

BEFORE THE DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA

CASE NUMBER 18-16

**S.B.
PETITIONER
v.
ALBERTVILLE CITY BOARD OF EDUCATION,
RESPONDENT.**

**FINAL ORDER
ISSUED
November 6, 2018**

**STUDENT: S. B.
PARENT : [REDACTED]
ATTORNEY:
Honorable James Sears
Attorney at Law**

[REDACTED]
[REDACTED]
[REDACTED]

**LOCAL EDUCATION AGENCY : Albertville City Board of Education
ATTORNEY:
Honorable Rodney C. Lewis
Attorney at Law**

[REDACTED]
[REDACTED]
[REDACTED]

HEARING OFFICER: Gwendolyn Kennedy Green

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 6. Providing special education services that did not provide even a de minimis benefit.
- c. Failing to train a para-educator to behavioral and educational integrity.
 - d. Failing to consider Petitioner an equal participant in the development and implementation of S.B.'s IEP.
 - e. 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.

A response to Petitioner's complaint was filed by the Albertville City School District (Respondent) on January 29, 2018, through its Counsel the Honorable Rodney Lewis, which denied the allegations contained in the complaint.

Thereafter, pursuant to a letter dated January 19, 2018, issued by the State Superintendent of Education, the undersigned was asked to serve as the impartial Hearing Officer in this proceeding. After the resolution meeting, the parties requested that the matter be continued to pursue Settlement options. An Order of Continuance was issued, to allow the parties to mediate this matter. Subsequently, counsel for the Petitioner notified the undersigned that the mediation efforts had been unsuccessful.

As the parties had attempted to settle this matter by their joint efforts and through Mediation, to no avail, this matter was set for Due Process hearing on September 11, 2018. This was a two (2) day hearing.

On September 11, 2018, a Due Process Hearing was conducted in Albertville, Alabama. The Parent appeared, represented by [REDACTED] attorney, the Honorable James Sears, and the School Board appeared, represented by the Honorable Rodney Lewis.

Prior to the commencement of this Hearing, general instructions were made on the record by the Hearing Officer and it was determined that the Hearing Officer and the Respondent has complied with all aspects of procedural safeguards necessary to have a fair due process hearing. Petitioner had been advised that ■ had a right to have the Hearing Open or Closed and the presence of the child, S.B. was waived. At the conclusion of the first day of the hearing, it was determined that an additional Hearing date was needed to complete the Hearing, and an additional date was set. On September 17, 2018, the Hearing was reconvened and concluded.

At the conclusion of the Hearing, the parties indicated their desire to submit written closing arguments and post trial briefs. As both parties indicated that time was needed to prepare and file same, the time was enlarged. Both parties submitted briefs and final arguments by October 28, 2018. This Final Order follows.

II. EXHIBITS ADMITTED INTO EVIDENCE

At the Hearing, exhibits were submitted by the parties and accepted into evidence by this Hearing Officer. These Exhibits have been examined by the undersigned, subject to the issues heard at the Due Process Hearing and in light of the testimony presented at said hearing. The 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.

The undersigned Hearing Officer placed no weight on any particular fact based upon its offering by either party, and it is understood that all of the appropriate documents were produced for equal consideration by the undersigned. Decisions were made as to the admission of each document based upon each individual objection or non-objection to same. The documents were

examined and weight given to each based upon the content of the document submitted, irrespective of the party who introduced it.

The Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of rendering a decision in this matter. The parties each introduced one binder containing exhibits as follows:

A. Petitioner's Exhibits

1. **Due Process Complaint**
2. **Notice and Eligibility Decision Re: Special Ed. Services ([REDACTED])**
3. **Notice of Proposal or Refusal to Take Action ([REDACTED])**
4. **Notice of Proposal or Refusal to Take Action ([REDACTED])**
5. **Notice of Proposal or Refusal to Take Action ([REDACTED])**
6. **Notice of Proposal or Refusal to Take Action ([REDACTED])**
7. **Notice of Proposal or Refusal to Take Action ([REDACTED])**
8. **Notice of Proposal or Refusal to Take Action ([REDACTED])**
9. **Notice of Proposal or Refusal to Take Action ([REDACTED])**
10. **Notice of Proposal or Refusal to Take Action ([REDACTED])**
11. **2015 – 2016 IEP ([REDACTED])**
12. **2015 – 2016 Annual Goal Progress Reports ([REDACTED])**
13. **2016 – 2017 IEP ([REDACTED])**
14. **2016 - 2017 Annual Goal Progress Reports ([REDACTED])**
15. **2017 – 2018 IEP ([REDACTED])**
16. **Summary of Evaluation ([REDACTED])**
17. **Correspondence from Director of [REDACTED] (admitted over Respondent's objection)**

