

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

<b>D. S.</b>	)	
<b>Petitioner,</b>	)	<b>Special Education No. 22-14</b>
<b>v.</b>	)	
	)	
<b>JEFFERSON COUNTY</b>	)	
<b>BOARD OF EDUCATION</b>	)	
<b>Respondent.</b>	)	

**DUE PROCESS DECISION**

**I. Procedural History**

This matter is before the undersigned pursuant to a request for due process that was filed on January 19, 2022 by the Honorable James D. Sears on behalf of Ms. [REDACTED] parent and legal guardian of [REDACTED] (“Petitioner”), a student in the Jefferson County school district. Thereafter, pursuant to a letter dated January 19, 2022, issued by the State Superintendent of Education, the undersigned was asked to serve as the Impartial Hearing Officer in this proceeding.

The Petitioner waived the Resolution process and as well waived mediation. In response the District also waived the resolution meeting. A *Scheduling Order* was issued by the undersigned on March 1, 2022. Following that, as called for under the *Scheduling Order*, the *Joint Stipulations of Fact* were filed on March 24, 2022. Petitioner’s *Claims Against the Respondent* was filed on March 27, 2022. Prior to that the *Respondent Jefferson County Board of Education’s Statement of Affirmative Defenses* was filed on March 24, 2022.

The Pre-hearing Conference was conducted on March 28, 2022, with counsel for both parties participating. The issues to be heard at hearing were clarified further and as well, the

*Joint Stipulations of Fact* were discussed and then included in the *Pre-hearing Order*. By agreement, the date of hearing was changed to Thursday, April 7, 2022. The *Pre-hearing Order* was issued by the undersigned on March 29, 2022.

The taking of testimony was completed late in the day on April 7, 2022. At the conclusion of the hearing on April 7, 2022, the parties requested to submit post-hearing memorandums in lieu of closing arguments, agreed that they would need until April 19 to do so and stipulated to allowing the deadline for a decision to be pushed out ten days to allow such process to occur. Accordingly, the deadline for a decision was extended until April 29, 2022, to allow time for the parties to submit such final statements and to allow time for the undersigned to have a thorough review of the record before a decision is entered. [See *Order* issued by the undersigned on April 11, 2022]

The Hearing comprised a lengthy day of testimony taken and transcribed on April 7, 2022. The parties submitted two sets of documents entitled *PETITIONER'S EXHIBIT & RESPONDENT'S HEARING EXHIBITS*. Testimony from Five (5) people was obtained during the hearing, including that of the Petitioner's parent, Ms. [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 was allowed time to file their post hearing letter/briefs and on April 19, 2022, the Respondent did so in conformity with the discussion following hearing as to a plan for post-hearing position statements. The Petitioner elected not to file a post hearing brief.

During the course of the hearing, each party presented evidence and offered the testimony

of witnesses in support of their respective positions and was 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 James D. Sears with Ms. [REDACTED] and her husband, present for the Petitioner. The Respondent was represented by the Honorable Andrew Rudloff and Ms. [REDACTED] [REDACTED] Special Education Director, serving as the corporative representative for the District.

## II. Exhibits and Witnesses

Exhibits admitted to evidence included a notebook of Petitioner's Exhibits and a notebook of Respondent's Hearing Exhibits and are referred to P Ex or page\_\_ and Re Ex or page\_\_. Citations from the transcript from April 7<sup>th</sup> are referred to as [TR \_].

### Witnesses (in order of initial appearance)

-Ms. [REDACTED] [REDACTED] Special Education Teacher, [REDACTED] [REDACTED] School, JCBOE

-Ms. [REDACTED] parent

-Ms. [REDACTED] [REDACTED] Principal, [REDACTED] [REDACTED] School, JCBOE

-Dr. [REDACTED] [REDACTED] Special Education Teacher, [REDACTED] [REDACTED] School, JCBOE

-Ms. [REDACTED] [REDACTED] Special Education Teacher, [REDACTED] [REDACTED] School, JCBOE

