

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

<b>R.R.,</b>	)	
	)	
<b>PETITIONER,</b>	)	
	)	
<b>v.</b>	)	<b>SPECIAL EDUCATION NO. 20-65</b>
	)	
<b>SHELBY COUNTY</b>	)	
<b>BOARD OF EDUCATION,</b>	)	
	)	
<b>RESPONDENT.</b>	)	

**HEARING DECISION AND FINAL ORDER**

**I. PROCEDURAL HISTORY**

This matter was filed by Petitioner on May 8, 2020 and was assigned to this Hearing Officer by the Alabama State Department of Education on the same day. A resolution meeting convened on May 11, 2020. A due process hearing convened in the instant matter September 14-16, 2020. The parties submitted closing briefs after the testimony concluded.

Student’s parents filed a previous Due Process Complaint on October 15, 2019. That matter was resolved via a Settlement Agreement, and the assigned Hearing Officer dismissed the matter by order on November 25, 2019. The Settlement Agreement stated that “Petitioner hereby releases the Board from any and all claims, charges, or complaints (‘claims’) in any way relating to claims existing prior to or as of the date of execution of this Agreement under the IDEA”. Accordingly, counsel for the parties agreed during the opening of the hearing in the instant matter that the timeframe for the instant decision is limited to November 25, 2019-May 8, 2020.

**II. EXHIBITS ADMITTED INTO EVIDENCE**

At the hearing, exhibits were submitted by the parties in Exhibit Binders and accepted by this Hearing Officer. These exhibits have been examined by this Hearing Officer subject to the

issues heard at the due process hearing and in light of the testimony presented at said hearing. The documents and materials have been in the constant possession of this Hearing Officer until the rendering of this decision. Hereafter, they will be delivered to the Alabama State Department of Education. The documents were examined and the weight given to each was based upon the contents of the document which was submitted and not on which party introduced said document. This Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of making a decision in this matter.

#### **A. PETITIONER'S EXHIBITS**

1. Petitioner's Exhibit 1, 1A, and 1B: Due Process Complaint, Exhibit A (November 2019 Settlement Agreement), and Exhibit B (Order Signed by Hearing Officer)
2. Petitioner's Exhibit 2: Speech and Language Evaluation Report
3. Petitioner's Exhibit 3: Occupational Therapy Evaluation Report
4. Petitioner's Exhibit 4: Intelligence Testing Report
5. Petitioner's Exhibit 5: Dyscalculia Evaluation Report
6. Petitioner's Exhibit 6: Dyslexia Evaluation Report
7. Petitioner's Exhibit 7: Summer Social Skills Group Treatment Summary
8. Petitioner's Exhibit 8: [REDACTED] Evaluations
9. Petitioner's Exhibit 9: PEAK Evaluation Report
10. Petitioner's Exhibit 10: Recommendations from [REDACTED] Program
11. Petitioner's Exhibit 11: Clinical Summary of Optometry Examination
12. Petitioner's Exhibit 12: Genetic Test Report
13. Petitioner's Exhibit 13: Response to Due Process Complaint
14. Petitioner's Exhibit 14: Omitted

15. Petitioner's Exhibit 15: Omitted
16. Petitioner's Exhibit 16: Omitted
17. Petitioner's Exhibit 17: Email Regarding Status of FBA
18. Petitioner's Exhibit 18: Attorney Letter Regarding FBA
19. Petitioner's Exhibit 19: Emails Regarding Contracting of FBA
20. Petitioner's Exhibit 20: Attorney Emails Regarding FBA
21. Petitioner's Exhibit 21: Attorney Emails Requesting Student Records
22. Petitioner's Exhibit 22: None
23. Petitioner's Exhibit 23: None
24. Petitioner's Exhibit 24: None
25. Petitioner's Exhibit 25: None
26. Petitioner's Exhibit 26: [REDACTED] IEP
27. Petitioner's Exhibit 27: [REDACTED] IEP
28. Petitioner's Exhibit 28: [REDACTED] IEP
29. Petitioner's Exhibit 29: [REDACTED] IEP
30. Petitioner's Exhibit 30: 2019-2020 Report Card
31. Petitioner's Exhibit 31: 2018-2019 Report Card
32. Petitioner's Exhibit 32: 2017-2018 Report Card
33. Petitioner's Exhibit 33: Emails Regarding FBA
34. Petitioner's Exhibit 34: Recommendation from [REDACTED] Program
35. Petitioner's Exhibit 35: Attorney Correspondence to School District
36. Petitioner's Exhibit 36: [REDACTED] Evaluation
37. Petitioner's Exhibit 37: Attorney Correspondence to [REDACTED]

