

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

D.T.,)	
)	
PETITIONER,)	
)	
v.)	SPECIAL EDUCATION NO. 21-113
)	
BESSEMER CITY)	
BOARD OF EDUCATION,)	
)	
RESPONDENT.)	

HEARING DECISION AND FINAL ORDER

I. PROCEDURAL HISTORY

This matter was filed by Petitioner on November 15, 2021 and was assigned to this Hearing Officer by the Alabama State Department of Education on the same day. Resolution was waived by the parties effective November 30, 2021. A due process hearing convened in the instant matter September 12, 2022. The parties declined to submit closing briefs after the testimony concluded.

II. EXHIBITS ADMITTED INTO EVIDENCE

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

A. PETITIONER'S EXHIBITS

1. Petitioner's Exhibit 1: Original Complaint
2. Petitioner's Exhibit 2: Petitioner's IEPs and Grades
3. Petitioner's Exhibit 3: [REDACTED] January 30, 2019 Evaluation Report
4. Petitioner's Exhibit 4: Settlement Agreements, Case Numbers 18-137 and 19-95
5. Petitioner's Exhibit 5: June 22, 2022 IEP Meeting Minutes
6. Petitioner's Exhibit 6: "Sworn" Statements from [REDACTED] and [REDACTED]
7. Petitioner's Exhibit 7: Affidavit of [REDACTED]
8. Petitioner's Exhibit 8: Employment Records of [REDACTED]
9. Petitioner's Exhibit 9: Employment Records of [REDACTED] Number One
10. Petitioner's Exhibit 10: Employment Records of [REDACTED]
11. Petitioner's Exhibit 11: Employment Records of [REDACTED]
12. Petitioner's Exhibit 12: Employment Records of [REDACTED] Number Two
13. Petitioner's Exhibit 13: [REDACTED] Test Results

B. RESPONDENT'S EXHIBITS

1. Respondent's Exhibits 1-20: A Table of Contents was developed in a previous notebook but not included in the notebook submitted at the hearing.

III. BURDEN OF PROOF

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

IV. STATEMENT OF FACTS AND SUMMARY OF THE TESTIMONY

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

testimony. The witnesses were examined and the weight given to each was based upon the substantive nature contained therein for the purpose of making a decision in this matter.

Testimony:

A. MS. [REDACTED] Student's Mother ("Mother"). Student is currently [REDACTED] years old and [REDACTED] grader at the [REDACTED] school in the Bessemer City School District. For the two years prior to the filing of the instant request for due process, Student was in the [REDACTED] grade at [REDACTED] School and in the [REDACTED] and [REDACTED] grades at the [REDACTED] school in the Bessemer City School District. Student was found eligible to receive special education services in [REDACTED] in the Bessemer City School District and has maintained eligibility to receive special education services since that time. For the two years prior to the filing of the instant request for due process, Student's primary category of eligibility was [REDACTED]. Student's IEPs contain goals for behavior, math and reading.

[REDACTED] completed a Neuropsychological Evaluation on January 30, 2019; one of the recommendations was that Student have a follow-up evaluation three years later. Student has no physical disabilities; Student has [REDACTED] and is [REDACTED] however, Student passed the vision screening. Student's speech is very proper. Student has legible handwriting and does not require physical therapy. Mother never raised a concern that Student has communication deficits to the IEP team. Mother also never raised a concern that Student needed assistive technology devices because Student had an aide. Student did not have behavior problems during virtual instruction during the COVID-19 pandemic, but technological problems existed.

Mother filed two previous requests for due process in 2018 and 2019, both of which culminated in settlements agreements between Mother and the school district. Mother believed that the District did not comply with the settlement agreements. Mother also believed that the

District did not comply with [REDACTED] recommendations. Mother believed that Student does not have a one-to-one aide at all times. Student did receive counseling and tutoring, and Student did not miss any tutoring sessions.

At the beginning of the two years prior to the filing of the instant request for due process, Student had two disciplinary incidents. Mother believed that Student's aide was not with Student during the incidents, yet one of the discipline reports stated that Student was physical aggressive with the aide. Mother also testified that Mother was not there during the incidents. Student has had no more disciplinary incidents since then.

Student participates in a community summer STEM program, and it is not a special education program. Mother reports that there are no behavior incidents and that Student does well academically there. No one has reported that they thought Student was below grade level. Mother testified that Student can write, read, and spell pretty well. Student knows how to read. Mother recently purchased what Mother believes to be [REDACTED] grade level books in math, reading and language; Student does work frequently in the books. Student can do the work well; if Student does not understand something, Mother reviews it with Student.