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. Stipulated Facts

1. The Student, a minor, by and through [REDACTED] mother and next friend, [REDACTED] filed a request for a due process hearing (“complaint”) pursuant to the Individuals with Disabilities Education Improvement Act and Alabama Administrative Code. 20 U.S.C. §1415; 34 C.F.R. Part 300; and Alabama Administrative Code §290-8-9-08(b)(12)(c).
2. The Jefferson County Board of Education operates the Jefferson County Schools, which includes [REDACTED] [REDACTED] and [REDACTED] [REDACTED]
3. The Student attended [REDACTED] [REDACTED] Schools prior to the 2020-21 school year.
4. The Student was initially found eligible for IDEA programming during the 2014-15 school year.
5. The [REDACTED] [REDACTED] Schools conducted a triennial reevaluation of the Student during the 2017-18 school year, and the Student’s IDEA eligibility was reaffirmed on or about February 2, 2018.
6. On or about January 23, 2020, an IEP was developed for the Student.
7. The Student’s mother withdrew the Student from the [REDACTED] Schools.
8. On or about September 1, 2020, the Student enrolled in [REDACTED] [REDACTED] in the Jefferson County Schools.
9. On or about October 9, 2020, the eligibility team convened to discuss the collection of new data in anticipation of a triennial reevaluation.
10. On or about October 13, 2020, the Student’s mother consented to a triennial reevaluation.
11. The Jefferson County Schools began its triennial reevaluation of the Student in November 2020.
12. The Student’s mother withdrew the Student from [REDACTED] on December 17, 2020.
13. [REDACTED] served as the Student’s special education case manager during the first semester of the 2020-21 school year.

14. During the first semester of the 2020-21 school year, the Student was absent from school for no fewer than 23 days. At least 18 of those absences were unexcused.
15. The Jefferson County Schools were closed for mid-year holidays between December 21, 2020 and January 1, 2021.
16. Students returned to the Jefferson County Schools for the second semester of the 2020-21 school year on January 5, 2021. The Student's mother enrolled the Student in [REDACTED] on that date.
17. The Jefferson County Schools continued the triennial reevaluation of the Student in January, 2021.
18. On or about January 20, 2021, the eligibility team convened, reviewed the results of the triennial reevaluation, and determined that the Student continued to meet IDEA eligibility criteria. The team identified [REDACTED] as a disability category supporting the eligibility determination. The Student's mother attended and participated in the eligibility meeting.
19. On or about January 20, 2021, the IEP team convened and developed an IEP for the Student. The IEP included an annual goal in the area of reading.
20. [REDACTED] served as the Student's special education case manager during the second semester of the 2020-21 school year.
21. The IEP team convened on or about October 22, 2021. The Student's mother attended and participated in the IEP meeting. The IEP team amended the IEP during that meeting to add an annual goal in the area of math.
22. On or about December 15, 2021, the IEP team convened and conducted an annual review of the Student's IEP. During that meeting, the IEP team developed an IEP for the Student. The Student's mother attended and participated in the IEP meeting. The IEP that was developed included annual goals in the area of reading, communication, and math.
23. [REDACTED] has served as the Student's special education case manager during the 2021-22 school year.
24. The complaint was filed on or about January 19, 2022.

#### **IV. Issues Presented**

- 1) Is the Petitioner entitled to compensatory relief due to the services provided by the District relating from the date the Petitioner transferred from an in-state school on or about September 1, 2020. As such, incumbent in this issue is the question of whether or not the District denied a FAPE to the Petitioner during the process of providing services to the Petitioner as an incoming transfer student with an IEP in place from ■■■ prior school?
- 2) As for the current IEP, are measurable annual goals compliant with the standards called for under the IDEA for the child to receive a FAPE and are required or incumbent services included?
- 3) Has the student met measurable annual goals or made progress towards mastery as shown in documentation of progress and if not, was a FAPE denied the Petitioner?

#### **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 three issues raised and identified by the parties during this Due Process Hearing considering the applicable law and the facts relevant to the matter, as presented during the hearing.

The First Issue is set out as follows: Is the Petitioner entitled to compensatory relief due to the services provided by the District relating from the date the Petitioner transferred from an in-state school on or about September 1, 2020. As such, incumbent in this issue is the question of whether or not the District denied a FAPE to the Petitioner during the process of providing services to the Petitioner as an incoming transfer student with an IEP in place from [REDACTED] prior school?

