ALABAMA STATE DEPARTMENT OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

[W.H.O.],	)	
	)	
Petitioner,	)	**Case No. 24-63**
	)	
v.	)	
	)	
T.C.S.S.,	)	**Hon. Jeffrey J. Courtney**
	)	**Hearing Officer**
Respondent.	)	

To: [Parent], Esq.

Erika P. Tatum, Esq.
Hill, Hill, Franco, Carter, Cole & Black, P.C.
425 South Perry Street
Montgomery, AL 36104
etatum@hillhillcarter.com
VIA EMAIL AND USPS

PROCEDURAL HISTORY

This matter comes before the undersigned Hearing Officer on Petitioners' Complaint for Due Process (hereinafter, at times, the "initial Complaint), filed on or about April 9, 2024, followed by the Petitioner's First Amended Complaint for Due Process, which was filed without objection from the Respondent ([School District]) on or about August 30, 2024 (hereinafter, "Amended Complaint"). The undersigned Hearing Officer (hereinafter, at times, "HO"), Jeffrey J. Courtney, was appointed to serve as such on April 9, 2024 by the Alabama State Department of Education (ALSDE). The response to the initial Complaint was filed by the Respondent on or about April 19, 2024 and to the Amended Complaint on or about September 9, 2024. A

resolution meeting pursuant to the initial Complaint was held on or about April 24, 2024, and the resolution meeting pursuant to the Amended Complaint was held on or about September 9, 2024. However, neither meeting yielded an agreement on any issues in this cause. A Pretrial Order was initially issued on or about July 26, 2026, followed by an Amended Prehearing Order that was issued on or about September 29, 2024. A Prehearing Conference was held on November 12, 2024. Personally identifiable information for the Petitioner is attached hereto as appendix A.

The Parties initially advised that the Due Process Hearing in this cause could be concluded in only one day. As such, a Due Process hearing in this matter was scheduled for only one day, specifically, November 14, 2024 and the subject hearing commenced on the said date. However, after a full day of testimony and submission of evidence by the Petitioner, the remainder of the hearing was continued to December 5, 2024. The hearing was a closed hearing. The Petitioner was represented by attorney, [Mother]., who is also the mother of the Petitioner, and the Respondent was represented by its attorney, Erika P. Tatum, Esq. The Petitioner entered into evidence exhibits P-1 to P-18 and the Respondent entered into evidence exhibits D1 to D5. A more detailed list of admitted exhibits is attached as Appendix B to this decision. The following individuals testified in this cause for the Petitioner: (1) [Father]; Father of the Petitioner; [Occupation], also a licensed CPA and a member in good standing of the Alabama State Bar; (2) [Parent]; a mother of two children that were in the same classroom as was the Petitioner in the 2023-24 school year; (3) [Teacher]; the homeroom teacher, a service provider and case manager for children in the Petitioner's Pre-K inclusion classroom; [Teacher] has a Master's Degree, attained "highly qualified" status per state regulation and is "certified"

for early childhood, Pre-K through third grade; (4) [Mother]; Mother of and attorney for the Petitioner. Testifying for the Respondent was: (1) [Preschool Specialist]; a Pre-K Specialist, who holds 5 degrees in psychology, including two master level degrees, an EDS degree and a PHD in school psychology. She is a Pre-K specialist who performs evaluations, referral meetings eligibility testing and assists in placing children in programs for the Respondent; (2) [Principal]; the Principal at the Petitioner's school during the school year 2023-2024; (3) [Related Service Provider 1]; the Petitioner's speech language pathologist with a Master of Science in Speech Language Pathology; and (4) [Related Service Provider 2]; a speech language pathologist who worked with the Petitioner.

JURISDICTION

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Act (hereinafter, "IDEA"), 20 U.S.C. § 1400 *et. Seq*., and the Alabama Administrative Code, Chapter 290-8-9.