38. Petitioner's Exhibit 38: Assistive Technology Consult
39. Petitioner's Exhibit 39: Assistive Technology Evaluation Report
40. Petitioner's Exhibit 40: Student's 2020-2021 Schedule
41. Petitioner's Exhibit 41: Screen Capture of Index of Alabama State Department of Education Guidance Regarding COVID-19
42. Petitioner's Exhibit 42: United States Department of Education Guidance Regarding COVID-19
43. Petitioner's Exhibit 43: United States Department of Education Guidance Regarding COVID-19
44. Petitioner's Exhibit 44: United States Department of Education Guidance Regarding COVID-19
45. Petitioner's Exhibit 45: Special Education Services "COVID-19 Q & A"
46. Petitioner's Exhibit 46: Letter Regarding Safe Return to School
47. Petitioner's Exhibit 47: Special Education Services "COVID-19 Q & A"
48. Petitioner's Exhibit 48: ALSDE Special Education Presentation
49. Petitioner's Exhibit 49: CASE Considerations for Special Educators
50. Petitioner's Exhibit 50: ALSDE Special Education Presentation
51. Petitioner's Exhibit 51: Special Education Services "COVID-19 Q & A"
52. Petitioner's Exhibit 52: Screen Capture of ALSDE Guidance for Administrators
53. Petitioner's Exhibit 53: Attorney Email Correspondence
54. Petitioner's Exhibit 54: Respondent's Exhibits
55. Petitioner's Exhibit 55: None
56. Petitioner's Exhibit 56: Math Goal Data Collection Sheet for 2019-2020 IEP



57. Petitioner's Exhibit 57: Math Goal Data Collection Sheet for 2020-2021 IEP

58. Petitioner's Exhibit 58: Email Regarding February 7, 2020 Meeting Attendance

**B. RESPONDENT'S EXHIBITS**

1. Respondent's Exhibit 1: Cumulative Folder Documents and Test Results

2. Respondent's Exhibit 2: 2019-2020 Student Schedule

3. Respondent's Exhibit 3: 2019-2020 Report Card

4. Respondent's Exhibit 4: 2019-2020 Comprehensive Progress Reports

5. Respondent's Exhibit 5: October 2019 Student Profiles

6. Respondent's Exhibit 6: Individualized Education Program 2/14/2018-2/13/2019

7. Respondent's Exhibit 7: Individualized Education Program 1/31/2019-1/30/2020

8. Respondent's Exhibit 8: Individualized Education Program 1/5/2020-1/14/2021

9. Respondent's Exhibit 9: Persons Responsible for 2019-2020 IEP

10. Respondent's Exhibit 10: Science Work Samples

11. Respondent's Exhibit 11: Math Work Samples, Email, and Comprehensive Progress Report

12. Respondent's Exhibit 12: ELA Work Samples

13. Respondent's Exhibit 13: Case Manager Records and Samples

14. Respondent's Exhibit 14: Speech and Language Records

15. Respondent's Exhibit 15: 2018-2019 Report Card

16. Respondent's Exhibit 16: Alabama Summative Examination, Student Home Report

17. Respondent's Exhibit 17: April 2019 Student Profile and Suggested Learning Objectives

18. Respondent's Exhibit 18: Student Overview Report
19. Respondent's Exhibit 19: April 2019 Eligibility Report
20. Respondent's Exhibit 20: Invitations to Meetings and Notices of Proposal
21. Respondent's Exhibit 21: Confidential Psychological Report
22. Respondent's Exhibit 22: Assistive Technology Consult and Final Report
23. Respondent's Exhibit 23: Occupational Therapy Evaluations
24. Respondent's Exhibit 24: Dyscalculia and Dyslexia Assessment Results and Scores
25. Respondent's Exhibit 25: Speech Language Evaluation Report
26. Respondent's Exhibit 26: Intelligence Testing and [REDACTED] Therapy Evaluation Reports
27. Respondent's Exhibit 27: Summer Social Skills Group Treatment Summary
28. Respondent's Exhibit 28: Correspondence with [REDACTED]
29. Respondent's Exhibit 29: Meeting Notes for February 7, 2020
30. Respondent's Exhibit 30: Email regarding Evaluation Report
31. Respondent's Exhibit 31: Update for Summer Services on May 21, 2020
32. Respondent's Exhibit 32: Emails regarding Assistive Technology Evaluation
33. Respondent's Exhibit 33: Communications regarding BCBA
34. Respondent's Exhibit 34: Emails regarding [REDACTED] Reports

