BEFORE THE STATE DEPARTMENT OF EDUCATION
OF THE STATE OF ALABAMA

JS

PETITIONER **Special Education No. 21-118**

vs.

AUTAUGA COUNTY BOARD OF EDUCATION

RESPONDENT

DUE PROCESS DECISION

I

Procedural History

A due process hearing was held as a result of a request by the attorneys for Petitioner. The request was filed on November 23, 2021. (Hearing Officer Exhibit 2)(hereinafter (HO.___). It was brought under the Individual's With Disability Education Improvement Act. 20 USC §1401 et.seq., The hearing request objected to the school system's attempt to change Petitioner's placement because of the system's claims that the behavior of the youngster required [redacted] removal from [redacted] zoned elementary school.

The undersigned was appointed by the Alabama State Department of Education to serve as the impartial due process hearing officer.(HO.1).

On December 3, 2021, the school system submitted its response to the complaint. (HO.3). The school system insisted the proposed placement was in actuality the child's "current educational placement". The system maintained the placement was justified because the Petitioner had routinely engaged in dangerous, aggressive and violent behaviors at the elementary school [redacted] attended. (HO. 3)

On December 3, 2021, the Hearing Officer conducted a telephone scheduling conference. (HO.4). Counsel for the parties argued their dispute over the "stay-put" (maintenance of placement) issue. (HO.4).The parties agreed to attend a resolution meeting on December 6, 2021.

On December 7, 2021 a second conference with counsel was held. Upon learning that the resolution meeting was unsuccessful, the Hearing Officer directed that the youngster should remain at [redacted] zoned elementary school as [redacted] "current educational placement" during the pendency of the due process proceeding.34 CFR 300.518 (HO.5). The due process hearing was set for January 12, 2022. (HO.6).

After these events, the parents declined to return the child to the public school [redacted] would attend if not disabled. They enrolled [redacted] in a private school. On December 10, 2021, they amended their complaint to seek reimbursement from Autauga County Public Schools for private school costs. (HO.7).(See Board's objection to amendment and Hearing Officer's Order granting the amendment [HO.8, HO.9 and HO.14]).

The Petitioner's lawyers sought a continuance of the case in order to gather information about Petitioner's progress at the private placement. The attorney for the school system objected. After a conference, the continuance was granted. (HO.12) lengthy email by hearing officer recounting events/parties' arguments). The due process hearing was re-set for March 1, 2022.

On March 1, 2022 the due process hearing was conducted. It continued on March 2 and March 3, 2022. A fourth day proceeded because the system desired to address an Independent Educational Evaluation (IEE) that was completed during the hearing.(HO.16)(IEE) and (HO.17) (Order).That day was March 18, 2022.

The hearing was held at the Autauga County Board of Education.

The parents of the child are [redacted] (father) and [redacted] (mother). Both attended the first three (3) days of the hearing. The paternal grandparents of the Petitioner also attended. [redacted] was present on the final day of hearing. Petitioner and [redacted] parents were represented at the hearing by two attorneys.

The Board of Education was represented by its' attorney. The school system's special education director and the principal of the Petitioner's zoned elementary school served as representatives of the school system. 20 USC §1415(h)(I).

The hearing was open. The presence of Petitioner was waived.

II

Statement of Issues

The initial issue was whether an IEP placement decision of November 9, 2021 by which means Petitioner would transfer from [redacted] zoned elementary school to a special behavioral unit "housed" (located) at the alternative school operated by the school system violated the Petitioner's right to receive educational and social/behavioral services in [redacted] least restrictive environment. 20 USC §1412(a)(5)(A). The acronym for that concept is LRE.

The lawyers for the [redacted] and [redacted] parents maintained that the placement violated the least restrictive environment because:

(1) The IEP teams' decision was predetermined without input from the parents of Petitioner
(2) It was substantively at odds with the regulatory requirements set forth in the IDEA. (HO.7)

The school system insisted the proposed placement was justified because the nature and severity of the young child's disability was such that education in regular classes with the use of supplementary aids and services [could] not be achieved satisfactorily.

After the filing of the due process hearing complaint the parents placed Petitioner in a private academy. The parents sought reimbursement for the cost of that placement.

Reimbursement for a private placement is permitted only if the school system failed to provide a free appropriate public education (FAPE) to the child **and** if the placement for which reimbursement is sought is appropriate.

The school system asserted that its efforts- including seeking assistance from third party [redacted] providers – demonstrated that it had provided a free appropriate public education to the Petitioner. Despite its efforts the child's behavior required [redacted] placement at the public school's behavioral unit. (HO.3)

The system further maintained that the private school placement was not appropriate. Indeed, Petitioner had not made progress with respect to [redacted] behavior at that facility.

III

Findings of Facts

The Petitioner was a [redacted] year old at the beginning of the 2021 – 2022 school year. That is the period made the basis of the due process complaint. Children returned to in-person learning at the Autauga County School System following out-of-school (virtual) instruction caused by the COVID-19 pandemic.

Petitioner enrolled in [redacted] zone-elementary school in early August, 2021. The youngster had never attended a pre-school or other educational/social program. [redacted] class consisted of a varying number of students- described as between 20 – 25 students.

