

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

In the Matter of

**DECISION OF THE
HEARING OFFICER**

STUDENT¹, by and through Parents,
Petitioners,

Date: June 26, 2021

v.

SCHOOL DISTRICT,
Respondent

Respondents: Daniel Ebihara, Esq.
and Lin Soriano, Esq., on behalf of
the School District. Also present for
Respondent were Alison Dunn,
Compliance Monitor, and Kierra
Zimmerman, Compliance
Monitor.

Victoria T. Oldenburg
Hearing Officer

INTRODUCTION AND PRELIMINARY MATTERS

On April 13, 2021, the Parent filed a due process complaint ("Complaint") on behalf of the above-captioned Student against the School District. ("the District"). 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 April 22, 2021. The District responded to the Complaint on April 22, 2021. The Hearing Officer issued a Preliminary Order on April 23, 2021 setting forth the statutory time periods applicable to the proceeding as established in 34 C.F.R. §§300.510-300.515 and the Parent was provided with her rights. The

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).

parties were unable to resolve the issues during the resolution period. Therefore, pursuant to notice duly given, the Hearing Officer convened a Pre-Hearing Conference on May 17, 2021 to, among other things, determine the precise issues to be addressed at the hearing, discuss whether pre-hearing motions or briefs were anticipated, establish deadlines for subpoenas and the exchange of documents, and confirm the date and time for the hearing and of any additional pre-hearing conferences.

On June 2, 2021, a second Pre-Hearing Conference was held. At the Second Pre-Hearing Conference the Parties discussed the Parent's request that the District be prohibited from introducing evidence existing prior to the 2-year statute of limitations, which commenced on or about April 13, 2019. The Hearing Officer ruled that the District could seek to introduce evidence which existed prior to April 13, 2019 if it were relevant to the issues, but that decisions regarding the admissibility of such evidence would be made at the hearing.²

The Parent also requested that the Hearing Officer issues a subpoena for a school psychologist who had prepared a Multi-Disciplinary Team (MDT) report addressing the Student's eligibility criteria. The District objected to the subpoena. The Hearing Officer reviewed the MDT report and ruled that the testimony of the school psychologist would not be relevant to the issues and therefore denied the subpoena request.³

The District provided the Parent with a language interpreter during all pre-hearing conference calls. The Parent did not request a translator for any documents provided to the Parties or for any e-mail exchanges. During the second Pre-Hearing conference the Parent requested that

² HO Exhibit 12.

³ HO Exhibit 12.

the interpreter be physically present with her during the virtual hearing. After discussion among the parties the Hearing Officer ruled that providing an interpreter from LanguageLine Solutions who is proficient in Amharic to provide telephonic interpretation during the Zoom hearing was appropriate and adequate as during all pre-hearing conference calls the Parent had been provided an interpreter from LanguageLine Solutions and the Parent never expressed dissatisfaction or any concerns regarding the interpretation services provided.⁴

Also discussed at the Second Pre-Hearing Conference was the Parent's objection to the District contacting the principal of the Student's former private school and to the District obtaining records from that school. The Parent objected on the grounds she had not given the District permission to contact the private school or obtain the Student's records, and because she believed doing so would be a violation of the Student's privacy rights. The District argued that it was entitled to the records under the Family Educational Rights and Privacy Act of 1974 (FERPA) and that the Parent waived any privacy rights by requesting, as a remedy, that the District pay for the Student to attend private school. The Hearing Officer ruled that the questions involving a violation of FERPA were not within the jurisdiction of the Hearing Officer, and that based upon the allegations in the Parent's Due Process Complaint and the requested remedies it appeared that the testimony from the principal of the private school and the school records would be relevant to the issues. The Hearing Officer reserved ruling on the admissibility of such evidence until the District sought to admit it at the hearing. The Parent had also requested a subpoena of a witness, a teacher at the Student's private school, to appear and testify at the hearing, which was objected to by the District. The subpoena was denied because the Parent was not able to identify the relevancy of

