

**IMPARTIAL DUE PROCESS HEARING
BEFORE THE HEARING OFFICER
APPOINTED BY THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS**

STATE OF NEVADA

In the Matter of

STUDENT¹, by and through Parents,

Petitioners,

v.

SCHOOL DISTRICT,

Respondent.

**DECISION OF THE
HEARING OFFICER**

Date: January 14, 2018

Representatives:

Petitioners: Michelle Bumgarner, Esq.

Respondents: Paul Anderson, Esq., and
Kristen Matteoni, Esq.; also present as party
representative: Jackie Matteoni

Victoria T. Oldenburg
Hearing Officer

INTRODUCTION AND PRELIMINARY MATTERS

On July 9, 2018, the Parent filed a due process complaint on behalf of the above-captioned Student against the School District (“the District”) alleging: 1) the District committed a procedural violation in regards to qualifying the Student for an IEP; 2) since 2016 and thereafter, the District violated the Student and the Parent’s rights and denied the Student a FAPE by failing to make the Student eligible for special education and related services; 3) the District denied the Student a FAPE by failing to properly provide comprehensive assessments in all areas of suspected disability, and 4) the District denied the Student a FAPE by failing to tailor an appropriate educational program to meet the Student’s individual needs since 2016 and

¹ Personally identifiable information is included in the Appendix to the final decision in this matter and will be removed prior to public distribution. *See Letter to Schad*, 105 LRP 4754 (December 23, 2004).

thereafter. The Nevada Department of Education Superintendent of Public Instruction appointed the undersigned Hearing Officer, Victoria T. Oldenburg, as the Hearing Officer for the case on July 17, 2018. The Hearing Officer issued a preliminary order on July 24, 2018 setting forth the statutory time periods applicable to the proceeding as established in 34 C.F.R. §§300.510-300.515. The District responded to the due process complaint on August 3, 2018, raising the affirmative defense of the statute of limitations as to claims prior to July 9, 2016. On August 8, 2018, the Hearing Officer issued an Order finding that the due process complaint did not contain the necessary clarity of factual issues and the legal basis for each alleged violation arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, its implementing regulations found at 34 C.F.R. Part 300, and/or under Chapters 388 of the Nevada Revised Statutes and the Nevada Administration Code.²

A Pre-Hearing Conference was held on August 14, 2018, wherein the Parent requested leave to file an amended due process complaint, and on August 16, 2018, leave was granted to file an amended due process complaint. On August 17, 2018, the Parent filed an Amended Due Process Complaint (“Complaint”). On August 27, 2018 the District filed a response to the Complaint, again raising the affirmative defense of the statute of limitations as to claims prior to July 9, 2016. On September 18, 2018, a Notice of Pre-Hearing Conference was issued, and on October 4, 2018 the Pre-Hearing Conference was held. A Pre-Hearing Report was issued on October 11, 2018 identifying the issues to be heard at the hearing which included the issues on the statute of limitations. On October 15, 2018, at the request of the Parties, two conference calls were held. The Parties represented that based upon the disclosures, the Parties did not believe

² Of note, this Hearing Officer does not have jurisdiction over claims arising under Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. Sections 705, 794, 794a, 794b; 34 C.F.R. Part 104) or the Americans with Disabilities Act (42 U.S.C. Sections 12101 et seq., 28 C.F.R. Part 35).

they would have sufficient time to conclude the hearing within the 2 days scheduled for the hearing, October 18-19, 2018. In an effort to better define the scope of the hearing the Hearing Officer offered the parties the option to present evidence and argument on the statute of limitations issue and whether the exceptions to the statute of limitations applied. The Parties concluded they would present evidence solely on the statute of limitations issue at the hearing scheduled on October 18 and continuing to October 19, 2018 if necessary. The Parties represented they would be filing a stipulation to continue the 45-day period for a period of 30 days in order to present the remaining issues in the Complaint and agreed to the dates of November 13-15, 2018. An Order issued on October 15, 2018 defining the statute of limitations issues to be heard at the preliminary hearing as follows:

I. Pursuant to 20 U.S.C. 1415 (f)(3)(C), 34 CFR 300.511 (e), and NAC 388.306(15):

- A. Did the Parent know, or should the Parent have known, about the alleged actions in August, 2015, and October, 2015, forming the basis of the due process complaint, specifically whether the procedural and substantive Child Find provisions of the IDEA and Chapters 388 of the NRS and NAC in identifying, locating, and evaluating whether the Student was in need of special education and related services applied?
- B. Did the Parent know, or should the Parent have known, about the alleged actions in May, 2016, forming the basis of the due process complaint, specifically whether, pursuant to the provisions of the IDEA and Chapters 388 of the NRS and NAC, the District properly and timely provide the Parent with prior written notice (PWN) of her rights, and with a copy of the procedural safeguards?

II. Pursuant to 20 U.S.C. 1415 (f)(3)(D), 34 CFR 300.511 (f), and NAC 388.306(15) (a) and (b):

- A. If the Parent did not know about the allegations forming the basis of the due process complaint from August, 2015 through May, 2016, was the lack of knowledge due to (i) specific misrepresentations by the District that it had resolved the problem forming the basis of the complaint; or (ii) the District's withholding of information from the Parent that was required to be provided to the Parent.

On October 16, 2018, the Parties submitted a stipulation to continue the hearing on the remaining issues in the Complaint for a period of 30 days. On October 16, 2018, an Order issued granting the 30-day extension of time and confirming the hearing dates of November 13-15, 2018 for the remaining issues in the Complaint. On October 16, 2018, a second Pre-Hearing Conference was held to discuss the Parent's disagreement as to one of the three issues identified regarding the statute of limitations (identified as issue I.(B)) and to discuss the objection by the District as to the Parent's disclosure Nos. 23 and 24 and request that those documents be removed from the Parent's disclosure. That same day an Order issued requiring the Parties to submit legal briefs on the statute of limitations issues, specifically the scope of evidence relevant to issue number I.(B) identified in the October 15, 2018 Order as it related to the May, 2016 IEP eligibility meeting, and denying the District's request to remove Parent's disclosure Nos. 23 and 24. On October 16, 2018, the Parties submitted their briefs on the statute of limitations issues. On October 17, 2018, an Order issued revising issue I.(B) as follows:

- I. *Pursuant to 20 U.S.C. 1415 (f)(3)(C), 34 CFR 300.511 (e), and NAC 388.306(15):*
- B. Did the Parent know, or should the Parent have known, about the alleged actions in 2016, forming the basis of the due process complaint, specifically whether the procedural and substantive Child Find provisions of the IDEA and Chapters 388 of the NRS and NAC in identifying, locating, and evaluating whether the Student was in need of special education and related services applied?

