BEFORE THE DEPARTMENT OF EDUCATION
OF THE STATE OF ALABAMA

B. E.	)	
Petitioner,	)	**Special Education No. 19-119**
v.	)	
	)	
SHELBY COUNTY	)	
Board of Education	)	
Respondent.	)	

DUE PROCESS DECISION

I. Procedural History

This matter is before the undersigned pursuant to a due process request filed on October 22, 2019 by Ms. [redacted] parent and legal guardian of [redacted] ("Petitioner"), a student in the Shelby County School District. Thereafter, pursuant to a letter dated the same October 22, 2019 issued by the State Superintendent of Education, the undersigned was asked to serve as the Impartial Hearing Officer in this proceeding. The undersigned issued correspondence dated October 23, 2019 setting a status conference for October 29, 2019.

Prior to the status conference, the parties participated in a Resolution Meeting convened on October 25, 2019 but were unable to resolve the matter. Thereafter both parties communicated their respective views of the status of the matter with the Petitioner being reminded to remember to include counsel for the district on any communication with the undersigned.

The status conference was then conducted on October 29, 2019. The parent, Ms. [redacted] appeared on behalf of the Petitioner. The Honorable Anne Yuengert and the Honorable Anne Knox Averitt appeared on behalf of the Respondent District. The parties advised at onset that the Petitioner and District may have worked out an arrangement and agreement for placement pending a hearing in this matter. The advised that the Petitioner had received a proposal on such temporary services from the District but wished to make some slight changes. The parties advised that they would do this and agreed to advise the undersigned of that resolution or advise that they were requesting that the undersigned make a determination on stay put.

The undersigned was informed that an IEP meeting had occurred on [redacted]19 following a settlement agreement from the early summer that had involved the Petitioner's then counsel and that while the petitioner's then attorney had participated in the [redacted] IEP meeting, he was no longer involved on behalf of the Petitioner. A Due Process Hearing schedule was set in the Pre-Hearing Order issued by the undersigned dated November 1, 2019.

On November 6, 2019, counsel for the Respondent District, the Honorable Anne Knox Averitt, filed *The Board's Partial Motion to Dismiss*. The basis for the *Motion* was that in addition to claims under IDEA, the Petitioner's complain asserted "...claims under Section 504 of the Rehabilitation Act, the Civil Rights Act, the Americans with Disabilities Act, and refers to other miscellaneous constitutional claims" and that "these claims fall beyond the scope of justiciability in the instant forum". The *Motion* also noted that certain issues may fall under both IDEA and Section 504 and that as such, the District did not contest the review of any overlapping issues.

In the Pre-hearing Order dated November 1, 2019 the undersigned had outlined the IDEA issues derived from the complaint. Following receipt of and then a review of the *Board's Partial Motion to Dismiss,* the undersigned issued an Order dated November 11th clarifying that certain issues were not within the purview of the undersigned and were due to be dismissed.

Following several subsequent pleadings filed by the parties, a phone conference was set and then conducted on November 22, 2019 with both parties participating. Duet to a conflict, the parties agreed to re-set the hearing to December 17, 2019 with the deadlines adjusted accordingly. Further issues of discovery, documents and witnesses were discussed with such being set out in an Order entitled *Pre-hearing Order AMENDED* issued by the undersigned on December 2, 2019.

The Pre-hearing Conference was conducted on 6th of December, 2019. The Petitioner failed to appear, though counsel for the District did. The undersigned issued correspondence thereafter, sent via email at noon on the 6th, calling for a clarification by the Petitioner as to whether or not she intended to proceed with the complaint. At approximately 4:00 p.m. on December 6, 2019, the Petitioner filed a letter via email stating she intended to proceed. The undersigned found that the hearing should proceed as scheduled and that the deadlines in place

pursuant to the *Amended Pre-hearing Order*, as adjusted in the undersigned's correspondence of December 6th, remained in place and were due to be followed. The undersigned found no merit at that point in the Petitioner's assertions of missing documents or 'evidence', nor did the undersigned see that the Petitioner was in any way prejudiced by such alleged lack of documents.

Accordingly, this matter was due to proceed to a hearing on December 17th, 2019 as agreed, with the further admonition that the parties were due to strictly comply with the deadlines set out in the undersigned's *Amended Pre-hearing Order* which were enlarged by the undersigned's December 6th correspondence, allowing the Petitioner further time to comply. Failure to comply may be considered as grounds for dismissal or factored into what documents or evidence would be allowed at hearing. [See *Order* issued by the undersigned dated December 7, 2019].

On the morning of December 17, the day set for the hearing, at approximately 7:00 a.m., the Petitioner advised the undersigned and counsel for the District that she was asking for a continuance due to the need to a health need for one of her children. The undersigned, as was the case for the District's counsel, did not become aware of this request until the hour before the hearing was to commence and both were already almost at the hearing location. Further, witnesses called by the District and Petitioner were also present at the hearing location, along with the District's representatives.

The undersigned attempted to call the Petitioner but was unable to have a conversation due to phone connection issues on the part of the Petitioner. Nevertheless, the undersigned determined that it would be appropriate to continue the hearing and the decision extended at the request of the District, whose counsel put such request on the record. However, due to concerns raised by the District as to the question of interim placement, the undersigned allowed discussion on the record as to such issue of the interim placement. Following this the undersigned found that for purposes of temporary placement it was in the best interest of the child that the appropriate interim setting for the child going forward would be the [redacted] which in fact had been identified by the IEP team on [redacted], 2019 as the appropriate placement for the child.

In the process of reaching this conclusion, the District's counsel proffered information as

to why the IEP team had found that [redacted] was due to be the least restrictive environment. Counsel called [redacted] to speak and testify to that issue briefly. In sum, the District's position was that the child would best be served at either at the behavior unit at [redacted] or possibly at [redacted] and that they had agreed to proceed with [redacted] while at the IEP team meeting in [redacted] of 2019 which occurred in conjunction with a settlement agreement entered earlier that summer. Since the filing of this matter on October 22, 2019, the District had been offering homebound services to the Petitioner for the child as a temporary placement, but urged that this was not conducive to the child's ongoing needs, and as such suggested that the child be placed at [redacted] for the upcoming semester pending a hearing.