In cross examination of [REDACTED] counsel for the Respondent summarized the question “...the contention is that there was no instruction provided to [REDACTED] during the period of time before [REDACTED] returned to in-person instruction” to which [REDACTED] replied “Correct”. Respondent’s Counsel then asked “You are not contending that there was a failure of the District to provide services to



█ after █ returned to in-person instruction; correct?" to which █ responded "Correct". [TR 137] This seemingly narrows the time frame of the alleged lack of FAPE provided by the District to the question of services provided between September 1 and 25, 2020.

Testimony and evidence show that when █ enrolled █, she told the administration that █ had an IEP and she believed they would get the records from █ █. Later, she was told they hadn't gotten the records because █ █ had not released them from SETS. █ stated from .... "the beginning 'I was at their school every day up until school started to get everything in order for █ IEP because I didn't want █ to start school and be lost'." [TR 99-101] It is clear that █ was seeking to track and advocate for her child as an interested and involved parent.

When the school year began in September 2020, all students in Jefferson County Schools were instructed remotely.<sup>1</sup> [TR 57] In an email from █, Office Coordinator, to █ the password and email address for █ to go to Schoology and access the assignments █ teachers posted. [R page 37] Nevertheless, █ urged in her testimony that the system was hard to work with for her child at times due to connectivity issues. [TR 103]

During the taking of testimony, █ explained "I communicated with █ and all my students via my Schoology account...the platform that we use to warehouse all of our courses, we had courses that we would build and put together to reach students to provide access to them for specially designed instruction...any of the information that we might want to use to provide students with what they might need to use during that time." [TR 14-15]

Counsel for the Petitioner questioned █

Q: And how did you arrange █ special ed support during that period of time?

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<sup>1</sup> As of the beginning of the 2020-2021 school year, most schools in Alabama had moved to remote learning due to the then ongoing pandemic related to Covid-19. This was guided by the 'Safer at Home' Orders issued by the



A: ...because of [REDACTED] particular IEP, [REDACTED] had both some decoding issues and some comprehension issues as I recall. I was using (Lexia) to help [REDACTED] with [REDACTED] decoding. And I also had some lessons I videotaped with regard to comprehension that was where we would map a specific piece of test and go through that line by line...So it was just working with [REDACTED] using the learning management Schoology, and also intervention program, Lexia, that's geared towards students. Those were the two ways I was working with [REDACTED] while we were remote. [TR 17-19]

[REDACTED] noted that during daily remote learning at [REDACTED] in [REDACTED] [REDACTED] the District used Google Classroom Meets and [REDACTED] special education teacher would be on with [REDACTED] as well as [REDACTED] regular classroom teacher. [TR 92-93] [REDACTED] explained Schoology was used with "all students" and we put our courses on there. Every teacher had an account". [TR 15]

District's counsel points out that the claim as to a lack of services during the September 1 through September 25, 2020, time frame while [REDACTED] was at [REDACTED] is an 'implementation' claim.<sup>2</sup> The District goes on to urge that this claim fails on the merits because the Board served [REDACTED]. "in conformity with" [REDACTED] IEP in the fall of 2020. The District points out that since [REDACTED]. was new to JCS, the Board applied a January 23, 2020 IEP developed by [REDACTED] past school. (Ex. 24-29; Tr. 138.) That IEP was "appropriate," an accurate picture of [REDACTED]., and included a "straightforward" goal. (Tr. 62-65, 70, 138-40.) And, since this time frame, September 2020 was still affected by the March 2020 pandemic-related closures all students in JCS were instructed remotely. (Tr. 56-57.) So, the IEP was implemented through different means to start the year—it had to be. But while the means were different, they were not deficient.

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Alabama Governor's office.