⁴ HO Exhibit 12.

the testimony. However, the teacher did testify at the hearing at the request of the Parent and the District did not object.⁵

The Hearing Officer convened and presided over the hearing conducted virtually, via the Zoom platform, on June 14-16, 2021. Present at the hearing was the Parent, and present on behalf of the District were: Daniel Ebihara, Esq., Lin Soriano, Esq., Alison Dunn, Compliance Monitor, and Kierra Zimmerman, Compliance Monitor. During the hearing the Parent had the assistance of an interpreter provided by the District who was proficient in Amharic.⁶

At the hearing, Hearing Officer Exhibits 1 through 13 were admitted, District Exhibits 1-12 and 15-17, as contained in the District's disclosures, were admitted, and Parent's Exhibits 1-2, produced at the hearing, were admitted.⁷ The decision in this matter is due on June 27, 2021. No extensions to the due date were requested.

ISSUES

The issues to be determined, which were agreed to by the parties at the Pre-Hearing Conferences and again at the beginning of the due process hearing, are: 1) whether the IEP for the 2020-2021 school year was appropriately developed, tailored to the Student's unique

⁵ HO Exhibit 12. The Parent also requested that the District produce a witness who was a teacher at the Student's special school, as well as a teacher at the comprehensive campus where the Student attended a distance learning reading class in a self-contained classroom. The District arranged for both teachers to testify at the hearing on behalf of the Parent. While the Parent did not submit disclosures prior to the hearing, the Hearing Officer permitted the testimony of these witnesses.

⁶ During the first day of the hearing the Amharic interpreter provided by LanguageLine Solutions, who was appearing telephonically but not by video at the Zoom hearing, had technical difficulties resulting in the interpreter being disconnected from the hearing on at least three occasions. Therefore, the hearing was discontinued until the District could obtain a qualified interpreter who could appear at the Zoom hearing by video. The District obtained a qualified interpreter, and the hearing resumed the next day.

⁷ The Parent did not request that the Exhibits be translated to Amharic. Parent's Exhibit 1 is the Parent's questions for certain witnesses written in English and Exhibit 2 is the Parent's closing statement written in English. The Parent requested that the Hearing Officer read the questions to the witnesses and read the closing statement into the record. The District did not object to the Hearing Officer reading the statement and the questions and the Parent affirmed that the content read by the Hearing Officer was accurate.

individual needs, and reasonably calculated to enable the Student to receive educational benefits in the least restrictive environment, specifically by placing the Student in a self-contained public school for educational services with the exception of the Student's reading class, which was provided through distance learning at a comprehensive campus and; 2) whether the IEP for the 2020-2021 school year was properly implemented, specifically in the area of reading, science and math instruction. Pursuant to Nevada law, the District has the burden of proof to show the District complied with the IDEA and Nevada law. NRS §388.467.⁸

FINDINGS OF FACT

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

1. The Student was born on September 2, 2008.
2. The Student was enrolled as a Student in the District in the third grade, the 2016-2017 school year, in a comprehensive elementary school and was deemed eligible for special education services under the category of emotional disturbance.⁹
3. During the 2018-2019 and 2019-2020 school years, fifth and sixth grade, the Parent enrolled the Student in a private school.¹⁰ The private school is dedicated to students with learning differences who struggle in the typical academic setting.¹¹
4. On November 8, 2018, during the fifth grade, the private school provided the Student with

⁸ Although the Parent requested several remedies in her Due Process Complaint, during her closing statement the Parent stated that the only opportunity for the Student to receive a FAPE is by attending a private school and requested that the Hearing Officer award private school tuition so that the Student could receive services in the least restrictive environment. No remedies, other than private school, were requested during the prehearing conferences.

⁹ District Exhibit 16.

¹⁰ Testimony of private school Principal, District Exhibit 15.