### **III. BURDEN OF PROOF**

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

#### IV. STATEMENT OF FACTS AND SUMMARY OF THE TESTIMONY

This section is a summary of pertinent facts presented to this Hearing Officer. This decision is based on all testimony presented at the hearing as well as exhibits admitted into evidence during the hearing. Both parties were permitted to offer testimony by way of witnesses sworn under oath. The testimony has been recorded and transcripts will be delivered to the Alabama State Department of Education. This Hearing Officer placed no weight on the fact that any particular testimony was offered by either party since the purpose was to provide all of the appropriate and admissible testimony. The witnesses were examined and the weight given to each was based upon the substantive nature contained therein for the purpose of making a decision in this matter. The following witnesses testified:

██████████: Psychologist  
██████████: Private Tutor  
██████████: Shelby County School District ██████████ Evaluator  
██████████: Shelby County School District Special Education Director  
██████████: Student's ██████ Grade Special Education Teacher and Case Manager  
██████████: Student's ██████ Special Education Math Teacher  
██████████: Speech and Language Evaluator  
██████████: Shelby County School District Special Education Program Specialist  
██████████: Student's ██████ English Teacher  
██████████: Occupational Therapy Evaluator

#### **Testimony:**

##### Prior to November 25, 2019:

Student was in ██████████ the Shelby County School District for the 2019-2020 school year. Student was ruled eligible to receive special education services in the category of ██████ in 2016, when Student was in the ██████ grade. Student repeated the third grade year.

Student's parents filed a Due Process Complaint on October 15, 2019. Respondent, in advance of attempting to draft a Settlement Agreement, requested that an Evaluator who was mutually agreeable to the parties conduct a Functional Behavioral Assessment (FBA) and then determine if a Behavior Intervention Plan (BIP) was needed. However, that mutually agreed upon Evaluator informed Respondent on November 6, 2019 that she was unavailable at the time. The Due Process Complaint was resolved via a Settlement Agreement, and the assigned Hearing Officer dismissed the matter on November 25, 2019. The Settlement Agreement included the following provisions:

3. The Board will contract with appropriate providers to obtain comprehensive independent evaluations for speech-language (including pragmatics), occupational therapy, assistive technology, and IQ testing. Upon receipt of the written reports from the evaluators, the IEP team will convene to review the reports and give good faith consideration to the reasonable, educational recommendations provided and, if recommended by the IEP team, amend [Student's] IEP.

4. The Board will contract with a mutually-agreeable BCBA to conduct a functional behavior assessment (FBA) in the appropriate setting. The Board and Parent will complete any behavior rating scales or checklists requested by the BCBA. Based on the results of the FBA, the BCBA will design an appropriate behavior reduction and skill acquisition program, including a behavior intervention plan, if determined necessary.



November 25, 2019-May 8, 2020:

Student was evaluated in the areas of IQ, assistive technology, speech-language, and occupational therapy in December 2019 pursuant to the Settlement Agreement. The Shelby County School District Special Education Director testified that she was out of the office quite a bit in the Fall 2019 due to family issues. She came back to the office the week before the district closed for the Christmas holiday. She telephoned the attorney who represented Petitioner in the previous Due Process matter the week before Christmas and left a voice mail regarding contracting with another Board Certified Behavior Analyst (BCBA) to conduct the FBA. She did not receive a response from that attorney. She testified that she normally contacts the attorney when parents are represented.

An IEP team meeting was convened on January 15, 2020 to develop Student's annual IEP. Student's [REDACTED] Grade Special Education Math Teacher testified that Student's math goal was revised based upon data that showed Student had mastered portions of the math goal for 2019-2020. The Shelby County School District Special Education Program Specialist testified that the IEP team added access to technology with speech to text to Student's IEP based upon the Assistive Technology evaluation completed pursuant to the Settlement Agreement. The Psychologist who evaluated Student submitted a report that was considered by the IEP team. The report showed a full scale IQ score of [REDACTED] with the following recommendation:

I noticed during the testing that [Student] struggles with synthesizing information. It would be extremely helpful for [Student] to have adequate one on one intervention with [Student's] schoolwork as [Student] and [Student's] peers begin to cover material that requires more complex thought.

Having a paraprofessional that is trained in some aspects of Applied Behavior Analysis would help [Student] tremendously. This would improve [Student's] chances of appropriate social and academic growth.

