

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

O. P.)	
Petitioner,)	Special Education No. 21-65
v.)	
)	
JEFFERSON COUNTY)	
Board of Education)	
Respondent.)	

DUE PROCESS DECISION

I. Procedural History

This matter is before the undersigned pursuant to a due process request filed on July 29, 2021 by the Honorable William T. “Bo” Johnson, III on behalf of Mr. [REDACTED], parent and legal guardian of [REDACTED] (“Petitioner”), a student in the Jefferson County School District. Thereafter, pursuant to a letter dated the same July 29, 2021 issued by the State Superintendent of Education, the undersigned was asked to serve as the Impartial Hearing Officer in this proceeding. The undersigned issued correspondence dated July 30, 2021 setting a status conference for August 13, 2021.

On August 7, 2021, the Honorable Andrew Rudloff and the Honorable Carl Johnson filed *Respondent’s Response to Due Process Complaint*. The parties held the Resolution Meeting on August 12, 2021 and while progress was made towards resolving the issues, the parties agreed to continue the discussions. During the initial status conference the parties advised that they have continued to have a dialogue as to a possible general resolution in addition to the procedural steps that may be needed taken to clarify what IDEA issues might be subject of a possible hearing. An outline of a tentative hearing schedule was set. [See correspondence issued by the undersigned dated August 19, 2021]

Following the additional status conferences conducted on September 1 and 13, 2021 the undersigned determined that a *Scheduling Order* was due to be finalized and issued in the event the parties failed to resolve the matter by agreement. Additionally, a status conference was set for September 21st. This was outlined in correspondence and a *Scheduling Order* issued by the

undersigned on September 14, 2021.

At the September 21st status conference it was determined the schedule for hearing needed to be adjusted. The hearing set for October 12 and 13, 2021 was continued and a status/scheduling conference was re-set for September 30, 2021. This was outlined in correspondence issued by the undersigned on September 23, 2021.

A status conference was held on September 30, 2021. The parties reported the additional evaluations were being completed and an IEP meeting was scheduled for October 5, 2021. A revised hearing schedule was set and outlined in the *Scheduling Order Revised* issued by the undersigned on October 4, 2021.

The Pre-Hearing Conference was conducted on November 4, 2021. The parties timely submitted their disclosures and as well, submitted a joint stipulation of facts on November 8th, 2021, later identified as Hearing Officer Exhibit 1. The *Pre-Hearing Order* was issued by the undersigned on November 16, 2021.

The Hearing comprised a lengthy day of testimony taken and transcribed on November 17, 2021. The parties submitted a set of documents entitled *PETITIONER'S EXHIBIT & WITNESS LIST RESPONDENT'S PRE-HEARING DISCLOSURES RE: EXHIBITS AND WITNESS VOLUME I* and *VOLUME II*. Testimony from Seven (7) people was obtained during the hearing, including that of the Petitioner's parent, Mrs. [REDACTED] and Mr. [REDACTED]. All exhibits were kept in the possession of the undersigned as the hearing proceeded and were reviewed again at the conclusion of the hearing.

Following the Hearing, each party timely filed their post hearing letter/briefs on December 3, 2021 in conformity with the discussion following hearing as to a plan for post-hearing position statements.

During the course of the hearing, each party presented evidence and 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. The Hearing was conducted as a closed hearing, with both parties represented by their counsel. The Petitioner was represented by the Honorable William T. "Bo" Johnson, III with Mr. and Mrs. [REDACTED]. The Respondent was represented by the Honorable Andrew Rudloff and [REDACTED], Special Education Director, serving as the corporate representative for the District and [REDACTED], Special Education

Coordinator, Audio/Visual Technician.

II. Exhibits and Witnesses

Below is a list of the Exhibits admitted to evidence including one Hearing Officer exhibit referred to as [HO 1]. Exhibits jointly presented by the parties from *Volume I* and *Volume II*, referred to as Bates stamped page numbers [B _]. Citations from the transcript from November 17th are referred to as [TR _]. A thumb drive containing videos was also admitted into evidence.