On October 18-19, 2018, the preliminary hearing on the statute of limitations was held. On November 6, 2018, this Hearing Officer issued an Order on Statute of Limitations, and on November 9, 2018 issued an Amended Order on Statute of Limitations, finding that all claims prior to July 9, 2016, with the exception of whether the District denied the Student a FAPE by failing to conduct assessments in all suspected areas of disability for the Student in May, 2016,

were barred by the statute of limitations. The hearing on this issue, and on the remaining issues was held on November 13-14, 2018. The hearing was also to be held on November 15, 2018 but was continued to December 4 (for a partial day) as the Parent could not attend the November 15, 2018 due to a family emergency. On November 15, 2018 the Parties requested a continuance of the 45-day period which was granted. On December 4, 2018 the Parties informed the Hearing Officer they needed an additional day and the hearing was concluded on December 14, 2018.

At the preliminary and continued hearing, Hearing Officer Exhibits 1-25 were admitted into the record, District Exhibits 1-25 and 31-36 were admitted, Parent's Exhibits 6, 8, Exhibit 17, pages P71 and P72, Exhibit 18, pages 76-81, 83, 112, 116-118, and 121-123, Exhibit 19, pages 132, 147, 152-159, and 176-182, and Exhibits 21 and 22 were admitted, and Joint Exhibits 1-19 were admitted. The Stipulated Facts were also entered into the record. The decision in this matter is due January 14, 2019.

ISSUES

The issues to be determined at the November 13-14, 2018 hearing and the December 4 and 14, 2018 hearing, which were agreed to by the parties at the Pre-Hearing Conferences and again at the beginning of the due process hearing, are as follows:

1. Whether the District committed a procedural violation by not assessing the Student in all areas of suspected disabilities in April-May, 2016 and, if there was a procedural violation, was there harm?

2. Did the District properly follow the procedural and substantive Child Find provisions of the IDEA and Chapters 388 of the NRS and NAC in identifying, locating, and evaluating whether the Student was in need of special education and related services during the 2016-2017 school year (8th grade) and the 2017-2018 school year (9th grade)?

3. Pursuant to the provisions of the IDEA and Chapters 388 of the NRS and NAC, did the District properly and timely provide the Parent with prior written notice (PWN) of the Parent's rights, and with the Procedural Safeguards during the 2016-2017 school year (8th grade) and 2017-2018 (9th grade) school year?

4. Was the Student denied a Free and Appropriate Public Education (FAPE) under the IDEA, and Chapters 388 of the NRS and NAC in the procedural and substantive development and implementation of the IEP developed in the Spring of 2018 by the District?

FINDINGS OF FACT

The Findings of Fact and Conclusions of law set forth in the Amended Order on the Statue of Limitations are attached hereto and incorporated by reference as though fully set forth herein.

After considering all the relevant evidence and credible testimony, this Hearing Officer's Findings of Facts are as follows:

1. The Student was born on April 30, 2003.
2. The Student was first enrolled as a Student in the on August 17, 2015 and has attended school in the District since that time. The Student is currently in the 10th grade.
3. On March 4, 2016, Parent requested an IEP evaluation for the Student because the Student was not completing the Student's assignments. (Testimony of Parent, District Exhibit 8). During this time the Student was on a §504 Plan for ADHD, anxiety, and mood disorder. The §504 Plan accommodations were: (i) remove the Student from the classroom for short break if anxiety becomes visible; (ii) when Student presents anxiety or mood disorder and instruction time is missed, the Student will be given equal time lost to make up homework and; (iii) teacher

to directly request assignments from the Student that are not turned in on time and clarify why. (District Exhibit 3, testimony of School Counselor).

4. In March, 2016, there had been no reports from teachers that the Student was struggling in class or exhibiting anxiety or that the §504 Plan was not working. (Testimony of School Counselor).

5. On March 8, 2016 the District sent to Parent a Prior Written Notice (PWN) to evaluate the Student for special education services along with a Determination of Needed Evaluation or Reevaluation Data form, and a Parent Consent for Evaluation which was signed by the Parent. (Stipulated Facts). The Parent received the procedural safeguards. (District Exhibit 10, testimony of School Psychologist).

6. On March 8, 2016 the Parent signed an Exchange of Confidential Information/Records authorizing the exchange of information with the Student's medical doctor and psychiatrist. (District Exhibit 12). The psychiatrist did not provide any information prior to the evaluation. (Testimony of Parent, testimony of School Psychologist). The general practitioner indicated the Student was being treated for mood disorder, and that the Parent had reported to him the Student had anxiety and possible bi-polar disorder. (District Exhibit 12).

7. On or about March 8, 2016 the School Psychologist contacted the Parent to discuss the Parent's specific concerns. (Testimony of School Psychologist). The School Psychologist explained the assessments to be performed, and the Parent agreed, in writing, to the scope of evaluations to be done which were cognitive, academics, social/emotional, and observations under the disability category Health Impairment. (District Exhibit 9, testimony of Parent, testimony of School Psychologist).

8. The Student was evaluated under the disability category of Health Impairment but not

Emotional Disturbance; the School Psychologist's Report noted a bi-polar diagnosis in 4th grade, and the current diagnosis of anxiety, ADHD, and mood disorder. (District Exhibit 14). The Student's mental health conditions were based upon conditions identified in the most recent §504 Plan and the reported medical diagnosis of the Parent and the general practitioner. (Testimony of School Psychologist, District Exhibit 12).

9. For a Student to be classified as having the disability of Emotional Disturbance under Nevada law the eligibility factors include excessive withdrawal or isolation, ostracism from their peers, and a tendency to engage in inappropriate behavior such as head-banging and outbursts of anger. The behavior lasts for three months or more, and the actions prevent the Student from performing developmentally appropriate tasks in the school setting. Emotional disturbance can also include anxiety and mood disorder. The eligibility category of Emotional Disturbance is rarely seen in students. (Testimony of School Psychologist).³

10. When the Student was assessed during the initial evaluation the Student was not assessed under the category of Emotional Disturbance because the Student did not fit the category of Emotional Disturbance under NAC 388.415. (Testimony of School Psychologist).