The IEP team discussed the Psychologist's IQ test results and recommendations. The IEP team made changes to the IEP based upon the Psychologist's report, including shortened assignments, reading aloud assignments, extra time for classroom assignments in math, English-language arts, and science not to exceed one day, and study guides be provided in math, English-language arts, and science. The changes also applied to social studies beginning in August 2020. The IEP team added adult support in physical education. Student had failed general education math for the first and second nine weeks and had a C average for the first and second nine weeks in special education math. Student's independent math tutor worked with Student on English-language arts skills for the three previous years, but changed to math in January 2020 due to math being the greatest need. Student also had [REDACTED]. Student's [REDACTED] [REDACTED] Special Education Teacher and Case Manager testified that Student's performance depended on "how tired [Student] was, if [Student] was ready to just get done." The Shelby County School District Special Education Program Specialist testified that Mother asked if Student could be in general education math and not do grade level work. The IEP team decided that Student would shadow a self-contained class for one week to give the IEP team more insight as to whether this was Student's Least Restrictive Environment.

An IEP team meeting was again convened on January 28, 2020. The Shelby County School District Special Education Program Specialist testified that district personnel who were members of the IEP team believed that Student's Least Restrictive Environment was a self-

contained classroom. However, Student's parents disagreed and at their request, the IEP team kept Student's placement the same. The IEP team again reviewed the Psychologist's report and added more accommodations to Student's IEP based upon the report, including preteaching and reteaching concepts and utilizing a variety of modalities. Student would be exempt from dressing out in physical education.

Student's parents asked the IEP team for a one-on-one paraprofessional based upon their interpretation of the report. The IEP team considered the request based upon the information they had and rejected the request. The IEP team members did not interpret the report as requiring a paraprofessional to provide a Free Appropriate Public Education (FAPE) and instead as "helpful". IEP team members also had concerns regarding dependency and the hinderance of social interactions with peers. Student was receiving one-on-one intervention as needed and had a one-on-one teacher with I.XL math before school pursuant to the Settlement Agreement. Student had access to an inclusion teacher in general education math and English-language arts as well as access to a paraprofessional in science. The IEP team amended the IEP to state:

Amendment 1/28/20: The IEP team convened to discuss [Student's] week shadowing another class and the assessment results conducted by [Psychologist] and her review those [sic] recommendations. The IEP team agreed to add the following services to [Student's] IEP: The special education teacher will pre-teach and re-teach concepts taught in the general education class to give additional exposure to new concepts and may facilitate comprehension and recall of general education class [sic] to give additional exposure to new concepts and may facilitate comprehension and recall of



information. The special education teacher will utilize a variety of modalities, using relatively simple vocabulary and sentence structure. The parents requested a one-on-one para [sic] for [Student] per their interpretation of [Psychologist's] recommendation as [Student] needing a one-on-one para [sic] to receive FAPE. The IEP team agreed to follow up on [Psychologist's] recommendation to determine exactly what she meant by her wording in her report.

The Shelby County School District Special Education Program Specialist testified that she informed the Shelby County School District Special Education Director what had happened in the meeting. The Shelby County School District Special Education Program Specialist asked the Shelby County School District Special Education Director to contact the Psychologist to follow up with the meaning of the report.

Student's [REDACTED] teacher testified that she provided Student's accommodations and modifications daily. She also testified that she and Student's [REDACTED] Special Education Teacher and Case Manager worked one-on-one with Student as needed. She also was assigned as the instructor of Student's math one-on-one morning tutoring pursuant to the Settlement Agreement. Student worked on different grade levels in the VMath program. The District Ordered a lower level of VMath materials specifically for Student. Student's [REDACTED] English-language arts teacher testified that ABA-type therapy or strategies were being accommodated in the general education classroom.

A meeting that all who testified conceded was not an IEP meeting was convened on February 7, 2020, where the Speech Language Pathologist and Occupational Therapist who



evaluated Student pursuant to the Settlement Agreement presented their reports with a Shelby County Special Education Coordinator. The Shelby County School District Special Education Director testified that she had told the Shelby County Special Education Coordinator that the Psychologist who performed the IQ testing did not need to attend the meeting because they had the Psychologist's report. The Shelby County School District Special Education Director was not aware that Mother had requested that the Psychologist who performed the IQ testing attend the meeting.

