

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

L.H.,

PETITIONER,

VS.

SPECIAL EDUCATION CASE NO.: 22-63

E.C.B.E.,

RESPONDENT.

HEARING DECISION

I. PROCEDURAL HISTORY

This due process hearing was conducted under the authorization of the Individuals with Disabilities Education Improvement Act (IDEA), 2004 Reauthorization, 20 U.S.C. § 1400 *et seq.*, implementing federal regulations at 34 C.F.R. Part 300, and implementing State regulations, the Rules of the Alabama State Board of Education, Chapter 290-8-9, *et seq.*

On or about April 12, 2022, the Parent filed a due process complaint. The undersigned Hearing Officer was assigned by the State Superintendent to hear this matter.

The due process hearing was conducted on August 16, 2022 and September 16, 2022 at the [REDACTED]. The Parent was represented by the Honorable James D. Sears and the District was represented by the Honorable Erika Perrone Tatum.

Prior to the hearing, the Petitioner was advised of her right to have the hearing opened or closed. The Petitioner advised the Hearing Officer that it was the Petitioner's

desire that the hearing be open. In addition, the Petitioner, through her attorney, advised the Hearing Officer that she was waiving this Child's presence at said hearing. The Petitioner also "invoked" the rule" which required all witnesses to remain outside the hearing room until they were called to testify.

The parties did not choose to provide opening statements but preferred to begin with taking of testimony. At the end of the taking of testimony, each party was requested by this Hearing Officer to prepare a decision-style brief and forward same to the Hearing Officer. Both parties agreed that they needed a copy of the transcript prior to preparing said brief. A briefing schedule was agreed to by both parties. Both parties submitted briefs as requested by the Hearing Officer. In rendering this decision, the Hearing Officer has considered all the exhibits introduced into evidence, all testimony offered as evidence at the hearing, and all written arguments made by the parties in their briefs.

No party has brought any procedural defect in any pre-hearing proceedings to my attention and I have determined that all parties timely complied with my Order to exchange witness and exhibit lists within the time required by applicable law.

II. EXHIBITS ADMITTED INTO EVIDENCE

There were numerous exhibits submitted by the parties and accepted into evidence by the Hearing Officer. These exhibits were examined by the Hearing Officer subsequent to the Due Process Hearing in light of the testimony presented at the hearing. These documents and materials have been in the constant possession of the Hearing Officer until the rendering of this Decision. Hereafter, they will be delivered to The State of Alabama Department of Education.

The Hearing Officer placed no weight on the fact that any particular matter was offered by any party since the purpose was to get all of the appropriate documents produced for consideration by the Hearing Officer so long as they were not prejudicial to any other party participating in the Due Process Hearing based upon objection. 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. The Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of decision making in this matter.

The following exhibits were submitted on behalf of this Petitioner by the Petitioner's attorney:

1. Petitioner's Exhibit 1 Complaint and Three-Ring Binder of all of the Petitioner's Exhibits.

The following exhibits were submitted on behalf of the Respondent by the Respondent's attorney:

1. Respondent's Exhibit 1 Notice and Eligibility Decision Regarding Special Education Services.
2. Respondent's Exhibit 2 IEP 2022-2022.
3. Respondent's Exhibit 3 Data Collection Sheet.
4. Respondent's Exhibit 4, Data Collection Sheet.
5. Respondent's Exhibit 5 Data Collection Sheet.
6. Respondent's Exhibit 6 April 7th, 2022 IEP Agenda.

7. Respondent's Exhibit 7 2022-2023 IEP.
8. Respondent's Exhibit 8 April 7th, 2022 IEP Meeting Minutes.
9. Respondent's Exhibit 9 Notice of Proposal or Refusal to Take Action.
10. Respondent's Exhibit 10 ACAP, Alternate Participation Decision Making Tool.
11. Respondent's Exhibit 11 2021-2022 IEP.
12. Respondent's Exhibit 13 Occupational Therapy Notes.

III. Witnesses

A. During the hearing, the Petitioner called the following witnesses:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]

B. The Respondent did not choose to call any witnesses but relied on cross examination of the witnesses called by the Petitioner.

IV. BURDEN OF PROOF

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

V. SUMMARY OF THE TESTIMONY AND EVIDENCE

This section is a summary of some of the pertinent facts presented to this Hearing Officer. These facts are not necessarily the only facts considered by this Hearing Officer

in making this decision. This Hearing Officer has heard all the testimony and has reviewed the transcript of said testimony. This decision is based on all testimony presented at the hearing as well as exhibits admitted into evidence during the hearing.

In summary, this Child is currently [REDACTED] year old [REDACTED] grade student in the [REDACTED] (“District”). This Child has a diagnosis of [REDACTED], and there is presently no dispute that this Child is a student with a disability who is eligible for special education services under the IDEA.

