BEFORE THE DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA

CASE NUMBER 19-53

S.S.
PETITIONER
v.
ENTERPRISE CITY BOARD OF EDUCATION,
RESPONDENT.

FINAL ORDER
ISSUED
August 15, 2019

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BEFORE THE DEPARTMENT OF
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	)
SS	)
Petitioner,	)
v.	)
ENTERPRISE CITY BOARD	)
OF EDUCATION	)
Respondent.	)

Special Education No. 19-53

FINAL ORDER

I. PROCEDURAL HISTORY

This Due Process Hearing was conducted pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 2004 reauthorization, 20 U.S.C., section 1400, *et sequitur*, implementing the federal regulations at 34 C.F.R. Part 300, and implementing the Rules of Alabama State Board of Education, Chapter 290-8-9, *et sequitur*. The matter is before the undersigned pursuant to a Due Process Hearing request filed on April 19, 2019, by the Honorable Shane Sears, on behalf of S.S. ("Petitioner"), a student in the Enterprise City School District. The Petition alleged that the school system did not provide the child with a free appropriate public education ("FAPE") during the 2017-2018 and 2018-2019 school years. Specifically, the Petitioner alleged that the School Board failed to

implement an appropriate individualized education plan ("IEP") for the child, a behavior intervention plan ("BIP"), and an Applied Behavior Analysis ("ABA"). Additionally, it alleged that the child was not placed in [redacted] least restrictive environment ("LRE") during this school year.

The remedy which Petitioner sought was an Order directing the School Board to "develop and implement a current behavior intervention plan ("BIP") that is based upon peer reviewed scientifically based research," and developed by a board-certified behavior analyst ("BCBA"). The Petitioner also sought an order to provide Petitioner with a one-on-one aide and other personnel who have been professionally trained in the areas of behavior management and crisis prevention intervention. Lastly, the Petitioner sought an Order directing the Board to provide weekly counseling, develop communication logs, as well as a check-in and check-out system, and an organizational system.

The school system submitted its response to the due process hearing request on April 30, 2019. (HO 2). Therein, the school system maintained that it provided the child a FAPE in [redacted] current placement at the Enterprise City Schools, and that it, at all times, met the legal requirements under the Individuals with Disabilities Education Act, as amended, and its respective federal and state implementing regulations (collectively, "IDEA"). Further the Board responded that it had properly evaluated the Petitioner under the IDEA, and had further developed programming

for the Petitioner based on the Petitioner's unique circumstances and disability-related needs sufficient, to constitute FAPE.

The Respondent stated that the IDEA requires only that, "[i]n the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." §300.324(a)(2)(i). Thus, Respondent contends that the Petitioner seeks specific relief that is neither contemplated nor required by law. Moreover, the Response states that the Board has, at all times, fulfilled the substantive and procedural obligations imposed by the IDEA with respect to behavioral programming.

On May 4, 2019, the parties waived the Resolution meeting and continued discussions of settlement. On May 24, 2019, a status was requested by the undersigned, which was responded to by the parties, and on that date a request for Continuance was made by the parties to have time to discuss possible, appropriate, private placement options. Section 290-8-9.08(c)12.(iv)IX (v) entitled, " Extension of Timelines" states, *"At the request of either party, the hearing officer may grant extensions for specific amounts of time beyond the periods set for the impartial due process hearings. Documentation pf extensions must be submitted to the State Department of Education, Special Education Services."* Therefore, the Continuance was granted. However, settlement discussions failed.

A Due Process Hearing was held in this matter on July 16, and July 17, 2019. The matter was reconvened and continued on July 23, and concluded on July 26, 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 the Petitioner was waived. However, the Petitioner did attend some portions of the hearing. ██ presence was at times distracting for the participants of the hearing. However, ██ appeared for extended periods of time. Due to ██ disability, ██ was not able to testify. The mother and father of Petitioner were present for the entire hearing as well as the Petitioner's paternal grandmother.

At the conclusion of the hearing, the parties jointly requested that the Final Order date be extended until August 15, 2019, to accommodate the additional days of Hearing and to allow for the submission of post hearing memoranda. The continuance was granted until August 15, 2019. This decision follows:

II. EXHIBITS ADMITTED INTO EVIDENCE

At the Hearing, exhibits were submitted by the parties and accepted into evidence by this Hearing Officer. These Exhibits have been examined by the undersigned, subject to the issues heard at the Due Process Hearing and in light of the testimony presented at said hearing. The documents and materials remained in the constant possession of this Hearing Officer until the rendering of this decision. Hereafter, they will be delivered to the State of Alabama Department of Education along with the original Final Order, and kept in accordance with applicable State and Federal laws.

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

This Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of rendering a decision in this matter. The parties each introduced one binder containing labeled exhibits. Several other items

were presented and accepted in accordance with applicable evidentiary standards and after appropriate rulings on objections, if any.