BURDEN OF PROOF

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

GENERAL BACKGROUND

At the time of the filing of the initial Complaint in this cause, the Petitioner was [age] years old and later turned [age] years old during the pendency of this matter. The Petitioner attended a "Pre-K" school during the 2023-2024 school year. Prior to the beginning of the school year, the Petitioner's Eligibility Decision determined [Disability Category 1] and [Disability

Category 2]. The Petitioner's parents are now dissatisfied with the Petitioner's placement during the 2023-2024 school year as they contend that it was not in compliance with the Petitioner's Individualized Education Program (IEP), and that the Respondent did not provide necessary staffing and ancillary services, specifically, potty training. Additionally, the parents felt they were materially and intentionally deceived by the Respondent as to what was represented to them would be the nature of the Petitioner's inclusive classroom placement and the services that would be provided to the Petitioner. After being advised by the Respondent that the Petitioner's prospective placement for the 2024-25 school year was not in accordance with expectations of the Petitioner's parents, the parents placed the subject child in a private school that the parents opined was a better option for the Petitioner. The Petitioner seeks reimbursement for private school tuition, reimbursement for potty training services and an award of attorney fees and expenses.

ISSUES

The issues to be determined in this matter are as follows:

A. Whether the Respondent provided a free appropriate public education (FAPE) to the Petitioner in the Petitioner's least restrictive environment (LRE).

B. Whether the Respondent is required to reimburse the Petitioner's private school tuition for the school year 2024-2025.

C. Whether the Respondent is required to reimburse the Petitioner's costs for potty training.

D. Whether the Respondent is required to pay the Attorney fees and costs of the Petitioner associated with this matter.

STATEMENTS OF FACT

Pursuant to the parties November 11, 2024 Joint Statement of Stipulations of Fact which the parties were ordered to submit prior to the commencement of the Due Process Hearing in this cause, the parties agreed to the Petitioner's name, date of birth and age, as well as the name of the school that the Petitioner attended during the 2023-2024 school year ([School 1]). Further, the parties agreed to the dates that the Petitioner filed the initial Complaint and Amended Complaint in this matter, as well the existence of an IEP for the Petitioner during the 2023-2024 school year that included a least restrictive environment (LRE) code of 20. The remaining statements / findings of fact are set forth below within the context of the discussion of issues.

DISCUSSION OF ISSUES

A. Whether the Respondent provided a free appropriate public education (FAPE) to the Petitioner in the Petitioner's least restrictive environment (LRE).

In effect, the following are set forth in the Petitioner's Post-Hearing Brief as reasons to support the assertion that FAPE was denied to the Petitioner:

(1) [School District] placed the Petitioner in a classroom that was a self-contained, special education classroom, thus failing to educate the Petitioner in the least restrictive environment for the Petitioner;

(2) [School District] failed to provide the Petitioner with a classroom that was adequately staffed;

(3) [School District] failed to provide the Petitioner with proper toileting supports.

The Petitioner's Least Restricted Environment is described on the Petitioner's IEP as, "20-Reg. Early Childhood Prog. At Least 10 hrs. Per Week Rcvg. Majority of Sec. Ed. Servs. In the Reg. Early Childhood Environment." In support of reason (1) above, the Petitioner relies heavily on the assertion that a page from the ALSDE website entered into evidence as P-18 and entitled, "Quick Tips for Preschool; INDICATOR 6: PRESCHOOL LRE," is a definitive, authority / mandate for the IEP LRE requirements which apply to the Petitioner in this cause. The webpage also included a description of "LRE 20" as: "Attends a regular early childhood program at least 10 hours per week receiving the majority of special education services in the regular early childhood environment." Such is abbreviated herein as "I6/LRE 20," (meaning Indicator 6/LRE 20). Further, the webpage provided, "Examples: LEA inclusion classes…community preschool classes…with at least 50% non-disabled children." The Respondent argues in its post-hearing brief that such is not a definitive authority / mandate, but that the webpage provides "monitoring indicators for district-operated preschool programs with classes for children with disabilities and is tied to date collection required from states to the United States Department of Education report on the number of preschool children with disabilities attending a regular early childhood program."

