

# IMPARTIAL DUE PROCESS HEARING

BEFORE THE HEARING OFFICER  
APPOINTED BY THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS

STATE OF NEVADA

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In the Matter of

STUDENT<sup>1</sup>, by and through Parent

Petitioners,

v.

SCHOOL DISTRICT,

Respondent

DECISION OF THE HEARING OFFICER

Date:

Representatives:

Student's Parent on behalf of Petitioner:

Paul J. Anderson, Esq. on behalf of School  
District, Respondent.

Hearing Officer:

David I. Nielsen

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## I

### PROCEDURAL BACKGROUND

This decision following a due process hearing arises from the Petitioner's claim brought under the authority of the Individuals with Disabilities Education Act (IDEA), 20 USC Section 1400 et seq.; 34 CFR 300.100 et seq.; Nevada Revised Statutes (NRS) Chapter 388; and the Nevada Administrative Code (NAC) Chapter 388.

The due process hearing took place on February 2 and 3, 2017. Petitioner was represented by the Student's parent, and Respondent was represented by Paul J. Anderson, Esq.

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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution. See Letter to Schad (FPCO 12/23/04)

The hearing was closed to the public, and witnesses were excluded from the hearing room with the exception of the Student's Mother, and the School District's Director of Special Education, assisting Mr. Anderson.

On November 18, 2016, Petitioner filed a Due Process Complaint. See Hearing Officer Record, (HO Ex. #1). The Due Process Complaint was received by the School District, on November 18, 2016, (HO Ex. #4), and the Nevada Department of Education on November 21, 2016, (HO Ex. #1). The Department of Education appointed the undersigned to serve as hearing officer by letter dated November 28, 2016. (HO Ex. #4). On November 29, 2016, this hearing officer scheduled a status review hearing to take place on December 7, 2016. (HO Ex. #5).

Following the status hearing and with the consent of the petitioner and the school district, a due process hearing was scheduled for January 25, 26 and 27, (HO Ex. #6), and by Order of the Hearing Officer pursuant to the stipulation of both parties, the decision date was extended to February 15, 2017, (HO Ex. #8).

The Hearing Officer received Respondent's Response to Due Process Complaint on December 23, 2016. (HO Ex. #10).

On December 8, 2016, this hearing officer scheduled a telephonic prehearing conference for December 21, 2016 at 9:00 a.m. (HO Ex. #6). The hearing was rescheduled by agreement of the school district and the petitioner for December 28, 2016 at 9:00 a.m., to allow the Nevada Department of Education to appear and participate as a named respondent in the petition. An agenda letter was provided to the department of education. (HO Ex. #9) Appearing at the telephonic prehearing conference conducted on December 28, 2016 was the Student's parent on behalf of the petitioner, Paul J. Anderson, Esq. on behalf of the School District, respondent, and Gregory D. Ott, Esq., on behalf of respondent, Nevada Department of Education. Following the prehearing conference, the hearing officer issued a Pre-Hearing Conference Summary and Order dated December 28, 2016. (HO Ex. #12).

The hearing officer restated the issues to be considered at the due process hearing. They were discussed and clarified during the prehearing conference, and were limited to those set forth in the request for due process hearing. Four issues were identified as subjects of the due process hearing. (HO Ex. #12, pages 4, 5 and 6). Those issues are as follows:

ISSUE #1: Did the District deny Student a FAPE by failing to allow parent participation at the IEP meetings conducted on October 13, 2016 and November 9, 2016? Parent was ill and unable to attend the October 13 meeting, and Parent was not provided enough time to review evaluations and assessments, and comment on how they should be used in the development of Student's IEP.

ISSUE #2: Was Student denied a FAPE when the District failed to properly evaluate Student prior to the October, 2016 IEP meeting, specifically by conducting an untimely Functional Behavior Assessment (FBA) after behavior was identified as a special factor? Evaluator was not aware of Student's stimming and shut down behaviors, resulting in a failure to diagnose Student's autism.

ISSUE #3: Was Student denied a FAPE when the District developed an IEP that failed to confer student with an educational benefit by:

- a. failing to include fit learner and functional behavior assessment recommendations under effects on student involvement and progress in the general education section of the IEP;
- b. failing to include in the IEP implementation of required methodology to address Specific Learning Disabilities (SLD);
- c. failing to implement needed supports identified by the FBA, specifically, Student's seating arrangement close to the instructor to correct off task behaviors, and conducting reading assignments in the morning when Student is able to concentrate;
- d. failing to identify and clarify MAPS methodology in the IEP;
- e. failing to fully implement the FBA recommendations;
- f. failing to provide goals that are clear, precise and measurable, in that measurement is by teacher observation, and goals provided are overly subjective, not standardized, and not based on developmental research based curriculum in that the teacher made records are used;
- g. goals fail to address discrete early learning skills identified in the FIT assessment;
- h. failing to provide alternative to the free reading time period, as assessment provides that Student does not engage in free reading;
- i. failing to identify goals for speech, occupational therapy and social interaction;
- j. failing to specify in the IEP, methodology to be utilized in list of subject areas identified for Specially Designed Instruction;
- k. failing to provide for audio books as recommended by the Independent Educational Evaluation (IEE);
- l. failing to provide Student with dictation for timed tests in all classes and/or access to word processing to address Student's difficulty with writing by hand;
- m. failing to adopt recommended speech and language therapy 4 days per week;
- n. failing to consider assistive technology; and

- o. failing to develop a Positive Behavioral Support (PBS) plan utilizing supplementary aides and services to address off task behaviors.

