

**BEFORE THE MISSISSIPPI DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION**

**STUDENT, FILED BY THE STUDENT'S
PARENT AND NEXT FRIEND,¹**

COMPLAINANT

V.

CASE NO. 08062018-3

SCHOOL DISTRICT²

RESPONDENT

DECISION AND ORDER

1. This is a proceeding pursuant to the Mississippi "State Policies Regarding Children with Disabilities Under 'The Individuals with Disabilities Education Act Amendments of 2004'"³ (collectively referred to as the Policies or the IDEA, herein), and involving a minor (referred to as the Student, Complainant, or Child, herein).

PARTIES

2. Complainant (whose interests were represented by ■■■mother and is called the Student, Child, or Complainant, herein) is a ■■■■■■■■■■ with a primary special education eligibility ruling of multiple disabilities with a subcategory ruling of autism and intellectual disability. The Respondent is the School District (Respondent, District, or LEA, herein) in which

¹Parent and Student are identified by name on the cover sheet to the original of this document filed with the Mississippi Department of Education and in the file with that department corresponding to the above case number.

²The School District is identified by name on the cover sheet to the original of this order filed with the Mississippi Department of Education and in the file with that department corresponding to the above case number.

³Which Policies were adopted under the authority of "The Individuals with Disabilities Education Act ("IDEA")," Public Law 101476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")," Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300, and the Mississippi Standards and Procedures for the Education of Exceptional Children, Mississippi Code §§ 37-23-133 through -150. The hearing officer and the Mississippi Department of Education have jurisdiction over these proceeding pursuant to the statutes and code sections cited.

⁴■■■■■ at the time of filing but now ■■■, having been born ■■■■■■■■■■

the Student is enrolled. This proceeding was initiated by the Parent by the filing of a Complaint for Due Process received by the District (District or Respondent, herein) and the Mississippi Department of Education on August 6, 2018. The Student was enrolled in the District and attending a District [REDACTED] school at the time the due process hearing request was filed.

ISSUES AND RELIEF REQUESTED

3. The Complainant, through its complaint, raised procedural and substantive issues in this matter, as follows:

1.
 - a. Whether the parent was informed of the LRE continuum and capable of consenting to the homebound environment;
 - b. whether the LEA provided a complete copy of the educational record prior to any resolution meeting, or to this date; and
 - c. whether the LEA provided a copy of the school's homebound policies and procedures prior to any resolution meeting, or to this day.
2. Whether the LEA with the use of supplemental aids and services could have mainstreamed the child in the general education environment?
3. Whether the LEA has mainstreamed the child to the maximum extent appropriate, including:
 - a. whether the district has made reasonable efforts to mainstream the child;
 - b. the educational benefits available to the child in regular class with supplements; and
 - c. the possible negative effects on the other students, including the child.
4. Whether the Child was denied FAPE for the two years preceding the filing of the Complaint for Due Process, and, if so, whether compensatory education in the number of hours [REDACTED] has been denied FAPE, in the form of summer programs at the conclusion of the 2019 Spring Semester, should be awarded;

5. Whether the Child has been denied FAPE because ■ has been denied transportation services? If yes,
 - a. Whether the transportation will require supports from an RBT;
 - b. whether an occupational therapist should perform an assessment to provide adequate caregiver instruction regarding transportation of the child with autism spectrum disorder, and to assess the need for adaptive equipment, environmental modifications, sensory strategies, and behavioral strategies.
 - c. whether a 1:1 RBT paraprofessional is required to accompany the petitioner during all travel from the home to the school and back home.
 - d. whether an occupational therapist and BCBA should train the 1:1 RBT to fidelity on the transportation requirements necessary for transportation as a related service; and
 - e. whether the parents are entitled to reimbursement of the parent at the federal mileage rate, and for the parent's time, in transporting the child as a result of unlawful duty-shifting by the LEA.
6. Whether the Child has been denied FAPE because ■ has been denied an appropriate BCBA evaluation, an appropriate BIP, and an RBT trained to fidelity to implement a BIP designed to include petition in an educational environment with ■ non-disabled peers to the maximum extent.
7. Whether the Child should at all time be in the physical presence of and receive the assistance of a designated one-on-on paraprofessional who shall be trained by the BCBA, in order maximize the LRE.
8. Whether the Child has been denied FAPE because ■ has been denied the opportunity to participate in nonacademic and/or extracurricular activities with his/her nondisabled peers.
9. Whether the Child has been denied FAPE because ■ has been denied a specially designed physical education?
 - a. Whether an appropriate adaptive physical education evaluation is required for the purpose of determining the Student's eligibility for adaptive physical education services;
 - b. Whether the child is entitled to compensatory physical

education in the number of hours ■ has been denied FAPE, in the form of summer programs at the conclusion of the ■ Spring Semester.

FACTS

4. The due process hearing convened September 19, 2018. The hearing required some fourteen days, with nine witnesses offered by the Complainant and seven by the Respondent District. Orders extending the time for completion of the hearing and decision were duly entered in accordance with the Policies. The Complainant's witnesses were ■,⁵ coordinator of education services at the Private School; the Student's Mother, ■; ■, teacher assistant at the Middle School; ■, former director of exceptional education services with the District; ■, psychologist with the District; ■, special education teacher at the Elementary School; ■, special education teacher at the Middle School; ■, psychologist and positive behavioral intervention specialist with the District; and Dr. ■, an expert for the Complainant. The District called as its witnesses psychologist ■; ■, a teacher assistant at the Elementary School; ■, the Middle School principal; ■, a Middle School special education teacher; teaching assistant ■; special education teacher ■; and ■, IDEA programs transition coach and case load manager for the District.

5. The complaint initiating this proceeding was filed on August 6, 2018. Prior to the resolution session mandated by the Policies the Complainant made a request to the Respondent District for the Student's educational records. Those records were not provided. Neither did the District provide any documents to Complainant as part of the required prehearing disclosures. On

⁵In order to protect the identity of the Student, names of persons and institutions involved are referred to by initials, in the case of persons, and without proper names, in the case of institutions. A page containing a key to identities of the persons and institutions is appended hereto and not to be distributed.

the beginning date of the hearing the District produced a large box filled with hundreds of pages. Despite Complainant's right pursuant to the Policies to prevent the introduction of any documents not provided to the Complainant at least five days before the hearing, *see Policies*, § 300.512 (a) (3), Complainant did not invoke that right and did not object to the introduction of any documents by the District based upon § 300.512 (a) (3).

6. Complainant Student, who resides with [REDACTED] Parents at their home in the County in which the District is located, was born [REDACTED], and was [REDACTED] years old at the commencement of this hearing. The Parents have been married for [REDACTED] years and have another child, two years older than the Student.

7. The family moved from the State of [REDACTED] to the County in Mississippi in which they now live and in which the District is located in 2007. The Student's father commutes to his job in a City in an Adjoining State, about an hour's drive from the Student's family's home. The Student's Mother is a stay-at-home mother with a degree in business administration.

8. The Parents noticed early on that the Student's gross motor functions were abnormal. [REDACTED] has been involved in and receiving services from IDEA early intervention programs since [REDACTED] parents lived in [REDACTED] [REDACTED] was eventually diagnosed medically by Dr. [REDACTED] at a Medical Center in a City in an Adjoining State as having a chromosomal abnormality called a 16p13.11 deletion.

