

**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
Parent,

Petitioners,

v.

SCHOOL DISTRICT,

Respondent.

DECISION OF THE HEARING
OFFICER

Date: July 30, 2021

Representatives:

Petitioners: Self-represented

Respondents: Lin Soriano, Esq.

Hearing Officer: Jamie Resch

Introduction

A due process complaint was filed by the proper person parent on May 21, 2021. A preliminary order documenting the appointment of the Hearing Officer was issued on June 7, 2021. On May 27, 2021, the District responded to the due process complaint. Resolution efforts were not successful during the thirty-day

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

resolution period. A final prehearing report and order was issued on June 30, 2021.

The due process hearing took place on July 14, 2021. At the hearing, Hearing Officer Exhibits 1 through 10 were admitted without objection. Joint Exhibits 1 through 3 were admitted without objection. District Exhibits 1-10 were admitted with objections to Exhibit 8 overruled. Parent submitted no individual proposed exhibits. All proposed exhibits were therefore admitted and made part of the record. The decision in this matter is due August 4, 2021 and no continuances were requested.

Preliminary Matters

The pre-hearing conference in this matter was held on June 30, 2021. The issues were clarified at the pre-hearing conference and are set forth below.

Parent elected a closed hearing and to have the student present, and the hearing itself was held virtually due to the ongoing pandemic. Parent elected to participate by telephone only during the hearing, although Parent and Student appeared on video briefly to be sworn in before they testified.

It is noted here at the start of the due process hearing, Parent moved for summary judgment. The motion was denied.

ISSUES

The issues to be determined, which were agreed to by the parties at the prehearing conference and again at the beginning of the due process hearing, and which are stated in the prehearing order, are as follows: Whether the Student was denied a free appropriate public education pursuant to the May 12, 2021 IEP when the placement was determined to be "special school," which Parent contends is not the least restrictive environment.

FINDINGS OF FACT

After considering all the evidence, this Hearing Officer's Findings of Fact are set forth below. The compacted hearing (a single day, originally scheduled for four days) was held in a 100% virtual format as a result of the ongoing pandemic. The parties are both complemented for their preparation and presentation, which given the circumstances, was notably efficient.

Certain basic facts were undisputed by the parties and those are discussed briefly below. The discussion then turns to the disputed facts concerning the Student's placement, which present a much closer evidentiary issue.

1. It was undisputed that: The student is sixteen years old, will be starting eleventh grade for the 2021-2022 school year, and is eligible for special education services under the emotional disturbance category. Pertinent enrollment history in the district was also undisputed in that Student attended eighth grade at Special School [SS] during 2018-2019, attended ninth grade at SS and [Facility] (a combined school/in-patient treatment center) during 2019-2020, and attended tenth grade during the 2020-2021 school year at SS in the virtual format due to the pandemic. Exhibit D2.

2. It was undisputed that Student's disabilities are primarily in the area of behavior. Neither party expressed a concern about Student's academic progress. Testimony by all witnesses showed, as well as exhibits to include grades, that Student generally performs at grade level in all subjects. The need for special education services is limited to behaviors. Exhibit J3, pp. 7-8.

3. Facts concerning the development of the IEP, supports required thereunder, and the ultimate placement decision are better classified as disputed and are therefore explored in more detail. Three IEPs were offered as joint exhibits which are dated: August 13, 2020 (J1), February 17, 2021 (J2), and May 12, 2021 (J3). The hearing challenged only the placement decision from the newest IEP.

4. Parent agreed to the placement decision in the August 2020 and February 2021 IEPs, which was "special school." See, J2, p. 18. Parent later disputed that she fully agreed with the placement, but these two earlier IEPs are not challenged in the due process proceeding and the better reasoned finding, made here, is that prior to the upcoming school year, the placement of special school was acceptable to the parent. Testimony of [Parent].

5. The IEP in dispute is the May 2021 IEP, and the parties agree that Parent did not accept the placement offer of special school under that IEP, either at the IEP Team meeting or afterwards. Exhibit D5, p. 3. To clarify a point here, the special school placement under the May 2021 IEP was anticipated to be SS, the same school Student had attended for several years prior, and that placement would have been effective for the upcoming 2021-2022 school year. Exhibit J3, p. 17.

6. The placement decision of special school for the 2021-2022 school year was the primary focus of the hearing.

7. The District presented several witnesses relevant to the issue of how the placement decision was made. The Interim Assistant Principal [Principal] at SS has 17 years of experience with the district and has been at SS for six years. The school's goal for Student was to transition her to a general education campus, but

that decision generally required data, which could come from sources such as work in the classroom, interactions with teachers, and academic performance.

