

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

<b>J.B.S.,</b>	)	
	)	
<b>PETITIONER,</b>	)	
	)	
<b>VS.</b>	)	
	)	<b>Special Education Case No: 19-16</b>
<b>JEFFERSON COUNTY BOARD OF</b>	)	
<b>EDUCATION,</b>	)	
	)	
<b>RESPONDENT.</b>	)	

**DUE PROCESS DECISION**

**I.**

**Procedural History**

A due process hearing was held as a result of a request by the attorney for the Petitioner. The hearing request was received by the State Department of Education on February 12, 2019. (Hearing Officer Exhibit 1) (hereinafter referred to as HO \_\_\_\_). On that date, another individual was designated as the impartial due process Hearing Officer. On two (2) occasions, and at the request of the parties, that Hearing Officer extended the deadline for a decision in this case. (HO 2-3). On August 22, 2019, the case was reassigned to the undersigned Hearing Officer. (HO 4-6).

The hearing request was made pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). 20 U.S.C. § 1400, et seq. The due process claim asserted a failure to develop an Individualized Education Plan (IEP) in accordance with the requirements of the United States Supreme Court decision in Endrew E. v. Douglas Cnty Sch. Dist. RE-1, 137 S.Ct. 988, 1000 (2017). It was asserted by counsel for

the Petitioner that the IEP for the child failed to be “sufficiently individualized” to address the unique needs of the child.

Secondly, counsel submitted that the behavior plan in existence at the time of the filing of the due process complaint was not adequate, that it failed to appropriately address the behaviors of the child and that it was not “based on peer reviewed scientifically based research”. (HO 7).

On September 13, 2019, the school system filed a motion to dismiss. (HO 8). After the Petitioner responded to the motion to dismiss on September 19, 2019 (HO 9), the school system renewed its motion to dismiss. The renewal motion was submitted on September 30, 2019. (HO 10).

On October 1, 2019, the motion to dismiss was granted in part and denied in part. (HO 11). The issues designated above remained for the parties to present evidence in support or in opposition thereto.

The hearing was held on November 13, 2019 and November 14, 2019.

At the request of the parents of the child, the hearing was closed. Witnesses were sequestered by agreement of counsel for the parties. The presence of the Petitioner was waived.

Petitioner was represented at the hearing by ■ lawyer. The mother and father of the Petitioner (Guardians) were present for the entire hearing.

The Jefferson County Board of Education was represented by its attorney. The Special (Exceptional) Education Director for the school system served as a representative of the local education agency.

**II.**  
**STATEMENT OF ISSUES**

The first issue was the alleged failure by the school system to individualize the Petitioner's IEP for the 2018-2019 school year. The second issue involved an allegation that the behavior plan implemented for the child was inappropriate or failed to address the child's maladaptive behavior(s).

**III.**  
**FINDING OF FACTS**

Petitioner is [REDACTED] years old. [REDACTED] was born in [REDACTED]. [REDACTED] attends the [REDACTED] grade at a middle school operated by the Jefferson County Board of Education. [REDACTED] placement is in a self-contained class throughout the day, i.e. 0-4. An 0-4 designation means that less than 40% of school day is spent inside a regular education environment.

Petitioner's parents/Guardians are Mr. and Mrs. [REDACTED]. According to the mother, the parents took responsibility for the child when [REDACTED] was three years old. At that time, [REDACTED] was non-verbal. Mrs. [REDACTED] explained that the child has a number of medical conditions including [REDACTED] conditions. In addition, the mother stated that Petitioner suffered from [REDACTED] [REDACTED]. [REDACTED] is treated by a psychiatrist. [REDACTED] also receives counseling from a psychologist on a monthly basis. The child has undergone a number of psychiatric hospitalizations. During [REDACTED]-grade year, [REDACTED] was placed in a residential psychiatric facility.

As a consequence of [REDACTED] conditions, Petitioner is designated for special education as multiple disabled. 34 C.F.R § 300.8(c)(7) (defining multiple disabilities). Although the

child has more than two of the conditions necessary for that designation, the school system has relied on [REDACTED] to address the services necessary for [REDACTED] educational program.

Petitioner is on the extended standards (AAA) program. According to the Special Education Director that program sets forth alternate achievement standards that are derived from the core themes taught for each grade level that a public-school student attends. The themes are governed by standards applicable to the particular grade to which a child is assigned. However, the grade appropriate standards are reduced in complexity, detail and rigor from the standards applicable to general education students. (Respondent [Board] Exhibit 4, 6 and 7) (hereinafter Bd. \_\_\_\_). Instruction via extended standards include techniques, activities and accommodations for students with disabilities to lessen the impact of their disability in the teaching/learning and testing environments. Id.