III. WITNESSES

Each party was permitted to offer testimony by way of their witnesses' who were sworn under oath. The testimony from these witnesses was examined, evaluated, and the appropriate weight was assigned each based upon credibility, and subject to the issues heard. The testimony has been duly recorded and transcripts have been delivered to the State Department of Education.

Both parties were allowed to introduce evidence that had not been timely exchanged, five (5) days prior to Hearing. The Petitioner was also allowed to proffer a last minute witness from the [redacted] over the objection of the Respondent, and the Respondent was afforded the same courtesy with regard to late offers of proof.

IV. BURDEN OF PROOF

The burden of proof in this matter is upon the Petitioner, as the Petitioner is the party seeking relief. *Schaffer v Weast*, 546 U.S. 49 (2005); *Ala. Admin. Code* 290-8-9.08(9)(c)(1). The applicable standard of proof is, proof by a preponderance of the evidence.

V. SUMMARY OF THE TESTIMONY AND EVIDENCE

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

VI. TESTIMONY [PRESENTED BY THE PETITIONER

The Petitioner is years old and currently a student in the Enterprise City School System in Enterprise, Alabama. was born in . The Petitioner's mother is J.S. and father is S.S. The child has been diagnosed with (TR 22-23). has severe behaviors including (TR 25-26). is non-verbal, and also has a as tends to elope.

There was testimony from both parties' witnesses that this behavior discussed above is typical of the student's behavior at school.

Prior to attending the Enterprise City School System, S.S. attended the County School System in Florida. (TR 29). The County School Board had a behavior intervention plan for S.S. in place in IEP. (TR 29-30). The

Parents testified that ▇ appeared to be making progress in the ▇ County Schools. (TR 31-32). ▇ was reportedly able to identify ▇ name from a list of eight students and move it to the other side of the board to indicate ▇ was present in the classroom. (TR 32).

This hearing officer and the parties viewed a video showing ▇ appearing to be in a classroom in ▇ County demonstrating a counting exercise. (TR 738-741; see also, Petitioner's exhibit six).

Following the filing of the due process complaint, the school district filed a DHR report concerning ▇ on the Petitioner. The matter was dismissed. (TR 820-821)

Upon examination, the school nurse testified that she had seen prior ▇ and ▇ on S.S but never reported it to DHR as ▇ (TR 812). The nurse submitted the form to DHR. (TR 813). She further testified that she submitted the report because she did not have an explanation for the ▇ However, she did not call the parents to ask how the ▇ occurred. (TR 813-816). She concedes that it may have been a good idea to contact the parents. (TR 818). The director of special education, ▇, agreed that it would make sense for the teacher or reporting person to determine if there was an explanation for the ▇ (TR 841).

For the 2017-2018 and 2018-2019 school years the Petitioner attended School operated by the Enterprise City Schools. . 's grandmother, reported that sometimes does not sleep at night as a result of and stays with her. (TR 336).

also punches in the face and engages in repetitive hand flapping. (TR 24). requires an aide to be with at all times to protect other students and (TR 25-26). will try and run off or elope if able. (TR 32). wears an electronic bracelet on left ankle from Project Lifesaver which is a tracking device. (TR 32-33). father was requested on at least thirty (30) occasions by school personnel to come pick up at school due to behavior. (TR 242-243). However, SS's mother, who is a physician, could not find anything medically wrong with to require a call from the school. (TR 243). Additionally, 's grandmother also have to pick when 's father was busy at work. (TR 242).

Enterprise City Schools has not developed a behavior intervention plan for (TR 38-39), and does not currently have a behavior intervention plan that is part of IEP. (Id.; see also, 471). However, has behavior which impedes learning and the learning of others in the classroom environment. (TR 40-41).

was teacher during the 2017-2018 school year and part of the 2018-2019 school year. (TR 36, 119). Ms. does not remember sending home a school document advising 's parents that the school district

would develop a BIP for ███ (TR 471-472). Notwithstanding, ███ provided S.S's parents a document (Respondent's Bates 346) that indicated that the IEP team would develop/revise/discuss a behavior intervention plan for ███ (TR 474-475). However, Ms. ███ concedes she did not follow through with the notice to the parent to develop/revise/discuss a BIP for ███ (TR 474-475). Moreover, a progress report was sent home to ███'s parents two days prior (Respondent's Bates 510) to the Notice and Invitation to meet to develop the BIP indicating that ███ expected ███ to master ███ behavior goal. (TR 497-498). Ms. ███ conceded that the grades on ███ grade reports were essentially meaningless. (TR 573). She explained that the parents cannot review them and determine how ███ is doing in a particular subject. (TR 574-576).

The school district attempted to keep behavior logs on the child. (TR 53). However, when ███s mother compared those behavior logs to the behavior logs produced by the school board, the school board's behavior logs were different. (Id., 461-462, 464). Ms. ███ testified that the behavior logs for ███ provided to the parents were not accurate. (TR 323-325). However, she never contacted ███'s mother to let her know the behavior sheets she was reviewing were inaccurate. (TR 325-326 (TR 319-321). Additionally, the school district's behavior logs were not accurate. (TR 325), neither were the parent's behavior logs accurate. (TR 482, 485-

486). There was no way to know if they were making progress with any behavior strategies because did not document it. (TR 581-582).