Testimony of [Principal].

8. [Principal] was not at any of the IEP meetings, but knows Student and is aware of the issues concerning placement. SS is a special school, fully self-contained, and 100% of its students have disabilities to include severe needs in behaviors such as interpersonal relationships and communication. SS has approximately 50 total high school students. Testimony of [Principal]. This compares to Facility which is a private, full-time institutional setting where students spend part of the day in an educational setting and the remainder of their day in a hospital/treatment setting. [Principal] personally has known Student since middle school, but was not directly involved in the placement decision. Testimony of [Principal].

9. To [Principal]'s knowledge, to include working at SS for six years and personally knowing the Student, the issue concerning placement was a lack of data collected by the school district as to how Student would perform in an in-person, general education setting because the 2020-2021 school year was held entirely in

a virtual format due to the pandemic, and not a function of affirmative data that would have supported placement in a special school. Testimony of [Principal].

10. The District's remaining witnesses all said the same thing. These include: Student's Special Education Teacher at SS [SET], the Special Education Instructional Facilitator at SS [SEIF], and a higher-level administrator at the student services division [SSD]. All testified, credibly, that behavioral data gathered in the virtual format did not directly translate to anticipated performance in the in-person setting because virtual instruction removes the crucial face-to-face component of communication that is the foundational behavioral problem for Student. Testimony of [SEIF, SSD, SET].

11. Despite these concerns, no witness claimed that data gathered in the virtual format was non-existent or irrelevant. A behavioral intervention plan was in place for the Student dated August 26, 2020. See Exhibit D10. The May 2021 IEP stated that the plan would be implemented as part of the IEP. Exhibit J3, p. 15. The BIP is written towards instruction in the virtual format, but the few references to virtual delivery of services in it can easily be read in a common-sense way to apply to real-world in-person interactions as well. Testimony of [SSD]. The target negative behaviors are largely limited to interruptions of "conversations and instructional

time" by Student. See D10. The plan is modest and could be implemented in any educational setting or placement. Testimony of [SSD], [SET].

12. Student's behavior during online learning in the 2020-2021 school year was described as "great," "fabulous," and "really good." Testimony of [SSD]. The evidence presented showed, at most, two discrete incidents of Student interrupting class during the 2020-2021 school year. Only a single incident where Student apparently typed an expletive in class chat is documented in a behavioral report. See Exhibit D6, p. 1. This single incident is found to be insignificant in the greater scheme of Student's behavioral progress, prototypical of what any high-school age student might be capable of doing. Standing alone, it was certainly insufficient to justify placement at a special school. Testimony of [Principal].

13. To be sure, the record as a whole discloses substantially worse behaviors on Student's part, to include a February 10, 2020 incident at [Facility] where Student was accused of hiding a pencil and was noncompliant with a strip search, and additional serious behaviors at [Facility] where Student used sexually explicit language, threatened others with sexual violence, started and participated in fights, threatened self-harm, and was on the receiving end of bullying behaviors by other

students. See D6, pp. 1-11. The overwhelming majority of these incidents occurred in 2018 and 2019.

14. Considering the evidence as a whole, Student's behaviors have clearly improved since 2019. See also, Testimony of [SEIF]. The point is taken that measurement of behavior over the 2020-2021 school year was not in-person, but rather online. But as [SEIF] acknowledged, there is no data to suggest Student's behaviors are getting worse, and there is data, albeit in the online format, which shows improvement. Multiple witnesses acknowledged that a lot of growth occurs in the two years between 9th grade and 11th grade. Testimony of [SEIF], [SET].

15. To summarize events so far, the data available as of the May 2021 IEP team meeting appears to be 1) in-person behavioral data gathered from Student's time at Facility, in the institutional setting, and 2) virtual behavioral data gathered over 2020-2021. Parent testified, credibly, that Student was on various psychotropic medications at Facility which grossly affected Student's behavior.

16. With regard to the May 2021 IEP team meeting, the evidence does not support a finding that the team did all it could to gather relevant data. There was a clear lack of data concerning in-person behaviors, as every District witness explained. Most succinctly, the District wanted data concerning Student's in-

person interactions with students and staff in the school setting. Testimony of [Principal]. For that reason, a home visit, for example, would not have provided the necessary data.