A. [REDACTED]

[REDACTED] is this Child's mother. She is employed by the [REDACTED] at [REDACTED] and would occasionally be called to calm this Child down during [REDACTED] melt downs. The mother found out that this Child was [REDACTED] and nonverbal when [REDACTED] was two years old. Anything out of [REDACTED] routine throws [REDACTED] off. [REDACTED] has made a lot of progress over the last year. [REDACTED] began taking medication [REDACTED] when [REDACTED] was age [REDACTED] which has had a positive impact on [REDACTED] communication skills. [REDACTED] now says a few words, such as, bye-bye, ball, momma and pop pops. [REDACTED] turned [REDACTED] years old on [REDACTED] [REDACTED]. This Child is a very structured and schedule-oriented child. [REDACTED] attended [REDACTED] from kindergarten to fourth grade. This Child has made a lot of progress over the last two years and decided in the last year that [REDACTED] wants to engage and communicate.

In kindergarten, first and second grades this Child spent time in the general education class. In third and fourth grades this Child did not spend time in the general education class. This Child’s mother and the special education teacher, [REDACTED], got along well.

This Child's mother thinks this Child's IEP goals are inappropriate but did not speak up at the IEP meeting or see any reason to argue. She made requests such as more inclusion for this Child to be able to stay in the general education classroom and be separated from another student in ■■■ class because the student was loud. The mother does not believe that this Child has received a free, appropriate public education.

This Child's mother wants ■■■ to remain at ■■■, because this Child has made more attempts at improvement in the last year of ■■■ life than ever. She believes giving this Child an extra year to continue that progress in the setting ■■■ is used to would benefit ■■■ more than moving this Child to a new setting with new people ■■■ does not know.

At the most recent special education eligibility meeting in 2020 this Child's mother stated that she hopes this Child will be included with ■■■ grade level the next school year. She also wanted this Child to participate in the same activities with ■■■ nondisabled peers as much as possible. This Child's mother no longer wants ■■■ to be included with ■■■ grade level because ■■■ is making more progress and the progress outweighs ■■■ need to go with ■■■ grade level. Learning and making progress is more important at this point.

This Child's mother had the opportunity to discuss her concerns with this Child's IEP team. This Child's mother has never asked this Child's special education case manager about this Child's IEP goals, standard scores, or self-help skills. This Child's mother has not reviewed the educational records regarding the make-up occupational therapy services. This Child's mother did not collect data and has no evidence regarding this Child's progress other than the progress reports she received from the school.

At the time of the due process hearing this Child had not attended school for the current school year because the mother wants to wait for a decision from this Hearing Officer before making any changes. This Child is assigned to [REDACTED] in the [REDACTED] grade for the 2022-2023 school year. [REDACTED] grade students in [REDACTED] are in middle school. Two students who were in this Child's [REDACTED] grade class during the 2021-2022 school year are currently [REDACTED] graders at [REDACTED]. This Child's special education teacher at [REDACTED] contacted the parent regarding the school's open house. This Child's mother informed the special education teacher that she would not be attending. This Child's mother has not visited [REDACTED] or requested a visit. This Child's mother is not willing to give this Child the opportunity to attend [REDACTED]. This Child's mother plans to keep [REDACTED] out of school until there is a due process hearing decision.

This Child has received speech therapy since the age of two that insurance and the parents have paid for. [REDACTED] also received occupational therapy but that has been discontinued due to the insurance provider recently denied coverage for that service. [REDACTED] started private ABA therapy about four years ago. [REDACTED] is currently going to private ABA therapy four hours per day. [REDACTED]. has been providing some service in some capacity since age two.

This Child had a difficult transition from early childhood programs to kindergarten. [REDACTED] would scream and cry until [REDACTED] calmed [REDACTED] down. [REDACTED] would have frequent meltdowns.

The mother testified that this Child's interaction with ■ peers who were not disabled was limited to (a) watching them play and run around on the playground, and, (b) being in the lunchroom at the same time.

She testified that she has never been provided an understanding of the assessments that were conducted. ■ indicated that ■ measurable annual goals found on ■ IEPs have not been mastered, even the goals on ■ earlier IEPs. ■ has consistently failed to master ■ IEP goals. ■. did not believe that the academic goals that were included by school personnel were appropriate because she was told "they have to put those goals in there".

In reviewing the measurable annual goals and benchmarks on ■ IEPs for the last two years, ■. testified that ■ had not mastered any of the goals according to the IEP. School personnel never explained why ■ never mastered any of the goals.

School personnel have never offered functional measurable annual goals (eating, toileting, dressing, grooming, maintenance of personal space). ■ has learned these skills via the private clinical training.

The mother said that this Child was supposed to have an aide with ■ all day but she doubts that ■ did because she knew that the aide in the classroom also had the responsibility for two other students.

The reason that the mother filed a Complaint for Due Process was because she wanted [REDACTED] to remain at [REDACTED] because [REDACTED] was showing some progress and moving [REDACTED], because of [REDACTED] [REDACTED], would disrupt that progress.

The mother says that she wants this Child to remain at [REDACTED]. because [REDACTED] has made more attempts at improvement in the last year of [REDACTED] life than [REDACTED] ever has. She feels like giving [REDACTED] an extra year to continue that progress in the setting that [REDACTED] is used to would benefit [REDACTED] more than sending [REDACTED] to middle school.