ISSUE #4: Did the State Department of Education deny Student a FAPE by failing to train District employees in the drafting and implementation of IEPs?

The Prehearing Conference Summary and Order provided that objections or corrections were to be submitted in writing to the hearing officer before January 6, 2017. (HO Ex. #12, paragraph 9). No objections to the prehearing conference order were received by the hearing officer prior to the due process hearing.

On December 27, 2016 the Nevada Department of Education filed a Motion to Dismiss Complainant's due Process Complaint as it applies to the Department of Education. (HO Ex. #11). The Petitioner filed an opposition to the motion on December 30, 2016, (HO Ex. #13), and Respondent, School District filed a non-opposition to the motion on January 3, 2017. (HO Ex. #15). The Hearing Officer filed an Order Granting Motion to Dismiss on January 9, 2017, dismissing the Nevada Department of Education from the Due Process Complaint, and eliminating Issue #4 from consideration at the due process hearing. (HO Ex. #16).

On January 20, 2017 Respondent filed a Motion to Continue Due Process Hearing and Decision Due Date. (HO Ex. #19). Petitioner opposed the motion by email received on January 20, 2017. (HO Ex. #20). The Hearing Officer entered an Order Extending Due Process Hearing and Decision Due Dates on January 23, 2017, extending the hearing date one week to February 2 and 3, 2017, and extending the decision due date to February 22, 2017. (HO Ex. #22).

The due process hearing commenced as scheduled on February 2, 2017 at 9 a.m., and the Hearing Officer began by stating the three issues to be decided. Both parties stated that they were prepared to proceed. Testimony was taken and documentary evidence was admitted over the following two days, and the due process hearing was concluded on February 3, 2017 at approximately 12:30 p.m. when the record was closed.

## II

### BURDEN OF PROOF AND PRODUCTION

The District has the burden of proof and burden of production concerning all issues. (NRS 388.467).

## III

### EXHIBITS

The hearing officer identified the exhibits and other relevant documents that would be part of the hearing officer's official record. Those exhibits are identified as HO Ex. #1 through HO Ex. #23.

The following Exhibits are located in Binder #1. The parties jointly submitted Exhibits J-1 through J-8, which were admitted into evidence during the course of the due process hearing, Petitioner submitted pages 206 and 207 of Exhibit P-1, which were admitted into evidence. The remaining pages of P-1 were not offered into evidence.

The following exhibits are located in Binder #2. The District submitted and the hearing officer granted admission of Exhibits D-1, D-4, D-5, D-6, D-10, D-11, D-12, D-13, D-14, D-15, D-16, D-17, D-18, D-19, D-20, D-21, D-22, D-23, D-24, D-25, D-26, D-27, D-28, D-29, D-30, D-31, D-32, D-33, D-34, D-35, D-36, D-37, D-38 and D-39. The District submitted and the hearing officer granted admission of Exhibit D-7 pages 84, 85, 100, 159-163 and 177-180. The District submitted and the hearing officer granted admission of Exhibit D-8 pages 275, 279 and 402-407. The remaining exhibits in Binder #2 were identified but not offered into evidence.

## IV

### STIPULATIONS OF FACT

The parties offered stipulated facts 1 through 13, located in Binder #1 which were admitted into evidence as Stipulated Facts Exhibit #1.

## V

### ISSUES

The issues to be determined are as stated by the Hearing Officer at the commencement of the due process hearing, as follows:

**ISSUE #1:** Did the District deny Student a FAPE by failing to allow parent participation at the IEP meetings conducted on October 13, 2016 and November 9, 2016? Petitioner, Student's Mother, alleges that she was ill and unable to attend the October 13 meeting, and Parent was not provided enough time to review evaluations and assessments, and comment on how they should be used in the development of Student's IEP.

**ISSUE #2:** Was Student denied a FAPE when the District failed to properly evaluate Student prior to the October, 2016 IEP meeting, specifically by conducting an untimely Functional Behavior Assessment (FBA) after behavior was identified as a special factor? Petitioner alleges that the evaluator was not aware of Student's stimming and shut down behaviors, resulting in a failure to diagnose Student's autism.

