

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.

CLARK COUNTY SCHOOL DISTRICT

Respondent

AMENDED DECISION & ORDER

Date: June 5, 2018

Representatives:

Greg Ivie, Esq. on behalf of Parents/Petitioners.
Also representing Petitioners was Anne Rhu,
Compliance Specialist

Daniel Ebihara, Esq., on behalf of Clark County
School District/Respondent. Also present for
Respondent, Michael Harley, Esq., Compliance
Officer; Lyn Materna, Compliance Monitor;
Amanda Kappel, Compliance Monitor; and Jessica
Lomassarro, Compliance Monitor

Hearing Officer:

Cara L. Brown, Esq.

INTRODUCTION AND PRELIMINARY MATTERS

On January 23, 2018, the Ivie Law Group filed a due process complaint (“Complaint”) on behalf of the above-captioned Student, through () Parents (“Petitioners”), against the Clark County School District (“Respondent”) alleging: 1) the Student was being denied a free appropriate public education (“FAPE”); and 2) the Student is being discriminated against solely because of () disability which has caused the Student to be denied the benefits of a public school education in violation of Section 504 of the Rehabilitation Act of 1973

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution. See *Letter to Chad* (FPCO 12/23/04) DECISION FOR PUBLIC ACCESS REDACTED AFTER ISSUANCE TO DELETE ALL INFORMATION THAT WOULD MAKE IT POSSIBLE TO IDENTIFY THE STUDENT WITH REASONABLE CERTAINTY. REDACTED IS DENOTED BY ()

("Rehabilitation Act") and Title II of the Americans with Disabilities Act of 1990 (the "ADA"). The Nevada Department of Education Superintendent of Public Instruction appointed the undersigned attorney, Cara L. Brown, as the Hearing Officer for the case on January 30, 2018. The undersigned Hearing Officer issued a Preliminary order on February 3, 2018 setting forth the statutory time periods applicable to the proceeding as established in 34 C.F.R. §§300.510 and 300.515. The School District issued a response to the Complaint on February 22, 2018.

The parties were unable to resolve the issues during the resolution period; thus, pursuant to notice duly given, the Hearing Officer convened Pre-Hearing Conferences on March 6, 2018 and April 9, 2018 to among other things, determine the precise issues to be addressed at the hearing, discuss whether pre-hearing motions or briefs are anticipated, establish deadlines for subpoenas and the exchange of documents, and confirm the date and time for the hearing and any additional pre-hearing conferences. At the March 6, 2018 Pre-Hearing Conference, the parties agreed the following were unresolved issues: 1) whether the Student will be denied a FAPE if the School District moves the Student from a self-contained Autism program at () Middle School ("() MS") to a self-contained Functional Life Skills ("FLS") program at() Middle School²; and 2) whether the Student is being denied a FAPE due to the School District's alleged failure to provide the Student exclusive use of a 1:1 adult assist in all school settings. Petitioner's counsel requested the parties be allowed to brief the additional issue of whether the proposed move of the Student from a self-contained Autism program at ()MS to a self-contained FLS program at () MS constitutes a change of placement. The Hearing Officer allowed the briefs on the issue and set the time for submitting the same. Per 34 C.F.R. 200.507 and NRS 388.463, this Hearing Officer has jurisdiction to hear the unresolved issues in the Complaint. However, this Hearing Officer does not have jurisdiction to hear Petitioner's Rehabilitation Act and ADA claims.

Petitioner's counsel requested, the School District agreed and the Hearing Officer granted an extension of the hearing date to April 18-20, 2018 due to scheduling issues. The hearing date was further

² At the hearing, prior to opening statements, counsel for the School District informed the Hearing Officer that he recently learned a FLS program will be opening at () Middle School ("() MS"), which is closer in proximity to the Student's home and offered to move Student to the FLS program at () instead of () Middle School. Petitioners, who had been made aware of the newly available location, noted that while the new location remediated the distance issues they had, it did not address their main concern of a change in school and change in program.

extended to May 2-4, 2018 due to the briefing schedule and Petitioner's counsel's assertion that he was having difficulty finding an expert witness.

This Hearing Officer convened and presided over the hearing which was held May 2-4, 2018. Present at the hearing on behalf of the Petitioners was Greg Ivie, Esq., counsel for the Petitioners; Anne Rhu, Compliance Specialist; Student's mother, and on the final day of the hearing, Student's father. Present at the hearing on behalf of the Respondent School District was Daniel Ebihara, Esq., counsel for the School District, Michael Harley, Esq., Compliance Officer; Lyn Materna, Compliance Monitor; Amanda Kappel, Compliance Monitor; and Jessica Lomassaro, Compliance Monitor.

Per NRS 388.467, the burden of proof and the burden of production resides with the School District.

The following individuals testified at the hearing:

1. (), Dean of Students, () MS
2. (), Nursing Coordinator, School District
3. (), Instructional Coordinator - (), School District
4. (), Special Education Teacher, () MS and Student's Teacher of Record ("TOR")
5. (), Special Education Teacher, () MS
6. (), Coordinator-Case Management, School District
7. (), SPTA, () MS
8. (), Principal, () MS
9. (), Behavior Interventionist - SSD (), CCSD
10. (), Director - SSD (), School District
11. Student's Mother
12. Student's Father
13. (), Petitioner's Expert Witness)

The following exhibits were offered and admitted into evidence:

- Joint Exhibits J-1 through J-12
- Exhibit P1
- Exhibit P2 pages 18 and 19
- Exhibit P4 pages 7-9
- Exhibit P5 pages 1, 18 and 19
- Exhibit P6
- Exhibit P8
- Exhibit D1
- Exhibit D2 page 12
- Exhibit D-3 pages 25 and 26

At the end of the hearing, the parties requested, and this Hearing Officer allowed, the filing of closing briefs on or before May 11, 2018. Closing briefs were filed and the record was closed on May 11, 2018. The decision due date is May 31, 2018.