B. Respondent's Exhibits

1. **Complaint of Petitioner ([REDACTED])**
2. **Response of Respondent**
3. **Respondent's Witness and Exhibit List**
4. **Early Intervention Transition Meeting ([REDACTED])**
5. **IDEA Referral ([REDACTED])**
6. **Notice and Consent for Initial Evaluation ([REDACTED])**
7. **Notice and Eligibility Decision Re. Special Ed. Services ([REDACTED])**
8. **Notice/Consent for Provision of Special Ed. Services ([REDACTED])**
9. **Executed Notice/Consent for Provision of Special Ed. Services ([REDACTED])**
10. **2015-2016 IEP ([REDACTED])**
11. **Amended 2015-2016 IEP ([REDACTED])**
12. **Notice of Proposal or Refusal to Take Action ([REDACTED])**
13. **2016-2017 IEP ([REDACTED])**

14. Conference Record of [REDACTED]
15. Notice of Proposal or Refusal to Take Action ([REDACTED])
16. Amended 2016-2017 IEP ([REDACTED])
17. OMITTED BY RESPONDENT
18. Functional Behavior Assessment and Behavior Intervention Plan ([REDACTED])
19. OMITTED BY RESPONDENT
20. Conference Record of [REDACTED]
21. Notice of Proposal or Refusal to Take Action ([REDACTED])
22. Amended 2016-2017 IEP ([REDACTED])
23. Conference Record of [REDACTED]
24. Notice of Proposal or Refusal to Take Action ([REDACTED])
25. Amended 2016-2017 IEP ([REDACTED])
26. Conference Record of [REDACTED]
27. 2017-2018 IEP ([REDACTED])
28. Conference Record of [REDACTED]
29. Notice of Proposal or Refusal to Take Action ([REDACTED])
30. Amended 2017-2018 IEP ([REDACTED])
31. Conference Record of [REDACTED]
32. Notice of Proposal or Refusal to Take Action ([REDACTED])
33. Notice of Proposal or Refusal to Take Action ([REDACTED])
34. Notice of Proposal or Refusal to Take Action ([REDACTED])
35. Notice of Proposal or Refusal to Take Action ([REDACTED])
36. 2018-2019 IEP ([REDACTED])
37. Notice of Proposal or Refusal to Take Action ([REDACTED])
38. Notice of Proposal or Refusal to Take Action ([REDACTED])
39. 2016-2017 Pre-School Gold Progress Report
40. Classroom Schedule
41. 2017-2018 Annual Goal Progress Reports

III. WITNESSES

Each party was permitted to offer testimony by way of witnesses sworn under oath. The testimony from these witnesses was examined, evaluated, and the appropriate weight has been given based upon credibility, subject to the issues heard. The testimony has been duly recorded and transcripts have been delivered to the State Department of Education. The Hearing Officer placed no weight upon whether any particular testimony was offered by either party, since the purpose of the presentation of witnesses was to provide all of the appropriate and admissible testimony for consideration by this Hearing Officer.

The witnesses at hearing were as follows:

1. [REDACTED], Parent of S.B.
2. [REDACTED], Representative for Respondent.

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 (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

Below is a summary of the pertinent evidence presented to the Hearing Officer in this matter. These facts are not the only facts considered by the undersigned in making this decision. The Hearing Officer has heard all of the testimony and has reviewed the exhibits submitted, as well as all post hearing briefs and submissions.