The Petitioner elicited testimony from [Teacher] on the definitive nature of I6/LRE 20 as shown on Exhibit P-18. [Teacher] testified that she was "very familiar" with that document, and that it "goes over Pre-K LRE and breaks down what it means, gives examples and what it is not." She further testified that what it meant to her was that it was referring to an "LRE inclusion class and that a class of 50% non-disabled children is written into those examples." On cross examination, [Teacher] testified that she had discussed LRE Codes with the Petitioner's Mother

and told her that "the LRE Code was not being met." She did not specify when such occurred, only that she had talked with her about such previously. On cross examination, [Teacher] testified that her authority for these assertions was "the State guidelines" and that the said 50% typical peer inclusion is a requirement "when it's an inclusion classroom." She also testified that she received the information through [School District] that was similar to P-18, but that she did not know that the 50% mark was not required by the IDEA.

[Preschool Specialist] testified for the Respondent on the I6 / LRE 20 question and described that the P-18 exhibit document was for the purposes of monitoring by the ALSDE. She further defined monitoring by the ALSDE as, "It's where they review data, different data points that we have within our school RLEA, and one indicator is the preschool LRE." Additionally, [Preschool Specialist] testified that the said 50% requirement is a "target." On cross examination, [Preschool Specialist] testified that the 50% of typical peers inclusion level in a classroom is a target, and that it was an indicator "that we look at trying to get these numbers." She further testified that "This is something the State Department has pushing us to get our numbers, trying to get us to have more inclusive environments in the preschool setting, in the preschool world."

A review of P-18 shows that there are "Measurements" set forth within Indicator 6, including, but not limited to, LRE 20. Further, the language "targets for Indicator 6" and the data from various FY, "was used to establish the new targets below," is clearly set forth on the exhibit. Coupled with the relevant testimony, this Hearing Officer determines that Indicator 6 / LRE 20 is not a definitive mandate that the Respondent was required to achieve in order to comply with any applicable law and/or provide FAPE, but that its meaning is consistent with the

testimony of [Preschool Specialist]. As such, the I6 / LRE 20 contention from the Petitioner is not probative to the final decision in this matter on the issue of LRE.

Both of the Petitioner's parents attended the Petitioner's May 11, 2023 IEP meeting for the 2023-2024 school year. Following that meeting, the parents testified that they were of the impression that the Petitioner would be in a regular classroom with typical peers of the Petitioner's age. Although zoned for [School 2], it was recommended to the parents that the Petitioner attend [School 1] because it was the most suitable environment for the Petitioner's needs and that the Petitioner was not going to be placed in a self-contained classroom. In August of 2023, the Petitioner's parents attended the open house at [School 1]. Their assessment was that the classroom itself was "a bit separated" and that the other children were not "typical peers" of the Petitioner, but had similar challenges experienced by the Petitioner. The parents were exceptionally disappointed and felt that what they saw was not representative of what they were told, nor of what was set forth in the IEP. However, the parents did not raise an LRE allegation to the Respondent until their initial Complaint was filed in this matter, on or about April of 2024. In any event, the parents contend that the Petitioner was placed in a self-contained classroom after being told that the Petitioner would be in an inclusive classroom.

[Preschool Specialist] testified that the school that was in the Petitioner's residential zone, [School 2], did not have a [age] program taught by a special education class and that [School 1] was better suited for the Petitioner because of such, as well as because of the fact that [Teacher] would be a good teacher for the Petitioner. [Principal] testified that the Petitioner's classroom was intended to be an inclusive classroom and was in fact, not a self-

contained classroom due to the time that the Petitioner would spend with typical peers outside of the actual classroom setting, which would include lunch, recess / breaks and Physical Education classes.

[Teacher's] testimony was that the 2023-24 school year amounted to a self-contained classroom setting for the Petitioner, and that she previously had exclusively self-contained classrooms in years prior. She also testified that she did not think that the Petitioner needed to be in a self-contained classroom. However, during the subject school year, she was aware of the Petitioner's LRE requirement and stated that she made efforts to assist regarding the Petitioner's LRE concerns, but not with specificity to the Petitioner. She maintained that her efforts were as an advocate for all of her students. [Related Service Provider 1] testified that the only typical peer in the classroom for the Petitioner was there for only "one or two months." [Principal's] testimony did reflect that all other children in the Petitioner's classroom had an IEP. The Petitioner asserts, in effect, that such is a de facto placement of the Petitioner in a self-contained classroom, if not an intentional placement.

