BEFORE THE STATE DEPARTMENT OF EDUCATION
OF THE STATE OF ALABAMA

S.M.B.,

PETITIONER,

VS. **SPECIAL EDUCATION CASE NO.: 23-38**

B.C.B.O.E.

RESPONDENT.

HEARING DECISION

I. PROCEDURAL HISTORY

This due process hearing was conducted under the authorization of the Individuals with Disabilities Education Act (IDEA) at 20 U.S.C. 1400 et. seq. and implementing Federal Regulations at 34 C.F.R. Part 300, and implementing State regulations, the Rules of the Alabama State Board of Education, Chapter 290-080-090, Special Programs I, No. 92-1.

On or about February 17, 2023, the Petitioner's Guardian filed a request for a due process hearing. The undersigned Hearing Officer was assigned by the Superintendent of the State of Alabama Department of Education to hear this matter. On March 3, 2023, the Honorable Sarah Young filed an Objection to the Sufficiency of the Complaint and Answer on behalf of Respondent in this matter. On that same day, the Hearing Officer emailed the Parties and indicated to [Honorable] Ms. Cornwell that she could submit a Motion to Amend with an Amended Complaint by March 6, 2023. On March 3, 2023, Petitioner,

through counsel, filed [Guardian's] Motion to Amend and First Amendment to Request for Due Process. On March 6, 2023, Respondent, through counsel, submitted another objection to the sufficiency of the amended due process complaint. On March 6, 2023, Petitioner submitted a Second Amendment to the Due Process Complaint. In both Amended Complaints, the Petitioner did not add new requests for relief except stating that "a safe environment going forward remain[ed] the goal." Accordingly, as of March 6, 2023, Petitioner was seeking the following as relief: (1) reimburse [Guardian] for tuition; (2) reimburse [Guardian] for medication; (3) reimburse [Guardian] for travel to school; (4) reimburse [Guardian] for private counseling; (5) reimburse [Guardian] for possible legal fees; and (6) a safe environment going forward.

In the Petitioner's Proposed Due Process Decision, the Petitioner sets out the relief requested by the Petitioner from this Hearing Officer: (1) reimbursement to the parent/student six (6) miles per day for 720 days at $0.655 cents per mile; (2) reimburse the parent/student for the tuition and related cost at [School 6] school for the 2021-2022, 2022-2023, 2023-2024 and 2024-2025 school years and (3) reasonable attorney fees and costs. There was no testimony presented and no request by the Petitioner for reimbursement of medication or private counseling submitted to this Hearing Officer.

Initially, by agreement of the parties a Hearing was scheduled for May 8, 2023. However, the parties advised this Hearing Officer that a key witness would not be available on May 8, 2023. Accordingly, the Hearing was rescheduled by agreement to July 25, 2023. This Hearing Officer was notified that there was a problem with a witness for the July 25,

2023 Hearing and by agreement of the parties the Hearing was continued to August 21, 2023.

On August 14, 2023, Petitioner's counsel disclosed her first three witnesses by email. On August 14, 2023, Respondent's counsel timely submitted Respondent's disclosures of witnesses and exhibits to Petitioner and provided the Hearing Officer Respondent's list of witnesses. On August 15, 2023, Petitioner's counsel provided her witness list to the Hearing Officer and Respondent's counsel. That same day, by electronic mail, Petitioner amended [Student's] complaint a third time, without permission of the Hearing Officer or consent of the Respondent, to include the same set of facts but new legal claims and requests for relief, specifically under Section 504, Title IX, and Section 1983. On August 15, 2023, Respondent, through counsel, objected to Petitioner's third amended complaint.[1]

The Hearing was conducted on August 21, 2023, and was concluded on that day. The Petitioner was represented by the Honorable Jennifer Cornwall and the District was represented by the Honorable Sarah Young.

Prior to the hearing the Petitioner was advised of [Student's] right to have the Hearing open or closed. The Petitioner advised this Hearing Officer that it was the Petitioner's desire that the Hearing be closed. The Student attended the Hearing. The

[1] As requested by Respondent at the hearing on August 21, 2023, Respondent is providing its objections to Petitioner's Third Amended Complaint and Motion to Dismiss same attached as Exhibit 1 to this Brief.

Petitioner also invoked "the rule" which required all witnesses to remain outside the hearing room until they were called to testify.

The Petitioner elected to make an opening statement and a closing statement during this Hearing. The District waived the right to make an opening statement and a closing statement. At the end of taking of testimony a briefing schedule was agreed to by both parties. During the hearing, each party presented evidence, offered the testimony of witnesses in support of their respective positions, and were allowed to cross examine witnesses as provided for under the applicable rules.

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

A. Petitioner's Exhibits:

- Petitioner used Respondent's exhibits.

B. Respondent's Exhibits:

- R Ex A: Cumulative/Student Work
- R Ex B: [Grade A] and [Grade B] grade IEPs
- R Ex C: Outside Evaluations

- R Ex D: Respondent Registration and Grades
- R Ex E: Communications/Complaints/Investigation
- R Ex F: [School System 2] School System Records
- R Ex G: Respondent Policies and Email Inquiries Variances/Complaints filed
- R Ex H: Due Process Pleadings
- R Ex I: Previous Years IEPs
- R Ex J: Of a school counselor in responding to allegations of bullying and/or harassment.

III. WITNESSES

A. Petitioner's Witnesses

1. [Guardian]
2. [Student]
3. [Assistant Principal]
4. [Math Teacher]
5. [Case Manager]
6. [Assistant to Director of Prevention and Support]
7. [Director of Prevention and Support]
8. [Police Officer]
9. [School Resource Officer-SRO]

B. Respondent's Witnesses

1. [Special Education Coordinator]
2. [School Counselor]
3. [Assistant Principal]
4. [Principal]

IV. BURDEN OF PROOF

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

In *Selma City Bd. Of Educ.*, 116 LRP 4681 (AL SEA July 25, 2014), "in order to prevail, the parent must demonstrate by a preponderance of the evidence that the Petitioner was in fact denied a FAPE by virtue of the actions, or lack thereof, by the Respondent School District. *Id*., *citing to Schaffer*.

The standard of proof is by a preponderance of the evidence.

V. SUMMARY OF FACTS

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 at the Hearing.

A. Introduction:

In 2014, [Guardian] became the guardian of [Student], Petitioner, [Student] R Ex. F 301-304. After obtaining custody of [Student], [Student] transferred from [School 1] to [School 2] in the [School System 1] for the 2013-14 school year. R Ex. D 246-247. During [Student's] [Grade] grade year, [Student] was a student at [School 3] located within the [School System 1]. While enrolled and attending [School 2], [Student] was referred for special education services due to [description of deficits]. R Ex. H 408. Prior to this time, [Student] was served as a student with a disability under Section 504 of the Rehabilitation Act ("Section 504"). In July of 2018, Respondent held an eligibility IEP and found [Student] eligible for services under the IDEA under [Disability Category] due to

difficulties with [description of deficits]. [Guardian] consented to special education services. Respondent developed and provided an IEP during the 2018-19 school year while [Student] was a [Grade] grade student at [School 3]. By the end of [Student's] [Grade] grade year, [Student] met [Student's] Reading and Math goals, and [Student's] grades were consistent at average to above average.