The Petitioner, through his witnesses and evidence presented the following:

A. The Student, Generally:

As a result of an illness that [REDACTED] mother had during her pregnancy, S.B. had some [REDACTED] after [REDACTED] birth. At about [REDACTED] months of age, [REDACTED] contracted [REDACTED]. The [REDACTED] caused [REDACTED] to [REDACTED] which ultimately resulted in a [REDACTED]. According to [REDACTED], [REDACTED] is moderate to profound. At age [REDACTED] months, [REDACTED] was diagnosed with [REDACTED] by [REDACTED] and [REDACTED] began intervention at a [REDACTED] Alabama facility.

Currently, S.B. is [REDACTED] years old, ([REDACTED] was [REDACTED] years old at the time most pertinent to this matter). [REDACTED] has [REDACTED] as well as a [REDACTED]. [REDACTED] also has [REDACTED].

Even the slightest [REDACTED]
[REDACTED] which is life threatening for [REDACTED]. [REDACTED] is described as “[REDACTED]
[REDACTED]”.

B. Pre School 2014-2015

S.B. attended [REDACTED] and [REDACTED] and, according to evaluations accessed by review of the Verbal Behavioral Milestones Assessment Placement Program (VB MAPP), was assigned to a Board Certified Behavioral Analyst (BCBA). This BCBA worked with S.B. and [REDACTED] was functioning at a successful level of improvement, with sufficient mastering of basic skills.

C. 2015-2016 School year

During the 2015-2016 school year, S.B was evaluated by the Albertville City Schools, but was too young to enter the preschool program. In 2016-2017, the BCBA in Albertville, unfortunately had [REDACTED] and [REDACTED] services had to be substituted. According to S.B.'s [REDACTED], the replaced services were not workable for S.B. and [REDACTED] regressed to engage in patterns of certain vocal and repetitive behaviors such as [REDACTED]
[REDACTED].

In 2016, during the IEP for the 2017-2018 school term, the [REDACTED] requested that the child, S.B. be retained in Kindergarten because of [REDACTED] functioning levels, [REDACTED], etc. [REDACTED] felt that, based upon [REDACTED] VB MAPP assessments, it was not reasonable to promote [REDACTED], and [REDACTED] would fare better if [REDACTED] was not moved ahead to Kindergarten. The School Board disagreed with [REDACTED] and promoted S.B to Kindergarten. After the decision to promote S.B. to K for the 2017-2018 school year, the [REDACTED] decided to enroll S.B. in a private [REDACTED] S.B.'s [REDACTED]

testified that the school system in Albertville lacked the consistent resources necessary to provide FAPE to S.B. Specifically, S.B. needed, and continues to need Speech Therapy, Occupational Therapy, Physical therapy, a skill acquisition program, health assistance due to [REDACTED], and an adequately trained one on one person

D. 2017-2018 School year Private Placement

[REDACTED] testified that [REDACTED] placed [REDACTED] in private school at [REDACTED], where [REDACTED] paid for private school tuition. [REDACTED] testified further that the tuition that [REDACTED] paid allowed [REDACTED] to receive, a speech pathologist, an individualized program created for [REDACTED], and it controlled [REDACTED] environment to keep [REDACTED] safe amid [REDACTED]. [REDACTED] out of pocket tuition costs was \$28,000.00, according to [REDACTED] testimony. [REDACTED] stated that [REDACTED] also paid to train personnel to care for [REDACTED]. It is for the cost of tuition and other services that [REDACTED] seeks reimbursement.

Summation of Petitioner's Argument

The Petitioner's [REDACTED] had the ultimate responsibility for ensuring [REDACTED] safety and well-being. In this case, [REDACTED] responsibility was heightened due to [REDACTED] disabilities ([REDACTED]). The Respondent's failure to provide appropriate accommodations left the parent with no other choice than to seek a placement without the school system. When a parent believes that a public educational placement is denying her child FAPE, the parent may choose to remove the child to a private placement. When warranted the parent is due reimbursement.

The Petitioner specifically averred in the Complaint that the Respondent denied the child FAPE by the following actions/inactions:

- a. Failing to evaluate S.B. in a timely manner.