At the time of [redacted] enrollment the Petitioner had a medical diagnosis of [redacted] initial disruptive behavior included running about the classroom and refusing to follow instruction. [redacted] behavior caused [redacted] teacher to refer [redacted] for a special education evaluation. That referral was on August 11, 2021. (Respondent [Board] Exhibit 5)(hereinafter referred to as Bd.__).(Petitioner's Exhibit 3) (hereinafter as (P. ___).

Some behavior interventions were initiated by the school system at that time.(Bd.4). On September 24, 2021 the school system hired a behavior analyst to conduct a functional behavior assessment of the [redacted] (Bd. 21,P.16). The goal of that assessment or FBA was to

develop a behavior intervention plan for the child. (Bd.12).The analyst had a significant amount of information about the [redacted] because the school system's special education evaluation had begun with assessments/testing of the child on August 18, 2021. (Bd.6).The information in possession of the analyst (referred to as a BCBA [Board Certified Behavioral Analyst]), included concern that the Petitioner's most significant (or target) behaviors were aggression and elopement.(Bd. 13-21 and Bd. 28).

The behavior analyst began a series of observations of the child on October 6, 2021.(Bd. 40). She conducted three observations but in none did she observe aggression or elopement. She did observe the [redacted] year old [redacted] engaging in threats of violence toward [redacted] teachers as well as being non-compliant with their instruction. The analyst concluded a fourth observation of the child was necessary (Bd. 40, p.31). She reached that conclusion on October 15, 2021.

On October 6, 2021 a special education eligibility meeting was held. (P.3).The child was found eligible for special education services under the designation of [redacted] ([redacted] 34 CFR 300.8(9)(defining [redacted] The behavior analyst conducted her first observation of Petitioner on that date. She was part of the IEP team that drafted an IEP program for the [redacted] year old. (P.3) The team concluded that the youngster exhibited behaviors that impeded [redacted] learning and the learning of others. (P.3 p, 3). Services to address that problem would be provided by pulling the child out of [redacted] general education class at specific periods and having a special education teacher work with [redacted] on [redacted] behavior/socializations skills.

The evidence presented to the Hearing Officer revealed that the [redacted] behavior was inconsistent from day to day. [redacted] demonstrated difficulty with self-control. [redacted] would not obey [redacted] teachers. [redacted] was described as often having difficulty socializing with [redacted] fellow students. [redacted] was easily distracted, unable to stay on tasks and frequently rushed through [redacted] work. Some team members believed [redacted] had difficulty following social cues so that [redacted] did not fit in with [redacted] peers. When asked to change to another task or perform a task [redacted] was adverse to such as writing, [redacted] the person directing [redacted] Sometimes when angry [redacted] pretended to be cartoon characters. [redacted] With this and other characters [redacted] would act like [redacted] would run about or call "Tornado" and begin to spin. [redacted] would then flop on the floor.

To address the aberrant behavior school personnel provided social skills training, resource room "calm down" time and re-teaching for the skills missed when in the resource room. Behavior strategies were implemented. (P. 20).

Despite those efforts the behavior escalated. The child [redacted] (Bd.19, 22-24, 31 and 33) On October 14, 2021 the elementary school's principal and guidance counselor referred the [redacted] year old [redacted] to a [redacted] (Bd. 28). At the time of that referral the Petitioner's aberrant behavior had resulted in 6 Student Behavior Reports(suspensions) and 2 office referrals (P. 26 and 27). Three of the out- of -school suspensions occurred in September 2021. (P.36). School system personnel twice presented the parents with safety plans reflecting that Petitioner had made [redacted] (Bd. 23 and 29). The principal and the child's special education teacher each initiated police incident reports on the child.(Bd.34, 35 and 38). The principal sought intervention regarding the child and [redacted] parents by and from both the Alabama Department of Human Services and the local district attorney's office. (Bd. 36 -37, 24, 25 and 31); (P. 13). These efforts by the system personnel began in September and continued throughout October and early November 2021. (P. 27).

Perhaps the most significant behavioral event occurred on November 4, 2021. It was the event that lead to the proposal by the school system to remove Petitioner from [redacted] zoned elementary school.

Of course, Petitioner is too young to recount [redacted] version of the events of that day. Thus, the Hearing Officer must accept the principal's description of them. Her testimony as well as post event emails generated by system personnel relating the event were less than credible. (Bd. 37 and Bd. 42). For example, despite the fact that the principal admitted in her testimony that she and another employee (assistant principal) grabbed the [redacted] to carrying [redacted] back into [redacted] classroom, in the post-event emails the action of the principal was referred to as "helping the child off the floor", "transporting [redacted] back to [redacted] room", "attempting" to restrain [redacted] and finally "aborting" the restraint technique. (P.32, p.132, 134,and 141-142). Whether accurate or not is of no matter. The accusation that the youngster tried to [redacted] – which even in her version occurred only after she and the assistant principal had attempted to physically restrain the [redacted] year old –lead to an IEP meeting which in turn lead to the due process hearing complaint.

On November 9, 2021, a large group of persons (including Petitioner's parents and grandparents) met to discuss Petitioner's least restrictive environment. (The principle of least restrictive environment requires that to the maximum extent appropriate a disabled child must be educated with [redacted] non-disabled peers).34 CFR 300.114. The school personnel on the IEP team complained of the [redacted] continued use of profanity and [redacted] graphic threats against staff members.(Bd. 45). Personnel referred to the fact that there

had been two [redacted] protocols written regarding the [redacted] year old's threats to [redacted] teacher(s). (See Bd.23 and 29).