Further, the undersigned advised that he was in agreement to the Petitioner's request for continuance of the hearing and an extension of the deadline for a decision to allow the Petitioner to complete her due process hearing. This matter was then set for a hearing on January 30th, 2020 with a status conference set for December 30, 2019. [See *Order* issued by the undersigned dated December 18, 2019] [See *Transcript*].

Subsequently on January 8, 2020, the Parent/Petitioner undertook to file, and in effect filed, additional documents inferring that 'the record' needed to be made clear. Subsequently, on January 9, 2020, the Respondent provided and filed a response, pointing out that while they did not feel it necessary to continue with pre-hearing pleadings, they were providing a response in an effort to continue to update the undersigned and respond to continual allegations made by the Parent regarding documents.

Upon review of all such pleadings, the undersigned found that the Petitioner's insinuations and protests about clarifying the record were not appropriate and there was no reason to re-consider or rehash what had already been discussed at length in the pre-hearing stage. Nonetheless, the undersigned sought to provide latitude to the Parent as a pro-see litigant and while the Petitioner's pleading of January 8th, 2020 would normally be stricken, the undersigned took it as part of the record as an effort by the Petitioner to voice her concern. However, the undersigned saw no reason to consider the attachments as evidence and, unless the Respondent stated otherwise at the hearing, such would not be admitted as part of the record.

In conclusion, the Petitioner was advised to be prepared to address the issues at hand with

evidence, including testimony, and was reminded of the nature of the legal proceeding she had undertaken, and advised to undertake her presentation with that concept in mind, cognizant of the time constraints of such a hearing as was clarified in earlier orders, correspondence, and during conference discussion on the hearing process. [See *Order* issued by the undersigned dated January 16, 2020].

On Friday, January 24, 2020, the District's counsel advised in an email that the Petitioner had now withdrawn her child from school. Upon review the undersigned set an immediate status conference that would be appropriate to clarify the purpose and issues for the January 30, 2020 hearing. This was outlined in an *Order* issued by the undersigned dated January 27, 2020. This telephonic conference was held at stated time on January 27, 2020 with both parties present. The Petitioner stated she intended to proceed with the hearing set for January 30, 2020. The undersigned outlined the issues at hand. With guidance from the undersigned, the parties outlined the order of witnesses.

The Hearing was comprised of the initial date of testimony proffered by the District as to the interim setting concern on December 17th, 2019 and a full day of testimony provided on January 30, 2020. Each party submitted a set of documents, with the Petitioner's comprising approximately 52 Pages and the Respondent's comprising approximately 759 pages. Testimony from Seven (7) people was obtained during the hearing, including that of the Petitioner's mother, Ms. [redacted] All exhibits were kept in the possession of the undersigned as the hearing proceeded and were reviewed again at the conclusion of the hearing.

Following the Hearing, each party timely filed their post hearing letter/briefs on February 10, 2020 in conformity with the discussion following hearing as to a plan for post-hearing position statements.

During the course of each of the hearing, each party presented evidence and offered the testimony of witnesses in support of their respective positions, and were allowed to cross examine witnesses as provided for under the applicable rules. The Hearing was conducted as a closed hearing, with both parties represented by their counsel. The Petitioner was represented by Ms. [redacted] mother, pro see. The Respondent was represented by the Honorable Anne Yuengert and the Honorable Anne Knox Averitt with [redacted] and [redacted], Director,

serving as the corporative representative for the District.

II. Exhibits and Witnesses

Below is a list of the Exhibits admitted to evidence including 11 Exhibits presented by the Petitioner, hereinafter referred to as [P _] and 7 Exhibits with Bates stamps presented by the Respondent referred to as [R _]. The attachments to the *Joint Stipulation of Facts* are referred to [JSF_] and not by Bates Stamp as listed in the document. Citations from the transcript of December 17, 2019 are referred to as [TR _].

Petitioner's Exhibits

P Ex 1: Lesson Plans

P Ex 2: Work Samples & Assessments

P Ex 3: Progress Monitoring 10/10/19

P Ex 4: Progress Monitoring 12/19/19

P Ex 5: Tera 3 – Reading Assessment

P Ex 6: Psychological Report 5/15/2018

P Ex 7: Harrill Reading & Math Report 12/19/19

P Ex 8: Discipline Report

P Ex 9: Discipline Report

P Ex 10: BIP Progress Monitoring 2019/2020 [redacted]

P Ex 11: [redacted] Center class brochure

Respondent's Exhibits

R Ex 1: Bates Stamp 96-114 IEP from 8/8/2019 to 5/21/2020

R Ex 2: Bates Stamp 749-755 [redacted] Program

R Ex 3: Bates Stamp 1-59, 627-721, Behavior data sheets, anecdotal records

R Ex 4: Bates Stamp various numbers Discipline Reports

R Ex 5: Bates Stamp 516-517, 625-626 Behavior graphs

R Ex 6: Bates Stamp 363-371 Eligibility Decision 5/30/2018

R Ex 7: Bates Stamp 745-748, Speech-Language Evaluation 11/22/2019, by [redacted]

R Ex 8: Bates Stamp 756-759 Occupational Therapy Evaluation 12/2/2019, by [redacted]

Joint Stipulation of Facts

JSF 2: [redacted] Confidential Psychological Evaluation

JSF 3: Notice & Eligibility Decision [redacted]/2018

JSF 4: IEP from 8/07/2018 to 5/23/2019

JSF 5: Attendance Profile 2018-19

JSF 6: Amended IEP 8/13/2018 to IEP from 8/07/2018 to 5/23/2019

JSF 8: [redacted] Program 2019

JSF 9: [redacted] evaluation 5/20/2019

JSF 10: Amended IEP 10/10/2019 to IEP from 8/08/2019 to 5/21/2020

JSF 11: Settlement Agreement

JSF 12: Attendance Profile 2019-2020

JSF 16: Behavior Data Sheets and anecdotal records

JSF 18: Notice IEP meeting date, placement decision 10/10/2019, attendance page

Witnesses (in order of initial appearance)

- [redacted]
- [redacted] Special Education Teacher, [redacted] Elementary
- [redacted] BCBA
- [redacted] Special Education Program Area Specialist
- [redacted] [redacted] Elementary School
- [redacted] Special Education Coordinator
- [redacted] Parent

The exhibits submitted have been kept and maintained by the undersigned during the course of this hearing. On December 17th, 2019 [redacted] testimony was transcribed by [redacted] Certified Court Reporter and Commissioner, ACCR #354, who duly took down all testimony and dialogue. On January 30th, 2020 the testimony taken was transcribed by [redacted] Certified Court Reporter and Commissioner, ACCR #231, who duly took down all testimony and dialogue. The transcript for the January 30th, 2020 testimony had yet to be filed due to the short timeframe from the date of taking testimony to the deadline for a decision. Neither party at the time post hearing statements had access to the transcript and had agreed to this in advance. The undersigned also did not have time to review the transcript as it had not yet been made available. However, the undersigned was able to review the record, exhibits, personal notes taken during testimony, and post-hearing briefs of each party in the preparation of and drafting of the decision set out below.