17. But it is not clear that a home visit would have been pointless because Student testified at the due process hearing, and it is patently obvious from that testimony that Student was richly capable of conveying information that would have answered many of the District's concerns. Student testified in a clear and concise fashion that she attended the May 2021 IEP meeting but did not speak more than one or two times. Testimony of [Student]. The IEP team could have learned a lot about Student's current behavioral in-person interactions with other students by conducting a home visit or just asking Student about those interactions during the IEP meeting.

18. Student in fact has had multiple and recent in-person positive behavioral interactions with other District students because she has friends that attend general education campuses which she hangs out with. Testimony of [Student]. The IEP team did not take steps, such as conversing with Student, to determine this information.

19. The members of the IEP team were somewhat inconsistent concerning the reasons for May 2021 placement decision of special school. [SET] and [SEIF], both team members, explained the placement decision was primarily based on a lack of data which would indicate a transition to less restrictive environment would be successful at this time. Making sure any transition was a success was an important goal. Testimony of [SET].

20. Only [SSD], who is an instruction coordinator with 28 years of experience in special education and who now assists dozens of schools with IDEA and administrative code issues, testified that the data showed negative behaviors were an ongoing concern. Behaviors noted included "inappropriate comments" as well as the several behaviors discussed earlier above which the witness noted occurred up until 2019. Testimony of [SSD].

21. Further, no half-measures were discussed at the May 2021 IEP meeting, it was a case of 100% placement at SS with zero percent of time spent in the general education environment. Testimony of [SSD]. The team did not discuss whether Student could spend part of the day in the general education environment. See also Testimony of [SEIF].

22. A request was made by [SEIF] to the student services division to transfer Student to a less restrictive environment, such as a general education campus, in the self-contained classroom, such as the STAR program which is a self-contained program for severely emotionally challenged students. Testimony of [SSD], see District Exhibit 8, dated March 17, 2021. Based on data including the virtual observations, and prior data from Facility, [SSD] recommended the IEP team gather more data, typically for a period of nine to twelve weeks, before making a decision whether to change Student's placement. Testimony of [SSD]. The witness expressly stated it was data that was missing that drove this decision. Testimony of [SSD].

23. Less weight is assigned to [SSD]'s testimony because the witness did not have personal interactions with Student outside of the IEP team context. [SET] and [SEIF] both had more extensive personal interactions with Student, and both of them stated a belief that Student could benefit from special education in a less restrictive environment based on everything they knew about Student at the May 2021 IEP team meeting. Testimony of [SET], [SEIF]. For example, [SEIF] stated Student could receive an educational benefit at a general education campus if Student was placed in a self-contained classroom that utilized the STAR program

(i.e. program for severely emotionally challenged students). Meanwhile, [SET] testified she was not sure if Student could benefit full-time from a different placement, but could benefit from being educated in the general education environment at least part of the time. Testimony of [SET]. The special education teacher explained her "hands were tied" due to a "lack of data." Testimony of [SET]. This was despite satisfactory progress documented in the IEP, as well as the glowing language used to describe Student's progress at the hearing. See Testimony of [SET], Exhibit J2, p. 14.

24. The [SET] noted emails where the school had asked Parent to authorize release of mental health treatment records from Facility, which the school did not have access to. Parent declined, but later explained this was because of her belief that Student's two-plus year old behavior in a medicated, institutional setting was not informative of the Student's current behavioral posture. Testimony of [Parent]. On the whole, there is no reason to conclude that data from Facility is more or less useful than the virtually gathered data from 2020-2021. Both are plainly imperfect when it comes to the ultimate question of how Student will behave in the in-person school setting.

25. A hallmark of SS's benefit to student is the smaller classroom size it affords. Testimony of [SET]. But a substantial drawback is that the other students at SS are "poor" role models for Student. Testimony of [SET]. Student did demonstrate maturity during online interactions in the 2020-2021 school year. Testimony of [SET], see also Exhibit J2, p. 10.

26. The issue of attendance was discussed but attendance does not appear to be an actionable concern. Although the student has absences, they were not extensive and caused his teacher no concern. Testimony of [SET].

27. Testimony also explored the issue of extracurricular activities. According to [SEIF], these were not discussed at the May 2021 IEP team meeting. According to [Student], she had previously expressed an interest in activities such as music and wrestling. SS does not offer those types of activities and for Student to participate it would have to occur at a general education campus. Testimony of [Principal].

28. The issues of costs was addressed and although specific costs are not known, the District does not make placement decisions based on financial concerns. Testimony of [SSD].

