BEFORE THE STATE DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA

D. M. S.

PETITIONER

Special Education Case No. 21-52

VS.

OZARK CITY 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 on May 10, 2021. Significantly, the complaint alleged that Petitioner had not received an appropriate education program because [redacted] Individualized Education Program (hereinafter IEP) did not provide for applied behavior analysis therapy (ABA) or behavior plan intervention. (Hearing Officer Ex 1) (hereinafter HO ___).

The school system responded on May 20, 2021. It insisted the youngster's classroom program included ABA concepts and techniques. A behavior program for Petitioner was not developed until the second semester of the 2020-2021 school year because the child's behavior did not warrant one. When Petitioner's behavior escalated in February 2021, resulting in physical attacks on [redacted] teacher and several of [redacted] aides, the school system responded by including a behavior goal in the youngster's IEP. The system engaged a board certified behavior analysist (BCBA) to evaluate the young[redacted]. (HO 2).

The hearing request was made pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). 20 USC§ 1400, et seq. A resolution meeting was conducted on May 26, 2021 (HO 3). The primary issue was revealed to be a dispute between the parties over the location where educational services for the 2021-2022 school year would be provided. The Board of Education proposed to implement Petitioner's ABA program and a behavior program created by the BCBA in the

summer of 2021 at the high school the Petitioner had attended for the past several years. However, that would be for morning classes only. In the afternoon the Petitioner would receive services to address [redacted] maladaptive behaviors either at a Day Program in Dothan, Alabama, at the [redacted] facility in Ozark, Alabama, or at the [redacted] facility where the youngster received similar services in the Summer of 2021.

The parent objected to that proposal. She demanded a full- days' service at the high school. At the high school the parent insisted Petitioner would be in a familiar environment and would be able to associate with [redacted] friends. The parent submitted that the proposal of the school system violated her [redacted] right to be served in [redacted] least restrictive environment. 20 USC 1412(a)(5). (Ironically, at the conclusion of this proceeding the Hearing Officer declined to address that issue. It was not "ripe" for consideration. No "final" determination had been made regarding such a placement).

The principle of the least restrictive environment requires that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled. 34 CFR§114(2)(i).

The effort to serve disabled children with non-disabled peers is subject to a caveat. A removal of a child with a disability from regular education classrooms to special classes, separate (special) schools etc. may be undertaken "only if the nature or severity of the disability is such that education in **regular classes** with supplementary aids and assistance cannot be achieved satisfactorily." **Id.**

It is undisputed that Petitioner is subject to that caveat. Because of the severe [redacted] with which [redacted] was diagnosed at the age of [redacted] years, the youngster has been served in a self-contained classroom. Thus, the issue regarding the proper placement of Petitioner is one solely of "appropriateness". **DeVires v. Fairfax County Schools Bd., 882 F.2d 876(4thCir. 1984)** (upholding placement of autistic child of vocational center 13 miles from the high school he wanted to attend); **Daniel R. v. State Board of Education, 874 F.2d 441(5thCir.1989)** (upholding system's removal of Downe Syndrome child from regular education classes because Congressional preference for mainstreaming must be weighed against providing appropriate education).

The grandmother of the child is [redacted] guardian and primary caregiver. (Petitioner's Exhibit 1) (hereinafter P.1__). For IDEA purposes this means she is Petitioner's "parent." 34 CFR 300.30(a)(3)-(4). Petitioner's biological mother is also involved in the [redacted] upbringing.

The parent filed the due process as [redacted]. on behalf of [redacted]. The parent was represented at the due process hearing by her attorney. Both parent and mother were present at the proceeding.

The Board of Education was represented by its' attorney. The school system's Special Education Director and the youngster's special education classroom teacher served as" **representatives** of the system with special knowledge or training with respect to the problems of children with disabilities". 20 USC 1415(h)(l).

The due process hearing was closed. The Hearing Officer allowed the system's Superintendent to attend a portion of the hearing because consideration of private schooling for the Petitioner i.e. afternoon behavioral programs at off campus institutions may carry a significant financial outlay by Ozark City Schools.

In addition, in this demand for relief the Petitioner sought enrollment and educational services beyond [redacted] 21st birthday. Were such services awarded it would entail obligations by the system that are outside normal budgetary considerations.

Petitioner appeared at the initial session of the hearing. [redacted] then returned to [redacted] classes. The witnesses were sequestered at the request of the Petitioner's attorney.

II

Statement of Issues

The initial issue was that the school system failed to design an appropriate IEP for the youngster for the 2019-2020 and 2020-2021 school years. The primary objection by [redacted] counsel in that regard was that the IEPs contained no behavior goals or behavior intervention plan despite escalating attacks by the youngster on school system staff. Counsel also criticized the IEPs for not designating ABA therapy as part of Petitioner's education program. However, the testimony from Petitioner's special education teacher was that she did implement ABA therapies in her classroom instruction – although perhaps not as much as the parent would have liked.

The second issue involved both procedural and substantive elements. It involved a decision by the school system on May 6, 2021, to suspend the child for the remainder of the school year. (P. 3 p.141 and 151). The proposed suspension was revised by the IEP team to classify it as a removal of Petitioner from school to homebound services. In that regard the change in the educational placement of Petitioner was substantive. 20 USC§1415(b)(6).