<sup>2</sup> The District suggest that that, under law, there are distinctly three types of claims when the question of a FAPE is raised: content, implementation and procedural. *L.J. by N.N.J. v. Sch. Bd. of Broward Cnty*, 927 F.3d 1203, 1207

█████ returned to in-person learning at ██████ on September 28, 2020. The focus was on resuming in-person learning and updating ██████ programming. On the former point, the Petitioner does not appear to claim the Board failed to provide services after the September 25. (Tr. 137.) Nonetheless, the evidence reflects that ██████ provided instruction at ██████ and sometimes offered ██████ more than what the IEP called for in a given week. (Tr. 68-69.) And, arguably efforts to refine ██████ IEP were underway around this time, too. This process started on September 22 and continued. (Ex. 118, 47-50; Jt. Stip., ¶¶9-12, 17-18.) This was true even though ██████ attendance was a substantial factor based on the large number of apparent absences, either related to a Covid 19 quarantine at ██████ home or relocation by ██████ family late in the fall of 2020. (Ex. 14 and Jt. Stip, 14 *with* Tr. 101-102.)<sup>3</sup>

Moreover, the District also points out that progress was made during the fall of 2020 while ██████ was at ██████ ██████ testified that despite the hurdles of pandemic-era learning and the significant number of absences, ██████ did progress over ██████ time at ██████. (Tr. 73-77.) A November 4<sup>th</sup> report conveyed that. (Ex. 104.) Additional questions posed ██████ ██████ appears to bear out the understanding that past programming and objective measures combined to illustrate how ██████ progress was measured or verified. (Tr. 25-26; 74 questions as to Ex. 151)

Digging deeper into the question of the possible implementation claim, the District suggest that first, “context matters.” *L.J.*, 927 F.3d at 1215. Here, programming turns on “unique circumstances.” And those “circumstances” no doubt includes the pandemic-related

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(11th Cir. 2019)

<sup>3</sup> Interestingly ██████ actually left ██████ and moved into the ██████ attendance zone in November 2020.

“circumstance” of COVID-19 and its curbing of traditional service models for a time. To that point, even the Petitioner conceded there were unavoidable limits on in-person instruction to start the 2020-21 school year. (Tr. 143-44.) And she also agreed those limits bore on what [REDACTED] could receive. (Tr. 143-44.)

Next, the District also points out that the Petitioner has proof problems with this first issue regarding its implementation claim as to services during the fall of 2020. The District explains that the inquiry in an “implementation” case is to look “quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole.” *L.J.*, 927 F.3d at 1214. The District urges that the Petitioner cannot prove what was “withheld” given all that [REDACTED] offered. Further, the District suggest that even if some misstep occurred, the Petitioner cannot prove it was truly “material” or important in relation to “the IEP as a whole.”

Finally, it is undisputed that the Board provided extra services upon return (Tr. 68-69); subjective input and objective data prove [REDACTED] progressed at [REDACTED] and [REDACTED] progressed after [REDACTED] left [REDACTED] for [REDACTED]. And evidence suggest that [REDACTED] was reading independently and comprehending [REDACTED] grade work at [REDACTED] (Tr. 180), [REDACTED] current IEP aims for completion of grade-level work (Ex. 231-39), and [REDACTED] had Bs in reading and math last quarter (Tr. 168; Ex. 302).

In essence, the evidence presented does not support the claim that the Petitioner was denied a FAPE during the process of providing services to the Petitioner as an incoming transfer student with an IEP in place from [REDACTED] prior school during that time period.

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(Ex. 115; Tr. 143.) [REDACTED] did not enroll at [REDACTED] until January 5, 2021. (Jt. Stip., ¶16.)

The Second issue is as follows: As for the current IEP, are measurable annual goals compliant with the standards called for under the IDEA for the child to receive a FAPE and are required or incumbent services included?

An IEP must include a “statement” of “measurable annual goals” and “special education.” §300.320(a)(2), (4). An allegation that an LEA failed to include such things in an IEP is a “procedural” claim. *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 911-12 (5th Cir. 2003).

In the *Respondent’s Post-hearing Brief*, counsel argues the Petitioner did not prove that the Board violated an IDEA rule. First they confirm the fact that the Petitioner participated in developing all goals in each IEP and clarified with her testimony that the goals had made sense to her. [TR 149, R page 157] While that it made sense to the mother does not mean it is appropriate, this at least clarifies that there was a level of understanding at the time. Further, the District suggest that the reading goal provides staff will give ■■■. “a grade level passage” on five occasions. (Ex. 234; Tr. 220-21.) ■■■ will read it and be questioned about the passage to gauge ■■■ understood it. ■■■ masters the goal if ■■■ answers 75% of the questions correct—in three of five trials—by the IEP’s end date...And further still, it flowed logically from a past goal that was mastered; it increased rigor; it is supported by baseline data; and it is generally appropriate. (Tr. 215-16, 220-21.)