Mother graduated from high school but has no formal training in the field of education. Student has passing grades and has never been retained in a grade level, but Mother believed that Student's passing grades were not truly earned because no one has ever told Mother that Student has mastered any goals. No progress reports are sent home, and dates of mastery for goals and benchmarks are left blank on Student's IEPs. However, Mother testified that Student's progress toward goals was discussed in IEP meetings. Mother does not receive any assignments or notes at home, and Student has little homework. Mother received general education progress reports

every four and one-half weeks and report cards every nine weeks. Mother does not believe that Student's grades are consistent with Student's standardized test scores.

B. [REDACTED] Bessemer City School District Special Education Director ("Director"). Director began serving as the Director of Special Education for the Bessemer City School District in March 2020. Director has had several meetings with Mother since beginning the current position. Director has met Student, and Student has participated in an IEP meeting with Director present. Student is served in the primary category of eligibility of [REDACTED] but also met the criteria for eligibility in the category of [REDACTED] pursuant to the 2017 reevaluation. A neuropsychological evaluation was completed by [REDACTED] on January 30, 2019, and the evaluation report was subsequently sent to the District. The evaluation report shows an IQ score of [REDACTED], in the average range. This evaluation ruled out Autism and stated that Student's deficits are "better explained by" conditions such as [REDACTED], [REDACTED], [REDACTED], [REDACTED] would need to be monitored. [REDACTED] performed an Functional Behavior Assessment in February 2019 and determined that a Behavior Intervention Plan was not needed. The District developed and implemented a Behavior Intervention Plan anyway pursuant to the settlement agreements. An IEP meeting was scheduled in November 2021 to discuss the need for additional evaluations. Director believed that the District had fully complied with both prior settlement agreements.

Director had reviewed Student's records provided to Petitioner's counsel and believed those records to be complete, except for some work samples found in summer of 2022. The record does not contain progress reports and behavior data sheets pursuant to goals for Student's IEPs. Student's IEPs do not contain dates of mastery of goals or benchmarks. Director has spoken to teachers in the district about the importance of documentation. Director believes that Student's

IEPs reflect Student's annual progress and contain plans to address deficits. Director did not believe it could be said whether Student's standardized test scores were valid because the conditions under which Student took those tests are unknown. Director believed FAPE had been offered to Student and that Student's achievement and grades are consistent with Student's abilities. Student's report cards indicate that Student has achieved grade level standards.

C. [REDACTED] Mother's Consultant ("Consultant"). Consultant holds a Bachelor of Science degree in premedical studies, a Master's degree in Rehabilitation Counseling, and holds All but Dissertation status for a Ph.D. in Professional Counseling. Consultant is currently in private practice and previously worked with the [REDACTED] [REDACTED] as a transition counselor. Consultant is a mental health provider; Consultant is not an educator and has never taught school nor holds a teaching credential.

Student was served by a different counselor across the hall from Consultant's office; this counselor had questions and sought advice from Consultant. Upon Mother's request, Consultant reviewed Student's 2020-2021, 2021-2022, and 2022-2023 IEPs and consulted with Mother regarding opinions of those IEPs. Consultant incorrectly testified that Student must be on the alternative diploma track rather than a regular education diploma track because benchmarks were provided along with Student's goals on the IEPs. Consultant displayed a lack of understanding of the Alabama Literacy Act. Consultant also believed that Student could benefit from assistive technology; yet, Consultant did not testify as to how providing assistive technology was necessary to provide Student FAPE. Incredulously, Consultant could not even state what the acronyms IDEA and FAPE stand for. This Hearing Officer gives minimal weight to Consultant's testimony.

V. ISSUES PRESENTED

The following claims were presented at the due process hearing in accordance with Petitioner's stated issues in Petitioner's Prehearing Submissions:

- A. Child Find.
- B. Failure to Provide a Free Appropriate Public Education (FAPE).
- C. Failure to Provide Compensatory Education Services.
- D. Substantive and Procedural Violations of the IDEA.
- E. Breach of Prior Settlement Agreements by Respondent.

VI. DISCUSSION OF THE ISSUES

Issue A:

Petitioner alleges that Respondent failed to properly identify Petitioner as a child with a learning disability and other disabilities which delayed an appropriate IEP and related services being provided to Student. Student is served in the primary category of eligibility of [REDACTED] but also met the criteria for eligibility in the category of [REDACTED] pursuant to the 2017 reevaluation. A neuropsychological evaluation was completed by [REDACTED] on January 30, 2019, and the evaluation report was subsequently sent to the District. The evaluation report shows an IQ score of [REDACTED], in the average range. This evaluation ruled out Autism and stated that Student's deficits are "better explained by" conditions such as [REDACTED] [REDACTED] would need to be monitored.