III. Summary of Facts

The parties submitted the following Eighteen (18) joint stipulated facts (for clarity, in the course of discussion of the corresponding exhibit number was added as [JSF x]):

1. [redacted] is a [redacted]- year old student in Shelby County Schools.

2. In 2016, [redacted] diagnosed [redacted]. (Confidential Psychological Evaluation (0241-1252). [JSF 2]

3. On [redacted] 2018, Petitioner attended a meeting at which Respondent determined that [redacted] was eligible for services in the area of [redacted] (Notice and Invitation to Meeting (0253); Notice and Eligibility Decision and supporting Assessment Data (0255-0263, 0276-0345)). [JSF 3]

4. Petitioner attended a meeting on [redacted] 2018 at which an Individualized Education Program (IEP) was created for [redacted] (Notice and Invitation to Meeting (0267); IEP (0269-0275)). [JSF 4]

5. [redacted] began attending [redacted] at the [redacted] Elementary School [redacted] on [redacted] 2018. (Attendance Profile (0168)). [JSF 5]

6. As a result of [redacted]'s significant behaviors at school, the IEP team (including Petitioner) convened on [redacted] 2018, [redacted] 2018, [redacted] 2018, [redacted] 2018, and [redacted] 2018. (Notice and Invitation to Meeting and Revised IEP (0220-0226); Notice and Invitation to a Meeting (0207, 0346); Notice of IEP Team's Decision Regarding Reevaluation (0208, 0347); Revised IEP (0211-0219); Amended IEP (0083-0095)). [JSF 6]

7. Beginning in [redacted] 2018, [redacted] began receiving homebound services and then received services at [redacted]. (IEP (0211-0219); IEP (0083-0095)). [JSF 6]

8. [redacted] transitioned back to [redacted] in [redacted] 2019 with services of a Registered Behavior Technician (RBT) from [redacted] for 12-15 hours per week, a 1:1 aide, and OT services. (IEP (0083-0095)). [JSF 6] [redacted] did initial observations ([redacted] Report and Recommendations (0586-0590)) and created a BIP. [JSF 8]

9. Respondent funded an independent assessment by Dr. [redacted] [redacted] on [redacted] 2019. ([redacted] Report (0568-0574)). Dr. [redacted] diagnosed [redacted] as having [redacted]. The report notes that Dr. [redacted] was not sure if [redacted] had an IEP and that Petitioner told him that [redacted] had a BIP, but he had not reviewed it. ([redacted] Report (0568)). [JSF 9]

10. [redacted]'s IEP team met on [redacted], 2019 and amended the IEP. At the [redacted] 2019 meeting, IEP team members suggested that [redacted] transition to the behavior unit at [redacted] Elementary School ([redacted]) or to the [redacted] Petitioner and her then-attorney did not agree with that suggestion. The IEP team agreed that [redacted] would remain at [redacted] at least through the end of the first nine weeks of the 2019/2020 school year. The IEP team agreed that ESY services (up to 10 hours) would be offered with HANDS if schedules worked out and would be paid for by Respondent. The amended IEP discussed Dr. [redacted]'s diagnoses and report and continued the existing BIP (prepared by [redacted]). The [redacted] 2019 IEP contained goals for behavior, reading, and math, services of direct instruction from a special education teacher, the assistance of a 1:1 aide, and OT consultation and services. (IEP (0096-0108)). [JSF 10]

11. On [redacted], 2019, Petitioner signed a Settlement Agreement in which she released Respondent from any and all claims, charges or complaints in any way relating to claims existing prior to or as of the date of execution of the agreement under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act and/or any state or federal law relating in any way, directly or indirectly, to [redacted]'s educational program. (Settlement Agreement, para. 11). [JSF 11]

12. [redacted] began attending [redacted] grade at [redacted] on [redacted], 2019. (Attendance Profile (0407-0408)). [JSF 12]

13. From August to October 2019, the following people worked with [redacted] at school:

a. [redacted] worked with [redacted] as a 1:1 aide every day.

b. Beginning [redacted], 2019, [redacted] worked with [redacted] every day as [redacted] Special Education Teacher.

c. [redacted], another Special Education Teacher, provided support and acted as [redacted]'s Case Manager.

d. [redacted], Occupational Therapist.

e. [redacted], BCBA.

14. Other members of [redacted]'s IEP team in the [redacted] 2019 time frame from Respondent were [redacted], Occupational Therapist, [redacted], Assistant Principal,

[redacted], Principal, [redacted], Program Area Specialist, [redacted], Special Education Coordinator, [redacted], BCBA, and [redacted], Deputy Superintendent.

15. During [redacted] 2019, Respondent engaged the services of [redacted], BCBA with [redacted], to work with [redacted], providing consultation on the implementation of the BIP, meeting with [redacted]'s teachers about [redacted] behavior, and determining how to revise the BIP to address [redacted]'s behaviors. On or about [redacted], 2019, [redacted] determined that she would no longer work with [redacted] and provided her data and recommendations for revision of the BIP to Respondent's BCBA, [redacted].