Testimony from [Parent] was that her two children were in the same classroom with the Petitioner during the subject 2023-2024 school year, and that the classroom did not include any typical peers that would promote an LRE for the Petitioner.

C.F.R. § 300.114(2)(i) requires the Respondent to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled and that the IEP must identify a student's least restrictive environment. Such is also set forth in § 290-8-9-.06 of the *Alabama Administrative Code.* Regardless of the I6 / LRE 20 mandate argument,

the Petitioner's IEP identified the Petitioner's IEP as, "20-Reg. Early Childhood Prog. At Least 10 hrs. Per Week Rcvg. Majority of Sec. Ed. Servs. In the Reg. Early Childhood Environment."

[Preschool Specialist] testified that the Petitioner's LRE was discussed at the May, 2023 IEP meeting wherein the parents were present and that there was "heavy" discussion about the benefits of being in [Teacher] class and her success with children meeting their goals and moving onto kindergarten and eventually being in a general education setting. Accordingly, the apparent line of thinking was that [School 1] would be a good placement for the Petitioner. The Petitioner's parents did not object to placement of the Petitioner at [School 1], nor did they subsequently object despite their concerns and disappointments until the initial Complaint in this cause was filed.

Additionally, [Preschool Specialist] testified that the Petitioner did not receive all [Petitioner's] special education services with non-disabled typical peers because the Petitioner demonstrated the need for specialized instruction to better access the preschool curriculum. Efforts were made outside of the classroom to include the Petitioner with [Petitioner's] nondisabled peers during daily physical education, recess and lunch, as well as music classes and school events.

The Respondent, through the testimony of [Preschool Specialist] asserts that classrooms may be made to be inclusive or more inclusive by recruiting parents / children from other schools who did not get into a Pre-K program at those schools and were placed on a waiting list to get into the school where they attempted to enroll, to come to a school with a Pre-K vacancy. [Preschool Specialist] testified that no waiting list of children who did not get into the Pre-K program existed for [School 1] and [School 2] and that it made extensive and good-faith efforts

to find typical peers for the Petitioner's class by attempting to recruit from waiting lists for children who did not get into Pre-K programs from various other schools, including utilizing a list from the individual who was then serving as the Respondent's Pre-K coordinator, and even expanded its efforts to search other schools in the district that were not as close to the Petitioner as [School 1] and [School 2], the two schools closest to the Petitioner. Contrarily, [Principal] testified that waiting lists did exist for both [School 1] and [School 2], but that the parents of these children were contacted prior to the start of the school year to let them know of another classroom at [School 1]. The Petitioner asserts that efforts were not made in good-faith and that witnesses could likely be produced that would show that families on the existing waiting lists had not been contacted. Although [Father] and [Parent] did testify that they had never been contacted in past years, nothing was produced at the hearing to definitively prove the Petitioner's assertions on the issue or disprove [Preschool Specialist's] accounts of her attempts to make the Petitioner's classroom more inclusive.

The IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F. v. Douglas County School District Re-1*, 137 S.Ct. 988, 1001, (2017). Although substantial time and energy in this case is devoted to LRE issues, it is of paramount importance to acknowledge the Petitioner's progress during the 2023-2024 school year. Specifically, the Petitioner mastered all of [Petitioner's] annual IEP goals. The Petitioner's parents had no complaints as to the classroom teacher's efforts or the efforts of the Petitioner's speech language pathologist. In fact, the Petitioner's teacher commented at one point during the 2023-2024 school year regarding the Petitioner, "Wow, at the growth this nine weeks. (The Petitioner) has shown me a plethora of

skills, and this is one of them. I am most likely to be able to see this skill presented when (the Petitioner) is able to use art and digital tools such as learning games. Great job, (Petitioner)." Further, the Petitioner's special education teacher reported during the school year that the Petitioner's progress was "HUGE" and that the Petitioner was communicating so much more and commenting / answering most questions with appropriate answer." No evidence was produced by the Petitioner to dispute the reported progress.

