BEFORE THE STATE DEPARTMENT OF EDUCATION
OF THE STATE OF ALABAMA

E. G. H.,	)	
	)	
PETITIONER,	)	
	)	
vs.	)	**Special Education Case No: 19-27**
	)	
ELMORE COUNTY BOARD OF EDUCATION,	)	
	)	
	)	
RESPONDENT.	)	

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 March 11, 2019. (Hearing Officer Exhibit 1) (hereinafter referred to as HO ____). The undersigned was appointed as the impartial due process Hearing Officer on that date. (Id.)

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 school system submitted its response to the due process hearing request on March 21, 2019. (HO 2). The due process hearing was held on May 14, 2019 and May 15, 2019.

At the request of the parent of the child, the hearing was closed. Witnesses were sequestered by agreement of counsel for the parties. The presence of Petitioner was waived. The youngster did attend the initial day of the hearing.

The Petitioner was represented at the hearing by [redacted] lawyer. The mother and father

of the Petitioner were present for the entire hearing. The Elmore County Board of Education was represented by its attorney. The Special Education Director for the school system and the Special Education Case Manager for the child for the 2018-2019 school year served as the representatives of the local education agency.

II.
STATEMENT OF ISSUES

The formulaic/"boilerplate" complaint submitted by counsel for the Petitioner did not invite substantial scrutiny by the opposing party. That was unfortunate. A great deal of the testimony and evidence presented in this matter by the school system involved the 2018-2019 school year. Counsel for the parent/child apparently had little complaint about the special education services provided by the Elmore County Board of Education for that school year. Petitioner's attorney and ██ parents did object to the school system's refusal to provide the relief they sought. That relief was the eradication from the Petitioner's education record/transcript of the fact that the child failed the ██ grade. ██ repeated that grade during the current 2018-2019 school year. As a consequence, the Hearing Officer intends to focus the decision on the 2017-2018 school year.

The due process complaint submitted in March 2019 maintained that the school system had failed to implement a satisfactory process for make-up work by the child. It was alleged that the system had failed to provide ██ assistance regarding any assignments and tests ██ missed during illness(es) experienced by the Petitioner during the 2017-2018 school year.

The due process complaint continued by asserting that although the school system

was aware that the youngster's medical condition caused frequent absences of the child from school – and in fact, required ███ confinement to home for significant periods – the system had failed to draft adequate IEPs (Individualized Education Plans) for Petitioner for the 2017-2018 academic school year. The complaint alleged that the school system did not provide Petitioner with adequate or appropriate accommodations/modifications to ███ program for Petitioner's initial ███ grade school year.

Three of the IEPs written during the 2018-2019 school year addressed those concerns.

Nevertheless, Petitioner's lawyer insisted that the child be presented an opportunity to declare "academic bankruptcy" as a result of ███ failing the ███ grade at the conclusion of the 2017-2018 academic year. The "bankruptcy" would eradicate all record that the child had failed the ███ grade. The zeros ███ received in each core curriculum course for that year would not be computed in ███ grade point average (GPA). It was acknowledged that the child's credits were earned when ███ repeated the ███ grade.

This case is about whether actions or omissions by school system personnel in the 2017-2018 school year failed to comply with the provision of a free appropriate public education (FAPE) in a least restrictive environment (LRE), i.e. homebound and quasi homebound – the latter arising from the fact the child missed a significant number of classroom days as a result of ███ disabling conditions. 20 U.S.C. § 1401(9) (defining free appropriate public education) and 20 U.S.C. § 1412(a)(5)(A) (defining least restrictive environment).

III.
FINDINGS OF FACTS/CHRONOLOGY OF EVENTS

The Petitioner is [REDACTED] years old. When [REDACTED] health permits, [REDACTED] attends a high school operated by the school system. [REDACTED] mother is a teacher at that school.

The child suffers from several [REDACTED] Those conditions frequently cause [REDACTED] to be absent from school because [REDACTED] is susceptible to airborne illnesses and other sicknesses that are common to a public school. In addition, the parents maintain that the child [REDACTED] (Based on the evidence presented, no staff at the school had observed [REDACTED]. Because [REDACTED] conditions are chronic – and can also result in acute events – the child is designated for special education services under the disability of the other health impairment. 34 C.F.R. § 300.8(9) (defining other health impairment).

Petitioner was first found eligible for special education services on [REDACTED] 2017. (Respondent [Board] Exhibit 19) (hereinafter referred to as Bd._____). That eligibility was determined prior to the youngster's enrollment in the [REDACTED] grade.