16. Per the BIP, [redacted] and [redacted] collected behavioral data each day [redacted] was in school, recording instances of [redacted]. (Behavior Data Sheets (0001-0082)). [JSF 16]

17. Of the 43 school days between [redacted] and [redacted] 2019, [redacted] was absent from school 7 days (Attendance Profile (0407-0408)). [JSF 12] Of the 36 days in which [redacted] was in school, [redacted] was suspended following behavioral incidents 7 times: [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted]. (Attendance Profile (0407-0408), [JSF 12] Behavior Data Sheets (0001-0082)). [JSF 16]

18. On [redacted], 2019, the IEP team met to review [redacted]'s progress for the first nine weeks. (Notice and Invitation to a Meeting/Consent for Agency Participation (0109)). After discussing the behavioral data collected, all members of the IEP team except Petitioner, concluded that the data supported that [redacted] was no longer [redacted]'s least restrictive environment. (IEP (0096-0108)). [JSF 10] Petitioner left the meeting but [redacted], her attorney signed. (Individualized Education Program (0114)). [JSF 18] He asked that Respondent send a Ten(10) day notice to Petitioner, which it did. (Notice of Proposal or Refusal to Take Action (0110)). [JSF 18]"

[Joint Stipulation of Facts]

Additional facts were gathered from the exhibits and were not contested at hearing. As background information, [redacted] was evaluated on [redacted], 2016, just shy of [redacted] [redacted] birthday, at the [redacted]. Diagnostic Impressions were summarized, in

part as "Overall, parent report, behavioral observations, and testing results indicated [redacted] is displaying significant behavioral difficulties including oppositional and defiant behavior (e.g. [redacted]) and extreme behavioral outbursts (e.g., [redacted]) that occur several times per day and last up to one hour. Therefore, a diagnosis of [redacted] is appropriate for [redacted] at this time." [JSF 2, 0250]

[redacted] attended a preschool for non-disabled children and was evaluated during that time. Two pre-school teachers completed the Behavior Assessment Scale for Children and several areas were scored in the clinically significant range including the areas of hyperactivity, aggression, and adaptability. During the non-structured observation during recess, [redacted] was on-task 100% of time. During the structured observation during calendar and snack time, [redacted] was on-task 60% of time (with teacher ignoring some behaviors, teacher re-direction, sitting in aide's lap). Off-task behaviors included [redacted]. The eligibility report also included the results from the [redacted] evaluation. [redacted] was found eligible for special education services in the area of [redacted] on [redacted], 2018. [JSF 3]

An Individualized Education Program (IEP) was developed on [redacted], 2018 with implementation dates from 8/07/2018 to May 5, 2019. Two behavioral goals were written; one to address "Behavior – Expressing Frustration" and another to address "Behavior – Disrupting Class". The total amount of special education time was 30 minutes daily. Supplementary Aids and Services included scheduled sensory breaks, daily behavior chart, option to sit apart at carpet as long as [redacted] is paying attention (i.e. sit in a chair or at [redacted] desk while others sit as a group at the carpet), preferential seating, incorporate mobility options across the day such as whole class stretch breaks or passing out papers, provide adult assistance with peer interactions. [JSF 4]

On [redacted], 2018 the IEP team met to amend the IEP. (Note: This was approximately one week after the beginning of school). The "Decision Regarding Specific Action Proposed or Refused" stated: "The IEP team met to discuss supports already in place (per [redacted]'s IEP) and discuss the need for any additional supports and/or accommodations to ensure [redacted]'s success in the classroom environment. [redacted] will be allowed access to the sensory room/resource

room for breaks and to practice sitting appropriately on the carpet. [redacted] will have access to the resource room if [redacted] behavior interferes with [redacted] learning or the learning of others." The "Basis for Decision" was "[redacted] is transitioning to [redacted], learning routines, and getting used to not having a 2-hour nap. For these reasons, [redacted] needs additional behavioral supports". [JSF 6]

On [redacted], 2018 the IEP team met to amend the IEP (Note: This was approximately one month after the beginning of school). "The IEP team met to discuss appropriate environment of [redacted]. The attorney for the parent asked that homebound services be provided temporarily until independent evaluations are completed. The parent has visited [redacted] to observe a resource classroom for students with behavioral issues. Eight hours per week of direct instruction will be offered through homebound services. Ms. [redacted] would like for these services to be offered on Tuesdays and Thursdays. At this time, the homebound teacher will provide instruction on Tuesdays and Thursdays for two hours each day. The district believes two hours/day is appropriate at this time and would like to offer these services over four days, but will discuss options with the teacher and behavior specialist after the first few visits. Meanwhile, if Ms. [redacted] would like to add any additional days per week, she can contact the Special Education Coordinator." [JSF 6, pg.0084]

A meeting was held on [redacted], 2018 "with attorneys, [redacted], [redacted], and Ms. [redacted] to discuss [redacted]'s need to be back in school immediately. A tentative plan was set to change [redacted]'s category of exceptionality from [redacted] to [redacted] and have [redacted] receive services from [redacted], BCBA at her business location temporarily (to be determined by [redacted]'s reports and IEP team). An IEP meeting was set for [redacted]-18 to make changes to the eligibility and IEP." [JSF 6, pg 0084]

On [redacted], 2018 "Ms. [redacted], [redacted], [redacted], and [redacted] met to make changes to the IEP… [redacted] will attend [redacted] for number of hours (within reason) and for the duration of weeks (within reason) recommended by [redacted]. [redacted] will start back to school after this temporary placement with services being provided by a registered behavior technician (with input from [redacted] and [redacted] RBT at [redacted])." [JSF 6, pg 0084]

In the [redacted] [redacted] Report and Recommendations dated [redacted]/19, it is stated: "[redacted] received one-on-one ABA therapy in [redacted] school setting for 3 ½ hours on Friday [redacted]/2019, and for 6 hours

per day on [redacted]/10 and [redacted]/19."…"Based on the 3 days spent…I recommend continuing with the 9AM start at this time. [redacted] time would increase based on [redacted] behavior. After 3 consecutive school days of no aggressive behaviors ([redacted]) and 5 or less incidents of [redacted] and [redacted] [redacted] day would increase by 30 minutes…Once [redacted] has worked up to a full school day and consistently participating in a minimum of PE, snack, lunch and recess with [redacted] general education classroom each day [redacted] inclusion time will increase based on [redacted] behavior as mentioned above.". [JSF 8]