ISSUES

The issues to be determined are as follows:

- 1) whether the School District's proposed move of the Student from a self-contained Autism program at () MS to a self-contained Functional Life Skills ("FLS") program at () MS constitutes a change in placement;
- 2) whether the Student will be denied a FAPE if the School District moves the Student from a self-contained Autism program at () MS to a self-contained Functional Life Skills ("FLS") program at () MS; and
- 3) whether the Student is being denied a FAPE because of the School District's alleged failure to provide the Student exclusive use of a 1:1 adult assistant in all school settings.

FINDINGS OF FACT

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

1. The Student is a 12-year old sixth grader whose special education eligibility is Intellectual Disabilities/Multiple Impairments, Autism Spectrum Disorder and Health Impairments other than Orthopedic as determined by a School District Multidisciplinary Evaluation Team Report dated May 23, 2016. See Exhibit J-5. The Student is non-verbal. See Exhibit J-4 at page 17.
2. The Student enjoys music and swimming. See testimony of Student's mother at page 286- lines 21-25 and page 287-lines 1-9.
3. The Student currently attends a self-contained Autism program at () MS.
4. Since moving to Las Vegas, NV in April 2016 and prior to attending () MS, the Student was placed in a self-contained Autism program at () Elementary School. See Exhibit J-6A at pages 2-33 which is the Student's May 24, 2016 IEP.
5. The Student's May 24, 2016 IEP provided for, among other things, instruction in functional reading, writing and math; speech/language therapy, occupational therapy and physical therapy. Parent's agreed with the components in the May 24, 2016 IEP. See Exhibit J-6A at page 32.
6. On May 1 and May 8, 2017 an annual review of the IEP was held which lead to the implementation of Student's June 5, 2017 IEP. See Exhibit J-6B.

7. Student's June 5, 2017 IEP provided for special education services that included, among other things, instruction in functional reading, writing and math; communication, self-help, behavior/social skills, speech/language therapy, occupational therapy and physical therapy. See Exhibit J-6B at page 27. The June 5, 2017 IEP also provided for a 1:1 adult assistant for feeding, toileting, dressing, maintaining completion of functional skill tasks, self-help tasks, injurious behaviors, elopement and behavioral concerns and to attend all field trips. Exhibit J-6B at pages 28 and 29. Parent's agreed with the components in the June 5, 2017 IEP. See Exhibit J-6B at page 34.
8. To ensure the Student had a successful transition from elementary school to middle school, at the beginning of the 2017-2018 school year, the Student's name was placed on a watchlist maintained by the School District's Student Services Division (). See testimony of () Instruction Coordinator SSD () (" ()") at page 81- lines 22-25 and page 82- lines 1-2.
9. The first week of the 2017-2018 school year, the School District's Special Education Instructional Facilitator submitted a Request for Assistance form requesting the Student Services Division () to observe the Student and help determine whether () programming was appropriate. See testimony of (), at page 82- lines 5-8. See also Exhibit J-6D at page 19 and the testimony of () at page 212- lines 4-15.
10. () observed the Student the first week of school and again in September 2017. See testimony of () at page 82, lines 9-21. After the first observation, () informed the special education instructional facilitator at the school to continue to take data on the student. See testimony of () at page 82, lines 14-17.
11. After ()'s second observation of the Student in September, she found that the Student was doing well. The teacher was collecting data on the student and the aide was working with the Student on functional goals for reading, writing and math in accordance with the September 2018 IEP. See testimony of () at page 83-lines 11-15.
12. On September 13, 2017, (), a School District Behavior Interventionist, performed a site visit to observe the Student in class. After the visit and following discussion with (), the Student's TOR,() issued a written Collaborative Plan wherein she noted the TOR's report that the Student is

“working on a functional curriculum and is very low functioning” and that the Student would benefit from a “LIF program that would better meet () needs.” See Exhibit P6-1. ()’s Collaborative Plan recommended that campus staff be utilized to help the TOR with the Student until () 1:1 is hired. See Exhibit P6-1.

13. During the first weeks of school the TOR intensely observed students in the class, including the Student, to determine how they interacted with their environment and peers. She has experience teaching FLS programs and working with various people and departments in the School District to create FLS programs. With that experience and her early observations of the Student she suspected the Student could possibly benefit from the program but wanted a second opinion and the opportunity to further observe the Student and collect data. See testimony of (), at page 150, lines 8-15 and page 152 at lines 6-14.
14. On September 13, 2017 the TOR sent the Student’s Parents a form titled “Parental Prior Notice of District Proposal” (“September 2017 Notice”) which form notified Parents of the School District’s proposed: review/revision of the Student’s IEP; change in special education placement; and change in special education related services. The September 2017 Notice set forth: 1) reasons for the action which was academic concerns, parent/guardian concerns, behavior concerns and teacher concerns; 2) other options considered by the School District prior to proposing the aforementioned action; 3) the reason the option was rejected; 4) the evaluation procedure, assessment, record or report relied upon by the School District when proposing the action which was identified as “data collection and observations, review of current IEP”; and 5) the factors relevant to the proposed action . See Exhibit P-8.
15. An IEP revision meeting was held on September 14, 2017 to discuss data collection and observations, obtain parental input on the data and observations, review the then current IEP and discuss proposed modifications to among other things, increase the amount of time allocated to functional reading, writing and math and communication skills and decrease the time allotted to behavior/social (elective/lunch). See Exhibit J-6C at page 1 and Exhibit J6-B at page 27.