Due to [REDACTED] residential psychiatric placement, it was decided by the parents and school system that the child should repeat [REDACTED] [REDACTED]-grade year. [REDACTED] did so for the 2016-2017 school year.

The parents/Guardians desired that the child remain at that school as [REDACTED] entered the [REDACTED] grade. But, in the summer of 2017 when the IEP team considered whether the child should remain at that school, it was decided that due to [REDACTED] and [REDACTED] need for a scientific research-based education and a behavioral program that the youngster be placed in a specialized class for students with [REDACTED]. (Petitioner's Exhibit 1) (hereinafter referred to as P. \_\_\_\_). [REDACTED] was placed in a middle school that had such a class. (P. 2). That school is outside the school zone that Petitioner would normally attend. The Petitioner enrolled

in the ■ grade.

The mother testified that she encountered difficulty with the child's ■ grade teacher. The teacher taught a self-contained classroom with approximately nine (9) students. According to the mother, the teacher would not share information that she (mother) wanted concerning the child. The parents wanted this information so that they could implement trials, repetitive instruction and other aspects of the youngster's school lessons at home. Ms. ■. stated that she was not receiving information from the teacher despite numerous efforts to obtain it. She acknowledged that sporadically she did receive the desired information from the middle school principal.

The ■-grade middle school teacher (who also taught Petitioner in the same self-contained room for children with ■ for the Petitioner's ■ grade school year) testified that she provided the parents a daily behavioral chart about Petitioner. The daily behavioral chart was referred to as the daily home note. The teacher explained that it contained information about the child's academics and behavior for each school day. The teacher added that a second piece of information was sent home to the parents. It was related to behavior. The teacher termed it a self-monitoring chart. It required that at the conclusion of each day the child acknowledge whether or not ■ had achieved the goals related to ■ behavior. These goals were to refrain from self-injurious behavior, to avoid aggression to others and to not use profanity.

According to both the mother and the self-contained Special Education teacher, the mother's demands for information concerning the child escalated in the ■ grade (2018-2019 school year). The principal for the middle school testified that he attempted to placate

the mother by providing his own information concerning the child. However, the principal pointed out that the manner for denoting the child's progress in regard to both academics and behavior was by means of progress notes provided to the parents each nine weeks. (April, 2018 IEP for 2018-2019 school year) (P. 5).

On October 9, 2018, the IEP team met with respect to the parents' complaints regarding the lack of information. At that time, the classroom teacher agreed to provide weekly emails to Ms. ■ stating what academic skills would be taught for that week. Attending that IEP meeting was Petitioner's sister. She is a Certified Special Education teacher. (P. 6).

The mother continued to express dissatisfaction. On December 11, 2018, the IEP team met again. (P. 7). At that time, work samples were provided to the parents so they could assist ■ at home. The school system also sent reading passages home for the child to practice.

The Special Education trained sister of Petitioner attended the December IEP meeting.

For a brief period in early 2019, when the Special Education teacher went on maternity leave, the substitute teacher failed to provide some of this information to Mr. and Mrs. ■ The principal stated that upon learning of that situation, he and the substitute teacher devised a weekly picture newspaper to be sent to the parents. A review of a few of these weekly newspapers show numerous parental comments in the margins.

In regard to the behavior plan developed for the child, the Special (Exceptional) Education Director and the ■ self-contained Special Education teacher expressed that

the plan was based on peer reviewed and scientifically based practices. Numerous data was reviewed to develop the plan. The mother provided information from both Petitioner's psychiatrist and psychologist. Information from the parent regarding the child's behavior at home, as well as teacher observation and assessments were considered in developing Petitioner's behavior plan.

The principal and the Special Education teacher insisted that the behavior plan was successful. The Special Education teacher reviewed her daily behavior chart and self-monitoring chart and each demonstrated that on most days Petitioner had a "perfect day". There was one incident when Petitioner denied that ■ had been unsuccessful on one of ■ behavior goals. When confronted with the teacher's assessment that ■ had been unsuccessful, ■ erupted in anger. ■ began to argue and then struggle with ■ teacher when she told him that ■ had marked the incorrect item (i.e. that ■ had not misbehaved when ■ had). That incident resulted in the child being physically restrained.