Next, the Petitioner argues as reason (2) that the classroom setting was inadequately staffed and that such denied FAPE to the Petitioner. [Teacher] testified that the classroom had a "revolving door" of [Employment Agency] subs that were largely incompetent, behaved inappropriately and even slept at times during the school day. She also testified that she felt there was a safety risk in the classroom. [Parent] testified to her opinion of unsafe conditions that included a day with only one person supervising all seven children in the classroom, wherein she witnessed that the classroom was "a mess" and that her own children were quite upset. The Respondent asserts via testimony from [Principal] that during the 2023-2024 school year the Petitioner's classroom had a special education teacher and two paraprofessionals working with seven students three days a week and five students two days a week. In addition, the Respondent asserts that the Petitioner was provided with summer services by a Speech Language Pathologist and a paraprofessional that worked with the Petitioner on daily living skills, general hygiene needs, restroom and academic skills. No evidence was produced by the Petitioner that progress toward the Petitioner's IEP goals was impeded as a result of inadequate staffing.

With respect to reason (3) set forth above, there was discussion between the parties that toilet training was an area of concern. The Petitioner asserts that the classroom the Petitioner was assigned to was further away than it should be for students with such issues (apparently other children in the classroom had the same issue), and that they had to share a bathroom with older students, and that other Pre-K classes without the level of need in this area were provided with bathrooms that were closer in proximity. However, the Respondent asserts that the Petitioner's classroom was better suited for such because it was closer to the sensory room where the changing table was located, and that it also had access to a bathroom on the hallway. No evidence was produced by the Petitioner that progress toward the Petitioner's IEP goals was impeded as a result of inadequate toilet training or access to bathrooms.

B. Whether the Respondent is required to reimburse the Petitioner's private school tuition for the school year 2024-2025.

Private school tuition reimbursement may be ordered by a Hearing Officer pursuant to § 290-8-9.10(7) of the *Alabama Administrative Code* if FAPE was not made available to a child and the child was placed in a private school or facility. Such an award may be reduced or denied if the parents did not inform the IEP team at the most recent IEP meeting that they were rejecting the placement proposed by the agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or provide notice of the proposed action at least 10 business days prior to the removal of the child from the public school. Further, the parents must show that the private placement is appropriate.

The Petitioner was enrolled in a local private school on July 30, 2024 after an email on July 29, 2024 from the parents advised the Respondent of the placement rejection. The Petitioner did not learn until July 17, 2024 of the Respondent's placement proposal. As such, the Petitioner was not afforded a 10-day time frame to provide the requisite notice. The date which was 10 business days from July 17, 2024, was July 31, 2024. Accordingly, the equities balance in favor of the Petitioner on the issue of the notice date because there was not enough time to give the 10-business day notice. While the parents of the Petitioner provided evidence that the Petitioner is doing well at the private school and that the Petitioner is enjoying the private school, the Petitioner did not produce any evidence from the private school that the Petitioner is now attending that the private school is an appropriate placement. Additionally, the July 29, 2024 email did not state that such would be at public expense, although it was disclosed sometime materially later that the amount of reimbursement being sought was / is $10,705.20.

C. Whether the Respondent is required to reimburse the Petitioner's costs for potty training.

The Petitioner is requesting a reimbursement in the amount of $1,000.00 for the costs for potty training the Petitioner. The gravamen of the Petitioner's argument is that such was necessitated by the Respondent's failure during the 2023-2024 to address the Petitioner's issues by providing adequate access to a bathroom and supports, despite being expressly told by [Preschool Specialist] that the [School 1] classroom was a good fit for the Petitioner because of additional toileting support. The Petitioner cites § 290-8-9-.08(17) of the *Alabama Administrative Code* as authority to award the cost of potty-training expenses to the Petitioner,

although such appears to address the award of attorney fees. In any event, testimony from [Father] revealed the potty-training was not a requirement for enrollment in the private school where the Petitioner is now attending. Further, testimony revealed that the Petitioner has had toileting issues at the private school the Petitioner is attending, despite the potty training for which the Petitioner seeks now reimbursement.