Ms. stated that she knew it was important to document everything she did in the classroom. (TR 470), and that keeping data is an important thing to do so that the parents know what is occurring in the school environment. (TR 722). There was no data collected by anyone else who worked with in the classroom environment. (TR 724).

's who taught in the Enterprise City School system for 31 years, testified that it is the best practice to keep a behavior log so the data does not get mixed up. (TR 356-358). Another Enterprise teacher, testified that accurate data collection for behavior is one of the most important components so that one can chart, graph, and analyze it. (TR 1110-1111). However, when she was allegedly working with , she did not document any of the strategies or techniques she was utilizing even though that would be a best practice. (TR 1117-1120).

Ms. conceded that collecting behavior data is important as a special education teacher. (TR 321-322). It is how the teacher determines if the behavior is getting worse or better. (TR 321).

Mr. was s aide during the 2018-2019 school year. (TR 306). He did not know he would be an aide in a self-contained classroom at

High School. (TR 386-387). He had no training to be s aide. (TR 388), and he had no training to work with children with especially those who were non-verbal. (TR 389). could be physically aggressive which was overwhelming to (TR 392). (TR 392-393). There were times when he needed assistance with (TR 398). However, he was never provided an additional aide in the classroom or any help. (TR 449).

Mr. advised the teacher, that they needed a BIP for based upon his experience working with students at in the behavioral unit. (TR 395-396). He helped develop BIPs in the past. (TR 410). He also discussed the need for a BIP with the English teacher, Ms. as well because 's behavior was so out of control. (TR 402-403). testified that he believed that needed to be in a private placement from time to time like (TR 396). He had been to visit the facility and knew the population it served. (TR 424).

The behavior sheets provided to s parents should have contained the same information kept by the school. (TR 401). s parents should have been able to reply on the accuracy of that information. (Id.).

Mr. finally resigned his position because s behaviors had gotten "a little bit too much" for him to handle. (TR 405).

’s grandmother witnessed times when Ms. would have to chase around the classroom to try and contain him. (TR 342). behavior started to regress or go downhill during the 2018-2019 school year. (TR 344).

only had one behavior goal for the 2017-2018 school year. (TR 878-879). The behavior goal for 2017-2018 was not mastered (or met) but it still was not carried over into the 2018-2019 IEP. (TR 881-882)

Ms. who is the School Board’s Special Education Coordinator, cannot point to any document produced by the school board which indicates that made progress during the 2017-2018 or 2018-2019 school years. (TR 1257). Even though Ms. claims to have worked with during the school year, she did not document any activities or interventions she did with (TR 1267).

was suspended from the bus in September of 2018 for behavior. (TR 901, 909). However, the school district did not develop a BIP for for the bus. (TR 909-912). The school district did not reimburse the parents for mileage when they had to transport to school. (TR 906). The change in transportation was not amended in IEP. (TR 908-909). In fact, there was absolutely no documentation of the 2018 IEP meeting. (TR 916-917). It was mandatory that a written document be created as a result of IEP meeting. (TR 917). There is no documentation that the IEP team decided no to take action. (TR 917-918; see also, 1008-1009).

[REDACTED] is employed for [REDACTED] Inc. ([REDACTED]) as a BCBA and assistant executive director. (TR 933). The majority of its clients are very low functioning with IQs in the 40 to 60 range. (TR 935). Health insurance does not pay for the services of The [REDACTED] (TR 944). Medicaid does not cover placement because it is not a medically-ran facility. (TR 945).

Programs and services at [REDACTED] are different from school based services due to personnel and training. (TR 948). It employs board certified behavior analysts versus teachers and the behavior analysts are trained to deal with significantly challenging behaviors as well as focus on skills that may not be considered academic. (Id.).

[REDACTED] has seen [REDACTED]'s behavioral concerns. (TR 950). There are other children at [REDACTED] with similar behaviors such as aggression to people and property. (Id., 951). There are also non-verbal children that attend. (Id.). Its representatives also conduct IEPs and develop BIPs. (TR 954, 1003-1004). It is a specialized treatment center and designed to offer educational programming over a 12 month period. (TR 959).

Daily residential programming is in the amount of $658.33. (TR 964). Parents can come to the program and see their children at any time. (TR 968). The [REDACTED] has spots reserved for the State Department of Education. (TR 991-

992). The LEA and the state negotiate internally as to an agreement for placement. (Id.). The [redacted] does not keep children longer than necessary. (TR 998).