2019-2020 IEPs and [Grade] Grade Year at [School 4]

In March of 2019, Respondent held an IEP meeting to prepare the 2019-20 IEP to provide services to [Student] while [student] was a [Grade] grade student at [School 4]. Team members discussed [Student's] current levels of performance and noted strengths in [student's] sense of humor, [student's] ability to solve math problems when [student] slows down, and that [student] was a good reader. The team noted that [Student] had gained 91 points in Scantron Math from September 2018 to January of 2019 and 132 points in Reading from that same period. The IEP team developed IEP goals in Math, Reading, and Attention. Team members discussed the accommodations and services that were to be provided to [Student].

Fall of 2019

In the fall of 2019, [Student] attended [School 4] and was noted as a quiet, happy student. [Student] made mostly A's and B's, and [Student's] teachers reported positive behaviors, good effort, and that they were providing [student] accommodations, such as preferential seating. In [Student's] student interest survey, [Student] reported that [student]

was good at science and the thing [student] liked most about school was [student's] [my] friends. At the end of quarter two, [Student] was passing all classes and making progress on [student's] IEP goals. [Student's] case manager, [Teacher A], saw [Student] each day in home room, and during that time, they would review [student's] academic progress, work on goals and stay in communication and up to date regarding [student's] IEP goal progress.

Spring of 2020

In March of 2020, due to the COVID-19 pandemic and nationwide shutdown, students received instruction at home via synchronous and asynchronous instruction in a virtual platform and through distance learning. On May 4, 2020, [Student's] IEP team convened virtually to conduct an annual review of [student's] 2019-2020 IEP, to review concerns for distance learning, and to develop an annual IEP for the 2020-21 school year. Team members noted that despite the shutdown of schools, [student] had mastered [student's] reading and math goals for the year. [Student's] attention goal was carried forward to the next school term. [Student] finished the school year with A's and B's in [student's] classes, and from September of 2019 to January of 2020, [student] improved 188 points in math on the noted standardized test. In developing the IEP for the 2019-20 school year, [Guardian] noted concerns regarding possible bullying from the spring of 2020 while students were at home with computers. [Guardian] also noted that while at home during distance learning, a teacher and a counselor notified [Guardian] regarding student communications through Google Meet. Team members discussed monitoring computer

usage. In addition, the team noted [Student's] strengths in that [student] was respectful and able to independently navigate the school. For the 2020-21 school year, the IEP team developed new math and reading goals and carried forward [student's] previous year's attention goal.

Fall of 2020

In the fall of 2020, due to the COVID-19 pandemic, [Guardian] enrolled [Student] in the [System's Virtual School] for [Student's] [Grade] grade year. Virtual school instruction during this time frame was offered through the [System's Virtual School] and instruction was both synchronous and asynchronous with tutoring sessions offered through Google Meet. In December of 2020, [Student's] IEP team met to discuss [Student's] progress and grades while in the Virtual School. The IEP team noted that [Student] was being offered IEP accommodations, unlimited attempts, and retesting opportunities (but [student] was rarely utilizing those opportunities) and [student] had only attended 3 small group Google Meets. During this meeting, [Guardian] noted that [guardian] had had outside testing completed, and [guardian] was planning to enroll [student] back at [School 4] for the Spring 2021 semester.

Spring of 2021

[Student] transferred back to [School 4]. in January of 2021. [Case manager] noticed an IEP meeting on January 15, 2021, to be held on January 29, 2021, in order to discuss the need for additional data collection, to revise the current IEP, and to hold a parent

conference. At the request of [Guardian], on January 21, 2021, the meeting was rescheduled. [Guardian], [Case Manager], and [Assistant Principal] conducted an informal meeting on February 19, 2021. [Guardian] did not discuss any concerns of bullying or harassment, but [guardian] did note that [student] was very social and was making friends since returning to [School 4]. [Guardian] shared results from outside evaluations. Members discussed taking the outside evaluations and conducting a re-evaluation for [Student] to consider eligibility. Members also shared that services as listed in the IEP would be provided regardless of eligibility exceptionality.

The IEP team met on April 13, 2021, to conduct an annual IEP review. The IEP team noted that [Student] was on track to meet [student's] 2020-21 IEP goals, and in fact [student] did master all 2020-21 IEP goals. [Student] finished [student's] [Grade] grade year with all A's and B's, and [student] was classified as an advanced reader and improved in [student's] Math Scantron series from the Fall of 2020 to the Winter 2021 assessment. At this same meeting, the team also developed [student's] 2021-22 IEP for transition into the [Grade] grade at [School 5]. [Student] and [Guardian] were both provided with the opportunity to provide input for the development of the 2021-22 IEP. The team noted [Student's] strengths in that [student] works hard in both classwork and homework, and [student] had a relative strength in math. They noted that [student] specifically practiced self-advocacy and speaks up for [student] when [student] needs clarification, and that [student] had made great strides in this area in [Grade] grade. [Guardian] did not mention bullying and harassment as a concern. The IEP team developed transition goals and a new

Reading and Math goal. The IEP provided that [Student] would have forty (40) minutes a week in the resource room for Math and Reading and twenty (20) minutes a week for [student's] transition goals, for a total of one hundred (100) minutes a week. Based on [student's] own input, the IEP team drafted accommodations to include access to the resource room, extended time on assignments, and use of a calculator and reduced answer choices. [Guardian] did not express any objection to the IEP at the meeting.

On May 4, 2021, and May 27, 2021, the IEP team convened to consider eligibility after conducting a formal re-evaluation in the spring of 2021. The team reviewed state assessments, performance series, IQ and Achievement, behavior, grades, discipline, attendance, and teacher input. The team reviewed and considered the outside evaluations from [Outside Agency 1] and [Outside Agency 2] in determining eligibility. [Guardian] noted in [guardian's] behavior scaling that while [student's] anxiety and bullying was a concern for [student], the "bullying had seemed to have slowed down." The IEP team, with [Case Manager], [Guardian], and [Assistant Principal] present, ultimately determined that [Student's] eligibility category was [Disability]. [Guardian] did not express any objections to the IEP at the meeting.

Transfer to [School 6]

In or around late June or early July of 2021, [Guardian] withdrew [student] from the [School System 1]. 488. [Guardian] did not tell [School 4] or [School 5] where [guardian] was enrolling [Student]. At the time of the hearing, [Student] was residing with [student's] guardian in [City], Alabama within the [School 5] feeder pattern. [Student], is currently

enrolled and attends [School 6] in a [System 2] school system. During the 2021-22 and 2022-23 school year, [student] received special education and services through an IEP while attending [School 6]. [Student's] IEP at [School 6] is almost identical to the one drafted by Respondent, except [Student's] [School 6] IEP, dated from 5/06/22 to 05/07/23 was written to only provide thirty (30) minutes a week of reading and math instruction and twenty minutes for transition goals- for a total of eighty minutes a week. During the 2021-22 school year, [student's] grades at [School 6] were as follows: three C's, 4 B's, and 1 A. As of May, 3, 2023, [student's] grades at [School 6] ranged from an A to a D. [Student] is on a tuition waiver at [School 6]. In addition, [Guardian] stated that [guardian] only paid half of the tuition costs for the 2021-22 school year, however Petitioner did not submit evidence to corroborate tuition amounts.

Outside Evaluations

In October of 2020, [Student's] guardian had [Outside Agency 1] conduct an outside evaluation. Ex C. 118-123. [Student's] guardian also asked [Outside Agency 2] to conduct an outside evaluation. Both evaluations noted family issues that had caused separation anxiety and that [Student] had been receiving counseling for years related to [redacted]. While [Student] had allegedly experienced bullying in the past, most of the outside evaluator's recommendations were related to managing [student's] [disability] and building math skills. These evaluations were utilized and considered by [School 4] and the IEP team in conducting the reevaluation of [Student] in the spring of 2021.

