BEFORE THE STATE DEPARTMENT OF EDUCATION
OF THE STATE OF ALABAMA

C. W.,	)	
	)	
PETITIONER,	)	
	)	
vs.	)	
	)	**Special Education Case No: 18-39**
OPELIKA CITY BOARD OF EDUCATION,	)	
	)	
	)	
RESPONDENT.	)	

DUE PROCESS DECISION

I. PROCEDURAL HISTORY

A due process hearing was held as a result of a request by the attorneys for Petitioner. The hearing request was filed on April 4, 2018. (Hearing Officer Exhibit 1)(hereinafter referred to as HO ____).

The due process hearing request maintained that the child had been denied educational services in his least restrictive environment (LRE). The principal of least restrictive environment, or mainstreaming, provides that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled. 20 U.S.C. § 1412(a)(5). In this instance, the allegation of a denial of least restrictive environment concerned non-academic or extracurricular activities (i.e. the Petitioner's physical education class). The mainstreaming requirement applies to such activities. 34 C.F.R. § 300.117; Daniel R.R. v. State Bd. of Educ., 874 F.2d. 1036 (5th Cir. 1989).

Counsel for the parties filed a number of objections to various exhibits (including videos) as well as objections about actions taken by the school system with respect to the Petitioner's [redacted] behavior **after** the due process hearing request was filed. (HO 3;

HO 8; HO 9).

Counsel for the parties complied with the Hearing Officer's Due Process Hearing Order and Directives dated May 1, 2018. (HO 4; HO 5; HO 6; HO 7).

II.
STATEMENT OF ISSUES

The issue in this case revolved around the contention that the removal of the child from [redacted] physical education class violated the mainstreaming mandate of the IDEA. Petitioner's Individualized Education Plan (IEP) stated that the student (Petitioner) did not require specially designed P.E. (Petitioner's Exhibit 3) (hereinafter P. ____). The 2017-2018 IEP dated [redacted] 2017, provided that "[Petitioner] will attend P.E. with a general education class and a special education aide". Id. (In his academic subjects, the IEP designated the Petitioner's least restrictive environment as entailing less than forty percent (40%) of the day inside a general education environment).

The second alleged violation of the least restrictive environment was the fact that after the child was placed in a physical education class with [redacted] other children with disabilities, a [redacted] was placed across the room. (Respondent [Board Exhibit 12 and 13] hereinafter Bd. _____). The [redacted] was approximately 2-3 feet above the floor of the P.E. classroom. It was attached to opposing walls. It was asserted by counsel for the child that the [redacted] inappropriately segregated or separated the child from the other [redacted] children.

III.
FINDING OF FACTS

The Petitioner is [redacted] years old. [redacted] was born in [redacted] [redacted] has been designated for Special Education Services under the title of [redacted]

[redacted]

The child attends a [redacted] school operated by the Local Education Agency (LEA). It is a [redacted]. For the 2017-2018 school year, Petitioner attended the [redacted] grade. During that period, [redacted] was in a [redacted] class taught by a qualified Special Education teacher.

The Petitioner was described as being [redacted] and [redacted]. Throughout the period [redacted] has attended the primary school [redacted] has engaged in varying degrees of [redacted] behavior toward [redacted] classmates. [redacted] has also eloped from [redacted] class and from the campus. As a consequence, [redacted] is assigned a [redacted]

Although the Petitioner has engaged in [redacted] behaviors, [redacted] was generally described as not being as problematic when [redacted] receives significant adult attention. According to a behavior analyst who observed [redacted] in [redacted] 2017, adult attention is an extremely powerful reinforcement for the child. The child's craving for adult attention sometimes causes [redacted] to engage in [redacted] or inappropriate conduct to obtain that attention, even if the attention is negative, i.e. verbal correction or timeouts. The child presently has a behavior intervention plan. (Bd. 4).

Based on the evidence, neither the parents nor the parents' attorneys expressed concern as to the propriety or efficiency of the behavior plan.

The dispute in this case arose when Petitioner's [redacted] observed the [redacted] in the physical education class occupied by the special education students. A substitute teacher at the school told [redacted] that the [redacted] was inappropriate. The father became upset. Mr. [redacted] engaged lawyers to represent his [redacted]

It was undisputed that the [redacted] was a strategy developed by the physical

education teacher for the [redacted] school. The teacher explained that she placed the [redacted] across the room because several of the students in the special education physical education class suffered from [redacted] These children tended to wonder into the area where the Petitioner typically played one on one with [redacted] adult aide. Occasionally the Petitioner would [redacted] those students.