16. Parents participated in the September 14, 2017 meeting telephonically and agreed with the components of the proposed September 14, 2017 IEP and the proposed changes were implemented pursuant to the IEP dated September 14, 2017. See Exhibit J6-C at page 32.

17. On November 9, 2017 a "Parental Prior Notice of District Proposal" form ("November 2017 Notice") was sent to Parents to notify them of the School District's proposed review/revision of the Student's IEP; change in special education placement; and change in special education related services. The November 2017 Notice described the reasons for the action as evaluation/reevaluation results; parent/guardian concerns and teacher concerns. The November 2017 Notice also described; 1) other options considered by the School District prior to proposing the aforementioned action; 2) the reason the option was rejected; 3) the evaluation procedure, assessment, record or report relied upon by the School District when proposing the action which was identified as "sensory profile measure, teacher observations and data collection"; and 4) the factors relevant to the proposed action. See Exhibit P-8. The sensory evaluation was requested by the Student's mother. See testimony of Student's mother at page 299, lines 14-19.

18. On November 3, 2017, (), the TOR, contacted Parent by phone to change the date of the IEP revision meeting to November 16, 2017 and to inform Parent that the new notice forms did not have a box for indicating a change in program but only a box for change of placement and thus the box for change of placement would be marked to allow the IEP team the opportunity to discuss program options based on data, current IEP and OT sensory assessment results. See J-3 at page 10. See also testimony of the TOR at page 131, lines 7-25 and page 132, lines 1-5

19. On December 1, 2017 the TOR sent Parents another "Parental Prior Notice of District Proposal" form ("December 2017 Notice) notifying them of the School District's proposed action review/revision of the Student's IEP; change in special education placement; and change in special education related services. The December 2017 Notice set forth: 1) reasons for the action which were identified in the Notice as evaluation/reevaluation results; parent/guardian

- concerns and teacher concerns; 2) other options considered by the School District prior to proposing the aforementioned action; 3) the reason the option was rejected; 4) the evaluation procedure, assessment, record or report relied upon by the School District when proposing the action which was identified as “sensory profile measure, teacher observations and data collection”; and 5) the factors relevant to the proposed action . See Exhibit P-8.
20. The revision IEP meeting was held on December 4, 2017 and attended by the Parents and other members of the IEP team, a regular education teacher, physical therapist, occupational therapist and other School District employees whom Parent’s approved. See J6-D at page 4.
 21. During the December 4, 2017 IEP revision meeting, the Student’s Special Education teachers, () and (), expressed their belief that a Functional Life Skills (“FLs”) program would be a better fit for the Student and would better meet () sensory needs. See () testimony at page 136-lines 3-19. See also testimony of () at page 207-lines 17-25; page 208-lines 1-25; and page 209-lines 1-2.
 22. During the December 4, 2017 IEP revision meeting and subsequent thereto, there was general discussion with the Parents regarding FLS programs; but a specific description of the proposed () MS FLS program and FLS curriculum was not provided. See testimony of () at page 41-lines 22-25 and page 52-lines 5-14. See also testimony of () at page 83, lines 24-25 and page 84, lines 1-5; the testimony of TOR at page 134 line 11 – 16; and the testimony of Student’s mother at page 314, lines 3-16.
 23. At the meeting the Student’s Parents raised concerns regarding the distance of () MS from their home considering the Student’s seizure disorder and history of regression. See testimony of Student’s mother at page 314 lines 19-25 and page 315 at lines 1-15.
 24. By email dated December 8, 2017, the Student’s TOR explained to the Parents the similarities and differences between the Student’s current Autism program and a FLS program noting that while they had no personal knowledge of the details of the FLS program at () MS, the focus of FLS programs is on “functional life skills ranging from self-help skills (hygiene, dressing and feeding) to functional academics such as identifying a student’s name while incorporating sensory elements based on individual student needs.” See email at Exhibit P2-1. In the Student’s

- Autism program, different resources are used to meet the academic goals of the student and different social skills curriculums are used to work on behavioral and social skills using the ABA behavioral model. See Exhibit P2-1.
25. FLS programs are functionally based and focus more on teaching functional life skills such as daily living skills, self-help, toileting and counting. There is more sensory-based instruction and positive behavior supports. There are general education aspects in an FLS program, but they are functionally based. Most of the students in the FLS program may have multiple disabilities and intellectual disabilities. See testimony of () at Vol. 1, pg. 44, lines 21-24 and pg. 52 at lines 6-10. See also the testimony of () at page 84 lines 11-14 and page 97 at lines 17-19. See also the testimony of () at page 260 lines 1-6.
 26. Autism programs uses the general education curriculum differentiated for each student's needs and levels. The program focuses on self-help, behavior and communication. See testimony of () at page 84 lines 15-21. The Autism program, for example, focuses more on addition, subtraction, reading, and reading comprehension and includes some functional life skills but not to the degree as is present in a FLS program. See testimony of () at Vol. 1, pg. 44 at line 25 and page 45, lines 1-3. See also the testimony of () at page 259, lines 19-25.
 27. Both programs integrate special education students with their general education peers throughout the school day. See testimony of () at page 84, lines 8-10.
 28. The December 4, 2017 revision IEP meeting adjourned with the IEP Team, including the Parents, agreeing to the proposed IEP except for the proposed move of the Student from () existing Autism program to the FLS program at () Middle School. The IEP team agreed to reconvene the IEP revision meeting two weeks out to allow Parent's sufficient time to visit the proposed FLS program. See testimony of (), Dean of Students at () Middle School at Vol. 1, page 42, lines 7-17.
 29. Student's Parents visited the FLS program at () Middle School on December 11, 2018 along with () who arranged the visit. The Parents asked questions regarding the program and toured certain areas of the school. See testimony of () at page 84, lines 22-25 and page 85, lines 1-9.