She testified that she would only saw this Child during P.E., which was the only time [REDACTED] got to interact with the other children. [REDACTED] loves watching the other children play and run around. [REDACTED] wouldn't necessarily play appropriately, but the children let [REDACTED] have fun [REDACTED] own way. [REDACTED] enjoyed being out there with the other children. She testified that there have been seven to eight students, one teacher, and one aide in [REDACTED] classrooms during [REDACTED] first four years at [REDACTED] [REDACTED] wasn't potty trained until [REDACTED] was nine when [REDACTED] started [REDACTED] medication. [REDACTED] is completely potty trained now and does not have any accidents. [REDACTED] is independent in [REDACTED] feeding skills.

B. [REDACTED]

[REDACTED] is the special education teacher for the self-contained unit at [REDACTED] She has been at [REDACTED] for six or seven years. [REDACTED]. has master's degree in early childhood special education. She was this Child's special education teacher in preschool, second grade, third grade and fourth grade. This Child has an intelligence quotient of [REDACTED], is nonverbal and

does not use functional language. ■ gestures and points. This Child is ■ feet tall and weighs ■ pounds. This Child was one of the bigger students in the self-contained unit at ■

■. is this Child's special education case manager and prepared ■ IEP. She sent a planning sheet home for the parents' input and used that information for the profile section of the IEP. For this Child's present level of performance in the IEP ■ utilized the KTEA and Brigance assessments. Because this Child is on the Alternate Achievement Assessment, she used extended standards for this Child. The special education case manager is required to use state standards for academic goals. She selects a goal that could be successful for this Child and develops benchmarks for the goal. The IEP goals and benchmarks are individualized for this Child. The special education case manager develops challenging goals for this Child, who has made progress. The special education case manager collected data regarding this Child's goals and benchmarks.

This Child benefited in the self-contained class because of more small group and one-on-one time, a routine, and a structured environment. The 2021-2022 IEP states one of the parents' concerns was this Child increasing ■ interaction with ■ peers. This Child's special education case manager addressed those concerns. During the 2021-2022 school year, this Child was around ■ nondisabled peers during PE, lunch, and field trips. The special education case manager selected times when this Child could actually interact with ■ peers. The special education case manager contacted the teacher to stay informed when the general education ■ grade class had picture day, awards day, and field day.

This Child's special education case manager attended the April 7, 2022 IEP meeting to develop the IEP for the 2022-2023 school year. An agenda was developed for the IEP meeting and all the items on the agenda were discussed at the IEP meeting. This Child's IEP goals were prepared based on [REDACTED] grade standards. [REDACTED] obtained input from a [REDACTED] grade teacher about this Child's IEP goal and services. This Child's mother had the opportunity to give input regarding this Child's IEP goals. There were no questions at the IEP meeting about this Child's IEP goals. This Child's IEP goals and services were discussed at the April 7, 2022 IEP meeting before the IEP team determined this Child's placement for the 2022-2023 school year.

There is not a self-contained unit at [REDACTED]. The closest middle school with a self-contained unit is [REDACTED]. The [REDACTED] grade special education teacher at [REDACTED] attended the April 7, 2022 IEP meeting and addressed this Child's mother's concerns about this Child being in another location. The [REDACTED] grade special education teacher also discussed transition from elementary school to middle school.

The special education case manager discussed with this Child's mother that any missed occupational therapy services would be made up. The mother requested one-on-one occupational therapy services for the 2022-2023 school year and the IEP team changed the IEP to reflect those occupational therapy services.

Regarding this Child being retained or placed in the [REDACTED] grade another year, in the special education case manager's opinion this Child's age and maturity level is at a different point than the other students in the unit and she does not know how staying back with younger students would help or benefit this Child. The self-contained unit at [REDACTED]

has students in kindergarten through [REDACTED] grade. The students in the unit are age five years old to nine years old and much younger than this Child. Although this Child's parents want [REDACTED] placed in the [REDACTED] grade again, the special education case manager disagrees with the parents. Elementary students should be with elementary students and this Child is no longer the elementary age at [REDACTED]

Other students in the self-contained unit at [REDACTED] the previous school year transitioned to [REDACTED] in [REDACTED] grade for the current school year. No students in the [REDACTED] grade were retained in the self-contained unit at [REDACTED]

[REDACTED] has been a special education teacher at [REDACTED] for 6 years. She has an alternative master's degree.

In preparation for an IEP meeting she sends home a planning sheet to assist her in putting together a profile page. For the present level of performance she refers to the results of KTEA and Brigance assessments.

This Child does not use functional language. [REDACTED] gestures and points. [REDACTED] is not discriminating. [REDACTED] always picks the first one. It is not an accurate assessment of [REDACTED] ability.

She does not know of a situation where this Child has mastered one of [REDACTED] academic goals. On the progress reports that are sent home, all of the scores that [REDACTED] is responsible for are twos. No ones. No threes. No mastery.