Regardless of how the change in placement was characterized, it occurred after a violent outburst during which Petitioner attacked not only staff but one of [redacted] fellow students. According to Petitioner's attorney, that removal entitled his client to a behavior manifestation hearing because it involved a violation of the student code of conduct. 34 CFR 300.530(e)- (f).

Counsel asserted that school personnel did not attempt to determine if Petitioner's conduct was caused by or related to [redacted] disability or that Petitioner's conduct was a result of staff failure to implement [redacted] IEP. 34 CFR 300.530(e). That allegation involved a procedural violation of the IDEA. 20 USC§1415(f)(3)(E).

The alleged violation of Petitioner's least restrictive environment must be examined in the light of the above events.

The final procedural issue was whether the school system had an IEP in place for Petitioner for the 2021-2022 school year. 34 CFR 300.323(a) ("at beginning of each school year" system must have an IEP in effect for each of its' students with a disability).

III

Findings of Facts

The Petitioner is a [redacted] years of age. [redacted] mother is [redacted]. [redacted] grandmother is [redacted]. Because the grandmother is the legal guardian of the child she is the individual authorized to make education decisions for Petitioner. 34 CFR 300.30(a)(3).

By law and on account of [redacted] severe disabilities Petitioner is entitled to receive a free public education until [redacted] is 21 years of age. 20 USC 1401(9). [redacted] has graduated from the local high school but in order to avoid any claim that [redacted] has exited the Ozark City School system [redacted] will not receive [redacted] graduation certificate until [redacted] completes or leaves [redacted] program with that school system. (P.3 p.190)

Petitioner is a large [redacted]. [redacted] is [redacted] to [redacted]. [redacted] weighs [redacted] pounds.(P.4) Despite [redacted] size [redacted] was described as usually quiet and docile. [redacted] classroom teacher [redacted] the young [redacted] as a "character." [redacted] is popular with classmates and friends. [redacted] was recently diagnosed with a [redacted] disorder. [redacted] takes two medications a day to calm [redacted] down, avoid hyperactivity and decrease [redacted] anxiety.

Petitioner is severely [redacted]. [redacted] Intelligence Quotient (IQ) was measured at [redacted]. (P.3 p.40) That score places [redacted] in the disability category of [redacted] disabled. [redacted] has such a significant [redacted] disability that evaluations and services must focus on determining and improving [redacted] adaptive abilities at home and at school. Ala Admin Code 290-8-.03(6)b)3(ii). (A Comprehensive Test of Nonverbal Intelligence given on November 12, 2019 revealed an overall IQ score as [redacted] which is in the [redacted] (P.3 p.39).

The services described in Petitioner's EP included math and community living (i.e. knows how to pay a cashier for food or other items, instructing [redacted] on the availability of various services in [redacted] town such as doctor, pharmacy). [redacted] reading program is designed to enable [redacted] with consistent prompts to answer written who, where, what and how questions. (Respondent's Exhibit 1) (hereinafter referred to as (Bd.___).

Petitioner's lawyer was critical of the IEPs. [redacted] alluded to the fact that [redacted] client's program appeared to be same each year with little or no progress.

To the contrary, the Hearing Officer was very impressed by the services provided to the Petitioner by the school system for the 2020 – 2021 school year. Any lack of progress by the youngster appeared to be the result of [redacted] low level of functioning rather than poor instruction by the staff.

It was the events during the past school year that lead to the parties' dispute. The Petitioner's IEP for that year included a functional goal and a continuation of independent living goals. That was the primary service the parent desired: for the youngster to be more independent- to operate a microwave and perform household chores. The functional goal developed the use of a written schedule to assist [redacted] in preparing for a new task. That goal was important because during the 2019-2020 school year staff had encountered nothing more than sporadic outbursts during which the large youngster grabbed or struck at [redacted] teacher or at classroom aides. Each of those events occurred when staff directed Petitioner to put away [redacted] laptop computer and transition to another activity. The functional goal of the IEP developed on April 11, 2019 for the 2020-2021 school year sought to address the transitioning issue. At the conclusion of that meeting the IEP team, with the concurrence of the parent, decided that Petitioner did not have behavior that impeded [redacted] learning or the learning of others. (P.3 p.18).

Additional evidence that Petitioner received appropriate educational services was demonstrated by the staffing in [redacted] class. [redacted] is served in a self-contained classroom with eleven other students. There are three aides in the classroom all of whom have some behavioral training. The aides assist the special education teacher. This teacher has taught Petitioner for four years. She apparently developed a good relationship with the [redacted] and [redacted] parent. She also has an amiable relationship with the child's mother. The two graduated from high school together.

The special education teacher testified at the due process hearing. She appeared to be dedicated and highly competent. She expressed great concern for her students – including the Petitioner. She stated that she focuses on what services [redacted] desired. She keeps Petitioner to a regular routine and development of [redacted] socialization skills. The behavior analyst who observed the special education class in the Spring of 2021 described it as "awesome".

The events that lead to the due process hearing began on Monday, February 1, 2021.They were repeated on Tuesday, February 2, 2021. On each day Petitioner engaged in an outburst. Both events occurred after lunch. On Monday Petitioner stated "something's

wrong at home." [redacted] refused to participate in [redacted] art class. [redacted] insisted it was time for the bus to take [redacted] home. [redacted] pretended to fall down. When [redacted] stood up [redacted] put [redacted] hand on another student's neck. That was a violation of the student code of conduct. [redacted] was sent home. The event was characterized as a suspension for one day. (P.3 p.147).