Team members urged the parents to accept the placement of the youngster at a program they called "[redacted] (P.18, p.24). That program is located at the school system's alternative school. A teacher that was engaged to provide behavioral services at the program described its benefits for children like Petitioner.

Mr. [redacted] agreed that the program was described as having the potential to benefit his [redacted] However, when his wife and he expressed reluctance about relocating their [redacted] away from [redacted] zoned school, team members said the Petitioner was going to be assigned to that program. At that point, the Petitioner's parents left the meeting. Before leaving they said they wanted to go home to discuss a proposal which in their minds had already been determined. (P.18)

The meeting continued without the family of the child present. The remaining team members voted to place Petitioner at [redacted] They voted for that placement because it had a small group setting, an excellent student to staff ratio and a program that would provide the child with new coping and replacement strategies in a highly structured program.(P.18 p.24; Bd. 43-44).

Examination of Board witnesses by Petitioner's counsel revealed that those same services/routines could have been provided at Petitioner's zoned elementary school. Indeed, at one time the proposed behavior program provided at the system's alternative school was located at that very elementary school.

The school system insisted that the behavioral program described to the parents at the IEP team meeting was merely "housed" in the alternative school building. The alternative school functions as a disciplinary unit for unruly students, including those of high school age. The principal of the school is over the "disciplinary units" and the behavioral unit there. He said that an IEP team cannot refer a student to the school. Only a school principal or his/her designee has the authority to make such a referral. The youngest child that may be placed at the school must be in the third grade. (P.51).

The alternative school is located in a fenced in campus. (photos at P.66-68). Barb wire tops the approximately 8-10 foot high wire fence. (**Id.)** When students arrive they are wanded to ensure they do not have weapons or contraband. They must turn their pockets inside out.

The proposed behavioral unit is on the same hallway as the disciplinary units. There is no physical barrier in the hallway between the behavior unit and the high school students.

Although the school's principal and the behavioral unit teacher maintained there is seldom exposure of the students assigned to the school for punishment and the young behavioral students, both admitted that it can occur. For example, when Mr. and Mrs. [redacted] inspected the school at the request of school system officials they observed two high school students arguing and cursing each other. They made that observation during lunch hour when the school's students were to be segregated from outsiders for confidentiality reasons.

Photographs of the behavioral unit classroom depicted a cramped but well-lit and gaily decorated room. (Bd.51). There was one window behind the teacher's desk. She testified that it had a curtain drawn over it which fell about a week before the due process hearing. The only bathroom the students are allowed to use is located in the classroom. It was unclear if the students were only allowed to use it during the two designated times a school day which is the general rule of the alternative school for bathroom breaks. There is no sensory room at the school. There is no gymnasium. There is no playground equipment or even a playground. If the behavioral students are allowed outside they can play on an old basketball court. From the testimony if appeared that most of the physical education for the behavioral students is achieved by exercising in their classroom while watching a video. There are no field trips provided by the school. Lunch is eaten at the student's desk. Lunch is brought over from the adjacent elementary school which is located outside the barbwire fence. There is no interaction at the school with non-disabled children unless there is an "accidental" encounter by the behavioral unit child with a child being punished for some school or other infraction.

As to the actual implementation of the educational/behavioral program, the behavior unit teacher enthusiastically extolled the virtues of her program. She instructs an extremely small number of students (3-5). The teacher and the adults who assist her are trained in behavior management. It was, however, unclear if all were there to instruct or merely to secure the room. The program appeared to be a very structured, ritualized babysitting service. A point system was used for good behavior. But that system could easily be used to keep a student in the program indefinitely. In the past, this Hearing Officer has likened the point system to the circumstance depicted in the song Hotel California by the Eagles ("you can check out any time you like, but you can never leave").

These observations are not a criticism of the teacher or her aides at the behavior unit "housed" at the alternative school. Based on review by the Hearing Officer of the services at such units operated by other school systems the services/program offered by the Autauga County school system are "pretty much the lay of the land" for children of Petitioner's young age. One must surmise that given the staff to the student ratio and

small group instruction, comradery among all is developed so a child like Petitioner improves in [redacted] weakest area: social/emotional development.

At the time of the due process hearing, the behavioral evaluation initiated on October 6, 2021 remained uncompleted. (HO.3 p.2). R.E.v New York City Department of Education 694 F.3d 167,194 (2d Cir.2012)(failure to conduct a functional behavioral analysis is a particularly serious IDEA procedural violation for a student who has significantly interfering behaviors). In her testimony the BCBA (board certified behavior analyst) hired by the school system explained that she could not conclude her evaluation because she never observed the two target behaviors of aggression and elopement. Without observing the behaviors she could not determine the behaviors' function or purpose.

But documentary evidence produced at the hearing disclosed that the analyst did not truly make an attempt to do so. The analyst possessed numerous reports of the child's behavioral outburst as well as an ABA recording sheet. (Bd.3). She had at least one – maybe two – behavior rating scales by Petitioner's teachers. (P.3) Almost all of that documentation revealed that when Petitioner was directed to do work that [redacted] did not want to do or to transition to another activity (or cease the activity in which [redacted] was engaged) [redacted] became disrespectful and combative.(Bd. 13-18, Bd. 21 and Bd.28).

