

**IN THE ALABAMA STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION DIVISION**

\_\_\_\_\_, a minor, by and  
through his Parent and Next Friend  
\_\_\_\_\_, on behalf of himself  
and all similarly situated students.

Petitioners,

v.

**MONTGOMERY PUBLIC SCHOOLS**

Respondent.

Case No. 2011-

**COMPLAINT FOR DUE PROCESS**

Petitioner \_\_\_\_\_, by and through his parent and next friend, \_\_\_\_\_, submits this Complaint for Due Process Hearing on behalf of himself and all similarly situated Montgomery Public Schools students. In support, Petitioner states the following:

**I. JURISDICTION**

1. This Complaint is brought under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, the Alabama Administrative Code (Ala. Admin. Code), § 290-8-9 *et seq.*, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 794.

**II. PARTIES**

2. Petitioner is a resident of Montgomery, Alabama, residing at \_\_\_\_\_, Montgomery, AL \_\_\_\_\_. Petitioner's date of birth is \_\_\_\_\_.
3. \_\_\_\_\_, Petitioner's mother, has authorized counsel to bring this Complaint on Petitioner's behalf.

4. Petitioner is a student in Montgomery Public Schools (MPS) and has been enrolled at MPS schools at all times relevant to this action.

5. Petitioner is eligible for services under IDEA and the Alabama Administrative Code. Petitioner is an individual with a disability under the ADA and the Rehabilitation Act.

6. Respondent MPS, a public school district, is a public entity covered by the ADA and subject to the Rehabilitation Act. MPS receives federal financial assistance from the United States Department of Education. MPS operates [REDACTED], a “neighborhood” or regular public elementary school.

### **III. FACTS**

#### **A. Introduction**

7. Petitioner [REDACTED] is a thirteen-year-old boy in the eighth grade. He enjoys assisting teachers and playing football and basketball with other children in his neighborhood. Teachers have noted that he responds well to verbal praise and can be well-mannered, cooperative, and eager to learn. Throughout his school years, Petitioner’s parents have actively been engaged with MPS to help their son succeed in school academically and socially.

8. Although Petitioner is motivated to succeed in school and has many strengths, he also experiences significant mental health challenges, including Attention Deficit Hyperactivity Disorder, cognitive disorder with processing deficits and learning disabilities, and psychotic disorder.

9. With appropriate special education services, including intensive mental health services tailored to his needs, Petitioner can learn and make progress in an inclusive classroom in his neighborhood school, which is the least restrictive and most integrated

setting for Petitioner. With appropriate special education services, Petitioner can realize a bright future.

10. Unfortunately, Petitioner has been denied appropriate special education services, including at his neighborhood school, and as a result, is not making progress at school. Because of the inadequate special education services Petitioner is receiving, he will likely continue to experience serious academic and behavioral problems at school.

11. Petitioner's situation is representative of many students within MPS. MPS fails to provide students with emotional disturbance<sup>1</sup> the specialized instruction and related services these students need to benefit from instruction in the least restrictive and most integrated setting. As a result, students in MPS with emotional disturbance fail to make progress in school, drop out at a high rate, and experience repeated yet avoidable disciplinary sanctions, including in-school and out-of-school suspensions, undocumented "cool off" removals (*i.e.*, undocumented suspensions), placements in alternative schools, and expulsions. Many students with disabilities are pushed into the juvenile justice system.

## **B. History**

12. Petitioner began receiving mental health services at age three or four. He was prescribed psychotropic medications at age five, following behavioral problems in kindergarten. Petitioner has been hospitalized periodically for treatment for his serious mental health condition.

13. MPS found Petitioner eligible for special education services as a student with

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<sup>1</sup> "Students with emotional disturbance," as used herein, includes both students with emotional disturbance whom MPS has identified and also students with emotional disturbance whom MPS should have identified.

emotional disturbance, and he has had an Individualized Education Program (IEP) since April 2006.<sup>2</sup>

14. Petitioner's school often called his parents to come and remove him from school due to behavior problems.

15. From January 2005 until summer 2007, Petitioner was segregated from his nondisabled peers and placed in a self-contained classroom at [REDACTED] Elementary School and, later, the [REDACTED] Center.