Hearing Officer Exhibit

HO Ex. 1: Joint Stipulation of Undisputed Facts

Petitioner's Exhibits

- P Ex 5A: Video of ■ on playground
- P Ex 5B: Video of ■ on playground
- P Ex 5C: Video of ■ on playground
- P Ex 7A: Video of ■ Ascending Stairs
- P Ex 7B: Video of ■ Descending Stairs
- P Ex 8: Video of ■ working on Step in Therapy Room
- P Ex 10A: Photo shown on screen
- P Ex 10B: Photo shown on screen
- P Ex 10C: Photo shown on screen

Witnesses (in order of initial appearance)

Mrs. ■

Mr. ■

■■■■■■■■■■ Pediatric Occupational Therapist, ■■■■■■■■■■

[REDACTED], Physical Therapist, [REDACTED]

[REDACTED], Occupational Therapist, Jefferson County Board of Education

[REDACTED], Physical Therapist, Jefferson County Board of Education

[REDACTED], [REDACTED] Grade Teacher, [REDACTED] Elementary, Jefferson County BOE

The exhibits submitted have been kept and maintained by the undersigned during the course of this hearing. Testimony was transcribed by [REDACTED], Certified Court Reporter, [REDACTED], who duly took down all testimony and dialogue. The parties were able to review the transcript prior to filing post-hearing briefs. The undersigned was able to review the record, exhibits, personal notes taken during testimony, transcript, and post-hearing briefs of each party in the preparation of and drafting of the decision set out below.

III. Summary of Facts

The parties submitted the following Fifty-five (55) joint stipulated facts:

STIPULATION OF UNDISPUTED FACTS

1. The Student, a minor, by and through [REDACTED] father and next friend, [REDACTED], filed a request for a due process hearing ("the complaint") pursuant to the Individuals with Disabilities Education Improvement Act, 34 C.F.R. §§ 300.500 *et seq.* and Alabama Administrative Code §§ 290-8-9-.08(8)(b)(12)(c) *et seq.*
2. The Jefferson County Board of Education operates the Jefferson County Schools ("the District"), which includes [REDACTED] Elementary School in [REDACTED], Alabama.

Student

3. The Student has been diagnosed with [REDACTED].
4. The Student has a [REDACTED] [REDACTED] [REDACTED].
5. The Student has been diagnosed with [REDACTED] [REDACTED] [REDACTED].

6. The Student has been diagnosed with [REDACTED], [REDACTED], [REDACTED].
7. [REDACTED]
8. The Student has [REDACTED]
9. The Student has [REDACTED]
10. The Student has [REDACTED], [REDACTED], [REDACTED]
11. The Student has [REDACTED]
12. The Student [REDACTED] [REDACTED]
13. The Student has been diagnosed with [REDACTED], [REDACTED]
14. The Student has exhibited delays in gross motor functioning.
15. The Student has been diagnosed with [REDACTED], [REDACTED]
16. The Student has other medical conditions, [REDACTED], [REDACTED]

Before 2020-21 School Year

17. The Student participated in IDEA Part C early intervention services through [REDACTED] [REDACTED] Early Learning Program [REDACTED] during the 2015-16 school year.
18. The Student was enrolled in [REDACTED] during the 2016-17 school year.
19. On December 14, 2017, a meeting was convened by the IDEA eligibility team, which included both District representatives and the Student's parent(s). The team determined that the student met IDEA eligibility criteria under the disability category of [REDACTED]
20. On December 16, 2017, the Student transitioned from [REDACTED] to IDEA Part B preschool programming in the District.
21. The Student was enrolled in the District's preschool program through the 2017-18 school year.

22. The Student was also enrolled in the District's preschool program through the 2018-19 school year.
23. The Student withdrew from the District and re-enrolled in [REDACTED] in the summer of 2019.
24. On October 16, 2019, [REDACTED] representatives and the Student's parent(s) developed an IEP for the Student.
25. The Student was enrolled in [REDACTED] through the 2019-20 school year.