The Respondent, through [redacted] witnesses and evidence presented the following:

The Petitioner and [redacted] family relocated to Coffee County, Alabama before the start of the 2017-18 school year. (Trans., pp. 147-48.) At the time of their arrival, the family resided outside of the territorial boundaries of the Enterprise City Schools. Previously, the family had resided in [redacted] County, Kentucky, and, more recently, [redacted] County, Florida, and the Petitioner was served by the respective school systems in those areas before the start of the 2017-18 school year. (Trans., p. 147-48.) The Petitioner was nonetheless permitted to attend ECS by virtue of a discretionary open-enrollment policy offered by the Board. (See Trans., pp. 1197-98.)

The Petitioner attended [redacted] Elementary School during the 2017-18 school year.(Trans., p. 304.) [redacted] was a relatively new facility, having been built in 2007. (See Trans.,p. 1185.) But, even prior to the Petitioner setting foot on campus, changes were made to the physical classroom at [redacted] to, among other things, minimize vocalizations from others and otherwise tailor the space to meet the Petitioner's individual needs. (Trans., pp. 1183-85.)

Ms. [redacted] served as the Petitioner's lead special education teacher at [redacted] (Id.) The Parents describe her as someone "who knew her business," "did

a wonderful job," who had "a tremendous rapport" with the Petitioner, and who was capable of "working magic" with [redacted] (See Trans., pp. 169-70, 340, 343.) Indeed, these accolades were consistent with the family'sactions of imploring Mrs. [redacted] to assist the Petitioner (and thus the family) at home during the summer after the 2017-18 school year. (Id.)

The record reveals that the family was well-pleased with what programming was afforded by Mrs. [redacted] Therefore, the family wished for the Petitioner to return to [redacted] (by virtue of the same out-of-district enrollment option) for the 2018-19 school year. (See Trans., pp. 1197-98.)

(b) 2018-19 School Year Instead, the bulk of the testimony and criticism offered at hearing centered on the 2018-19 school year and associated events.

The Petitioner attended [redacted] Junior High School that year, not [redacted] (Trans., p. 304.) The self-contained space at Coppinville was largely built and furnished before the school year began with the Petitioner and [redacted] actual (and anticipated) needs in mind. (See Trans., pp. 1190-92, 1201-1203.) That individualized planning of the physical space involved specific meetings with the school's design firm and ranged from the incorporation of bathing and washing facilities in the event of toileting accidents, to the purchase and use of specific mats

designed to help the Petitioner with learned, consistent shoe removal prior to entering ███ classroom. (Id.)

Equally as important, the actual class at ███ was comprised of only four students (three once one student left due to a mid-year move). This construct enabled individualized, differentiated academic instruction in the classroom based on student need and ability, while still affording an opportunity for socialization and peer engagement at ███ via specials (e.g., physical education, choir, Special Olympics, etc.). (See Trans., pp. 305, 413, 419, 436, 439, 449-50, 1204-1205, 1241-42.)

From the administration's perspective and consistent with research in this area, typical-peer involvement through socialization is an essential part of enabling a student with ███ to mirror positive behaviors. (Trans., pp. 1241-44.)The staff-to-student support ratio at ███ was also exceedingly low.

Mrs. ███ voluntarily agreed to move from ███ to continue to serve as the Petitioner's lead teacher at ███ and she ended up doing so for over half of the 2018-19 school year. (Trans., pp.304, 1198.) ███ who had past experience with students with ███ was trained in crisis-prevention strategies at ███ completed part of additional school-sponsored behavioral intervention programming, and provided paraprofessional assistance in Mrs. ███ ███ classroom. (Trans., p. 304, 306-308, 413, 417-19.) Mr. ███ started

in that role in October of 2018. (Id.) Additional adult support was also provided in the classroom throughout the course of the school year and took a host of different forms, including regular and "consistent" support from those at "the top." This included the District's Special Education Director, and the District's behavior intervention strategist, who provided administrative oversight for staff, recommending tweaks and changes to classroom methodologies, and actually performing "hands on" teaching with the Petitioner in the classroom. (See Trans., pp. 413, 419, 449-50, 1222-24.)

Of course, the Petitioner's needs were neither new nor novel to either of Notably, Mrs. served as a past educator at a residential behavioral health center, which included, among other things, development and implementation of behavior strategies, and as a former special education teacher in the self-contained unit at (See Trans., pp. 1166-71.) In addition to her current District-wide administrative responsibilities, her individualized work with the Petitioner at during the 2017-18 school year ran the gamut, ranging from implementing "compliance training," to academics, to assisting with toileting, to filling in as a paraprofessional in the event of Mr. absence. (Trans., pp. 1223-24.)

Mrs. background and experience in the area of educating students with was equally impressive. She trained at the knee of a renowned scholar in

the area of [redacted] she has been trained on multiple occasions by [redacted] [redacted] [redacted] in Birmingham; she herself trains others in behavior management and sensory integration strategies Indeed, many of Mrs. [redacted] students during her four-and-one-half years at [redacted] were male, nonverbal students with [redacted] and, as a consequence, she helped shape behavioral instruction relative to the AAA. (See Trans., pp. 1166-71.)