The Special Education teacher remarked that the behaviors that the parent complained about at home, were not observed at the school. The principal added that despite four (4) specific incidents over a two-year period, Petitioner's behavior improved. Petitioner was generally a happy child. The youngster assisted the other children and teachers. The ■ expressed that ■ enjoyed coming to school. ■ did not engage in as many self-injurious behaviors as ■ had before. ■ tendency to invade another persons' space decreased. ■ rarely engaged in aggressive behavior toward ■ classmates. ■ became more receptive in ■ responses to persons who spoke to ■. ■ was more conversational. ■ expanded from one word replies to speaking in whole sentences.

The principal did agree that on four (4) occasions, the child had to be restrained. He commented that the restraints were administered in accordance with the State Department of Education approved HELP program. Nevertheless, the principal recognized that in each instance the child had to be placed lying horizontally and held for a brief period. According to the principal, each of these incidents quickly deescalated.

Another behavior issue expressed by Mr. and Mrs. ■ was that they wanted school system personnel to follow-up on punishment that they administered to the child at home. The “punishment” was withholding from the child things that ■ enjoyed. These things (watching t.v. and eating preferred foods) were “reward” type items that were denied the child when ■ misbehaved. Mrs. ■ stated that she desired that school officials give her notice if the next day the child would receive similar rewards such as watching movies or eating snacks. She wanted advanced notice that these “rewards” would be provided to Petitioner. She asked that such activities/items be withheld. However, she agreed that if it were a “class earned reward” the child should be allowed to participate in another activity.

The principal responded that the school system attempted to work with the parents concerning their request. But he explained that the rewards were earned by the self-contained class “as a whole” for good or desired behavior. As a result, it was determined that alternatively the Petitioner would assist the school custodian or the principal in activities that Petitioner seemed to enjoy. Later, the parent no longer wanted that as a “reward” activity. When she expressed that view, the principal stated that other activities were substituted such as allowing ■ to work on a puzzle or play on an iPad.



#### IV. DISCUSSION OF ISSUES

It was apparent that the parents' primary concerns were their desire for additional information regarding [REDACTED] school work. They wanted to see that work so they could assist the youngster at home through modeling and repetition of [REDACTED] lessons.

The school system did not express any problems with that desire. Its representatives stated that the school was pleased that the parents were active with respect to the child and wanted information concerning what was going on in [REDACTED] instruction.

That said, the IDEA only requires that periodic reports on the progress that a child is making toward meeting annual goals be provided to a parent. 20 U.S.C. § 1414(d)(1)(A)(i)(III). According to Petitioner's IEP, those progress reports were to be provided to the parent every nine (9) weeks. (P. 5).

When and what type of reports are required to be provided to the parent are left to the discretion of school system officials. Assistance to States for the Education of Children with Disabilities. 71 Fed. R. 46664 (2006). In this case the reports provided Mr. and Mrs. [REDACTED] by the school system complied with the applicable regulation. 34 C.F.R. § 300.320(a)(3)(ii) (IEP should contain description of when periodic reports will be provided).

Nevertheless, as the parents concern for the absence of information grew, the school system provided more information. That effort was in accordance with the IDEA. 20 U.S.C. § 1414(d)(4)(A)(ii)(III). Initially, Mrs. [REDACTED] received both a self-inventory behavior report and a daily home note. As her demands increased, the IEP team met and began to

provide what was characterized as weekly emails describing the academic skills to be taught. (P. 6). (That information was recognized as sufficient by her signature on the IEP by Petitioner's Special Education teacher sister). Two months later the school system agreed to provide work samples and reading passages. (P. 7). They also provided weekly newsletters to the parents. The newsletter contained pictures, one of the methods the child relied on in understanding ■■■ school work.

The 2018-2019 IEP for the child was individualized in accordance with the requirements of the IDEA as well as the decision in Andrew E. The Special Education teacher stated that she did not just throw together the State Department of Education standards required for the AAA assessment. She recognized that the numbers she wrote on the IEP (i.e. R.E. § 6.4, etc.) – and about which counsel for the Petitioner complained – were based on those AAA standards. However, regardless of the numbers, the teacher explained that after undertaking assessments of the child, including her instruction, teacher observation, teacher made tests and a review of the child's standardized assessments she formulated ■■■ IEP. She then examined the peer reviewed, scientifically researched teaching methods, which in her professional judgment, addressed Petitioner's weaknesses. ■■■ IEP goals were directed toward resolving those weaknesses. And while she taught to achieve those goals, the teacher was aware that she must rely on the AAA standards to assist the child when ■■■ underwent the AAA assessment. According to her explanation, the IEP goals and the AAA standards are two separate items. The AAA standards she selected should apply to the IEP goals, but they should also allow the child to succeed on the AAA assessment. She insisted, however, that the AAA standards were not the IEP

goals.