As the behavior analyst who testified as an expert for Petitioner explained, (and the Board's analyst testimony at hearing confirmed), the Board's analyst did not target the precursor behaviors which were non-compliance and verbal threats. Those behaviors should have initially been the primary target behaviors because they typically happened before or lead to aggression or elopement by Petitioner. (P. 40). The Petitioner's expert further expressed that the Board's analyst should have finalized her functional behavior analysis (FBA) in a timely fashion. **(Id.)**

As a consequence, the professional assigned to perform the very task that the school system relied on in excusing its' failure to address escalating maladaptive behavior did not complete the task. The absence of such information/recommendations resulted in the system's inability to provide a free appropriate public education to this young student. The FBA(and behavior intervention plan) that may have made it unnecessary to remove the [redacted] year old to a special school was not completed.

Despite what certainly must have been an awareness by the school system's personnel that the Board's behavioral analyst desired a fourth observation of the child in order to complete her functional behavioral analysis, the elementary school principal wrote an email to the system's special education director on October 21, 2021 expressing

skepticism that the elementary school was the child's least restrictive environment.(P.30, p.116-117).

From that moment on the system accelerated the paperwork necessary to support the principal's assessment. (Bd. 30-38). The system's efforts included reports to law enforcement and human resources.(Bd. 24-25; Bd. 31 and Bd. 36). Those efforts resulted in and produced investigations of abuse and neglect of the youngster by ■ parents by the Alabama Department of Human Resources. They produced threats of prosecution of Mr. and Mrs. ■ by the local district attorney.(P. 13).(See also P.24 special education teacher's undated "To Whom It May Concern letter).

Although many of the infractions by Petitioner resulted in out-of-school suspensions and/or constituted significant violations of the Student Code of Conduct, the system did not choose to use the disciplinary procedures specified by the IDEA. If implemented, those procedures would have protected staff and Petitioner's fellow students from harm. 34 CFR 300.530 and 533.

Instead, the system chose the least restrictive environment route which allowed it to achieve the same result that disciplinary measures would have achieved: removal from the elementary school premises and the implementation of special education services in a segregated, highly restrictive environment.

One must conclude that the evidence presented supports the notion that the system's/activities were designed to avoid the procedural protections to which a student/parent are entitled in an IDEA disciplinary proceeding.

The fact that the alternative school cut-off for its' youngest students is third grade suggests a more nefarious purpose. By characterizing students from kindergarten to second grade as "behavioral program" students, the system can remove those children to the alternative school premises just as it would for students being punished for conduct violations.

IV

Discussion of Issues

Each school system must ensure that a continuum of alternate placements is available to meet the needs of children with disabilities for special education and related services. 34 CFR 300.115 (a). In instances where a disabled child's behavior is thwarting his/her education, functional behavior assessments (FBA) and behavior intervention plans (BIP) are important tools in determining where the child's least restrictive environment lies within that continuum. Neither one existed in this case.(P.18, p.24-25).

No behavior program for Petitioner by means of placing [redacted] in a self-contained classroom at [redacted] zoned elementary school or a less restrictive intervention was suggested even though the behavior program now proposed for the youngster was once located at that elementary school.

The only revision in the school system's behavior program for young children was that the program was re-located. It is currently provided in a segregated, physically confined facility attended by students removed from their respective schools for disciplinary reasons - an "alternative school".

Indeed, the November 9, 2021, IEP designated that Petitioner's special education services would be provided at the system's "alternative school" classroom (Bd.43). That notation revealed that the IEP team members viewed the [redacted] year old's behavior program as an alternative school placement. After touring the facility, the [redacted] father characterized it as a "mini-prison".

An examination of the rules at the facility, known as the "[redacted] program, reveal how Petitioner's father reached that conclusion. (P.55). The school system's Student Code of Conduct disclosed the restrictive nature of that school setting. (P.51,p. 18-20) In the documents relating details of the [redacted] program (i.e. alternative school) there is no mention of an exception from the rules/restrictions at that facility for the much [redacted] behavior unit. The program procedures for the unit are intermingled with those of alternative school. (Bd.50).The only variation the undersigned could discern is that the behavioral students get to select a reward at the end of the day if they are good. (Bd. 50)

Further, the IEP team ignored the regulatory provision demanding that absent unusual circumstances, education/behavior services must be provided in a regular placement "as close as possible to the child's home." 34 CFR 300.114(a)(2)(ii); 300.116(b)(3). That admonishment is similar to Section 504 LRE requirements concerning removal to comparable facilities and services for a handicapped person in an educational setting.34 CFR 104.34(a) and (c).

The evidence disclosed that the services of the behavioral unit at its' segregated location could be provided at a class in virtually any physical location. (Bd.46).The testimony of the system's special education behavior specialist revealed as much.