9. The Student was discharged from the School District's early intervention program on March 10, [REDACTED] and subsequently entered a District [REDACTED] school [First [REDACTED] School] at the beginning of the [REDACTED] school year. The Student, about [REDACTED] and a half years old at

that time, had an Individualized Education Program [IEP], with an eligibility ruling of autism⁶ and attended a full day in the school's public pre-kindergarten program.

10. [REDACTED] continued at the First Elementary School through the [REDACTED] school year. During that time [REDACTED] was not yet speaking but was able to communicate using some sign language, such as signs for eating, milk, and going to the bathroom. [REDACTED] attended a full day at [REDACTED] pre-k program and [REDACTED] mother took [REDACTED] to and from school. The parents had good communication with school personnel during that time and the Student had no behavioral problems at school.

11. In August [REDACTED] the student, at the age of [REDACTED] began [REDACTED] year at another District elementary school [Elementary School, or School, hereinafter]. The Student attended school for a full school day, had no behavioral issues at school, and the parents received only positive comments concerning the Student from [REDACTED] teachers. The Student continued at the Elementary School through the [REDACTED] grade, which [REDACTED] began at the beginning (August) of the [REDACTED] school year, and which [REDACTED] repeated the following school year ([REDACTED]). The Student's Mother testified that [REDACTED] speech "took off" at the age of [REDACTED] which would have been sometime after [REDACTED] birthday in March [REDACTED]. Before that, she said, "he made only occasionally

⁶There is no dispute that the Student has the condition commonly described as Autism. According to the State Policies:

Autism (AU) (also commonly referred to as Autism Spectrum Disorder) means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. Included in the Autism category are the Pervasive Developmental Disorders, including Autistic Disorder, Asperger Disorder, Pervasive Developmental Disorder-Not Otherwise Specified, Rett's Disorder, and Childhood Disintegrative Disorder.

“utterances.” During those two years the Student went for a full school day with no apparent behavior problems.

12. The Student’s [REDACTED] was a continuation of the previous years, as far as behavior was concerned. The student continued to attend a full day of school with no negative behaviors reported.

13. The Mother testified that during the summer of [REDACTED] the Student began to exhibit negative, aggressive behaviors at home, such as hair pulling, open hand slapping, kicking, and knocking [REDACTED] Father’s glasses off [REDACTED] face. Most of the aggressive behaviors were directed toward [REDACTED] Mother at that time.

14. Teacher [REDACTED] testified that she first met the Student at the beginning of the [REDACTED] year ([REDACTED]), at which time the Student was an “inclusion student,” meaning [REDACTED] spent most of [REDACTED] time in a regular education classroom and went to a “self-contained” special education classroom only for certain academic subjects. In the Student’s case, [REDACTED] regular education, or inclusion, teacher was [REDACTED]. [REDACTED] went to her special education class for reading and math for only about one hour per day.

15. [REDACTED] testified that during the [REDACTED] she noted that, although the Student was in the [REDACTED] grade, [REDACTED] was performing at [REDACTED] level in both reading and math, and that [REDACTED] District had not tested the Student to determine [REDACTED] intelligence quotient (I. Q.). Based on those observations, in December [REDACTED] she recommended to the Student’s IEP team that the Student be re-evaluated.

16. A re-evaluation was conducted, including testing by Mississippi Department of Education certified District Psychometrist [REDACTED]. The psychometrist testified that the scale traditionally

given to children is the Wechsler Intelligence Scale for Children, 5th Edition (WISC5). The WISC5 is given orally through conversation with the child tested. ■■■ used a non verbal version of the test that allowed the Student to speak or touch the answers, however, because the ■■■ lacked the communication skills needed for testing with the oral edition. She determined the Student's ■■■ to be 42, which places the Student in the .01 percentile, meaning that 99.99 percent of ■■■ chronological peers function intellectually at a higher level than ■■■.

17. Psychometrist ■■■ also evaluated the Student's adaptive behavior skills as measured by the Vineland assessment, which measures communication, daily living skills (e. g., brushing teeth, combing hair, dressing), and socialization (which she described as how one "handles different types of interaction throughout the day").

18. Finally, she administered the Woodcock-Johnson III Tests of Achievement, which evaluate basic reading skills, calculation, basic math problems, passage reading comprehension, and math problem solving. In all three tests the Student's scores placed ■■■ in the lowest (.01) percentile.

19. As a result of ■■■ re-evaluation, the Student's eligibility ruling was changed on March 8, ■■■, the date of the final report from that re-evaluation, to a primary disability ruling of Multiple Disabilities with a subcategory ruling of Autism and Intellectual Disability. Based on that re-evaluation, the IEP Team revised the Student's IEP, which revision included removing ■■■ from the inclusion class and placing him in a self-contained classroom. ■■■ continued to go to recess and physical education with ■■■ regular education ■■■ grade class.

20. Meanwhile, according to the testimony of ■■■ teacher, ■■■ the Student exhibited no significant negative behaviors at school that year until March 7, ■■■, when he pushed ■■■

teaching assistant from behind. Then, on March 9, [REDACTED], the Student randomly struck [REDACTED] during class. [REDACTED] attributed both incidents to "a bad day or an off day." Other than those two occasions, the Student exhibited no behavioral problems at school. To the contrary, according to [REDACTED]'s testimony, [REDACTED] typically was very happy, eager to work, and never gave [REDACTED] teacher problems about completing [REDACTED] lessons.

21. The Student's problematic behaviors began at school at the beginning of the [REDACTED] school year. The first such instance of aggressive behavior occurred September 21, [REDACTED] following an uneventful August. On that morning, according to the Certified Teaching Assistant (CTA) [REDACTED]'s testimony, the CTA noticed "a really strange look on [the Student's] face" and told Ms. [REDACTED] that "something is not right."

22. While the Student was having breakfast at school, [REDACTED] reached to stabilize a wobbling cereal bowl and the Student slapped her hand. The teacher tried a second time to handle the bowl and the Student slapped her hand harder. The teaching assistant approached the Student to orally correct [REDACTED] and [REDACTED] kicked her twice in the legs.

23. The following day, according to [REDACTED], the Student had a bad morning on the bus and, then, while in line for breakfast, punched a pre-schooler. Later that morning [REDACTED] slapped a teacher. [REDACTED] documented the date and times of the incidents in an ABC (Antecedent, Behavior, Consequences) log she maintained on the Student.

24. Around Sept 21, [REDACTED] with the Parents' consent, Psychometrist [REDACTED] began a functional behavior assessment of the student, including a formal observation of [REDACTED] in [REDACTED] class and a parent interview. Among other things, the parent interview asks the parent to "rate the manageability, the disruptiveness, how often the behavior occurs per day and how many months the behavior has

been going on." It also asks questions about the consequences or results of the behavior, she explained. One thing she learned from the Parent interview was that the Student did not seem to understand "rewards versus negative consequences."

25. From her observations and data collection, [REDACTED] identified certain target behaviors in the student. [REDACTED] acted "out violently toward others in place of verbal communication in seven out of ten situations" [REDACTED] perceived as stressful.