**ISSUE #3:** Was Student denied a FAPE when the District developed an IEP that failed to confer student with an educational benefit by:

- a. failing to include Fit learner and functional behavior assessment recommendations under Effects on student involvement and progress in general education section of the IEP;
- b. failing to include in the IEP implementation of required methodology to address Specific Learning Disabilities (SLD);
- c. failing to implement needed supports identified by the FBA, specifically, Student's seating arrangement close to the instructor to correct off task behaviors, and conducting reading assignments in the morning when Student is able to concentrate;
- d. failing to identify and clarify MAPS methodology in the IEP;
- e. failing to fully implement the FBA recommendations;
- f. failing to provide goals that are clear, precise and measurable, in that measurement is by teacher observation, and goals provided are overly subjective, not standardized, and not based on developmental research based curriculum in that the teacher made records are used;
- g. goals fail to address discrete early learning skills identified in the FIT assessment;

- h. failing to provide alternative to the free reading time period, as assessment provides that Student does not engage in free reading;
- i. failing to identify goals for speech, occupational therapy and social interaction;
- j. failing to specify in the IEP, methodology to be utilized in list of subject areas identified for Specially Designed Instruction;
- k. failing to provide for audio books as recommended by the Independent Educational Evaluation (IEE);
- l. failing to provide Student with dictation for timed tests in all classes and/or access to word processing to address Student's difficulty with writing by hand;
- m. failing to adopt recommended speech and language therapy 4 days per week;
- n. failing to consider assistive technology; and
- o. failing to develop a Positive Behavioral Support (PBS) plan utilizing supplementary aides and services to address off task behaviors.

Both parties stated that they were prepared to proceed on the date of the hearing.

## VI

### FINDINGS OF FACT

After considering all the evidence, this Hearing Officer's Findings of Fact are as follows:

1. Student attends a school in the Respondent, School District. (Stipulated Fact #3).
2. Student is eligible for special education under the category of "specific learning disability" as determined on April 27, 2016. (Stipulated Fact #4).
3. Prior to April 27, 2016, student was eligible for special education under the category of autism. (Stipulated Fact #5).
4. An IEP meeting was held for Student on October 13, 2016. Student's Mother did not attend the meeting stating on October 11, 2016 that she was sick, but agreed to have the meeting go forward without her because the annual IEP review was due to be completed by October 13, 2016. She was not offered a new date for the IEP meeting. (Stipulated Facts #8 and #9; and Testimony of Student's Mother, Testimony of Director of Special Education).
5. Student's Mother requested another IEP meeting to go over the IEP adopted on October 13, 2016, and the School District set that meeting for November 9, 2016.

- Student's Mother was under the impression that the November 9 meeting was an IEP review meeting. (Stipulated Fact #10 and Testimony of Student's Mother).
6. On October 7, 2016 the School District provided Student's Mother with the preliminary summary of the Functional Behavior Assessment (FBA) dated October 7, 2016, the FIT Learning Behavior and Language Assessment result dated July, 2016, and the Independent Educational Evaluation (IEE) dated June 6 through August 31, 2016. (Stipulated Fact #11, Testimony of Director of Special Education and Testimony of Student's Mother).
  7. The final version of the FBA was dated October 13, 2016, and was provided to Student's Mother on or about October 13, 2016. The FBA was presented at the IEP meeting of October 13, 2016 by its author, a Behavior Analyst. (Stipulated Fact #13, Testimony of Behavior Analyst, Testimony of Director of Special Education).
  8. The Director of Special Education testified at the hearing. She is the Director of Special Education Services with the School District, and has held that position for eight months. She has oversight responsibilities for all special education programs throughout the School District, working with administrators, teachers, service providers and contractors to ensure compliance with the provision of a Free Appropriate Public Education (FAPE) for student's of the district with disabilities. She has a 1992 Bachelor of Science Degree in Elementary and Special Education from the University of Nevada and a Masters Degree in Education from the University of Southern Mississippi in 1997. She has previously worked as a special education teacher at an Intermediate School and Cottonwood School for twelve years, the Director of Special Education for County School District for five years, and for the Nevada Department of Education as an education program professional and Special Education Director monitoring compliance of all special education programs

and IEPs, and provided training for the writing and development of IEPs in the State of Nevada. After serving the State Department of Education for four years, she started in her current position as Director of Special Education for the School District. The Director of Special Education's education and experience is extensive, and her testimony merits a finding of a high degree of knowledge and credibility. (Testimony of the Director of Special Education).

9. At the request of the Student's Mother, an Independent Educational Evaluation (IEE) was conducted regarding the Student during the summer of 2016. The IEE included a psychological evaluation, an assessment through FIT Learning, followed by an FBA. The evaluations and assessments were to be performed at the school district's expense, including transportation to Reno, meals and a hotel room for the Student and Student's Mother. The completed FBA was presented by its author the Behavior Analyst at the October 13, 2016 IEP meeting. A thorough preliminary summary was prepared by the Behavior Analyst dated October 7, 2016 and provided to the IEP team, including the Student's Mother, on October 7, 2016. (Stipulated Fact #11, Exhibit D-1, Exhibit J-4, Testimony of Behavior Analyst and Testimony of the Director of Special Education).
10. Student's annual IEP review was due on or before October 13, 2016. On September 22, 2016 Student's Mother asked by email that materials relevant to the IEP review be sent to her through email so that she could review them prior to the IEP meeting. The School District interpreted the email to request that the IEP meeting be conducted by email, and on September 23, 2016 offered to conduct the meeting by telephone or video conference. The District also suggested other accommodations could be provided, including that she could bring someone to assist her at the meeting, and that she could tape record the meeting. (Testimony of the Director of

Special Education, Testimony of Student's Mother, and Exhibit D-7 Pages 160, 161, 177-180).