She does not believe that this Child should be retained in the [REDACTED] grade at [REDACTED]

C. ■■■

■■■ is one of the District's occupational therapists. She has been employed by the District for two school years. She has an undergraduate degree in health and human services, a minor in nursing, and a master's degree in occupational therapy. She had six months training in a school setting prior to working in the District. She worked with this Child on handwriting. This Child has the physical ability to write. However, handwriting is not her main focus with this Child because that is not how ■■■ tests.

The occupational therapist works with this Child on ■■■ sensory integration system. This Child is overstimulated by noises. This Child does not like changes in ■■■ routine and the occupational therapist would also work with ■■■ on transition and emotional regulation. The occupational therapist engaged in activities with this Child to improve ■■■ hand/eye coordination, fine motor strengthening, sensory processing, social participation. Sometimes the occupational therapist would work with this Child one-on-one and other times in a small group because this Child modeled other students well. She tries to engage this Child in conversation with ■■■ peers and turn taking skills.

The occupational therapist prepared a 2021-2022 Occupational Therapy End of Year Report to summarize this Child's progress from the beginning of the school year to the end of the school year. The occupational therapist determined this Child's present level of performance by assessing and observing ■■■ writing skills, cutting skills, and self-help skills. The occupational therapist also developed summer strategies for this Child to continue strengthening ■■■ fine motor, visuomotor, and visual perceptual skills.

Prior to the end of the 2021-2022 school year [REDACTED], and another District occupational therapist made up all the occupational therapy services this Child missed. She kept notes of the occupational therapy services provided. The occupational therapist attended the April 7, 2022 IEP meeting in which occupational therapy makeup services were discussed.

This Child's parent requested one-on-one occupational therapy services and the occupational therapist complied with the request. In the occupational therapist's opinion, this Child works better in a small group setting.

D. [REDACTED]

[REDACTED] is the principal of [REDACTED]. He has been the [REDACTED], principal for seven years and previously was the assistant principal at the school for three years and a second grade teacher. He has master's degree in administration.

The principal has worked with the Parent as a [REDACTED] and she does a great job. After the Parent requested this Child be retained at [REDACTED] for another school year, the principal initially said that he was alright with this Child remaining in the [REDACTED] grade for another year but later had a discussion with the District's Special Education Director regarding a free appropriate public education for this Child. He also discussed retention with this Child's special education teacher. Although other students at the school are retained, they do not have an IEP and are not on extended standards.

The principal described the special education self-contained unit at [REDACTED], which contains kindergarten through fourth grade students. The majority of the time this Child was in the self-contained unit. [REDACTED] was also with [REDACTED] grade homeroom class.

The principal reviewed this Child's IEPs. This Child made progress at [REDACTED] despite the fact that [REDACTED] did not master [REDACTED] IEP goals. Behaviorally, this Child had more meltdowns in earlier years of elementary school and made progress with not having meltdowns as [REDACTED] got older.

The principal talked to the special education director about the parent's request for this Child remaining in the [REDACTED] grade. The special education director told the principal to follow the Alabama Administrative Code and directed him to the service delivery section of the least restrictive environment provision (290-8-9.06):

Students who are provided special education services in settings other than the student's general education classroom, resource, self-contained, must be provided with services as follows: Elementary students with disabilities must be only served with other elementary students. Secondary students with disabilities must be only served with other secondary students.

The principal had this referenced section printed for this Child's IEP team's consideration and it was discussed at the IEP meeting. This Child's IEP team followed the Alabama Administrative Code in making this Child's placement determination for the 2022-2023 school year.

The principal does not see any benefit to this Child being retained in the [REDACTED] grade. It is best for this Child to go to the [REDACTED] grade. This Child was one of the older students in the [REDACTED] grade class with a [REDACTED] birthday. [REDACTED] grade in the District's schools is middle school.

VI. ISSUES PRESENTED

A. Whether the District provided a free appropriate public education to this Child in ■ least restrictive environment.

1. Petitioner contends that the District failed to provide this Child with a free appropriate public education for the following reasons:

a. Failing to develop and implement IEPs that comply with state and federal laws and regulations that address all of Petitioner's disabilities and that are based upon peer-reviewed research, as required by the aforementioned state and federal laws. Examples of additional failures to develop and implement appropriate IEPs included: measurable annual goals that are in academic areas that are beyond the Petitioner's capabilities; failing to acknowledge that Petitioner has not mastered any of ■ goals in the preparation of new goals; no extended school year services were provided, despite not having mastered any of the goals within the time line established for mastery; and not including realistic inclusion with Petitioner's peers who are not disabled.

b. The parent was left out of education decision-making.

c. Requiring the Petitioner to transfer to a school that is not ■ home-zone school.

d. Not providing occupational therapy according to Petitioner's IEP

2. The District contends that they did provide this Child with a free appropriate public education in ■ least restrictive environment.

VII. DISCUSSIONS OF THE ISSUES

It is evident to this Hearing Officer that the Mother of this Child truly loves her Child and is fully committed to making sure that her Child receives each and every educational benefit that ■ is entitled to under the law. The Mother took an opportunity to substitute at this Child's school and ■ so that she could be available to help ■ during any of ■ melt downs.