The next day, a more significant behavior incident occurred. Petitioner again reported "something's wrong at home." [redacted] refused to participate in [redacted] art class. [redacted] insisted it was time for the school bus to take [redacted] home. (P.3 p.148). When the special education teacher directed [redacted] to put away [redacted] laptop, [redacted] ran at her, grabbing her and pulling both to the ground. [redacted] would not let go of [redacted] teacher until she told [redacted] [redacted] could go home. This was a violation of the student code of conduct. Petitioner was suspended for two days.

The closeness of the two events caused alarm among school staff. An inquiry was made to the parent about Petitioner's concern that something was wrong at home. The parent said she did not know what it was about except that she had recently taken a new job and the youngster may have thought she would not be home when [redacted] came home from school. She reported that Petitioner's aggressive behavior had been escalating at home. It had increased over the Christmas Holidays. (P.3 p. 240-241). On one occasion Petitioner had violently attacked [redacted] mother. (P.3 p. 241).

On February 4, 2021, the parent met with school officials in the special education classroom to discuss the two incidents. She acknowledged that she had ceased to use the "home schedule" for her [redacted]. The schedule was to be implemented during the COVID quarantine. The parent remarked that Petitioner just wanted to stay at home and work/play on [redacted] laptop. (P.3 p. 241).

The parent requested that a behavioral specialist observe the youngster "to figure out what is going on with [redacted]".(P.3 p.241). No one at the meeting inquired further about events at the Petitioner's home the weekend before the Monday, February 1, 2021 incident when the youngster demanded to leave school because "something is wrong at home".

On February 12, 2021, a virtual IEP meeting was held "to determine if changes were needed in Petitioner's IEP". (P.3 p.68) It was suggested that a behavioral intervention plan might be useful. The team cautioned that before such was included in Petitioner's program a behavioral analyst would have to determine the source of Petitioner's agitation and what lead to [redacted] physical aggression.

At the February 12, 2021 meeting Petitioner's IEP was amended. (Bd.9). A behavior goal was added to [redacted] IEP. (Bd.9 p.2 and 6).

The school system requested written consent from the parent to conduct a functional behavior analysis (FBA) of the youngster by a Board Certified Behavioral Analyst (BCBA). On March 3, 2021 the school system's special education director contacted an individual with those qualifications. (P.7 and P.8). After a period in which attempts to schedule an observation of Petitioner by the BCBA in a school setting-

including the Spring break intercession – a functional behavior assessment was conducted by the BCBA on March 31, 2021. (Bd.2).

The BCBA observed two maladaptive behaviors. The BCBA recorded these as task avoidance/task delay and repeated anal digging (Bd.2). The anal digging primarily occurred during unstructured free time. The task delay/ task avoidance had long been a problem with child. [redacted] special education teacher testified it usually occurred when the youngster was having a "bad day". It was addressed by using [redacted] written schedule and prompts when [redacted] needed to transition from one task to another. Occasionally, [redacted] was given a treat after [redacted] successfully transitioned to a new task. The BCBA commented that on the day of her observance there were few instances of task delay/task avoidance.

Most significantly, the BCBA stated: "no occurrence of aggression occurred during the observation. (P.3 p.85). Her observation" was hardly suspect since events in which Petitioner was violent were sporadic at best.

The same day as the BCBA observed Petitioner at the high school an IEP meeting was held. (Bd.1). The BCBA retained by the school system participated in the IEP meeting. At that meeting the behavior goal was continued. It was to be to be implemented in accordance with the young [redacted] functional goal. The behavior goal emphasized a structured work environment designed to help Petitioner stay on task. The IEP team concluded that a structured environment seemed to improve behavioral outcomes for Petitioner. The IEP designated that Petitioner had behavior which impeded [redacted] learning or the learning of others.(Bd.1 p. 207).

At the March 31, 2021 IEP meeting the parent related that despite an increase in her [redacted] medications [redacted] had attacked [redacted] mother "again" during Spring break (P.3 p.241). The school system responded by continuing to provide the services designated in Petitioner's IEP – including a response to [redacted] behavior. However, based on the experience of [redacted] special education teacher and others who instructed the child all thought [redacted] aggressive behavior could be managed by staff.

Indeed, on April 20, 2021, [redacted] grabbed the wrist of one of the classroom aides. Initially [redacted] refused to let go. But, upon urging by [redacted] classroom teacher, [redacted] let go. She remarked that she was able to calm [redacted]. [redacted] received a disciplinary warning. The write-up stated the event occurred when Petitioner was told by the aide to get off "you tube" and start another assignment at [redacted] digital issue unit. (P.3 p.149).

The next day after completion of PE (unstructured time), the youngster ran ahead of [redacted] classmates, pushing them out of the way. [redacted] reached a doorway, partially closing it on another student's arm in [redacted] attempt to leave school and go home. [redacted] ran to [redacted] special education classroom. When [redacted] teacher demanded that [redacted] return to [redacted] work [redacted] cried. [redacted] pleaded that [redacted] wanted to go home and play on [redacted] computer. Again, [redacted] received a disciplinary warning. (P.3 p. 150).