11. The FIT learning report was received by the School District on August 25, 2016. The psychological evaluation was performed by Dr. Ayarbe and received by the School District on October 6, 2016. Student's Mother received both these reports as they came to the District. (Testimony of the Director of Special Education).
  
12. The Behavior Analyst is licensed by the Nevada Board of Psychological Examiners as a certified behavior analyst. He has a Doctorate Degree in Psychology with a specialty in Behavior Analysis. The Behavior Analyst owns his own practice and works for school districts in the State of Nevada providing Functional Behavior Assessments and developing Behavior Intervention Plans. He is a highly qualified professional with superior credentials. His experience and education makes him a very qualified analyst with a high degree of credibility in his testimony at the hearing. The Behavior Analyst conducted a Functional Behavior Assessment and prepared a preliminary report received by the School District on October 7, 2016 and a completed FBA report received on October 13, 2017. Both reports were forwarded to Student's Mother on the dates they were received by the School District. (Testimony of the Director of Special Education and Testimony of the Behavior Analyst).
  
13. A six hour annual IEP review was conducted on October 13, 2016. Student's Mother was not present due to illness which she reported to the District on October 11, 2016, and she agreed that the meeting could go forward in her absence. Present at the IEP meeting were the School Principal; the Special Education Teacher; Special Education Teacher 2; the Speech and Language Pathologist; the General Education Teacher; the Behavior Analyst, Behavior Specialist; the Occupational Therapist; and the Director

- of Special Education Special Education Director. (Testimony of the Directory of Special Education, Stipulated Fact#8 and #9).
14. The annual IEP was completed on October 13, 2016 and sent to Student's Mother on October 17, 2016. (Exhibit D-8 pg. 275, Testimony of the Director of Special Education).
  15. A review of the October 13, 2016 IEP was scheduled and conducted on November 9, 2016. Present at that meeting were the same individuals who attended the October, 13, 2016 IEP meeting plus Student's Mother and her advocate, Diedra Hammonds. (Testimony of the Director of Special Education).
  16. The obligation of the IEP team with respect to the FIT Learner and the FBA is to give consideration of the findings and recommendations, and as a team, determine what portions should be adopted into the IEP. In the Present Levels of Academic Achievement and Functional Performance (PLAAFP) section of Student's IEP adopted on October 13, 2016 the IEP team included on page 5 a substantive discussion of the findings made by the Behavior Analyst in Student's FBA. Similarly, the IEP team discussed the assessment and recommendations in the FIT Learning Behavior and Language Assessment on Page 6 of the IEP. That consideration led to the compare and contrast goals on page 18 of the IEP, and the peer interaction goals and short term objectives on page 17. (Exhibit J-2, page 6, 17 and 18; Testimony of the Director of Special Education).
  17. Specific methodologies are not required to be a part of the IEP. Teachers are left with the flexibility to use a variety of methodologies that will best enable a student to attain the goals and objectives set forth in the IEP. Instructional approaches are included on Page 14 item 6 of the IEP, where Dr. Ayarbe's identification of Student's

Dyslexia led to several specific instructional approaches considered by the IEP team. (Exhibit J-2, page 14; Testimony of the Director of Special Education).

18. The IEP team took into consideration the FBA developed by the Behavior Analyst in development of Student's October 13, 2016 IEP. The team discussed Student's behavior in the present levels section of the IEP where behavior was given considerable attention especially where the FBA described Student's off-task, shutdown, stereotypic and blurting behaviors. The classroom is set up to provide the Teacher with opportunity to correct off task behaviors, which are easy to correct by touching Student's shoulder or providing a verbal correction. The goals and objectives sections of the IEP presented Student with a plan to address the behavioral aspect of Student's disability. Page 19 of the IEP establishes specific goals and three objectives to address off-task behavior. Page 20 of the IEP addresses socialization and stresses appropriate interaction with peers as short term objectives with a goal of Student initiating appropriate verbal interactions with peers. Finally, the Related Services provided in the Student's IEP includes 120 minutes per month with a behavior specialist to develop a plan to address the behavior concerns in the FBA. (Testimony of the Director of Special Education, Testimony of General Education Teacher, Testimony of the Behavior Analyst, Exhibit J-2, pages 5, 19, 20 and 23).
19. Measure of Academic Progress (MAPS) is a national assessment tool used to measure progress in different curriculums. "MAPS" has been adopted for that purpose in several Nevada school districts. It gives teachers the ability to address identified needs or to show areas of deficits. "MAPS" is used to describe present levels but is not a method of teaching. In the Student's IEP "MAPS" is referenced as a measurement of progress toward achieving goals. For example, on page 15 of the