Alleged Bullying and Harassment and Criminal Charges

On or about February of 2021, [Student] reported to [Guardian] that [student] had been [redacted] at [School 4] during the previous school year (2019-2020). It was never confirmed when or how many times the alleged harassment might have occurred, but [Student] testified in the hearing that the perpetrator, [student's] at one-time [redacted], would repeatedly [redacted] "everyday" during "P.E." and in [student's] [Grade] grade "math class." [Student] was enrolled in [Math Teacher's] math class during [Grade] grade. [Student's] math class was supervised by two adults: [Math Teacher] and another special education teacher, sometimes [teacher]. Neither adult ever saw the alleged perpetrator [redacted] [Student]. Neither adult testified that [Student] reported any [redacted] to them. [Student] and [Guardian] did not report that the [redacted] occurred "every day," in "math," or in "P.E." when they made their initial reports to law enforcement and [School 4] in February of 2021. [Student] did appear to make some sort of report about a student during the 2019-20 school year. [Student] confirmed that the student who [student] reported as [redacted] [student] in the [Grade] was [student's] [redacted] at one time, and [student 2] was also the same student [student] was alleging to [Guardian] to have continued to [redacted] [student] during [student's] [Grade] year. When the incident was originally reported to the administration during [Student's] [Grade] grade year, the administration investigated and disciplined the student involved.

When [Student] reported this information to [Guardian] on or about February 26, 2021, [Student] and [student's] guardian, [Guardian] filed a police report.[2] R Ex. E, 267-270. Around that same time, [Guardian] also reported the alleged harassment to [School 4] Principal, [Principal]. Upon receipt of the complaint, he asked his Assistant Principal, [Assistant Principal] to investigate the concerns, and she did so. He also looked through previous student incident reports and noted that the alleged perpetrator had received discipline during the 2019-20 school year. [Assistant Principal] reviewed the concerns and communicated back with [Guardian] regarding actions taken. She changed the alleged perpetrator's schedule so that [Student] would not have any classes with [student 2]. As a result of [Assistant Principal] looking into the concerns, several female students then made contact with [Student]. On or about March 17, 2021, [Assistant Principal] again met with [Guardian], listened to [guardian's] concerns regarding the text messages from the female students, and shared back with [Guardian] that [Student] should fill out a bullying and harassment complaint form. [Student] filled out and submitted that form on March 17, 2023. From March 17, 2023 until March 22, 2023, [Assistant Princial] investigated the reported concerns by: (1) interviewing the victim, (2) interviewing witnesses, (3) interviewing the offender, (4) collecting statements, (5) interviewing [Guardian], (6) speaking with the offender's parents, (7) obtaining copies of the police report statements, (8) reviewing emails and text messages from [Guardian], and (9) meeting with the SRO.

[2] Law enforcement also investigated the incident and ultimately charged the perpetrator with "harassment." Evidence indicated that the alleged perpetrator entered a plea to the charge of harassment on or around June of 2021, but no one could reveal what the substance of the plea was, although [Guardian] indicated that taking a plea meant that you were "guilty."

Following her investigation, [Assistant Principal] again: (1) conferenced with the perpetrator, (2) gave [student 2] another warning, (3) met with the SRO, (4) changed the female students' schedules - in addition to the perpetrator's schedule that had already been changed, and (5) called the alleged perpetrator's parent. [Assistant Principal] did not ignore the concerns, and in fact, [Guardian] acknowledged the administration's efforts when [guardian] reported to the IEP team in the reevaluation documents that the bullying had improved.

Finally, in May of 2021, on the last day of school, [Student] had an altercation with a different [redact] student. Administrators again responded, interviewed students, and disciplined the [redact] student. [Student] was not disciplined.

Zone Variance

In the Spring of 2021, [Guardian] reported that [guardian] met with [Director of Prevention and Support] regarding a zone variance. [Guardian] testified that [Director of Prevention and Support] reported to [guardian] that [guardian] would need to submit a request and information in writing to him. Board policy 6.2 requires a parent to submit a request for a zone variance in writing. [Assistant to Director of Prevention and Support] keeps written records of each written zone variance request, including whether the request was granted or denied. [Guardian] admitted that [guardian] was not aware of the Board Policy on zone variances and that [guardian] never submitted a written request for a zone variance to [Director of Prevention and Support]'s office. [Assistant to Director of Prevention and Support] had no record of a written zone variance request for [Student].

[School 5]

[School 5] was ready, willing, and able to implement the proposed 2021-22 IEP that was drafted for [Student] in the spring of 2021. [Guardian] never notified [School 4] or [School 5] regarding the results of the criminal matter in June of 2021. [Guardian] withdrew [Student] in the summer of 2021, prior to [Student]'s [Grade] grade year, without notifying the IEP team, [School 4] or [School 5], and without affording [School 5] the opportunity to address any safety concerns that [Guardian] might have had. [School 5] is able to safely supervise students and keep students separated from each other if needed. The IEP drafted and implemented by [School 6] is almost identical to the one that was drafted for implementation at [School 5], but the [School 6] IEP actually provides *less* services.

VI. ISSUES PRESENTED

The Petitioner set forth the following issues to be determined in this due process hearing:

ISSUE 1: Was a FAPE denied due to the alleged failure to implement Petitioner's IEP resulting in a failure to provide petitioner a safe environment?

ISSUE 2: Was a FAPE denied due to the alleged failure to respond to bullying or harassment resulting in a failure to provide petitioner a safe environment?

ISSUE 3: Was a FAPE denied due to petitioner not receiving a zone variance to a different school within the [School System 1] County public school system?[3]

ISSUE 4: Should the Petitioner's Third Amended Complaint be accepted by this Hearing Officer even though the Respondent has filed an objection to same?

VII. DISCUSSION OF THE ISSUES

There is no doubt in this Hearing Officer's opinion that the Guardian/[Guardian] of this Child truly loves this Child and wants what is best for [student] in every regard including academics.

This Due Process Hearing was conducted under the authorization of the Individuals with Disabilities Education Act (IDEA) at 20 U.S.C. Section 1400 et seq. and implementing Federal regulations, The Rules of The State of Alabama Board of Education, Chapter 290-080-090, Special Programs I, Supp. No. 92-1. Prior to October 30, 1990, the Act now known as Individuals with Disabilities Education Act was referred to as The Education of All Handicapped Children Act. Public Law No. 101-476, Section 901, 104 Stat 1103, 1142 (October 30, 1990), changed the name of said Act to the Individuals with Disabilities Education Act.

The Individuals with Disabilities Education Act (IDEA) provides that handicapped children are to be provided with a free appropriate public education. The term "children

[3] *See* Petitioner's Original, First Amended and Second Amended Request for Due Process Hearing.

with disabilities" includes [intellectual disability], speech impaired, seriously emotionally disturbed, other health impaired children and children with specific learning disabilities. 20 U.S.C. Section 1401 (1) "Free appropriate public education" means special education and related services which are provided at public expense, under supervision and direction and without charge, which meet the standards of the state educational agency, and include preschool, elementary or secondary education, are provided in conformity with the Individualized Educational Program (IEP) required by 20 U.S. C. Section 1414 (a) (5), 20 U.S.C. Section 1401 (18). The term "special education" refers to a specialized designated instruction to meet the needs of children with disabilities (including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions). 20 U.S.C. Section 1401 (16).