¹¹ Testimony of private school Principal.

a Customized Education Plan (CEP). The CEP noted several positive observations of the Student including that he was a bright and helpful Student, puts forth effort during work assignments, asks for help when needed and helps around the classroom, including helping other students, and completes his work on time. The Student was observed to thoughtfully participate in class discussions and capable of showing empathy in situations where he had a favorable opinion about the person. The CEP also noted learning challenges in that the Student's high energy often hinders his ability to regulate his actions or words, and that non-mastery of impulse control and lack of attention on how his actions affect others impedes his ability to think first before doing or saying anything. The CEP further noted that the Student needed reminders to assist him in displaying appropriate social skills. Examples given were that the Student blurts out in class and talks constantly while the teacher is talking, or when the class has been given instructions to do a task, which causes disruptions and distraction to the classroom, and that the Student will push his way to the front of the classroom to be first with no forethought to others who were in line before him.¹²

5. On January 6, 2020, during the sixth grade, the private school provided the Student with a new CEP.¹³ The CEP noted that the Student was a bright young man who struggles with attention-deficit issues and in keeping negative thoughts about other students to himself. The CEP also noted the Student had a hard time completing assignments and focusing in order to complete tasks, was distracted by other students, and had a tough time managing his behavior.¹⁴

6. During the sixth grade the Student's original placement was transitioning from class to class

¹² District Exhibit 15, page 8-9; testimony of fifth grade Teacher.

¹³ Testimony of private school Principal; District Exhibit 15.

¹⁴ District Exhibit 15, page 1.

with the other sixth graders. However, the private school subsequently placed the Student in a “self-contained classroom” which resulted in the student being in one class for the entire day. The decision was made because the Student had issues with compulsive behaviors, such as impulsively poking/elbowing other students, which was found to be detrimental to the personal safety of the Student as some of the students he poked were vulnerable to being touched and would react to the Student, with at least one student hitting him after being poked.¹⁵ The Student was also struggling academically moving from class to class as it was difficult for him to settle down when transitioning.¹⁶ One of the benchmarks in the CEP was to have the Student move to other classes incrementally in February, 2020.¹⁷ The Student was eventually able to transition from class to class when the private school went to distance learning (online) in mid-March, 2020 due to the COVID-19 pandemic.¹⁸

7. Prior to distance learning the Student was difficult to control in large groups during less supervised times such as lunch, recess, and before and after school. The Student would get up from the middle-school lunch table and go to the high-school lunch table and would engage in concerning behavior during recess, so he was kept inside. The Parent wanted the Student to go to lunch with his peers and go outside during non-supervised times. Because there was no one at the school to watch the Student during those times the Parent volunteered to assist and watch over the Student.¹⁹ During distance learning the Student's behavior was much improved and he did well

¹⁵ Testimony of private school Principal.

¹⁶ Testimony of private school Principal.

¹⁷ District Exhibit 15, page 4.

¹⁸ Testimony of private school Principal.

¹⁹ Testimony of private school Principal.

with one-on-one instruction provided by private school staff.²⁰

8. When the private school principal was asked whether the Student would be accepted back to the private school for the 2021-2022 school year, the Principal testified that he would be accepted back under certain conditions. In order to meet his needs in upper school (where the students move from class to class) and for him to be productive and move forward academically the Student would require one-on-one support from a Registered Behavior Technician (RBT) who would essentially shadow the Student, follow him from class to class and ensure he was focused, safe, and not engaging in compulsive behavior.²¹

9. At the commencement of the 2020-2021 school year, when distance learning was still ongoing, the Parent enrolled the Student at a District special school.²² The special school focuses on individual needs and goals of students with behavioral challenges and utilizes a level system criteria for movement from high to low depending on behavior. The system is tied to the ability of the Student to earn privileges. The level system, slightly modified for distance learning which was in place due to the COVID-19 pandemic, was utilized for the Student.²³

10. At the special school the Student was in a distance learning class with 4-5 other students.²⁴

²⁰ Testimony of private school Principal.

²¹ Testimony of private school Principal.