30. The IEP Team reconvened an IEP meeting on December 18, 2017. See the testimony of () at page 50-lines 23-25 and () at page 135-lines 16-18. See also Exhibit J-3 at page 13.
31. At the December 18, 2017 IEP meeting the Student's Parents expressed their disagreement with moving the Student to the FLS Program at (). See Exhibit J-6D at page 40 where Parent checked the box indicating disagreement.
32. The Parents expressed a concern with moving the Student to a FLS program at () due to the increased distance of the school from their home and the Student's seizure disorder. There was concern the Student could have a seizure on the bus and need medical help. See testimony of Student's mother at page 314 lines 19-23. See also testimony of () at page 44, lines 3-6; and the testimony of the TOR at page 135 line 10-15.
33. The Parents also expressed concern that the Student has a history of regression and may regress due to the change in environment. No discussion was had as to how to mitigate possible regression. See testimony of Student's mother at page 315 lines 13-15 and page 335 at lines 16-22.
34. Parents were further concerned that they do not know whether the FLS program is more appropriate than an ABA based Autism program as they have not seen the Student have as much success as () has in a program that utilizes the ABA methodology. See testimony of Student's mother at page 342, lines 9-14. See also testimony of Student's father at page 362, lines 15-19.
35. After visiting the FLS program at () Middle School, the Parents expressed an additional concern that the program was not a good fit for () because the aides they observed were not fully engaged and the Student's current needs could be met in () current the Autism program. See testimony of Student's mother at page 319, lines 17-25 and page 320, lines 1-4. See also the testimony of () at page 87 lines 11-25 and page 88, lines 1-14.
36. On December 18, 2017 the School District issued a Notice of Intent to Implement IEP dated December 18, 2017 that contained the proposed change to a FLS program and reflected a proposed implementation date of December 28, 2018. See Exhibit J- 6D page 1.
37. The goals and objectives set forth in the December 18, 2017 IEP remained the same as those set forth in the Student's IEP dated September 14, 2017; the services remained the same with some

- adjustments to the time allotted to functional math, writing and reading; the behavior/social lunch elective and PE. The Supplementary Aids and Related Services remained the same. The percentage of Student's school day in the regular education environment remained at 22%. See Exhibit J6-C and Exhibit J6-D.
38. The Parents disagreed with the components of the IEP dated December 18, 2017. See Exhibit J-6D at page 40.
39. The Student's IEP was amended December 22, 2017 to correct two errors in the December 18, 2017 IEP that Student's mother discovered. One correction related to the navigation goal in the IEP. The other correction related to the Student's iPad accommodation. See Exhibit J6-E - Notice of Intent to Implement IEP dated December 22, 2017 with a proposed implantation date of December 22, 2017. See also testimony of () at page 43, lines 1-24.
40. The Parents agreed with the components of the IEP dated December 22, 2017. See Exhibit J-6E at page 40.
41. Based upon the present levels of performance set forth in the Student's December 22, 2017 IEP, the Student had limited progress in the areas of functional academics; progress was very inconsistent with respect the other goals with little to no evidence of consistency and generalization of the skill. The Student did show success with goals that involved movement or skills and being able to sit for the recommended number of minutes on the bathroom toilet; the ability to walk up and down stairs with () iPad; opening and closing doors. The Student has also demonstrated emerging skills at home and progress in self-help and physical therapy goals. See testimony of the TOR at page 143, lines 7-25 and page 144, lines 1-14. See also testimony of () at page 218, lines 1-4. See also the testimony of Student's mother at page 295, lines 22-25 and page 341 at lines 6-12.
42. The student showed the most progress when () received ABA services at home and school. See the testimony of Student's mother at page 296- lines 5-13.
43. (), the Dean of Students at () Middle School, supported the recommended move of the Student to a FLS program because, having observed both the Autism program and FLS programs during her tenure with the School District, she believed the FLS program would meet the Student's

- needs better than the Autism program because the entire class is based on functional life skills and the entire school day is structured around sensory. See testimony of () at page 53, lines 4-12.
44. Both of the Student's Special Education Teachers, () and () supported moving the Student to an FLS program because the Student would have more opportunities to meet () functional skills needs such as self-help, dressing, toileting and hygiene; and would have more opportunity to work with music, movement and address () sensory needs while still challenging () See testimony of TOR at page 136, lines 12-19. See also testimony of () at page one of the Student's Special Education teachers at page 207, lines 17-25 and page 208, lines 1-5. See also testimony of () at page 44-lines 7-24 and testimony of () at page 101-lines 23-25 and page 102-lines 1-5.
45. If moved to the FLS program, the Student would be educated with () non-disabled peers to the same extent as () is in the Autism program and would have the same opportunity to participate in non-academics and extracurricular activities in an FLS program. See testimony of () at page 98, line 25 and page 99, lines 1-9. See also testimony of () at page 188, lines 15-25 and page 189, lines 1-4. See also the testimony of () at page 271, lines 14-25.
46. Moving from a self-contained Autism program to a self-contained FLS program is a lateral move. It is not a more restrictive placement. See testimony of () at page 100, lines 6-11.
47. A self-contained Autism program is the at the same point along the continuum as a self-contained FLS program. Neither is in the general education environment and both are in small settings with a teacher and an aide. See Exhibit J-6C at page 30, Exhibit J-6D at page 38 and Exhibit J6-E at page 38. See also the testimony of () at page 105, lines 10-13.
48. The Student's IEP goals can be accomplished both in the Autism program at () Middle School and in an FLS program. However, the FLS program is functional and the Student's goals are functional and are geared toward improving () adaptive skill deficits in that they address safety and health, self-care, home living and functional academics. In an FLS program the Student would have more exposure to opportunities to improve those skills. See testimony of () at page 105, lines 17-22 and page 106 at lines 19-25 and page 107 at lines 1-3. See the testimony of the (