26. Although some of [REDACTED] striking out attempts she observed seemed random, at times she found them to be "preceded by a directive from an adult or during a transition that [The Student] does not want to make."

27. Based on her data, it was her professional opinion that the violent behavior seemed to be the Student's way "to try to communicate when [REDACTED] was frustrated and didn't have the words to express [REDACTED]"

28. The aggressive behaviors continued. According to [REDACTED], on September 25, [REDACTED] the Student slapped [REDACTED] bus driver and hit a teaching assistant. Between 12:40 and 2:00 p.m. that same day [REDACTED] hit [REDACTED] speech teacher to the point that [REDACTED] had to send her teaching assistant to the speech session in order for the Student to be allowed to continue receiving services that day. At 2:00 p.m. that day [REDACTED] slapped [REDACTED] teacher in the face and tried to turn over a computer.

29. [REDACTED] further testified that on the following day the Student hit [REDACTED] teacher's hand during a math activity, tried again to overturn a computer, and slapped [REDACTED] teacher on the back and on the hand.

30. [REDACTED] consulted with her principal, [REDACTED], and the District Behavior Intervention Specialist, concerning the Student's behavior. A meeting was held on October 5 to discuss the

FBA and to consider a behavior intervention plan (BIP). Present were general education teacher [REDACTED]; [REDACTED]; [REDACTED]; Principal [REDACTED]; the Mother; Counselor [REDACTED], and Psychometrist [REDACTED]

31. As a result of the meeting it was determined that “a BIP will be put in place to help [the Student] manage [REDACTED] behavior”; a “behavior goal was added to the IEP” (By the end of the [REDACTED] school year [the Student] will use an appropriate form of communications to express [REDACTED] during stressful situations 10/10 times the situations occur using communication tools and strategies taught in the classroom); and that the Student’s “LRE” [Least Restrictive Environment] would be changed to [the Student] coming ½ day to school every day.” The IEP committee also decided that the Student would see a counselor two times a week.

32. After the change to half days, the Student continued to receive [REDACTED] service in [REDACTED] classroom. “Of course,” she testified, “it was more of a battle now. It was constant redirection, constant movement in the room to make sure everyone was safe. [REDACTED] still received [REDACTED] academics, but that too was a struggle because [REDACTED] was more focused on hitting than we were completing academics.” [REDACTED] Mother picked [REDACTED] up at school at the end of [REDACTED] four hours. Also, she testified that, about this time, getting [REDACTED] on the bus became problematic so the Parents decided to take [REDACTED] to school.

33. The negative behaviors escalated and the Student began to suddenly charge persons in [REDACTED] [REDACTED]’s classroom. According to [REDACTED]’s testimony, she rearranged a table and chairs in the room in order to present obstacles to the Student’s charging. [REDACTED] continued hitting [REDACTED] teacher and, on at least two occasions after October 5, [REDACTED] hit fellow students. Aggression, she testified, was “all day, every day.” Teacher [REDACTED] and her assistant had to maintain constant vigilance in order

to prevent the student from engaging in aggressive behavior toward others. “█ still received █ academics,” testified █, but that too was a struggle because we were more focused on hitting than we were completing academics.”

34. The Student also began to wet █ pants during this time period, something █ Mother and █ suspected to be caused by a medicine █ was taking at that time called Risperidone, which was intended help ameliorate the symptoms of autism. On October 10 the Student hit █ bus driver and the school Principal. █ also fell asleep at school that day, something █ had not done before. █ thought that █ falling asleep also may have been caused by the medicine █ was taking.

35. The behavior intervention specialist, █ came to observe the Student on October 12. During that session the Student hit her four times and assistant principal █ several times. The Student also cried tears that day, something █ had never seen █ do before.

36. According to █, the negative behaviors continued to escalate. October 13 the Student scratched █ Counselor and hit, kicked, and tried to butt the assistant principal with █ head. On October 16 █ hit █ mother at the bus stop and then hit the bus driver. Following that incident, █ mother elected to drive █ to school and █ no longer rode the bus.

37. On October 19, testified █, the Student fought as █ was taken from █ parents' car to the school. Once at school, the negative behaviors such as charging, kicking, and hair pulling occurred throughout the day. The Student also tried to attack others █ encountered while walking from point to point within the school.

38. The next day, according to ██████, the Student was "uncontrollable" and "[i]t took two people to contain ██████" The Student attacked the teaching assistant and the principal. The Student's parents had to be called to the school.

39. On October 25, ██████, another IEP committee meeting was held, this time for the purpose of determining the Student's "most appropriate placement," recommending "[d]ue to [the Student's] violent and aggressive behaviors impeding ██████ academic growth, an LRE change . . . to minimize violent & aggressive behaviors toward ██████ & others by providing homebound services at [the ██████ School] Monday-Thurs from 9-10 [a.m.] receiving academic & related services within the time frame by a special education teacher." The only other option the committee considered was "not to homebound⁷ [the Student]." The committee noted that it used the Student's "BIP, medical records, [and] teacher observations" as the basis for its decision to go to "homebound" services and its rejection of non-homebound services. The change, according to ██████, "was a temporary LRE change," although the IEP Committee's report of the meeting does not state that.

40. Neither IEP documents nor any of the witnesses described any alternatives to homebound services the Committee considered, if any, other than not to go to home-bound services.

41. According to ██████, the reduction of the LRE to one hour per day four days a week was done because "the IEP team [was] still trying to remove any over stimulus or anxiety that ██████ may be ridden with for a one hour schedule to see if we could get ██████ to state where ██████ could actually perform." Part of that effort to remove anxiety including teaching the Student "carrier phrases," short communications that could, as ██████ testified "voice ██████ wants and needs," to help ██████

⁷ Although considered by the District to be "homebound" services, the services were provided in a separate room from other students at the School.

“escape anxiety,” and “relieve some of [redacted] “negative expressive communication,” such as hitting or attempting to hit. [redacted] gave as examples of such carrier phrases, “I don’t know” and “[the Student] needs help.”

42. The student's services in [redacted] new LRE were delivered in the office of the assistant principal, [redacted]. The Student's schedule under this format, according to [redacted], called for [redacted] to receive three hours of academics, 30 minutes of occupational therapy, and 30 minutes of speech per week. Physical education was no longer part of the Student’s curriculum.

43. If the student arrived displaying a “very aggressive” demeanor, they would “take a break and go outside” to allow the student to use the swings. [redacted] provided the academic instruction while [redacted] sat by the Student to keep [redacted] from leaving [redacted] chair or hitting the Teacher. [redacted] testified that “not a lot of work [was] completed due to always focusing on the hitting.”

44. [redacted] left for maternity leave sometime before Thanksgiving and was replaced another special education teacher, [redacted], until around March [redacted] when [redacted] returned.

45. In late November [redacted] the Parents met with [redacted], a Board Certified Behavior Analyst working with a private school [the Private School] in a neighboring state. The Private School was founded 32 years ago. It offers day services and residential services to children with special needs, primarily focusing on autism. The purpose of the Parents’ meeting with Dr. [redacted] was to inquire about Applied Behavior Analysis [ABA] services. Dr. [redacted] is director of the [redacted] School, a division of the Private School. The Private School is located less than an hour’s drive from the family’s home in Mississippi.