As a consequence, the P.E. teacher related that she envisioned the [redacted] as a strategy to teach Petitioner's fellow students that they should not invade the space of others. The [redacted] was stated to be a means to maintain classroom order and safety.

When the principal of the [redacted] school first observed the [redacted], he was concerned. The principal instructed the P.E. teacher to remove the [redacted]. The principal told her to attempt other strategies. However, at some point the [redacted] was put back up. It was still being used in [redacted] 2018 when the Petitioner's father observed it.

Both the principal and P.E. teacher testified that the Petitioner could cross under the [redacted] to play with toys or use items on the side of the room that [redacted] did not occupy (i.e. trampoline, etc.). Despite that ability, the P.E. teacher said that Petitioner seldom ventured across the room. [redacted] chose to stay on [redacted] side playing with [redacted] aide. She surmised that that tendency was primarily because the [redacted] likes the one on one attention.

It was undisputed that the parents of the child were not advised of the use of the [redacted] prior to its observation by Mr. [redacted]

More problematic for this dispute was the evidence that prior to the [redacted] special education students being placed in the self-contained physical education class, all participated in a physical education class with non-disabled children. With respect to Petitioner, that participation was specified in [redacted] 2017-2018 IEP. (Bd. 2)

Despite that fact, at some point in the fall of 2017-2018 school year, a decision was made by the P.E teacher and administration staff to remove the [redacted] disabled children [redacted] to a self-contained physical education classroom. (A self-contained class does not have any non-disabled students). There appeared to be no documentation of that event and/or the basis for that decision. Nor were Petitioner's parents told that their [redacted] had ceased to attend a physical education class with non-disabled students.

It was explained by the P.E. teacher and the principal of the primary school that the children on the [redacted] in the general P.E. class were either being overly stimulated or agitated (and, in some instances, teased by the non-disabled students) or the activities in the class caused them to simply withdraw and refuse to participate in any activities. For that reason, the teacher and principal decided to change the physical education period for [redacted] of the disabled children. Their P.E. class was conducted after [redacted]. The children engaged in P.E. in the self-contained class which included the same items and toys used by the general education students during another period. That is, the classroom was the same room for both groups.

It was undisputed that a notice of intent concerning this proposed (and implemented) change was not sent to the parents of the Petitioner. 34 C.F.R. § 300.503(a)(1) (written notice must be given to parents of a child with a disability when a school system proposes a change in the child's program or refuses to initiate a change in the child's program). Further, Petitioner's IEP was not amended to reflect the change. In fact, an IEP meeting was neither proposed nor conducted.

As the special education director testified, that circumstance was a "procedural

error" by the special education teacher. The director agreed that the removal of Petitioner from general education P.E. should not have occurred without an amendment to [redacted] IEP. The special education director recognized that Petitioner's IEP was not followed with respect to the youngster's removal from the general education P.E. class. However, the director maintained that the removal of the Petitioner from the general education P.E. to a self-contained physical education class attended only by disabled children was not a "change in placement." Thus, she did not believe it violated Petitioner's right to be served in his least restrictive environment.

All witnesses who testified agreed that Petitioner did not need specially designed instruction in his P.E. class. 34 C.F.R. § 300.39(b)(3) (defining specially designed instruction)

V.
DISCUSSION OF ISSUES

Ala. Admin. Code 290-8-9-.07(2) states that: "[c]hildren with disabilities must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless the child is enrolled full-time in a separate facility or needs specially designed physical education as determined by the IEP Team". It is undisputed those two conditions did not exist. There was no consideration about whether those conditions existed before the child was removed from the physical education class which his 2017-2018 IEP designated [redacted] to attend. (Bd. 2 at p. 000040).

Although school system personnel expressed reasonable reasons for the change in Petitioner's physical education environment at the hearing, they produced no documentation supporting those reasons. The P.E. teacher and principal stated that the

Petitioner could be [redacted] but it appeared from the testimony – including that of the behavior analyst who testified for the school system – that the Petitioner's [redacted] behavior was primarily directed at the other disabled children, including those [redacted] than [redacted] (Bd. 11 and 14).

The decision in Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991) examined five factors in determining if the congressional preference for mainstreaming a disabled student may be overridden. One of the factors that the Hearing Officer finds important in all least restrictive environment disputes is the fourth factor announced in Greer v. Rome City Sch. Dist. That factor is the affect the child's participation (or lack thereof) in the classroom is having on the education of [redacted] fellow students. That factor can vary in degrees, including situations where the classroom teacher has to spend too much time with the disabled child and/or where the child's behavior(s) interferes with the ability of his classmates to learn.