2020-21 School Year

26. In August 2020, the Student re-enrolled in the District.
27. The Student was zoned to attend [REDACTED] Elementary School ("the old school") during the 2020-21 school year.
28. The District offered all students the option of participating in in-person learning or virtual instruction during the 2020-21 school year.
29. The Student's parents elected for the Student to participate in virtual instruction during the 2020-21 school year.
30. On August 25, 2020, the IEP team met and discussed data collection during the months of September and October 2020.
31. The 2020-21 school year started on September 1, 2020.
32. On or about September 14, 2020, a District-employed Occupational Therapist, [REDACTED], M.S., prepared an Occupational Therapy (OT) IEP written summary, dated September 14, 2020.
33. On or about October 12, 2020, a District-employed Physical Therapist, [REDACTED], DPT, performed Physical Therapy (PT) assessment of the Student. A PT IEP written summary, dated October 12, 2020, was prepared.
34. On October 14, 2020, the IEP team met, conducted an annual review of the Student's IEP, and considered the September 14, 2020 OT IEP summary and the October 12, 2020 PT IEP summary.
35. The IEP team agreed during the October 14th meeting that the District would assess the Student in the area of Adapted Physical Education (APE).

36. On or about October 18, 2020, a District-employed APE instructor, [REDACTED], performed an APE assessment of the Student and prepared a corresponding written report.
37. On November 4, 2020, the IEP team reconvened via WebEx and considered the October 18, 2021 written APE report, which included the results of [REDACTED] APE assessment.
38. The IEP was amended during the November 4th meeting to add APE programming.
39. On or about March 8, 2021, in-person student learning transitioned from the old school to the new [REDACTED] Elementary School (“the new school”).
40. The IEP team reconvened on May 20, 2021.
41. The 2020-21 school year ended on May 28, 2021.
42. The Student’s general physical education teacher did not attend the IEP meetings held on August 25, 2020, October 14, 2020, November 4, 2020, or May 20, 2021.

Summer of 2021

43. During the summer of 2021, the District offered a program titled “Strengthening Our Academic Rigor” (SOAR) at different sites throughout the District.
44. SOAR was available to all District students.
45. The new school was one of the District sites where SOAR was offered.
46. The SOAR Program started on or about June 7, 2021.
47. The SOAR Program ended on or about July 1, 2021.
48. The Student participated in the SOAR Program at the new school.
49. The complaint was filed on July 29, 2021.

2021-22 School Year

50. The 2021-22 school year started on August 10, 2021.
51. On October 1, 2021, [REDACTED] performed an OT assessment of the Student and prepared a corresponding written report.

52. On October 1, 2021, a District-employed Physical Therapist, [REDACTED], performed a PT assessment of the Student and prepared a corresponding written report.
53. On October 1, 2021, [REDACTED] performed an APE assessment of the Student and prepared a corresponding written report.
54. On October 5, 2021, the IEP team met, conducted an annual review of the Student's IEP, and discussed the October 1, 2021 OT, PT, and APE written reports and corresponding assessment results and recommendations.
55. The IEP team reconvened on October 12, 2021 to complete the annual review of the Student's IEP.

[HO 1]

IV. Issues Presented

- 1) Whether or not the Petitioner was denied a FAPE for failure to properly evaluate and provide adequate services for Occupational Therapy (OT)?
- 2) Whether or not the Petitioner was denied a FAPE for failure to properly evaluate and provide adequate services for Physical Therapy (PT)?

V. Discussion

The Individuals with Disabilities Education Act (the "IDEA" or "Act") established certain basic entitlements, including a free, appropriate public education ("FAPE"), for children between the ages of three and twenty-one years old with specified disabilities. *20 U.S.C. §§ 1400, 1412(a)(1)(A) (2004)*. Now called the IDEIA (Individuals with Disabilities Improvement Act), the act defines "free appropriate public education" (FAPE) as "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title" 20 U.S.C. § 1401 (18). In order to be eligible for Federal financial services under IDEIA, a state must therefore assure that "all children with disabilities

who are between the ages of three and twenty-one receive a Free Appropriate Public Education (FAPE).”