46. Their discussion resulted in an introduction to [REDACTED] who, in addition to working as a Coordinator of Learning Services at the Private School, also has a private consulting business separate from the school. [REDACTED] is a Board Certified Assistant Behavior Analyst [BCaBA] in in two states other than Mississippi, including the one in which the Private School is located. She holds a bachelor's degree in psychology and a master's degree in special education. She has qualified to sit for the Board Certified Behavior Analyst examination but had not yet done so as of the date of her testimony. As an assistant Behavior Analyst, she is required to work under the supervision of a Board Certified Behavior Analyst [BCBA], which she does. Her supervising BCBA is Dr. [REDACTED]. Both [REDACTED] and Dr. [REDACTED] are employed by the Private School.

47. [REDACTED] began working with the Student as a private client on December 11, [REDACTED]. For about two months she worked with [REDACTED] for two sessions per week of about three hours each, according to her testimony, focusing primarily on behavior rather than academics.

48. She began in a similar manner to Psychometrist [REDACTED] by taking a history of the child and spending time observing [REDACTED] during which she witnessed what she called "behaviors of mild aggression" based on certain "routines," or patterns. Again, much like [REDACTED], she determined that some of those "routines" she observed sprang from the Student's "communication deficits." For example, she said that [REDACTED] might slap a questioner to "buy time" when [REDACTED] doesn't know an answer.

49. In February [REDACTED] she reduced her time with the Student to one three hour session per week. Although she met with the Student at the [REDACTED] School, she mainly took [REDACTED] out to public settings, e. g., Chuck E. Cheese, where they might encounter some unpredictable factors because, she testified, the negative "behaviors are more likely to occur when something out of the ordinary happens," and such things more likely will occur in public places.

50. Around February 21, [REDACTED] the Mother decided to explore the possibility of retaining an advocate to help her in her dealings with the District on the Student's behalf. The District became aware of that intention on her part. On February 26, [REDACTED] when she dropped the Student off at a school, [REDACTED], the Student's special education teacher at the time, told her the school wanted to have a meeting. That meeting was held on February 28, [REDACTED] with both Parents and nine persons from the District.

51. Thereafter someone filed a complaint with "Child Protective Services" alleging aggressive behavior by the Student against [REDACTED] older sibling. The older child was removed from class and interviewed by a child protective services representative and the Mother received a call from that agency on March 13, [REDACTED]. The Mother testified that she had discussed with District personnel the problems at home with the Student's hitting before but no complaint had been made with CPS until the District learned of her inquiries concerning an advocate. The Mother believed that the District filed the complaint in retaliation for her efforts to find an advocate for the Student. She also testified that she felt like trust between her and the school had been broken.

52. On March 19, [REDACTED] the IEP committee met to consider extended school year (ESY) services for the Student but determine ESY was not necessary at that time. Another meeting convened on April 25, [REDACTED] [REDACTED] attended that meeting. So did the Mother.

53. The IEP committee met again on May 11, [REDACTED] to work on the Student's [REDACTED] IEP. [REDACTED] attended that meeting, as well, as did her supervisor, Dr. [REDACTED]. The Parents provided a letter to the committee that included requests that the District obtain the services of a BCBA for the Student, for an aid be specifically assigned to the Student alone, and for an increase in speech and occupational services for the Student. The committee discussed, among other things, the parents'

requests and increasing the Student's class time and transitioning ██████ back into a self-contained classroom.

54. A fundamental difference between approaches of the District and that of the Parents and ██████ and Dr. ██████ came into clear focus at that meeting. For example, ██████ recommended that the District personnel look at certain apparent attempts by the Student to hit or strike-out with ██████ hands as "fake-outs" rather than violent behavior. If the persons who were the apparent objects of such behaviors, ██████ suggested, would not assume a protective position against such attempts, the Student would not follow through, hence the term "fake-out." The District declined to adopt that approach.

55. The IEP committee continued its consideration of and completed the Student's IEP at a meeting on May 21, ██████. The Parents did not sign the ██████ IEP. The new IEP called for the Student to begin the ██████ school year at the Middle School. ██████, who would be the Student's teacher at the Middle School, was part of that IEP meeting.

56. The Student's Complaint requesting a due process hearing was filed on August 6, ██████ the same day the ██████ school year began.

LAW

57. The purpose of the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living ... [and] that the rights of children with disabilities and parents of such children are protected." 20 U.S.C.A. § 1400(d)(1)(A)-(B). States receiving federal funds must make a FAPE available to all children with disabilities living within the state. *Forest Grove Sch. Dist, v.*

T.A., 129 S. Ct. 2484, 2487 (2009). Each child with a disability must be evaluated by the local or state educational authority in order to develop a written "individualized education program" ("IEP") including special education and related services. 20 U.S.C.A. § 1414(d).

58. In Mississippi, an IEP committee at the local education agency [LEA], in this case, the District, develops the student's IEP. Policies, §§ 300.320-300.321. IEP committees are composed of various teachers and related service providers from institution in which the student is placed at the time. The student's parents also are members of the IEP committee. Policies, § 300.321. If the parents disagree with an IEP committee decision, they may file a due process complaint specifying the grounds of their disagreement. Policies, § 300.507.

59. A hearing officer's role in considering a due process complaint is not to second guess state and local policy decisions, but to determine whether school officials have complied with applicable law, and if not, what the proper remedy should be. *Flour Bluff Independent School Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996). The law does not require that a school district provide the best education possible. Rather, the law requires only that a district provide access to public education "sufficient to confer some educational benefit upon the handicapped child." *Houston Independent School District v. Bobby R.*, 200 F. 3rd 341, ¶ 28, 31 IDELR 185 (5th Cir. 2000). That benefit must not be of a mere *de minimis* nature, but likely to result in progress, rather than "regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245, ¶ 4 (5th Cir. 1997). The recent U. S. Supreme Court case, *Endrew F., v. Douglas County School District*, 580 U.S. ____, 137 S. Ct. 988; 197 L. Ed. 2d (2017), makes clear that the educational benefit conferred must be greater than "merely more than *de minimis*." *Endrew F.*, Slip Opinion at 14. The education offered must be

“reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, Slip Opinion at 14

60. The Parent, as challenger of the District’s actions in this case, has the burden of proof as to all issues presented in this matter. *See, Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808 (5th Cir. 2003).

61. In deciding whether the requirements of the IDEA have been met and FAPE provided, the first question to consider is whether the school district complied with the procedures of the IDEA. *Buser v. Corpus Christi Independent. School District*, 51 F.3d 490, 492 (5th Cir. 1995).

Procedural matters considered in this inquiry include such things as the right to independent educational evaluations, the right to prior written notice to the parent of certain meetings, the right of the parent to give or withhold consent in certain situations, access to educational records, and the right to notice of the opportunity to have complaints heard through procedures outlined in the state policies. *See, e. g., State Policies*, § 300.504. Procedural violations, in and of themselves, do not amount to a denial of a free appropriate public education [FAPE] unless the violations result in the loss of educational opportunity to the student or seriously infringe upon the parents’ opportunity to participate in the provision of FAPE to the student. *Adam J. v. Keller Independent School District*, 328 F.3d 804 (5th Cir. 2003); *State Policies*, § 300.513;

62. Second, the hearing officer asks a substantive question: was the IEP “reasonably calculated to enable the child to receive educational benefits.” *Buser v. Corpus Christi Independent. School District*, 51 F.3d 490, 492 (5th Cir. 1995), citing *Board of Education v. Rowley*, 458 U.S. 176, 206-207 (1982).