When Congress enacted the IDEA, it found that “the educational needs of millions of children were not being fully met because ... the children were excluded entirely from the public school system and from being educated with their peers.” 20 U.S.C. § 1400(c)(2). To ensure that the students with disabilities receive a Free and Appropriate Public Education (“FAPE”), Congress enacted the IDEA which mandates the creation of individualized education programs (“IEPs”) for those students. *See Jefferson Cty. Bd. Of Educ. v. Bryan M.*, 706 F. App'x 510, 512 (11th Cir. 2017) citing 20 U.S.C. § 1412(a)(4). The IDEA requires school districts to include student's parents in the IEP team, 20 U.S.C. 1414(d)(1)(B), and treat them as equal partners, *see M.A.M. ex el. C.M. v. Sch. Bd.*, 437 F.3d 1085, 1095 (11th Cir. 2006) (“During the IEP development process, parental involvement is critical; indeed, full parental involvement is the purpose of many of the IDEA's procedural requirements.”).

To meet its substantive obligation under the IDEA, a school must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of this child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L.Ed. 2d 335 (2017). An IEP serves to “set out a plan for pursuing academic

and functional advancement.” *Id.* at 999. “Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Id.* See also *Jefferson County Bd. of Educ. v. Amanda S.*, 418 F. Supp. 3d 911, 914 (N.D. Ala. 2019). The test for determining whether a school board has provided a FAPE as called for under the IDEA includes asking “(1) whether the state actor has complied with the procedures set forth in the IDEA, and (2) whether the [individualized educational program] developed pursuant to the IDEA is reasonably calculated to enable this child to receive educational benefit.” *Id.*

To ensure that the students with disabilities receive educational services necessary to provide such an education, Congress has mandated the creation of individualized education programs for students who are protected by the IDEA. *Jefferson Cnty. Bd. of Educ. v. Bryan M.*, 706 F. App’x 510, 512 (11th Cir. 2017) citing 20 U.S.C. § 1412(a)(4). The IDEA requires school districts to include student’s parents in the IEP team and treat them as equal partners. See 20 U.S.C. 1414(d)(1)(B); *M.M. ex el. C.M. v. Sch. Bd.*, 437 F.3d 1085, 1095 (11th Cir. 2006). (“During the IEP development process, parental involvement is critical; indeed, full parental involvement is the purpose of many of the IDEA’s procedural requirements.”). To meet its substantive obligation under the IDEA, a school must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of this child’s circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L.Ed. 2d 335 (2017).

As part of the IDEA, the school district must provide the services recommended by the IEP in the least restrictive environment possible. *Jefferson Cnty.*, 706 F. App’x at 512,

citing 20 U.S.C. § 1412(a)(5). For that reason, the IEP must identify a student's least restrictive environment ("LRE"). *Id.*, citing 20 U.S.C. § 1436(d)(5). IDEA's least restrictive environment requires children with disabilities be educated with nondisabled peers to the maximum extent appropriate. *Ala. Admin Code* § 290-8-9.06; 34 C.F.R. § 300.114. If a student's parents believe the IEP has incorrectly identified that environment, they can challenge the IEP's designation. *Id.*

The Eleventh Circuit Court of Appeals has applied a two-part test for determining whether a school district has complied with the least restrictive environment requirement of IDEA. *See S.M. v. Gwinnett Cnty. Sch. Dist.*, 646 F. App'x 763, 764 (11th Cir. 2016); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991). First, it asks whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily. *Id.* If it cannot and the school district intends to provide special education or to remove this child from regular education, the court inquires as to whether the school has mainstreamed this child to the maximum extent appropriate. *Id.* When addressing whether a child is placed in the least restrictive environment, the following factors may be considered:

- (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services;
- (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom;
- (3) the child's overall educational experience in regular education, including non-academic benefits; and
- (4) the effect on the regular classroom of the disabled child's presence in that classroom.

L.B. v. Nebo Sch. Dist., 379 F.3d 966, 976 (10th Cir. 2004), citing *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989).

In the present case, the Parent, as the petitioner, has the burden to demonstrate this Child's placement is not the appropriate least restrictive environment. As explained below, the Hearing Officer finds insufficient evidence to meet that burden.

First, pursuant to the Eleventh Circuit's two-part test, the Hearing Officer inquires into whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily. Here, the District presented credible evidence that a general education classroom placement for this Child cannot be satisfactorily achieved. Therefore, the Hearing Officer finds that the parent has failed to meet her burden under the first prong to demonstrate that education in a general education school setting, with the use of supplemental aids and services, can be achieved satisfactorily.

Turning to the second prong of the Eleventh Circuit's test, the Hearing Officer inquires as to whether the District has mainstreamed this Child to the maximum extent appropriate. In other words, has the Parent demonstrated that there is an environment less restrictive than homebound placement that would be appropriate for this Child? Under present facts, the Hearing Officer finds that the Parent failed to demonstrate that a less restrictive environment is appropriate. Significantly, the Parent does not have a veto power over the IEP. *Letter to Richards*, 55 IDELR 107 (OSEP 2010). The IEP Team should consider parents' suggestions and discuss ways to address parental concerns, but the IEP Team is not required to adopt all the parents' recommendations. *See e.g., Blackmon v.*

Springfield R-XII Sch. Dist., 31 IDELR 132 (8th Cir. 1999); *Anthony C. v. Department of Educ., State of Hawaii*, 62 IDELR 257 (D. Hawaii 2014).