On April 22, 2021 the BCBA provided a behavior write-up for the young [redacted]. Again it only addressed anal digging and task avoidance/task delay. (P.3 p.241).

On May 4, 2021, [redacted] requested that an IEP meeting be held. Her request was made after she yelled at staff concerning what she claimed was the inability of the four adults in her [redacted] classroom to handle [redacted]. (P.3 p. 242).

The parent's outburst occurred following the most serious incident in which Petitioner acted violently toward staff or classmates. Earlier that day when the Petitioner was denied computer time and was directed to continue with [redacted] lesson, the youngster grabbed a [redacted] student and began choking the student. When staff tried to intervene Petitioner fell backwards pulling the student to the floor with Petitioner. Petitioner then stopped [redacted] attack, got up and went and sat on a couch. (P.3 p.151). This violation of the student code of conduct constituted a ten-day suspension out of school. (P.3 p.151).

An IEP meeting was immediately called. The meeting was conducted on May 6, 2021. The Petitioner, [redacted] mother and [redacted] grandmother (parent) attended. (P.3 p. 141). At the meeting the IEP team reversed the ten day suspension. It decided that due [redacted] aggressive behavior that Petitioner's least restrictive environment should be changed from services at the high school to services at [redacted] home. This restrictive environment is called "homebound". The parent disagreed with the decision. She walked out of the meeting. After she left, the IEP team reconvened to determine to the appropriate self-contained setting (P.3 p.130). Members of the team agreed that due to the young [redacted] unpredictable acts of physical aggression toward peers and adults in the educational setting, [redacted] required intense behavioral intervention in a **controlled setting.** (P.3 p.141).

In accordance with the regulatory continuum of placements, the IEP team considered alternative placements for the Petitioner. These are special classes, specials schools and home instruction. 34 CFR 300.115(b). The team selected home instruction. The parent refused the services offered because they would be at her home. She demanded that her [redacted] remain in [redacted] special education class for the rest of the school year. She insisted that an aide be assigned solely to her [redacted] in order to prevent any further aggressive outbursts.

On May 10, 2021, a due process complaint was filed with the State Department of Education. (HO1). The undersigned was assigned by that agency as Hearing Officer. (HO4).

The parties engaged in settlement negotiations, including the regulatory mandated resolution meeting. (HO3). Despite the efforts of all, negotiations ended an impasse. (It is noteworthy that Petitioner did receive behavioral services provided by an entity not connected to the school system during the summer of 2021. The Ozark City Board of Education paid for those services).

IV

Discussion of Issues

The Hearing Officer will dispense with the procedural issues first. The initial procedural error asserted is directed to Petitioner's contention that even into the month of September 2021, the child does not have a current IEP. That assertion was based on the language in the Notice of Intended Action that the Petitioner's IEP being examined during that period would expire on May 27, 2021. (Bd.1 p 217). The Notice continued by stating a new IEP would need to be drafted to address [redacted] behavior needs. (Bd.1, p.217). The contention was further supported by the May 6, 2021, IEP meeting which referenced a "new IEP" to address behavior and least restrictive environment i.e. remaining homebound or returning Petitioner to [redacted] self-contained class at the local high school. (P.3 p.144).

The Board insisted that the March 31, 2021, IEP to which the Notice of Intended Action was attached, was the Petitioner's IEP for the 2021-2022 school year. (Bd.1). Because of confusion as to the existence or non-existence of a 2021-2022 IEP, the Hearing Officer held a lengthy off the record discussion. That discussion was held off-the-record because it included discussions of settlement negotiations between the parties, including directives and advice by the attorneys for the parties to their respective clients.

The Hearing Officer concludes that the language in the Notice of Intent was a "Scrivener's Error". A Scrivener's Error occurs when there is an unintentional mistake in a contract or agreement which distorts the true intention of the parties. It may be corrected by convincing oral evidence. It may be corrected when a court or examining authority is convinced that a mistake is absolutely clear.

In this case the school system used the State Department of Education drop down computer box to fill out the Notice of Intent. The drop down menu directed disclosure that the 2020 -2021 IEP would expire on May 27, 2021. But it did not direct inclusion of a sentence that informed the reader that the IEP (March 31, 2021) which accompanied the Notice would be Petitioner's IEP for the upcoming 2021-2022 school year. For that reason the principle of Scrivener's Error applies. The oral testimony by school system personnel at the hearing demonstrated they believed it to be (and implemented it as such) Petitioner's IEP for the 2021-2022 school year. Consequently, the Hearing Officer concludes that the March 31, 2021 IEP was appropriately designated as the Petitioner's IEP for the present school year.

Nor does the conclusion of the Hearing Officer prejudice the parent or the child. Indeed, it was the March 31 2021 IEP which allowed Petitioner to return from homebound confinement to the local high school at the outset of the 2021-2022 school year, allowed continuance of the implementation of [redacted] behavior goals and allowed the BCBA to continue work on a BIP funded by the school system.