Did Procedural Violations, If Any, Result in a Denial of FAPE?

63. The Complainant sets out three alleged procedural violations for consideration. First:

Was the parent informed of the LRE continuum and capable of consenting to the homebound environment/

64. Mississippi's Policies require that each public school district "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services" that must "[i]nclude the alternative placements listed in the definition of special education under §300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions)"

Policies § 300.115.

65. There is no requirement that all possible placements on the continuum be discussed at an IEP meeting or that if they are they be discussed and considered in any particular order. Moreover, the Mother testified that, although she couldn't say "which meetings they all came from," she had "several copies of the procedural safeguards," a state document that informs parents of their rights under the IDEA, including the right to a hearing if they were dissatisfied with any decisions by the IEP committee. Under the circumstances, I do not find any violation of the Parents' or Student's rights in regard to the information provided regarding the LRE continuum.

Did the LEA provided a complete copy of the educational record prior to any resolution meeting, or to this date?

66. The evidence does establish that the District failed to provide a copy of the Student's education records to the Student's representatives prior to the hearing. The state Policies guarantee the right of Parent "to inspect and review any education records relating to their children that are

collected, maintained, or used by the” District. See Policies, §§ 300.501, 300.613. That right includes the right to request that the District “provide copies of the records containing the *information if failure to provide those copies would effectively prevent the parents from exercising the right to inspect and review the records.*” (emphasis added) § 300.613.

67. In this case I find no allegation or supporting evidence for an allegation that the District’s failure to provide the requested copies would have effectively deprived or did effectively deprive the Parents of their right to inspect and review the records. Accordingly, I find no violation of the Parents’ rights in that regard. Even if the Parents were entitled to copies of the Students’ records under the circumstances of this case, I do not find evidence in the record establishing that the District’s failure to produce such copies resulted in any loss of educational opportunity to the student or seriously infringed upon the parents’ opportunity to participate in the provision of FAPE to the student. State Policies, § 300.513;

The LEA did not provide a copy of the school's homebound policies and procedures prior to any resolution meeting, or to this day.

68. While there is no evidence that the District provided copies of any homebound policies or procedures to the Parents at any time or that such policies or procedures even exist, neither is there any substantial evidence that such failure by the District infringed or impeded the Student’s or Parents’ rights.

69. Despite the District’s failures as discussed above, I find that the evidence does not support a finding that any such procedural defaults, taken individually or together, deprived the Student of FAPE (1) by impeding the Student’s right to FAPE; (2) by significantly infringing upon the parents’ opportunity to participate in the provision of FAPE to the student; or otherwise (3) causing any deprivation of any educational benefit. State Policies, § 300.513;

Substantive Issues

70. The Complainant, in complaint and at the hearing, also challenged the implementation and propriety of the Student's Individual Education Programs (IEPs). In considering that issue, the question becomes: was the IEP reasonably calculated to confer educational benefit? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997) designates four criteria to be considered in making that determination:

- (1) Was the IEP individualized on the basis of the student's assessment and performance.
- (2) whether the program were administered in the least restrictive environment;
- (3) whether the services were provided in a coordinated and collaborative manner by the key stakeholders; and
- (4) whether positive academic and non-academic benefits were demonstrated.

Bearing those criteria in mind, we review the IEPs here at issue.

Were the IEPs individualized on the basis of the student's assessment and performance?

The [REDACTED] IEP

71. In reviewing the [REDACTED] IEP, I note that the Present Levels of Academic Achievement and Functional Performance [PLAAFP] page for the IEP's reading section states that the Student "has been working through First Grade Saxon Phonics," was able to call all but the most recent words introduced when given a "sight word test from that kit," that [REDACTED] reading had improved, and that [REDACTED] was still unable to "use phonics to decode words and use words acquired" Responding to that, the IEP set as the Student's measurable annual Reading goal that the Student would "apply phonics and decode words and use words with 70% accuracy" in five out of ten "trials by the end of the school year." Similarly, [REDACTED] Math goal -- to be able to find the perimeter

of simple shapes during a math activity with 70% accuracy" in three out of four attempts was based upon ■■■ inability to find the perimeters of simple shapes as revealed in school testing. In the area of Gross/Fine Motor Skills, the PLAAFP found the student, when writing or keyboarding, had "difficulty with sizing lines and spacing words and sentences," and used the "hunt and peck method" which slowed ■■■ typing speed, those being deficits negatively impacting ■■■ and requiring Occupational Therapy. The annual goal set for the Student addressed that finding by calling for ■■■ to "demonstrate age appropriate handwriting/keyboarding skills for the ■■■ grade with 90% accuracy."

72. The ■■■ IEP exhibits a similar understanding of the Student's abilities in the measurable annual goals stated on the Gross/Fine Motor Skills and Communication sections. The Communication PLAAFP stated that the Student's "lack of expressive communication" impacted ■■■ participation socially with classroom PEERS. The Annual Goal – that the Student, by the end of the school year, "when given a picture or read a story out loud," would "speak clearly in complete sentences in order to provide requested detail" – related to that PLAAFP.

73. This is not to say that the ■■■ IEP was ideal. Former SPED director ■■■, in fact, agreed that the document's measurable annual goal for reading was deficient in that it called for the Student to "work on phonics and decode words and use words applied with 70 percent accuracy," but failed to designate what words ■■■ would be able to decode. Its imperfections notwithstanding, I find that the ■■■ IEP was based on the Student's assessment and performance.

The [REDACTED] IEP

74. The IEP Committee met May 8, [REDACTED], to draft the Student's [REDACTED] IEP. That document indicates that the Committee took notice of extensive data related to the Student's assessments and performance, including the re-evaluation, undertaken the previous year. The committee made detailed, written observations regarding the Student's abilities and deficits in Math, telling time, reading, life skills (such as properly feeding himself), behavior, and communication.

75. For example, the Committee found the Student's Saxon Math Assessment indicated that the student was unable to identify "two or fewer coins, count from 80-140 by 1's, count to 20 by 2's, [or] correctly identify fractional parts." Although the Student could "match smaller numbers using one-to-one correspondence," the Committee said "[REDACTED] need[ed] to be able to understand the larger numbers and matching quantities using manipulatives." The Committee further found that the Student could "sometimes understand an hour and half hour but [needed] to be able to understand the concept of time and what time tell[s] us about our schedule."

76. The committee also found that, based on another assessment called the Leveled Literacy Intervention Assessment, the Student was "unable to comprehend. . . what [REDACTED] has read without the prompting of pictures to help [REDACTED] recall certain passages" and "needs to be able, not only to increase [REDACTED] site [sic] word knowledge [but] to be able to understand word meaning . . . and how to sequence events relating to first, middle, and last"

77. Regarding life skills, the committee noted that, while the Student could feed [REDACTED], [REDACTED] "continues to stuff food into [REDACTED] mouth until [REDACTED] chokes."