A. Burden of Proof

The Petitioner claims that Respondent denied Petitioner FAPE by failing to provide a safe educational environment, failing to provide the accommodations and services as listed in the Petitioner's 2019-20 and 2020-21 IEP, and by failing to grant a zone variance to another school within Respondent's school system. (Resp. Ex. B, p. 91). As an initial matter, under the IDEA, the burden of proof in an administrative hearing challenging an IEP is placed upon the party seeking relief. *E.G. Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005); *M.M. ex rel. C.M. v. Sch. Bd. Of Miami-Dade Cnty., Fla*., 437 F.3d 1085 (11th Cir. 2006). *See also*, 20 U.S.C. § 1414(d). For the reasons outlined below, Petitioner has failed to meet that burden of proof.

1. Petitioner has failed to provide sufficient evidence that Respondent did not implement the IEP and therefore provided an unsafe environment that deprived Petitioner a FAPE.

Petitioner claims that Respondent denied Petitioner FAPE by failing to provide Petitioner's IEP services and accommodations. R Ex B, 91. Without providing any evidence to support that services and accommodations were *not* in fact provided by Respondent, Petitioner's sole basis for this claim is that *IF* services and accommodations had been provided, the alleged [redacted] or harassment would not have occurred. In other words, since harassment or [redacted] allegedly occurred, the IEP services and accommodations must not have been provided. This legal conspiracy fails for many reasons. First neither the IDEA nor any other disability-based law requires a school board to ensure that "absolutely no disability-based harassment or bullying occur; that is an impossible burden." *Sparman v. Blount Co. Bd. Of Educ*., 68 IDELR 202 (N.D. AL. 2016). Second, Petitioner has failed to show that harassment and/or bullying[4] did in fact occur.

4 Petitioner has failed to show that [student] was "bullied," much less bullied as a result of [student's] disability. According to the U.S. Education Department, bullying is characterized by aggression used within a relationship where the aggressor has more real or perceived power than the target and the aggression is repeated or has the potential to be repeated over time. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying the student's participation in or receipt of benefits, services, or opportunities in the institution's program. *Dear Colleague Letter*, 111 LRP 45106 (OCR/OSERS 07/25/00). *See, e.g., Tenafly (NJ) Pub. Schs.*, 121 LRP 5082 (OCR 09/17/21) (Evidence that classmates teased a student with an undisclosed disability because of his physical stature helped a New Jersey district overcome claims that it violated Section 504 and Title II of the ADA. Witnesses' statements, which both the student and parent failed to challenge, indicated the comments stemmed from the student's youthful appearance, not a disability.). Petitioner's only support that the actions taken against [student] were repeated over time is [student] and [student's] guardian's own statements. Multiple adult witnesses reported having never observed Petitioner being bullied or harassed. Multiple adults testified that Petitioner never reported bullying or harassment to them. Petitioner also has not supplied any evidence that there was real or perceived power from the alleged perpetrator. In fact, at one point in time, the power between the two parties were mutually beneficial enough for Petitioner to call the perpetrator [student's] [redacted] at the hearing. In addition, Petitioner has never reported that [student] believed any of the alleged statements or actions taken towards [student] were because of [student's] [Disabiltiy] or any other disability. Witness statements do not reveal any mention of a disability related reason for the communications to Petitioner. In fact, Petitioner's failed to acknowledge "disability" as an alleged reason for the actions when [student] completed the bullying and complaint form. *See* R Ex E, 264 and 282.

Multiple witnesses testified that they never witnessed, nor received reports from [Student], that [student] was being inappropriately [redacted] or verbally or physically harassed. The only evidence submitted supporting that any inappropriate [redacted] or harassing occurred was the testimony of [Student] and [Guardian] hearsay statements regarding what [Student] told [guardian]. In addition, [Student] also testified that the alleged perpetrator was [student's] [redacted], and [student] admitted that they had exchanged text messages noting that they loved each other.

Finally, the evidence submitted by Respondent does not support, but rather contradicts, Petitioner's position that the: (1) harassment or [redacted] continually occurred every day and

(2) That the Respondent did nothing in response. First, two adults in the math class testified they never witnessed any of the alleged behavior and that [Student] never reported any concerns to them. The counselor testified that [Student] never reported any [redacted] or harassment to her. This same counselor did *not* ignore bullying or harassment when it did occur. She testified that when she was made aware of some text messages occurring on [Student] 's laptop in the late-night hours during COVID, she took steps to contact [Guardian] and address the behaviors. Lastly, when the administrators were made aware of the report from [Student] in the spring of 2021, they investigated to determine if the alleged perpetrator had been disciplined during their [Grade] grade year- and [student 2] had. That being said, Respondent still investigated [Student] and [Guardian]'s concerns and took action to include discipline, offers of additional safety measures during

transitions, and alterations to other students' schedules. [Guardian] acknowledged that the bullying had gotten better, and [Student] mastered [student's] IEP goals and finished [student's] [Grade] grade year with all A's and B's.

Next, Petitioner claim fails because [Guardian] did not offer testimony that [student's] IEPs were implemented incorrectly. To the contrary, as outlined above, Respondent submitted evidence showing that the school system staff did in fact implement the services and accommodations within Petitioner's 2019-20 and 2020-21 IEPs. Respondent provided evidence that Petitioner made progress. Witnesses testified that [Student] was quiet and shy, but that [student] could advocate for [student], tried hard, and successfully met [student's] IEP goals- all despite COVID closures, a semester of virtual school, and family issues at home. Documentary evidence and witness testimony confirmed that teachers provided IEP accommodations, to include proximity seating. In addition, when [Guardian] re-enrolled Petitioner back at [School 4] in the spring of 2021 for [student's] final semester of [student's] [Grade] grade year, Respondent re-evaluated Petitioner and considered all relevant and submitted outside evaluations. Despite COVID and virtual schooling, Petitioner still mastered [student's] IEP goals, made A's and B's in [student's] classes and improved in [student's] standardized math scores. [Assistant Principal] testified that [Case Manager] was and is an excellent teacher, and she never received any negative reports regarding [Case Manager's] implementation of IEPs.

In summary, Petitioner and Petitioner's guardian testified essentially that their entire request for due process was based solely on Petitioner's testimony, that [student] was

[redacted] repeatedly, every day, during a math class and P.E. class, by [student's] former [redacted], in the presence of two adults, and while sitting in close proximity to the teacher. As shown above, Petitioner simply could not, and did not, supply sufficient corroborating evidence in support of this claim. The uncorroborated testimony by Petitioner, and the hearsay testimony of Petitioner's guardian, simply do not support a factual finding that (1) that Respondent did not implement Petitioner's IEPs, (2) that Respondent denied a FAPE to Petitioner. *See, West Chester Area Sch. Dist.*, 108 LRP 71224 (PN SEA Dec. 23, 2008) (finding that grandparent's uncorroborated hearsay statement was not sufficient basis for a factual finding); *Santa Cruz City Sch. Dist.*, 111 LRP 74039 (CA SEA Nov. 21, 2011) (finding that mother's hearsay summary of what her child told her could not be used as the sole basis upon which to render findings of fact in a special education law proceeding; *West Chester Area Sch. Dist.*, 117 LRP 2718 (PN SEA Dec. 5, 2016) (finding that parent's testimony was unreliable, because it was not based upon personal observation or perception but rather based entirely upon hearsay of the student's characterization of events); *and see, Sparman v. Blount Co. Bd. Of Educ*., 68 IDELR 202 (N.D. AL. 2016) (finding that a plaintiff's submission of her own deposition, her own affidavit, the affidavit of her child, a doctor's note, and police reports she filed is not enough to create a question of material fact that the school's response to bullying were inappropriate).