11. The School Psychologist conducted the assessments of the Student and prepared a Confidential Psycho-Educational Report (Report) that was shared with the Student's eligibility team, including the Parent, on May 11, 2016. (District Exhibit 14, testimony of Parent, testimony of School Psychologist). Based upon the Student's scores set forth in the Report, including information from the Parent and two teachers, in the area of cognitive disabilities the Report indicated the Student was average in verbal intelligence, nonverbal intelligence, and composite memory, and below average in speed processing skills. In the area of social and emotional

³ See NAC 388.415.

condition, the Report stated the Student was "at risk" in leadership, social skills, study skills, functional communication, and activities of daily living, and that the Student demonstrated anxiety in the classroom setting which can cause the Student to feel overwhelmed at times. In the area of academic achievement, the Report indicated the Student was average in reading, math, and written language. The Report showed that the Student's fall semester grades were a B in math, a B- in science, a B in English, a C in social studies, a B- in PE/art/food and nutrition, and an A in computer programming/logic and reasoning/public speaking/creative concepts in art. At the time of the Report, the Student's current grades around the middle of the spring semester were a C in math, a D in science, a D in English, an F in social studies, a B+ in PE/art/food and nutrition, and an A in computer programming/logic and reasoning/public speaking/creative concepts in art. The low spring semester grades at the time of the evaluation were due to missing/late assignments. (District Exhibit 14, testimony of School Psychologist). The Student informed the School Psychologist that the mid-term grades were lower because the Student quit talking to teachers and stopped asking questions. (Testimony of School Psychologist). The Student received average or above average grades in all subjects at the end of the spring semester with the exception of English, which was a D+, and social studies which was a D, and the Student transitioned to the 8th grade. (District Exhibit 24).

12. It is not the obligation nor appropriate for the School Psychologist to medically diagnose a student as the School Psychologist is not a medical doctor; the School Psychologist only assesses in suspected areas of disability from an educational standpoint. (Testimony of School Psychologist).

13. The eligibility team, which included the Parent, issued a Statement of Eligibility on May 11, 2016, determining the Student was ineligible for special education services under the

category of Health Impairment, which the Parent received and signed. (District Exhibit 15). As set forth on the Statement of Eligibility, the eligibility team did not find that the Student had an impairment that limited the strength, vitality, or alertness of the Student, including without limitation a heightened alertness to environment stimuli which results in limited alertness with respect to the education environment and which is caused by a chronic or acute health problem such as ADD or ADHD, and that the Student's health impairment, i.e. ADHD, did not adversely affect the Student's educational performance. (District Exhibit 15).

14. At the eligibility team meeting on May 11, 2016 the Parent disagreed with the determination of ineligibility and informed the team that the Student needed accommodations, in the form of a study skills class. (Testimony of Parent). A study skills class is only offered to special education students. (Testimony of School Counselor/Case Manager).

15. On May 12, 2016 the Student's then psychiatrist stated in a note, provided to the District on May 16, 2017, that the Student's Mood Disorder was affecting the Student's academic progress, noting the Student's mood symptoms at home make study impossible, and that the Student needed an IEP and was requesting a study period. (Testimony of Parent, Parent Exhibit 6, District Exhibit 16). The School Psychologist did not have the note when the Student was evaluated but the note would not have changed the evaluation because the doctor's statement did not change what was seen in the school setting. The School Psychologist did not see any indicators of the Student's anxiety or mood disorder during the evaluation or observations at the school setting. If the IEP team had received the note they may have reconvened but the team felt that anxiety and mood disorder was not impacting the Student's education. (Testimony of School Psychologist).

16. On August 15, 2016, prior to the start of 8th grade, the Parent requested that a

neuropsychology evaluation (IEE) be done on the Student. (District Exhibit 18).

17. On September 16, 2016 the District informed the Parent they would grant an Independent Educational Evaluation (IEE) but the Parent did not request an IEE. (District Exhibit 19, Testimony of Executive Director (ED) for Special Services). The District informed the Parent the District would pay for an IEE because the Parent disagreed with the IEE prepared by the School Psychologist, and that the IEE would be commensurate in scope with the evaluation conducted by the School Psychologist. (District Exhibit 20).

18. While the Parent testified the Parent did not obtain the IEE because the Parent did not understand what an IEE was, the evidence shows the District informed the Parent that the District would pay for the IEE because the Parent disagreed with the prior evaluation done by the School Psychologist, and that the IEE would be commensurate in scope with the evaluation done by the School Psychologist. (District Exhibit 19).

20. The Math/Computer Science Teacher testified that around the time of the October 19, 2016 §504 meeting there was a meeting where the §504 team met and voted on the Student's IEP eligibility. (Testimony of Math/Computer Science Teacher). There was also testimony that there were no meetings at that time to discuss the Student's eligibility for an IEP. (Testimony of ED of Special Services).

19. On October 19, 2016 the Student's §504 Plan was reviewed and revised, and the Parent was present at the meeting. The accommodations included: (i) that the Student receive a planner, which is a calendar which allows the Student to write down homework assignments or classroom work being done; (ii) that the prime reading (PR) classroom teacher would, once a week, check the Student's grades and fill out a grade tracker; (iii) that a teacher could send a note to the PR teacher so that the Student could go to that teacher for extra help during the PR period;

(iv) that classwork would be modified to show mastery of skills with work turned in at the end of the class period and; (v) that the teachers would provide the Student with supplemental notes to accommodate vision adjustment issues. (Joint Exhibit 5). Classwork modification is essentially minimizing the amount of work, not the content, required for the Student to show knowledge and was done in an effort to accommodate the Student when the Student was feeling overwhelmed; the Student would be graded only on the modified work. The accommodation for a Planner was added because the Parent had requested greater communication with what was being done in the classroom in order to follow-up at home, and to assist the Student with any anxiety. The School Counselor/Case Manager assisted the Student with prioritizing work to be done in the Planner but the Student was independently managing the Planner. (Testimony of School Counselor/Case Manager).

20. The PR class is for 30 minutes, five times a week. Because the Student was a strong reader the Student was allowed to leave the PR class to get further tutoring or utilize the PR time to finish projects or homework in subject areas. Other programs offered to all students, including the Student, were "grade recovery" where if a student was struggling with their grades and needed more academic help they would go to grade recovery where they could receive help in English, math, science, history, etc. from a qualified teacher, and "enrichment learning" in which a student who was not in need of grade recovery could attend a session to learn about something that interested them; grade recovery or enrichment was offered for 40 minutes twice a week. The Student could also receive tutoring, also offered to all students, for 55 minutes twice a week after school, and the School Counselor/Case Manager agreed to promote tutoring to the Student, i.e. remind the Student about tutoring on the day of the session. However, the Student rarely attended tutoring. (Testimony of School Counselor/Case Manager, Testimony of

Assistant Principle).