An IEP Amendment meeting was held on [redacted], 2019. "The IEP team met to discuss [redacted]'s progress as [redacted] has transitioned back to [redacted] with the support of [redacted] ([redacted] and [redacted]). The team also met to review [redacted] services and add a behavior intervention plan – BIP. The results of the functional behavior assessment indicate that a majority of [redacted]'s behaviors occur when demands are placed on [redacted] in academic and instructional settings, when [redacted] is asked to transition away from a desired activity or when [redacted] no longer wants to do an activity. The functions appear to be avoidance and escape of demands being placed on [redacted]. The majority of behaviors have occurred between 10 and 11 a.m. The most frequent behaviors are [redacted], but [redacted] has only had three days in which any behavior occurred more than five times. The [redacted] and [redacted] have not been sporadic across the day; rather these behaviors have occurred in concentrated times of 10 minutes or less. Sometimes it appears [redacted] wants to escape because the environment is too loud or crowded. The team discussed how important consistency is for [redacted]. Everyone will be trained to follow the BIP. [redacted] involvement is currently approximately 12-15 hours/week and will be faded out as behavioral data meets criteria set in BIP." [JSF 6, pg.0084]

A neuropsychological evaluation was conducted on [redacted], 2019 by Dr. [redacted] at the [redacted]. In the report, it is stated:

"8. [redacted]'s presentation during the current evaluation, conducted in a quiet one-on-one environment, suggests an extremely low frustration tolerance and a lack of adaptive coping skills, the combination of which quickly escalates to episodes of uncontrolled emotional and behavioral dysregulation. These issues are further complicated by [redacted] sensory processing issues, which can lead [redacted] to quickly become overwhelmed and precipitate an outburst. [redacted] appears to meet criteria for a diagnosis of [redacted]…" [JSF 9]

With attorneys for both parties present, the IEP team met on [redacted], 2019 and developed an IEP with duration dates 8/8/2019 to 5/21/2020 for which [redacted] would be entering [redacted] grade. The team reviewed the report by Dr. [redacted] and agreed [redacted] displayed similar behaviors at [redacted] Elementary. ESY services were provided. "…The option of [redacted] transitioning to the behavior unit at [redacted] was discussed at the meeting. Parent and parent attorney are not in agreement at this time. The team will reconvene at the end of the first nine weeks to review [redacted]'s data and discuss any changes if needed based on data"….IEP services included an hour and a half of direct services in the resource room, direct instruction by adult staff daily, allowing the use of a backpack with a change of clothes in the bathroom, all day support from a 1:1 aide to monitor and support behaviors, alternate schedule due to [redacted]'s stamina to be increased as behavioral goal are met, direct and consultative OT services and accommodations to address sensory processing issues, and 240 minutes monthly direct and consultative support from [redacted] in order to assist with implementing the BIP and helping [redacted] achieve success towards meeting [redacted] behavior goals. [JSF 10]

The IEP team met again on [redacted], 2019 and determined placement would be the "…behavior unit at [redacted] Elementary School "based upon a review of the data from the nine weeks, [redacted] is no longer considered to be [redacted]'s Least Restrictive Environment". [JSF 10, pg. 0108]

The complaint for a due process hearing was filed by Ms. [redacted] on October 22, 2019 [see record]

IV. Issues Presented

1) Whether the placement proposed by the IEP team at [redacted] is appropriate and the least restrictive environment such that a FAPE would be provided?

2) Whether the District properly identified and evaluated the child as called for under IDEA?

3) Was the parent allowed to participate with the IEP team as is provided for under IDEA?

V. Discussion

The Individuals with Disabilities Education Act (the "IDEA" or "Act") established certain basic entitlements, including a free, appropriate public education ("FAPE"), for children between the ages of three and twenty-one years old with specified disabilities. *20 U.S.C. §§ 1400, 1412(a)(1)(A) (2004).* Now called the IDEIA (Individuals with Disabilities Improvement Act), the act defines "free appropriate public education" (FAPE) as "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title" 20 U.S.C. § 1401 (18). In order to be eligible for Federal financial services under IDEIA, a state must therefore assure that "all children with disabilities who are between the ages of three and twenty-one receive a Free Appropriate Public Education (FAPE)."

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

The first issue suggested and raised by the Petitioner is whether or not the placement proposed by the IEP team in October 2019 for the child at [redacted] *is appropriate and the least restrictive environment such that a FAPE would be provided?* As clarified by the U.S. Court of Appeals for the Second Circuit, "The IDEA mandates that "[t]o the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes,

separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A); *Walczak,* 142 F.3d at 122." Mr. and Mrs. P v. Newington Board of Education, 546 F.3d 111, 51 IDELR 2, 7(2nd Cir. 2008).

However, the Second Circuit in their decision in Mr. & Mrs. P goes on to explain that "Nevertheless, we have also acknowledged that, "[w]hile mainstreaming is an important objective, we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students. Under the [IDEA], where the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily, mainstreaming is inappropriate." *Briggs v. Bd. of Educ. of Conn.,* 882 F.2d 688, 692 (2d Cir. 1989) (citations omitted); *see also Lachman v. Ill. State Bd. of Educ.,* 852 F.2d 290, 295 (7th Cir. 1988)." From here the Second Circuit goes on to point out that 'the approach by the Third, Fifth, Ninth, Tenth and Eleventh Circuits provides appropriate guidance to the district courts without "too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials."

The Court in Mr. & Mrs. P then explains how the approach works. "Pursuant to that test, a court should consider, first, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child," and, if not, then "whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* at 1048; *see also L.B. v. Nebo Sch. Dist.,* 379 F.3d 966, 976 (10th Cir. 2004); *Sacramento City Unified Sch. Dist. v. Rachel H.,* 14 F.3d 1398, 1403-04 (9th Cir. 1994) (slightly modified version); *Oberti v. Clementon Sch. Dist.,* 995 F.2d 1204, 1215 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.,* 950 F.2d 688, 696 (11th Cir. 1991)." *Id* at 7.

The "Oberti" test that the 2nd Circuit adopted was articulated as follows:

In sum, in determining whether a child with disabilities can be educated satisfactorily in a regular class with supplemental aids and services (the first prong of the two-part mainstreaming test we adopt today), the court should consider several factors, including: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and

services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

If, after considering these factors, the court determines that the school district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider the second prong of the mainstreaming test whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate. *Id* at 7-8.