78. With those facts in mind, the IEP committee established math goals that included calling for the Student to, within 36 instructional weeks, “identify all money and money value through game based activities with 70% accuracy during 3 out of 4 attempts”; “when given digital and analog printed representations of clocks, [to] verbally tell and write the time in hours with 7/10 correct responses during time telling activities during 4 consecutive sessions”; and “identify inches and feet by using a rule or method of measurement to measure a line segment correctly using inches and feet during 3 out of 4 attempts during 3 consecutive sessions.”

79. Reading goals, likewise corresponded to the Student’s assessment, and were projected over the same 36 instructional week time frame. One goal called for the Student to “increase [redacted] comprehensive skills by asking and answering ‘What,’ ‘Where,’ ‘Who,’ ‘When,’ ‘How,’ and ‘Why’ questions on a first grade level text using picture prompts and begin to identify site words in print to connect words with meaning during 3 out of 4 attempts with 70 accuracy during reading activities.” Another goal called for the Student to “identify the following second grade level site [sic] words: work, saw, first, made, pretty, want, present, under, both, never, some, and here and obtain knowledge of the word through realistic pictures in order to help understand word meaning with 7 out of 10 attempts during four consecutive sessions.” A third reading goal aimed for the Student “within 36 instructional weeks [to] read fluently and when given a sequence of events, place them in order by first, middle, and end during 3 out of 4 consecutive reading sessions.

80. To address [redacted] eating issue, the Committee established as an annual goal for the Student to use a vibrating toothbrush for desensitization purposes and to “increase [redacted] oral motor skills.”

81. Following the Functional Behavior Assessment undertaken by Psychometrist [REDACTED] and the subsequent development of the Behavior Intervention Plan in October [REDACTED], a behavior component was added to the IEP as well.

82. In reviewing the [REDACTED] IEP and noting the relationship between its stated goals and the Student's assessed strengths and deficits, I find that the goals and objectives of the [REDACTED] IEP took into consideration the Committee's extensive knowledge of the Student's abilities and needs and was individualized on the basis of the student's assessment and performance.

Was the program were administered in the least restrictive environment?

83. One of the goals of the IDEA is "mainstreaming" -- educating the special needs child in regular education classes to the greatest extent possible. *Policies*, § 300.114. In *Daniel R. R. Daniel R. R. v. State Board of Education*, 874 F. 2d 1036 (5th Cir. 1989), the Fifth Circuit Court of Appeals adopted a two-pronged test for determining whether a school has met that obligation. First, the inquiry asks "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily," and, if not, "whether the school has mainstreamed the child to the maximum extent appropriate. *Daniel R. R.* at 1048. The Court proposed these factors for use in that consideration: (1) the steps taken by a school to accommodate the child in general education, (2) the extent to which the student receives an educational benefit from general education, and (3) the effect the disabled student has on the regular classroom environment.

84. Reviewing the testimony in the light of *Daniel R. R.*, I find the District plainly took steps to accommodate the Student in general education. Until the [REDACTED] school year, in fact, [REDACTED] was an inclusion student who spent most of [REDACTED] time in a regular education classroom and who went to

a self-contained, special education classroom only for certain academic subjects. In that year, after ■ teacher, ■■■■■, observed ■ was far behind ■ peers, doing kindergarten level work in a ■ grade class, and a re-evaluation disclosed the extent of ■ disabilities, including an I. Q. of 42, it was determined ■ would benefit more from a self-contained special education setting than the regular education classroom. ■ placement was changed accordingly. Consequently, supplementary aids and services would not have enabled the District to mainstream the student in general education classes. The Student's effect on the regular education environment was not an issue during the ■■■■■ school year and, as ■ teacher ■■■■■ testified ■ continued to go to recess and physical education with ■ regular education ■ grade class. Accordingly, I find that that the ■■■■■ IEP was administered in the Least Restrictive Environment.

85. The only one of the three Daniel R. R. factors to change during the ■■■■■ school year was the effect the disabled student on the regular classroom environment. At the beginning of that school year the Student's behavior at school inexplicably and suddenly became problematic. Testimony from a variety of witnesses, including teacher ■■■■■, certified teaching assistant ■■■■■, and District behavior specialist ■■■■■, well establishes that the Student regularly hit, kicked, and otherwise lashed out physically toward teachers, administrators, and fellow students. Not only did those aggressive behaviors threaten and, occasionally, cause injury to teachers and students alike, they also endangered the Student as well. As ■■■■■ suggested in her testimony, the Student did not understand that a larger person who did not appreciate the Student's disabilities might harm the Student if the Student was aggressive toward such a person.

86. Because of ■■■■■ problematic behaviors, the IEP committee, on October 5, ■■■■■ reduced the Student to a four hour school day in ■■■■■ self-contained classroom. When the aggression

did not abate, the IEP Committee met again on October 25, [REDACTED], and, according to [REDACTED] testimony, moved the Student out of her self-contained classroom to the assistant principal's office and reduced the Student's school time from four hours per day, Monday through Friday, to one hour per day, Monday through Thursday.

87. When asked to give the IEP Committee's rationale for such a reduction in the Student's school day, [REDACTED] testified that the Committee believed that "if we put [REDACTED] in an environment where it was [REDACTED] and another teacher, we could develop a positive relationship with [REDACTED] in order to remove those negative behaviors and maybe establish some positive behaviors."

88. The Complainant argues that the decision to reduce services to one hour per day four days a week violated IDEA Section 612(d) (1) (A) (i) (IV), which section is reflected in the Policies at § 320 (a) (4). Those sections require special education and related services provided to a child to be based, to the extent practicable, on peer reviewed research. None of the District witnesses questioned could point to any peer reviewed research supporting the decision to reduce the Student's school day to one hour per day four days per week.

89. Department of Education comments make clear, however, that, at least in the DOE's understanding of the law, "there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE." *See Federal Register*, Vol. 71, No. 156 Page 46665. Rather, the "final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs." *Id.*

90. The student's behavior posed a constant barrier to [REDACTED] school work. As [REDACTED] put it, even after the IEP team changed the Student's day to four hours, "we were more focused on hitting than we were completing academics." In an effort to help the student, the IEP committee, noting it had taken into

consideration the Behavioral Intervention Plan, medical records, and teacher observations, reduced the Student's school week to one hour per day four days per week.

91. The Complainant contends that the District erred in giving the Student a "homebound" placement, a placement that it argues is the most restrictive there is. Referring to the LRE continuum in *Procedures for State Board Policy 74.19*, Complainant argues that a "Special School" would be a less restrictive continuum than the homebound program for 1 hour per day, four days per week.

92. The Continuum of Educational Options listed in the *Procedures for State Board Policy 74.19* includes but is not limited to the following: General Education Classroom with Consultative Services, Itinerant Instruction in the General Education Classroom, Co-Teaching with the Regular Educator, Resource Room Instructional Support, Part-Time Special Class, Full-Time Special Class, Community-Based Services, Special School, Residential Facilities, Home/Hospital, in that order.