21. During the October 19, 2016 §504 meeting there also was discussion about the Parent's request to place the Student in a study skills class. The study skills class is solely comprised of students who have an IEP that requires specially designed instruction. The team felt strongly that the Student was a typical student who possessed the skills needed to access the Student's education. (Testimony of ED of Special Services). The Student could understand the content and access the curriculum. Homework seemed to be a battle at home and the biggest issue so the team was trying to build supports for the Student for things that were occurring at home. (Testimony of Middle School Assistant Principle). The team specifically discussed that there were many missing homework assignments from the Student's math class (testimony of Math/Computer Science Teacher). The team discussed not causing stress to the Student about all the missing assignments but rather moving forward with a new plan so the Student could feel the Student was making progress rather than being stuck on the missing assignments. (Testimony of Assistant Principle). The Student was described as a bright student and the accommodations were designed to help the Student with skills the Student already had and to assist with and alleviate some of the Student's homework by allowing the Student to do homework during the school day. (Testimony of School Counselor/Case Manager).

22. Around the time of the §504 meeting the Parent was given the IEE PWN and Procedural Safeguards as well as a letter to the Parent explaining the IEE and identifying 2 outside psychologist qualified to perform the IEE. (Testimony of Parent, Testimony of ED of Special Services, District Exhibit 20).

23. Specifically designed instruction was not necessary for the Student to show mastery in math and computer science during the 8th Grade. The Student was able to participate in work

groups, engaged actively in discussions and contributed insights, and had friends in class. The Student was not ostracized and was accepted and got along with other students. (Testimony of 8th Grade Math/Computer Science Instructor.)

24. Specifically designed instruction was not necessary in order for the Student to understand the content of the Student's English class. The Student was observed frequently to be seen reading a book and was described as an avid reader by teachers. However, reading is not the only assessment of a Student's English grade. (Testimony of 8th Grade English Teacher).

25. On November 22, 2016 the Parent acknowledged the Planner was working and the Student was motivated to improve the Student's grades, but the Parent expressed concerns with the modified work assignments that were being sent home. (District Exhibit 21.

26. During the 7th and 8th grade years the Student participated in the Connections Program which is an overnight weekend outing to enhance connections between students and staff so that the students might feel connected to at least one staff member on campus and with others in the program on campus. The Student was successful at the program and in all the group activities and developed a close bond with one of the custodial staff attending the retreat; the Student participated and engaged in the entire team experience. (Testimony of School Counselor/Case Manager, Testimony of 8th Grade Math and Computer Science Teacher). During the weekend the Student was talkative and engaged in reciprocal conversation and talked about being shy. (Testimony of Assistant Principle).

27. There was an instance in 8th grade English where the Student was sent to the School Counselor/Case Manager's office because the Student was unwilling to do a writing assignment but rather wanted to read a book. The situation was resolved and the Student returned to class to do the writing assignment. (Testimony of School Counselor/Case Manager).

28. On April 25, 2017 the Parent was informed that the Student became agitated when asked why the Student did not bring the Planner to English class and did not bring the April 14, 2017 assignment to class, but that during class the Student was pleasant and followed the class activity. On April 27, 2017 the Teacher informed the Parent that the Student was defiant, rude, and disrespectful, and loud and aggressive when the Student was asked to put away the prime reading book. On April 28, 2017 the Teacher informed the Parent that the Student was polite and had a very positive day in English class. It was not unusual for any student, from time to time, to act in a defiant manner in the classroom. (Parent's Exhibit 19, pages 176-178, Testimony of 8th Grade English Teacher).

29. During 8th grade the Student seemed comfortable, outgoing, not as shy, more vocal, and was socializing with other students. The Student was observed in the lunchroom with friends working on an assignment or chatting like other students, had friends and was able to interact with other students. (Testimony of Middle School Assistant Principle).

30. The Student received passing grades and full credit in the 8th grade and transitioned to 9th grade. (District Exhibit 24).⁴

31. On August 8, 2017, prior to the beginning of 9th grade, the Parent informed the District that the Student's psychiatrist wanted the Student evaluated to see if the Student was on the "spectrum," apparently referring to Autism Spectrum Disorder, and requested an evaluation. (District Exhibit 25, testimony of ED of Special Services).

32. On August 28, 2017 § 504 meeting was held. (Joint Exhibit 8). The Parent expressed to the team that the Student had issues with anxiety and wanted to ensure that the modifications in

⁴ The Student's first semester grades were a C in Computer Science, a D in English, a C in History, a D in Spanish, a C in Science and a B in Math. The Student's second semester grades were a C in Computer Science, a C in English, a B in History, a B in Spanish, a C in Science and a B in Math. (District Exhibit 24).

the 8th grade §504 Plan would be met in high school. (Testimony of 9th grade Biology Teacher). The 9th grade §504 Plan provided the following accommodations: (i) time and space provided if/when the Student begins to become agitated (Student may read other material or draw), and teacher will redirect when needed, 5 minutes to regroup; (ii) communication home will take place in planner and teacher to oversee daily planner activities; (iii) supplemental notes provided by teacher when the Student is making an attempt to take their own notes to accommodate vision adjustment issues; (iv) assignments/classroom work turned in on time and evaluated by teacher to determine further parameters for completion and/or mastery, and; (v) assignments may be modified. The Student and teachers were both responsible for accommodations (i) through (iv), and only the teacher was responsible for accommodation (v). (Joint Exhibit 8, Testimony of 9th Grade Biology Teacher).

33. Subsequently the District processed the IEE paperwork and on November 11, 2017 an IEE was prepared by a clinical neuropsychologist. (Parent's Exhibit 8, Testimony of ED of Special Services). The neuropsychologist found the Student did not meet the diagnosis of Autism Spectrum Disorder. The neuropsychologist stated the Student would benefit from the following interventions in school: (i) a resource period where the Student does homework and unfinished classwork and could check grades and go over with the teacher a plan to re-do low grades or make up missing work; (ii) be allowed to make up missing work one week after it is posted; be provided time and a half on all assessments; (iii) teacher to initiate if Student needs help; (iv) take work to resource room if the Student shuts down; (v) take tests in resource room so the Student could relax and focus on the work; (vi) have a note taker so the Student could listen rather than focusing on taking notes; (vii) be given the lectures before the lecture so the Student could take notes on the lecture and; (viii) use a Life Scribe Pen to take notes and which

also records the lecture. The neuropsychologist generally recommended the Student get help with long term goals, i.e. whether the Student wanted to go to college, and receive social skills training from an outside source. (Parent's Exhibit 8.) The Student did not present as needing social skills training but presented as an average 9th grader. (Testimony of Special Education Teacher).

34. The Student is described as successful in high school, interacts well with peers and adults, has friends, generally behaves appropriately in classes, and is not a disciplinary problem. (Testimony of High School Principal). The Student was observed during 9th grade as having friends and engaging socially. (Testimony of High School Assistant Principal).

35. The Parent testified that the Student has meltdowns when the Student comes home from school and has behavioral issues at home which the Parent believes are related to school. Over the years the Student has been on several different medications for the Student's mental health needs. The Parent does not consider D's as passing grades because colleges do not consider D's as passing grades. (Testimony of Parent).