The point of service whereby a FAPE is provided to children eligible for services, is at the local level, the school district or local educational agency, where a child resides. With this matter of course, Jefferson County Schools is this Local Educational Agency. The State of Alabama implements this law via the directives found in the Rules of the Alabama State Board of Education, State Department of Education, Special Education Services, codified in The *Alabama Administrative Code* § 290-8-9-.00 et seq. Additionally, the Federal Regulations that provide guidance for the implementation of IDEIA are found in the Code of Federal Regulation, 34 CFR 300.101, et seq. What follows is a discussion of the general issues raised and identified by the parties during this Due Process Hearing in light of the applicable law and the facts relevant to the matter, as presented during the hearing.

The *Alabama Administrative Code* 290-8-9.07(5) Related Services states in pertinent part: “Each IEP Team must determine what related services, if any, are required to assist a child with a disability to benefit from special education. Related services may include...occupational therapy...physical therapy...”.

In the *Petitioner’s Post-Trial Brief* counsel states the issues as: [REDACTED] current level of fine and gross motor skills prevent [REDACTED] from accessing [REDACTED] curriculum to the best of [REDACTED] cognitive abilities. The remaining issues are what amounts of OT and PT, respectively, are “required to assist [REDACTED] ... to benefit from” [REDACTED] education. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (citing 20 U.S.C. §§ 1401(26), (29)). Currently, [REDACTED] is not being given “the chance to meet challenging objectives.” *Enter. City Bd. of Educ. v. S.S.*, 2020 WL 3129575 *1, *5 (M.D. Ala. June 12, 2020) (quoting *Endrew F.* 137 S. Ct. 988 at 1184). For the student like [REDACTED] “whose physical access to [REDACTED] entire program rests with the positive results occupational and physical therapy can provide,” inadequate amounts of OT and PT “amount to a substantive violation of FAPE.” *Palestine-Wheatley School District*, H 21 32, 121 LRP 29936 *1, *11 (Aug. 16, 2021). [Petitioner’s Post-Trial Brief]

The first issue suggested and raised by the Petitioner is whether or not the Petitioner was denied a FAPE for failure to properly evaluate and provide adequate services for Occupational Therapy (OT).

Counsel for the Petitioner claims “The District’s occupational therapist, ██████████, did not perform any type of OT evaluation on ██████████ in preparation for ██████████ 2020-2021 IEP. ██████████ *Testimony*, T.188/1 to 190/6. When ██████████ finally conducted an OT evaluation in October 2021, ██████████ testified that she discovered ██████████ scores were low enough to qualify ██████████ for weekly OT services in the school setting, despite the fact that ██████████ previously received OT services only once per month. *Id.* at T.211/22 to T.212/3. ██████████ testified that had she performed the evaluation and obtained its results earlier, she would have realized that ██████████ primary deficit with regard to OT-related skills lies in the area of motor coordination. *Id.* at T.212/19 to T.213/6 (“[I]t allowed me to see as a therapist that I need to concentrate more on the motor coordination than visual perception.”) In other words, between the fall of 2020 and the fall of 2021, ██████████ had been serving ██████████ for over a year without knowledge of ██████████ specific deficits. Thus, ██████████ was deprived of a FAPE during the 2020-2021 school year.” [Petitioner’s Post-Trial Brief]

The record reflects that IEP with duration dates from 10/16/2019 to 10/15/2020 includes the results of The Peabody Developmental Motor Scales 2 (PDMS-2) with descriptive results, description of fine motor needs, and goals and objectives for fine motor. [B 377-390]

During the taking of testimony, counsel for the Petitioner questioned ██████████ on this as follows:

Q: So you did that evaluation on October 1, 2021, right?

A: That is correct....

Q: ...But you said that based on the evaluation that ██████████ needed direct occupational therapy services for 30 minutes once a week, right?

A: Yes.

Q: ...██████████ does require direct occupational therapy as a related service a minimum of 30 minutes a week?

A: Yes.

Q: Okay. And did you make that recommendation—was that your opinion before or after you did the evaluation?

A: Before.

Q: Okay. When did you make the decision that ██████████ needed to have direct occupational

therapy for at least 30 minutes once a week?