Lastly, in selecting the least restrictive environment for the child the IEP team violated the spirit – if not the letter – of the LRE regulations. 34 CFR 300.116(d). The IEP team gave little –if any- consideration to potentially harmful effects on a [redacted] year old child who's

formal education experience was 48 days at school where [redacted] parents – if not the [redacted] – received hostile treatment. Nor did the IEP team reflect on the **quality** of services [redacted] needed. The quality of services includes education with children who are not disabled. It includes services at a facility that is not governed by the same punitive restrictions that apply to the other students attending that facility. **See Sam K. v Department of Education of the State of Hawaii**, 2013 WL 638603 *11(D. Ha 2011) (condemning disabled child's exposure to students attending placement school sent there from juvenile court).

V

Conclusions

In considering LRE issues courts generally reject a segregated learning environment. **C.B. v Special School District No.1** (2011 WL1496485* 4(8th Cir. 2011);**Sumter County School District v Heffernan** , (2011 WL 15770430*8(4th Circuit 2011). If a disability can be addressed in a less restrictive environment where similar education services can be provided, then that is deemed the least restrictive environment. **Id.** The preference for mainstreaming set forth in 20 USC 1412(a)(5)(A) was aimed at preventing schools from segregating disabled students from the general student body. **Sumter County School Dist. supra at *7**. In part, courts look at whether the proposed LRE placement provides limited opportunities for social interaction. **Id.** at *7.

In this case, the principal of the school Petitioner attended and the [redacted] special education teacher who should have been [redacted] most ardent supporter concluded Petitioner was "too much" trouble.(P. 24, P. 27 p. 94). The principal revealed as much by her October 21, 2021 email.(P. 30, p.116-117). The principal was not going to allow the child to remain in her school regardless of the status of the uncompleted functional behavior analysis.

That fact was particularly true after the principal began receiving complaints from the parents of the Petitioner's fellow students.(See P.27 p. 94). In her email to the special education director the principal expressed concern that the [redacted] year old [redacted] who is small in stature might act on [redacted] threats [redacted] (P. 30, p.117)(Bd. 22, 24 and 33)

The Hearing Officer agrees that the education of the many should not be obstructed by the actions of one student regardless of whether that student is a typical child or a disabled child. But, the IDEA has measures to address the situation faced by the principal. Disciplinary action could have been undertaken if she was correct in her assessment that

the [redacted] ([redacted] (Bd.5, Bd.27 and Bd. 31).That relief is codified in 34 CFR 300.530(g).

Alternatively, compliance with the LRE continuum and actual consideration of the LRE requirements was available. 34 CFR 300.114-116. The principal and the November IEP team chose neither option. In that regard the school system denied Petitioner a free appropriate public education.

Nor was the action taken by the IEP team the only denial of a free appropriate public education experienced by Petitioner and his parents. Multiple procedural violations cumulatively may result in the denial of a free appropriate public education even if individual violations do not. **R.E.** v **New York City Board of Education** 694 F.3d 167,190(2d Cir 2012).

As previously stated, the absence of, and failure to complete, the FBA to which the system concluded the child was entitled was a "particularly serious" procedural violation of the IDEA. **R.E.** **supra** at 194.

The fact that the system chose to ignore the recommendation of the behavior analyst it selected compounded its failure to complete the FBA. In an undated report, the Board's BCBA recommended a "comprehensive psychological evaluation of the child" in order to "understand factors relevant to [redacted] behavior".(P.103 p.27). The school system disregarded that recommendation. In view of Petitioner's escalating aberrant behavior which was shifting from [redacted] an IEP team or other administrators should have met to consider the BCBA recommendation. The school system's omission in that regard was another significant procedural violation of the IDEA.

So too was the IEP team's change of Petitioner's LRE placement by pre-determining that placement without input from [redacted] parents. **Eg.** **Sam** **K** v **Department of Education, State of Hawaii** 2013 WL 638603* 11 (D. Ha 2013). A school district violates the IDEA if it pre-determines placement for a student before the IEP is developed or steers the IEP to the pre-determined placement. **K.D.** v **Department of Education** 665 F.3d 1110, 1123(9th Cir.2011); **Spielberg** v **Henrico County Public Schools,** 853 F. 2d 256 (4th Cir. 1988).

In this dispute the parents could not provide input about the proposed behavioral program at the alternative school because they were not aware of its existence. When the November meeting began members of the IEP team expressed that it was in the best interest of their [redacted] for [redacted] to go into that program.

At least two members of the team, including the teacher who supervised the instruction there, boasted of its' success in helping children like Mr. and Mrs. [redacted] The degree to

which school system persons had made up their mind is supported by the data they had already assembled in support of that placement.(Bd. 45) The Petitioner's parents said they were overwhelmed by the proposal to remove their [redacted] from [redacted] zoned elementary school. They left the IEP meeting after expressing that they wanted to discuss what was being considered. According to the program's special education teacher, after the parents' departure the remaining 8 members – all of whom are employed by the school system – took a vote. The eight unanimously chose placement at [redacted] where the child would receive classroom services at the "alternative school". (Bd. 43, p.15).

The designated placement was not a comparable school. Nor was it as close as possible to the [redacted] zoned school. It was not the school in which [redacted] would attend if [redacted] were not disabled. 34 CFR §300.116(b)(3) and (c).

The next day the parents were notified that the school system would take the proposed action immediately. (Bd. 44) The notice was sent to Mr. and Mrs. [redacted] by email, regular mail and certified mail. Petitioner could not return to [redacted] zoned school.

(One must assume that the multiple "sendings"/communications of the notice were intended to address the fact that the parents never received the parent FBA form allegedly "sent home" to Mr. and Mrs. [redacted] in early October 2021. [Bd. 40]).