The Speech Language Pathologist who evaluated Student pursuant to the Settlement Agreement shared her report with the Shelby County Special Education Coordinator during the meeting. She testified that Student's evaluation showed that Student performs [REDACTED] and that Student "is functioning where [Student] is cognitively." She further testified that her recommendations in her report were meant to be carried out by classroom teachers. She testified that "in the meeting, we were all on the same page. And a lot of the stuff that we had recommended they—it seemed like they were using a lot of visuals and that kind of thing already in the classroom." She further testified that her recommendations are general for the classroom routine and may not be included in an IEP. She testified that some strategies may work and others will not. The occupational therapist who evaluated Student reviewed her report at the meeting as well. She testified, "I would think that they would take this information and then make it functional for the specific setting, classroom space, where [Student] would be." She further testified that all recommendations are guides "for the school to take into account and determine if appropriate, if at all." She testified that she did not know if her recommendations were already being implemented.

Mother asked about the status of the FBA and BIP at the February 7, 2020 meeting, which had not yet been contracted. Mother then requested an IEP meeting to review the report of the Psychologist who performed Student's IQ testing with the Psychologist present at that meeting. The Shelby County School District Special Education Director testified that the district intended to convene a meeting but there was no availability in February 2020, so the district started looking at March 2020 dates. Then the District shut down on March 13, 2020 due to the coronavirus and reopened virtually on April 6, 2020. The Shelby County School District Special Education Director testified that an IEP team could have convened a virtual IEP meeting between April 6, 2020 and May 8, 2020, but the District chose not to because the FBA had not been completed. The Shelby County School District Special Education Director testified that "it made sense at the time, to wait on the functional behavioral assessment to be completed. And because of COVID and the way services were provided, it just didn't seem feasible at the time, I don't believe."

Following the February 7, 2020 meeting, The Shelby County School District Special Education Director testified that "[m]aybe we dropped the ball" in not getting the FBA contracted and completed, because she did not contact a new BCBA until after this meeting. The District arranged for a new BCBA to come on February 21, 2020, but turned the new BCBA away because the parents had not agreed to the new BCBA at that time. At that point, the District learned that Petitioner was represented by a new attorney. Petitioner then agreed to the new BCBA, who went to observe Student twice in March 2020. The observations stopped when the District shut due to coronavirus.

Student's [REDACTED] Special Education Teacher and Case Manager testified that she developed an individualized distance learning plan for Student when school shut down due to coronavirus. Student's parents had input of what critical skills should be addressed. The

individualized distance learning plan was developed based upon the parental input and Student's [REDACTED] Special Education Teacher and Case Manager belief of critical skill needs.

After May 8, 2020, the date of the Filing of the Due Process Complaint:

The Shelby County School District Special Education Director unsuccessfully attempted to contact the Psychologist who completed Student's IQ testing in February and early March. The two finally talked May 2020. The Psychologist explained to the Shelby County School District Special Education Director that the two paragraphs of recommendations in her report are related. The Psychologist recommended that Student have a Registered Behavior Technician as a one-on-one paraprofessional and testified "that I really thought that would be the best thing to do for [Student]."

The Shelby County School District Special Education Director testified that she had a conference in May 2020 with the district's occupational therapist, who informed her that the strategies recommended by the Occupational Therapy evaluator pursuant to the Settlement Agreement were implemented during the Spring 2020 semester.

Student did not pass general education math for the 2019-2020 school year. Student had a C average for the first and second nine weeks in special education math then a D in the third nine weeks. Student's [REDACTED] Special Education Math Teacher testified that Student did not master the math goal but Student "definitely has shown progress with the IEP goal."

The [REDACTED] Tutor administered the Brigance assessment in May 2020 at the request of Student's parents to determine Student's grade level performance. The Psychologist who administered Student's IQ test pursuant to the Settlement Agreement administered the PEAK assessment for children with a developmental delay in July 2020 at the request of Student's parents.



At some point during the Spring 2020 semester, Student's parents requested that Student be tested for dyslexia and dyscalculia. Student's [REDACTED] Grade Special Education Teacher and Case Manager testified that no one considered requesting testing for dyscalculia because they knew Student struggled and knew the discrepancy based upon the testing and data. The Shelby County School District [REDACTED] Evaluator evaluated Student for dyslexia on June 8, 2020 and dyscalculia on July 13, 2020. She waited until the district reopened because she preferred conduct the evaluations in person. She testified that Student has deficits in reading but does not appear to fit the profile for dyslexia. She further testified that Student would benefit from reading intervention and that a small group setting is appropriate to include engagement with other students. The evaluator could not rule out [REDACTED] as being part of the underlying cause of Student's difficulty with math, but felt confident in saying that there are some characteristics of [REDACTED]. She testified that Student needs continued support in a small group setting.