In this case, the school system apparently relied on the fact that the Petitioner's behavior adversely affected [redacted] fellow students in determining that [redacted] should be placed in a self-contained P.E. class. But there was no documentation or other supporting evidence that in the general education P.E. class Petitioner's behavior was disrupting the activities of not only the non-disabled students but also those of [redacted] disabled peers. The school system presented a photograph that showed the Petitioner interacting with other students on the playground during recess. (Bd 10). The photo did not depict [redacted] behavior even though recess is a much less structured environment than a physical education class.

In addition, it was disturbing that the physical education teacher who initiated the decision to remove the disabled students, including the Petitioner, to a self-contained room

had not read the Petitioner's 2017-2018 IEP. (P. 4 and 5).

The law is clear that a disabled child is entitled to be educated in regular education to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)2 and § 300.117 (non-academic settings). In that regard, the school system was required to follow the proper procedure and determine if it was necessary to serve Petitioner in a more restrictive physical education environment. 34 C.F.R. § 300.503(a)(l) and 34 CFR § 300.116. That determination must be made during the development of a child's IEP. 34 C.F.R. §§ 300.320-321. The determination should not be pre-arranged or decided by administration without appropriate input from teachers, and most particularly, parents of the disabled child. Id. The actions of the school system did not comply with the provisions of the Individuals with Disability Education Act (IDEA).

However, the Hearing Officer agrees that that omission (including the omission to send the parent a prior notice of intent) were procedural violations of the IDEA. In matters alleging a procedural violation, a hearing officer may find that the child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a free appropriate public education; (2) 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 (3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii).

In the present dispute, the placement of Petitioner in the physical education room did not cause a deprivation of educational benefits. There was no evidence that the child needed specially designed instruction or adaptive physical education. All of the witnesses who observed [redacted] testified that [redacted] appeared happy. [redacted] participated in those activities that

would enhance the development of physical and motor fitness as well as fundamental motor skills and patterns. Ala. Admin. Code 290-8-9-.11(31)(b)2. (defining physical education). Petitioner primarily engaged in batting a balloon about so it did not touch the floor or tossing a ball back and forth with [redacted] aide. The behavior analyst stated he observed Petitioner's activities with is one on one aide in the self-contained physical education class. The behavior analyst expressed that the child's activities were "totally appropriate for [redacted]".

On the other hand, the omissions by the school system upon the actual transfer of Petitioner to a self-contained physical education class and its failure to take the appropriate procedural steps before taking that action did impede the child's right to free appropriate public education.

Ignoring a specific provision of a Petitioner's IEP without notice to the parent as well as the lack of consideration by the appropriate persons – including as the Greer case requires – a determination if other actions or activities or interventions (such as those suggested by the behavior analyst in late November 2017) should have been implemented before the change in Petitioner's schedule and placement with the non-disabled children transpired constituted a violation of a free appropriate public education. 34 C.F.R. § 300.116 (placement decisions).

Similarly, the omissions of the school system to provide a parental notice of intent, propose an IEP meeting, conduct an IEP meeting, and amend the child's IEP significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to their child.

The school system seemed to argue that the fact that the parents of the child had not

attended any of the yearly IEP meetings since the child has been in the [redacted] school caused its omissions regarding the change in the child's placement to be a trifling matter that did not affect the parents' right to participate in the provisions of a free appropriate public education for their [redacted] But past actions do not always disclose future conduct. The school system's argument is speculative at best. (It is significant to the Hearing Officer that the behavior analyst who conducted the functional behavior analysis (FBA) of the child and developed Petitioner's behavior intervention plan testified that he met and interviewed the father of the Petitioner at some length and afterward, the father attended the meeting where the behavior plan was discussed).

The responsibilities to comply with the procedural aspects of the IDEA are those of the school. They are not those of the parent except where expressly specified by the statute. Consequently, whether parents have failed to participate in IEP or other meetings or interventions regarding their disabled child in the past should not be used to justify a school system's failure to act in accordance with the provisions of the IDEA.

In the regard to the effect of potential IDEA violations by the use of the [redacted] there was no evidence that the [redacted] adversely affected Petitioner's physical education program. The evidence appeared to reflect that the Petitioner actually preferred that arrangement because it allowed [redacted] to play with [redacted] aide one-on-one which was the very circumstance that the evidence disclosed was the child's most rewarding experience, i.e. adult attention. (The behavior analyst considered individual attention from an adult to be a potential reinforcer for Petitioner to engage in good behavior and/or cease inappropriate behavior).