Later, but before the Hearing Officer's December 7, 2021 directive that "stay put" permitted the child to return to [redacted] classes at the elementary school, the mother testified she brought Petitioner to the school. On the first occasion the person assigned to escort young students into the school ignored her. The next day the mother was confronted by the school's principal who rudely rebuffed her. Mrs. [redacted] was told her [redacted] was not allowed in the school. The principal "reminded" Mrs. [redacted] that her child's placement was at the behavioral unit. (P. 86, p.187) (The due process complaint was filed on November 23, 2021). [HO 1-2]. The described event occurred on November 30, 2021. [P. 86]).

In matters involving a procedural violation of the IDEA, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies or failures (1) impeded the child's right to a free appropriate public education; (2) caused a deprivation of educational benefits or (3) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the child. 20 U.S.C. §1415(f)(3)(E)(ii)(I)-(III). The actions of the school system in this dispute demonstrated all three conditions that support a finding of a denial of a free appropriate public education.

The U.S. Supreme Court decision in **Burlington** v **Department of Education,** 471 U.S. 359(1985) held that parents of a disabled child could be reimbursed for the cost of a private school placement. **Burlington** and the later Supreme Court decision in **Forrest Grove School Dist** v **TA** 129 S.Ct. 2484,2493 n. 9 (2009) permitted reimbursement only when (1) a school district fails to provide a free appropriate public education and (2) the private school placement is appropriate, that is, "proper under the Act [IDEA]." **Id.**

Once it is determined that a school district failed to provide a free appropriate public education and private placement is suitable, various related factors such as notice to the district of the private placement, the district's opportunity to evaluate the child and most significantly in this case, the district's opportunity to provide services each must be examined to determine if reimbursement is warranted. **Forrest Grove,**557 U.S. at 247. Moreover, those factors and other equities may also be considered in awarding reimbursement or reducing the amount of the reimbursement. **Burlington** 471 U.S.at 370.

In this case the school system denied Petitioner a free appropriate public education. As a consequence, the youngster's placement at the private school was appropriate. The private school is staffed by qualified individuals, including persons trained in special education. It has an acceptable student to staff ratio. (Bd.48). Although Petitioner has only been enrolled a short time, the school has taken steps to address [redacted] distracted and non-compliant behavior by reducing the hours [redacted] will attend. In the interim it will provide tutoring as compensation for missed instruction. (Bd. 49). That said, it would be speculative to say the child will "progress" at that school in the future. Were [redacted] not to progress, the placement might not remain appropriate or "proper under the Act" for purposes of reimbursing its cost.

Nonetheless, in this case equitable considerations preclude reimbursement because "stay put" at Petitioner's zoned elementary school was in place at the time of [redacted] enrollment in the private school. (HO 5) (Bd.49). Once notified by its counsel of the Hearing Officer's directive, the school system was prepared to offer education and behavior services at the child's zoned elementary school when [redacted] returned to public school at the conclusion of Christmas holidays.

An Independent Education Evaluation (IEE) requested by the parents was agreed to by the school system. The system agreed to the evaluator selected. It agreed to pay the amount the evaluator sought for her professional services.

At the end of the holidays the parents declined the school system's "invitation" to return to the elementary school. The Hearing Officer understands the parents reluctance to return –

particularly in view of the school staff's earlier actions which one could only view as designed to cause the parents to withdraw their [redacted] from that school. But while private placement may have been appropriate because of the LRE being offered by the system, the system was entitled to offer services at Petitioner's previous LRE – [redacted] zoned school.

Equities demand that reimbursement should not be awarded to the parents. The public school system is entitled to an "at bat" before being obligated to pay for private school tuition. **C.H** v **Cape Henlopen Sch Dist**,606 F.3d 59, 72(3rd Cir. 2010)(IDEA not intended to fund private school tuition for children who have not given the public school a good faith opportunity to meet its obligations). **Lauren G.** v **West Chester Area Schools,** 2012 WL5400215 *16 (E.D. Pa 2012)(same).

VI

Specific Findings

1) The Autauga County Board of Education failed to provide Petitioner with a free and appropriate public education for the first semester of the 2021-2022 school year.

2) Petitioner is entitled to a functional behavior assessment. Such an assessment shall be conducted by an appropriate/competent evaluator not employed by the school system. The evaluator shall be selected by the school system. The observations for the FBA shall be conducted on two separate (but not successive)school days. The FBA shall be conducted at the school where Petitioner is enrolled – regardless of whether it is a private or public placement.

It is suggested – but not required – that the evaluator observe the child at [redacted] home or in the some other non-school setting in addition to the above observations.

The FBA shall be conducted and completed within (30) days of this Order. It shall be paid for by the Autauga County Board of Education.

In the event the timeline cannot be achieved, the parties' counsel shall confer and determine another timeline. In no event shall that timeline be beyond May 27, 2022.

3) The Petitioner is entitled to compensatory education services.The services upon which the Hearing Officer makes that award result from the two days (November 29 and November 30, 2021) that Mrs. [redacted] brought her [redacted] to [redacted] elementary school for educational services but was either ignored or rebuffed.