The more serious procedural error alleged against the school system was its' failure to conduct a manifestation determination immediately upon its' proposal to suspend the child out-of-school for ten days as a result of May 4, 2021 attack by Petitioner on [redacted] fellow student. 34 CFR 300.530(e). That error clearly impeded the child's right to a free

appropriate public education and deprived the Petitioner of educational benefit. 20 1415(f)(3)(E)(ii)(I) and (III). As a result of its' omission the school system deprived the Petitioner of [redacted] in-school activities and services for the remainder of the school year-17 school days. The student was deprived of in- school education despite the admission of school system personnel at the due process hearing that in a manifestation hearing the youngster would have prevailed: [redacted] conduct was a manifestation of [redacted] of disability.

The Hearing Officer also believes the denial of a manifestation determination was a substantive violation of one of the four key elements governing the rights of disabled children and their parents which is their entitlement to an appropriate placement. 20 USC§1415(b)(6).

This view will be addressed later in the decision, including an explanation of why the system's omission does not constitute "limited success" by the Petitioner but instead, demonstrates that the complaining party has prevailed on a significant issue and has achieved some benefit by initiating a request for a due process hearing.

As to Petitioner's complaint that the IEP(s) implemented for Petitioner were inappropriate with respect to the education services of the child the Hearing Officer concludes the opposite. All IEPs complied with the U.S. Supreme Court's holding in **Endrew F. v. Douglas County School District RE-1**, (137 S. Ct. 988 (2017). In that case the court held that 'a school must offer an IEP reasonably calculated to enable a child to **make progress appropriate in light of the child's circumstances".** (137 S. Ct. at 996).

The Petitioner suffers from a severe [redacted] disability. [redacted] is severely [redacted]. Despite these impairments [redacted] has made progress given [redacted] significant limitations. [redacted] is capable of reading- even memorizing [redacted] daily schedule. [redacted] can use a laptop computer – although often to [redacted] detriment. In some instances [redacted] uses it to read. [redacted] is gaining the ability to dial 911, recognizing that [redacted] must pay for service or food and identifying some of the individuals/businesses who might provide a particular service [redacted] may need when [redacted] transitions out of [redacted] current program.

Counsel for the Petitioner complained that ABA therapy was not included in the child's program. The Special Education teacher disagreed. She testified she incorporated ABA techniques in Petitioner's daily education program throughout the period she has taught the [redacted]. There was no evidence to suggest otherwise. The degree and extent of a particular methodology used to instruct a disabled student must be left to his/her teachers unless otherwise specified in the disabled child's IEP **Dong v Board of Education,** 197 F.3d 393(6th Cir.1999)(deferring to district's choice of methodology in declining to use discrete-trial therapy), **Steinmetz v Richmond Community Sch.**, 33 IDLER 155 (S.D.Ind.2000) (deferring to district methodology and rejecting applied behavioral analysis program), **CM v Board of Education,** 85 F Supp. 574(W.D.N.C 1999) (relying on district's methodology and rejecting ABA program for a child with autism).

Perhaps the greatest amount of time expended in this due process hearing was Petitioner's contention that the IEP of the child did not include a behavior intervention plan. Aside

from the Hearing Officer's view that Petitioner's behavior prior to the second semester of the 2020-2021 school year did not warrant such a plan, Petitioner's assertion of the right of a student to a behavior intervention plan is misguided.

The IDEA statute specifically identifies interventions called functional behavior assessments (FBA) and behavior intervention plans (BIP) only in one provision: manifestation determinations. 20 USC 1415(k)(1)(F); 34 CFR 300.530(f) (That statutory reference will be important to the Hearing Officer's later analysis of why the school systems failure to conduct a manifestation hearing was substantive –rather than a mere procedural violation of the IDEA statue).

In the event a parent/child successfully demonstrates that the behavior of the child that violates the student code of conduct is a manifestation of the child's disability, the local education agency must conduct an FBA and implement a BIP. 20 USC 1415(k)(l)(F)(i). If a BIP is already in place the local education must modify the BIP to the extent necessary to address the behavior. **Id**. at 1415(k)(l)(F)(ii).

Contrary to the suggestion of Petitioner that an FBA/BIP should be implemented upon significant behavioral events, the actual provision governing behavior is found not in the code section addressing removal of a student for misbehavior, but in 20 USC 1414(d)(3)(B)(i). That statutory provision states that in the case of a child whose behavior impedes the child's learning or the learning of others, the IEP team shall **consider** the use of positive behavioral interventions and supports, and other strategies to address that behavior. **Id.**

When the successive behavioral events occurred on February 1, 2021 and February 2, 2021 the school system held a meeting with the parent on February 4, 2021, (P.3, p.241). At that meeting the parent described that the youngster had become aggressive at home. The parent requested a behavior specialist to observe her [redacted] "to see if they can figure out what is going on with [redacted]" (P.3, p.241).

On February 12, 2021 a virtual IEP meeting was held (P.3, p.130). The parent and school system personnel decided to amend the Petitioner's IEP in order to incorporate a "**new** behavior goal based on these **new** behaviors". Id. (Bd.9). The IEP drafted on that date included a behavior goal. (Bd.9 p. 2 and 6).

At that point in this dispute the school system was in compliance with the IEP requirements of 20 USC 1414(d)(3)(B)(i). There is no statutory or case law requirement that it do more i.e. conduct or undertake a FBA or provide a behavior intervention plan. See **A.G. v Paso Robles Joint United School Dis.** 561 Fed. Appx. 642(9th Cir. 2014) (unpublished); Eleventh Cir. Court of Appeals R.36-2.