-) at page 136, lines 23-25; page 137, lines 1-14 and at page 158, lines 9-19. See also the testimony of () at page 207-lines 17-25 and page 208 lines 1-22.
49. In the Student's current Autism program, the Student has () own separate curriculum which is different from the others in the class. When others are working on certain activities, the Student is working with () 1:1 on or () adaptive PE or on sensory skills. In a FLS program the students would be working on similar goals. See testimony of () at page 208, lines 17-25 and page 209, lines 1-10.
50. The class size is the same in the FLS program as it is in the Autism program – six to eight students. See testimony of () at page 260, lines 7-12.
51. It is unclear whether the FLS program incorporates ABA methodology. See testimony of () at Vol. 1, page 53, lines 13-17 and page 61, lines 15-17. See also the testimony of the TOR at page 159, lines 7-23.
52. The Student needs a multisensory approach to learning to increase () participation and calm () body according to () TOR and Parents. See testimony of the TOR at page 160, lines 7-11. See also testimony of () at page 211, line 8-13.
53. Routine and structure is important for general education and special education students and there may be negative impacts moving students around to different schools and programs, particularly students with Autism. See testimony of () at page 109, lines 5-15. See also testimony of the TOR at page 178, lines 14-17.
54. The Student did not demonstrate difficulty with changes in people or schedules or the transition to middle school. See testimony of the TOR at page 179, lines 1-15. See also the testimony of () at page 216, lines 4-25 and page 217 at lines 1-12.
55. The Student had a 1:1 dedicated aide at () elementary school and Parent's believed there would be a 1:1 dedicated aide for () at () MS as there had been no change in the IEP wording relating to the 1:1 aide. There was not a 1:1 aide dedicated exclusively to the Student due to hiring challenges. See testimony of Student's mother at page 322 lines 1-25 and page 323 at lines 1-2. See also Exhibit P6-1.

56. The Student had a 1:1 aid from the inception of the 2017-2018 school year though it was not a 1:1 aid dedicated exclusively to (). Two aides rotated every week – one week the Student has a dedicated 1:1 aide and the following week () has a classroom aide. See testimony of (), Dean of Students at () Middle School at pages 36 -38 and pg. 54, lines 13-16. See also Exhibit P6-1 – Collaborative Plan. See also testimony of TOR at page 160 lines 14-25 and page 161 lines 1 – 15; and the testimony of () at page 205, lines 7-14 and page 214 at lines 10-21.
57. On January 25, 2018, the Student fell in the gym and chipped () two front teeth. The aide found () teeth and brought them to the health office where Student’s mother picked up the Student a short time after the incident. It is unclear whether an aide was present with the Student when () fell. See testimony of (), Health Services Coordinator for the School District, at page 75, lines 7-25.
58. A 1:1 aide was present when the Student fell in gym class and bruised () knee in March 2017, but he forgot to report it to the Student’s teacher. See testimony of () at page 240, lines 6-14.
59. Having a 1:1 aide helps the Student focus () attention on the task at hand and limits self-injurious behavior. Parent believes the Student would not be as successful if () did not have a 1:1 aide. See testimony of Student’s father at page 349, lines 24-25, page 350, lines 1-2 and page 357, lines 6-9.
60. There are advantages and disadvantages to the Student having a dedicated 1:1 aide as opposed to rotating aides. The student has demonstrated difficulty in generalizing skills and so there is some benefit to () having exposure to different people who have the same requests or demands. There benefit of a dedicated 1:1 aide is continuity and the ability to understand () behaviors and which sensory inputs work best. Whether a dedicated aid is assigned to the Student or rotating aide, the aide would need to encourage the Student’s independence as () is currently very prompt dependent. See testimony of () at page 186, lines 15-25 and page 187, lines 1-14. See also the testimony of () at page 274, lines 21-25 and page 275, lines 1-22.

61. Though the Student's June 5, 2017 IEP required all school staff who witness a fall to report the fall and record it on the Student's daily activity sheet and send it home in the Student's backpack, () personnel did not send home any daily activity sheets though the student fell on at least two occasions. See testimony of Student's mother at page 303 lines 17-25 and page 304, lines 12-25 and page 305 lines 1-15.
62. () is an expert in Applied Behavioral Analysis and educating students with Autism. She has a Masters Degree in Educational Psychology and a Ph.D. in Special Education with an emphasis in Autism and Applied Behavior Analysis services. She is also a Board Certified Behavioral Analyst. See testimony of () at page 366, lines 2-8. See also ()'s CV at Exhibit P1-P3. She has worked with children with autism since 2001. See testimony of () at page 367, lines 11-12.
63. She has owned and served as the clinical director of Southwest Autism and Behavioral Solutions (hereinafter "SABS) since 2010. See testimony of () at page 364, lines 20-25.
64. SABS provides in-home and in-clinic based ABA therapy services to children on the Autism spectrum and who have other behavioral disorders. () also performs evaluations and assessments to determine if ABA services are needed and medically necessary for children with autism and then makes recommendations typically to insurance companies or state paid programs as to whether a child could benefit from AA services. See testimony of () at page 370, lines 20-25.
65. Eight years ago, () taught in an Autism classroom in the School District. She also provided consultation services to teachers in the School District's Autism classrooms. See testimony of () at page 369 lines 23-25 and page 370 line 1.
66. The School District utilizes the ABA methodology in Autism classrooms and are required to attend training to teach them how to implement discrete trials and other components of the ABA methodology. See testimony of () at page 375 lines 18-25 and page 376 lines 1-2.