In addition to these aspects of her background in the area of behavior management, she also received training, and had ample experience implementing, strategies falling under the umbrella of Applied Behavior Analysis ("ABA"). (Trans., pp. 1179-80. at the building, district, and state levels; she serves as a facilitator for a program specifically used to build communication skills (both verbal and nonverbal) by students with [redacted] and she has generally devoted a "substantial part" of her 20-year career as an education professional to teaching students with [redacted] including those who fit the mold of "severe [redacted] (Trans.1048-57; see also Resp. Exh. 3.)

In particular, Mrs. [redacted] became more heavily involved in the Petitioner's behavioral and sensory programming at [redacted] after October of 2018. (See Trans., p. 1104.) Admittedly, some change occurred for everyone in the spring of 2019. For instance, in February of 2019, [redacted] assumed teaching responsibilities in the classroom in the place of Mrs. [redacted] (Trans., p. 259.) Mrs.

returned to at that point in the year to fill the void created by another teacher's medical-related absence. (Trans., p. 305.) And, while their litigation position presumably entails a challenge to the programming that Mrs. provided at up until her departure (and beyond), the real complaint voiced during the hearing was that the Petitioner was losing the services of a teacher whose skill and commitment had produced acknowledged progress and in whose ability to meet the Petitioner's needs they placed great trust and confidence. (See Trans., pp. 170-71, 259, 1124-25.)

The family experienced changes of their own around this same time that could have adversely impacted the Petitioner's routine and explained the temporary increase in behavior in mid-spring of 2019. They moved from their home in Coffee County into another home in the Enterprise city limits—and thus within the territorial boundaries of the ECS—in April of 2019.(See Trans., pp. 152; 351.) This relocation solidified their entitlement to services in the ECS and would hardly have been made when it was were there serious concerns regarding the quality and caliber of the Petitioner's program. The combined efforts of teaching personnel, support personnel, and District administrators (who were sometimes wearing "multiple hats") yielded gains in different areas—including in the area of communication, a particular deficit area for the Petitioner. (See Trans.,pp. 1238-39.)

And, in a meeting between school personnel and the family in the spring of 2019, even the family acknowledged some of those gains had in fact carried over from school and into the home setting. (Id.) Indeed, gains in the area of behavior were seen not only at [redacted] during the 2018-19 school year (see, e.g., Trans., pp. 1228-29), but were more recently manifested by the Petitioner's ability to sit through—and be able to be directed to perform tasks during—extended periods in the due process hearing itself (see Trans., pp. 1237-38). Despite those relative successes and others, the subject complaint was still filed. And, while the complaint itself demanded the involvement of a Board Certified Behavioral Analyst("BCBA"), the administration of a functional behavioral assessment ("FBA"), and/or the development and implementation of a formal behavior intervention plan ("BIP"), the parents had expressed no desire for such supports before that point in time. (See Trans., pp. 164-68.)

VI. ISSUES PRESENTED

1. Whether the Enterprise City school board denied ███ a free appropriate public education ("FAPE") during the 2017-2018 and 2018-2019 school years, by failing to provide the procedural requirement of allowing the parents to be participants in the process?
2. Whether the Enterprise City school board failed to implement an appropriate individualized education plan ("IEP") a behavior intervention plan ("BIP"), and an Applied Behavior Analysis ("ABA") for ███?
3. Whether the Enterprise City school board failed to place the student in ███ least restrictive environment ("LRE") during 2017-2018 and 2018-2019 school year.
4. Whether, if the previous issues are answered in the affirmative, the following remedies which Petitioner seeks are appropriate, to wit,

   a. Whether the Board should be directed to develop and implement a current behavior intervention plan ("BIP") that is based upon peer reviewed scientifically based research?

   b. Whether the school board should develop a board-certified behavior analyst ("BCBA")?

   c. Whether the school board should be ordered to provide Petitioner with a one-on-one aide and other personnel who have been professionally

trained in the areas of behavior management and crisis prevention intervention? and,

d. Whether the school board should be Ordered to provide weekly counseling, develop communication logs, as well as a check-in and check-out system, and an organizational system?

e. Whether the Enterprise City School Board must allow S.S, to attend an alternative placement at the [redacted] at the Board's expense?

VII. DISCUSSION OF THE ISSUES

Foundationally, the Individuals with Disabilities Education Act ("IDEA"), requires states to provide a free appropriate public education ("FAPE") to all students whose disabilities undermine their school performance, and who need specialized instruction and/or related services to make meaningful educational Progress. A focus on the particular child is at the core of the IDEA, which includes appropriate education for children like [redacted], with serious emotional and medical difficulties.

The instruction offered must be "specially designed" to meet a child's "unique needs" through an "[i]ndividualized education program." §§1401(29), (14). It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth.

In order to comply with the IDEA, a school system must satisfy two obligations - one procedural and the other substantive. Hendrick-Hudson Central Sch v. Rowley, 458 U.S. 176, 188-189 (1982). Initially, a school district must comply with the guaranteed procedural safeguards provided by the IDEA. Id. At 206-207. Board of Education of Murphreesbroro Community Sch. Distr. #186, Illinois State Board of Education, 41 F. 3d 1162, 1166 (7th Cir. 1994). Parents must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. 34 CFR § 300.501(b)(1).