Despite that fact, on March 3, 2021 the school system began to negotiate with a Board Certified Behavioral Analyst to observe the Petitioner and prepare a FBA. (The FBA report was not provided to the school until April 22, 2021).

After contractual negotiations and the intervening spring break, an FBA was conducted on March 31, 2021. Unfortunately, the primary purpose for the BCBA's observation did not occur. Petitioner demonstrated no aggressive behavior. [redacted] had no "outburst." When asked to cease one task and began another, even one where [redacted] was using [redacted] computer, [redacted] complied. In other words, it was a typical day.

The BCBA did observe numerous occasions of anal digging and a few mild instances of task refusal and task avoidance. She informed the IEP team which she met with on that day that she would write a report addressing those behaviors. She emphasized that the youngster's unstructured time be limited. In regard to that suggestion, classroom personnel were already seeking to limit to Petitioner's unstructured time. (Bd.9)

There were two events on successive days in April, 2021 that resulted in disciplinary warnings. On the first of the two occasions in question, the youngster was written up for inappropriate touching of [redacted] aide for 15 seconds; in the second, [redacted] received a disciplinary warning for pushing [redacted] classmates out-of-the-way in an effort to get to [redacted] classroom where [redacted] implored [redacted] teacher to "let [redacted] go home to play on the computer" (P.3, p. 149-150). Neither event suggested a revision of Petitioner's IEP behavioral goal.

There was, however, one significant violation of the IDEA statute by the school system. That was its' failure to conduct a manifestation determination. A manifestation determination is made in order to decide if a student's wrongful conduct was caused by or contributed to by [redacted] disability. (It is only required if the school system proposes to remove the student from [redacted] classes for ten or more days as the result of a disciplinary offense). If the student succeeds in showing [redacted] conduct was caused by [redacted] disability, he/she remains in school. (A student may also succeed by demonstrating his/her conduct was the result of the failure of the school system to appropriately implement his/her IEP). In addition to remaining in school the disabled student is entitled a FBA/BIP. It is both of such benefits to which that Petitioner was deprived by the school system's omission. 34 CFR 300.530(e)-(f).

On May 4, 2021 when Petitioner's demand to use [redacted] computer was rejected and [redacted] was told to finish [redacted] work, the youngster jumped up and inexplicably began choking a classmate who was walking by.(P.3, p.151). When the teacher tried to disengage the two, Petitioner was described as continuing to squeeze the other student's neck. The two then fell or were pulled to the floor. Unlike several other incidents of grabbing/striking at teachers and staff, this incident could have had significant repercussions for both Petitioner and the local education agency. (The Special Education Director testified that it was her understanding that the mother of the student took [redacted] to the hospital emergency room that evening after the child told her what occurred and expressed that [redacted] was scared to return to school).

The incident resulted in a ten day suspension of Petitioner for intimidating for behavior (P.3,p. 151). (Attendance records reveal Petitioner only served two days suspension). The ten day suspension entitled the disabled child to a manifestation determination. None was offered. None was conducted.

The excuse of the school system was that there was no need to conduct a manifestation hearing because Petitioner's conduct on May 4, 2021 was clearly a manifestation of [redacted] disability. Instead, the local education agency proposed an IEP meeting to consider revising Petitioner's least restrictive environment. At that meeting- and over the objection of the parent- the IEP team decided to "homebound" [redacted] for the remainder of the school year. Actually, the IEP homebound the child "indefinitely". (Bd. 12, p.14) "The child will receive all services via homebound until the IEP team reconvenes and determines it is appropriate for [child] to return to the self-contained setting". (P.3 p.130).

As a consequence of this "switch-a-roo" from what was initiated as a disciplinary action to an IEP team determination, the school system was able to remove Petitioner from school. (See P.3, p.142). Even if the manifestation determination had been adverse to the parent/child [redacted] lost 7 school days. (Ten day suspension versus 17 remaining school days for the 2020 – 2021 school year). Similarly, [redacted] IEP ended on May 27, 2021. When one considers that fact, [redacted] lost two school days because a new IEP had not been created to determine further homebound status.

But in reality the Petitioner lost the entire 17 remaining school days. It was acknowledged by school system personnel that the conduct for which [redacted] was disciplined was indeed conduct caused or contributed to by [redacted] significant disability.

Not only did the child lose school days including instruction/socialization that cannot be duplicated in a homebound setting, [redacted] was deprived of a right to a second FBA. While the school system might argue that Petitioner had already been provided an FBA in March 2021, that FBA was of no value as to the May 4, 2021 attack on a fellow student. During the March 2021 FBA, the BCBA saw no aggressive behavior. Thus, March 31, 2021, FBA declined to address steps to mitigate or eliminate that type behavior.

Further, because the youngster was homebound, the FBA to which [redacted] was entitled could not be conducted in a school setting. An FBA conducted by observance in the Petitioner's home would be of little or no value in the formulization of a BIP.

The Hearing Officer does not believe the denial of a manifestation hearing to the child, and consequently, the Petitioner's disciplinary rights, as well as the system's use of another means (IEP) to exclude [redacted] from school was nefarious or sinister. However, it did deprive this young [redacted] of services to which [redacted] was entitled. For that reason the Hearing Officer concludes a substantive violation of (b)(6) of 1415 occurred. The school system displaced the location (and its services) to which Petitioner was entitled in accordance with [redacted] February 12, 2021 IEP. It removed [redacted] to [redacted] home for educational and proposed behavioral services. That action denied Petitioner the appropriate placement to which [redacted] was entitled under the IDEA.