36. In the spring of 2018, prior to the IEP eligibility determination, the Student had been placed in the study skills class as a teacher's assistant.

37. In preparation for a January, 2018 IEP eligibility meeting the Biology teacher was asked to provide observations on the Student and noted he had once witnessed the Student getting overwhelmed because the Student was intent on reading on the Student's phone and was asked to put it away. The teacher notes reflected in the IEP state the Student likes to participate and be involved in class activities but if the activities get overwhelming, the Student will shut down and the Student's coping mechanism is reading, which the Student can do when the Student needs a break. The Student struggles to advocate about the Student's feelings and struggles a bit with

organization and does better when the Student can turn in assignments as they are finished. The Planner is being used but sometimes the work does not get done or turned in. The Student works better with modified/shortened assignment that aren't too overwhelming. (Joint Exhibit 11). The Student worked with other students in the classroom and was not adverse to doing so, had friends in class, and did not require assistance with social skills. (Testimony of Biology Teacher).

38. The Math Teacher was also asked to provide observations. The Math Teacher's observations reflected in the IEP noted that the Student gets modified assignments but struggles to understand. The Student is allowed to read when stressed and has difficulty with classroom instructions at times. When the Student gets behind it snowballs and nothing gets done. The Student has a daily Planner that is to be brought to the teachers. (Joint Exhibit 11).

39. The English Teacher also provided observations. The English Teacher's observations noted in the IEP were that the Student participates fully in English and is organized and completes work. Google Classroom assignments and tests are completed by the Student. The Student turned in 3 assignments late last semester but continued to earn a B at the end of the first semester. The Student reads a book during instructions and work time when there is no observed stress or anxiety. The Teacher is trying to determine if each incident is an attempt to not do the work, to do a preferred activity, or to self-regulate; this is a concern when completing English work. (Joint Exhibit 11).

40. On January 19, 2018 an IEP eligibility meeting was held with the Parent and Student participating. The IEP team considered the IEE prepared on November 11, 2017 by the clinical neuropsychologist. An IEP was created for the Student under the eligibility category "Other Health Impairment." PWN and the Procedural Safeguards were provided to the Parent. (Joint

Exhibit 9, 11, District Exhibit 31, 32, Testimony of Special Education Teacher). The neuropsychologist's IEE, including results and recommendations, was discussed at the eligibility meeting as well as IEP goals and objectives. The LiveScribe Pen recommended by the neuropsychologist was not an accommodation because the team did not feel the Student presented as needing a very restrictive assistive technology in place and felt the LiveScribe Pen was more restrictive than the current accommodation of giving the Student a copy of class notes and being able to go on Google Classrooms and see lectures ahead of time which seemed to work for the Student, and the Student presented as capable of using the accommodation the Student had at the time. (Testimony of Special Education Teacher, Testimony of ED for Special Services).

41. After the eligibility meeting the IEP was developed, on January 19, 2018, and provided modifications, accommodations, or supports for the Student which were similar to the §504 accommodations; (i) assignments may be modified to show mastery of content; (ii) after attempted notetaking, the Student may be given a copy of classroom notes/PowerPoints; (ii) Student may have 1 extra day (block) to complete assignments/tests, quizzes without penalty; (iv) Student to write in the planner the classroom work to be completed as homework and give to classroom teachers; (v) Student may finish classroom tests/quizzes and assignments in the study skills class⁵ and; (vi) Student to be released 1 minute from class to transition to the next class or lunch. (Joint Exhibit 11, Testimony of 9th Grade Biology Teacher). The Parent and the Student participated in the meeting and the Parent was provided with the procedural safeguards. The Parent's concerns were addressed at the January 19, 2018 IEP eligibility meeting. (Joint Exhibit 11, Testimony of Special Education Teacher).

⁵ The study skills class is formally referred to as the Communication Instruction Class. (Joint Exhibit 11).

42. On January 24, 2018, the Parent was provided with PWN. (Joint Exhibit 12, testimony of Special Education Teacher). The Parent, in writing, agreed with the IEP and understood it would be implemented (Joint Exhibit 11), and was also provided with PWN that the IEP would be implemented. (Joint Exhibit 12).

43. At the time of the January 19, 2018 IEP meeting the Student did not present needing special education but was provided with the study skills class pursuant to the Parent's request; things at school were good and the Student's grades were okay. The hope with the study skills class was workload management and completion of homework due to conflicts at home. (Testimony of Special Education Teacher). It was also observed in the school setting that the Student is more successful when the Student has a relationship and rapport with the respective teacher. (Testimony of ED of Special Services).

44. The Assistant Principle did not believe the Student was in need of specifically designed instruction as the Student was doing well under the §504 accommodations. (Testimony of Assistant Principle).

45. The only specifically-designed instruction the Student was receiving under the IEP was the study skills class; there was no specifically designed instruction delivered in the classroom. Assistance in helping students become organized is provided to all students as most 9th grade Students are disorganized and if a parent requests assistance with a planner then the teacher will provide assistance. (Joint Exhibit 11, Testimony of 9th Grade Biology Teacher). The Parent testified that the electronic Planner developed for the Student in the spring of 9th grade was a beneficial tool for the Student. (Testimony of Parent).

46. The study skills class is designed to facilitate learning how to be a high school student, especially at the freshman level, looking at grades on a daily basis, organizing assignments,

fulfilling doing assignments, and sometimes test completion or quiz completion. The Student did not demonstrate a need for any additional assistance or instruction in classwork with the exception of the Student's math class; once the Student developed a relationship with the special education math teacher the Student would seek his assistance with math. The Student was a role model in the study skills class and demonstrated the ability to work in groups, had friends, and there was a good rapport with the teacher. (Testimony of Special Education Teacher).

47. A consultant, retained by the Parent in January, 2018, met with the Student around 8 or 9 times in the home setting. The consultant reviewed the neuropsychological report and reviewed the January and February, 2018 IEP's, and was present during the February, March, and May, 2018 IEP meetings. The consultant felt the IEP team did not understand the Student's disability and the team was blaming the Student for the Student's disability. The consultant opined that the verbatim support recommendations of the neuropsychologist should have been adopted by the IEP team, and the supports in the January and February 2018 IEP were not appropriate and were not helping the Student. The consultant testified the Student informed the consultant that the IEP goals had no meaning to the Student and were not teaching the Student the skills the Student had issues with, i.e. planning, organizing, and putting everything together, and the Student felt the Student was not being taught those skills. The Consultant testified the Student was not taught those skills at school. (Testimony of Consultant).