A: Having been working in the school system, this is my 15th year with JeffCo Ed. I recognize the standard, the requirements for █ grade student are higher. And in our last WebEx session in May, I mentioned to Ms. █ at the end of our sessions the potential to increase OT service time at █ next IEP meeting to weekly services. And I consulted with Ms. █ and with Ms. █ in August, September, in preparation for the upcoming IEP. [TR 238-239]

Counsel for the Respondent questioned Ms. █:

Q: Did the results of the Beery confirm what you are anticipating in May?

A: Yes. [TR 260]

In further questioning regarding the test results of the Berry VMI, counsel for the Petitioner asked: “What does the comparison of the █ and █ tell you when you look at that?”. [TR 112] Ms. █ responded: “...it makes sense to me because with █ VMI score being a █, I feel like █ visual perceptual skills being a little stronger, and the fine motor skills being a little lower, when █ is able to bring those skills together, it gives █ that █. And it allowed me to see as a therapist that I need to concentrate more on the motor coordination than visual perception.” [TR 212-213] Ms. █ appears to give an in-depth interpretation of the scores, and how a therapist can translate that information into choosing tasks to work on the deficit areas, rather than evidence of lack of knowledge of specific skills.

A review of the IEPs and transcript would indicate that Ms. █ did indeed have knowledge of █ specific deficits. Further, the *Alabama Administrative Code* Section 290-8-9.02(6)(b) states “A reevaluation must be conducted if the IEP Team determines that the education or related services needs, including improved academic achievement and functional performance of the child warrant a reevaluation, or if the child’s parent or teacher requests a reevaluation” and in (c) “Reevaluations shall not occur more than once a year, unless the parent and the public agency agree otherwise, and must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary.” The evidence does not support the notion that the District failed to properly evaluate █, thereby denying █ a FAPE.

Counsel for the Petitioner claims that “The District failed to develop an IEP “reasonably

calculated to enable [REDACTED] to make progress appropriate in light of [REDACTED] circumstances” and denied [REDACTED] a FAPE.” [Petitioner’s Post-Trial Brief]. Specifically, he noted the teacher’s observation that [REDACTED] was unable to use snaps or buttons on clothing, a skill which [REDACTED] has neither acquired nor worked toward in school-based therapy. [Petitioner’s Post-Trial Brief]

Counsel for the Petitioner questioned Ms. [REDACTED] concerning daily living or self-help skills:

Q: Some of the skills activities of daily living that you are working with [REDACTED] on or self-help skills include buttoning and zipping and unzipping; correct?

A: Yes. Not every session. But some sessions.

Q: Some sessions. How many sessions are you—address that specific skills?

A: Tying shoes would be the largest one that I work on with [REDACTED] in the school setting....But we have worked on buttoning—a buttoning strip. A therapeutic activity of a button strip.

Q: And so what about snaps? Are you doing any work with [REDACTED] to teach [REDACTED] how to snap or unsnap?

A: Actually, I’ve just ordered... a ADL Board that I made mention of earlier that has a variety of buckles, snaps, zippers....

Q: So [REDACTED] has not used the ADL?

A: ...we have used the tying shoes demonstration, tying shoes board. And we have done buttoning. But not snapping or zipping yet.

[TR 236-237]

Counsel for the Petitioner stated: “[REDACTED] ultimately relented that practicing self-help skills **remotely** [emphasis added] was simply “one of the hardest things to address . . .” and decided to focus on fine motor and effective handwriting strategies, instead. *Id.* at T.257/11-18. As such, [REDACTED] was denied a FAPE during the 2020-2021 school year.” [Petitioner’s Post-Trial Brief] It is not clear to the undersigned, however, as to why choosing activities to work to enhance skills when working **remotely** denies a FAPE.

Counsel for the Petitioner claims “The District failed to develop an IEP “reasonably

calculated to enable [REDACTED] to make progress appropriate in light of [REDACTED] circumstances and denied [REDACTED] a FAPE”,... “[REDACTED] has been unable to make meaningful progress in light of [REDACTED] circumstances during the 2021-22 school year and has continued to be denied a FAPE.”, and “[REDACTED] requires substantially more OT than the District is providing in order to receive a FAPE.” [Petitioner’s Post-Trial Brief] Counsel cites *Palestine-Wheatley School District* 121 LRP 29936 (August 16, 2021) for a student like [REDACTED] “whose physical access to [REDACTED] entire program rests with the positive results occupational and physical therapy can provide,” inadequate amounts of OT and PT “amount to a substantive violation of FAPE.” Yet, in *Palestine*, the student did not receive the amount of OT and PT services as stated in the IEP and the amount of lost time was significant, therefore denying FAPE. That does not appear to be what has occurred with [REDACTED].