- IEP, “MAPS” measures the improvement of reading skills. (Testimony of the Director of Special Education; Testimony of the Special Education Teacher 2; Exhibit J-2, page 15).
20. The IEP team took into consideration the FBA developed by the Behavior Analyst in development of Student’s October 13, 2016 IEP. The team discussed Student’s behavior in the present levels section of the IEP where behavior was given considerable attention especially where the FBA described Student’s off-task, shutdown, stereotypic and blurting behaviors. The goals and objectives sections of the IEP presented Student with a plan to address the behavioral aspect of Student’s disability. Page 19 of the IEP establishes specific goals and three objectives to address off-task behavior. Page 20 of the IEP addresses socialization and stresses appropriate interaction with peers as short term objectives with a goal of Student initiating appropriate verbal interactions with peers. Finally, the Related Services provided in the Student’s IEP includes 120 minutes per month with a behavior specialist. (Testimony of the Director of Special Education, Testimony of the Behavior Analyst, Exhibit J-2, pages 5, 19, 20 and 23).
21. Teacher observation and teacher made records can be an appropriate method to measure a goal. The goals set forth in the Student’s IEP include measurements by teacher observation. Starting on page 15 of the IEP, goals and objectives are measured in a variety of methods. Page 15 reading goals are measured by MAPS testing data, while the first objective is by teacher observation of Student summarizing a grade level story with three key details from a text and two inferences twice each quarter as measured by teacher observation. The second objective requires Student to write a summary of a grade level story, poem or drama with 3-5 sentences including the main idea and two supporting details twice each quarter.

- Measurement of this objective is by teacher measurement. The third objective is measured by running records of Student increasing the number of words read aloud per minute. The fourth objective is to read aloud fluently with appropriate intonation and expression with 94% accuracy with teacher measuring by keeping a running record. (Testimony of the Director of Special Education, Exhibit J-2, page 15).
22. Discreet early learning skills are foundational, developmental abilities that are to be achieved before moving on to new skills. Relational goals on page 18 are developed out of the FIT learning assessment to address discreet early learning skills, relating objects to each other and identifying differences using adjectives and attributes, such as color, shape and odor. (Testimony of the Director of Special Education, Exhibit J-2).
  23. Audiobooks are included in the Supplementary Aids and Services section of the Student's IEP, and intended to address off task behavior during free reading activities in the general education classroom. Additionally, during the review of the then adopted October 13, 2016 IEP, Student's Mother suggested the use of math problems in the early afternoon to address Student tending to fall asleep during that time. (Exhibit J-2, page 22; Testimony of the Director of Special Education; Testimony of the Behavior Analyst, Testimony of Student's Mother).
  24. Occupational Therapy Goals are included in the Student's October 13, 2016 IEP where Student is expected to improve fine motor skills so that classroom writing tasks can be read and understood by others as measured by teacher or occupational therapist data collection and by achievement of Objectives addressing letter sizing, letter placement on appropriate lines, consistent spacing between words and

- increasing typing speed to an average of 9 words per minute with a measurement for accuracy. (Testimony of the Director of Special Education, Exhibit J-2 page 16, 17).
25. Speech goals are included in the Student's October 13, 2016 IEP where Student will participate in discussions by making relevant oral contribution measured by teacher observations and attaining objectives of retelling models and AV materials when given directions, and by contributing to discussions in small groups of peers after a lesson with at least one relevant thought or idea building on peers previous thoughts. (Testimony of the Director of Special Education, Exhibit J-2 page 17).
  26. The Student's IEP includes a goal that directs that Student expand social initiations and to be able to initiate social interactions in a variety of ways by asking peers if Student can join an activity, by using language to initiate play with a peer and being self motivated to make at least five appropriate initiations of conversations with peers for five consecutive days. This goal is supported by four objectives related specifically to social interactions. (Exhibit J-2, page 20).
  27. Specially designed instruction utilizing Special Education services are provided in the Student's IEP for English Language Arts, reading and mathematics without specifying methodology, which would narrow the classroom teacher's ability to try multiple methods of teaching the subject and choosing the method that is best suited for the Student. (Testimony of the Director of Special Education, Exhibit J-2, page 22).
  28. Audiobooks and word processing for writing assignments of more than one paragraph are included in Student's October 13, 2016 IEP as supplementary aids. Audiobooks are available to the Student in his regular classroom, and he worked on a book report using the audio book technology. (Testimony of the Director of Special

- Education, Testimony of General Education Teacher, Testimony of the Behavior Analyst and Exhibit J-2, pg. 22).
29. Student is provided with the ability to dictate answers for timed tests and access to word processing for writing assignments of more than one paragraph. During this school year, there have been no timed tests in the general education classroom. (Testimony of the Director of Special Education, Testimony of the General Education Teacher, Exhibit J-2 Pg. 22).
  30. The Fit learner speech and language therapy recommendation of four days per week was not adopted by the October 13, 2016 IEP team. Under the Related Services section, the IEP provides for Speech and Language therapy during two 45 minute sessions per week in both special education and general education classrooms. (Testimony of the Director of Special Education, Exhibit J-2, page 23).
  31. Assistive Technology is a related service to be provided by the October 13, 2016 IEP. An Assistive Technology assessment was proposed by the School District to be performed by the School District's Assistive Technology analyst. The assessment was refused by Student's Mother, who requested that the assessment be performed by the Easter Seals agency. Testimony of Student's Mother, Testimony of the Director of Special Education, Exhibit J-2 pg. 13, 23, Stipulated Fact 12).
  32. The October 13, 2016 IEP provides for the development of a Positive Behavioral Support plan as recommended by the FBA. A behavior specialist is included in the Related Services section of the IEP to spend two hours per month working with Student and staff to implement a behavior plan and train staff in the execution of the plan. (Testimony of the Behavior Analyst, Testimony of the Special Education Director, Exhibit J-2 page 23, Exhibit J-5).