67. In her experience eight years ago with the School District, FLS classrooms were not ABA based classrooms and the teachers in those classrooms do not attend ABA training. See ()'s testimony at page 377, lines 17-25.
68. () evaluated the Student approximately two weeks prior to the hearing to determine if ABA services were medically necessary and to obtain approval through () insurance for her company's ABA services. Her company determined ABA services were medically necessary and submitted a request to the insurance company for 15 hours per week of in-home ABA services. See ()'s testimony at page 378, lines 9-24.
69. () recommends keeping the Student in the Autism classroom because she believes () will highly benefit from ABA services and the ABA teaching methodology especially since that methodology also will be used at home. See ()'s testimony at page 379, lines 8-17.
70. The Students goals are written in the December 18, 2017 IEP in a way that indicates that they are based on the ABA methodology using discrete trials. See ()'s testimony at page 382, lines 2-5.
71. In ()'s opinion, for the Student to be successful, () would need someone who is trained in implementing discrete trial methodology. See ()'s testimony at page 395, lines 7-11.
72. Currently, the ABA methodology and the teaching strategies under its umbrella is the only research-based methodology that has been found to be effective with Autistic children. See ()'s testimony at page 396, lines 24-25 and page 397 at lines 1-3.
73. An FLS program is generally indicated when a child has multiple impairments and a physical handicap who needs a lot of support performing their daily routines. See ()'s testimony at page 399, lines 18-25 and page 400 at line 1.
74. Sensory strategies can be taught in Autism classrooms. See ()'s testimony at page 382, lines 6-18.
75. Based upon the Student's Parents' indication that the Student has made some regressions when () has changes in routines or too many transitions, () is worried that the move to an FLS program and a move away from ABA methodology may disrupt () learning. See ()'s testimony at page 384, line 25 and page 385, lines 1-17.

76. () has not observed the Student in the classroom, nor has she spoken with any of () teachers.

See ()'s testimony at page 387, lines 10-18.

77. () has not reviewed a FLS program curriculum since 2010. See ()'s testimony at page 387, lines 23-25.

78. () does not know whether teachers in classrooms other than Autism classroom attend ABA training. See ()'s testimony at page 390, lines 19-25 and page 391, lines 1-17.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Conclusions of Law of this Hearing Officer with respect to the issues presented are as follows:

Issue: Whether the School District's proposed move of the Student from a self-contained Autism program at () MS to a self-contained FLS program at () MS constitutes a change in placement.

The determination as to whether a change in placement has occurred must be made on a case-by-case basis. The U.S. Department of Education has outlined four factors to be considered when analyzing whether a change of placement has occurred:

1. Whether the educational program set out in the child's IEP has been revised;
2. Whether the child will be able to be educated with nondisabled children to the same extent;
3. Whether the child will have the same opportunities to participate in nonacademic and extracurricular services;
4. Whether the new placement option is the same option in the continuum of alternative placements.

Letter to Fisher, 21 IDELR 992 (OSEP 1994).

In the instant case, on or about December 4, 2017, the School District proposed to move the Student from a self-contained Autism program at () MS to a self-contained FLS program at () MS. No material changes were proposed to the goals set forth in the Student's September 14, 2017 IEP which goals which were functionally based. Specifically, the goals included functional reading, functional writing, functional math, matching objects and pictures to communicate, using augmentative communication to indicate wants, preferences and needs; recognizing and responding to () name and critical safety commands; walking to prevent falls and without dropping () iPad; opening and closing doors independently; toileting and dressing.

According to the testimony of (,) Director of Student Services () and () Dean of Students at () MS, the primary difference between Autism programs and FLS programs is Autism programs are based on the general education curriculum differentiated for each student's needs and levels. FLS programs are functionally based and focus on teaching functional life skills such as daily living skills, self-help, toileting and counting - the same skills that are the focus of the Student's December 18 and 22, 2017 IEPs. The Student essentially has been engaged in a functional based program while in a self-contained Autism classroom. There were no proposed changes to the Student's supplementary aids or related services. Based upon the foregoing facts, moving the Student from the self-contained Autism program at () MS to a self-contained FLS program at () MS does not substantially or materially affect the composition of the Student's educational program. For a change in program or services to be considered a change in placement, the change must be significant. *Doe v. Maher*, 793 F.2d 1470, 1481 (9th Cir. 1986), affirmed, *Honig v. Doe*, 484 U.S. 305 (1988).

According to the uncontroverted testimony of (), the Student's Special Education teachers and TOR, (), the Student will be able to be educated with nondisabled children to the same extent in FLS program as () is in the Autism program and the Student will have the same opportunities to participate in nonacademic and extracurricular services.³ The proposed move is from one self-contained program to another self-contained program and per the testimony of () and is a lateral move that is no more restrictive and is the same option on the continuum of alternative placements.⁴ Based upon the foregoing analysis, a change in placement has not occurred.⁵

Petitioner's counsel's position that the proposed FLS program would substantially and materially alter the Student's placement because the ABA methodology is not used in FLS programs is not supported by the evidence. In fact, () testified that most FLS teachers are trained in the ABA approach. See testimony of () at page 61-lines 11-20. What the preponderance of the evidence indicates is that it is unknown whether the

³ See testimony of () at page 98-line 25 and page 99-lines 1-9. See also testimony of () at page 188-lines 15-25 and page 189-lines 1-4 and the testimony of () at page 271-lines 14-25.