Additionally, the Parent has not provided any evidence that the self-contained unit is inappropriate for this Child. The Parent's only disagreement is this Child moving to the [REDACTED] grade at [REDACTED]. Therefore, the Hearing Officer finds a lack of evidence to demonstrate that the placement is inappropriate under the second prong of the test.

The comments to the IDEA regulations state that school districts have the flexibility to assign a child to a particular school or classroom:

While public agencies have an obligation under [IDEA] to notify parents regarding placement decision, there is nothing in the [IDEA] that requires a detailed explanation in children's IEPs of why their educational needs or educational placement cannot be met in the location the parents' request. We believe including such a provision would be overly burdensome for school administrators...

71 Fed. Reg. 46588 (2006); *see also Letter to Breeskin* (OSEP 2019).

This Child's zoned school, [REDACTED], does not have a special education self-contained unit. Therefore, the IEP team determined that this Child would attend the middle school closest to [REDACTED] home with a special education self-contained unit, *i.e.*, [REDACTED]. This Child's nondisabled peers for the 2022-2023 school year are [REDACTED] grade students in middle school, not elementary school students at [REDACTED]. *See Ala. Admin. Code* § 290-8-9.06(4)(a) and (b)(Students who are provided special education services in settings other than the student's general education classroom, resource, self-contained, must be provided with

services as follows: Elementary students may be served only with other elementary school students. Secondary students may be served only with other secondary school students.)

Hearing officers in Alabama have upheld IEP team's decisions in similar circumstances. *See e.g., T.B.R. v. Elmore County Bd. of Educ.*, Special Education Case 13-78. In the *T.B.R.* case the special education student attended an elementary school operated by the Elmore County Board of Education. The student was in the fourth grade. The elementary school served students in kindergarten through fourth grade. Following the fourth grade, it would be necessary for the student to move to a middle school, serving students in fifth grade through eighth grade. The student's IEP team determined a multi-disability unit at the middle school was the student's least restrictive environment. The student would be assessed utilizing the Alabama Extended Standards. The middle school multi-disability unit was located in another community of the school district. *T.B.R.*, at 5-7.

In the *T.B.R.* case the parent lived five minutes from the elementary school this child attended and the parent was concerned about this child attending the middle school outside his community. Following the due process hearing, the hearing officer held that the law does not require the parent be allowed to select the site where the educational services will be provided. *T.B.R.* at 19, citing *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003). The hearing officer weighed the parent's concerns against the educational needs of this child that the IEP team determined would best be provided in ■ non-home zoned school. Members of the IEP team believed that this child could not be provided an

appropriate educational benefit at the elementary school and to place [REDACTED] there would be a disservice to this Child and prevent [REDACTED] from receiving the educational benefit under IDEA. Accordingly, the petitioner did “not sustain the burden necessary to demonstrate the denial of a FAPE.” *Id.* at 23-24.

Similarly, in the present case this Child’s IEP team’s decision followed IDEA requirements regarding this Child attending [REDACTED] grade at [REDACTED], with [REDACTED] nondisabled peers. This Child’s special education teacher and elementary school principal testified that this Child would not be with [REDACTED] nondisabled peers at the elementary school. This Child’s age and maturity level is at a different point than the other students in the unit. The special education case manager does not believe staying back with younger students would help or benefit this Child. The principal does not see any benefit to this Child being retained in the [REDACTED] grade. Notably, this Child’s mother has previously requested for this Child to be included with [REDACTED] grade level and participate in the same activities with [REDACTED] nondisabled peers as much as possible. *See* Respondent’s Exhibit 1; *see also Ragan-Adkins ex. Rel Regan v. San Diego Unified Sch. Dist.*, 37 Fed. Appx. 932 (9th Cir. 2002)(affirming ALJ’s conclusion that educational environment for a nine year old is a classroom with peers who are similar in age because of legal presumption in favor of mainstreaming with *age comparable nondisabled peers*).

There is no right to a neighborhood school and no presumption of neighborhood schooling either in the IDEA or its implementing regulations. *See Murray v. Montrose Cnty. Sch. Dist. RE-IJ*, 51 F.3d 921 (10th Cir. 1995)(“LRE mandate does not include a

presumption of neighborhood schooling, and a school district accordingly is not obligated to fully explore supplementary aids and services before removing a child from a neighborhood school”). Schools have *significant authority* to determine the school site for providing IDEA services. “IDEA permits schools to provide special education services in a centralized location, as opposed to in each student’s neighborhood school.” *J.T. v. Dumony Pub. Sch.*, 533 Fed. Appx. 44 (3rd Cir. 2013). Parents do not have a right under the IDEA to participate in site selection, because the term “educational placement” does not refer to a place, but to a program of services. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003); *C.R.R. v. Water Valley Sch. Dist.*, 2008 WL 723842 (N.D. Miss.)(School district “has policy discretion to determine the geographic location for education placement”); *Killoran v. Westhampton Beach Sch. Dist.*, 2021 WL 4776720 (E.D.N.Y.)(“while parents have a procedural right in the educational placement of their child, ‘*i.e.*, the academic program to which the student is assigned,’ they ‘are not...procedurally entitled to participate in the decision regarding school placement, ‘i.e., the specific location to which the student is assigned.’”)(emphasis added).