16. MPS continued to place Petitioner in a self-contained classroom in an alternative school, segregated from his nondisabled peers, until the [REDACTED] Center closed and Petitioner enrolled in the sixth grade at [REDACTED] Middle School.

17. At [REDACTED], Petitioner was initially placed in a regular education classroom, but was soon moved to the segregated Behavior Intervention Program ("BIP") at the school.

18. Upon his transfer to the BIP, a "Behavior Intervention Plan" ("Behavior Plan" or "Plan") was developed. The Plan was not tailored to Petitioner's actual needs but instead contained a cookie cutter approach used throughout the BIP. As a result, Petitioner's behavior did not improve.

19. The IEP drafted for Petitioner in October 2008 reflects that Petitioner was performing below grade level in all academic areas and was performing on the third-grade level in Math. In addition, it reports that Petitioner displayed "hyperactivity," was "argumentative with teachers and peers," and had other behavioral issues, including "walking out of the

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<sup>2</sup> Petitioner was administered a Woodcock-Johnson Achievement Test in March 2005, which showed that he had a relative deficit in reading comprehension, scoring over two standard deviations lower in reading comprehension than in oral comprehension. Although in 2006 MPS considered evaluating Petitioner to determine whether he had a learning disability, it chose not to because he had already qualified for special education as an "emotionally disturbed" child.

classroom, and fighting.” The IEP was wholly inadequate to meet Petitioner’s academic and mental health needs, and the IEP was also not implemented as described. Petitioner’s placement in the BIP did not lead to improvements in Petitioner’s academic performance or behavior. Progress reports describe continuing behavior problems and continuing ineffective punitive responses.

20. Petitioner’s Behavior Plan was vague and inadequate. It did not appropriately identify triggers for behaviors or specific interventions to be implemented in response to behaviors. In addition, even the limited interventions in the Plan were not implemented. For example, the behavioral aide often departed from the Plan, resulting in Petitioner spending less time in the regular classroom and more in the BIP.

21. Petitioner’s parents requested that Petitioner be educated in a regular education setting. In January 2009, Petitioner’s father told school officials that “[REDACTED] feels he is a prisoner” and that he was isolated. Petitioner’s parents raised concerns that the BIP could not meet Petitioner’s academic needs, in part because the BIP included children of varying age and skills.

22. As Petitioner’s needs went unmet, his behaviors continued to worsen. On February 19, 2009, Petitioner was placed on homebound status. The notes from the Manifestation Determination Review indicate that Petitioner’s “medication is not working” and that Petitioner and his special education teacher, [REDACTED], have a “personality conflict.”

23. Petitioner’s homebound placement both denied him the special education he needed and segregated Petitioner from his peers. Petitioner’s IEP provided for only four hours per week of homebound instruction, which was inadequate to meet his needs. Even those four

hours were not consistently provided. The homebound placement was originally scheduled to last 45 days, but was extended to fill the remainder of the semester.

24. Petitioner's IEP report for the 2008-2009 school year stated that "no" progress had been made that year toward Petitioner's math, reading, and behavior goals.

25. In May 2009, Petitioner's IEP team decided, for the 2009-2010 school year, that Petitioner would return to [REDACTED], again placed in the BIP.

26. When Petitioner returned to [REDACTED], the special education services he received at the BIP were inadequate and failed to meet his academic and mental health needs.

27. On September 11, 2009, Petitioner was placed at [REDACTED], a segregated alternative school, as a result of behaviors that the IEP team incorrectly determined were not a manifestation of his disability. Those behaviors were the same behaviors that his 2008-2009 and 2009-2010 Behavior Plans identified as "characteristic of [Petitioner's] disability." Neither of Petitioner's parents was present when the manifestation determination was made and Petitioner's mental health counselor dissented from the team's determination.