As the Special Education Director explained, the special education teacher correctly picked the grade standard that aligned with the weaknesses of the child based on the teacher's assessments, etc. The teacher then developed standards unique to the child. In this case, ■■■ grade standards were used. For example, the teacher said she linked the reading standards of the ■■■ grade to the actual standard (3<sup>rd</sup> grade) that most matched the ■■■ capabilities. Those standards were compiled/revised using actual functions or topics that are for a third grader. The standards were then broken down further to formulate measures for the IEP bench marks. The benchmarks were used to measure the child's progress toward ■■■ annual IEP goals. The benchmarks included teacher made assessments applicable to measuring the ■■■ progress, etc. The teacher used modeling, word pictures, hands on instruction and repetitive instruction to assist Petitioner in meeting ■■■ benchmarks. According to the Special Education Director that approached complied with the Andrew E. "individualization test", including standards/goals that were sufficiently ambitious yet not so excessively challenging that they would prevent the child from succeeding.

Although Mrs. ■■■. expressed disappointment in Petitioner's progress, the educational benefit provided to a special education child "must be gaged in relation to the child's potential". Ridgewood Bd. of Ed. v. N.E., 172 F.3d 238, 347 (3rd Cir. 1999); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 185 (3rd Cir. 1988). Levels of progress may be modest by most standards, but may be reasonable in the context of the child's disability. Bd. of Ed. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458

U.S. 176, 207 n. 20a (1982); Lessard v. Wilton-Lyndenborough Coop. Sch. Dist., 518 F.3d 18, 29 (1st Cir. 2008); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Jefferson County Bd. of Educ. v. Amanda S., 75 IDELR 95 (N.D. Ala. 2019).

In this case, the school system personnel not only testified that Petitioner had progressed by means of ■ IEP and classroom instruction, but gave examples of ■ progress.

Similarly, there was no evidence that the behavior plan for the child was inappropriate. Testimony was that it was developed from a program that was peer-reviewed and scientifically based. It was derived from numerous sources. As the testimony demonstrated, it has been successful in that there have been few incidents of self-injurious or other maladaptive behavior by the child.

The attorney for the parents/child was also critical of the fact that only one measurable annual goal for each skill/academic area was developed by the Petitioner's Special Education teacher. (There was one such goal for reading, math, social language, written language, adaptive P.E., as well as goals by means of the child's behavior plan). Under the IDEA, local educator's enjoy wide latitude in developing a program appropriate for disabled student, and in that regard, may apply their professional judgment in selecting the instruction for the child. Andrew E., supra. (deference is given to school authorities based on their expertise and exercise of judgments); J.G. v. Douglas County Sch. Dist., 552 F.3d 786 (9th Cir. 2008); M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1101 (11th Cir. 2006); Hartman v. Loudoun County Sch. Bd., 118 F.3d 996, 1001 (4th Cir. 1997). Given Petitioner's disabilities, including ■ cognitive limitations, one cannot say

that a single annual goal for each subject area was inappropriate.

Finally, Petitioner's lawyer asserted that the parents were denied opportunity to participate as equal participants in the IEP process. Although this procedural issue was waived by the pre-hearing failure to raise it, it was apparent that the parents were active participants in their ██████ program. A number of IEPs, as well as follow-up meetings/amended IEPs occurred upon the school system learning of the parents' disenchantment with their ██████ program. The parents special education trained daughter participated in several of the IEP meetings. And Mrs. █. stated that the Special Education Director for the system had been most helpful to her over the years that the youngster had been enrolled in the Jefferson County school system. The parent recognized that the Special Education Director responded to her inquiries or concerns on a number of occasions. It was only when Mrs. █. received no response from the Director regarding the parents' disagreement with the actions of school system officials in January 2019, that the parents filed a due process hearing request. (Bd. 5); (HO 1).

A second procedural issue, which was similarly waived by the failure to assert it, concerned the contention by counsel for the Petitioner that the principal for the middle school could not sign as a general education teacher for the IEP meeting that amended the child's IEP in December 2018 (as well as the April 2018 IEP meeting that was for the 2018-2019 school year). (P. 5 and P. 7).

Regardless of the applicability of "failure to raise" principle, the absence of a general education teacher who instructs the child at an IEP meeting is a technical violation that does not warrant relief. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 764 (6<sup>th</sup> Cir.