Student's IEPs contain goals for behavior, math and reading. Student has received counseling and tutoring. Student has no physical disabilities; Student has [REDACTED] [REDACTED] however, Student passed the vision screening. Mother testified that Student's speech is very proper. Student has legible handwriting, and thus there is no concern regarding the need for occupational therapy. Student does not require physical therapy. Mother never raised a

concern that Student has communication deficits to the IEP team. [REDACTED] performed an Functional Behavior Assessment in February 2019 and determined that a Behavior Intervention Plan was not needed. The District developed and implemented a Behavior Intervention Plan anyway pursuant to the settlement agreements. Mother also never raised a concern that Student needed assistive technology devices because Student had an aide. Consultant also believed that Student could benefit from assistive technology; yet, Consultant did not testify as to how providing assistive technology was necessary to provide Student FAPE. The District has identified and addressed Student's needs. See *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1196 (11th Cir. 2018). This Hearing Officer finds by a preponderance of the evidence that no violation has occurred.

Issue B:

Petitioner alleges that Respondent denied Student a Free Appropriate Public Education ("FAPE") by failing to develop an appropriately ambitious IEP which did not provide appropriate speech, assistive technology, occupational therapy, physical therapy, a behavior intervention plan, ABA services, and compensatory education.

Mother testified that Student's speech is very proper. Student has legible handwriting, and thus there is no concern regarding the need for occupational therapy. Student does not require physical therapy. Mother never raised a concern that Student has communication deficits to the IEP team. [REDACTED] performed an Functional Behavior Assessment in February 2019 and determined that a Behavior Intervention Plan was not needed. The District developed and implemented a Behavior Intervention Plan anyway pursuant to the settlement agreements. Mother also never raised a concern that Student needed assistive technology devices because Student had an aide. Consultant also believed that Student could benefit from assistive technology; yet,

Consultant did not testify as to how providing assistive technology was necessary to provide Student FAPE. None of the testimony reflects that Student needs ABA therapy. As no violation which rises to a denial of FAPE has occurred, no award of compensatory education is warranted. This Hearing Officer finds by a preponderance of the evidence that no violation has occurred.

Issue C:

Petitioner alleges that Student is owed compensatory education. This Hearing Officer finds by a preponderance of the evidence that no violation which rises to a denial of FAPE has occurred, and thus no award of compensatory education is warranted.

Issue D:

Petitioner alleges that procedural and substantive violations occurred. Procedurally, Petitioner alleges that the IEP Team met without necessary service providers attending or being invited to the IEP meeting. The testimony does not demonstrate that this allegation occurred.

Petitioner alleges the following substantive violations: (1) The IEP did not provide FAPE to the Petitioner; (2) the IEP did not address all of the Petitioner's needs including but not limited to a one-to-one aide, translation services, translator, FBA, BIP, AT, PT, OT, ABA, and Speech services; (3) the IEP team did not write appropriately ambitious goals; and (4) Respondent failed to conduct comprehensive/appropriate assessments to identify Petitioner's other disabilities.

First, Petitioner alleges that the IEP did not provide FAPE to Petitioner. The United States Supreme Court provided guidance in *Endrew F. v. Douglas County School District Re-1*, 137 S.Ct. 988 (2017), regarding what a Free Appropriate Public Education is. The Supreme Court stated that an educational program must be "appropriately ambitious" in light of the child's circumstances. *Id.* at 1000. The IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001.

The Court did not “elaborate on what ‘appropriate’ progress will look like from case to case. *Id.* “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. *Id.* “A reviewing court may fairly expect those [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress in light of his circumstances. *Id.* at 1002.

Student has passing grades and has never been retained in a grade level, but Mother believed that Student’s passing grades were not truly earned because no one has ever told Mother that Student has mastered any goals. No special education progress reports related to goals are sent home, and dates of mastery for goals and benchmarks are left blank on Student’s IEPs. Mother does not believe that Student’s grades are consistent with Student’s standardized test scores.

Student has an average IQ, and Director believed that Student has the ability to perform academically and that Student’s grades reflected that ability. Director testified that Student’s IEPs reflect Student’s annual progress and contain plans to address deficits. Director did not believe it could be said whether Student’s standardized test scores were valid because the conditions under which Student took those tests are unknown. Director offered a cogent and responsive explanation for why Student’s test scores may not be consistent with grades. Additionally, the IEP for the 2021-2022 school year demonstrates that the IEP Team believed that Student may have deficits due to the COVID-19 pandemic conditions. Thus, the IEP Team decided to recommend ESY Services for Student to address any deficits which may have occurred. Thus, the IEP was designed for Student to make appropriate progress, and Student received passing grades.