93. Complainant contends that Home/Hospital is the most restrictive category and should not have been chosen until after other options were considered. Notwithstanding the District's use of the term "homebound" to describe the manner in which the Student's IEP prescribes ■■■ services, the Continuum clearly envisions delivery of "home" services in an actual home. See Policies §300.115 (b) (1) ("The continuum of alternative placements. . . must . . . include . . . home instruction"). The one hour per day, four days per week, program, delivered by two teachers in a room at school, is not "home instruction," despite the District's use of the term "homebound."⁸ That arrangement would fit more neatly under the category, "special class," which, by Complainant's argument, would be a less restrictive environment than is "special school." *State Policies*, however, do not require placements to be considered in any certain order – it could not, for by its terms, it is not an exhaustive list – it only lists the options that must be made available.

⁸It is instructive to that in the in *Procedures for State Board Policy* book the term home is paired with hospital, thus home/hospital, indicating those are the actual sites of the proposed delivery of the services described.

94. Accordingly, I find that the Student's IEP for [REDACTED] was administered [REDACTED] least restrictive environment.

Whether the services were provided in a coordinated and collaborative manner by the key stakeholders

95. The evidence indicates that, generally, throughout the Student's time in the George County School District, the services received by the Student were provided in a coordinated and collaborative manner by the key stakeholders. The Mother and sometimes the Father, according to her testimony, were actively involved in the IEP process, and communication was generally good between District personnel and the Parents. When the Parents consulted with [REDACTED], the District, according to the [REDACTED] and [REDACTED], listened to her and incorporated some of [REDACTED] suggestions in their work with the Student. Although, according to the Mother's testimony, her trust of the District deteriorated in Spring of [REDACTED] after [REDACTED] older [REDACTED] was interviewed by a child protective services representative. Those in charge of service delivery, likewise cooperated in working with the Student. [REDACTED], for example, testified that she worked jointly with the speech therapist, who would help her help the Student with [REDACTED] communication, and with the occupational therapist, who would help her teach the Student how to write correctly. The foregoing considered, I find that services generally were provided in a coordinated and collaborative manner for the two years prior to the filing of the complaint.

Were positive academic and non-academic benefits were demonstrated?

96. The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. *Andrew F.*, Slip opinion at 15-16. There is no "bright line" rule for determining whether positive academic and non-academic benefits were demonstrated in any given case. Rather, the question varies with the circumstances of the individual student. The Student's IEP

for █████ contained both academic and non-academic goals: e. g., reading, math, communication, and occupational therapy.

97. The Student's IEP for █████ as interpreted by █████ Special Education Teacher, █████, indicates that the Student made "sufficient progress" in reading, occupational therapy, and math for the year, and met █████ communication goal. Accordingly, I find that this criterion is met as to the █████ IEP.

98. When the █████ IEP was first crafted in May █████, the Committee having the benefit of a new and thorough evaluation of the Student, drafted appropriate goals as discussed in the review of that document above. The October 25, █████, amendment restricted the Student's school week to but four hours (three hours of academic, a half hour of occupational therapy, and a half hour of speech therapy), What is more, the amended program eliminated physical education, required to be provided by §300.308 from the Student's Curriculum. The rationale for the reduction from the IEP team (committee), according to teacher and IEP Committee member █████

█████ The Committee hoped the new arrangement would allow a teacher to "develop a positive relationship with █████ in order to remove those negative behaviors and maybe establish some positive behaviors," she testified.

99. The Student's behavior, however, did not improve. "[F]rom the time [the Student] started with one hour" classes four days per week, █████ testified, the negative behaviors continued, even for "the whole hour."

100. Nonetheless, according to the Report of Progress pages of █████ IEP, by the end of the school year (May 3, █████), █████ was found to be making sufficient progress toward academic and behavior goals. Relative to █████ behavior goal, the end of the year report found that █████ had begun

using carrier phrases “when ■ became frustrated with 70% accuracy.” The report also noted that ■ was making progress in self-monitoring ■ impulsive behaviors. Although ■ continued to attempt to hit, ■ “has not followed through with physical contact” and was “self regulating by asking why ■ couldn’t hit, holding ■ hand down, and using carrier phrases when ■ began to get frustrated with 60% accuracy.

101. ■ was found to be making sufficient progress in ■ math goals, as well. For example, ■ had learned to identify the names of all coins with 80% accuracy (although ■ only knew the amount of a penny). The Progress Report even found that ■ had mastered one math goal by learning to “tell time to [the] hour and half an hour with 80% accuracy.” In reading, although ■ continued “to struggle with ■ attention and completing reading activities,” the Student also was determined to have made sufficient progress on ■ goals. ■ was able to “answer simple ‘what’ questions with picture prompts with 70% accuracy”; “made progress with using simple site [sic] words in sentences with 80% accuracy”; and had “done better with reading a short sentence and choosing the correct sequence with 70% accuracy.”

102. In view of the foregoing, I find that positive academic and non-academic benefits were demonstrated in the Student’s education as a result of the Student’s IEPs for ■ and ■. Viewing the foregoing through the lens of *Endrew F., v. Douglas County School District*, 580 U.S. ___, 137 S. Ct. 988; 197 L. Ed. 2d (2017), I further find that the educational benefits conferred by the Student’s IEP were greater than “merely more than de minimis”; the education offered was “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” those circumstance being described at length in the Facts section of this Decision and Order, *Endrew F.*, Slip Opinion at 14; and the Student did in fact

make progress. Accordingly, I find sufficient positive academic and non-academic benefits were demonstrated, *Cypress Fairbanks Independent School District v. Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997), and that neither the IEPs as developed and written nor their implementation caused any deprivation of FAPE to the Student for the two years prior to the filing of the complaint, and that the Complainant has not met its burden of proof otherwise.⁹

Issues as Stated by Complainant

103. I now address one by one to the Complainant's issues as stated by the Complainant.

Whether the LEA with the use of supplemental aids and services could have mainstreamed the child in the general education environment?

104. This issue is addressed under the discussion of Least Restrictive Environment, *supra*.

Whether the LEA has mainstreamed the child to the maximum extent appropriate, including:

- a. **whether the district has made reasonable efforts to mainstream the child;**
- b. **the educational benefits available to the child in regular class with supplements; and**
- c. **the possible negative effects on the other students, including the child.**

105. These questions were addressed under the discussion of Least Restrictive Environment, *supra*.

⁹District transition coach and case load manager [REDACTED] having testified that the District is not the Student's LRE as of [REDACTED] school year, and the complaint having been filed on the first day of the [REDACTED] school year, it is unnecessary to consider this criterion in relation to [REDACTED]

Whether the Child was denied FAPE for the two years preceding the filing of the Complaint for Due Process, and, if so, whether compensatory education in the number of hours [REDACTED] has been denied FAPE, in the form of summer programs at the conclusion of the [REDACTED] Spring Semester, should be awarded.

106. As noted above, I find no denial of FAPE for the period in question and an award of compensatory education, accordingly, is not warranted.