Toward the end of [REDACTED] grade year, Petitioner did not attend classes because of [REDACTED] susceptibility to illnesses. The child had not completed all [REDACTED] courses. (Bd. 21). For that reason, summer school was offered in order to allow [REDACTED] to start the [REDACTED] grade at the beginning of the 2017-2018 school year. (Bd. 21).

At an August 8, 2017 IEP it was determined that the child had completed the necessary courses. [REDACTED] was enrolled in the [REDACTED] grade. (Bd. 22). That was the 2017-2018 school year.

The IEP and Eligibility Notice state that the child should receive "accommodations

in all subject areas due to medical diagnosis." At the meeting that found Petitioner eligible for special education, team members concluded that the child's disability impacted ability to perform manual tasks, walk, work, concentrate and caused to be easily susceptible to illness. (Bd. 20). teacher reported that the youngster's medical problems adversely affected ability to keep up with classwork. The teacher expressed that the needed one-on-one instruction in math and science. (Bd. 19, p. 14).

Despite those assessments, on October 31, 2017, an IEP meeting was held because the parents complained the child was not receiving special education accommodations. (Bd. 23). Specifically, they said that their disability made it difficult for to take notes and keep up with assignments. In that regard, Petitioner had been given additional time to complete assignments (up to three additional days) and to receive teacher's notes.

At the meeting Petitioner's mother insisted that the child had only been capable of attending the first three or four weeks of the grade. She maintained that the child suffered . On one occasion was seen in an emergency room. Mrs. H. remarked that up until that time school system personnel had frequently failed to provide with lessons. When child returned to class after absences, could make-up work, but there was no instruction provided to . Accordingly, the mother complained that the accommodations stated in the IEP were not adequate.

The records examined at the October 31, 2017 IEP revealed that the child had continued to fall further behind in classwork. (Bd. 23). The IEP team discussed providing the child homebound services. For the time being, the parents stated that they

wanted their [redacted] to continue to attend school. (Bd. 24).

On November 29, 2017 the Petitioner was continuing to miss a number of classes. [redacted] IEP team met to discuss homebound services. (Bd. 25). The mother testified that if her [redacted] was placed in homebound status, Mrs. H. wanted one of either of two potential online/internet educational services, i.e. "Access" through the State Department of Education (a program that includes daily monitoring) or "virtual school", which also has monitoring capacity to ensure that a student completes his/her work. Mrs. H. was told that Access was not available. It was explained to her that no enrollment in "virtual school" was permitted unless the student enrolled at the beginning of the school year. Instead, a program called E-2020 was offered by the school system. The mother complained that that on-line program did not provide actual instruction or assistance when a child did not understand his or her work.

The teacher assigned to provide the homebound services was to come to the Petitioner's home only once a week. According to the mother, that individual was certified for K-6 teaching. Although Mrs. H. was complimentary of the individual because the individual volunteered to provide the homebound services which were in a different city than the high school the child attended, the mother expressed that the homebound teacher could not provide assistance to her [redacted] in the more complex courses such as science and math. Her [redacted] told her that in one instance when Petitioner asked the homebound teacher for help with an Algebra problem, the homebound teacher replied that she did not know how to do it.

The homebound services were further complicated because the homebound teacher

could not come if the child was ill or when inclement weather prevented her visit. Finally, both of Petitioner's parents worked so that a chaperone had to be present at the home when the homebound teacher arrived to provide assistance to the child. (Bd. 28 and Bd. 29).

During this period Mrs. H. insisted that work assignments from her [redacted] teachers at the high school were not sent home on a consistent basis. Since the mother taught at that school, she asked that the teachers place the assignments in her out box. Mrs. H. said that was not done on a regular basis.

The mother also testified to events at the October 31, 2017, IEP meeting. According to her, a number of the special education accommodations were withdrawn. Among those accommodations were alternative assignments, reduction in number of assignments and limited hand written assignments. (Compare Bd. 20 with Bd. 23). These accommodations were withdrawn at the direction of the high school Principal and with the agreement of the Special Education Case Manager for the child. The Case Manager explained that because Petitioner did not suffer from an "intellectual disability", accommodations were not needed. (Bd. 24).

Inexplicably, the Case Manager's explanation ignored portions of the Petitioner's IEP which stated that "[E.H.] will need accommodations in all subject areas due to medical diagnosis" and "[E.H.'s] disability impacts [redacted] ability to perform manual tasks, walk, work, concentrate, and cause [redacted] to be easily susceptible to other illnesses". (Bd. 23).