Student is repeating the [REDACTED] grade for the 2020-2021 school year. The Shelby County School District Special Education Director testified that Student is receiving consultative services for occupational therapy this year. The Shelby County School District Special Education Director testified that she told the new BCBA that the FBA could not be completed during the summer because it would not be conducted in the school setting. Observations visits have been scheduled for this school year to complete the FBA.

## **V. ISSUES PRESENTED**

The following issues were presented at the due process hearing in accordance with Petitioner's stated issues in Petitioner's Prehearing Brief. Petitioner alleges that Respondent denied Student a Free Appropriate Public Education ("FAPE") in the following ways:

1. Breached the November 2019 Settlement Agreement.



2. Failed to contract for a Functional Behavioral Assessment (“FBA”) and accompanying behavior intervention plan/behavior modification plan (“BIP/BMP”) in a timely manner.
3. Failed to develop and implement an IEP that (i) complies with state and federal laws, and all regulations and policies promulgated thereto; (ii) addresses the individual needs and characteristics of Petitioner; and (iii) is based upon current professional practices as determined by peer reviewed research.
4. Although Respondent contracted for and undertook Student’s I.Q. testing, speech-language pathology evaluation, and occupational therapy evaluation after the November 2019 settlement, Respondent failed to either implement or give reasonable consideration to the recommendations made by the professionals who performed Student’s I.Q. testing, speech/language evaluation, and occupational therapy evaluation.
5. Although Respondent was aware of the fact that Student may suffer from dyslexia and/or dyscalculia, Respondent refused to administer to Student the tests that would likely provide the data to determine with some scientific certainty whether Student does, in fact, suffer from dyslexia, dyscalculia, or both.
6. With respect to Student’s continued need for speech/language therapy, Respondent failed to make arrangements for Student’s therapy to continue during distance learning, which was implemented after COVID-19 struck the state.
7. With respect to Student’s continued need for occupational therapy, Respondent failed to make arrangements for Student’s therapy to continue during distance learning, which was implemented after COVID-19 struck the state.

## VI. DISCUSSION OF THE ISSUES

### Issue 1:

Petitioner alleges that Respondent breached the November 2019 Settlement Agreement. This issue is vague and overbroad. This issue is discussed in context in the issues below.

### Issue 2:

Petitioner alleges that Respondent failed to contract for a Functional Behavioral Assessment (“FBA”) and accompanying behavior intervention plan/behavior modification plan (“BIP/BMP”) in a timely manner. The pertinent part of the Settlement Agreement states:

4. The Board will contract with a mutually-agreeable BCBA to conduct a functional behavior assessment (FBA) in the appropriate setting. The Board and Parent will complete any behavior rating scales or checklists requested by the BCBA. Based on the results of the FBA, the BCBA will design an appropriate behavior reduction and skill acquisition program, including a behavior intervention plan, if determined necessary.

While this clause of the Settlement Agreement does not have a date or timeframe for the contracting of the mutually-agreeable BCBA to occur, it was not timely. There is no provision in the *Alabama Administrative Code* mandating a timeline for evaluations to be conducted other than initial evaluations for eligibility, which states: “The public agency has sixty (60) calendar days from the date the public agency receives a parent’s signed consent for initial evaluation to conduct and complete an initial evaluation.” Ala. Admin. Code § 290-8-9.02(1)(b). This provision in the Alabama Administrative Code does not apply to the instant evaluation as it is not an initial evaluation for eligibility, but it is instructive as to what timeliness is for conducting evaluations.

The Shelby County School District Special Education Director testified that “[m]aybe we dropped the ball” in not getting the FBA contracted and completed, because she did not contact a new BCBA until after the February 7, 2020 meeting. The previous mutually-agreeable BCBA notified the district that she was not available on November 6, 2020, which is before the district entered into the Settlement Agreement. As a guideline of timeliness, no BCBA was even contracted within 60 days of the effective date of the Settlement Agreement of November 25, 2019, much less an evaluation completed. Respondent’s delay in contracting resulted in Section 4 of the Settlement Agreement not being completed due to the district shut down for coronavirus. This Hearing Officer finds by a preponderance of the evidence that Respondent failed to contract for a Functional Behavioral Assessment (“FBA”) and accompanying behavior intervention plan/behavior modification plan (“BIP/BMP”) in a timely manner.