In this case, ███'s parents aver that the Enterprise City School board did not provide them a meaningful opportunity to participate in IEP for their child by (1) failing to provide accurate behavior information to ███'s parents; (2) failing to provide documentation of a proposal or refusal to initiate change concerning the bus situation; and, (3) failing to provide a BIP for the bus and in the classroom.

Specifically, they allege that their child's teacher kept a daily log of ███ behavior that was sent home after school each day. However, the testimony was uncontroverted that the teacher kept another set of the same documents which contained similar markings for her records. The school's copy was slightly different than the copy that was sent home to the parent, because they were copied by hand. However, the parents were in contact routinely with the teacher about the child's

behavior and they worked together to craft solutions to issues as they arose. The duplicating system was not error free, but it did not appear to rise to the level of denying the parents equal participation in the child's education plan.

With respect to the bus matter, the evidence submitted at the hearing was undisputed that the school district suspended [redacted] from the bus from at least the mornings and for a period of time in the afternoons from September 2018 until February 2019. The evidence indicated that the parent had to transport the child to school at least for mornings per week to avoid interruption in the education of the child. Such a change requires notice by the school district to the parents of the child in compliance with 20 U.S.C. §1415(3). The Petitioners are due reimbursement.

The issues to address at this point is need for a Behavioral Intervention Plan. The evidence indicates that S.S's teacher, Ms. [redacted] provided S.S's parents with a document (Respondent's Bates 346) that indicated that the IEP team would develop/revise/discuss a behavior intervention plan for [redacted] (TR 474-475). However, this did not occur and there was no evidence that a meeting to develop/revise/discuss a BIP for [redacted] ever occurred (TR 474-475). If there was such a meeting, no amended IEP or document proposing to refuse or initiate change was provided to the parents of [redacted] or placed in [redacted] educational records.

The prior, written notice to the parents of a child is required whenever the LEA proposes to initiate or change or refuses to initiate or change the identification,

evaluation, or educational placement of the child, or provision of a FAPE. 20 U.S.C. §1415(3). This failure of notice denied the parents meaningful participation and is a denial of FAPE as to this issue.

Additionally, despite the indications that the student had some regression, issues with [REDACTED] no Behavior Intervention plan was ever implemented. This plan should have been discussed and documented with the parents, teachers, and specialists. This failure denied the parents a meaningful opportunity to participate in the identification, evaluation, and education placement of their child.

Therefore, although the LEA did NOT fail to provide procedural safeguards by (1) failing to provide accurate behavior information to [REDACTED]s parents; it did fail to provide documentation of a proposal or refusal to initiate change concerning the bus situation; and, it failed to provide a BIP for the bus and in the classroom. These violations denied [REDACTED]s parents a meaningful opportunity to participate in the identification, evaluation, and education placement of their child during IEP meetings with the school district.

The next issue is the substantive obligation under the IDEA. A substantive violation arises under the IDEA where the substantive content, such as the education services contained in the IEP, are insufficient to afford FAPE. Substantive violations

usually include IEP Compliance, Least Restrictive Environment., and the adequacy of the individualized instructions and educational supports in an IEP.

Courts have routinely held that IDEA requires school districts to provide an IEP that is reasonably calculated to enable the student to make meaningful educational progress but does not require that districts maximize a student's potential or provide the best educational program available. Neither does it require any particular methodology to educate children with disabilities. Instead, decision makers defer to school districts to select teaching approaches and accommodations, and they will uphold a district's methods as long as those methods are reasonably calculated to help the particular student learn what he needs to learn. Importantly, the district's approaches need not be the best available methodologies.

For children diagnosed with [redacted] disorders, Applied Behavioral Analysts (ABA) therapy as only one of many options that are available to districts in providing a FAPE. Thus, even in cases where parents present experts who testify that ABA therapy is the best methodology to educate their [redacted] child, which did not occur in this case, courts will often uphold a school district's rejection of ABA in favor of a more eclectic educational program, so long as the district provides evidence that the child is receiving an educational benefit. ***See, e.g., Joshua A. by Jorge A. v. Rocklin Unified Sch. Dist., 319 Fed. Appx. 692, 695 (9th Cir. Mar. 19, 2009) (holding that the district-offered eclectic program provided the student with a meaningful benefit, despite the fact that***

the program was not peer reviewed; courts should not decide whether an eclectic program is "the best" approach, only whether it satisfies the requirements of the IDEA); see also Hensley ex rel. Hensley v. Colville Sch. Dist., 2009 Wash. App. LEXIS 269, at *24 (Wash. Ct. App. Feb. 3, 2009) (holding, in rejecting plaintiff's claims that school's ABA services were inadequate, that the IDEA does not "guarantee maximization of potential"); Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ., 2009 U.S. Dist. LEXIS 94860, at *35-36 (S.D. Ohio Sept. 28, 2009) (holding that 30 hours of ABA were appropriate for autistic child even where parents and experts claimed 40 hours were necessary, because courts cannot mandate a "bright-line standard" under the IDEA); K.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046, 1055 (N.D. Cal. 2009) (holding that IDEA does not mandate one methodology over another, so ABA was not required).