²² The special school placement was based upon a prior decision of the District made before the Student was enrolled in private school. *See* District Exhibit 9, Notice of Intent to Implement IEP dated March 23, 2021, stating that the Student previously attended a private school and returned to the District with an expired IEP, and that according to his last IEP, the IEP decision was a special school setting. The Hearing Officer takes judicial notice that on December 1, 2017, a decision was made by a hearing officer to uphold the District's decision for a special school placement, which was affirmed by a special review officer on February 16, 2018.

²³ District Exhibit 4, testimony of special school Interim Assistant Principal.

²⁴ Testimony of special school special Education Instructional Facilitator.

11. The last IEP the District had for the Student, which was expired, was from the 2016-2017 school year.²⁵ At that time the Student's eligibility criteria was Emotional Disturbance. The IEP detailed significant behavioral issues resulting in the District decision that the Student be placed in a special school.²⁶

12. Distance learning commenced on August 24, 2020.²⁷ On October 1, 2020, the IEP Team met to develop the Student's new IEP. In developing the Student's October 1, 2020 IEP, the IEP Team utilized various assessment tools including teacher observations through distance learning from the beginning of the school year, informal testing, and student work samples in the areas of Reading, Writing, and Math and Social/Skills; it was determined that the Student was eligible for special education services due to deficits in all areas.²⁸

13. In the area of behavior/social skills, the IEP Team utilized the private school report card for the 2019-2020 school year (provided by the Parent), distance learning teacher observations from the beginning of the 2020-2021 school year, parent input and student input. With regard to the report card, the private school teachers stated that the Student is a:

[V]ery enthusiastic student and has great potential. When focused and surrounding himself with the right people, he is very successful. [The Student] is still continuing to make strides

²⁵ By way of background, in August, 2019, the District was engaged in communications with the Parent to prepare a revised IEP for the Student. The Parent wanted to discuss placement and for the District to pay for private school for the Student. The District requested that the Parent sign a release for the records from the previously attended private school but the Parent refused. An IEP Team meeting, for purposes of revising the 2016-2017 IEP, was held on September 9, 2019. The Parent again requested that the District pay for private school for the Student, stating the Student was successful in private school in both academics and behavior. The Parent provided the fourth quarter report card for the 2018-2019 school year. The Team informed the Parent it was outside their scope to pay for private school. The Parent disagreed with the draft revised IEP and was provided with her rights. District Exhibit 5, pages 9-10.

²⁶ District Exhibit 16. *See also* footnote 20.

²⁷ District Exhibit 1.

²⁸ District Exhibit 6, pages 4-6.

with learning to work with his peers and adopt strategies to help cope with various stressful situations. He needs to continue to make strides on improving both time management and respect towards authority and peers. He has trouble working independently, obeying the rules in class, and can be disruptive with inappropriate comments to peers and adults. During the 4th quarter of the 2019-2020 school year²⁹ [the Student's] teachers reported that [the Student] has shown great improvement with communicating with his teacher and completing his assignments on schedule. He has improved extremely in his behavior in the classroom setting. He also asks for help when needed and completes his work in a timely manner.³⁰

14. The teacher observations for the beginning of the 2020-2021 school year, during distance learning, were that the Student does a great job with active listening and participating in class discussions. When asked a question he answers the questions while on topic.³¹

15. The October 1, 2020 IEP statement regarding the assessment and the effect on the Student's involvement and progress in the general education curriculum in the area of Behavioral/Social Skills states:

Grade level social expectations require that students interact effectively with peers and adults on the school campus, effectively work in groups, and actively participate in activities and assignments during the scope of the academic day. Students are able to appropriately convey their wants and needs and consistently meet teacher behavioral expectations. Students are also able to monitor and redirect their own behavior according to school/classroom expectations. Because [the Student] has shown difficulty in working independently, obeying the rules in class, and can be disruptive with inappropriate comments to peers and adults, this may affect his success in the general education curriculum.³²

When developing the Student's 2020-2021 IEP the District did not have access to the Student's private school records, including behavior during in-person instruction and non-supervised

²⁹ The schools were closed to in-person learning during the fourth quarter of the 2019-2020 school year per the Nevada Governor's directives.