Whether the Child has been denied FAPE because [REDACTED] has been denied transportation services? If yes,

- a. Whether the transportation will require supports from an RBT;**
- b. whether an occupational therapist should perform an assessment to provide adequate caregiver instruction regarding transportation of the child with autism spectrum disorder, and to assess the need for adaptive equipment, environmental modifications, sensory strategies, and behavioral strategies.**
- c. whether a 1:1 RBT paraprofessional is required to accompany the petitioner during all travel from the home to the school and back home.**
- d. whether an occupational therapist and BCBA should train the 1:1 RBT to fidelity on the transportation requirements necessary for transportation as a related service; and**
- e. whether the parents are entitled to reimbursement of the parent at the federal mileage rate, and for the parent's time, in transporting the child as a result of unlawful duty-shifting by the LEA.**

107. The Student's Mother testified that, when the student was on half day schedule, she started taking [REDACTED] to school after having trouble getting [REDACTED] on the bus. While the Mother did testify that, once the Student had been moved to a one hour schedule, [REDACTED] school hour came at a time the regular school bus was not running, her testimony does not indicate that the Student was ever denied services. Moreover, [REDACTED] testified that the Parents were reimbursed all mileage expense for

which they made timely application. Accordingly, I find that the Student was not denied FAPE due to any refusal to provide transportation services.

Whether the Child has been denied FAPE because ■ has been denied an appropriate BCBA evaluation, an appropriate BIP, and an RBT trained to fidelity to implement a BIP designed to include petition in an educational environment with his non-disabled peers to the maximum extent.

108. Complainant contends the Child was denied FAPE because ■ was denied an appropriate BCBA evaluation, an appropriate BIP, and an RBT trained to fidelity to implement a BIP [Behavior Intervention Plan] designed to include the Student in an educational environment with ■ non-disabled peers to the maximum extent. Having found that mainstreaming of the student became inappropriate during October ■ I find it unnecessary to decide this issue. The Policies, in any event, do not require evaluations by Board Certified Behavior Analyst or that BIPs be developed and implemented by a BCBA and an RBT. Psychometrist ■, of course, did oversee the production of a BIP, which I find has not been proved in this proceeding to have been inadequate. While the Complainant offered witnesses who clearly favored the use of such professionals, e.g., ■, and favored the therapies afforded by them (e. g., Dr. ■) I find the Complainant has not met its burden in proving that the above named services were necessary for the provision of FAPE. Accordingly, I find FAPE was not denied due to the lack of a BCBA evaluation or an RBT to implement the student's BIP.

Whether the Child should at all time be in the physical presence of and receive the assistance of a designated one-on-one paraprofessional who shall be trained by the BCBA, in order maximize the LRE.

109. The Policies do not require the use of BCBA in the circumstances. Neither did the proof establish the above described use of a BCBA and BCBA-trained paraprofessional to be necessary to provide FAPE in this case. Accordingly, I find that the Complainant has not met its burden of proof as to this issue.

Whether the Child has been denied FAPE because ■■■ has been denied to the opportunity to participate in nonacademic and/or extracurricular activities with his/her nondisabled peers.

110. This issue is addressed in the Least Restrictive Environment discussion, *supra*.

Whether the Child has been denied FAPE because ■■■ has been denied a specially designed physical education?

- a. **Whether an appropriate adaptive physical education evaluation is required for the purpose of determining the Student's eligibility for adaptive physical education services.**
- b. **Whether the child is entitled to compensatory physical education in the number of hours ■■■ has been denied FAPE, in the form of summer programs at the conclusion of the ■■■ Spring Semester.**

111. The Complainant put on no evidence during the course of the hearing regarding the above physical education issues, and, accordingly, I do not find FAPE has been denied in that regard.

Placement

112. The initial complaint did not ask for a placement outside the District. At the beginning of the hearing the Complainant, through counsel, asked, first, for placement of the Student in the District with an evaluation of the Student to be conducted by an independent Board Certified Behavior Analyst and that a Registered Behavior Technician, trained in working with autistic

children by a BCBA to be provided as a one-to-one aide to the student until such time as one a one-to-one aide no longer is required. Alternatively, the Complainant asked for placement at the Private School. Counsel concluded [REDACTED] request, saying, if “those first two placements are not appropriate, that the District's suggestion that the child attend a school [in a specified In State Private School] would be the final alternative.” In Complainant’s final written submission, styled “Proposed Findings of Fact, Conclusions of Law, Order and Judgment,” Complaint proposed placement only at the Private School. During the course of this hearing, witnesses for the District, while maintaining FAPE had been provided prior to the [REDACTED] school year, admitted the District was no longer the Least Restrictive Environment for the Student. Both Parties agree the child needs intensive therapy in a special school context, but they disagree as to what school should be the setting for such placement.

113. Complainant contends that I, as a hearing officer, have the authority pursuant to *Burlington School Comm. v. Mass. Dept. of Ed.*, 471 US 359 (1985), and the Mississippi “Procedures for State Board Policy 74.19,”¹⁰ to order the District to place the Student at the Private School and to order the District to pay for the placement.

114. Quoting from *Burlington*, Complainant states that it seems “clear beyond cavil that ‘appropriate’ relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.” I read the *Burlington Case*, however, as applying to the right of a parent to reimbursement under certain conditions for unilateral placement. Moreover, the portion of the opinion cited by Complainant

¹⁰ “If a Hearing Officer determines that an LEA has not made FAPE available to a child with a disability or has not made FAPE available in a timely manner, the parents may place the child in a private school or facility that provides appropriate services. In addition, the Hearing Officer may order the LEA to pay for these services. A Hearing Officer or a court may find the parental placement is appropriate even if it does not meet Mississippi’s standards that apply to public agencies.”

as warrant for a Mississippi hearing officer to order a school to pay for a private placement already made refers to courts, not hearing officers, and cites a statute giving *courts* rather than *hearing officers* authority “to grant such relief as *the court determines* is appropriate (emphasis added).” See 20 U. S. C. §§ 1415(e)(2). The passage from the state policies cited by Complainant likewise refers to the authority of a hearing officer, under certain conditions, to order a school district to reimburse a Parent for a unilateral placement. See *Policies*, § 300.148 (c). That section does not authorize a hearing officer to order, as a remedy for denial of FAPE, the placement of a child in particular private school.¹¹

115. As a hearing officer, my authority in this instance is to determine whether FAPE has been provided. I do not find authorization within the Policies to order the District to make prospectively a private placement.

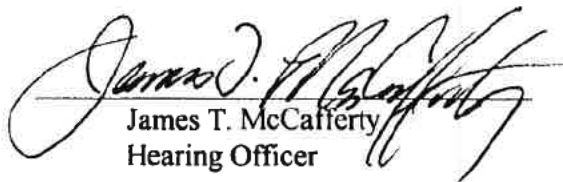
RELIEF GRANTED

116. The foregoing considered, I find that Respondent District having admitted during the course of this hearing that it is no longer the Least Restrictive Environment for the education of the Student and that the proper placement for the Student is in a special school, said District is hereby ordered to, within 60 days, both convene an IEP meeting and provide an IEP for the Student that places ■■■■ in a special school and complies in all respects with the Mississippi “State Policies Regarding Children with Disabilities Under ‘The Individuals with Disabilities Education Act Amendments of 2004,’” with particular regard to academic education, physical education, behavioral therapy, and all appropriate related services.

¹¹ According to the testimony of witness ■■■■ and of District Representative ■■■■ the Private School is not on the Mississippi Department of Education’s approved list in order for a Student to be placed there. While that would be no obstacle to a Parent’s request for reimbursement for unilateral placement, see *Policies*, § 300.148, it is for a placement by a District. See, *Policies*, § 300.17

117. Any other prayers for relief are denied.

So ordered, this the 3rd day of May 2019.


James T. McCafferty
Hearing Officer