V

Conclusions

In this case while the parent was attentive, patient and an advocate for her [redacted] needs, she was misguided in terms of her/his educational rights. It is the collaborative efforts of a **consensus** of the IEP team whose recommendations/programs/placements prevail. While a parent may disagree with that consensus, his/her recourse is not to dictate to school system officials what should be done, but to file a due process hearing request to contest what course the IEP team has chosen.

In this case the parent did just that. [redacted] filed a due process challenging the appropriateness of the nature and scope of her [redacted] IEP(s). The primary emphasis of that challenge was the lack of appropriate responses to Petitioner's escalating aggressive behavior in December 2020, and January and February, 2021. That behavior was apparently more manifest in the home setting than in [redacted] special education class.

The school system took immediate action upon the occurrence of the February 1, 2021 and February 2, 2021 events. By February 12, 2021 an amended IEP had a goal that addressed aggressive behavior. The IDEA required no more. 20 USC§1414(d)(3)(B)(i).

The school system continued by responding to the behavior challenges exhibited by the child. It did so despite such being sporadic at best. A certified behavior analyst was engaged. A functional behavior analysis was scheduled. The special education for the Petitioner continued. [redacted] teacher began implementing soothing and calming behavior techniques when the youngster became agitated or engaged in task refusal.

The Petitioner's schedule became even more structured than previously. A focus was initiated on transitioning [redacted] from task to task. Periods of transition appeared to all staff to be when [redacted] unpredictable outbursts occurred. The efforts of the school system accorded Petitioner a free appropriate public education.

But despite commendable efforts by system personnel the local education agency "stumped its toe" as one veteran Board attorney use to say when Ozark City Schools failed to conduct a manifestation determination hearing on behalf of the Petitioner following the May 4, 2021 attack on a fellow student by Petitioner.

That event was a serious disciplinary infraction warranting serious disciplinary measures. The fact that the school system sought to re-characterize the event as merely one that caused staff to be concerned for the safety of Petitioner and [redacted] peers, does not make it otherwise. The change of the characterization of the event could only lead an unbiased observer to conclude that the "switch a roo" was designed not to remove the Petitioner from campus for the ten days warranted by the May 4, 2021 event, a goal which the system could not achieve due to the young [redacted] disability, but instead, was to re-characterize the event in terms of the Petitioner's least restrictive environment. The

"re-characterization" enabled the school system to remove [redacted] from the campus via homebound not only for the remainder of the school year but "indefinitely". (Bd. 12)

The Hearing Officer finds that the events of May 4, 2021 mandated a manifestation determination hearing. The school system recognized that Petitioner would have prevailed at such a hearing. [redacted] would have been entitled to remain in school. [redacted] would have been entitled to a FBA. The FBA could have been conducted throughout the remaining weeks of May, 2021 had Petitioner remained in [redacted] classroom as [redacted] was entitled. The failure to conduct a manifestation determination was a substantive violation of IDEA which deprived Petitioner of a free appropriate public education.

VI

Specific Findings

1. The Ozark City school system provided Petitioner with a free appropriate public education for the 2019 – 2020 school year.

2. The Ozark City school system provided Petitioner with a free appropriate public education for the 2020-2021 school year with the exception of its failure to conduct a timely manifestation determination hearing in May, 2021.

3. The Ozark City School system's IEPs and the services provided by means of those IEPs provided Petitioner a free appropriate public education.

   The school system did not improperly deny the Petitioner extended school year - either in the summer of 2020 or the summer of 2021. The IEP team considered such services but did not find them necessary.34 CFR 300.106 and 300.324. The parent was offered a summer program for her [redacted] at the end of the 2019-2020 school year. She declined that program.

   The Petitioner was enrolled in a behavior program at a facility operated by a BCBA during the summer of 2021. The school system paid for that program.

4. The Petitioner's contention that the principle of "child find" was violated due to the alleged failure of Ozark City Schools to recognize and address Petitioner's behavioral difficulties is rejected. The Ozark City Schools undertook prompt remedial measures to address those difficulties when such manifested themselves to the extent that a response was warranted.

5. The failure of Ozark City Schools to conduct a manifestation determination meeting after the event of May 4, 2021 was a procedural violation of the IDEA.

It deprived the Petitioner of a free appropriated public education. It deprived Petitioner of educational services. 20 USC 1415(f)(3)(E.)(ii) (I and III).

6. The failure of Ozark City Schools to conduct a manifestation determination meeting after the event of May 4, 2021 was a substantive violation of the IDEA. 20 USC §1415 (b)(6). It deprived Petitioner of [redacted] proper placement in a self-contained special education class at the local high school.

7. By its violations Ozark City Schools caused the Petitioner to be entitled to relief that would not have been attained or caused without this due process litigation.

8. Petitioner is entitled to a functional behavior assessment. Such an assessment shall be conducted by an appropriate/competent evaluator selected by the school system. The FBA shall be conducted on two separate (but not successive) days. The Petitioner's Special Education teacher shall supply the evaluator any information he/she requires **before** the evaluation is undertaken.