It is well settled that Applied Behavioral Analysts (ABA)s are crucial in many of the steps in this process, including deciding whether or not a particular student qualifies for an IEP. And, a Behavior Intervention Plan (BIP) takes the observations made in a Functional Behavioral Assessment and turns them into a concrete plan of action for managing a student's behavior. In effect, it provides a blueprint for all educators and caregivers responsible for the student to follow. The BIP sets goals and objectives for the student; describes the techniques for direction intervention in problem behaviors; identifies appropriate responses to the exhibition of problem behaviors; and, lists replacement behaviors to encourage.

Having said that, let us turn to the instant case. [redacted]s behavior rose to an apex causing the aide, who had been requesting assistance, to resign. (TR 405).

Indeed, testimony from both parties was uncontroverted that SS had severe behavioral issues that significantly interfered with the education process. In fact, displayed the behavior about which the parents speak during the hearing, which occasioned the intermittent interruption of same.

The issue is whether the school system employed methods to address this student's behavior with the appropriate amount of effectiveness to yield a meaningful benefit, regardless of the methodology? IEPs must be "appropriately ambitious in light of circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. Endrew v. Douglas County School District, 137 S.Ct. 988, 1000 (2017). The goals may differ, but every child should have a chance to meet challenging objectives." Id.

In this case, the Petitioner's parents testified that aptitude and behavior regressed since entering the Florida School System. In support of this argument, they produced video from the prior LEA and the parents testified that behaviors increased throughout the two school years was with the Enterprise School District. (This hearing officer and parties viewed a video showing appearing to be in a classroom in County demonstrating a counting exercise. (TR 738-741; see also, Petitioner's exhibit six)).

The evidence submitted during this four day hearing supports this argument. During time at Junior High School, did not have a behavior

intervention plan (BIP) or ABA, even though engaged in attacking aides and students, biting them, pulling individual's shirts and hair, walking in repetitive circles, grabbing fibers off the carpet and putting them in mouth. (TR 25-26; 406-407; TR 390-391, 448-449). However, the aide assigned to was never provided an additional aide in the classroom or any help. (TR 449).

aid advised the teacher, Ms. that they needed a BIP for based upon his experience working with students at in the behavioral unit. (TR 395-396). He knew because he had helped develop BIPs in the past. (TR 410). He also discussed the need for a BIP with the English teacher, Ms. as well because 's behavior was so out of control. (TR 402-403). Mr. also testified that believed that needed to be in a private placement from time to time like (TR 396).

The school district defends by indicating that did not need a BIP because had one behavior goal in 2017-2018 and 2018-2019 IEPs. (TR 878-879). Notwithstanding, no witness could corroborate with any documentation that made progress during the 2017-2018 or 2018-2019 school years. (TR 1257). The various employees of the school district testified of the progress that made, but there is no documentation of any of it. The Special Education Coordinator also testified that she worked with during the school year, at length, but she did not document any activities or interventions she did with (TR 1267).

The school district also did not document IEP meetings with the IEP team. (TR 916-917). It was mandatory that a written document be created as a result of IEP meeting. (TR 917). There was no documentation when the IEP team decided not to take action. (TR 917-918; see also, 1008-1009).

The IDEA does not explicitly authorize the award of compensatory education. However, the IDEA "...authorizes the court to 'grant such relief as the court determines appropriate.'" *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Todd A.*, 79 F.3d 654, 656 (7th Cir. 1996)(quoting 20 U.S.C. Section 1415(3)(2)(now at 20 U.S.C. Section 1415(i)(2)(c)(iii)). The Seventh Circuit has recognized that this provision allows district Compensatory education is awarded upon a denial of a FAPE. However, not every denial of a FAPE requires compensatory education. A Wisconsin district court has indicated that *de minimus* violations do not warrant an award of compensatory education. *James S. v. Milwaukee Public Schools,* No. 01-C-928, 2009 WL 1615520 (E.D. Wisc. June 9, 2009).

In determining whether compensatory educational services should be awarded, the question to consider is- if the student had not been denied a FAPE, would the student be in a better position than ██ is now? If so, compensatory education is appropriate. Therefore, each court must look to the nature of the FAPE

violation and the clinical information available to determine the nature and amount of services required to remedy the violation.

In the instant matter, the aide's requests for extra assistance in the classroom by means of another aide and requests to other teachers and staff for a BIP for the Petitioner should have been a red flag that the LEA should have taken action. Additionally, the school district's multiple contacts to the parents to pick [redacted] up was a call to action. It does appear that a BIP was considered at some point but the LEA cannot substantiate that it took any action to create one or refused to create one for valid reasons.