2001); Cleveland Heights-Univ. Heights Sch. Dist. v. Boss, 144 F.3d 391, 398 (6<sup>th</sup> Cir. 1998). The principal’s presence certainly did not render the IEP(s) invalid. Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). Further, the principal was certified as a general education instructor. The principal observed the child on a number of occasions in the ■■■ physical education (P.E.) class. (Other than art, that was Petitioner’s sole participation in general education instruction). The principal also assisted in the development of information/instructions for the parents to use with the child at home. The principal’s involvement – albeit limited – complied with 34 C.F.R. § 300.321 which specifies that the IEP team should include not less than one regular education teacher of the child (if the child is or may be participating in the regular education environment). Id. § 321(a)(2). See 20 U.S.C. § 1414(d)(3)(c). Thus, the principal was qualified to fulfill the statutory duties of a general education teacher “of the child”. See Anderson v. Dist. of Columbia, 606 F. Supp. 2d 86, 91 (D.D.C. 2009) (where IEP team did not include student’s regular and special education teacher, the team with adequate substitutes had information to produce sufficient IEP).

V.  
**CONCLUSIONS AND SPECIFIC FINDINGS**


The Individualized Education Plan for Petitioner for the 2018-2019 school year (and its amendments) complied with the mandate of the Andrew E. decision. It provided the child with a free appropriate public education. It permitted the child to “progress” within the confines of ■■■ disabilities. See, Jefferson County Bd. of Educ. v. Amanda S., supra; Perkiomen Valley Sch. Dist. v. S.D., 75 IDELR 67 (E.D. Pa. 2019).

The behavior plan for the child was peer reviewed and scientifically based. It was compiled using information from a number of varied sources. Data concerning behavior was recorded and maintained. The implementation of its components allowed the Petitioner to reduce the frequency of ■■■ maladaptive behaviors. That is progress in accordance with the IDEA.

**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-.8(9)(c)16.

DONE and ORDERED this 4th day of December, 2019.

  
\_\_\_\_\_  
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Hearing Officer  
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Carl Johnson, Esq.  
Andrew E. Rudloff, Esq.  
Dr. Melissa Card

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**APPENDIX OF WITNESSES**

<u>NAME</u>	<u>POSITION</u>
1. [REDACTED]	Petitioner's mother
2. [REDACTED]	Self-contained teacher
3. [REDACTED]	[REDACTED] Middle School Principal
4. [REDACTED]	School System Special (Exceptional) Educational Director



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**Appendix of Admitted Exhibits**

Hearing Officer Exhibits:

HO 1	02/12/19	Request for Due Process Hearing
HO 2	05/08/19	Order Enlarging Time
HO 3	06/21/19	Order Enlarging Time
HO 4	08/21/19	ALSDE email re: reassignment
HO 5	08/22/19	Hearing Officer response to reassignment
HO 6	08/23/19	Order Extending Deadline
HO 7	09/13/19	Board Motion to Dismiss
HO 8	09/19/19	Petitioner Response to Motion to Dismiss
HO 9	09/20/19	Interim Order
HO 10	09/30/19	Board's Renewed Motion to Dismiss
HO 11	10/01/19	Order re: Motion to Dismiss
HO 12	10/01/19	Hearing Officer letter to parties re: Order
HO 13	10/07/19	Amended Order & Directives
HO 14	11/11/19	Board statement of defenses
HO 15	11/18/19	Parties Stipulations/Agreed Facts
HO 16	11/29/19	Board Post-hearing brief (with Exhibits A-D)

Petitioner's Exhibits:

P. 1	04/27/17	IEP
P. 2	06/08/17	Amended IEP
P. 3	10/10/17	Amended IEP
P. 4	10/19/17	Amended IEP

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P. 5	04/24/18 – 04/24/19	IEP
P. 6	10/09/18	Amended IEP
P. 7	12/11/18	Amended IEP

Respondent (Board) Exhibits:

Bd. 1	01/17/18	To whom it may concern letter from Mr. and Mrs. ■.
Bd. 2	10/09/18	To whom it may concern re: Special Education Teacher, from Mr. and Mrs. ■.
Bd. 3		■ – notes of IEP/BIP meeting
Bd. 4		Alabama Extended Standards (Reading)
Bd. 5	01/30/19	Parent email to Special Education Director (with attachments)
Bd. 6		Alabama Extended Standards (Science)
Bd. 7		Alabama Extended Standards (Mathematics)