Following that IEP meeting, the child continued to fail to complete assignments. On November 29, 2017, homebound services were initiated. At the time of the meeting the youngster was enrolled in the advanced diploma curriculum. Because the Principal

believed the child would receive undue advantage in [REDACTED] advanced classes if [REDACTED] received accommodations, the parents were urged to select the option of their child dropping down to obtain a standard diploma. The parents agreed to that course at that IEP meeting. (Bd. 26). The parents were not told until that meeting that the on-line program E-2020 available to their [REDACTED] while homebound did not teach advance diploma courses. Id.

At that IEP meeting, Petitioner's father continued to insist to school system officials that his [REDACTED] suffered from anxiety and depression. Those conditions caused [REDACTED] to not complete assignments. (Bd. 24 and Bd. 26). (Mr. and Mrs. H. attributed those conditions to the medicine that their [REDACTED] was taking).

The response of the IEP team members was to demand medical documentation to support the parents' claims.

When homebound began in January (after Christmas holidays) the child continued to fall behind in [REDACTED] assignments. On February 8, 2017, [REDACTED] IEP was amended to increase teaching services by [REDACTED] homebound instructor. (Bd. 28). However, the additional services were by Skype or Facebook and were only for thirty minutes a week. (The thirty minutes was in addition to the one hour established for actual visits by the homebound teacher). It appeared that the IEP team again ignored the conclusion of Petitioner's [REDACTED] grade teacher that the child needed one-on-one instruction in math and science. (Bd. 19, p. 14). The team ignored that teacher's assessment that Petitioner's medical problems adversely affected [REDACTED] ability to keep up with [REDACTED] classwork. (Id.)

No evidence was presented at the hearing as to how many of the designated one-on-one meetings with the homebound teacher actually transpired.

On May 8, 2018, the IEP team met to discuss the Petitioner's status. (Bd. 29). It was decided at that time that the youngster would remain homebound until the end of the school year. [redacted] was given until May 24, 2018, to complete [redacted] lessons. (Id.)

Mr. and Mrs. H. did not attend that IEP meeting.

Petitioner did not complete [redacted] course work. (Bd. 29). Mr. H. stated that the child had been [redacted] and had [redacted] In his [redacted] mind [redacted] didn't see the need to complete the assignments. (Bd. 30). He recognized that because the assignments were not completed his [redacted] would fail [redacted] grade. However, Mr. H. declined summer school for the child because he felt [redacted] needed some "rest". (Bd. 30).

It was significant to the child's homebound status that using the E-2020 Petitioner did not complete any course work (except [redacted]) that exceeded 50% of the work assigned. (In February, [redacted] had been asked to complete [redacted] lessons at twice the pace of a typical school year due to the fact that [redacted] was proceeding so slowly). (Bd. 27). In all but [redacted], the other assignments completed were below 20%. (On the work that [redacted] completed the child did receive [redacted] and [redacted] except for a high [redacted]). For that reason, the school system maintained its E-2020 program was appropriate. (Bd. 28 and 29). The 2017-2018 Special Education Case Worker described that the program was effective, but the child did not avail [redacted] of it. The Case Worker remarked that Petitioner chose not to do the work assigned to [redacted]

At a July 30, 2018, IEP meeting it was decided that the child would repeat the [redacted] grade for the 2018-2019 school year. (Bd. 1 and 2).

Throughout the late summer and early fall, various evaluations of the youngster

(assisted technology, occupational therapy, functional assessment) were conducted. In November 2018, ███ IEP was amended to allow Petitioner the opportunity of an abbreviated school day. (Bd. 8). ███ was also given a laptop for note taking and assignment assistance. Shortly thereafter, ███ was given an iPad. (Bd. 8 and 9)

On December 3, 2018, an IEP meeting was held. It was decided that Petitioner would attend school for a full day. The youngster would use one period of that school day to make-up tests and assignments. (Bd. 10 and 11).

After the second semester began, the IEP was amended to allow Petitioner to attend "virtual school" which is an online program. (Bd. 12 and 13). Petitioner was to attend that virtual school for the fourth nine weeks. (Bd. 14). Apparently, ███ has done well by means of ███ on-line educational program. ███ will advance to the ███ grade in the upcoming school year.