- b. Failing to develop and implement an IEP consistent with the requirements of the IDEA by:
 - 1. Limiting S.B.'s special education services without an education or behavioral basis.
 - 2. Not including specific and meaningful behavior strategies in S.B.'s IEP.
 - 3. Not addressing S.B.'s [REDACTED]
 - 4. Calculating S.B.'s nap time as behavioral training.
 - 5. Reducing S.B.'s [REDACTED] services without cause.
 - 6. Providing special education services that did not provide even a de minimis benefit.
- c. Failing to train a para-educator to behavioral and educational integrity.
- d. Failing to consider Petitioner an equal participant in the development and implementation of S.B.'s IEP.
- e. 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.

The Respondent, through its witnesses and evidence presented the following:

A. 2015-2016 School Year

On [REDACTED] The IEP team found S.B. IDEA eligible under an eligibility classification of [REDACTED]. During the 2015-2016 school year, S.B. received direct special education and related services as designated by [REDACTED] 2015-2016 IEP in a one-on-one setting. S.B. did not attend at the District's pre-school program during the 2015-2016 school as [REDACTED] was not yet age four which is the age criteria requirement for attendance at the pre-school program. Further its witness testified that S.B.'s teachers and service providers for the 2015-2016 school year participated in a forty-hour Applied Behavior Analysis (ABA) training program provided by a Board-Certified Behavior Analyst (BCBA). S.B. was provided BCBA services from the District during the 2015-2016 school year.

B. 2016-2017 School Year

\ The Board's witness testified and the records introduced as evidence show that On [REDACTED] [REDACTED] an IEP team meeting was held to develop S.B.'s 2016-2017 annual IEP. Petitioner attended this meeting, along with S.B.'s special education teacher, general education teacher, school principal, speech-pathologist, and a local education agency representative. The BCBA also attended this IEP meeting to provide input as to the development of S.B.'s 2016-2017 IEP. A health care plan was also developed at the IEP meeting to address S.B.'s [REDACTED]

The Board's testimony further stated that its position is that the 2017 IEP team determined the appropriate and least restrictive environment for the implementation of S.B.'s 2017-2018 IEP was for [REDACTED] to attend Kindergarten for the 2017-2018 school year. Petitioner expressed concerns at this meeting in regard to [REDACTED] desire that S.B. attend school in a kindergarten classroom for the 2017-2018 school year. In determining the location of S.B.'s 2017-2018 program, the IEP team reviewed the supports and services to be provided by S.B.', the proposed 2017-2018 IEP as well as current school data as to S.B.'s functional levels across all areas to include academic, behavior, and socialization. S.B.'s pre-school classroom teacher, special education teacher, and speech language pathologist, all opined at this meeting that S.B.'s attendance in a kindergarten classroom for the 2017-2018 school year was the appropriate placement for S.B.

Summation of Respondent's Argument

The School Board took every action necessary and appropriate to provide the student with a Free and Appropriate Public Education (FAPE) by providing every service mandated by law. Therefore the parents' choice to enroll the child in a private school was their own choice

and not necessitated by any action or inaction on the Respondent's part, and therefore, no reimbursement for said cost of enrollment is warranted.

VI. ISSUES PRESENTED

The overall issue presented is whether the Respondent, Albertville City Board of Education denied the Petitioner a free, appropriate, public education (FAPE), and if so, the extent to which, if at all, the Respondent should reimburse the Petitioner's parent for the cost of tuition reimbursement. In determining this issue several smaller issues must be addressed:

ISSUE ONE – Whether S.B.'s initial [REDACTED] idea eligibility evaluation complied with all procedural and substantive requirements of the IDEA.

- a. Failing to evaluate S.B. in a timely manner.

ISSUE TWO – Whether S.B.'s 2016-2017 IEP was developed or implemented inconsistent with the requirements of the IDEA.

- b. Failing to develop and implement an IEP consistent with the requirements of the IDEA by:
 1. Limiting S.B.'s special education services without an education or behavioral basis.
 2. Not including specific and meaningful behavior strategies in S.B.'s IEP.
 3. Not addressing S.B.'s [REDACTED]
 4. Calculating S.B.'s nap time as behavioral training.
 5. Reducing S.B.'s [REDACTED] services without cause.
 6. Providing special education services that did not provide even a de minimis benefit.
- c. Failing to train a para-educator to behavioral and educational integrity.
- d. Failing to consider Petitioner an equal participant in the development and implementation of S.B.'s IEP.
- e. 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.