## VII

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Conclusion of Law of this Hearing Officer is that the School District denied Student a FAPE when it failed to allow Student's Mother an opportunity to participate at the October 13, 2016 IEP review meeting.

The Individuals with Disabilities Education Act (IDEA) provides requirements for the education of students with disabilities. (20 U.S.C. Sections 1400 et seq.). School districts are required to make available to disabled students a free appropriate public education (FAPE).

To ensure disabled children receive a FAPE, school districts and parents work together to develop an individualized education program (IEP). *Schaffer v. Weast*, 546 U.S. 49 (2005). An IEP is a written statement for each child with a disability that is developed, reviewed and revised in a meeting in accordance with 34 CFR Sections 300.320 through 300.324 to include a child's present levels of academic achievement and functional performance, a statement of measurable goals, including academic and functional goals designed to meet the child's needs to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the disability. (34 CFR 300.320).

Under the IDEA and the decisions rendered by the courts, an appropriate educational program must be designed to meet the student's needs and be reasonably calculated to provide the student with an educational benefit. The IDEA does not require school districts to provide students with disabilities the best education available or to provide instruction or services that maximize the student's potential. School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related supportive services, which are designed to meet the student's unique needs and provide the student with educational benefit. *Board of Education v. Rowley*, 458 U.S. 176 (1982), at pages 207-208.

The ninth circuit court in *State of Hawaii v. Katherine D.*, 727 F.2d 809 (9<sup>th</sup> Cir. 1984) concluded that school districts are not required to maximize the potential of, or provide the best possible education to each student with a disability.

#### ISSUE #1

The IDEA sets forth a set of procedural rules that will ensure that a FAPE is provided to a disabled child. The IEP team must include (1) The parents of the child; (2) Not less than one regular education teacher of the child; (3) Not less than one special education teacher of the child; (4) A representative of the public agency who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about general curriculum and is knowledgeable about the availability of resources of the agency; (5) an individual who can interpret the instructional implications of the evaluation results; (6) at the discretion of the parents or the agency, other individuals who have knowledge or special expertise regarding the child; and (7) whenever appropriate, the child with the disability. 34 CFR 300.321(a).

A student may file a complaint requesting a due process hearing for any alleged violation of the IDEA. 34 CFR 300.507. The complaint filed by Student's Mother on November 18, 2016 was filed pursuant to 34 CFR 300.507 and the hearing officer has jurisdiction to determine the issues set forth in the complaint and finalized by the parties as the three issues that are the subject of this due process proceeding. (See Procedural Background, Finding of Fact 1 and 2)

The first issue to be determined in this matter is whether Student was denied a FAPE by failing to allow Student's parent to participate at the IEP meeting conducted on October 13, 2016. The Complaint also references an IEP meeting On November 9, 2016, however the testimony proved that the meeting on that date was an informal review of the October 13, 2016 IEP meeting set up to provide Student's Mother with information about the IEP developed at the October 13th meeting. Student's Mother did not attend the October 13, 2016 IEP meeting. (See Findings of Fact 4 and 5).

The Student's parent is a required member of the IEP team. The federal regulations require the School District to ensure that the parent of a disabled child is present at the IEP meeting, or at least provided with an opportunity to be present. 34 CFR 300.322(a). In this matter, the Student's Mother was not present at the October 13, 2016 IEP meeting, having informed the District that she was ill and unable to attend. (Finding of Fact #4).

Parental participation in the IEP process is an integral part of the IDEA. "However, an IEP meeting may take place without a parent in attendance if the agency is "unable to convince the parent that they should attend." 34 CFR 300.322 and *K.D. v. Department of Education State of Hawaii*, 58 IDELR 2, 665 F.3d 1110 (9<sup>th</sup> Cir. 2011). The district was informed by email on October 11, 2016 that Student's Mother was ill and could not attend the IEP meeting. The district provided Student's Mother with the preliminary FBA, the Fit Learners and psychological assessment, and the preliminary IEP. Further, the School District told Student's Mother by email on September 23, 2016 that she could participate at the October 13, 2016 IEP meeting by telephone or by video conference and that she could record the proceedings and have another person present to assist her. (Findings of Fact #6, 7, 10 and 13). The District at no time indicated that they could continue the IEP meeting to another date, because October 13, 2016 was the last day to hold the meeting in compliance with the requirement of an annual review. 34 CFR 300.324(b)(i). (Findings of Fact #4 and 10).

Under the facts of this case, the requirement of an IEP annual review is in conflict with the requirement that "Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting, or are afforded the opportunity to participate, including (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place". 34 CFR 300.322. Furthermore the student's parent must be a member of the IEP team and the team must consider the concerns of the parents for enhancing the education of their child. 34 CFR 300.324(a)(ii).