**Issue 3:**

Petitioner alleges that Respondent failed to develop and implement an IEP that (i) complies with state and federal laws, and all regulations and policies promulgated thereto; (ii) addresses the individual needs and characteristics of Petitioner; and (iii) is based upon current professional practices as determined by peer reviewed research. The IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County School District Re-1*, 137 S.Ct. 988, 1001 (2017). The record reflects that Student’s IEPs were reasonably calculated to enable Student to make progress appropriate in light of the Student’s circumstances for the time period of November 25, 2019-May 8, 2020. While Student did not master the special education math goal, Student’s Special Education Math Teacher testified that Student made progress. The IEP team reviewed and revised the math goal based upon Student’s individualized needs. An IEP team meeting was



convened on January 28, 2020. The Shelby County School District Special Education Program Specialist testified that district personnel who were members of the IEP team believed that Student's Least Restrictive Environment was a self-contained classroom. However, Student's parents disagreed and at their request, the IEP team kept Student's placement the same. And while Student did not pass general education math, the record reflects that numerous changes were made to Student's IEP based on Student's individualized needs to provide support. Student had access to adult support in classes. Student's [REDACTED] teacher testified that ABA-type therapy or strategies were being accommodated in the general education classroom. This Hearing Officer finds by a preponderance of the evidence that no violation has occurred.

**Issue 4:**

Petitioner alleges that although Respondent contracted for and undertook Student's I.Q. testing, speech-language pathology evaluation, and occupational therapy evaluation after the November 2019 settlement, Respondent failed to either implement or give reasonable consideration to the recommendations made by the professionals who performed Student's I.Q. testing, speech/language evaluation, and occupational therapy evaluation. The pertinent part of the Settlement Agreement states:

3. The Board will contract with appropriate providers to obtain comprehensive independent evaluations for speech-language (including pragmatics), occupational therapy, assistive technology, and IQ testing. Upon receipt of the written reports from the evaluators, the IEP team will convene to review the reports and give good faith consideration to the reasonable, educational



recommendations provided and, if recommended by the IEP team, amend [Student's] IEP.

The record reflects that the IEP team considered the report of the Psychologist who conducted the IQ testing in IEP meetings both on January 15, 2020 and January 28, 2020. The record reflects that the IEP team made numerous changes to Student's IEP based upon said report. The testimony showed that IEP members considered the request for a one-on-one paraprofessional and weighed the request with the considerations of Student's needs. The IEP team weighed the Psychologist's report with their knowledge of Student and Student's needs. Judge Coogler, writing for the United States District Court, Northern District of Alabama, opined, that "an [Independent Educational Evaluation] is not dispositive." *K.W. v. Tuscaloosa Cnty. Sch. Sys.*, Case 7:17-cv-01243-LSC (N.D. Ala. 2018), at \*16. But also on January 28, 2020, the IEP team agreed to contact the Psychologist to gain clarification regarding the recommendation. Mother requested an IEP meeting with the Psychologist present on or after February 7, 2020. No IEP meeting was ever convened, even though an IEP meeting could have been convened virtually. "If the parents or the child's teacher has reason to suspect that the IEP needs revision, an IEP meeting may be requested at anytime. The education agency must conduct the IEP meeting *within 30 calendar days* upon the receipt of the request." Ala. Admin. Code § 290-8-9.05(11)(3) (emphasis in original). Additionally, no IEP team meetings were ever convened to consider the reports of the Speech-Language and Occupational Therapy Evaluators, even though those meetings could have been conducted virtually. The record reflects that a meeting convened to discuss the reports, but this was not an IEP meeting to consider the reports and review Student's IEP accordingly. The Settlement Agreement required that these IEP meetings be convened "[u]pon receipt of the written

reports from the evaluators” and is not contingent upon any other section of the agreement being performed.

The Settlement Agreement does not require that the IEP team adopt each and every recommendation from the evaluation reports and implement said recommendations. Instead, the Settlement Agreement requires that the IEP team will convene to review the reports and give good faith consideration to the reasonable, educational recommendations provided and, if recommended by the IEP team, amend [Student’s] IEP. This Hearing Officer finds by a preponderance of the evidence that Respondent failed to convene the necessary IEP team meetings to give reasonable consideration to the recommendations made by the professionals who performed Student’s I.Q testing, speech/language evaluation, and occupational therapy evaluation.

**Issue 5:**

Petitioner alleges that although Respondent was aware of the fact that Student may suffer from dyslexia and/or dyscalculia, Respondent refused to administer to Student the tests that would likely provide the data to determine with some scientific certainty whether Student does, in fact, suffer from dyslexia, dyscalculia, or both. The record reflects that the evaluator preferred to conduct the evaluations in person. The record reflects that the evaluator conducted the evaluations in June and July of 2020. The record does not reflect that this delay is prejudicial. *K.A. ex rel F.A. v. Fulton Cty. Sch. Dist.*, 741 F.3d 1195, 1205 (11<sup>th</sup> Cir. 2013). This Hearing Officer finds by a preponderance of the evidence that no violation has occurred.