The due process hearing complaint was filed on November 23. 2021. The complaint demanded "stay put" or Petitioner's entitlement to maintain placement at [redacted] zoned elementary school. Despite that complaint and the Mother's verbal assertion of "stay put", the school's principal chose to ignore the pleas of Mrs. [redacted] The principal violated the regulatory placement required by 34 CFR 300.518.

Petitioner is entitled to twelve (12) hours of compensatory education from the Respondent regardless of whether [redacted] re-enrolls in the public school or remains in a private school.

Within ten (10) days of this Order the attorneys for the parties shall confer with the parents and appropriately qualified school personnel to determine what the compensatory services shall be and where the services shall be provided. The Hearing Officer has concerns as to whether [redacted] and [redacted] are **qualified** to participate in that determination.

In the event the child is not enrolled for an entire school day at the school [redacted] attends, the compensatory services may be provided during those times. If the child attends a full day of schooling the compensatory education shall be provided after school hours, unless the parties agree otherwise.

Counsel for both parties shall be paid their standard hourly rate in making the above determination or engaging in the negotiations concerning them. Petitioner's counsel may only submit billing for one attorney so engaged.

In the event the child fails to attend one compensatory session for reasons that are not justified or excused, the child's right to the remainder of the compensatory education services shall be terminated. In such an event, the Autauga County Board of Education shall have no further obligation for compensatory services. If Petitioner is enrolled in the Autauga County school system, the system's obligation to provide a free appropriate public education shall remain.

The Autauga County school system's special education director and the person(s) engage to provide compensatory services shall make the determination if the child's absence or failure to attend should be excused. That determination shall only be made after consultation with the attorney for the Board.

4) Because the school system violated the principles of least restrictive environment

The Petitioner is entitled to enroll in the school nearest [redacted] home or that for which [redacted] is zoned.

5) Should the parents' choose to re-enroll their [redacted] at that school they shall provide written notice of their intent to the school ten (10) school days prior to the day they expect their [redacted] to re-enroll or attend the school. Upon such notice a **provisional** and **facilitated** IEP meeting shall be held between the parties to discuss/determine initial special education services upon Petitioner's return. (It is suggested but not required that the system incorporate the suggestions of the IEE evaluator and BCBA regarding such services).

Forty (40) school days after Petitioner's return to the public school setting officials and the Petitioner's parents shall engage in an IEP meeting to finalize [redacted] IEP for the school year.

The Hearing Officer does not believe he has authority to dictate or require system personnel interaction/non-interaction with disabled students or their parents. However, in view of the obvious break-down of trust between the elementary **school principal** and the **parents**, it is suggested (but not required) that the system employ a means by which those two parties have as little contact as possible.

6) The procedural violation by school system officials in predetermining the LRE placement of Petitioner at the November 9, 2021 IEP meeting requires additional training for the school system employees who attended that meeting.

The Hearing Officer directs that those IEP-team individuals be compelled to receive two (2) hours training regarding conduct of an IEP meeting, including instruction in the LRE components.

The Board's attorney or other qualified non-Board employee shall provide that training. The training shall be provided within thirty (30) days of this Order.

Documentation of the training shall be provided to the parents or their attorneys upon its completion.

7) The violations of the IDEA by the Autauga County Schools caused Petitioner to be entitled to relief that would not have been attained without due process litigation.

8) Petitioner's claim for reimbursement of tuition and other costs for private enrollment/services at [redacted] is denied

9) 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 SC§ 1415 (i)(2). The party dissatisfied with the decision must file a notice of intent to file a civil action with all other parties with thirty (30) days of receipt of the hearing decision. The dissatisfied party must file the civil action with thirty (30) days of the filing of the notice of intent. Ala Admin Code 290-8-9.08 (c)15.-16.

Done and Ordered this the 25th day of March 2022.

/s/wesleyromine
Wesley Romine
Hearing Officer

Landis Sexton (email and regular mail)
Erika Tatum (email and regular mail
Michael Braun (email and regular mail)
Elizabeth Herndon (email) (hand delivery)

APPENDIX OF ADMITTED EXHIBITS

Hearing Officer Exhibits

HO 1 Hearing Officer appointment

HO 2 11/23/21 Due process hearing complaint

HO 3 12/3/21 Board answer to complaint

HO 4 12/3/21 Scheduling conference email/stay put assertions

HO 5 12/7/21 Hearing Officer stay put directive

HO 6 12/8/21 Order setting hearing

HO 7 12/10/21 Amendment to due process complaint

HO 8 12/21/21 Board Motion to Dismiss complaint

HO 9 12/22/21 Order denying motion to dismiss

HO 10 12/22/21 Board waiver of resolution

HO 11 12/23/21 Petitioner objection to waiver of resolution

HO 12 1/4/22 Email on continuance (chronological description of events)

HO 13 1/10/22 Report of second resolution meeting

HO 14 2/22/22 Board affirmative defenses

HO 15 1/13/22 Amended scheduling order

HO 16 3/3/22 [redacted] (IEE) Psychological Evaluation (Petitioner diagnosed with [redacted]

HO 17 Order limiting subject upon resumption of hearing with emails from parties proposing/objection to resumption