Failing to provide progress reports and to document mastery of goals on Student’s IEPs are procedural violations. However, in the instant matter, these procedural violations do not rise to a level of denial of FAPE. Mother testified that Student’s progress toward goals was discussed in

IEP meetings. Mother received general education progress reports every four and one-half weeks and report cards every nine weeks. In the instant matter, the testimony reflects these procedural violations did not significantly impede Mother's ability to participate in IEP teams.

Second, Petitioner alleges that the IEP did not address all of the Petitioner's needs including but not limited to a one-to-one aide, translation services, translator, FBA, BIP, AT, PT, OT, ABA, and Speech services. Mother testified that Student's speech is very proper. Student has legible handwriting, and thus there is no concern regarding the need for occupational therapy. Student does not require physical therapy. Mother never raised a concern that Student has communication deficits to the IEP team. [REDACTED] performed an Functional Behavior Assessment in February 2019 and determined that a Behavior Intervention Plan was not needed. The District developed and implemented a Behavior Intervention Plan anyway pursuant to the settlement agreements. Mother also never raised a concern that Student needed assistive technology devices because Student had an aide. Consultant also believed that Student could benefit from assistive technology; yet, Consultant did not testify as to how providing assistive technology was necessary to provide Student FAPE. None of the testimony reflects that Student needs ABA therapy, translation services, or a translator.

Third, Petitioner alleges that Respondent denied Student a Free Appropriate Public Education ("FAPE") by failing to write appropriately ambitious goals. None of the testimony reflects that the goals were not designed for Student to make progress based upon present levels of performance. The exhibits reflect that Student's goals were not the same from year to year and written based upon Student's deficits identified from evaluations.

Fourth, Petitioner alleges that Respondent denied Student a Free Appropriate Public Education ("FAPE") by and failing to conduct comprehensive/appropriate assessments to identify

Petitioner's other disabilities. The testimony does not demonstrate that the District failed to conduct comprehensive/appropriate assessments to identify Student's other disabilities. Student was evaluated by [REDACTED] and an IEP Team meeting was scheduled in November 2021 to discuss the need for further evaluations. The testimony does not reflect the need for further evaluations.

This Hearing Officer finds by a preponderance of the evidence that no violation which rises to a level of denial of FAPE has occurred.

Issue E:

Petitioner alleges that Respondent failed to comply with the previous Settlement Agreements. Both agreements were signed by the parties outside the two years prior to the filing of the instant request for due process. However, the testimony does not reflect that the District failed to comply with the Settlement Agreements. The testimony reflects that [REDACTED] recommendations were implemented and that Student had a one-to-one aide assigned. At the beginning of the two years prior to the filing of the instant request for due process, Student had two disciplinary incidents. Mother believed that Student's aide was not with Student during the incidents, yet one of the discipline reports stated that Student was physical aggressive with the aide. Mother also testified that Mother was not present to witness the incidents. [REDACTED] recommended that a follow-up evaluation be completed three years after the initial evaluation; this time frame ends after the filing date of the instant request for due process. The testimony reflects that no violation has occurred that rises to denial of FAPE. This Hearing Officer finds by a preponderance of the evidence that no violation has occurred.

The appropriate relief, if any:

This Hearing Officer finds that the Bessemer City Board of Education provided Student a Free, Appropriate Public Education. Accordingly, this Hearing Officer finds by a preponderance of the evidence that no relief is warranted.

VII. SPECIFIC RULINGS AND CONCLUSIONS

- A. This Hearing Officer finds that, based upon the preponderance of the evidence, the School District provided Student a Free, Appropriate Public Education.
- B. This Hearing Officer finds that, based upon the preponderance of the evidence, no relief is warranted.

VIII. FINAL ORDER AND NOTICE OF APPEAL RIGHTS

This Hearing Decision constitutes a Final Order in this case. Any party dissatisfied with the decision may bring an appeal pursuant to 20 U.S.C. §1415(i)(2). The party dissatisfied with this decision must file a notice of intent to file a civil action with all other parties within thirty (30) calendar days of the receipt of this decision. Thereafter, a civil action must be initiated within thirty (30) days of the filing of the notice of intent to file a civil action. Ala. Admin. Code 290-8-9-.08(9)(c)(16).

SO ORDERED this the 11th day of October, 2022.


AMANDA DICKERSON BRADLEY
HEARING OFFICER

CERTIFICATE OF SERVICE

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

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SO CERTIFIED, this the 11th day of October, 2022.


AMANDA DICKERSON BRADLEY
HEARING OFFICER