D. Whether the Respondent is required to pay the Attorney fees and costs of the Petitioner associated with this matter.

The Petitioner also relies on § 290-8-9-.08(17) of the *Alabama Administrative Code* as authority to award attorney fees to the Petitioner in this cause. However, a review of this code section reveals that such only authorizes, "the Court" to award attorney fees. Such is further codified in 20 U.S.C. § 1415(i)(3)(B)(i) that provides that *the court* (emphasis added) may award reasonable attorney fees. The Respondent cites 34 C.F.R. §§ 300.517 and 300.507 as authorities that prohibit this Hearing Officer from awarding attorney fees in this matter, as well as § 290-8-9-.08(9)(c)12(iv)(I)(X) of the *Alabama Administrative Code*. Because this tribunal is administrative in nature, and not a Court of requisite jurisdiction, it is clear to this Hearing Officer that he does not have the authority or jurisdiction to award attorney fees in this matter.

CONCLUSIONS

A. This Hearing Officer concludes that the Petitioner was provided a FAPE in the Least Restrictive Environment. The Petitioner mastered all goals and made meaningful progress during the 2023-24 school year. Further, the Petitioner's assertion that "Indication 6: LRE 20" provided a mandate for the Respondent per the ALSDE is found to be incorrect. The Respondent attempted to provide inclusive activities outside the classroom, but also attempted

to recruit other children to make the Petitioner's classroom more inclusive. The Petitioner did not receive all special education services with non-disabled typical peers because the Petitioner demonstrated the need for specialized instruction to better access the preschool curriculum, as described by [Preschool Specialist].

B. Because a FAPE was provided to the Petitioner, the Respondent is not required to reimburse the Petitioner's private school tuition for the school year 2024-2025.

C. This Hearing Officer finds no basis for which the Respondent should be required to reimburse the Petitioner's costs for potty training.

D. The Respondent is not required to pay the Attorney fees and costs of the Petitioner associated with this matter, as this Hearing Officer is without the authority and/or jurisdiction to do so.

ORDER

It is ordered, adjudged and decreed that any and all requests of the Petitioner are denied and that this matter is dismissed.

DONE AND ORDERED THIS 24TH DAY OF FEBRUARY, 2025.

/s/ Hon. Jeffrey J. Courtney____
Hearing Officer
P.O. Box 100
Wetumpka, AL 36092
334-567-2545
334-567-2547 fax
jeffcourtney@jcourtneylawfirm.com

c: ALSDE Due Process

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by the hearing officer's decision may bring a civil action in any State court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy. 20 U.S.C. § 1415. The party bringing the civil action must file a notice of intent to file a civil action within 30 days after receipt of the hearing decision. See Ala. Admin. Code 290-8-9-.08(9)(c)16. The civil action itself must be filed within 30 days of the filing of the notice of intent. *Id.*

APPENDIX A – PERSONALLY IDENTIFIABLE INFORMATION

****ONLY SET FORTH ON MAILED COPIES, NOT SET FORTH ON EMAIL SUBMISSION****

APPENDIX B – EXHIBITS

	Transcript Page
Petitioner's Exhibit 1 (Notice and Invitation to Meeting)	39
Petitioner's Exhibit 2 (IEP 8/9/23 to 5/23/24)	41
Petitioner's Exhibit 3 (Notice & Eligibility Decision)	55
Petitioner's Exhibit 4 (Complaint for Due Process)	62
Petitioner's Exhibit 5 (7/17/24 Letter to [Parent])	65
Petitioner's Exhibit 6 (7/24/24 Email from [School Administrator])	69
Petitioner's Exhibit 7 (TA Enrollment 24-25)	70
Petitioner's Exhibit 8 (7/29/24 Email to [Board Attorney])	73
Petitioner's Exhibit 9 (28 Color Photos)	76
Petitioner's Exhibit 10 (8/23/24 Star Diagnostic Report)	79
Petitioner's Exhibit 11 (9/17/24 Parent-Teacher Conference)	81
Petitioner's Exhibit 12 (TA Institution Balances)	87
Petitioner's Exhibit 13 (1st Amended Complaint for Due Process)	88

E X H I B I T S, (CON'T)