HO 18 3/10/21 Board Closing Argument

Appendix of Witnesses

Name	
[redacted]	Parent (father)
[redacted]	Parent (mother)
[redacted]	Petitioner's BCBA expert
[redacted]	Board's BCBA expert/evaluator
[redacted]	Behavior unit special education teacher
[redacted]	Principal: Alternative School/[redacted]
[redacted]	Occupational therapist
[redacted]	Principal: [redacted] Elementary School
[redacted]	[redacted] Headmaster (private school)
[redacted]	School psychometrist

Respondent (Board) Admitted Exhibits

Bd 1 Ethics Code for Behavior Analyst (excerpt)

Bd 2 8/5/21 to 12/6/21 (elementary school principal's timeline of events

Bd 3 General education behavior chart

Bd 4 8/11/21 positive behavior (PST team)

Bd 5 8/11/21 Referral for special education

Bd 6 9/14/2001 Notice of Eligibility

Bd 7 Behavior strategies checklist

Bd. 8 System's redirect/escalation checklist

Bd 9 10/6/2021 IEP

Bd 10 Federal Register comments (behavioral interventions)

Bd 11 9/9/21 In-school suspension

Bd 12 9/9/21 Behavioral referral (child response)

Bd 13 9/13/21 Student behavior report (P.E. preferred activity)

Bd 14 9/14/21 Student behavior report

Bd 15 9/15/21 Student behavior report

Bd 16 9/16/21 Out of school suspension

Bd 17 Parental Notice of school suspension

Bd 18 9/20/21 Student behavior report

Bd 19 9/21/21 Student behavior report

Bd 20 9/22/21 Alabama Behavior Referral

Bd 21 9/24/21 FBA/BIP Referral

Bd 22 10/13/21 Email string re: behavior

Bd 23 10/18/21 Student Safety Plan ([redacted]

Bd 24 10/15/21 DHR Report of Suspected Child Abuse/Neglect

Bd 25 10/18/21 DHR Report of Suspected Child Abuse/Neglect

Bd 26 10/19/21 Email string re: behavior

Bd 27 9/21/21 Behavior incident report

Bd 28 10/14/21 Email re: referral to third party mental health

Bd 29 10/18/21 [redacted] ideation form

Bd 30 10/22/21 Email string principal to special ed director re: LRE

Bd 31 10/26/21 Written report re: suspected child abuse

Bd 32 10/26/21 Safety/Transition Plan

Bd 33 10/27/21 Email principal to social worker

Bd 34 Police Incident Report (special ed teacher)

Bd 35 Email social worker to principal re: attempts at parental contact

Bd 36 11/4/21 DHR Report of Suspected Child Abuse/Neglect

Bd 37 11/4/21 Management Behavior Referral

Bd 38 Police Incident Report (principal)

Bd 39 CV – system's BCBA

Bd 40 Report of system's BCBA

Bd 41 Antecedent behavior recording sheet

Bd 42 11/4/21 email re: event (alleged [redacted]

Bd 43 11/9/21 IEP (change in LRE)

Bd 44 11/10/21 LRE decision

Bd 45 11/9/21 minutes of IEP meeting

Bd 46 Behavior supports (system's [redacted] program)

Bd 47 Parental consent notice form

Bd 48 [redacted] (private placement) Learning Plan

Bd 49 [redacted] (private placement) student records

Bd 50 Behavioral Unit Procedures

Bd 51 Behavioral Unit photographs

Bd 52 facimile Behavioral Unit Daily Behavior Report

*Bd 53 Fed regs evaluation procedures

*Bd 54 Alabama regs evaluation procedures

*Objection on grounds of relevancy and repetition sustained by Hearing Officer

Petitioner's Admitted Exhibits

P 3 10/6/21 IEP

P 8 Restraint Order on Petitioner

P 13 District Attorney letter

P 15 9/14/21 Notice of Special Ed Eligibility

P 16 9/24/21 Referral for FBA/BIP

P 17 11/9/21 IEP

P 18 Minutes 11/9/21 IEP meeting

P 18(A) Notice of System Action

P 20 Behavior Strategies Checklist

P 24 Special Ed Teacher "To Whom It May Concern" (undated) letter

P 25 Disciplinary Referrals (with school system emails)

P 26 Disciplinary Referrals (with school system emails)

P 27 Disciplinary Referrals (with school system emails

P 30 Board Emails documenting misbehavior

P 34 9/10/21 OT evaluation

P 36 Petitioner's attendance records

P 37 8/13/21 referral for evaluation: aggression/threats

P 39 CV (Petitioner's expert)

P 40 Report (Petitioner's expert: BCBA)

P 44 Elementary school mission statement (Always learning/Always leading)

P 49 Elementary School letter to parents (providing highest quality education)

P 51 Student Code of Conduct

P 53 Ethics & Conduct (school employees)

P 55 Rules & [redacted] Program

P 58-59 photos of Petitioner's zone elementary school

P 60-70 photos of [redacted] Board of Education alternative school

P 86 Elementary school principal's timeline

P102 Board BCBA CV

P103 Board BCBA report (undated)

P105 [redacted] Program Procedures

*P106 Photo of [redacted] (Petitioner)

P107 Parent/Student Handbook

*Introduced over objection. Board objected to all Petitioner exhibits not expressly reviewed during the hearing. These were the Petitioner's school records. They were provided to counsel for Petitioner prior to the due process hearing. Each page contains the Bates stamp placed on it by system personnel.