In the *Respondent’s Post-hearing Brief*, counsel notes “direct OT is not all that [REDACTED] gets. Direct OT is buttressed by teacher-therapist collaboration and facets of [REDACTED] specially designed instruction”. During the taking of testimony, Ms. [REDACTED] explained:

A: Ms. [REDACTED] and I consulted about [REDACTED] journaling... [REDACTED] { [REDACTED] } was having difficulty writing small enough on the page. And we discussed the addition of a simple boundary box...because [REDACTED] visual perceptual skills are within average limits, [REDACTED] is able to see that box and that helps [REDACTED] see, I need to write a little bit smaller. [TR 216-217]

A: ...Ms. [REDACTED] and I have discussed [REDACTED] { [REDACTED] } posture, making sure [REDACTED] feet are on the ground...sitting with more upright stable posture. [TR 217]

A: ...Mr. [REDACTED] and I have consulted several times...There is a little overlap with occupational therapy and adaptive PE in terms of eye/hand coordination, grasping different sized balls, throwing them...[TR 222]

During the taking of testimony, Ms. [REDACTED]: “...just to maximize [REDACTED] education level and [REDACTED] abilities withing the education level, I think it would be great to have some in-depth {OT} therapy, which is what outpatient therapy does”. [TR 130] Counsel for the Respondent claims this recommendation is based on medical prescriptions to be provided in the clinical setting. Further, citing 34 C.F.R. §300.34(a). “an LEA is only required to offer what is necessary ‘to assist’ a student ‘to benefit from special education’...” “And they are what the U.S. Supreme Court and 11th Circuit have said is not required. *Andrew F.*, 137 S.Ct. at 1000-1001; *Rowley*, 458 U.S. at 198; *M.M.*, 437 F.3d at 1102; *accord Guest*, 900 F. Supp. at 910”.

[Respondent's Post-Hearing Brief]

The next issue raised by the Petitioner was whether or not the Petitioner was denied a FAPE for failure to properly evaluate and provide adequate services for Physical Therapy (PT).

As evidenced by the IEP, joint stipulation of facts, and testimony by both parties, there is no doubt that [REDACTED] experiences delays in locomotion skills. Counsel for the Petitioner stated: *Johnston School District*, 111 LRP 57612 *1, *15 supports the notion that therapies in the outpatient setting can provide a different level of PT support to students like [REDACTED] (finding that for a [REDACTED]-year-old child with disabilities similar to [REDACTED] outpatient physical therapy “is extremely necessary and the results are different than those of [school based] physical therapists.”). The District’s witnesses suggested during the hearing that [REDACTED] outpatient therapies were for “medical” purposes as opposed to “educational” purposes. This argument is not supported by law or the facts. The IDEA does not distinguish between therapy for access to education and therapy for medical purposes. *Johnston, supra*. Further, the therapies that Ms. [REDACTED] and Ms. [REDACTED] say [REDACTED] requires are not “medical services” because both OT and PT can be provided by professionals who are not physicians. *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999). Factually speaking, the skill-acquisition and therapeutic goals and recommendations that Ms. [REDACTED] (Hearing Officer’s Exhibit 1 at 668) and Ms. [REDACTED] (Hearing Officer’s Exhibit 1 at 664-65) wrote in their evaluations for [REDACTED] overlap nearly completely with the skill-acquisition and therapeutic goals that Ms. [REDACTED] (Hearing Officer’s Exhibit 1 at 639) and Ms. [REDACTED] (Hearing Officer’s Exhibit 1 at 642) wrote in their respective evaluations. [REDACTED] Testimony at T.246/5 to T.250/13; [REDACTED] Testimony at T.293/11 to T.299/3. The evidence shows that [REDACTED] was denied a FAPE during the 2020-2021 and early 2021-2022 school years when [REDACTED] received no direct PT whatsoever and continues to be denied a FAPE as [REDACTED] receives direct PT services for only 30 minutes monthly. [Petitioner’s Post-Trial Brief]