VII. DISCUSSION OF THE ISSUES

A. IDEA - General Statutory Scheme

The Individuals with Disabilities Education Act (IDEA or Act) 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." *Hoefl ex rel. Hoefl 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.

Pursuant to 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. § 1414(d)(1)(B).

"

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).

B. Reimbursement for Private School Placement

Sec. 300.148 of the IDEA: Placement of children by parents when FAPE is at issue states, in pertinent part:

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§300.131 through 300.144.

(b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§300.504 through 300.520.

(c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a

public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement—

(1) Must not be reduced or denied for failure to provide the notice if—

(i) The school prevented the parents from providing the notice;

(ii) The parents had not received notice, pursuant to §300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if—

(i) The parents are not literate or cannot write in English; or

(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.

It is well settled under the IDEA that parents who unilaterally enroll their disabled child in a private school without the consent of local school officials do so "at their own financial risk". *Carter*, 510 U.S., at 15 (quoting *Burlington*, 471 U.S., at 373-374). Moreover, the Supreme Court has made clear that tuition reimbursement for a parent's unilateral private school placement of his or her disabled child is not the normal means of obtaining a FAPE under the IDEA. *Carter*, 510 U.S., at 15 (Congress intended that the IDEA's promise of a 'free appropriate public education' for disabled children would normally be met by an IEP's provisions for education in the regular public school or in private schools chosen jointly by school officials and parents."). *Id.* at 12. The IDEA views private school placement as a last resort. *W.S. v. Rye City Sch. Dist.*, 454 F.Supp.2d 134, 148 (S.D.N.Y. 2006)

The IDEA and interpretive case law provides a three-prong test for determining whether a public-school district can be held financially liable for a private school placement unilaterally selected by a parent of a disabled student. This three-prong test requires a parent to establish the following:

1. the educational program recommended by the school district was inadequate or inappropriate;
2. the program selected by the parents is appropriate; and
3. the equitable considerations warrant reimbursement to the parent for the unilateral placement.

Forest Grove School Dist. v. T.A. 557 U.S. 230 (2009); *Florence County Sch. Dist. Four v. Carter*, 510 US 7 (1993); *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359 (1985); 20 U.S.C. 1412(a)(10)(C)(iii)(III).

In short, the Petitioner's [REDACTED] must show that the Respondent's inaction in providing appropriate accommodations left [REDACTED] with no other choice than to seek a placement outside of the school system to meet S.B's needs. Further, [REDACTED] must prove that, [REDACTED] discussions cooperative participations with school personnel, [REDACTED] was unable to produce a satisfactory alternative to the "promotion to kindergarten or to achieve FAPE for the Petitioner." Then [REDACTED] must show that [REDACTED] provided the Respondent notice of [REDACTED] intent to place [REDACTED] in a private setting which provided what the public school did not..

1. WAS S.B. DENIED FAPE UNDER [REDACTED] CIRCUMSTANCES?

A. Procedurally - The evidence in the record supports the Respondent's position that the Respondent made a timely evaluation of the needs of SB during the 2015-2016 school year. Further, there was no evidence presented to show that the Petitioner had not been allowed to be

an equal participant in the process regarding S.B., although same was alleged in the Complaint. The mere allegation is not enough.

B. Substantively - The substantive allegations will be discussed in concert, as they were alleged in the Petitioner's Complaint. to wit, (a) failure to develop and implement an IEP consistent with the requirements of the IDEA by limiting S.B.'s special education services without an education or behavioral basis, not including specific and meaningful behavior strategies in S.B.'s IEP; (b) not addressing S.B.'s [REDACTED] (c) calculating S.B.'s nap time as behavioral training; reducing S.B.'s [REDACTED] services without cause; (d) providing special education services that did not provide even a de minimis benefit; failing to train a para-educator to behavioral and educational integrity; (e) 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.

In *Endrew F.*, 137 S. Ct. at 999, *The Court* noted as follows regarding a tribunal's subsequent review of the appropriateness of a student's IEP:

[t]o 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." *Id.* at 999. 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 in light of the child's circumstances.*

The record revealed, based upon a review of the IEP's and the collective testimony of the parties' witnesses, that there were substantive short comings in the provision of services to SB which will be discussed herein.