⁴See testimony of () at page 100, lines 6-11.

⁵ See Exhibit J-6C at page 30, Exhibit J-6D at page 38 and Exhibit J6-E at page 38. See also the testimony of () at page 105, lines 10-13.

FLS program at () MS employs or will employ the ABA methodology.⁶ Petitioner’s expert witness provided somewhat confusing testimony. She initially testified that in her experience, FLS classrooms are not ABA based classrooms and the teachers do not attend ABA training. See testimony of V. Fessenden at page 377- lines 22-25. She later testified that when she worked in the School District eight years ago neither the ABA methodology nor discrete trials were the “primary teaching method” in FLS classrooms. See testimony of V. Fessenden at page 387 lines 19-25 and page 388, lines 1-1.

The fact that () checked the “Change in Placement” box on the Parental Prior Notice forms used to notify Parents of proposed IEP changes does not make the change in the Student’s program a change in placement. () testified the new notice forms did not have a box for indicating a change in program but only a box for change of placement and thus the box for change of placement was marked to allow the IEP team the opportunity to discuss program options based on data, current IEP and OT sensory assessment results. See Exhibit J-3 at page 10. See also testimony of () at page 131, lines 7-25 and page 132, lines 1-25. According to ()’s testimony and her notes dated November 3, 2017 in the Confidential Status Record, she explained the same to Student’s mother during a call with her on November 3, 2017. See Exhibit J3 at page 10.

Based upon the foregoing, this Hearing Officer concludes that moving the Student from the self-contained Autism program at () MS to a self-contained FLS program at () MS does not constitute a change in placement.

Issue: Whether the Student will be denied a FAPE if the School District moves the Student from a self-contained Autism program at () MS School to a self-contained Functional Life Skills (“FLS”) program at () MS.

34 C.F.R. 300.17 defines a free appropriate public education or FAPE as special education and related services that:

- (a) Are provided at public expense, under public supervision and direction and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;

⁶ See the testimony of () at page 61-lines 11-17 stating that she does not know if ABA methodology is used at in the FLS program at () MS. See also the testimony of () at page 159-lines 10-20 indicating that ABA instruction “can be used” in FLS programs but that she cannot speak to whether it is or is not used in () MS or () MS.

- (c) Include an appropriate preschool, elementary school or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

In determining whether a FAPE has been or will be provided, a twofold inquiry is required:

1. Have the procedures set forth in the IDEA been adequately complied with; and
2. Is the IEP reasonably calculated to enable the child to benefit educationally. *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al.*, 102 S. Ct. 3034, 553 IDELR 656 (1982).

In this case, as there is no claim of procedural violations under the IDEA thus the analysis can be focused on the second of the Rowley two-part test - whether the Student’s IEP is reasonably calculated to enable the child to benefit educationally.

In *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 69 IDELR 174 (United States Supreme Court (2017)), the United States Supreme Court clarified the FAPE standard it established under *Rowley*⁷ and held that a school must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 999 The IEP must be “appropriately ambitious in light of the circumstances.”

The evidence supports a finding that moving the Student from a self-contained Autism program to a self-contained FLS program with no material change to () IEP goals is reasonably calculated to allow the Student to make progress in light of () disabilities. The Student has a functional curriculum that is being administered in an Autism classroom. The Student’s IEP goals have not changed. () is making limited progress toward () functional academic goals and more progress toward () functional skills goals. The Student’s Special Education Teachers, () and (), testified that if the Student is moved to a FLS program, () would have more opportunities to meet () functional skills needs and more opportunity to work with music, which () loves, movement and address () sensory needs while still being challenged. See the testimony of () at page 136, lines 12-19 and the testimony of () at page 207, lines 17-25 and page 208, lines 1-5. According to (), the Dean of Students at () MS, the entire school day is structured around functional life skills and sensory strategies and thus would better meet the Student’s needs. See testimony of ()g, at page

⁷ See *M.C. v. Anetelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1200 (9th Cir. 2017).

53, lines 4-12. Their view is supported by (), the Instructional Coordinator for the School District's Student Services () who works with the special education department for schools in the () division. () testified that "in order for the Student to get the full benefit of a functional curriculum, placing () in a functional classroom where that's all they do all day would probably benefit [], and I say 'probably' because it is one of those things where you have to take the data, implement it, take more data and see what progress () is making." See testimony of () at page 107, lines 8-13; page 101-lines 23-25 and page 102-lines 1-5.

According to the testimony of Petitioner's expert, (), a FLS program is generally indicated when a child has multiple impairments, a physical handicap and needs a lot of support performing their daily routine. In this case, the Student has multiple impairments, a physical handicap and requires significant support performing () daily routine an FLS program should be appropriate for (). Consistent with the expert's opinion, the School District's "Guide to Student Services" manual at Exhibit P5-18 states that the FLS program provides inclusive practices, functional academic instruction, positive behavior supports and augmentative technology - all of which are components of the Student's December 22, 2018 IEP.

