618, 636 (E.D. Pa. 2017).

B. DISCUSSION OF THE ISSUES.

It is clear to this Hearing Officer that this █████ clearly loves this Child and is seeking the very best for this Child. It is also clear to this Hearing Officer that the █████ and the school personnel that testified in this matter have a good working relationship and respect for each other. It is evident to this Hearing Officer that all of the witnesses who testified in this case truly care for this very special █████.

ISSUE ONE

Petitioner's due process complaint alleges that the District's initial evaluation of N.P. was incomplete and untimely. However, Petitioner failed to prove this claim at the hearing. Respondent's Exhibit 5 reflects that N.P. was evaluated and found eligible for special education services for █████ as of August 28, 2015. At the hearing, Petitioner did not contend that N.P. should have been evaluated as having a disability in any suspected area other than █████. Nor did █████ contend that the District failed to evaluate N.P. for special education services in a timely manner. Petitioner did not prove any errors in the District's evaluation or its timeliness. And, notwithstanding the allegation in the due process complaint, Petitioner did not advance any alleged evaluation errors in █████ post-hearing brief. Therefore, the Hearing Officer finds that Petitioner has failed to meet █████ burden to demonstrate that the District's evaluation of N.P. was improper.

ISSUE TWO

Petitioner's due process complaint also alleges that the District "failed to consider

Petitioner an equal participant in the development and implementation of N.P.'s IEP.” However, as discussed below, the Hearing Officer finds that Petitioner has failed to meet ■ burden on this claim.

The IDEA recognizes the importance of parental participation in both the development of an IEP and any subsequent assessment of its effectiveness. *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). Accordingly, the IDEA establishes various procedural safeguards which guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education, and the right to seek review of decisions they believe are inappropriate. *Id.* As the United States Supreme Court has said:

These safeguards include the right to examine relevant records pertaining to the identification, evaluation, and educational placement of their child; prior written notice whenever the responsible educational agency proposes (or refuses) to change the child's placement or program; an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education; and an opportunity for an impartial "due process hearing."

Id. at 484 U.S. 311-312, citing 20 U.S.C. § 1415; *see also Christen G. v. Lower Merion School District*, 919 F. Supp. 793, 798 (E.D. Pa. 1996).

The IDEA permits a Hearing Officer to find that a child was denied FAPE only where procedural inadequacies “significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child.” 20 U.S.C. § 1415(f)(3)(E)(ii)(I). The parameters of this right are set forth in the regulations at 34 C.F.R. § 300.322, entitled “Parent Participation.” Specifically, a school district must: ensure that the parents are present at

the meeting by giving them proper notification and finding a mutually agreeable time and place; inform them in a notice of the purpose, time and place of the meeting, and of their right to participate; consider alternatives to physical presence of the parents, such as a phone conference, if necessary; hold a conference without a parent present only when efforts to obtain the parent's presence are well-documented; and provide the parent with a copy of the IEP at no charge.

“[A]lthough parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it.” *K.C. ex rel. Her Parents v. Nazareth Area School District*, 806 F. Supp.2d 806, 829 (E.D. Pa. 2011) (citing *Kasenia R. ex rel. M.R. v. Brookline School District*, 588 F. Supp. 2d 175 (D.N.H. 2008)). Parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *J.E. v. Boyertown Area Sch. Dist.*, 834 F. Supp. 2d 240, 246, citing *Rowley*, 458 U.S. at 199. *See also Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 885 (D. Minn. 2003) (“The fact that the Slamas were not allowed to choose every facet of their daughter's education was not, however, a denial of FAPE ... no parent of a public school child -- whether the child is disabled or not -- is entitled to select every component of the child's education”).

The Hearing Officer finds a lack of evidence in this matter establishing that the Petitioner at any time was not provided with an opportunity for meaningful input as to the IEP development for N.P. The evidence indicates that Petitioner generally attended and participated in the IEP team meetings for N.P. The evidence further reflects that the IEP team generally considered and attempted to address any of Petitioner's specific concerns.