In a review of *Johnston*, one finds that the 7-year old student had received physical therapy services at the private facility when the district sought to eliminate the services from the

student's IEP and increase the physical therapy that the district itself provided. In short, "the IHO also noted the private therapist's explanation that in the student's case, medical-based therapy and educational-based therapy were intertwined because of the complexity of his cerebral palsy". *Johnston School District 57* IDELR 270 and 111 LRP 57612. It is not clear to the undersigned that such facts directly relate to this matter, though they could be informative.

To that end, Counsel for the Respondent questioned Ms. [REDACTED]:

Q: First of all, why is it important for you as a physical therapist to examine and evaluate [REDACTED] in the educational environment where [REDACTED] functions?

A: Because [REDACTED] is [REDACTED] is there every school day of the week. And I want to make sure that [REDACTED] is independent and safe and can access all of [REDACTED] school environment. So if there is a need that [REDACTED] does have that I can help work on that with [REDACTED]. [TR 278]

Q: What was the recommendation that the team ultimately adopted and incorporated in the IEP?

A: Direct therapy services once a month.

Q: Why the differentiation between the consultative recommendation and what the team ultimately landed upon?

A: Well, when I do my physical therapy evaluation, I do make recommendations based on what I feel. But when presented to the IEP Team, it's ultimately on what we all as a team feel that [REDACTED] could benefit from. And so based on that, I increased it to a direct service so that I could see [REDACTED] directly and maybe work on some building blocks that [REDACTED] needed to work on as far as balance and strengthening. [TR 284-285]

Q: Mr. [REDACTED] talked to you about the goals, one, two, three, four, and five. And irrespective of whether those translate to the educational setting for the receipt of educational programming and instruction, do the interventions that you are using with [REDACTED] in the time that you are seeing [REDACTED] work towards those goals?

A: Yes. [TR 306]

During the taking of testimony, Ms. [REDACTED] stated: "The reason I say I would want to see [REDACTED] what I said is because I think [REDACTED] needs some very one-on-one specialized work on certain balance activities and certain strengthening activities that are not what the school-based therapy is doing...and kind of match up well with me focusing on higher level certain skills that

aren't necessarily education based." [TR 168]

In the *Respondent's Post-hearing Brief*, counsel states: "...an LEA is only required to offer what is necessary "to assist" a student "to benefit from special education." 34 C.F.R. §300.34(a). Practically and legally, that limitation means an LEA need not treat a disability, rehabilitate a disability, or build-up independence or functional abilities as much as possible. Rather, what the IDEA requires is that an LEA offer an appropriate education to a disabled student."

Further, in the *Respondent's Post-hearing Brief*, counsel makes these arguments:

"On the one hand, "special education" means "specially designed instruction"—more specifically, adapting the content, methodology, or delivery of *instruction* to address a student's unique needs and ensure the student's access to the general curriculum. §300.39(3). An LEA's offer of "special education" in an IEP must meet a substantive bar. That bar, first, requires an LEA to use "prospective judgment" to craft an offer that aims for progress. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-I*, 137 S.Ct. 988, 999 (2017). An LEA clears the bar if it offers an IEP that is aimed on target—*i.e.*, one that is "reasonably calculated to enable a child to make progress [that is] appropriate in light of the child's circumstances." *Id.* The degree of progress envisioned must be more than *de minimis* yet still "appropriate" given the student's "unique circumstances." *Id.* at 1000-1001. So, while a floor exists and goals must be aspirational, an IEP need not try to maximize potential or be the best. *Id.*; *see also Bd. of Edu. of Hendrick Hudson Central Sch. Dist., Westchester Cty v. Rowley*, 458 U.S. 176, 198 (1982); *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade Cty, Fla.*, 437 F.3d 1085, 1102 (11th Cir. 2006).