Nonetheless, the parent sought to explain that her concern was that if ■■■ was reading at a 4<sup>th</sup> grade level when the goal of a 6<sup>th</sup> grade level was set, she was concerned that ■■■ would not understand the content. [Tr 149-151] The counterpoint, and how the District suggest one process this concern is with the sense that if ■■■ is answering questions with a 75% accuracy, there is a

presumption that there is comprehension, and further, the parent had open access to [REDACTED] teacher, [REDACTED] during the spring of 2021 to raise concerns. [Tr 151-152] And, the progress reflect progress. [152-153]

Next, at hearing, the Petitioner urged that because the IEP spanned two years, use of the phrase “grade level passage” somehow condemned the goal. (Tr. 158.) The District, however, demonstrated that the use of that phrase just means the goal operates much like one with benchmarks. The aims of the two are the same: for [REDACTED] to read seventh grade material with requisite accuracy by the middle of [REDACTED] seventh-grade year. (Tr. 220-21.) The math goal operates much like the reading goal. (Ex. 236; Tr. 218-19.)” [Respondent’s Post-Hearing Brief]

Counsel for the Respondent continues: “Annual goals aside, the IEP includes “special education” service descriptions. It was incorrectly assumed that since PowerSchool generates an empty block in the IEP form titled “Service Type,” the block had to be filled. (See Tr. 205-206.) But that is a formatting matter—not a FAPE matter. And the IEP plainly includes “statement[s]” that explain and detail, for instance, that the Board staff will use research-based strategies to deliver reading instruction to [REDACTED] in defined quantities, times, and locations. (Ex. 237; Tr. 205-206.) That fulfills not only what the IDEA envisions; it also fulfills what it requires.” [Respondent’s Post-Hearing Brief]

Accordingly, on the second claim, the hearing officer finds the Petitioner did not prove the IEP goals violated the IDEA’s rules, nor met the burden of proof proving the goals violated IDEA.

The Third and final issue is as follows: Has the student met measurable annual goals or made progress towards mastery as shown in documentation of progress and if not, was a FAPE denied the Petitioner

The parent of the Petitioner raised some concerns regarding the progress of the Petitioner. ██████ asserted at hearing that, prior to the production of discovery for hearing, she had not seen many of the documents on annual goal progress. [TR 113] Specifically, she testified that she had not seen the progress reports sent on January 21, 2021; March 29, 2021-comprehension; March 29, 2021, nor did her signatures appear to be on such forms. [ P ex 177-179] While the lack of signatures is not unusual since much was likely being done virtually at this time, this contention remains perplexing and difficult to fathom based on the clear sense that the parent was active and involved in ██████ education and schoolwork despite her large family.

Reviewing the history of the IEP with the alleged issues as to goals, one finds that the IEP developed on January 20, 2021, stated ██████ “read excerpts from three fifth grade passages. ██████ median accuracy was ██████ which is frustrational range, and ██████ median rate was ██████ words per minute.” [R page 151] There is no mention of ██████ instructional or independent reading level. During the taking of testimony, ██████ provided some explanation when she answered the question about ██████ goal had ██████ reading ██████ and ██████ grade passages: “It (above assessment) says to me had I given ██████ a ██████ or ██████ grade passage, ██████ would have performed better. ██████ might have exceeded their goal”. [TR 75]

During the classroom observation conducted by ██████ on November 3, 2020 she stated: “██████ scrolls through internet pages on subject. The classroom teacher redirects and encourages ██████ to use ██████ AT tools for read aloud ██████ needs them”. [R page 101]