IV.
DISCUSSION OF ISSUES

As stated in the initial preface of this decision, it is apparent that the 2018-2019 IEPs addressed the special education concerns expressed by counsel for the Petitioner in his initial complaint. The Special Education Case Manager for the child for the 2018-2019 school year appeared to be much more empathetic to Petitioner's difficulties. (The Case Manager also seemed to be far more knowledgeable of what special education for a student with above average intellectual capabilities entails than Petitioner's previous Case Manager). The present Case Manager is working with the child to allow ███ to make-up assignments. Each teacher allows three days to make-up work. However, the Case

Manager testified that often the child is given additional time. Petitioner has the fifth period in [redacted] schedule open to complete [redacted] assignments. The Case Manager said that teachers or other personnel assist Petitioner with the make-up work.

As to Petitioner's depression that the parents suggested caused their [redacted] difficulty in completing assignments and making up work, the school system has offered mental health services. (Bd. 9, p. 140).

Finally, the admissions policy for "virtual school" changed so that a student could enroll in that program in the middle of the school year. Petitioner did so and seems to be doing well.

The services provided for the 2018-2019 school year did not deny Petitioner a free appropriate public education.

As a consequence, the remaining issue for consideration is whether the school system denied Petitioner a free appropriate public education for the 2017-2018 school year. In that school year the child was placed in [redacted] east restrictive environment of homebound. That placement did not violate the LRE required by the IDEA. 20 U.S.C. § 1412(a)(5)(A) (to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled). In making that placement the school system complied with the continuum of alternative placements and other regulatory requirements. 34 C.F.R. § 300.115 and 116. However, placement in a homebound setting presents the most perilous situation for a school system in that it is difficult to provide a homebound student the type academic/non-academic program that is available to a child who attends school on a regular basis.

From the outset, the program offered by the school system to the child (and ██ parents) was designed to fail. While the individual who volunteered to be the homebound teacher should be complimented – and there was no criticism of her actual behavior or efforts – one hour a week even for a child who is above average cognitively is insufficient. That the child was not completing tasks should have been addressed in a hands-on matter rather than simply repeatedly calling IEP meetings. Hands-on would mean a teacher would go to the premises and actually assist and supervise the child.

Petitioner suffered from a number of ██ conditions. Despite that fact, no instruction was offered to ██ in homebound except to allow the child to go online to view the E-2020 program. (The child had been studying for an advance diploma, yet E-2020 did not include instruction in advance diploma courses). There was no evidence that E-2020 included a means for monitoring or assisting a student to ensure completion of assignments. Surely members of the IEP team who placed the child in that program should have recognized that a ██ grader, home alone because ██ parents work, would probably not be consistent in completion of assignments or making up work. That realization should have been evident by the physician of the child characterization of the adverse effect ██ medical condition had on ██ stamina and concentration. (Petitioner's Exhibit 4) (hereinafter referred to as P ___).

The response of the school system was in February 2017 to increase ██ online assistance by thirty minutes of Facebook/Skype. No effort was made to determine the reason the child was falling further behind nor to provide the actual personal assistance that ██ initial eligibility determination revealed that ██ required. (Bd. 19 and Bd. 20). Those

are the services compelled by the designation of "needs" special education, i.e. specialized instruction services. 34 C.F.R. § 39(b)(3) (specialized instructions are services to address the unique needs of a student that result from a disability in order to ensure a student's access to general curriculum so the student can meet governing educational standards). See, L.J. v. Pittsburg Unified Sch. Dist., 835 F.3d 1168 (9th Cir. 2016) (general education does not provide for one-on-one direction, specially designed mental health services, clinical interventions by district behavioral specialist or persistent teacher oversight).

In a similar vein, the services provided **before** the homebound placement were not adequate. The period of the first semester of the 2018-2019 school year might well be characterized as the child being quasi homebound because ███ was absent from ███ classes so many days. Despite the fact that the child was frequently absent, the school system did not consistently provide ███ assignments or make-up work. The obvious solution would have been to provide those assignments to the mother at school so that Mrs. H. could assist ███ ███ when the child was out of school with illness or ███ chronic medical conditions. Although the case manager believed that those materials were provided, the mother offered a different version of events. Her version was very much the more credible of the two.

The failures of the school system with respect to educational services during both the child's homebound and quasi homebound periods were a violation of the IDEA. The system's omissions denied Petitioner a free appropriate public education.