Specifically, Petitioner's [REDACTED] requested in the IEP in May of 2017, that the Petitioner be allowed to remain in the preschool setting for an additional year. Petitioner had completed public preschool. The Respondent personnel insisted that S.B. be promoted to the kindergarten class. In the Kindergarten setting, Petitioner would be with a larger number of students and in a class with a greater student-to-teacher ratio. The Respondent discussed that it could not ensure the Petitioner's parent that Petitioner would have an adult assigned to Petitioner on a one-to-one basis. The evidence from the appropriate assessments indicates that S.B. was on a Level 2 or had the equivalent development of a 2 ½ year old child, yet the IEP team insisted on promoting him to Kindergarten.

Further, the Petitioner's [REDACTED] testified that S.B. needed to be retained in the preschool program for an additional year because of [REDACTED] physical size, in addition to the other issues [REDACTED] also testified that [REDACTED] did not believe that the arrangement in kindergarten would provide the intense supervision that was necessary to prevent Petitioner from interacting with [REDACTED]

[REDACTED] In particular, the Petitioner's [REDACTED] testified that even exposure to [REDACTED], or Petitioner accepting [REDACTED]. Even the [REDACTED] on the Petitioner by [REDACTED].

2.. WAS THE UNILATERAL PLACEMENT APPROPRIATE?

Having found that the child was denied FAPE, we must consider the appropriateness of the parent's private school placement. When a parent believes that a public educational placement is denying ■■■ child FAPE, the parent may choose to remove the child to a private placement. *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 18 IDELR 1019 (9th Cir. 1992). However, a showing of how the unilaterally selected program and services meets the child's needs is paramount to the parents' case. It is imperative that the parents demonstrate how the placement they selected overcomes IEP deficiencies, especially where the parent has attacked the IEP on substantive FAPE grounds.

The Petitioner's parent herein provided testimony that the alternative placement in a private school would be able to provide the one-on-one supervision that was necessary to ensure the child's safety. ■■■ testified that SB needed a controlled environment to protect ■■■ due to ■■■ ■■■ also needed, according to ■■■ testimony, assistance with ■■■ as well as ■■■ Math, Language, and communication deficits.

Further, ■■■ stated that there was no program proffered by the IEP team to address the needs agreed upon, not to mention the team's decision to promote ■■■ to the Kindergarten setting with even less assistance. The ■■■ testified that ■■■, as the alternative placement, provide the one-on-one supervision that was necessary to ensure the child's safety, a controlled environment, a speech pathologist, and an ABA Program tailored for S.B. All of the provisions of the private placement afforded S.B. an appropriate education under the circumstances, where the public placement had failed.

3 IS THE PARENT DUE REIMBURSEMENT?

Generally, if the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enrolls the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment, if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. 34 C.F.R. § 300.148(b). *Florence County Sch. Dist. 4 v. Carter*, 20 IDELR 532 (U.S. 1993). *See also Burlington School Committee v. Massachusetts Department of Education*, 556 IDELR 389 (1985).

In the instant matter, the Petitioner's [REDACTED] had the ultimate responsibility for ensuring [REDACTED] safety and well-being. In this case, [REDACTED] responsibility was heightened due to [REDACTED] disabilities ([REDACTED]) and serious, life threatening [REDACTED].

To gain reimbursement, the Parent MUST show three things:

1. That the school district failed to offer the child an appropriate IEP (that is, a FAPE) in a timely fashion;
2. That the private school that the parent enrolled the child in is appropriate to meet the child's needs under IDEA; and
3. That providing tuition reimbursement to said parent would be equitable and fair under the circumstances.

The last inquiry becomes, whether, under the circumstances, it would be equitable to reimburse this parent for Petitioner's placement in [REDACTED]. Based upon the record

herein, I am of the opinion that it is equitable to reimburse the parent at a reduced rate for the following reasons.

At the time the issue became ripe, S.B. was a “young” [REDACTED]-year-old who was [REDACTED] than [REDACTED] peers, and developmentally functioning at [REDACTED]. [REDACTED] is also [REDACTED], as well as [REDACTED]. It is undisputed that Petitioner has [REDACTED].