The Re-evaluation Eligibility Meeting was held at the same time as the IEP Review meeting. The RIAS-2 had been administered and [REDACTED] earned a Composite Intelligence Index of [REDACTED] [R page 135]. The Record Form shows a Verbal Intelligence Index of [REDACTED] and a Nonverbal Intelligence of [REDACTED] [R page 137] and these scores are reported on the Eligibility Decision Report. [R page 139]. During the taking of testimony, when questioned by the counsel for the Petitioner, [REDACTED] noted no one had explained the results of the RIAS-2 to her. [TR 108-109] The Hearing and Vision screening dates were recorded as 11/07/2017. (There was nothing in the record that indicated vision and hearing screening were updated at the time of the re-evaluation.) The results of the DAB-4 were reported as Listening Comprehension – [REDACTED] Synonyms – [REDACTED] Spoken Language Composite – [REDACTED] Alphabet/Word Identification [REDACTED] Reading Comprehension – [REDACTED] Reading Composite – [REDACTED] Writing [REDACTED] Mathematics Reasoning – [REDACTED] Mathematics Calculations – [REDACTED] Mathematics Composite – [REDACTED] [R page 142] The student was found eligibility for services in the area of [REDACTED] [R page 144]

[REDACTED] started working with [REDACTED] in January of 2021 when [REDACTED] was at [REDACTED] She was also involved in the IEP developed in January 2021, explaining how ‘The Eligibility process was started while [REDACTED] was still at [REDACTED] Or I will say the reevaluation process was started while [REDACTED] was at [REDACTED] And the eligibility meeting was held once [REDACTED] got to [REDACTED] [Tr pg 176] Under questioning from the Petitioner’s counsel she explained the data utilized in the revaluation process and development of the January 2021 IEP. “So this assessment data is from a functional reading assessment that was given while [REDACTED] was at [REDACTED] When I’m reading this, I see that [REDACTED] has some foundational phonics skills. [REDACTED]



accurate—reading accuracy is at █ percent, which is the functional frustrational range. And then █ rate is a little bit lower than where I would want it to be.’ [Tr pg 184]

In response to questions posed by Petitioner’s counsel, █ testified as to █ having progressed well and that █ was engaged in what they were doing while in her class during the Spring of 2021. She further explained that while █ had started at 5<sup>th</sup> grade reading level with █ accuracy and █ words per minute, by April he was at █ accuracy at █ words per minute. [ Tr pg 180] Additionally, █ explained that █ made gains in accuracy and fluency under the program utilized that spring of 2021. ‘I used a reading intervention program called Visualizing and Verbalizing, which is from the Lindamood-Bell Learning Center. And that’s a program primarily focused on comprehension. But, as a result of █ participation in that program, █ also made gains in accuracy and fluency.’ [Tr pg 188] Further, she explained that she saw an increase in confidence in █ by end of the semester. ‘I saw a gain in confidence with █ █ always participated in class and was very engaged and willing to speak up and was very engaged and willing to speak up and encourage █ classmates. So that continued. But I did see an increase in confidence.’ [Tr pg 190] Finally, █ testified that at the end of the spring semester of 2021 that █ told her she was proud of █ and █ progress and offered to make herself available for assistance over the summer, but █ did not elect to reach out to her for such assistance. [Tr pg 152]

Thereafter during the 2021-2022 school year, on █ first quarter report card, █ earned a █ in █ general education math class, which was a concern for █ and to the math teacher. An IEP amendment was held, and a math goal was added. [R page 199 and 212,213] Ms. K was also concerned about the amount of stuttering she had noticed in █ speech. The

speech/language therapist conducted a stuttering evaluation and found [REDACTED] demonstrated at very mild fluency disorder. [R page 232] An IEP goal for speech fluency was added on December 15, 2021. [R page 235 and 237] There are no indications in the record that [REDACTED] was screened for any other language issues by the speech language therapist, only that which was requested. Given the low scores on the DAB-2 and the discrepancy in verbal and non-verbal scores on the RIAS, one would think that the team would have reviewed this detail to determine if further testing warranted. However, the team made their decision, and it is not the job of the undersigned to second guess the team. *Board of Education Hendrick-Hudson v. Rowley*, 458 U.S. 176, 206 (1982).