An IEP team has a continuing duty to review and revise an existing IEP. 34 C.F.R. § 300.324(b). The IEP team must identify additional data necessary to assess the child's

educational levels and determine whether modifications to the IEP are needed to enable the child to meet the IEP's annual goals. L.G. v. Wissahickon Sch. Dist., 2011 WL 13572 (E.D. Pa. 2010). An IEP should be revised to address the lack of progress toward either annual goals in the IEP or in the general education curriculum – in this case, completion of assignments. 34 C.F.R. § 300.324(b)(1)(ii)(A). Despite the fact that anyone paying attention could have reasonably surmised in February 2018, that the child was not going to complete ██ written assignments in a timely matter, no action – except to urge ██ to quicken ██ pace – was taken until May 8, 2018. (Bd. 27 and Bd. 28). At that time, the child was unreasonably given until May 24, 2018, to complete the assignments or fail the ██ grade. Those circumstances ignored the continuing duties of an IEP team.

Of course, there have been many IEP meetings for this child, but simply assembling an IEP team only to do very little to address a deteriorating situation does not comply with either the substantive or procedural requirements of IDEA.

Nor is it appropriate to blame Mr. and Mrs. H. for their failure to act as overseers of their ██████ school work. (Mrs. H. did indicate she would have undertaken that task had her ██████ teachers provided her with the assignments her ██████ was requested to complete). It is well established that the public agency cannot eschew its affirmative duties under the IDEA by blaming parents. Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 (9th Cir. 2012); Doug C. v. State of Hawaii Dept. of Educ., 2013 WL 2631518 *1 (D. Hw. 2013). See, Moore v. Hamilton Southeast Sch. Dist., 2013 WL 4607228 *17 (S.D. Ind. 2013) (school district obligation to provide FAPE not excused by parental opposition to district plan).

Nothing could be more indicative of the school system's failure than the statements of the Principal and the child's 2017-2018 Case Worker at the October 31, 2017 IEP meeting. The fact that the meeting was held on Halloween does seem somehow consistent with the bigoted and illogical views expressed by both individuals at the meeting. Each stated that the child should not have accommodations in ███ IEP (e.g. retaking failed tests) "because ███ doesn't have an intellectual disability". (Bd. 24). One can only hope that they were not using the term "intellectual disability" as it is defined in the IDEA. An individual with an "intellectual disability" is _________. 34 C.F.R. § 300.8(6). The assessment by these two was in direct contradiction to the IEP statements that the child needed accommodation in all subject areas due to ███ medical diagnosis. They were at cross-purposes with the earlier school personnel findings (repeated in several IEPs) that Petitioner's disability impacted ███ ability to perform manual tasks, work, concentrate and cause ███ to be easily susceptible to illness. Further, the Case Manager reiterated her lack of knowledge about special education by stating that if a disabled child is where he/she should be at grade level and academically "you don't typically have an IEP in that situation". (Bd. 24). Courts have condemned that type attitude in circumstances examining whether a child is eligible for special education. <u>See</u>, <u>Mr. and Mrs. I. v. Main School Admin. Dist.</u>, 480 F.3d 1 (1st Cir. 2007); <u>Moore v. Hamilton Southeastern Sch. Dist.</u>, 2013 WL 4607228 *16 (S.D. Ind. 2013).

The high school Guidance Counselor and the school system's Special Education Director pushed back on these unfortunate comments by expressing that it was unfair or disadvantageous to Petitioner to deny ███ assistance because the child was missing

instruction when [redacted] was unable to come to school. Nonetheless, it must be noted that between the May 24, 2017, IEP and the August 8, 2017 IEP, a number of suggested supplementary aides and services were deleted from the child's IEP. (Compare Bd. 21 with Bd. 22). These services included: retake failed tests/assignment if received below 60%, provide study guide, and provide access by the child to "[redacted] mother's classroom" throughout the day. The lack of special education knowledge of the Case Worker, the Principal, and the members of the August, 2017 IEP team supports the notion that staff caused the deletion of those services. The unsupported deletion of previously provided accommodations may certainly be characterized as a violation of a free appropriate public education.[1]

In this case, for the 2017-2018 school year the Elmore County Board of Education failed to develop an IEP that included special education and supplementary aides and services tailored to meet the unique needs of a particular child and be reasonably calculated to enable the child to receive educational benefit. Endrew E. v. Douglas Cnty Sch. Dist.

---

[1] The Hearing Officer has no jurisdiction over violations of Section 504 or the Americans with Disabilities Act. Ala. Admin. Code 290-8-9.08(9)(c)12(iv)X. But the fact that the [redacted] school Principal (LEA) urged the child to drop from the advanced placement degree to a standard degree because [redacted] parents' sought accommodation(s) might invite federal scrutiny.