2. <u>Petitioner has failed to provide sufficient evidence that Respondent did not investigate and respond to alleged bullying and harassment and therefore provided an unsafe environment that deprived Petitioner a FAPE.</u>

For the reasons outlined above, Petitioner has failed to show that ongoing bullying and harassment occurred. Further even if Petitioner had sufficiently shown that harassment or bullying did occur, **and** that Respondent allowed the harassment or bullying to occur, as demonstrated in the following court and hearing officer decisions, Petitioner still failed to show by a preponderance of the evidence that Petitioner was denied a FAPE:

- *Richard Paul E. v. Plainfield Community Console Sch. Dist*., 202, 2009 WL 995459, *20 (two unfortunate isolated incidents- "whether they are physical encounters or emotional embarrassments" did not demonstrate a denial of FAPE; student was performing well both academically and behaviorally).

- *West Chester Area Sch. Dist*., 108 LRP 71224 (PN SEA Dec. 23, 2008) (finding that grandparent's uncorroborated hearsay "was too slender a reed to support any denial of FAPE);

- *Santa Cruz City Sch. Dist.*, 111 LRP 74039 (CA SEA Nov. 21, 2011) (finding that parent's claim based solely on the testimony of the mother summarizing what her child told her was hearsay and not sufficient evidence to support that the school system denied FAPE);

- *Sioux City Comm. Sch. Dist.*, 116 LRP 32037 (IA SEA July 19, 2016) (finding that even though petitioner was injured by another student when student pinched petitioner's arm, there was no evidence that the personal injury resulted in a denial of FAPE; staff were trained in behavioral interventions and "there was no evidence that teacher's classroom was unsafe, let along unsafe to the point of depriving student of a FAPE.");

- *West Chester Area Sch. Dist.*, 117 LRP 2718 (PN SEA Dec. 5, 2016) (finding that parent's testimony regarding student's safety and alleged bullying was not sufficient to support a denial of FAPE by a preponderance of the evidence, because such testimony was based on hearsay and contradicted the weight of the evidence provided by the school system);

- *Clark Co. Sch. Dist.*, 106 LRP 38948 (NV SEA Oct. 31, 2003) (finding that the preponderance of the evidence established that there was no interference with student's FAPE because (1) parent failed to produce evidence, other than hearsay, that the bruises of a child occurred at school, much less occurred as a result of inappropriate interventions by classroom staff, and (2) that event assuming the

events incurred, parent had failed to establish that the events interfered with Student's FAPE; "evidence established that staff used positive interventions and the student was making some progress");

- *Selma City Bd. Of Educ.*, 116 LRP 4681 (AL SEA July 25, 2014) (finding that in cases where a parent claims that a failure to keep a student safe denied a FAPE, the petitioner must not only show that the alleged acts happened but that such acts happened to the extent that the student was prevented from being able to learn or receive the offer of FAPE); and

- *Montgomery Co. Bd. Of Educ.*, 116 LRP 4244 (AL SEA Apr. 29, 2015) (finding evidence insufficient to support a finding of a denial of FAPE because although student had safety issues, the school had taken steps to provide a safe learning environment and student's own behavior was partly to blame for safety concerns).

Like the cases above, Respondent took steps to provide a safe environment. During the 2019-20 [Grade] grade school year, an administrator investigated the alleged [redacted] and disciplined the alleged perpetrator. During the 2019-20 school year, the counselor investigated online behavior taken by students during COVID at-home learning. During the 2019-20 school year, [Student's] case manager, [Case Manager] worked with [Student] on [student's] IEP goals during their Focus class. She frequently pulled [Student's] grades and kept up with [student's] IEP progress. She was also an additional adult that supervised and provided instruction during [Math teacher's] math class. [Math Teacher] documented that [student] was provided proximity seating. All witnesses reported that [Student] was a quiet student, but that [student] appeared happy and successful. Finally, during the 2019-20 school year, [Student] received A's and B's and mastered [student's] math and reading goal.

During the Fall of 2020, virtual school teachers continually monitored all students progress and offered online tutorial sessions. In December of 2020, the IEP team convened

to discuss [Student's] progress and noted that [Guardian] had decided to enroll [Student] back at [School 4]. [School 4] very quickly responded to [Student's] transfer by convening an informal meeting to discuss outside evaluations and an IEP for a reevaluation. Upon receiving reports of the previous [redacted] and alleged bullying and/or harassment, [School 4] investigated and responded with additional safety measures, including changing another student's schedule. [Student's] schedule was not changed. Ex. E. at 285-291. [Student] finished the year with all A's and B's. [Student's] guardian reported that the bullying had improved. R Ex B, 187. [Student] provided input for [student's] 2021-22 IEP. *Id*. 156-160. IEP team members noted that [Student] was able to self-advocate for [student] even though [student] remained quiet. *Id.* 164. When [Student] had an altercation on the last day of school with a different student, administrators responded and disciplined the other student. [Student] was not disciplined.

The evidence shows that Petitioner made progress in 2019-20 and 2020-21. [Student] mastered [student's] reading and math goals. [Student] made A's and B's. [Student's] reading and math standardized assessments noted improvements, despite COVID closures and [student's] guardian's choice to enroll [student] in virtual school instruction in the fall of 2020. The evidence shows [Student] was self-advocating and that the alleged bullying improved. Respondent did not ignore the parent or [guardian] concerns. Respondent took action on many occasions throughout the 2019-20 and 2020-21 school year when alleged behaviors and concerns were brought to teachers', counselors', or administrators' attention. Administrators communicated with the guardian

through email, by phone, or in person. Administrators investigated and responded to the alleged bullying and harassment. Students other than [Student] had their schedules changed and/or were disciplined. Both [Principal] and [Assistant Principal] met with the guardian and listened to [guardian's] concerns. [Director of Prevention and Support] met with the guardian and listened to [guardian's] concerns. He told [guardian] how [guardian] could submit a written zone variance.

The IEP team met to conduct an annual IEP. The IEP team met to discuss reevaluation. The IEP team met to draft a new IEP for the 2021-22 school year at [School 5] [Special Education Coordinator] testified that [School 5] was [Student's] appropriate placement and that [School 5] could provide a safe environment while implementing the 2021-22 IEP- an IEP that is almost identical to the one being implemented by [School 6]. Accordingly, for the reasons above, the evidence does not support a finding that the Respondent did not provide a safe environment nor that Respondent denied FAPE based on any lack of action. *See Selma City Bd. Of Educ*., 116 LRP 4681 (AL SEA July 25, 2014) (finding that immediate response and actions of school system in responding to parent's reports of bullying and concerns for student safety failed to demonstrate deliberate indifference to the allegations and thus did not support a denial of FAPE based on an alleged failure to provide a safe environment). For the above reasons, the evidence shows that Petitioner received educational benefit, and Petitioner has failed to show by a preponderance of the evidence that Petitioner was deprived of a safe environment, let alone to the point of denying a FAPE.

3. Petitioner has failed to provide sufficient evidence to show that Petitioner was denied a FAPE when [student] was not granted a zone variance, and under the IDEA a hearing officer lacks authority to order that Respondent must allow Petitioner to attend Petitioner's parent's desired location through a zone variance.