The progress that is envisioned when an IEP is offered can be different from what progress is actually obtained when the IEP is put into action. So, logically, evidence of progress or a lack of progress is not necessarily determinative in a "content case"—one where a parent alleges what is or was offered fell short of the IDEA's substantive bar. *L.J. by N.N.J. Sch. Bd. of Broward Cnty*, 927 F.3d 1203, 1214 (11th Cir. 2019); *Jefferson Cty Bd. of Edu. v. Amanda S.*, 418 F.Supp.3d 911, 918 (N.D. Ala. 2019). That makes sense; "the IDEA cannot and does not promise any particular [educational] outcome." *Andrew F.*, 137 S.Ct. at 998.

That brings us to "related services" and their interplay with instruction. "[R]elated services" are "such developmental, corrective, and other supportive services as are required to

assist a child with a disability to benefit from special education” §300.34(a); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 889-90 (1984); *Donald B. v. Bd. of Sch. Comm’rs of Mobile Cnty.*, 117 F.3d 1371, 1374 (11th Cir. 1997); *see also Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632, 641 (7th Cir. 2010). Put differently, schools need only provide such “supportive services” as are necessary for educational purposes—*i.e.*, to achieve progress on IEP instructional objectives. Services beyond that are not an LEA’s responsibility, even if medically necessary or recommended.” [Respondent’s Post-Hearing Brief]

In sum, as suggested and maintained by the Respondent in their brief, the Petitioner did not provide sufficient evidence proving that the level of OT and PT services offered in the IEP were insufficient, and consequently prevented [REDACTED] from benefiting from [REDACTED] educational instruction.

VI. Conclusion

The issues properly before the undersigned hearing officer in this due process hearing are due to be reviewed in the manner provided for under *20 U.S.C. §1415 (f)(3)(E)*. Further, Congress directs that any decision of the undersigned is limited in this Final Order to a decision:

- (i) [Made] on substantive grounds based on a determination of whether the child received a free appropriate public education.
- (ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate education only if the procedural inadequacies-
 - (I) impeded the child’s right to a free appropriate public education; or,
 - (II) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parent’s child; or,
 - (III) caused a deprivation of educational benefits. *20 U.S.C. §1415(f)(3)(E)(I)&(ii)*

The undersigned reviews the issues in light of the fact that the burden of proof in a due process hearing rests upon the Petitioner as the party bringing a complaint. Therefore, in order to prevail the Petitioner 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. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005)

Finally, in completing a review in this matter the undersigned is mindful that it is not the

job of the hearing officer to substitute his judgment for those of the educational professionals involved in the decisions made for the child. The standard as to such review does arise through the decision in *Board of Education Hendrick-Hudson v. Rowley*, 458 U.S. 176, 206 (1982) along with the impact of the decision in *Andrew F by Joseph F v. Douglas County Sch Dist*, 69 IDELR 174, 137 S.Ct. 988(2017). With this in mind the undersigned has reviewed the facts as set forth in the testimony and evidence, providing the due weight to the information provided by the Petitioner and Respondent alike. The discussion above purports to examine what the undersigned found was not only relevant to an understanding of the facts in this hearing, but the facts that were germane to an understanding of how the law would apply to the questions posed by the Petitioner's complaint and allegations.

VII. Specific Findings

- 1) The Petitioner was not denied a FAPE for failure to properly evaluate or provide adequate services for Occupational Therapy (OT).
- 2) The Petitioner was not the denied a FAPE for failure to properly evaluate or provide adequate services for Physical Therapy (PT).

VIII. Notice of Appeal Rights

Any party dissatisfied with the decision may bring an appeal pursuant to 20.U.S.C. § 1415(e)(2) and/or Alabama Administrative Code 290-8-9.08(9)(c)(15) and must file notice of intent to file a civil action with all other parties within thirty (30) calendar days of the receipt of this decision. Thereafter, a civil action must be initiated within thirty (30) days of the filing of the notice of intent to file a civil action.

DONE and ORDERED.

Entered this the 10th day of December, 2021.


Steve P. Moran, Jr.
Due Process Hearing Officer

A copy of this Order has been forwarded to the Honorable Bo Johnson., the Honorable Carl Johnson and the Honorable Andrew Rudloff via email.

cc: - Ms. Shonta Jackson