28. At [REDACTED], Petitioner was placed in a self-contained classroom. Throughout the 2009-2010 school year, Petitioner was suspended and experienced numerous undocumented removals from school due to behaviors that were a manifestation of his disability, including leaving class, lapses in self-control, not bringing supplies, and failure to complete assignments.

29. At times, [REDACTED] staff called Petitioner's parents to come and calm Petitioner down. Often on these occasions, school officials often asked his parents to take Petitioner home. School officials did not document these disciplinary removals as suspensions or comply with applicable procedural safeguards. Petitioner's disciplinary removals constituted changes in

placement under 34 C.F.R. § 300.536(a)(2), but MPS failed to hold the required Manifestation Determination Reviews.

30. Petitioner finished the school year at [REDACTED]. While at [REDACTED], his IEP continued to be inadequate, failing to meet either his academic or mental health needs.

31. In Fall 2010, Petitioner returned to [REDACTED]. Neither his IEP nor Behavior Plan adequately or appropriately identifies or addresses his academic or mental health needs. As a result, Petitioner is not making progress in school and he has experienced multiple suspensions and undocumented removals due to behaviors that are a result of his disability.

[REDACTED] Petitioner was hospitalized in January and February 2011 at [REDACTED] [REDACTED],<sup>3</sup> and in April 2011 at [REDACTED].

33. Petitioner's consultant, neuropsychologist Dr. [REDACTED], recently evaluated Petitioner and concluded that Petitioner has "clearly failed to benefit from his educational experiences to date" and was "far behind his peers academically" as a result of his unmet academic and mental health needs. Dr. [REDACTED] stressed the importance of a positive, consistently implemented behavioral intervention plan and collaboration between Petitioner's mental health providers and school personnel to ensure that school personnel understand Petitioner's educational and emotional needs. Dr. [REDACTED] recommended that Petitioner's IEP include specialized instruction in reading and written expression, individualized assistance focusing on phonemic identification and use, teaching geared toward auditory learning (books on tape and educational videos), attention to occupational therapy needs, and transitional services when Petitioner turns 16.

34. Petitioner has never received the special education he requires for a free and

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<sup>3</sup> [REDACTED] did not respond to the hospital's request for Petitioner's school assignments.

appropriate public education. In addition, Petitioner has not been educated with his nondisabled peers to the maximum extent appropriate. Petitioner is fully capable of being educated in a regular education setting if appropriate specialized instruction and mental health services are provided.

35. MPS systemically fails to provide appropriate specialized instruction and related services to Petitioner and other students with emotional disturbance, resulting in their academic failure, removal from regular education settings, and being sanctioned for avoidable behaviors that are manifestations of their disabilities.

36. MPS systematically fails to provide intensive mental health services to students with emotional disturbance who need them to receive a free and appropriate public education in the least restrictive and most integrated setting. Because MPS systematically denies such students the related services they need, Petitioner and other students with emotional disturbance are denied the opportunity to learn in regular education settings in their neighborhood school, which is the least restrictive and most integrated setting for these students.

37. The related services that Petitioner and similarly situated students require include:

- a. *Direct Behavioral Interventions*: positive behavioral supports, skills building, and other rehabilitative interventions provided by qualified personnel including behavioral aides and mentors;
- b. *Teacher Coaching and Training*: coaching and training teachers and other school staff to implement positive behavioral supports and skills building and other rehabilitative interventions;

- c. *Parent Coaching and Training*: coaching and training parents or guardians such as Ms. [REDACTED] to participate in and complement the behavioral interventions provided at school;
- d. *Mobilizing Community Resources*: mobilizing resources available in the community, including through the Montgomery Area Mental Health Authority;
- e. *Coordination with Non-School Providers*: coordinating the school's activities with those of the mental health and other public systems, including psychiatrists prescribing medication, therapists, and counselors.

#### IV. CLASS ALLEGATIONS

38. Petitioner brings this Complaint on behalf of himself and similarly situated MPS students with emotional disturbance who are not receiving the special education services they need to receive a free and appropriate public education in the least restrictive and most integrated setting. Petitioner seeks relief individually and on behalf of other students to remedy violations of federal and state law.