Petitioner's next challenge appears to be that the zoned school that Petitioner would have received services under the 2021-22 IEP, [School 5], is not an appropriate location to implement Petitioner's IEP because it could not keep Petitioner safe. Although Petitioner failed to submit a written zone variance in compliance with Board policy, Petitioner's pleadings and guardian's testimony focused on Respondent's alleged "denial" of a zone variance. Whether requested as relief for Respondent's alleged failure to provide a safe environment, or as a separate challenge under the IDEA to the Petitioner's location for services, Petitioner's claim for relief in the form of reimbursement to [School 6] due to Respondent's alleged denial of an alternative [redacted] school location within the district is insufficient and due to be DENIED.[5]

Because Petitioner has failed to establish by a preponderance of the evidence that Petitioner was denied a FAPE, Petitioner has failed to support a finding that Petitioner is due [guardian's] requested placement change to [School 6]. *See Selma City Bd. Of Educ.*, 116 LRP 4681 (AL SEA July 25, 2014) (finding that even though it was clear "something wrong had happened" to the student, the Hearing Officer found that because the evidence did not demonstrate that the school system failed the student in a way that prevented the

5 Petitioner has never requested the hearing officer to grant [student] a zone variance to another location within the [System 1] County Public School System. It appears [Guardian] is content arguing that either [School 5] cannot provide [student] a FAPE and if not, that [student] should receive tuition reimbursement from Respondent to attend [School 6]. Either way, Petitioner's claim fails.

student from receiving FAPE, the evidence consequently also failed to support a finding for Petitioner's requested relief of reimbursement).

In addition, even if Petitioner had established a denial of FAPE, Petitioner has not established that [School 5] cannot implement Petitioner's IEPs, or that if [guardian] had requested that the Hearing Officer grant [student] a zone variance within the Respondent's school system – to which [Guardian] alleges [guardian] was denied - Petitioner cannot demonstrate that such a request falls within the Hearing Officer's authority as a request for a change in "placement." As such, Petitioner's attempt to dictate the location of Petitioner's receipt of educational services- whether at [School 6] or at a campus within the [School System 1] that is not [School 5]- is not allowed under the IDEA. "The general rule that a parent may not dictate that a student's educational program be provided at a particular location, institution, school or desk has been consistently recognized." *Cherokee Co. Bd. Of Educ*., 111 LRP 5931 (AL SEA Aug. 20, 2010), *citing to Hill v. Sch. Bd. For Pinellas Co.,* 954 F.Supp. 251, 253-54 (M.D. Fla. 1997), *aff'd* 137 F.3d 1355 (11th Cir. 1998). In limited circumstances, a particular location may be held so intrinsically related to an IEP that modification in one of these areas may constitute a change in placement. *Id.* (internal citation omitted). OSEP has specified that the following four factors are determinative of a change in placement under the IDEA:

1. Whether the educational program set out in a child's IEP has been revised;
2. Whether the child will be able to be educated with nondisabled children to the same extent;

3. Whether the child will have the same opportunities to participate in a nonacademic and extracurricular services; and

4. Whether the placement options are the same options on the continuum of alternative placements.

Id. *Citing to Letter to Fisher*, 21 IDELR 992 (1994).

Importantly, unless a change in placement in the location of a student's IEP meets these standards, a Hearing Officer under the IDEA generally has no authority to force a school district to educate a child at a location desired by the parent. *Id*. For example, in *Cherokee Co*., the hearing officer reviewed all four factors above and found that the child's IEPS were near identical. For example, in both IEP locations; (1) the student would be in the same continuum of placement options; (2) the student would be provided opportunities to participate in nonacademic and extracurricular services; (3) the student would be educated with nondisabled children; and (4) the student would receive the same related services, therapies and specialized instruction. *Id*. Accordingly, the Hearing Officer found that the proposed change of schools would only constitute a change in the "location" of IEP services and thus, the decision of whether to make the location change was *within the purview of the board of education*, not the hearing officer. *(emphasis added). See also, Flour Bluff ISD v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996) (finding that the IDEA has not been read to require attendance at a campus of the parent's choosing, so long as the campus designated by the school system can implement the student's IEP); *White v. Ascension Parish Sch. Dist.*, 343 F.3d 373 (5th Cir. 2003) (the IDEA did not prohibit the district from making the administrative decision about where to provide services; while the act requires

parental participation in educational placement decisions, such placement refers to educational programming, not physical location) (emphasis added); *K.L.A. v. Windham Southeast Supervisory Union*, 54 IDELR 112 (2d. Cir. 2010 unpublished) (holding that the specific location of a student's services was a matter for the district to decide); *North Kingston Sch. Dist.*, 111 LRP 57611 (RI SEA Aug. 17, 2011) (denying a parent's request for a change in location of services, because such a determination was not within the Hearing Officer's authority under the IDEA).

In this matter, Petitioner has not alleged any substantive issue with the proposed IEP that was due to be implemented at [School 5] Petitioner's guardian unilaterally withdrew [Student] from the school system and enrolled [student] in [School 6] after the Respondent allegedly verbally denied [Guardian's] request for a zone variance to an unknown alternative [redacted] school location. Petitioner simply did not want the proposed IEP implemented at [School 5], yet [Guardian] never provided [School 5] an opportunity to address how [Student's] IEP could be implemented safely at [Student's] zoned school, *i.e.*, the school that [student] would attend if [student] were not a child receiving services under the IDEA. [Guardian] testified that [guardian] did not report any of the subsequent criminal investigation information to [School 4] or [School 5]. In addition, an almost identical IEP is being provided at [School 6] from that which was proposed to be provided by [School 5]. [School 6] however, is providing *less* services than what the Respondent's IEP team proposed. [Special Education Coordinator] testified that [School 5], and their teachers and administrators, are capable of carrying out Petitioner's IEPs. [School 5] is the school

[Student] would attend if [student] were enrolled in Respondent's schools based on [student's] residence in [City], Alabama. [Special Education Coordinator] testified that [School 5] is the school with Petitioner's peers that [student] would attend if [student] were nondisabled. The other [redacted] schools within Respondent's school system do not serve students that live in [City], Alabama.

[Special Education Coordinator] testified that while Petitioner could receive the same services, instruction, and safety at any of the high schools within the Respondent's school system, [School 5] was ready, willing, and equipped to implement [Student's] IEP. In other words, assuming Petitioner was even asking for such as proposed relief in this matter, if Petitioner received a zone variance to another [redacted] school, [student] would be provided an identical IEP except for campus location and teacher assignment. Petitioner failed to provide any alternative [School] school location that would be acceptable to [guardian]. Petitioner also failed to prove that Respondent actually denied a zone variance to any particular campus. Petitioner simply wants to stay enrolled at [School 6] with an almost identical IEP that was offered by Respondent.

As sincere as Petitioner's guardian's concern might be, without any evidence to support that Petitioner was harmed by [School 5], or that any of the teachers or staff are unqualified or inadequate, it is within Respondent's discretion to choose the campus and personnel that will carry out Petitioner's IEP. For example, in *J.E. v. Boyertown Area Sch. Dist.*, 56 IDELR 38 (E.D. Pa 2011) a court ruled that a mother fearing that her child with social skills deficits would face bullying if he were placed in public school was not enough

to garner public funding for a private placement. More specifically, the District Court held that the school's IEP offer was reasonably calculated to confer benefit and that a student "may face bullying, but a fair appropriate public education does not require that the District be able to prove that a student will not face future bullying at a placement, as this is impossible." Likewise, Petitioner has failed to show by a preponderance of the evidence that Respondent's IEP was not calculated to confer educational benefit. In fact, Petitioner is receiving an almost identical IEP, albeit with less service times, at [School 6]. Respondent designed an IEP for the 2021-22 school year based on updated data, outside evaluations, and input from both Petitioner and Petitioner's guardian. In addition, like in *Boyertown*, Petitioner failed to show that administrators and teachers at [School 5] were and are not qualified and equipped to address [Student's] safety on campus when and if an incident occurred. [Special Education Coordinator], however, testified based on her experience working with [School 5] staff, that staff and administrators could put measures in place to address safety concerns. *Respondent* demonstrated the following in exercising its administrative discretion under the IDEA to determine that [School 5] is an appropriate location for services:

- [School 5] could implement the IEP proposed during the 2021-22 school year. Petitioner has not objected to any of the substance in the proposed IEP that was to be implemented at [School 5]. In fact, the same IEP, but with less services, is being implemented by [School 6].