**Issue 6:**

Petitioner alleges that with respect to Student’s continued need for speech/language therapy, Respondent failed to make arrangements for Student’s therapy to continue during distance learning, which was implemented after COVID-19 struck the state. For the five weeks when

school resumed virtually from April 6, 2020 to the filing of the instant Complaint on May 8, 2020, Student would have received speech-language services 30 minutes weekly per the IEP, for a total of 150 minutes. The record reflects through Exhibit 31 that six hours of speech-language services were provided during the summer of 2020. Student received more speech-language services than Student missed. The record does not reflect that this delay is prejudicial. *K.A. ex rel F.A. v. Fulton Cty. Sch. Dist.*, 741 F.3d 1195, 1205 (11<sup>th</sup> Cir. 2013). This Hearing Officer finds by a preponderance of the evidence that no violation has occurred.

**Issue 7:**

Petitioner alleges that with respect to Student's continued need for occupational therapy, Respondent failed to make arrangements for Student's therapy to continue during distance learning, which was implemented after COVID-19 struck the state. There were no agreed upon services in Student's IEP for the timeframe of November 25, 2019-May 8, 2020, and thus no services to continue during distance learning. This Hearing Officer finds by a preponderance of the evidence that no violation has occurred.

**The appropriate relief, if any:**

This Hearing Officer finds that Respondent breached the Settlement Agreement that was effective November 25, 2019. Accordingly, this Hearing Officer finds by a preponderance of the evidence that Petitioner is entitled to specific performance of the Settlement Agreement. This Hearing Officer finds by a preponderance of the evidence that no award of compensatory education or other relief is warranted, as the record does not show that Respondent's noncompliance with the Settlement Agreement resulted in Student missing any agreed-upon services. The Settlement Agreement does not require that the IEP team adopt each and every recommendation from the evaluation reports and implement said recommendations. Instead, the Settlement Agreement



requires that the IEP team will convene to review the reports and give good faith consideration to the reasonable, educational recommendations provided and, if recommended by the IEP team, amend [Student's] IEP.

## **VII. SPECIFIC RULINGS AND CONCLUSIONS**

- A. This Hearing Officer finds that, based upon the preponderance of the evidence, Respondent breached the Settlement Agreement.
- B. This Hearing Officer orders Respondent to convene an IEP meeting within 30 days of the date of this Order to review the reports for speech-language (including pragmatics), occupational therapy, and IQ testing and give good faith consideration to the reasonable, educational recommendations provided and, if recommended by the IEP team, amend [Student's] IEP, pursuant to the Settlement Agreement.
- C. This Hearing Officer orders Respondent to convene an IEP meeting within 30 days of receipt of the results of the FBA to give good faith consideration to said results and the BCBA's design of an appropriate behavior reduction and skill acquisition program, including a behavior intervention plan, if determined necessary, pursuant to the Settlement Agreement.
- D. This Hearing Officer finds that, based upon the preponderance of the evidence, no award of compensatory education or any other relief is warranted.

## **VIII. FINAL ORDER AND NOTICE OF APPEAL RIGHTS**

This Hearing Decision constitutes a Final Order in this case. Any party dissatisfied with the decision may bring an appeal pursuant to 20 U.S.C. §1415(i)(2). The party dissatisfied with this decision must file a notice of intent to file a civil action with all other parties within thirty (30) calendar days of the receipt of this decision. Thereafter, a civil action must be initiated within

thirty (30) days of the filing of the notice of intent to file a civil action. Ala. Admin. Code 290-8-9-.08(9)(c)(16).

**SO ORDERED** this the 4th day of November, 2020.

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AMANDA DICKERSON BRADLEY  
HEARING OFFICER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been sent via certified mail and electronic mail to:

Hon. William T. Johnson, III  
Attorney for Petitioner  
1 Independence Plaza Drive, Suite 520  
Homewood, Alabama 35209  
bjohnson@kirbyjohnsonlaw.com

Hon. Anne Yuengert  
Hon. Anne Knox Averitt  
Attorneys for Respondent  
1819 Fifth Avenue North  
Birmingham, Alabama 35203  
ayuengert@bradley.com  
aaveritt@bradley.com

SO CERTIFIED, this the 4<sup>th</sup> day of November, 2020.

  
AMANDA DICKERSON BRADLEY  
HEARING OFFICER