[redacted] (Principal) stated "…[redacted] [E.H.] doesn't need study guides unless the rest of the class gets one because [redacted] is in advanced classes with no intellectual disability and [redacted] is competing with other students." [redacted] stated that without an "intellectual disability [redacted] [E.H.] shouldn't be receiving academic accommodations". [redacted] (Case Manager) "…we don't need to put in accommodations to retake any failed tests because [redacted] [E.H.] doesn't have an intellectual disability." (October 31, 2017). [redacted] (Guidance Counselor) asked if [Mr. and Mrs. H.] were okay moving [E.H.] to the standard diploma because E-2020 is not available for the advanced curriculum. They [Mr. and Mrs. H.] stated that "they were okay with that". (November 29, 2017).

RE-1, 137 S.Ct. 988 (2017); Walczak v. Florida Union Free Sch. Dist., 142 F.2d 119, 122 (2nd Cir. 1997).

In addition, all of the school system officials who attended the IEP meetings seemed overly concerned with the medical diagnosis of the child. A medical diagnosis alone is not enough to qualify a child for special education. See, Ala. Admin. Code 290-8-9.03(9). From that, it logically follows that a medical diagnosis is not required for the school system to consider and reach conclusions as to what the child needs. Ala. Admin. Code 290-8-9-.03(9) ("**if** a medical diagnosis is presented...for other health impairment"). When evaluating a potentially disabled child the eligibility team must conduct a thorough meeting. Ala. Admin. Code 290-8-9.02(1)(f). The child must be assessed in all areas of the suspected disability including, **if appropriate** health... Id. (g). But there is no **single measure** that compels a specific determination for either services or designation of disability. Ala. Admin. Code 290-8-9-.02(1)(h).

The school system had sufficient medical information to increase Petitioner's supplementary services by means of academic accommodations. (P. 4) (physician letter dated December 1, 2016, setting forth the child's diagnosis, expressing that it is chronic and long term, advising of a compromised immune system, **recurrent fatigue and [E.H.'s] reduced stamina and difficulty learning and concentrating**). That said, the father procured additional medical documentation supporting not only his child's diagnosis, but need for accommodations as well. (P. 1-3).

Lastly, with respect to the allegation that the parents were not treated as equal partners, the Hearing Officer must conclude that their concerns were considered at the IEP

meetings. The fact that the parents were allowed to decline summer school services, were allowed to delay the implementation of a homebound program in the late fall of 2017, and were given opportunities to express their views (including that the child was not completing ███ work due to the fact ██ suffered from ██████) are sufficient circumstances to demonstrate that Mr. and Mrs. H. were allowed to participate in their ██████ IEP meetings in a manner that satisfied the IDEA statute. That parental demands are not acquiesced to by an IEP team does not mean the parents are not treated as equal partners in the process. D.A. v. Meridian Joint Sch. Dist. No. 2., 2014 WL 43639 *8 (D. Idaho 2014) (parents actively participated in eligibility team meetings). See, A.E. v. Westport Bd. of Educ., 251 Fed. Appx. 685 (2nd Cir. 2007) (nothing in IDEA requires that all parties agree to the terms of an IEP); Ms. S. v. Vashon Island Sch. Dist., 337 F.3d 1115, 1131-32 (9th Cir. 2003) (school district must allow parent meaningful participation, but parent does not have veto power over any decision by an IEP team); Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1036 (3rd Cir. 1993) (parent who has opportunity to discuss proposed IEP and whose concerns are considered by the IEP team, participated in the IEP process in a meaningful way).

V.
CONCLUSIONS

This dispute must be analyzed under the Supreme Court decision of Endrew E. v. Douglas Co. Sch. Dist. RE-1, 137 S.Ct. 988 (2017). In that case, the United States Supreme Court examined the IDEA requirement that a local education agency must provide a disabled child with a "free appropriate education" by means of a "uniquely tailored"

"individualized education program". It is the decision of the Hearing Officer that Petitioner's 2017-2018 Individualized Education Program – including the five amendments to that program – did not satisfy that requirement. While the child could not be fully integrated in the regular classroom due to absences caused by [redacted] illness, [redacted] intellectual capabilities (high average I.Q.) demonstrate that [redacted] is capable in performing grade level work and advancing from grade to grade. In fact, when the youngster completed [redacted] work, [redacted] generally earned A's and B's. (As discussed in Section IV., Discussion of Issues, those grades were one of the basis for the misguided notion that Petitioner did not need accommodations or other specialized services). Yet, despite the youngster's abilities, [redacted] did not perform grade level work on a consistent basis. [redacted] did not advance to the [redacted] grade.