During the IEP discussion of the 2017-2018 placement for the child, the Parent testified that [REDACTED] discussed with the School Board [REDACTED] concerns about the child and presented evidence to show that [REDACTED] would not be safe in a Kindergarten environment. [REDACTED] further testified that the child was [REDACTED] and could not be in the Kindergarten safely. [REDACTED] presented the IEP records which themselves indicated that the child was not mastering skills at a level that would justify [REDACTED] movement up to Kindergarten. Yet, [REDACTED] assertions were ignored and [REDACTED] was promoted. The parent also stated that with S.B.’s [REDACTED] and [REDACTED], [REDACTED] could die if not protected by a one on one adult aide.

Out of concern for [REDACTED] child, academically and physically, [REDACTED] placed him in a private tuition based setting for which [REDACTED] incurred great cost, and for which [REDACTED] desires reimbursement.

There was evidence presented, via testimony, that the costs of the tuition was \$28,000 for the school year. There was also testimony that additional costs were incurred for the training of an individual or individuals. However, there was no evidence to clarify what amounts, and/or to whom the funds were paid, or for what specific, additional services they were paid. This clarification is a burden that the Petitioner must bear. However, it may be reasonably inferred from the record that a portion of the total tuition cost was for the controlled environment and the safety provision for S.B.’s well fare that the private school placement provided. Therefore, at least a

portion of this cost should be reimbursed to the Petitioner. This partial reimbursement is an equitable remedy reflective of the Respondent's efforts to assist this child. The record is replete with indications through IEPs and other documents that efforts were being made, although it resulted in an ultimate denial of FAPE. Likewise, the Petitioner worked cooperatively, and tirelessly to assist [REDACTED] within the parameters of the available services provided by the Respondent. However, the law is clear as to the burden of proof that the Petitioner bears to proffer evidence as to what specific services were denied by the public institution and provided by the private placement and the costs for same, to gain reimbursement for tuition. This allocation was not made clear on the record.

Therefore, reimbursement is awarded to the Petitioner, for one half of the costs of the private school tuition incurred. This amount allows for the overlap in academic services outlined in the Respondent's IEP, and for which Petitioner presented no evidence.

In light of the foregoing, it is hereby Ordered Adjudged and Decreed as follows:

VIII. SPECIFIC RULINGS

- 1. That Respondent failed to provide this Child with a free and appropriate public education (FAPE), based upon [REDACTED] circumstances, as required by federal and state law;**
- 2. That Petitioner's request for relief in this matter is Granted in part. Specifically, the Petitioner is Granted reimbursement for one half of the cost of tuition, upon submission of proof of same to the Respondent; and**
- 3. That Petitioner's request for reimbursement of any other costs beyond the costs of one half of tuition, only, is Denied as the Petitioner did not present evidence in the record to indicate proof of payment for additional services rendered and/or that the costs for said additional services provided by the private placement were the services denied to the Petitioner by the Respondent.**

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 6th day of November 2018



Gwendolyn Kennedy Green
Hearing Officer

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Final Order was served upon the parent of the Petitioner, through [REDACTED] attorney, the Honorable James Sears, upon the Albertville City Board of Education, through its attorney, Honorable Rodney C. Lewis, and upon the State of Alabama Department of Education, through, the Honorable DaLee Chambers, J.D., PhD, along with the Exhibits, in compliance with applicable law by placing same in the United States mail, postage prepaid, properly addressed, on this the 6th day of November, 2018. The Parties and the State Department of Education were also served through their attorneys of record via electronic service on November 6, 2018, to the email addresses indicated.

Student's Attorney:

Honorable James Sears

Attorney at Law

[REDACTED]
[REDACTED]
[REDACTED]


Albertville City Board of Education's Attorney:

Honorable Rodney C. Lewis

Attorney at Law

[REDACTED]
[REDACTED]
[REDACTED]

ALSDE's Representative:
Dr. DaLee Chambers
ALSDE/Special Education Services
P.O. Box 302101
Montgomery, Alabama 36130-2101
Via U.S. Mail and Email to: daleec@alsde.edu



Gwendolyn Kennedy Green
Hearing Officer