39. The class of students represented by Petitioner is so numerous that joinder of all members is impracticable. Among students whom MPS has found eligible for special education services, approximately 85 were found eligible as "emotionally disturbed." This figure does not represent all students with emotional disturbance in MPS. The number of such students is at least 300 and possibly higher. The Surgeon General of the United States has estimated that between five and nine percent of children aged 9 to 17 have "serious emotional disorders."<sup>4</sup>

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<sup>4</sup> See U.S. Department of Health and Human Services, "Mental Health: A Report of the Surgeon General," (1999), *available at*

40. There are questions of law and fact common to the class including, *inter alia*,
- a. Whether MPS is violating the IDEA by failing to provide Petitioner and the class with the related services they need to receive a free and appropriate education in the least restrictive environment;
  - b. Whether MPS is violating the ADA and the Rehabilitation Act by failing to provide educational services to Petitioner and the class in the most integrated setting appropriate to their needs;
  - c. Whether MPS is violating the ADA and the Rehabilitation Act by denying Petitioner and the class the opportunity to reach the same level of achievement as other students;
  - d. Whether MPS is violating the ADA and the Rehabilitation Act by denying Petitioner and the class the benefits of services, programs, or activities of a public education, including by denying them the related services they need to receive a free and appropriate education; and
  - e. Whether MPS is violating the ADA and the Rehabilitation Act by failing to make reasonable modifications in its policies, practices, or procedures as are necessary to avoid discrimination on the basis of disability.
41. Petitioner's claims are typical of those of the class, allowing Petitioner to adequately and fairly represent the interests of the class. Petitioner will fully and vigorously prosecute this action and is represented by attorneys experienced in federal class action litigation and special education and disability law. Individual members of the class would have difficulty pursuing their own claims or remedying systematic violations on their own.

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[http://www.surgeongeneral.gov/Library/MentalHealth/chapter2/sec2\\_1.html](http://www.surgeongeneral.gov/Library/MentalHealth/chapter2/sec2_1.html) (last visited May 23, 2011).

42. MPS has acted or refused to act on grounds generally applicable to Petitioner and to the class, thereby making the relief requested below appropriate with respect to the class as a whole.

## V. VIOLATIONS

### **Count I: Failure to Provide a Free Appropriate Public Education** ***Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(1), § 1412(a)(5)***

43. MPS is denying Petitioner the specialized instruction and related services he needs to receive a free and appropriate public education.

44. As a result, Petitioner is not performing at grade level, is not progressing at school, and is not being educated with his nondisabled peers to the maximum extent appropriate or in the least restrictive environment.

45. The related services Petitioner requires, but is not receiving, include:

- a. Direct behavioral interventions;
- b. Teacher coaching and training;
- c. Parent coaching and training;
- d. Mobilizing community resources; and
- e. Coordinating with non-school providers.

46. Moreover, MPS has failed to implement even Petitioner's inadequate IEP.

47. Neither "the nature [n]or severity" of Petitioner's disability, 34 C.F.R. § 300.114(a)(2)(ii), requires or justifies Petitioner's placement for extended periods on homebound status or in an alternative school.

42. MPS failed to follow required procedural safeguards, 20 U.S.C. § 1415(k), when it suspended Petitioner, sent him home early, and placed him for extended periods of time on homebound status and at an alternative school. In Petitioner's case, MPS has used

“discipline . . . as a means of disconnecting [Petitioner] from education.” *See* 71 Fed. Reg 46715.

48. MPS is denying students with emotional disturbance as a class the specialized instruction and related services they need to receive a free and appropriate public education.

49. As a result, MPS students with emotional disturbance are not performing at grade level, are not progressing at school, and are not being educated with their nondisabled peers to the maximum extent appropriate or in the least restrictive environment.

**Count II: Discrimination on the Basis of Disability**  
***Americans with Disabilities Act, 42 U.S.C. §12132;***  
***Section 504 of the Rehabilitation Act, 29 U.S.C. §794***

50. Petitioner is an individual with a disability within the meaning of the ADA and Rehabilitation Act. Petitioner has an impairment that substantially limits major life activities, including learning and interacting with others.