Thus, one must examine that portion of the Endrew E. decision that emphasizes that the test of an appropriate education is whether the child's educational program is sufficiently ambitious in light of the circumstances. The inquiry is: is the program tailored to the individual needs of the child so that the child can meet objectives that reveal successful educational progress. In this case, the response of the school system was that during the child's first [redacted] grade year Petitioner simply did not do [redacted] work. That assertion ignored the eligibility findings that first designated [redacted] for special education services at the end of [redacted] grade year. The response ignored the fact that the child's disability impacted [redacted] ability to perform manual tasks, walk, work, concentrate and caused [redacted] to miss [redacted] classes due to [redacted] susceptibility to illnesses. From the outset of [redacted] eligibility for special education the school system assessed the child and agreed that [redacted] needed accommodations

"in all subject areas due to medical diagnosis". One teacher expressed that the child needed one-on-one assistance in math and science. The teacher wrote that Petitioner's medical problems adversely affected ability to keep up with classwork. The IEP meetings that were held after those conclusions superficially considered them, then reduced the accommodations to: extended time on assignments, access to resource room and at "teacher discretion" a peer tutor.

Due to the child's frequent absence from school in the early weeks of the 2017-2018 school year, those accommodations were obviously insufficient. But the Petitioner's IEP was not adjusted despite IEP meetings in October and November 2017. The apparent reason that no significant revision in the supplementary aides and services was initiated was that some school system officials viewed the Petitioner as not doing the work, not taking the opportunity to make-up assignments.

No individual from the school system conducted an additional assessment to determine if, when the child was absent from school and returned, was capable of understanding the missed lesson. No one appeared to have considered the fact that the child was going from the grade to the grade, including its social and academic disruptions. No one wanted to attempt the very one-on-one assistance first called for in grade special education evaluation.

Instead, on October 31, 2017, an IEP meeting was held in which team members (including the LEA (Principal) and the youngster's Special Education Case Manager) proclaimed that because Petitioner was not "intellectually disabled" should not receive any accommodations. The LEA did grudgingly state that "with a time limit, the child might

be able to make-up work". Others at the IEP meeting who insisted that Petitioner was "at a disadvantage because [redacted] is missing instruction in class" and that "it wasn't fair to the child to hold [redacted] accountable for what happens at school when [redacted] is unable to come to school" were unable to prevail in their opinions. The IEP team proceeded to reduce the special education assistance for the child.

A month later, the IEP team met and placed the child on homebound. Again, as discussed in Section IV, that program was totally incapable of assisting the child to advance to the [redacted] grade. As the court in Endrew E. expressed, the program contained in an IEP must turn on the unique circumstances of the child for whom it is created. While the court agreed that deference should be given to the expertise and exercise of judgment of school authorities, the October 31, 2017 IEP meeting and the November 29, 2017 IEP, demonstrated that that "expertise" was focused on an online computer program – which did not even teach the curriculum for the advanced diploma that the child was seeking – without any assistance from an individual except an occasional visit from the homebound teacher who did not appear to be certified on a [redacted] school level of instruction. Accordingly, it cannot be said that even on the days that the homebound teacher arrived that any assistance with, or explanation of, the assignments of the child was achieved.

As the child fell further and further behind in [redacted] work, no one from the school system sought to examine the parents' claim that their [redacted] suffered from [redacted] [redacted]. And while school system personnel certainly had a right to demand medical records that would support the parents' claim, to have disregarded their claim in the interim, given the child's past difficulties and the fact that [redacted] had no social or academic

interaction due to homebound status, was remiss.

In regard to each of these omissions, the school system could only express that the child's difficulties and failure of grade year were the fault of the child – and by implication, parents. Even the school system's position that in early May it provided the child a last opportunity to complete all work so that could advance to the grade was cynically offered. Based on the child's past performance, it was clear was not going to complete work. How one could think that a child who had failed to complete 70%-80% of assignments in all subjects (except history – favorite course) would complete them by the end of the school year.

Based on the above circumstances, the local education agency failed to provide a free appropriate public education for the 2017-2018 school year. The IEPs provided to the child while was homebound and quasi homebound (the numerous absences from class during the first semester) were inadequate. They were not tailored to meet the unique needs of the child. As a result, the child did not advance from grade to grade despite capacity to perform grade level work.