The 9<sup>th</sup> Circuit Court of Appeals considered this conflict in *Doug C. v. State of Hawaii Department of Education*, 61 EDELR 91, 720 F.3d 1038 (9<sup>th</sup> Cir. 2013), where a student’s annual IEP was scheduled on November 9, 2010 with the annual deadline for the review occurring on November 13. On the morning of November 9, the student’s parent emailed that he was sick and unable to attend the IEP meeting, and asked that it be rescheduled for the following week on November 16 or 17. The school suggested participation by telephone, or internet which the parent refused wanting to be physically present at the meeting. Hearing dates prior to the November 13 deadline were considered, but when the parent indicated that he may not be well enough to attend on those dates, the school went ahead with the meeting on November 9 without the parent. The Court found as follows:

The more difficult question is what a public agency must do when confronted with the difficult situation of being unable to meet two distinct procedural requirements of the IDEA, in this case parental participation and timely annual review of the IEP. In considering this question, we must keep in mind the purposes of the IDEA: to provide disabled students a free appropriate public education and to protect the educational rights of those students. It is also useful to consider our standard for determining when a procedural error is actionable under the IDEA. We have repeatedly held that “procedural inadequacies that result in the loss of educational opportunity or seriously infringe on the parents’ opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE. When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency’s action in such a scenario, we will allow the agency reasonable latitude in making that determination.

. . . the Supreme Court and this court have both repeatedly stressed the vital importance of parental participation in the IEP creation process. We have further held that delays in meeting IEP deadlines do not deny a student a FAPE where they do not deprive a student of any educational benefit. Under the circumstances of this case, the Department’s decision to prioritize strict deadline compliance over parental participation was clearly not reasonable. (Citations omitted) *Doug C. v. State of Hawaii Department of Education*, 61 EDELR 91, 720 F.3d 1038 (9<sup>th</sup> Cir. 2013),

In this case, the District received an emailed agreement to have the IEP meeting conducted in the absence of Student’s Mother. However, Student’s Mother was not informed of her right to have the IEP meeting rescheduled beyond the annual deadline so that she could

recover from her illness and be present at the meeting. (Finding of Fact #4). The failure to inform Student's Mother of this right renders the consent uninformed and inadequate to allow the District to conduct the hearing in her absence.

This failure to offer a rescheduled date for the meeting constitutes a procedural error that was not cured by the subsequent meeting on November 9, 2016 where the results of the IEP meeting were explained to Student's Mother. The court in *Doug C.*, citing *Shapiro v. Paradise Valley Unified sch. Dist.*, 317 F.3d 1072 (9<sup>th</sup> Cir. 2003) also considered this issue and found that "after-the-fact parental involvement is not enough". The new IEP was already completed and adopted. Therefore the meeting for "explanation of the IEP" was not enough to cure the procedural violation.

Once a procedural violation is established, a denial of FAPE can be found if the violation significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child. 34 CFR 300.513. The Hearing Officer finds that the annual review of an IEP by the IEP team that is required to include the Student's Parent, is such an integral part of the IDEA and the entire process of providing education to disabled children, that it must be found that this procedural error resulted in a denial of FAPE to the Student by failing to provide for Parental participation at the IEP meeting.

## ISSUE #2

With respect to Issue #2, CFR 300.303 provides that "a public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sections 300.304 through 300.311 " if the public agency determines that the academic and functional performance of the child warrants a reevaluation, or "if the child's parent or teacher requests a reevaluation". In this case, during the Spring of 2016, Student's Mother requested an Independent Educational Evaluation (IEE), and the School District agreed to fund the evaluation. (Finding of Fact #9). The IEE was conducted and ready to be considered at the October 13, 2016 IEP meeting. (Finding of Fact #9 and Stipulated Fact #13). The IEP team, including the Student's Mother,

was provided with the results or summaries of the results of the evaluation prior to the meeting. The evidence supports that the evaluations including the FBA were done in a timely manner during the spring and summer of 2016 for presentation at the October IEP team meeting. The Hearing Officer finds that the FBA was conducted as a part of the IEE requested by Student's Mother, and it was conducted in a timely manner following the request. The District prevails on issue #2.

### ISSUE #3

The remaining issue #3 is an allegation that the October 13, 2016 IEP failed to provide a FAPE in that it failed to confer Student with an educational benefit. Based on a finding of denial of FAPE on Issue #1 due to procedural violations, it is not necessary to determine whether the resulting IEP would have provided a FAPE.

## VIII

### ORDER

Based on the above Findings of Fact and Conclusions of Law, it is hereby ordered that the IEP review on October 13, 2016 by the School District was procedurally improper and Student was consequently denied FAPE. The October 13, 2015 IEP will remain in effect until a review is conducted according to law.

In order to provide a remedy resulting from the denial of FAPE, the hearing officer determines that the decision needs to consider petitioner's disputed provisions of the October 13, 2016 IEP in the following manner:

#### ISSUE #3, subparagraph:

- a. The Fit learner and FBA recommendations were fully considered at the October 13, 2016 IEP meeting. Where they appear in the IEP is not an actionable concern of the hearing officer in this matter. The federal regulations provide in the definition of IEP, "Nothing in this section shall be construed to require . . . (2) the IEP Team to include information under one

component of a child's IEP that is already contained under another component of the child's IEP." 34 CFR 300.320(d)(2). (Findings of Fact #16). No remedy is required.