To any other extent that the complaint filed in this case is that the [redacted] – in

the special education context – caused the school district to exclude, deny benefits, or discriminate against Petitioner (student) solely on the basis of [redacted] disability under § 504 of the Rehabilitation Act of 1973, the Hearing Officer has no jurisdiction over that provision. 29 U.S.C. § 794(a). See Rhodes v. Lamar Cnty. Sch. Dist. 72 IDELR 17 (S.D. Miss. 2018) (parents whose claim that school district deprived student with autism of appropriate behavior instruction when it placed him in a 16 square foot "chill zone" must exhaust IDEA remedies before seeking relief under §504 and ADA).[1] Special Education due process Hearing Officers have no authority to resolve or determine claims or issues arising under state law (other than laws and regulations adopted for the purpose of implementing requirements of the IDEA) or rising under federal laws other than the IDEA and its implementing regulations. Ala. Admin Code 290-8-9-.08(9)(c)(12)iii.

IV.
CONCLUSIONS

The school system did not follow the mandate of the IDEA in removing the child from the physical education class that [redacted] attended with non-disabled students. 20 U.S.C. §1412(a)(5). The school system did not follow the continuum necessary to preclude the child from continuing in the general education P.E. class. 34 C.F.R. § 300.115(b). The school system did not conduct an appropriately formulated IEP meeting to make the change in the Petitioner's placement. 34 C.F.R. § 300.324 and § 300.503(a).

Because Petitioner was a child whose behavior impeded the child's learning or that

[1] The Eleventh Circuit recently held that the parents of a disabled child had failed by means of their IDEA due process hearing to exhaust §504 and Americans with Disabilities Act claims. 29 U.S.C. § 794 and 42 U.S.C. § 12131. Durbrow v. Cobb County School District, 72 IDELR 1 (11th Cir. 2018)

of others, the IEP team would have been compelled to consider "the use of positive behavior interventions and supports and other strategies to address that behavior" before undertaking a change in [redacted] least restrictive environment. 34 C.F.R. § 503(a)(1). That action was not undertaken. 34 C.F.R. § 300.116 (placement decisions).

V.
SPECIFIC FINDINGS

Within fourteen (14) days of the date of the decision, the following shall take place:

(1) The LEA (local education agency) is directed to conduct an Individual Education Plan (IEP) meeting. The IEP team should determine appropriate placement of Petitioner with respect to [redacted] entitlement to physical education instruction and discuss if there should be "specially designed physical education for the child".

(2) The IEP team should consider whether there is a need to include in Petitioner's IEP:

a. a summary of the present level of performance of the Petitioner in the physical education context;

b. the frequency, duration, and measurements of present level of performance;

c. specifying in the IEP the type of physical education services or activities Petitioner will receive or be engaged in;

d. the goals and objectives to be obtained by the physical education instruction; and

e. the placement (general ed, self-contained, resource, etc.) where those services are to be provided.

In the event the attorney for Petitioner (one only) chooses to attend the IEP meeting, the attorney shall be paid for travel and attendance at his/her usual hourly rate and mileage reimbursement. Any such sums shall be paid by the LEA within ten (10) days of invoice.

(3) The LEA is directed to include in Petitioner's educational file a summation which will reflect negative behaviors and/or rewards received for positive behaviors in [redacted] physical education class at the end of each week. This summation shall be available to Petitioner's parents upon email or other written request.

(4) On a daily basis the LEA is directed to provide an email or other correspondence to Petitioner's parents which discloses/describes Petitioner's school day as it relates to behavior in [redacted] P.E. class.

(5) The LEA is directed to provide or obtain training to staff and teachers at Petitioner's [redacted] school of the LRE requirements and the continuum for alternative placement. 34 C.F.R. §§ 300.114 and 300.115.

(6) The LEA is directed to provide or obtain training to staff and teachers at Petitioner's [redacted] school as to appropriate steps for determining when to conduct an IEP meeting, including training regarding the notice to a parent of the convening of such meeting.

(7) The LEA shall provide written guidance to the [redacted] school staff of the requirements that the instructors of a disabled child be familiar with and/or aware of the contents of a disabled child's IEP.

(8) The LEA shall provide to Petitioner's parents and [redacted] counsel of the documentation of the completion of the above trainings/guidance.

VI.
APPEAL RIGHTS

Any party dissatisfied with the decision may bring an appeal pursuant to 20 U.S.C. § 1415(i)(2). The party dissatisfied with this 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) days of the filing of the notice of intent to file a civil action. Ala. Admin. Code 290-8-9-.08(9)(c)16.

DONE and ORDERED this 21st day of May, 2018.

[redacted]

Wesley Romine
Hearing Officer

[redacted]

cc: [redacted]