Regarding this Child’s mother request for this Child to be retained in the [REDACTED] grade and remain at [REDACTED] for 2022-2023 school year, the *Alabama Administrative Code* does not contain regulations for promotion and retention of students with IEPs. See Alabama State Department of Education, *Mastering the Maze*, Question 1-155, p. 170. A promotion or retention decision is not synonymous with a placement decision for IDEA purposes. *Letter to Davis-Wellington*, 40 IDELR 182 (OSEP 2003).

Every IEP must include “a statement of the child’s present levels of academic achievement and functional performance,” describe “how this child’s disability affects this child’s involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic and functional goals,” along with a “description of how the child’s progress toward meeting” those goals will be measured. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)–(III). The IEP also must describe the “special education and related services ... that will be provided” so that this child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.” 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

The *Alabama Administrative Code* specifically addresses IEPs for students with significant cognitive disabilities who are assessed with the Alabama Alternate Assessment: Academic goals must be written to Alabama Extended Standards. *Ala. Admin. Code* § 290-8-9.05(6)(o). This Child’s special education case manager testified at the due process hearing that because this Child is on the Alternate Achievement Assessment, she used extended standards for this Child.

The IEP must “set out a plan for pursuing academic and functional advancement.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 137 S. Ct. 988, 999 (2017)(citing 20 U.S.C. § 1414(d)(1)(A)(i)(I)–(IV)). “In the context of the IDEA, ‘education’ extends beyond discrete academic skills and includes the social, emotional, and physical progress necessary to move this child toward meaningful independence and self-sufficiency consistent with this child’s cognitive potential.” *Sean C. v. Oxford Area Sch. Dist.*, No. 16-5286, 2017 WL 3485880 *8 (E.D. Pa.). Since progress for one student is

different than progress for another student, an IEP must be “constructed only after careful consideration of this child's present levels of achievement, disability, and potential for growth.” *Andrew F.*, at 999.

A substantively adequate IEP should be appropriately ambitious in light of a student's circumstances such that the student has “the chance to meet challenging objectives.” *Andrew F.*, 137 S.Ct. at 1000–01. The adequacy of the educational program offered depends on the particular child and ■ unique needs. This hearing officer must attempt to gauge whether this Child’s IEP was designed to challenge ■ and to enable ■ to make progress appropriate in light of ■ circumstances. Because “crafting an appropriate program of education requires a prospective judgment by school officials,” the hearing officer cannot evaluate whether an IEP is reasonably calculated to provide FAPE solely in terms of what a student actually achieves. *Id.* at 999-1000.

Considering ■ circumstances, this Child had the chance to meet challenging objectives. This Child’s special education case manager testified that IEP goals and benchmarks are individualized for this Child. The special education case manager developed challenging goals for this Child, who has made progress and mastered benchmarks. The special education case manager collected data regarding this Child’s goals and benchmarks. The Parent failed to demonstrate how this Child’s goals and benchmarks could have been further individualized or how the benchmarks denied this Child an appropriate education.

The Parent's primary criticism of this Child's IEP was that ■ did not master the IEP goals. The Parent's focus on mastery of goals is not the proper analysis. *Jefferson Cnty Bd. of Educ. v. Lolita S.*, 977 F. Supp. 2d 1901, 1118 (N.D. Ala 2013)("The point of requiring an *Individualized* Education Program is to have the program meet this Child's unique needs, not to assume that *all* children in special education are capable of meeting state goals for that grade."); *Rosaria M. v. Madison City Bd. of Educ.*, 325 F.R.D. 429 (N.D. Ala. 2018)(this Child's progress under the IEP "does not necessarily indicate whether the IEP was appropriate"). Considering this Child's present levels of achievement, disability, and potential for growth pursuant to the *Andrew F.* standard, the evidence demonstrated this Child made significant progress at ■. The Parent's testimony was that this Child has made a lot of progress over the last two years and decided in the last year that ■ wants to engage and communicate. This Child's special education case manager and elementary school principal also gave testimony of this Child's progress, especially behaviorally.

The evidence further established this Child's IEPs set out the requisite services the District would provide to help this Child meet ■ goals. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV). This Child's occupational therapist testified that she works with this Child on ■ sensory integration system. Because this Child does not like changes in ■ routine and the occupational therapist would also work with ■ on transition and emotional regulation. The occupational therapist engaged in activities with this Child to improve ■ hand/eye coordination, fine motor strengthening, sensory processing, social participation. She tries to engage this Child in conversation with ■ peers and turn taking

skills. The occupational therapist determined this Child's present level of performance by assessing and observing ■ writing skills, cutting skills, and self-help skills. The occupational therapist also developed summer strategies for this Child to continue strengthening ■ fine motor, visuomotor, and visual perceptual skills.