During the hearing, Petitioner did not contend that the District failed to follow correct procedures, or that ■■■ was otherwise denied the opportunity to participate in IEP team decisions. The Hearing Officer finds that the parents were afforded the right to participate in IEP team decisions as required by the IDEA.

ISSUE THREE

Petitioner's due process complaint further alleges that the District failed to provide N.P. with a Free Appropriate Public Education (FAPE). Specifically, Petitioner contends that the District failed to develop and implement an IEP for N.P. based upon peer reviewed research that addressed N.P.'s individual needs.

A FAPE encompasses special education and support services provided to a disabled student free of charge. *See Id.* § 1401(9). A school system has met its FAPE obligation by providing a program that is "reasonably calculated" to deliver "educational benefits." *Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *Lt. T.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004).

As discussed above, ■■■ testified at length about the N.P.'s behavior program and its basis in research. Ultimately, ■■■ testified that N.P.'s program is reasonably calculated to allow ■■■ to make progress, which N.P. did. Petitioner did not call any expert witnesses, and did not present any evidence to rebut the testimony of ■■■. Therefore, the Hearing Officer finds that Petitioner has failed to meet ■■■ burden on this issue.

As to the issue of a one-on-one aide, the evidence at the hearing establishes that N.P.'s classroom is staffed with one teacher and two aides to serve ■■■ children. Petitioner provided no evidence that the classroom is understaffed. ■■■, and ■■■ both

testified that the classroom is adequately staffed to meet N.P.'s needs without a one-on-one aide. Moreover, [REDACTED] testified that N.P.'s elopement behavior is being addressed and reduced through [REDACTED] behavior intervention plan and that, in [REDACTED] opinion, a one-on-one aide is not necessary for N.P. to receive the benefits of [REDACTED] educational program. Based on the evidence, the Hearing Officer finds that Petitioner has not met [REDACTED] burden to demonstrate that FAPE requires provision of a one-on-one aide for N.P.

ISSUE FOUR

Finally, Petitioner alleges that the District failed to develop and implement an appropriate behavior intervention plan, developed by a board-certified behavior analyst based upon peer reviewed research and a functional behavior assessment. However, the District demonstrated that N.P.'s has a behavior intervention plan which was developed and monitored with the assistance of [REDACTED], a board-certified behavior analyst. [REDACTED] testified at length regarding the behavioral assessment of N.P., the basis of N.P.'s behavior plan, and its foundation in peer-reviewed research. Petitioner provided no expert witness and no evidence contradicting the testimony of [REDACTED] regarding the adequacy of the current plan. Based upon the evidence presented at the hearing, the Hearing Officer finds that the District has provided an appropriate behavior intervention plan for N.P.

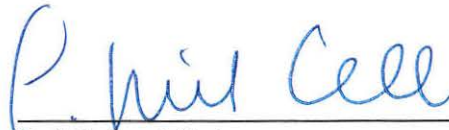
VIII. SPECIFIC RULINGS

1. Petitioner has failed to meet [REDACTED] burden of proof in this matter as to the issues presented in [REDACTED] due process complaint.
2. Petitioner's requests for relief in this matter are hereby DENIED.
3. Respondent is the prevailing party herein.

IX. NOTICE OF APPEAL RIGHTS

Any party dissatisfied with the decision may bring an appeal pursuant to 20 U.S.C. 1415(i)(c). The party dissatisfied with the decision must file a 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) calendar days of the filing of the notice of intent to file a civil action. *Ala. Admin. Code 290-8-9-.8(9)(c)16.*

DONE and ORDERED this the 27th day of December, 2018.



P. Michael Cole
Hearing Officer

X. CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Hearing Decision was duly served upon all parties of record by placing a copy of same in the United States mail, certified mail, postage prepaid, this 27th day of December, 2018 and addressed to the individuals named below:

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P. Michael Cole
Hearing Officer