An administrative ruling from Missouri provides some further guidance on the issue. In reviewing an administrative ruling following a Due Process Hearing regarding the placement of a child who sustained a traumatic brain injury and had desired to be placed in his home school setting despite the lack of services available, a review panel determined that the actual needs of the child trumped the belief that a transfer would not be the 'least restrictive environment'. As suggested by the decision of an Administrative Law panel for the Missouri State Educational Agency, the IEP Team and the school districts, in their efforts to take steps to mainstream children and afford the child an educational setting that is the least restrictive environment, must be mindful of the needs of the child. *North St. Frances Cnty School District, Missouri State Educational Agency*, 59 IDELR 179 (2012)

Another example is provided by a Massachusetts State Administrative Judge considering somewhat similar issues. Here the ALJ concluded that the "Parents advocated for the least restrictive environment for their child (LRE) but determination of LRE cannot be divorced from the determination of what is needed and appropriate for Student to make meaningful, effective progress within the context of the IDEA." *Stroughton Public Schools, Massachusetts State Educational Agency*, 57 IDELR 296 (2011)

A review of the efforts by the District it its effort to both educate [redacted] and accommodate [redacted] [redacted]'s concerns, suggest to the undersigned that the proposed placement at [redacted] would serve as [redacted] least restrictive environment. The testimony by [redacted], the special education teacher who worked with [redacted] during the [redacted] 2019 period of time, was that the child needed a more self-contained setting such as provided at [redacted]. [redacted] explained that she had followed the BIP, worked with [redacted] of [redacted] and utilized approaches suggested but was emphatic that the setting [redacted] was in was not appropriate and that [redacted] needed a setting such as provided at [redacted]. Finally, it was also clear that [redacted], who at the time of her testimony had begun

working at another school district, was experienced, trained and a quite capable teacher whose opinion as such a teacher was informative on the question of whether or not a setting such as [redacted] would serve as [redacted] least restrictive environment.

The testimony by [redacted], while it did not address the specifics of whether or not [redacted] was the least restrictive environment, did lend support to the theory that the setting argued for by the Petitioner was not the proper setting. Simply put, the child spent a great deal of having [redacted] behavior managed that required [redacted] to be away from [redacted] classmates and in effect, isolated [redacted]. Nonetheless, [redacted]'s testimony was that she felt that the efforts by both [redacted] and the aid to manage [redacted]'s behavior had been correct and that she agreed that the best environment to manage [redacted]'s behavior would be in a smaller setting. Further, the evidence presented, data, indicated this was the case.

As part of the evidence put forward, there are approximately 40 "Behavior data sheets" each charting 7 or 8 target behaviors during 7 timeframe increments, with written or typed accompanying anecdotal notes from [redacted], 2019 to [redacted], 2019, encompassing approximately 153 pages in Respondent Exhibit 3. There are approximately 12 "Report of Student Disciplinary Action" pages, indicating 5 or 6 suspensions in Respondent Exhibit 4. In Petitioner Exhibit 10, a "BIP Progress Monitoring 2019/2020-[redacted] Elementary" with dates from [redacted].19 through [redacted].19 is provided and includes percentages of behaviors.

Set out hereafter are Exerts from BIP Progress Monitoring 2019/2020.

"Target Behavior: When presented with an academic task directive to follow, transitioning in the hallway/between activities, or when [redacted] feels upset, [redacted] may display [redacted]. [redacted] added as a target behavior [redacted]/19".

"Replacement Behavior: [redacted] will communicate to others when [redacted] feels frustrated, mad, or sad by using [redacted] words and still comply with teacher directions".

Date: [redacted]/19: "Based on progress monitoring data, [redacted] is currently exhibiting [redacted] 35% of the day, [redacted] 23% of the day, [redacted] 3% of the day, [redacted] 43% of the day, [redacted] 45% of

the day, [redacted] 72% of the day, and [redacted] 60% of the day. Please note that the first 2-weeks of this school year could be considered a honeymoon period. [redacted] was very interested in [redacted] new environment…Please note that [redacted] was suspended 3 times during this time frame, absent 2 times…checked out early 3 times, and checked in late 2 times…"

Date [redacted]/19: "Based on progress monitoring data, [redacted] is currently exhibiting [redacted] 56% of the day, [redacted] 20% of the day, [redacted] 0% of the day, [redacted] 44% of the day, [redacted] 66% of the day, [redacted] 100% of the day, and [redacted] 91 % of the day, and [redacted] 42% of the day. Please also note [redacted] was suspended 2 times during this time frame, absent 4 times…checked in/out 2 times…and slept through direct instruction 2 times…"

Date [redacted]/19: "Based on progress monitoring data, [redacted] is currently exhibiting [redacted] 58% of the day, [redacted] 33% of the day, [redacted] 0% of the day, [redacted] 56% of the day, [redacted] 59% of the day, [redacted] 83% of the day, and [redacted] 87% of the day and [redacted] 51% of the day. Please also note [redacted] was suspended 3 times during the time frame, absent 2 times, checked out early 3 times, and checked in late 2 times…" [P 10]

Set out hereafter are Three Data Behavior Sheets, one from the beginning of the fall semester, [redacted]/19, one from [redacted]/19, and another from later on, [redacted], 2019.

8-19-19 Data Behavior Sheet:

[redacted]

[redacted] [JSF 16 & R 3 pg.0013-15]

8-28-19 Data Behavior Sheet:

[redacted]

[JSF 16 & R 3 pg 0038-0043]

10-9-19 Data Behavior Sheet:

[R 3 pg. 0712-0721]

As is clear from both the articulated explanations by both and , as well as from the three examples of data behavior sheets, the work done by District personnel to manage and assist with behavior was extensive. It was also clear that the District had not arrived flippantly at the determination that would be better served in a different smaller setting such as . Both and testified to this and as well explained their positions on this, while at the same time confirming their concern for the well-being of . explained that at has a behavior unit called the . And it is a self-contained unit where students go in---really it's sort of a resource setting, but they have their instruction in the classroom in the behavior unit and then they go out to specials like art and music and PE. And so that would be what would do at). would be able

to have --- in the classroom [redacted] would have [redacted] instruction in small group or individualized instruction." [TR pg.21]

[redacted] also explained that [redacted]'s behavior had impacted [redacted] ability to learn while in [redacted] current setting, the setting that Ms. [redacted] urged remain [redacted] setting. '[redacted] is not performing. And in conversations that I've had before with the IEP team in the IEP meetings and also separately with Ms. [redacted] have been that [redacted] has the ability to learn. [redacted] behaviors are interfering with [redacted] ability to learn. [redacted]'s more of what we could call skill deficient in that [redacted] needs more opportunity to learn without the behaviors present." [TR pg. 22] She also explained that '[redacted] would provide more structure for [redacted] than [redacted] does. It would also allow [redacted] to be around peers. At [redacted] we have a teacher and a peer educator for [redacted], but what we're trying there doesn't seem to be successful for [redacted]. [redacted] behaviors tend to have escalated other than going down this fall semester." [TR pg. 23]