VI.
SPECIFIC FINDINGS

1. The Petitioner is entitled to compensatory educational services. Educational services were not provided on a consistent and sufficiently frequent basis throughout the 2017-2018 school year.

However, the Hearing Officer does not find that the child's failure to advance to the next grade was entirely because of the school system's omissions. At least a portion of the

blame for the child's lack of success was ███ alone. See, Alex R. v. Forestville Valley Comm. Unit Sch. Dist. #221, 375 F.3d 603, 610-11 (7th Cir. 2004); CJN v. Minneapolis Public Schools, 323 F.3d 630, 642 (8th Cir. 2003); T.M. v. District of Columbia, 2014 WL 6845495 *6 (D.C.C. 2014). Further, because ███ parents and ███ elected for ███ to repeat the ███ grade, what are the subjects to which ███ would be entitled to enroll in order to compensate for the local education agency's failure to provide ███ a free appropriate public education? Consequently, the specifics of ███ entitlement to compensatory education must be revised in accordance with those two circumstances.[2]

2. It is the Hearing Officer's determination that the compensatory education shall be provided by the school system paying for outside psychiatric or counseling services for Petitioner. These sums shall be paid by the local education agency to any provider (psychiatrist, psychologist or mental health counselor) presently providing or subsequently engaged by the parents to provide those services to the child. The school system may receive an offset for insurance coverage (or other governmental or private source payment), but shall be required to pay all co-pays, deductibles or other out-of-pocket monies paid by the parents. These payments shall be for such services for the period of 18 months. The psychiatric or counseling sessions shall be no more than two per month.

---

[2] The Petitioner's failure to do ███ work is one of the purposes of credit recovery policies. In this case, Petitioner did not avail ███ of credit recovery. (Bd. 32). ███ parents and ███ also chose for ███ not to attend summer school. For these reasons it would be unfair to expunge or eradicate from ███ school transcript ███ failure of the ███ grade.

Following completion of the evidentiary portion of the hearing, the school system's lawyer did offer the parents' an opportunity to seek amendment of their child's records by means the Federal Educational and Privacy Act (FERPA), 34 C.F.R. § 99.20(a)-(b) or its special education counterpart, Ala. Admin. Code 290-8-9-08(f).

3. The school system shall reimburse the parent(s) for mileage at a rate typically reimbursed by the school system for travel to and from the sessions.

In the event the parent and child fail to attend two consecutive sessions without an appropriate excuse, the local education agency shall no longer be obligated to pay for counseling/psychiatric sessions by an outside provider.

4. As further compensatory education, the school system shall pay for up to 20 hours of tutoring sessions for the child by a person selected by the parents. The cost per session shall not exceed $60.00 per hour.

5. The school system shall reimburse the tutor (or the parents if they travel to tutoring sessions) for mileage at a rate typically reimbursed by the school system for travel to and from sessions.

6. In regard to the October 31, 2017, IEP meeting, the local education agency shall conduct training for staff at the school where Petitioner attended concerning its obligations to provide a free appropriate public education, including accommodations and supplementary services. The training shall be conducted for **all** staff, and shall specifically include the former Principal and 2017-2018 Case Worker for the child, as both expressed ignorance concerning special education rights. Documentation of completion of the training shall be provided by the school system to Petitioner's parents and their attorney.

The training may be provided by school system staff on the condition that he/she/they are not assigned to that school or, alternatively, by an outside person, including the attorney for the school system. The training shall be provided within thirty (30) days of the beginning of the 2019-2020 school year.

7. For the 2018-2019 school year, the Hearing Officer finds that the school system provided the Petitioner with a free appropriate public education.

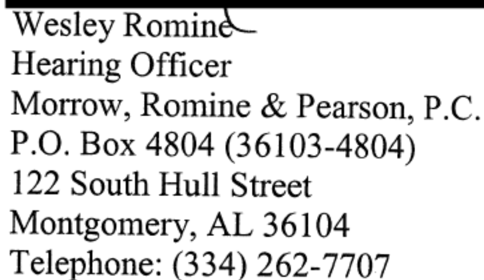
8. The school system treated the parents as equal partners in the IEP process.

9. All other requests for relief are DENIED.

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 30th day of May, 2019.



Wesley Romine
Hearing Officer
Morrow, Romine & Pearson, P.C.
P.O. Box 4804 (36103-4804)
122 South Hull Street
Montgomery, AL 36104
Telephone: (334) 262-7707

cc: James D. Sears, Esq.
Erika P. Tatum, Esq.
Dr. Melissa Card