48. On February 12, 2018 another IEP follow-up meeting was held at the Parent's request to finish discussing certain things the team did not have time to discuss at the January IEP meeting (Testimony of Biology Teacher) and to discuss assistive technology (testimony of Special Education Teacher). The Parent, the Consultant, and the Student were present at the meeting. (Joint Exhibit 14). At the request of the Parent new accommodations were added: (i) instead of

leaving early the Student was to stay after class one to two minutes to talk about the customized planner; (ii) alternative setting for tests as needed; (iii) lengthy assignments or tests containing critical content to be chunked as needed; (iv) Student may request 5 minutes to regroup (reading book or movement) and; (v) classroom assignments will be modified as needed by teachers to show mastery without cutting critical content. (Joint Exhibit 14). The Parent's request for a LiveScribe Pen was discussed in great length but the team decided not to add the accommodation as the team did not believe it was needed. (Testimony of Principal).

49. The Parent did not want to sign the revised IEP but was provided with PWN of the intent to implement the IEP (testimony of Special Education Teacher, Joint Exhibit 15), and was provided with the parental rights at the IEP meeting. (Joint Exhibit 14, Testimony of Biology Teacher, Testimony of Special Education Teacher).

50. That same day the Parent requested another IEP meeting and the meeting was scheduled for March 20, 2018; the Parent, the Student, and the Consultant attended the meeting and the Parent was provided with PWN and the parental rights. (Testimony of Special Education Teacher, District Exhibit 34, 35). At the March 20th meeting the Parent and the Parent's Consultant requested the LifeScribe Pen. The team, except for the Parent, felt the current accommodations for classroom notes were working and the LiveScribe Pen was very invasive and not needed as the Student was successful in accessing the general education curriculum without it through the note taker, where the Student was provided with a copy of the class notes and the lecture, and through access to Google Classroom where the Student can look at the lecture. The team does not necessarily accept that every verbatim recommendation in the IEE be included in the IEP; the team takes recommendations under consideration and does what is appropriate for the child. The school staff members of the team felt 100 percent that the IEP in

place in January, 2018 was working for the Student. At the end of the meeting the Parent requested another meeting and PWN and parental rights were provided. (Testimony of Special Education Teacher, District Exhibit 36)

51. On May 3, 2018, another IEP meeting was held at the request of the Parent. (Joint Exhibit 19). The Parent received PWN of the meeting and the parental rights. (Joint Exhibits 16, 17, and 19) . The Parent and the Parent's Consultant were present at the meeting and the Parent's educational concerns were noted. (Joint Exhibit 16) At this meeting the neuropsychologist who had prepared the IEE was on the phone at the request of the Parent to discuss the IEE and the educational recommendations which had been provided to the IEP team prior to the first IEP meeting in January, 2018. The Parent again requested the LiveScribe pen. At the request of the Parent the revised IEP changed the language from the February IEP which stated, "Student to identify and prioritize" to "with teacher facilitation and prompting Student will identify and prioritize," added "visual modifications of assignments and tests will be used as applicable to alleviate anxiety (Joint Exhibit 14, testimony of 9th Grade Biology Teacher, testimony of Special Education Teacher). The IEP team agreed to provide the LiveScribe Pen on a trial basis to see how the Student liked it. Although it was available to the Student the Student did not use it during the remainder of the semester. (Testimony of Special Education Teacher).

52. Overall the Student did not exhibit behavioral problems in class. On one occasion during 9th grade the Student was sent to the Assistant Principal's office because the Student had become upset during biology class; one of the factors may have been a change in the Student's medication. (Testimony of High School Assistant Principal).

53. The Parent received IEP progress reports in April and June, 2018. The Student showed meaningful progress under the IEP. (Testimony of ED for Special Services).

54. The Student received passing grades and full credit in the 9th grade and transitioned to the 10th grade.⁶ (District Exhibit 24).

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Conclusions of Law of this Hearing Officer are as follows:

1. The District did not commit a procedural violation by not assessing the Student in all areas of suspected disabilities in the May, 2016 evaluation.

The IDEA requires that a due process decision be based upon substantive grounds when determining whether a child has received a FAPE, unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to their child or causes a deprivation of educational benefits. 20 U.S.C. §1415(f)(3), *Board of Education of the Hendrick Hudson Central School District, Westchester County, et.al. v. Rowley*, 458 U.S. 176, 206-207, (1982). A student must be assessed in all areas of suspected disability. NAC 388.340 4(b), 388.215, and 34 CFR §300.111. Emotional disturbance, which may include anxiety, mood disorders, and bipolar disorder, is a disability under the IDEA. 34 CFR § 300.8. Failure to assess a child in all areas where that child has displayed symptoms of a covered disability may constitute a procedural violation of the IDEA. *Timothy O. v. Paso Robles USD*, 822 F.3d 1105, 1119, 1124-1125 (9th Cir. 2016).

The Parent alleges that in May, 2016, the Student should have been assessed in areas

⁶ The Student's first semester grades were a B in English, a D in Spanish, a B in PE, a D in Algebra, and a C in Biology. The Student's second semester grades were an A in English, a C in Spanish 2, an A in PE, a C in algebra, and a B in biology. Grades for additional courses taken in 9th grade were a B in Investigating Digital Lit and Design, a C in Health, a B in Agriculture Science, and an A in Communication Instruction (i.e. study skills). (DISTRICT Exhibit 24).

related to social and emotional disabilities, in other words, the category of Emotional Disturbance. The School Psychologist assessed under the category of "Health Impairment" based on the §504 Plan and reports of the Parent that the Student had been diagnosed with ADHD, Anxiety, Mood Disorder, and possible bi-polar disorder.

Pursuant to NAC 388.415, a student with a serious emotional disturbance is eligible for special services and programs of instruction if the eligibility team concludes (i) the student has a serious emotional disturbance and, by reason thereof, needs special education and related services; (ii) the student consistently manifests certain characteristics⁷; (iii) the characteristics have been evident for at least 3 months; (iv) the characteristics adversely affect the ability of the student to perform developmental tasks appropriate to the student's age within the education environment despite the provision of intervention strategies and; (v) special education support is required to alleviate the adverse effects. NAC 388.415(1).