- b. This subparagraph seeks the inclusion of methodology in the IEP. However, doing so would limit the flexibility of teachers to try new or different methodologies in an attempt to best suit the needs of the student. In general, School Districts are not required to include specific methodologies in an IEP. *J.I. and M.I. v. Mercer Island*, 575 F.3d, 52 IDELR 241 (9<sup>th</sup> Cir. 2009). (Finding of Fact #17). No remedy is required.
- c. Implementation of the supports and other aspects of the FBA are included under the related services portion of the IEP. Where a Behavior Specialist is engaged to provide two hours each month of services for development of a behavior plan for the student. (Finding of Fact #18). It is appropriate that this Order include the development of a behavior plan as remedy for the denial of FAPE. Therefore, it is ordered that the District provide 120 minutes of services each month by a behavior specialist, beginning in the month of March, 2017, and continuing until a behavior plan is instituted.
- d. MAPS is not a methodology for instruction, but is a measurement of academic progress. The teacher will determine the methodology to be utilized in an attempt to improve the MAPS scores. (Finding of Fact #19). No remedy is required for this subparagraph.
- e. See discussion and order for remedy under subparagraph c. above. (see also Findings of Fact #18, #20 and #32).
- f. The goals and measurements are proper and fulfill the objective of measuring progress. No remedy is necessary with respect to this subparagraph. (Finding of Fact #21).

- g. The FIT assessment identified a need to address discreet early learning skills to provide Student with the foundational strengths Student needs for future educational success. (Finding of Fact #22). The October 13, 2016 IEP provides goals and objectives addressing this need. (See Exhibit J-2 page 18). It is hereby ordered that within 14 days of the receipt of this decision, the District shall implement the goals and objectives on page 18 of the October 13, 2016, and they shall remain in effect until the next revision of Student's IEP.
- h. The use of audiobooks is identified in the October 13, 2016 IEP as a Supplementary Aid and Service for Student to use during free reading time periods. It is ordered that audiobooks be available to Student within five days of the District's receipt of this decision. This requirement shall continue until modified at an IEP review. (Finding of Fact #23).
- i. Goals are identified in the October 13, 2016 IEP to address speech, occupational therapy and social interactions. (Findings of Fact #24, #25 and #26). It is ordered that these goals be implemented within 14 days of the District's receipt of this decision and continue until modified by a revised IEP.
- j. Methodologies are not required in Student's IEP. (See Finding of Fact #27 and discussion under subparagraph d. above). No remedy is required.
- k. Audiobooks are available to Student under the IEP of October 13, 2016. See discussion and remedy in subparagraph h., above. (Finding of Fact #28).
- l. Dictation for timed tests and access to word processing for assignments requiring writing of more than one paragraph are provided in the October 13, 2016 IEP and will be ordered to commence within 14 days of the District's

receipt of this decision and continue until there is a revision of the IEP.

(Findings of Fact #28 and #29).

- m. Student was denied speech and language therapy as a result of “stay put” considerations during the pendency of this due process complaint. Under the category of Related Services in the October 13, 2016 IEP, the Student was to receive 1.5 hours per week of Speech/Language therapy. (Exhibit J-2 and Finding of Fact #30). For purposes of providing a remedy for the denial of FAPE it will be ordered that Student begin receiving Speech and Language Therapy 1.5 hours per week beginning within 14 days of the District’s receipt of this decision and continuing until Student’s IEP is revised. To compensate for the loss of Speech and Language Therapy during the “stay put” period, 30 additional hours of speech therapy will be provided to Student at the rate of 2 hours per week beginning within 21 days of the District’s receipt of this decision and continuing until the additional 30 hours is provided to Student. The remedy ordered herein shall not interfere or diminish any other educational services provided to Student.
- n. Assistive Technology is a related service recommended for an assessment under the October 13, 2016 IEP. (Finding of Fact #31). Student’s Mother refused the assessment to be completed by the District Assistive Technology Analyst. If Student’s Mother had been a part of the discussion on October 13, 2016 she may have accepted the assessment in the best interests of the Student. It is ordered that within 14 days of District’s receipt of this decision, the District offer an Assistive Technology Assessment for Student to be performed by a person of the School District’s choosing.
- o. See discussion and remedy under subparagraph c. above. (see also Findings of Fact #18, #20 and #32).

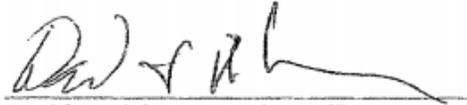
In summary, the remedy for the procedural violation will be to revert to the October 13, 2015 IEP with the modifications provided above until such time as a revision of Student's IEP is conducted with Student's Mother having an opportunity to participate and contribute as required by law.

IX

**NOTICE OF RIGHT TO APPEAL**

Any party aggrieved by this Decision has the right to appeal within thirty (30) days of the receipt of this decision pursuant to NAC §388.315. A party to the hearing may file a cross-appeal within ten (10) days after receiving notice of the initial appeal. If there is an appeal, a state review officer appointed by the Superintendent from a list of officers maintained by the Department shall conduct an impartial review of the hearing pursuant to NAC 388.315.

Dated this 20th day of February, 2017.



David L. Nielsen, Hearing Officer  
2477 Gentry Lane  
Carson City, Nevada 89701