³⁰ District Exhibit 6, page 5.

³¹ District Exhibit 6, page 5.

³² District Exhibit 6, page 5.

activities, with the exception of the report card for the 2019-2020 school year. On or about August 28, 2020, the District requested the Student's private school records but the Parent refused to give consent for the Release of Confidential Information (Form 503).³³ The District needed the records from the private school to help them create the IEP and an effective plan for the Student.³⁴

16. The Student's first IEP for the 2021-2021 school year, dated October 11, 2020, provided that the Student was eligible in the category of "Other Health Impairment."³⁵ At that time the Parent requested that the Student attend a comprehensive campus for distance education as the parent disagreed with the special school placement. The request was refused by the IEP Team because the District did not have current data to support the Student's ability to be successful on a comprehensive campus.³⁶ The IEP Team informed the Parent that once more data from the Student's previous private school was provided the Team could revisit the school placement.³⁷

17. The IEP Team looks at many different data points for moving a student into a least restrictive environment and in transitioning the student to a comprehensive campus, including (i) the deficits the student had when they arrived at the special school; (ii) skills, including learned

³³ Testimony of special school Special Education Instructional Facilitator. The District attempted to contact the Parent on August 28, 2020 regarding temporary placement of the Student at the special school and a Release of Confidential Information. The Parent contacted the District on August 31, 2020 and refused to give consent for the release of Confidential Information but agreed to temporary placement at the special school and agreed to the IEP meeting on October 1, 2020. District Exhibit 5, pages 6-8.

³⁴ Testimony of Special Education Instructional Facilitator.

³⁵ Pursuant to NAC 388.046, "Health impairment" means an impairment that limits the strength, vitality or alertness of the pupil, including, without limitation, a heightened alertness to environmental stimuli which results in limited alertness with respect to the educational environment and which:

1. Is caused by chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, childhood disintegrative disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, Rett's disorder, sickle-cell anemia and Tourette syndrome; and
2. Adversely affects the educational performance of the pupil.

³⁶ District Exhibit 6.

³⁷ District Exhibit 5, page 7.

pro social skills, that would help them be successful at a comprehensive campus and the ability to maintain those skills across settings, and; (iii) and the student's growth towards IEP goals and objectives.³⁸

18. During a meeting of the IEP team on February 22, 2021, the Team agreed to have the Student attend one class per day at a comprehensive public school campus through distance learning in a STARR classroom, and at the meeting the Parent agreed to the special school placement.³⁹ The Student's IEP was officially amended on March 9, 2021 to provide that the Student's daily Reading class be provided at a comprehensive campus in a self-contained special education classroom through distance education.⁴⁰ The Student attended the class seven times during the month of March, 2021.⁴¹ The Team selected the Reading class as reading was one of the Student's strengths.⁴²

19. On the average, approximately 1 to 2 students showed up at the Reading class. The instructor did not have an opportunity to observe how the Student interacted with other students as he never got to see the Student in person and the students, including the Student, did not have their screens on. However, the Student's conduct was good and he showed up and did the work he was asked to do.⁴³

³⁸ Testimony of special school Interim Assistant Principal; District Exhibit 5, pages 4-5.

³⁹ Testimony of Special Education Instructional Facilitator; District Exhibit 7.

⁴⁰ District Exhibit 8; testimony of Special Education Instructional Facilitator. The reading class was classified as a STARR class which is a program for students with significant emotional and behavioral deficits and is a self-contained class. Testimony of Region Coordinator.

⁴¹ District Exhibit 12.

⁴² Testimony of Region Coordinator.

⁴³ Testimony of distance learning Instructor at comprehensive middle school.