Parents expressed concern that the progress the Student has made in the Autism program may be lost if the ABA methodology employed in the Autism program is not used in the proposed FLS program. Expert witness, (), echoed the concern and testified currently, the ABA methodology and the teaching strategies under its umbrella are the only research-based methodology that has been found to be effective with Autistic children. See ()'s testimony at page 396, lines 24-25 and page 397 at lines 1-3. () also testified that the Student's goals are written in a way that indicates they are based on the ABA methodology using discrete trials. See ()'s testimony at page 382, lines 2-5. She noted, however that one must be taught or trained on how to implement discrete trials. As noted above, there was no evidence introduced to support a finding that the FLS program at () MS does not or will not use the ABA methodology. If it is determined that the Student should receive ABA based instruction and the teachers and staff are not trained to implement it, the School District can provide intensive autism training to the FLS program teachers and staff through its LINKS program. See Exhibit P3-1.

This Hearing Officer is unable to determine prospectively whether the change would be traumatic for Student or trigger a regression so significant that it would amount to a denial of FAPE. Petitioner's expert witness indicates that by systematically implementing changes, autistic children can learn to tolerate

unexpected routine changes. The Student has encountered quite a bit of change the past two years. Per the testimony, () moved to Las Vegas in April 2016. Entered a new elementary school with unfamiliar students, teachers and school personnel. Approximately one year later, in 2017, the Student transitioned to middle school where () had new teachers and aides and many new fellow students. According to the Student's Special Education teachers at () MS, the Student has not demonstrated any difficulty with changes in people or schedules or the transition to middle school. See testimony of () at page 179- lines 1-15 and the testimony of () at page 109-lines 5-15.

This Hearing Officer concludes the proposed change of the Student's program from the self-contained Autism program at () MS to a self-contained FLS program at () MS would not deny the Student a FAPE. The proposed December 22, 2018 IEP which incorporates the proposed move is reasonably calculated to enable the Student to make progress appropriate in light of () circumstances and is appropriately ambitious.

Issue: Whether the Student is being denied a FAPE because of the School District's alleged failure to provide the Student exclusive use of a 1:1 adult assistant in all school settings.

The Student's IEP dated September 14, 2017, which was agreed to by the Parents, requires a 1:1 aide attend all field trips; a 1:1 adult assistant (classroom staff and related service staff) to maintain completion of functional skill tasks, self-help tasks, injurious behaviors, elopement and behavioral concern; and a 1:1 adult assistant (classroom staff and related services staff) to assist with feeding, toileting, dressing. See Exhibit J-6C at page 27. From the start of the 2017-2018 school year, two aides served as the Student's 1:1 aide on a rotating basis. One week one of the aides provided the 1:1 services and the next week the other aide provided the 1:1 services. See testimony of () at page 160-lines 14-25 and page 161- lines 1 - 15. See also testimony of () at page 205-lines 7-14 and page 214-lines 10-21. The IEP does not require the provision of a "dedicated" aide for the Student's exclusive use though the Student's mother testified that the Student had a dedicated aide at () elementary school. See testimony of Student's mother at page 293-lines 20-21.

Parents question whether a 1:1 aide was provided for the Student in all school settings because there were two incidents during the school year where the student fell and hurt ()self. In one incident, the Student fell and bruised () knee. An aide was present but testified he forgot to report the incident to the Student's teacher. See testimony of () at page 240, lines 6-14. The second incident occurred when the Student fell and

chipped two of () teeth. It is not clear whether an aide was present at that time. See the transcript at page 330-lines 18-22.

The Student's occupational therapist has indicated that having a 1:1 aide helps the Student focus () attention on the task at hand and limits self-injurious behavior. See Exhibit J-6D at page 17. Parent also believes the Student would not be as successful if () did not have a 1:1 aide – whether they be rotating aides or not. See testimony of Student's father at page 349, lines 24-25, page 350, lines 1-2 and page 357, lines 6-9. According to Student's Special Education teacher, () and (), there are advantages and disadvantages to the Student having a dedicated 1:1 aide as opposed to rotating aides. In the instant case, the Student has demonstrated difficulty in generalizing skills and so there is some benefit to () having exposure to different people who have the same requests or demands. On the other hand, the benefit of a dedicated 1:1 aide is continuity and the ability to understand () behaviors and which sensory inputs work best. () testified that whether a dedicated aid is assigned to the Student or rotating aide, the aide would need to encourage the Student's independence as () is currently very prompt dependent. See testimony of () at page 186, lines 15-25 and page 187, lines 1-14. See also the testimony of () at page 274, lines 21-25 and page 275, lines 1-22.

Based upon the preponderance of the evidence, I conclude the School District's provision of two rotating 1:1 aides complied with the requirements of the Student's IEP and the Student was not denied a FAPE because of the School District's failure to provide the Student exclusive use of a dedicated 1:1 aide.

This Hearing Officer does, however, find that the language in the Student's IEP related to the provision of a 1:1 aide or adult assistant could be more clearly stated in terms of requiring a 1:1 aid in all school settings.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. the Student's most recent IEP shall be revised to reflect () MS as the location for the proposed FLS program;


2. the language in the Student's most recent IEP regarding a 1:1 aide and 1:1 adult assistant shall be deleted and replaced with language that provides: "student is to be provided a 1:1 adult assistant/aide (classroom staff and related services staff) in all school settings;" and
3. Student's name shall be placed or maintained on the "watchlist" maintained by the School District's Student Services Division () for at least one year so that the division can periodically monitor Student and assist in determining whether () programming is appropriate.

The foregoing action shall be completed within ten (10) days of the date of this Order.

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. Since this decision is being delivered in both electronic and hard copy, receipt of a copy of this Decision and Order will be determined by either the date of actual delivery or the date of the first attempt to deliver by the U.S. Postal Service.

Dated: June 5, 2018



Cara Brown, Esq.
Hearing Officer