The ACAP Cumulative Record for Grade [REDACTED] has English Language Arts at Level [REDACTED] and Math at Level [REDACTED]. Looking at the Reporting Categories, Reading is [REDACTED] stars (on track) while writing and language are [REDACTED] star (support needed). [R page 151] The only other test score reported in written expression are on the DAB-4. [R page 142] Most of the work samples are from work online. One work page stood out in the exhibits presented. It was a sample on which [REDACTED] wrote [REDACTED] name in cursive and printed in manuscript. Letters appear poorly shaped. Some of the words are circled in odd-shaped circles. Again, one would think that the team would have reviewed all the information to determine if any other evaluations are warranted though it is not the undersigned's duty to second guess their thinking.

The Term Grades for the 2<sup>nd</sup> quarter were reported and [REDACTED], in [REDACTED] grade, had a [REDACTED] in English Language Arts, a [REDACTED] in Mathematics, a [REDACTED] in Reading, a [REDACTED] in Science, and a [REDACTED] in Social Studies. [R page 250] In January of 2022 Ms. [REDACTED] emailed [REDACTED] about the progress report from the second quarter, while [REDACTED] was at [REDACTED] and stated: "I'm really not understanding

why █ grades are so low, █ barely brings anything home, which █ does it's all on █ computer. There seems to be some type of issue with █ not getting any paper work for home, even █ tribe project we had nothing to go by. Is there anything you can do to help me with figuring out where the issue is?" [R page 270] She continues "...This is █ current grades that came home today. There is more than one class that █ is apparently struggling in. I thought all of █ teachers were on the same page when we had our IEP meeting. They know what they are supposed to do for █ It's in █ paperwork. I still haven't received goal reports for █ either" [R page 271] Clearly the parent is concerned about progress, but it is also clear, she has a path to voice her concerns. And, the record shows that █ promptly responds to such inquiries. [R page 271]

In the *Respondent's Post-Hearing Brief*, counsel for the states: "the Petitioner alleges █ did not meet "measurable annual goals"—i.e., that █ did not progress...But on its face, this claim is totally undercut by *Andrew, L.J., Amanda S.*, and persuasive authority on point regarding post-IEP "progress." While the IDEA guarantees a plan of a certain caliber, it does not "promise[s] any particular [educational] outcome." *Andrew*, 137 S.Ct. at 998. Counsel continues: "█ nonetheless did progress in the 2020-21 and 2021-22 school years. (Tr. 73-77.) █—a CALT-certified language specialist—saw it. (See Tr. 179-80, 187, 190-91). And █—who spends upwards of an hour a day with █—saw it, too. (Tr. 217, 220-23.) Objective data buttressed these views, and the Petitioner admitted she had no reason to question much of that data. (Ex. 151, 231; Tr. 148, 154, 216.)" [Respondent's Post-hearing Brief]

In sum, while there may have been some missteps in communication and not enough explanation of scores, there is no evidence provided that the Petitioner failed to make progress.

## 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 *Endrew 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.

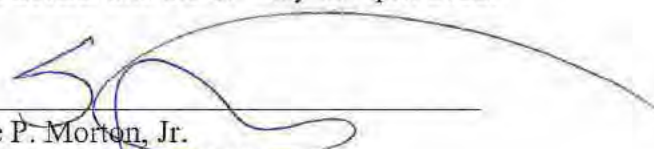
### **VII. Specific Findings**

- 1) The Petitioner was not denied a FAPE with respect to the District's provision of services to the Petitioner as an incoming transfer student with an IEP in place from [REDACTED] prior school during the identified time during the fall of 2020.
- 2) The Petitioner was not denied a FAPE with respect to the IEP developed by the District in January 2021, as amended late in 2021, the 'current IEP', in that the measurable annual goals were compliant with the standards called for under the IDEA.
- 3) The Petitioner was not denied a FAPE with respect to the fact that the child did make progress towards mastery as shown in documentation of progress, and as such, there is not sufficient evidence to support a claim of a denial of a FAPE to the Petitioner.

### **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, and ENTERED** this the 29<sup>th</sup> day of April 2022.

  
\_\_\_\_\_  
Steve P. Morton, Jr.  
Due Process Hearing Officer

A copy of this Order has been forwarded to the Honorable James D. Sears, the Honorable Carl Johnson, and the Honorable Andrew Rudloff via email.  
cc: -Elizabeth Herndon