20. On March 23, 2021, the IEP Team met to discuss the Parent's concern's regarding the Student being pulled out of his Math class, which was still being provided through distance education at the special school, to be able to attend the distance education Reading class at the comprehensive campus, and to discuss the Parent's request that any lost instruction be made up. Scheduling issues had arisen due to new school schedule for hybrid learning. Because the schedule for the Reading class and the schedule for the special school Math class conflicted, if the Student were kept in the Reading class it would result in the Student missing an excessive amount of Math instruction.⁴⁴ The Team also felt it was causing the Student too much stress and anxiety to move from class to class in distance learning.⁴⁵ Thus, the IEP was amended on March 23, 2021 to remove the reading class placement; the Parent disagreed with the IEP.⁴⁶

21. The Student was offered make-up instruction for the math instruction the Student missed while attending the reading class.⁴⁷ The Student received all of his instructional minutes in math and science through distance learning.⁴⁸ During distance learning at the special school the Student was doing well, behaviorally and academically.⁴⁹

22. When the District was going to a hybrid model for in-person instruction in March, 2021, the District, through the IEP Team process, asked the Parent to have the Student attend in person

⁴⁴ Testimony of Special Education Instructional Facilitator; District Exhibit 5, page 3.

⁴⁵ Testimony of Special Education Instructional Facilitator; testimony of Region Coordinator; testimony of the Student.

⁴⁶ District Exhibit 9.

⁴⁷ Testimony of Special Education Instructional Facilitator.

⁴⁸ Testimony of Region Coordinator.

⁴⁹ Testimony of Special Education Instructional Facilitator.

classes two days per week, with distance instruction on the other days, so that they could collect face-to-face data on the Student as all the District had was distance learning data.⁵⁰ The Parent stated she would not send the Student to the special school for in-person instruction as she did not trust the Student would be safe at the special school or that the staff would keep the Student safe.⁵¹

23. When making a recommendation to transition a student to a comprehensive campus the Region Coordinator stated the District generally needs several weeks of data that shows good behavioral progress.⁵²

24. The decision was made by the IEP Team, at the Parent's objection, to keep the Student at the special school for the 2021-2022 school year as the District did not have any in-person data showing the Student had gained any pro social skills or the ability to be with other peers and staff in a comprehensive in-person school setting. When the District re-opened for in-person hybrid education in the spring of 2021 the Student did not attend any in-person classes. The District intended to discuss with the Parent a comprehensive campus placement when it has behavioral data on the Student. However, the Parent has stated, on multiple occasions, that she will not return the Student to the special school.⁵³

CONCLUSIONS OF LAW

The Individuals with Disabilities Education Act ("IDEA") requires that public schools provide children with disabilities a "free appropriate public education" ("FAPE"). 20 U.S.C. §1412(a)(1)(A). In order to meet its substantive obligation under the IDEA, a school must offer

⁵⁰ Testimony of Region Coordinator.

⁵¹ District Exhibit 9, page 11-12. The Due Process Complaint was filed shortly thereafter.

⁵² Testimony of Region Coordinator.

⁵³ Testimony of special school Interim Assistant Principal; testimony of Special Education Instructional Facilitator.

an individual education plan (IEP) that is reasonably calculated to enable 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, 69 IDELR 174 (2017).

The IDEA mandates that children with disabilities be educated in the least restrictive environment or, whenever possible, that disabled and nondisabled children be educated together. Specifically, the IDEA provides that "[t]o the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that the education in the regular class with the use of supplemental aids and services cannot be achieved satisfactorily." *See* 20 U.S.C. §1412(5)(B) and 34 C.F.R. 300.114(a)(2).