The preponderance of the evidence does not support a finding that the Student should have been assessed in the disability category of Emotional Disturbance. When the Student was assessed by the School Psychologist the Student was not assessed under the category of Emotional Disturbance because the Student did not fit the category of Emotional Disturbance under NAC 388.415. While the School Psychologists report noted the student was "at risk" in leadership, social skills, study skills, functional communication and activities of daily living, and that at times the Student demonstrated anxiety in the classroom setting, these assessment do

⁷ These characteristics are (a) an inability of the student to build or maintain satisfactory interpersonal relationships within the school environment, including withdrawal and isolation of the student from others and efforts by the student to obtain negative attention from others through punishment, ostracism or excessive approval; (b) inappropriate behavior or feelings under normal circumstances including atypical behavior such as outbursts of anger, crying, or head banging, without apparent cause or reason; (c) a pervasive mood of unhappiness or depression, or (d) fears or a tendency to develop physical symptoms associated with personal or school problems. NAC 388.415 (2).

not meet the category of Emotional Disturbance under NAC 388.415. In addition, there were no reports from teachers or other school staff that the Student was demonstrating signs of Emotional Disturbance; to the contrary; in 7th grade the Student successfully participated in the Connections Program and built relationships, was social, and participated in group activities which supports a finding that the school, including the team, was not on notice the Student should have been assessed in the area of Emotional Disturbance.

Therefore, the District has met its burden in showing the District did not violated the IDEA or Nevada law by not assessing the Student in the category of Emotional Disturbance.

2. The District properly follow the procedural and substantive Child Find provisions of the IDEA and Chapters 388 of the NRS and NAC in identifying, locating, and evaluating whether the Student was in need of special education and related services during the 2016-2017 school year (8th grade) and the 2017-2018 school year (9th grade).

The Parent alleges the District made a predetermination to keep the Student on a 504 Plan in the fall of 2016-2017 during the Student's eighth grade, and during a portion of the Student's ninth grade year, 2017-2018. On August 15, 2016, at the beginning of 9th grade the Parent requested an evaluation for the Student. The District informed the Parent that the Student could receive an IEE but the Parent did not obtain an IEE.

Around the time of the §504 meeting on October 19, 2016, the Parent received PWN and the Procedural Safeguards in accordance with the IDEA. Although there was testimony from the Math/Computer Science Teacher that around the time of the October 19, 2016 §504 meeting there was a meeting where the §504 team met and voted on the Student's IEP eligibility, there was also testimony that there were no meetings at that time to discuss the Student's eligibility for an IEP. Of note, a §504 team is not tasked with determining IEP eligibility. Even assuming, *arguendo*, the §504 team made a predetermination during a pre §504 meeting, such a

predetermination would have been harmless as the preponderance of the evidence shows the Parent was offered an IEE and did not obtain an IEE until the fall of 2017, the Parent participated in the October 19, 2016 §504 meeting, agreed to the §504 Plan, and was provided with PWN and the Procedural Safeguards under the IDEA. While the Parent testified the Parent did not obtain the IEE because the Parent did not understand what an IEE was, the evidence shows the District informed the Parent that the District would pay for the IEE because the Parent disagreed with the prior evaluation done by the School Psychologist, and that the IEE would be commensurate in scope with the evaluation done by the School Psychologist.

The Parent further alleges the District should have evaluated the Student for eligibility and special education services under the IDEA during the Student's 8th grade year and prior to the January 2018 eligibility determination in the spring of 9th grade.

A child can be denied FAPE if the school does not comply with its child find obligations. Eligibility under the IDEA is premised on the student having a disability that adversely affects academic performance and, because of this, the student is in need of special education. *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1193-1196 (11th Cir. 2018). In *Durbrow*, the court found that even if a student's attention deficit hyperactivity disorder (ADHD) constituted a qualifying disability, he did not, on account of his ADHD, need special education, and thus he was not a “child with a disability,” as would trigger school District's IDEA obligation to provide him a free appropriate public education (FAPE) (student is unlikely to need special education, and thus unlikely to qualify as a “child with a disability,” as would trigger IDEA obligation to provide a free appropriate public education (FAPE), if, inter alia: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the

capacity to comprehend course material). *Id.* at 1193-1196. The Court found that the under the IDEA the school district did not owe the student a child-find duty to identify, locate and evaluate the student with ADHD, as he was not a “child with a disability,” within the meaning of the IDEA, and even if he was a “child with a disability,” the school district could not have known he needed special education since he generally performed well in his classes and did not exhibit alarming behavior or other clear signs of disability, and the school district attended to student's academic shortcomings through means other than special education. *Id.*⁸ As long as the student makes educational progress in the classroom the school does not have to ensure that the student can apply learning skills outside the school. *Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017); *JSK v. Henry County*, 941 F.2d 1563 (9th Cir. 1991) (as long as student makes gains at school and receives educational benefit even if no progress is necessarily being made at home.) Being on a Section 504 Plan does not equate with a finding that the student is suspected of being IEP eligible; the school is permitted to draw its own conclusions about whether the student needed to be assessed based on its own staff observations and its own interventions. *Panama-Buena Vista Union School District v. A.V.* 71 IDELR 57 (U.S. Dist. Ct., E.D. Ca. 2017).⁹

There is no evidence the Student required individualized special education in the classroom due to the Student's disabilities. The Student was provided with §504 accommodations for the Student's anxiety, ADHD and mood disorders, and supports to complete

⁸ In *Durbrow*, the Court found that even if the student had a disability the evidence based on multiple sources of information did not support his need for special education.

⁹ See *R.B. v. Napa Valley Unified School District*, 469 F.3d 932, 945-947, 48 IDELR 60 (9th Cir. 2007) (student not eligible for IDEA relief on alleged inability to build or maintain relationships where student had good relationships with others and where there was no evidence the student's infrequent inappropriate behavior adversely affected the Student's educational performance; the student's grades for the most part were average or better and achievement test scores were average or better).

classwork and homework assignments which were provided through the §504 Plan and through interventions provided to all Students. Although after the conclusion of 7th grade the Student's psychiatrist stated in a note that the Student needed a study skills class because the Student's mood disorders made home studies impossible, there is no evidence the psychiatrist engaged in any effort to get information about the Student from the school. This information, in the absence of observations at school that the Student should be evaluated in the fall of 2016, was not sufficient to trigger another evaluation for an eligibility determination. In addition, at the start of the next semester the Parent was provided an opportunity to obtain another IEE and declined to do so.

The Student met academic standards, the teachers did not recommend special education for the Student, the Student did not exhibit unusual or alarming conduct warranting special education, and the student demonstrated the capacity to comprehend course material. The Student had friends, was social, and participated in group activities. There was no evidence the Student did not have an appropriate opportunity to access the general educational curriculum during the school day. Missing homework assignments does not equate to the Student being denied access to the Student's education, and the §504 Plan and interventions provided the Student with opportunities to complete assignments during the school day.

During 8th grade the Student received full credit and passing grades under the §504 Plan and transitioned to 9th grade. During the time the Student was on a §504 Plan in 9th grade, the Student received full credit and passing grades. Therefore, the District met its burden in showing the District met its obligations in identifying and evaluating whether the Student was in need of

individualized special education due to the Student's disabilities.¹⁰

¹⁰ See *R.B. v. Napa Valley Unified School District*, 469 F.3d 932, 945-947, 48 IDELR 60 (9th Cir. 2007) (student not eligible for IDEA relief on alleged inability to build or maintain relationships where student had good relationships with others and where there was no evidence the student's infrequent inappropriate behavior adversely affected the Student's educational performance; the student's grades for the most part were average or better and achievement test scores were average or better).