- [School 5] is the [redacted] school closest to the Petitioner's current residence in which Petitioner would have access to her community peers.

- [School 5] has a history of being able to protect students and supervise students in a way that keeps students separated if needed.

Accordingly, like in *Boyertown*, it is not the place of Petitioner's guardian to choose the teachers and administrators- and therefore campus location, and as such, Petitioner has not shown by a preponderance of the evidence that [Student] is entitled to an order requiring Respondent to publicly fund any and every cost allegedly associated with [student's] guardian's decision to unilaterally enroll [Student] in [School 6]. In addition, Petitioner has also not shown by a preponderance of the evidence that [student] is entitled to an order from this Hearing Officer finding that [Student] should be granted a zone variance and entitled to attend another [redacted] school within Respondent's school district. Thus, after determining that there is no proof to support that [School 5] failed to implement [Student's] IEP, and/or failed to protect [Student] or respond to allegations of bullying and/or harassment, and/or failed to provide [student] a FAPE, and taking the above factors into consideration, Respondent, in its administrative discretion, believes that Petitioner's educational program should be implemented, if at all, at [School 5]. Accordingly, for the above reasons, Petitioner has failed to show by a preponderance of the evidence that Petitioner was or is entitled to a location change from [School 5].

4. <u>Equitable factors as grounds for denial</u>

In this complaint, Petitioner has not requested reimbursement for private placement. Rather, Petitioner's guardian unilaterally placed Petitioner in another public educational setting, *i.e.*, [School 6]. Because Petitioner does not reside within the municipal limits of [School 6], [Student] is and was subject to out-of-district tuition costs for attending [School

6]. Accordingly, based on the tuition reimbursement request, an analysis of the IDEA and case law regarding private school reimbursement is persuasive in this instance.

Under the IDEA, the cost for reimbursement for private placement may be reduced or denied if:

> (aa) At the *most recent IEP meeting* the parents attended *prior to* removal of the child from the public school, the parents *did not inform* the IEP Team that they were *rejecting the placement* proposed by the public agency to provide a free appropriate public education to their child, *including* stating their concerns and their *intent to enroll* their child in a *private school* at public expense; or
>
> (bb) 10 business days (including any holidays that occur on a business day) *prior* to the *removal* of the child from the public school, the parents *did not* give *written* notice to the public agency of the information described in item *(aa)*; or
>
> Upon a judicial finding of *unreasonableness* with respect to actions taken by parents.

20 U.S.C.A. § 1412. *See also, Ashland School District v. Parents of Student E.H.*, 109 LRP 76213 (9th Cir. Dec. 7, 2009) (upholding a district court's denial of parental reimbursement because the parents placed their child primarily because of medical difficulties rather than educational, because the parents failed to provide proper notice to the district before placement into residential, and because the parents repeatedly failed to object to many of the IEPS that the district prepared before placing the child into residential); *Forest Grove School District v. T.A.*, 109 LRP 77164 (D.C. Oreg. Dec. 8, 2009) (denying parent reimbursement for private residential facility placement because the parent failed to provide

the district the required notice until well after the student's placement and because the underlying reason for the students placement were unrelated to the student's difficulties at school). *W.D. v. Watchung Hills Reg'l High Sch. Bd. of Educ*., 65 IDELR 63 (3d Cir. 2015, unpublished) (holding that the parent's failure to notify the district of the student's removal before the student began attending the private program justified the dismissal of his reimbursement action); and *Rockwall Indep. Sch. Dist. v. M.C.*, 67 IDELR 108 (5th Cir. 2016) (denying a tuition reimbursement request in its entirety where the parents indicated unwillingness to attend a follow-up IEP meeting unless the district agreed to their proposed placement).

At the May 2021 IEP, [Student's] guardian did not inform the IEP team of [guardian's] rejection of the IEP team decision to offer services at [School 5] for the 2021-22 school year. In June of 2021, when [guardian] withdrew [Student] from the [School System 1] [Guardian] did not express [guardian] intent to enroll [Student] in [School 6] or any other school for that matter. Rather in late June or early July of 2021, [guardian] enrolled [Student] in the [School 6], and the Respondent was only made aware through a subsequent education records request by [School 6]. Petitioner and [student's] guardian never gave Petitioner's IEP team written notice that [student] was rejecting any IEP team decision and that [Guardian's] intent was to place [Student] in [School 6]. In fact, the first time Respondent learned of Petitioner's alleged unhappiness with any IEP was when counsel for Petitioner amended Petitioner's due process complaint on March 3, 2023. Because Petitioner failed to give the Respondent notice of [guardian's] intent, either at the

IEP meeting or ten (10) days prior to in writing, to place [Student] in [School 6] prior to [Student's] withdrawal from the [School System 1], according to 20 U.S.C.A. § 1412, the hearing officer may reduce or deny Petitioner's request for reimbursement.

Finally, a Hearing Officer may consider equitable factors as grounds for denying a parent reimbursement request. 34 C.F.R. § 300.148(d). Here, in this matter, [Guardian] has not provided ***any*** evidence that [guardian] incurred any out-of-pocket expenses, other than supposedly having to pay half of the alleged tuition costs for the 2021-22 school year. Petitioner has not submitted evidence regarding medical costs, transportation costs, or private counseling costs- much less that any of these alleged costs were a direct result of any alleged failure by the Respondent to provide a FAPE. A district's obligation to pay for an IDEA-eligible student's private school tuition only extends to costs the parent *actually incurred* and upon a showing the services (costs) were appropriate to address a student's needs and/or provide educational benefit. (emphasis added). *See J.C. v. San Juan Unified School District*, 80 IDELR 261 (E.D. Cal. 2022) (finding that since special education school did not bill the parent for 20 weeks of services, parent was not entitled to reimbursement); *Tucson Unified Sch. Dist.*, 30 IDELR 1000 (AZ SEA Mar. 1, 1999)(finding no error by hearing officer in denying reimbursement for privately funded related services, as there was no evidence of any costs for such services); *In re: Student with a Disability*, 115 LRP 8899 (NY SEA Aug. 14, 2014) (denying parent's request for transition and tutoring service costs because there was insufficient evidence in the hearing record to indicate what services the student received and whether or not those services were appropriate to address the student's

unique needs and/or provide the student with an educational benefit). Petitioner failed to submit any evidence showing that [Guardian] incurred actual outside costs and expenses for services provided to [Student]. Petitioner failed to submit any evidence regarding medical, travel, or private counseling expenses, nor how any of those expenses met [Student's] educational needs. Accordingly, Petitioner has not proven that [Student] is entitled to any of [Guardian's] reimbursement requests.