Again, in reviewing the law as guided by the Court in Mr. & Mrs. P, the answer is that the District, despite extensive and proper effort, was not able to educate [redacted] in 'the regular classroom, with the use of supplemental aids and services' and as such, was not able to allow a satisfactory level of educational benefit therein. As set out in a finding by a commissioner for a Missouri Due Process Hearing, 'Mainstreaming does not require inclusion in a regular classroom if doing so would jeopardize a student's ability to achieve a meaningful educational benefit. Thus, inclusion is not appropriate when the nature or severity of a student's disability precludes an education benefit from inclusion with non-disabled students." Belton School District, 19-1148, 120 LRP 3803, Jan 2020.

Additionally, taking the testimony by [redacted] under review as to the plans to provide small group structured setting that would allow [redacted] to learn while still allowing [redacted] to participate in 'specials, art, music and PE in the general education setting, the District is 'mainstreaming' [redacted] to the best extent possible. Finally, as indicated by [redacted] in her testimony, the goal of this placement would be to allow [redacted] to learn to adjust behaviors such that it is not a permanent plan, rather a time period to help [redacted] learn to adjust and improve [redacted] behaviors.

The next issue raised by the Petitioner was whether or not the District properly identified and evaluated the child as called for under IDEA? In her *Closing Statements*, Ms. [redacted] asserts that the District failed to properly process the evaluation process for [redacted]. However, JSF 2 through 11 contradict such an assertion and in fact indicate that the District did in fact properly evaluate and process incoming information as time went on about the child.

The records indicate that Ms. [redacted] had [redacted] assessed at [redacted] in 2016 (at age [redacted]. [redacted] diagnosed [redacted] with [redacted]. This evaluation included a language assessment and also noted that [redacted] had been evaluated by speech/language pathology and occupational therapy for Early Intervention Services at 19 months but did not qualify for services. [JSF 2].

In [redacted] of 2018, the spring before [redacted] began [redacted], Petitioner gave consent for [redacted] to be observed, and completed an Early Learning Progress Profile which included basic information about [redacted] rudimentary reading and math skills. Shelby County Special Education Teacher [redacted] then observed [redacted] at [redacted] preschool in [redacted] of 2018. In [redacted] and [redacted] of 2018, [redacted] administered a Test of Early Reading Ability (TERA-3) and an intellectual assessment (RIAS-2), which included verbal and nonverbal intelligence testing. These primarily reflected that [redacted] fell into the average range, with certain categories slightly above or slightly below average.

For the most part, this [redacted] testing indicated that [redacted]'s abilities were average, with some categories slightly above or slightly below. As [redacted], the Program Area Specialist, testified, the Board cannot diagnose a [redacted] student with a specific learning disability because [redacted] has not yet had formal school instruction. The applicable IDEA regulations further require that the Board rule out an emotional disability before diagnosing a student with a specific learning disability. Given [redacted]'s profile and behavioral challenges, the Board was not able to rule out an emotional disability as the cause of [redacted] learning impediments, and in fact deemed [redacted] eligible for services based on a diagnosis of [redacted]. [JSF 3]

After the behavioral issues that emerged in [redacted]'s [redacted] year, the Board funded an independent assessment by Dr. [redacted] on [redacted], 2019. Dr. [redacted] diagnosed [redacted] as

having [redacted]. [JSF 9].

In her *Closing Statements*, Ms. [redacted] referred to the "underlying deficits in sensory process" diagnosed by Dr. [redacted] and stated "The District failed to give any consideration to the impact or recommendations…The District failed to properly evaluate [redacted] in this area". However, the IEP dated [redacted], 2018 calls for "sensory breaks". [JSF 3] Further, the record shows that back in [redacted], 2018 the IEP was amended to include allowing [redacted] access to the sensory room and resource room. [JSF 4] Then, the IEP dated [redacted], 2019 lists numerous accommodations to address sensory needs and reviewed the report. [JFS 10] Contrary to Ms. [redacted]'s closing statement, the District made many accommodations to address [redacted]'s sensory needs as evidenced in the IEPs, testimony, and data collection sheets.

Finally, the District does not dispute that [redacted] is behind academically. Throughout [redacted]'s time at [redacted] [redacted] behavior resulted in significant absences from school and interfered with [redacted] instruction on days [redacted] was in school. Nothing in the evidentiary record suggests that [redacted]'s academic deficits are a result of a learning disability—instead, [redacted] behavior has interfered in [redacted] ability to receive instruction, to demonstrate to [redacted] teachers what [redacted] has already learned, and even to remain at school at all. To that end, the District pointed out that it is legally required to rule out an emotional disability before concluding that a child such as [redacted] has a specific learning disability, and it is not able to do so given [redacted]'s significant behavioral issues. To the contrary, the data collection and assessments indicate that an emotional disability (i.e., "[i]nappropriate types of behavior or feelings under normal circumstances" (Ala. Admin. Code § 290-8-9-.03 (4)(a)(3))), rather than a specific learning disability is at the heart of [redacted]'s challenges.

The last of the three issues raised by the Petitioner, Ms. [redacted]., whether or not the parent was allowed to participate with the IEP team as is provided for under IDEA? Her concerns break down into the following parts: *One*, that she was not allowed appropriate input as a member of the IEP team; *Two*, that she was not allowed to impact the decision on where [redacted] would go to school for the balance of [redacted] 2019-2020 school year.

A review of these two components of the Petitioner's argument in the context of the applicable law begins with a review of whether or not the Petitioner was in some way excluded

from participation on the IEP team for her [redacted]. The facts clearly indicate that is not the case as she has been a constant participant and vocal advocate, as she admits in her post hearing statements, and as clearly reflected in the record. However, Ms. [redacted] appears to argue that due to the IEP team not following her posture of what the appropriate placement would be for [redacted], they have denied her as a parent, a participation level that would deny her child a FAPE.