Occupational therapy services were discussed at the April 2022 IEP meeting. Due to limited staffing for occupational therapy, this Child did not receive weekly occupational therapy services. The IEP team agreed the occupational therapy services for this Child would be made up throughout the current school year and/or summer. The occupational therapist testified that all of the occupational therapy services were provided to this Child, including any services missed. The Parent did not present evidence to dispute the occupational therapy services. *See T.T. v. Jefferson Cnty. Bd. of Educ.*, 2020 WL 6870506 (N.D. Ala.) (finding the school district did not deny this Child an appropriate education and parent had not produced any evidence that this Child's education suffered for ■ lack of occupational therapy). The Petitioner's attorney in ■ proposed Decision concedes that the occupational therapy sessions that were missed were later made up by the occupational therapist.

Although an IEP must provide a student with a "basic floor of opportunity," it does not have to provide "the optimal level of services," or incorporate every program requested by this Child's parents. *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564 (3rd Cir. 2010). "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Andrew F.*, 137 S. Ct. at 1000 (citing *Rowley*,

458 U.S. at 206–07). Tellingly, the Parent did not request any changes to this Child’s IEP, except for one-to-one occupational therapy services, which the IEP team put into effect and the occupational therapist implemented.

Peer reviewed research is not required to be in the IEP. “Naming a specific program in the IEP is not recommended because a specific program may change...within the implementation and duration dates of the IEP.” See Alabama State Department of Education, *Mastering the Maze*, Question 1-171, p. 172. The decision about the appropriate methodology is for the educators in the District. See *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 673 (6th Cir. 2003). The difference of opinion about the appropriate methodology, even if based upon a reasonable and supported difference of opinion, does not provide a basis for finding the IEPs to be deficient. Parents “have no right to compel a specific program or methodology.” *Hupp v. Switzerland of Ohio Loc. Sch. Dist.*, 912 F. Supp. 2d 572, 598 (S.D. Ohio 2012) (citing *Tucker by Tucker v. Calloway Cnty. Bd. of Educ.*, 136 F.3d 495, 505 (6th Cir. 1998)). The Parent in the present case failed to present evidence showing that reliance upon the extended standards in this Child’s IEP was so far outside the norm of what was appropriate that it can be said the District failed to develop and implement an IEP that was not reasonably calculated to ensure that this Child received necessary educational benefits.

Further, an IEP is not to be judged with the benefit of hindsight; the appropriateness of the IEP is judged as of the time it was developed. *Furhmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3rd Cir. 1993); see also *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520,

530 (3d Cir. 1995)(3rd Cir. 1995). Thus, a court should determine the appropriateness of an IEP by evaluating the evidence acquired subsequently to the creation of an IEP to determine the reasonableness of the school district's decision at the time the IEP was made. *Bayonne*, 602 F.3d at 564.

[“U]nder the IDEA, courts must accord significant deference to the choices made by school officials as to what constitutes an appropriate program for each student.” *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 277 (3rd Cir. 2012). Ultimately, “the IDEA does not require the IEP to furnish every special service necessary to maximize each child's potential.” *J.B. v. N.Y.C. Dep't of Ed.*, 242 F. Supp. 3d 186, 189 (E.D.N.Y. 2017) (citing *M.H. v. N.Y.C. Dep't of Ed.*, 685 F.3d 217, 224 (2d Cir. 2012)). The hearing officer finds that the IEPs at issue pass the reasonableness standard and satisfied the IDEA.

VIII. SPECIFIC FINDINGS

The Hearing Officer finds that the District provided a free appropriate public education to this Child in [REDACTED] least restrictive environment.

IX. NOTICE OF APPEAL RIGHTS

Any party aggrieved by the findings and decision made herein has the right to bring a civil action in the appropriate Court under 20 U.S.C. Section 1415. *The Alabama Administrative Code* 290-8-9.08 (9) (c)16 provides an aggrieved party shall file a notice of intent to file a civil action with all parties to the Impartial Due Process Hearing within **thirty (30) calendar days** upon receipt of the decision of the Impartial Due Process Hearing Officer. The Code further provides that a civil action in a court of competent

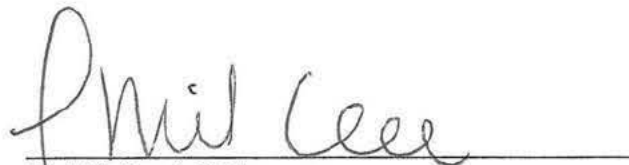
jurisdiction must be filed within **thirty (30) days** of the filing of the notice of intent to file a civil action.

X. CERTIFICATE OF SERVICE

I hereby certify that a copy of this Decision has been forwarded to the following individuals by First Class U.S. Mail with postage prepaid as well as by electronic mail on this the 19th day of October, 2022.

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A handwritten signature in black ink, appearing to read "P. Michael Cole", written over a horizontal line.

P. Michael Cole
Due Process Hearing Officer