Nevada Administrative Code (NAC) Section 388.245 provides that "[a] pupil with a disability may not be placed in a special class or in a school different than the one the pupil would normally attend, or otherwise removed from the regular environment, unless: (a) [t]he Pupil's individualized educational program otherwise provides; and (b) [t]he nature or severity of the disability of the pupil is such that, even with the use of supplementary aids and services, the pupil cannot be educated satisfactorily in the regular educational environment." Four factors must be balanced in determining whether a student's educational placement is the least restrictive environment: (1) the educational benefits available to the student in a regular classroom, supplemented with appropriate aides and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the student in a regular education classroom. *City*

School District v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

When the Student entered the District's special school in the 2021-2021 school year, the last IEP the District had was the expired IEP for the 2016-2017 school year which detailed significant behavioral issues resulting in the District's decision to place the Student in a special school, which decision was upheld through the IDEA's and Nevada Revised Statute Chapter 388's appeal process. Notwithstanding, the IEP Team made a good faith effort to develop the October 1, 2020 IEP using various assessment tools including teacher observations through distance learning from the beginning of the 2020-2021 school year, informal testing, and student work samples in the areas of Reading, Writing, and Math and Social/Skills. In assessing the Student's behavioral/social skills, the IEP Team used the private school report card for the 2019-2020 school year, distance learning teacher observations from the beginning of the 2020-2021 school year, parent input and student input.

Even if the District had the data from the private school the evidence established that during in-person instruction the Student was unable to successfully transition from class to class during the sixth grade due to impulsive behaviors which put the Student in danger, and which caused the Student to struggle academically as it was difficult for the Student to settle down when transitioning from one class to the next. In addition, the Student was difficult to control in larger groups during less supervised times such as lunch, recess, and before and after school. Testimony of the private school staff stated that in order for the Student to be accepted back at the private school and to move forward academically the Student would require one-on-one support from a Registered Behavior Technician (RBT) who would essentially shadow the Student, follow him from class to class and ensure he was focused, safe, and not engaging in compulsive behavior.

Due to the COVID-19 pandemic and the mandatory closure of schools during a significant

portion of the 2020-2021 school year, it was unfeasible for the District to obtain the behavioral data it needed to show whether the Student would be able to receive a FAPE by being provided with personalized instruction with sufficient support services to permit the Student to benefit educationally in a less restrictive environment. When the District returned to in-person instruction in the spring of 2021 the Parent refused to send the Student back to school for 2 days per week of in-person instruction, which the evidence established was needed in order to obtain data on the Student's behavior and whether he could transition to a less restrictive environment because the distance learning data did not provide the IEP Team with the information required to make such a decision.

As to whether the IEP was properly implemented, the evidence established that the decision to place the Student in a STARR reading class for distance learning at a comprehensive campus was not workable due to scheduling conflicts resulting from the new hybrid learning schedules which would adversely affect the Student's Math instruction, and evidence the reading placement was causing the Student stress, all which warranted removal of the STARR reading class from the Student's IEP. Assuming, arguendo, the IEP was not properly implemented due to the scheduling issues, the implementation issue did not result in a denial of FAPE as the evidence establishes the Student was able to make up any missed Math or Science instruction and received good grades in Math and Science in the second semester.⁵⁴ There was no evidence of "a material failure" in the implementation of the IEP in the areas of Math, Reading or Science. *See Van Duyn v. Baker School District*, 502 F.3d 811, 47 IDELR 182 (9th Cir. 2007) (only "material failure" in implementation of IEP constitutes violation of the IDEA).

⁵⁴ District Exhibit 17.

The record shows the Student is a bright Student and was succeeding academically at the special school. There was no evidence that the Student was being denied a FAPE by being placed at the special school during distance education, or due to the scheduling issues in implementing the March 2021 IEP regarding the Student's reading class.

Based upon the foregoing, the District has met its burden in showing that the IEP for the 2020-2021 school year was appropriately developed, tailored to the Student's unique individual needs, and reasonably calculated to enable the Student to receive educational benefits in the least restrictive environment. In addition, the District has met its burden in showing that the IEP for the 2020-2021 school year was materially implemented and that the Student was not denied a FAPE due to issues with the reading class placement.

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 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.



Victoria T. Oldenburg, Hearing Officer
P.O. Box 17422
Reno, NV 89511
vtoldenburg@sbcglobal.net