The law specifies that District ensure that the parent to be able to attend and that she be afforded an opportunity to be a participant in the team that creates the IEP. This is provided for under the Administrative Code for Alabama, putting in place the IDEIA with regards to application in Alabama in conjunction with the United States Code. "(5) Parental Involvement in IEP Development (a) Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including the provision of a written notification of the IEP meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place." *Ala Admin Code* § 290-8-9.05(5)(a). Further, the implication of the law is that the parent's participation be more than perfunctory. "Congress incorporated [into the IDEA] an elaborate set of what is labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements" with respect to the provision of a FAPE. *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985).

A review of the record, including the testimony of current District personnel along with [redacted] and [redacted], indicates that the District has allowed a high level of participation, and has welcomed her input as the IEP team has sought out a way to best educate [redacted] and in the most appropriate setting. The fact that the IEP team elected to make a decision regarding the location for services for [redacted] that differs from what the Petitioner thought best is not a *prima facia* case that the parent was excluded from participation on the IEP team as an equal partner. While there does not appear to be evidence that she was prevented from participation, including the IEP meeting in [redacted] 2019, with the IDEIA there are two types of violation under IDEIA, procedurally and substantively. Not allowing the parent to have sufficient input as an IEP team member has been considered a procedural violation, not necessarily a substantive violation.

"There are two types of violations under the IDEA -- procedural violations and substantive violations. Substantive violations occur when there is a deficiency in what the school system offers as services for the child, thereby preventing the child from receiving a FAPE. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd.,* 484 F.3d 672, 679 n.7 (4th Cir. 2007). The denial of a parent's "opportunity to participate meaningfully" in the creation of the child's IEP is a procedural violation of the IDEA. *See Knable ex rel. Knable v. Bexley City Sch. Dist.,* 238 F.3d 755, 767-70 (6th Cir. 2001). However, a procedural violation does not necessarily mean the child failed to receive a FAPE and that relief is warranted. *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cnty.,* 309 F.3d 184, 190 (4th Cir. 2002)." *Singletary vs. Cumberland County Schools*, 61 IDELR 281,113 LRP 35384 (U.S. Dis. Ct. for N C 2013) A review of the evidence does not indicate that Ms. [redacted], as a parent, was denied the ability to participate as an equal participant, nor that there was any reason to construe the result of her level of participation to equate to that of a substantive denial of a FAPE.

The next part of Ms. [redacted]'s concern is somehow related to the fact that the IEP team made this decision despite her objections and concerns. Ms. [redacted] clearly raised her concerns with what appears to be good intentions and true concern for her child, as presumably did her lawyer at the [redacted] 2019 IEP meeting. And, she is correct to think that she would have a voice in placement since the IDEA requires that the parents be part of the team that creates the IEP and determines the educational placement of the child, 20 U.S. C. § 1414(d)(1)(B); and the IEP is to include location, 20 U.S. C. § 1414(d)(1)(A)(vi). Additionally, 20 U.S.C. § 1414(f) requires the local educational agency to ensure that the parents are members of any group that makes decisions on educational placement. However, the Petitioner appears to confuse the concept of participation with having the 'final say' with regard to the IEP team decisions.

As an example, the Fifth Circuit notes that for the parent to have 'input' does not mean that they are to have 'veto power over the IEP team'. *White*, 343 F. 3rd 379. See also, *Lachman v. Illinois St. Bd. of Educ.*, 852 F.2d 290, 297(7th Cir) "Parents, no matter how well-motivated, do not have a right under [the IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child". The evidence provided in the record and through the testimony of all witnesses, including that of Ms.

[redacted] as the petitioning parent, provided no evidence of bad faith on the part of the District regarding any possible suggestion that she was somehow excluded from the team decision making process or any other ulterior motives regarding the placement of [redacted] at [redacted].

In sum, Ms. [redacted] has offered no evidence to support her allegation that she was denied the ability to participate in [redacted]'s education. Although Petitioner disagrees with the IEP team's [redacted], 2019, decision to change [redacted]'s placement from [redacted], this does not amount to a denial of participation. Nothing in the record suggests that Petitioner was denied the opportunity to participate in [redacted]'s education.

VI. Conclusion

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

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

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

Finally, in completing a review in this matter the undersigned is mindful that it is not the job of the hearing officer to substitute his judgment for those of the educational professionals involved in the decisions made for the child. The standard as to such review does arise through the decision in *Board of Education Hendrick-Hudson v. Rowley,* 458 U.S. 176, 206 (1982) along

with the impact of the decision in *Endrew F by Joseph F v. Douglas County Sch Dist*, 69 IDELR 174, 137 S.Ct. 988(2017). With this in mind the undersigned has reviewed the facts as set forth in the testimony and evidence, providing the due weight to the information provided by the Petitioner and Respondent alike. The discussion above purports to examine what the undersigned found was not only relevant to an understanding of the facts in this hearing, but the facts that were germane to an understanding of how the law would apply to the questions posed by the Petitioner's complaint and allegations.

In conclusion, and as set out above, the undersigned finds that a FAPE was provided [redacted] and that none of the three issues raised by the Petitioner lead to a determination that the District had failed to provide a FAPE.

VII. Specific Findings

1) The provision for placement by the IEP team for [redacted], arising from the [redacted] 2019 IEP team meeting, that [redacted] attend [redacted] was the least restrictive environment for [redacted] educational services.

2) The District's evaluation process was proper and as such, served to comply with the law and therefor did not deny [redacted] a FAPE under the IDEA.

3) The Parent was not prevented from providing meaningful input and was in fact allowed meaningful participation as a member of the IEP team.

VII. Notice of Appeal Rights

Any party dissatisfied with the decision may bring an appeal pursuant to 20.U.S.C. § 1415(e)(2) and/or Alabama Administrative Code 290-8-9.08(9)(c)(15) and must file notice of intent to file a civil action with all other parties within thirty (30) calendar days of the receipt of this decision. Thereafter, a civil action must be initiated within thirty (30) days of the filing of the notice of intent to file a civil action.

DONE and ORDERED.

Entered this the 13th day of February, 2020.

[redacted]
Steve P. Morton, Jr.
Due Process Hearing Officer

A copy of this Order has been forwarded to Ms. [redacted]., the Honorable Anne Knox Averitt and the Honorable Anne Yuengert via email and US mail first class.

cc: - Dr. Melissa Card