51. As a school-aged resident of Montgomery, Alabama, Petitioner is qualified to receive public educational services from MPS. 34 C.F.R. § 104.3(*l*).

52. MPS is a recipient of federal financial assistance.

53. MPS is discriminating against Petitioner in violation of the ADA and Rehabilitation Act by:

- a. Denying Petitioner the opportunity “to reach the same level of achievement” as other students, 28 C.F.R. § 35.130(b)(1)(iii);
- b. Denying Petitioner “the benefits of services, programs, or activities” of a public education, including by denying him the related services he requires to receive a free and appropriate public education, 28 C.F.R. § 35.130(a); 34 C.F.R. §§ 104.4(b), 104.43(a);

- c. Denying Petitioner educational services in the “most integrated setting” appropriate to his needs, 28 C.F.R. § 35.130; 34 C.F.R. § 104.34(a);<sup>5</sup> and
- d. Failing to make reasonable modifications in its policies, practices, or procedures as are necessary to avoid discrimination on the basis of disability, 28 C.F.R. § 35.130(b)(7); 34 C.F.R. § 104.44.

54. MPS is discriminating against students with emotional disturbance as a class, in violation of the ADA and Rehabilitation Act, by:

- a. Denying them the opportunity “to reach the same level of achievement” as other students, 28 C.F.R. § 35.130(b)(1)(iii);
- b. Denying them “the benefits of services, programs, or activities” of a public education, including by denying them the related services they require to receive a free and appropriate public education, FAPE, 28 C.F.R. § 35.130(a); 34 C.F.R. §§ 104.4(b), 104.43(a);
- c. Denying them educational services in the “most integrated setting” appropriate to their needs, 28 C.F.R. § 35.130; 34 C.F.R. § 104.34(a); and
- d. Failing to make reasonable modifications in its policies, practices, or procedures as are necessary to avoid discrimination on the basis of disability, 28 C.F.R. § 35.130(b)(7); 34 C.F.R. § 104.44.

## **VI. PRAYER FOR RELIEF**

55. Petitioner [REDACTED] respectfully requests that MPS provide Petitioner with the following relief:

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<sup>5</sup> Under the IDEA as well, MPS is required to educate Petitioner with his nondisabled peers to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5).

- a. Retain an independent behavioral specialist, chosen by Petitioner, to assist MPS in developing and implementing a new IEP for Petitioner's IEP, including by conducting a comprehensive functional behavior assessment and helping MPS develop and implement an effective behavior intervention plan. The behavior intervention plan should identify and prescribe the direct behavioral interventions that Petitioner will receive, and that teachers, other school staff, and Ms. [REDACTED] will be trained to implement. All members of the IEP team should participate in the assessment of Petitioner's strengths and needs. The IEP team should invite community providers available to support Petitioner and Ms. [REDACTED] to participate on the team.
- b. Implement Petitioner's revised IEP in a regular educational setting in a "neighborhood" school; and
- c. Provide Petitioner with compensatory education services in the form of intensive remediation for reading, written expression, and math.

56. Additionally, on behalf of the class, Petitioner requests that MPS:

- a. Provide students with emotional disturbance the specialized instruction and related services they require to receive a free and appropriate public education in the least restrictive and most integrated setting, including by providing direct behavioral interventions, teacher coaching and training, and parent coaching and by mobilizing and coordinating with non-school providers;
- b. Develop and implement an effective approach to identifying students with emotional disturbance;
- c. Provide compensatory education to remedy MPS's past violations of law;

- d. Provide necessary training to school administrators and staff to effectuate the above; and
  - e. Provide additional relief as appropriate.
57. Petitioner requests reimbursement for any independent educational evaluations obtained for this Complaint.
58. Petitioner requests reimbursement for reasonable attorneys' fees and costs incurred during the prosecution of this Complaint.

Respectfully submitted,

/s/ Nancy Anderson

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