Clearly, this child's behavior impeded [redacted] education progress and that of [redacted] classmates, continually, and to no avail. [redacted] even [redacted] at [redacted] classmates, with no change in [redacted] plan.

The IDEA says that children who receive *special education* should learn in the least restrictive environment (LRE). This means they should spend as much time as possible with peers who do not receive special education. There are two things about LRE that are important to understand when working with the IEP team: (1) The child should be with kids in general education to the "maximum extent that is appropriate. (2) Special classes, separate schools or removal from the

general education class should only happen when ther child's learning or attention issue— "disability" under IDEA—is so severe that supplementary aids and services can't provide with an appropriate education.

Although has serious behavioral issues that were impacting upon ability, and potentially classmates' ability, to learn, needed intervention, not isolation. Despite the issues and possible regression of the child, the Petitioner did not prove that the Student required a residential placement to receive FAPE, or that the Inc. is an appropriate placement.

In the Petitioner's case-in-chief, the Petitioner's parents provided only general input regarding their observations of the proposed private placement at the Ms. testimony actually tended to prove that placement at the would not be "appropriate." By way of example only, the is admittedly a more restrictive placement than the Petitioner's public-school based program in ECS. Moreover, it is a 12-month residential facility.

In sum, although the Petitioner proved that was denied FAPE, by evidencing that parents' were denied meaningful participation in the education process for SS, in that the Board failed to develop a BIP, or to provide a BCBA , one-on one behavioral aid, or counselor, in light of such a grave need for same,

there has been no proof that the alternative placement, which is sought, is appropriate.

CONCLUSION

SS has severe and issues. As a result of the is non verbal and has severe problems. needs a BIP and needs to have a BCBA work with team to address these concerns. Additionally, needs a one on one Behavioral Aide. It is clear that one aide for a class of 4 is inadequate when the students present with multiple issues as with On these facts, the Board failed to provide FAPE.

However, it is to be noted that has a devoted and caring group of educators who seem to desire to help success, and enviable parents that are devoted to . classroom environment is extremely adaptive to needs and with changes, can thrive there. also gained a benefit when allowed to be with other children in the Special Olympics activities and in the classroom.

In the sought placement, would be placed only with other children with disabilities. This placement has restrictive access to the outside, more diverse environment. In essence, this placement would institutionalize for 12 months at a time.

For reasons stated above, I issue the following Specific Rulings and Order:

SPECIFIC RULINGS

1. That the failure of the local education agency to provide a BIP to the Petitioner during the 2017-2018 and 2018-2019 school years deprived Petitioner of a free appropriate public education;

2. That the LEA did commit a procedural violation of the IDEA by failing to implement a behavior intervention plan for the Petitioner for the 2017-2018 and 2018-2019 school years;

3. That the LEA did commit a procedural violation of the IDEA by failing to provide a behavior intervention plan for the bus and for failing to provide bus transportation for the Petitioner for the time period of September 2018 until February 2019;

4. That the LEA is directed to provide mileage reimbursement to Petitioner's parents for the mileage incurred at the U.S. Federal mileage rate.

5. That the LEA committed a procedural violation of the IDEA by failing to document the IEP decision concerning the proposal to develop/revise/discuss a behavior intervention plan for the Petitioner;

6. That the LEA is directed to provide [redacted] with a BIP, and a BCBA, immediately, to work with [redacted] team to address these concerns;

7. That the LEA is directed to provide [redacted] a one-on-one Behavioral Aide and a counselor, immediately; and,

7. That the LEA is directed to provide [redacted] a one-on-one Behavioral Aide and a counselor, immediately; and,

8. That the private placement at the [redacted] is not the Least Restrictive Environment in light of the availability of adequate services that are less restrictive, and that there was insufficient evidence to support a finding that this placement will meet the unique needs of [redacted] therefore, this placement request is denied.

IX. NOTICE OF 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 civil action with all other parties within thirty (30) calendar days of receipt of this decision. Thereafter, a civil action must be initiated within thirty (30) days of filing of the notice of intent to file a civil action. Ala. Admin Code 290-8-9-.8(9)(c)16.

DONE this the 15th day of August, 2019.

Gwendolyn Kennedy Green
Hearing Officer

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Final Order was served upon the parent of the Petitioner, through her attorney, the Honorable Shane Sears, upon the Enterprise City Board of Education, through its attorney, Honorable Carl Lewis and the Honorable Andrew Rudloff, and upon the State of Alabama Department of Education, through, the Honorable DaLee Chambers, J.D., PhD, and Dr. Melissa Card. The Exhibits, and transcript have been copied and placed with the ALSDE. This Order will be placed in the U.S.mail in compliance with applicable law, postage prepaid, properly addressed, on this the 15th day of August, 2019. The Parties and the State Department of Education were also served through their attorneys of record via electronic service on August 15, 2019, via the email addresses indicated.

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