3. The District properly and timely provide the Parent with prior written notice (PWN) of her rights, and with a copy of the procedural safeguards during the 2016-2017 school year (8th grade) and 2017-2018 school year (9th grade).

It is alleged the Parent was not provided with prior written notice (PWN) when the Parent requested IEP's in during the Student's 8th and 9th grade years in lieu of a 504 plan (Sept. 2016-January 2018). PWN must be provided to the parents of a child with a disability before the school proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child. 34 C.F.R. §300-503. Notice of the procedural safeguards established by the IDEA must also be provided to the parent, 34 F.F.R. 300.504(a), which must include a full explanation of those procedural safeguards. 34 C.F.R. §300.504(c). A school must take steps to ensure that the parent understands the content of the notice, and that there is written evidence the parent received and understood the information. 34 C.F.R. §300.503(d)(ii)(iii).

The evidence shows the Parent received PWN and the Procedural Safeguards and the Parent understood the information. The Parent received PWN and the procedural safeguards in May, 2016, at the time of the denial of eligibility, in October, 2016, when the Parent requested an IEE, in September, 2017, when the Parent again requested and IEE, in January, 2018, when the Student was deemed eligible for an IEP, in February, 2018, during a second IEP meeting to review the accommodations, in March, 2018 at a third IEP meeting to review accommodations, and in May, 2018, at a fourth IEP meeting to review accommodations. Therefore, the District has met its burden in showing the Parent was provided with PWN and the Procedural Safeguards at all required times.

4. The Student was not denied a Free and Appropriate Public Education (FAPE) under the IDEA, and Chapters 388 of the NRS and NAC in the procedural and substantive development and implementation of the IEP developed in the Spring of 2018 by the District.

Parent alleges the District made a predetermination in the development of the IEP without input from the Parent. Parental participation in educational decision-making is a critical component of the IDEA. *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013). Parental participation is necessary in both the development of the IEP and any subsequent assessments of its effectiveness. *Honig v. Doe*, 488 U.S. 305, 311 (1988).

Even though the Parent did not feel the Parent's concerns were being addressed, the evidence shows the Parent was an active participant in the development of the 2018 IEP and that the Parent's concerns were taken into consideration. After the January 2018 IEP meeting the Parent requested three follow-up meetings which were timely held by the IEP team in order to address the Parent's concerns about the accommodations under the IEP.

Parent also alleged the IEP was deficient in that it failed to consider all of the accommodations recommended by the neuropsychologist in the IEE. The gravamen of the Parent's complaint does not concern the specialized education, which consisted solely of the study skills class, but the supplementary aids provided in the IEP. This claim primarily concerns the decision of the IEP team to not provide a LifeScribe Pen. While the due process complaint alleges the IEP contained inappropriate goal and objectives, there was no evidence to establish the goals and objectives in the initial and revised IEP's were inappropriate.

A child receives a FAPE if the child is provided with personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et.al.*

v. Rowley, 458 U.S. 176, 182 (1982). If the child is being educated in the regular classroom, the personalized instruction, i.e. the individualized education plan (IEP) should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* The IDEA does not promise any particular educational outcome; while the IEP must be reasonable there is no requirement that it provide what is best or ideal but that it reasonably enables a child to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017). This fact intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents; however deference is based upon the application of expertise and the exercise of judgment by school authorities. *Id.*¹¹

A FAPE does not mean the absolutely best or "potential maximizing" education for the individual child. *Gregory K. v. Longview School District*, 811 F.2d 1307, EHLR 558:284 (9th Cir. 1987). The services provided in the IEP must conform to the goals stated in the IEP. *Caspistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 22 IDELR 804 (9th Cir. 1995). However, it is not necessary that the child progress at a constant, linear rate in all areas. *R.P. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31 (9th Cir. 2011).

The standard for related services is that the service must be necessary to aid the student to

¹¹ The IEP is prepared at a team meeting among a qualified representative of the school who is qualified to provide or supervise the provision of specifically designed instruction to meet the unique needs of children with disabilities and be knowledgeable about the general curriculum and the availability of resources of the school, the child's teacher, the special education teacher, an individual who can interpret the instructional implications of evaluation results, and the child's parents. *J.W. ex. Rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432 (9th Cir. 2010), 34 C.F.R. §300.321, NAC §388.281(2)(a). The IEP should document the child's current levels of academic achievement, specify measurable annual goals so that the child can make progress in the general education curriculum, and list the special education and related services to be provided so that the child can advance appropriately towards the goals. *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 749 (2017), 20 U.S.C. §§1414(d)(1)(A)(i)(I) and (II), (IV)(aa). The IEP must also include a description of how the child's progress towards meeting the IEP's stated goals will be assessed, *Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988, 994 (2017), and when periodic reports on the progress of the child will be provided. 34 C.F.R. §300.320(a)(3)(ii).

benefit from special education. *Irving Independent School District v. Tatro*, 104 S.Ct. 3371, 468 U.S. 883 (1984). The IEP team determined the LiveScribe Pen was invasive and not necessary in order for the Student to benefit from special education as the current accommodations, including the note taker, provided the Student with a copy of the class notes and the lecture, the Student had access to Google Classroom to review the lecture, and that those methods were working. The District agreed to the LiveScribe Pen in May, 2018, on a trial basis. Further, while the January IEP was revised in minor areas, there is no evidence the January and subsequently revised IEP's denied the Student a FAPE and the majority of the neuropsychologist's recommendations were incorporated into the IEP.

While the Parent's Consultant, retained by the Parent in January, 2018, opined that the accommodations in the January and February 2018 IEPs were not appropriate and were not helping the Student, and that the Student told the consultant that the Student was not getting help at school with organizational skills and did not understand the goals, the consultant was never in the classroom environment during observations of the Student but rather in the home and there was no reliable testimony that the IEP was not being properly implemented; the Parent testified the Planner was helping the Student in the spring of 9th grade. In addition, while the neuropsychologist noted the Student would benefit from social skills training, there was no evidence the Student's social skills were interfering with the Student's ability to access the Student's education.

Therefore, the DISTRICT has met its burden in establishing the Student was not denied a FAPE in the development and implementation of the 2018 IEP.

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by this Decision, and the Amended Decision on the Statute of

Limitations, 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 District Superintendent from a list of officers maintained by the Nevada Department of Education shall conduct an impartial review of the hearing pursuant to NAC §388.315.



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