5. Petitioner's Third Amended Complaint is due to be Dismissed

Alabama Administrative Code 290-8-9-.08(c)(6) states that "the party requesting the impartial due process hearing may not raise issues at the due process hearing that were not raised in the written request for hearing, unless the other party agrees otherwise. As noted by email on August 15, 2023 and at the hearing, Respondent did and does not agree to the new issues and legal claims brought forward for the first time on August 15, 2023 under Section 504, Title IX and 1983.

Alabama Administrative Code 290-8-9-.08(c)(iv) states that a party may amend its due process request only if the other party consents in writing to such an amendment and is given the opportunity to resolve the issue(s) through a resolution meeting, or the hearing officer grants permission, except that the hearing officer may only grant such permission to amend at any time not later than five calendar days before a hearing begins. If a party files an amended request, the timelines for a resolution meeting and the thirty-day resolution period begin again with the filing of the amended request. Respondent objected by email on August 15, 2023. Respondent did not consent to the amendment. Petitioner

submitted the amendment approximately six calendar days before the hearing, denying Respondent any ability to address these claims by resolution. Petitioner did not seek permission from the Hearing Officer to amend.

Further, Petitioner's Third Amended Complaint is outside the jurisdiction of the Hearing Officer. Alabama Administrative Code 290-8-9-.08(c)(9), states that a parent's responsibility in a due process hearing is to request a due process that pertains to the proposal or refusal to initiate or change the identification, evaluation, educational placement and/or the provision of FAPE to the child. Petitioner's Third Amended Complaint, submitted by email without consent of Respondent or permission of the Hearing Officer, asserts for the first time, claims for relief under Section 504, Title IX and 1983. While the facts making the basis of these claims are the same and should have been known to Petitioner at the time of their original filing in February of 2023, none of the claims under Section 504, Title IX or Section 1983 truly relate to the identification, evaluation, educational placement, and/or the provision of FAPE to the child under the IDEA. In accordance with Alabama Administrative Code 290-8-9-.08(c)12, regarding the responsibility of the Hearing officer to ensure that the issues raised in the hearing request pertain to the proposal or refusal to initiate or change the identification, evaluation, educational placement, and/or the provision of FAPE, Respondent requested that the hearing officer dismiss the new claims and issues that are not justiciable or otherwise properly raised.

Finally, as stated above, Petitioner did not assert any *new* facts related to [Guardian's] new legal claims and requests for relief under Section 504, Title IX and Section 1983. Rather, [Guardian] amended [Guardian's] complaint to include new legal claims and *additional* relief. Because the new claims are based on the same set of facts, these claims were known or should have been known to the parent when the original due process hearing was filed. Accordingly, in accordance with Alabama Administrative Code § 290-8-9-.08(c), the claims brought under Section 504, Title IX and Section 1983 are outside the statute of limitations as they occurred more than two years from August 15, 2023 when they were first asserted.

Based upon the following, the District's Motion to Dismiss the Third Amended Complaint is due to be, and hereby is, GRANTED due to the timing of the Third Amended Complaint and because this Hearing Officer's jurisdiction only applies to IDEA issues and does not apply to alleged violations under Section 504, Title IX and Section 1983. This Hearing Officer does not have the authority to award attorney fees in Due Process Hearings.

I. CONCLUSION

For the reasons provided above, the Petitioner has failed to prove by a preponderance of the evidence that the Respondent failed to implement Petitioner's IEPs and/or failed to provide Petitioner a safe environment and/or failed to grant a zone variance to which Petitioner was entitled, and therefore Petitioner has failed to prove by a preponderance of the evidence that Petitioner has been denied a FAPE. Accordingly,

Petitioner has failed to show by a preponderance of the evidence that Petitioner is entitled to [Guardian's] requested relief of: (1) tuition reimbursement to [School 6], (2) travel to [School 6] reimbursement, (3) medical reimbursement, (4) therapy/private counseling reimbursement and (5) attorney's fees.[6] In addition, pursuant to the IDEA, Petitioner has failed to provide by a preponderance of the evidence that Petitioner's unilateral withdrawal and enrollment at [School 6] was anything more than a location change under the IDEA, and thus, Petitioner has failed to show that Petitioner is entitled to any order by the Hearing Officer requiring the Respondent to educate Petitioner at a school or campus location desired by the Petitioner's guardian.

VIII. SPECIFIC FINDINGS

1. Petitioner has the burden of establishing by a preponderance of the evidence that the Respondent did not make a free appropriate education available to [student] in a timely manner prior to the student's enrollment at [School 6] city school system and that [Guardian] is entitled to reimbursement for said school placement.

2. The Petitioner failed to prove by a preponderance of the evidence that the Respondent failed to implement Petitioner's IEPs and that a FAPE has been denied.

3. The Petitioner failed to prove by a preponderance of the evidence that the Respondent failed to provide Petitioner a safe environment and that a FAPE has been denied.

4. The IEPs developed by respondent for the 2019-20 and 2020-21 school years were appropriate and provided the Petitioner meaningful educational benefit and a FAPE.

6 The IDEA states that the court" may award reasonable attorney's fees to a prevailing party in a FAPE dispute. 34 CFR 300.517 (a). Administrative decisions consistently have held that hearing officers do not have the authority to award attorney's fees under the IDEA. *See, e.g., Spring Hill Indep. Sch. Dist.,* 114 LRP 44741 (SEA TX 07/10/14); *Forney Indep. Sch. Dist*., 63 IDELR 87 (SEA TX 2014); *In re: Student with a Disability*, 113 LRP 48350 (SEA NM 11/21/13); *Keystone Oaks Sch. Dist*., 112 LRP 2733 (SEA PA 12/03/11); *Springfield Pub. Schs*., 111 LRP 26774 (SEA MA 04/12/11); and *North Kansas City 74 Sch. Dist*., 111 LRP 51352 (SEA MO 03/02/11); *Tuscaloosa Co. Sch. Bd*., 30 IDELR 841 (AL SEA July 1, 1999).

5. The IEPS developed by the Respondent for the 2019-20 and 2020-21 school years contained appropriate goals and objectives in all areas of need. The IEPS were objective, measurable, and were based on [Student's] present levels of performance.

6. The IEPs developed by the Respondent for the 2021-22 school year, were appropriate and were reasonably calculated to confer educational benefit on the Petitioner if the Respondent had the opportunity to implement the IEP.

7. If Petitioner's guardian chooses to enroll Petitioner back in the Respondent's school system, the location of services and least restrictive environment, would be [School 5].

8. The Petitioner did not appropriately amend [Guardian's] due process complaint on August 15, 2023 and any new legal claims and remedies for violations under Section 504, Title IX, and Section 1983 are outside the jurisdiction of the hearing officer and are dismissed.

9. The Petitioner has not carried the burden of proof on any issue.

10. Petitioner is not entitled to reimbursement for tuition to [School System 2].

11. Petitioner is not entitled to reimbursement for school, travel, medical, or private therapy/counseling.

12. All Relief requested by the Petitioner is DENIED.

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) calendar days** of the filing of the notice of

intent to file a civil action.

DONE and **ORDERED** this the 28th day of September, 2023.

/s/P. Michael Cole
P. Michael Cole
Hearing Officer

X. CERTIFICATE OF SERVICE

I hereby certify that a copy of this Decision has been forward to the following individuals by Certified Mail with postage prepaid and return receipt requested properly addressed as well as by electronic mail on this the 28th day of September, 2023.

Honorable Jennifer Cornwall
112 N. Alabama Avenue #1
Monroeville, AL 36460

Honorable Sarah Young
2600 N. Hand Avenue
Bay Minette, AL 35607

/s/P. Michael Cole
P. Michael Cole
Due Process Hearing Officer