   As part of the evaluation, the evaluator, relying on input and discussions with Petitioner's Special Education teacher, shall assess and give his/her opinions on whether a day program at a facility other than the high school that the Petitioner attends is appropriate or capable of implementation

   The FBA shall be conducted within thirty (30) days of this Order. It shall be paid for by Ozark City Schools. In the event that timeline cannot be achieved, the parties' counsel shall confer and determine another deadline. In no event shall that deadline be beyond December 1, 2021.

9. The Petitioner is entitled to compensatory education services. Given [redacted] disabilities and often limited attention span, the Hearing Officer believes the full amount of compensatory services to which the Petitioner is entitled – 17 days – would not be compensatory but would instead be punitive.

   As consequence, within ten (10) days of this Order the Petitioner's Special Education teacher shall confer with the parent and biological mother of Petitioner to determine what the compensatory services shall be including whether behavioral, academic, functional, **recreational** or a combination of all. If a third party is selected to provide compensatory services, the school system shall pay for the third party services The Hearing Officer believes that functional training (operating household appliances, navigating the community etc.) is best but will leave it to the parties to determine. These compensatory services shall be provided in increments over a six week period. In no manner shall they be less than a total of sixteen hours of compensatory education. The services may be provided at a facility operated by the Board of Education, at Petitioner's home or at a third party facility. In the event a dispute arises as to

the location the parties shall confer with counsel to resolve. If no resolution can be reached in that manner, the parties shall be required to use the mediation services of the State Department of Education.

10. As an additional compensatory act, the parent and biological mother of Petitioner are entitled to receive four (4) hours of de-escalation/behavior intervention training. That the receipt of such training shall be the choice of the parent/mother and shall be the option of each. In the event a third party provides the training it shall be paid for by the school system. The parties shall determine the location of the training as described in paragraph 9.

11. All other claims of Petitioner not expressly granted herein are **Denied.**

VII

Appeal Rights

Any party dissatisfied with the decision may bring an appeal pursuant to 20 USC§1415(i)(2). The party dissatisfied with the decision must file a notice of intent to file a civil action with all other parties within (30) days of receipt of the hearing decision. The dissatisfied party must file the civil action within 30 days of the filing on the notice of intent. Ala Admin Code 290-8-9(9)(c).

Done and Ordered this the 6th day of October, 2021.

/s/Wesley Romine
Hearing Officer
3131 LeBron Road
Montgomery, AL 36106
(334)676-1368

Shane Sellers (e-mail and regular mail)
Erika Tatum (e-mail and regular mail)
Shonta Jackson (e-mail and regular mail)

Appendix of Witnesses

Name	Position
1. [redacted]	Parent (Grandmother) and Guardian
2. [redacted]	Special Education Teacher/Special Education Case Manager
3. [redacted]	Board Certified Behavior Analyst
4. [redacted]	Petitioner's Pediatrician
5. [redacted]	Special Education Director

Appendix of Admitted Exhibits

Hearing Officer Exhibits:

HO-1	5/10/2021	Due Process hearing complaint
HO-2	5/20/2021	Board answer to complaint
HO-3		Letter on resolution meeting
HO-4	5/10/2021	Hearing Officer appointment
HO-5	5/19/2021	Due Process Scheduling Order and Directives
HO-6	8/19/2021	Order on Continuance (chronological description of scheduling events)
HO-7	8/26/2021	Amended Scheduling Order
HO-8	9/22/2021	E-mail directive to parties re: evidence/witnesses
HO-9		E-mail extending decision deadlines
HO-10		Petitioner's post-hearing argument/brief
HO-11		Board's post hearing agreement/brief

Petitioner's Admitted Exhibits

P.1	Order on Guardianship
P.2	Petitioner's Daily Worksheet
P.3	2019-2020 and 2020-2021 School Records (pp 1-350)
P.4	Dothan Pediatric physician notes
P.5	BCBA Invoice

P.6 *

P.7 3/3/2021 Email string (BCBA/special education director)

P.8 3/20/2021 Email string BCBA/special education teacher

P.9 Contract between BCBA/School System (unsigned)

*P.6 Duplicate invoice (not admitted)

Respondent (Board) Admitted Exhibits

Bd.1 3/31/2021 IEP

Bd.2 3/31/2921 FBA

Bd.3 2020-2021 Disciplinary Report for Petitioner

Bd.4 4/3/2020 IEP for 2020-2021

Bd.5 Alabama Dept. of Rehab Services Case Note re: referral of Petitioner

Bd.6 9/10/2021 Classroom Journal (Petitioner's self-contained class)

Bd.7 8/30/2021 Functional Task data sheet (Hot Pocket)

Bd.8 12/10/2020 – 5/6/2021 Petitioner's Behavior Documentation

Bd.9 2/12/2021 IEP (including behavior goal)

Bd.10 2/12/2021 Notice of IEP decision (behavior)

Bd.11 2/12/2021 Notice of Intended Action

Bd.12 5/6/2021 IEP (least restrictive environment)

Bd.13 Email string by special education teacher to parents: classroom activities

Bd. 14 Email by special education teacher to parents: classroom/school activities

Bd. 15 11/18/2019 Eligibility Report

Bd.16	6/2/21	Request for parental consent for assistive technology evaluation
Bd.17		Educational Records of Petitioner