29. During testimony, [Student] explained that she has been waiting for "four years" to transfer to a less restrictive environment and did not necessarily believe

that even more data would result in a transfer. [Student] expressed that she did not want to attend a hybrid of SS and general education, but preferred to just move to the general education campus all at once, and recognized the potential for failure. [Student] appeared highly motivated to succeed as evidenced by her testimony as well as her ongoing academic performance.

CONCLUSIONS OF LAW

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

Basic requirements of the IDEA:

Under the Individuals with Disabilities Education Act ("IDEA"), public schools are required to provide children with disabilities with a "free appropriate public education" ("FAPE") by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program ("IEP") that is developed according to the IDEA's procedures. 20 U.S.C. §1401(9); 34 C.F.R. §300.17. In Nevada specifically, the IEP "shall" include "positive strategies to modify the environment of pupils with disabilities to promote adaptive behavior and reduce the occurrence of

inappropriate behavior” for pupils who require “positive behavioral strategies, supports and interventions.” NAC 388.284(3)(b)(1).

The United States Supreme Court has twice addressed the substantive standard of the IDEA in the provision of FAPE, first in *Board of Education v. Rowley*, 458 U.S. 176 (1982) and much more recently in *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017). The basic requirements of the act, and especially those relevant to the procedural requirements of the act, have remained the same since *Rowley*.

“[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g. 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP...demonstrate[s] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”

Rowley, 458 U.S. at 205-206.

To meet its substantive obligations under the IDEA, the District must offer an individualized educational program developed through the Act’s procedures “reasonably calculated to enable a child to make progress appropriate in light of

the child's circumstances." *Andrew F.*, 137 S.Ct. at 999. Notably, the IEP must be reasonable – there is no requirement that it provide what is best or ideal. *Id.*

The issues under consideration in this case are very narrow, and ask whether a substantive violation occurred in the placement decision of special school made in the May 2021 IEP. Several additional provisions reflect on this issue.

Primarily, the IDEA recognizes the need for special education students to be educated in what is known as the least restrictive environment. "To the maximum extent appropriate" children with disabilities must be educated with children who are nondisabled. 34 C.F.R. §300.114. Removal of children with disabilities, such as to a separate school, must occur "only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. §300.114.

In addition, nonacademic and extracurricular services and activities like meals and recess must be provided by a school district to "to ensure that each child with a disability participates with nondisabled children...to the maximum extent appropriate to the needs of that child." 34 C.F.R. §300.117.

Nevada law contains the same requirements concerning the IEP team's responsibility to choose the least restrictive environment. NAC 388.245. But it also states "[T]he committee shall provide for the placement of the pupil in a regular class unless the committee determines that the pupil cannot receive an appropriate education in a regular class, even with supplementary aids and services. NAC 388.245(4).

Much was made at the hearing of the so-called lack of data available to the IEP team. The administrative code provides an answer to this issue as well, noting that the IEP team must "draw upon information from a variety of sources, including, without limitation, aptitude and achievement tests, input from the parent of the pupil, recommendations from the teacher of the pupil and any other information about the physical condition, social or cultural background of the pupil and the adaptive behavior of the pupil." NAC 388.340(5).

There is then, a duty on the part of the IEP team, to gather the data necessary to determine the content of the IEP including the placement decision, after reviewing a continuum of placements. See 34 C.F.R. §300.115. The IEP team is required to explain how it arrived at the placement decision. 34 C.F.R. §300.320(a)(5).

After consideration of the evidence, the May 2021 IEP did not comply with the least restrictive environment requirements of the IDEA because the evidence shows the Student can receive an educational benefit in an environment less restrictive than a special school.

This case does present an interesting issue, and there is evidence that both supports and refutes Petitioner's claims. That said, considering the applicable burden of proof is on the District, the District has come slightly short of justifying its placement decision, in as much as the decision here considers whether an immediate change is required or whether data should be gathered for a period of time prior to any change in placement.

In the District's favor, it is undeniable that Student's behaviors as documented up until 2019 were deplorable and a threat to the Student's safety as well the safety of other students. It is equally clear that Student's more current behavior in the virtual setting was far removed from those prior incidents. Whether that is a function of improved maturity or merely a reflection of the student not being physically present at school has already been addressed in the factual components of this decision. It's plainly both, although Student's success in the virtual format combined with facts the District failed to uncover such as information provided by the Student outweigh the serious behavioral concerns documented

from Student's time at Facility. This was echoed in the testimony of [SET] and [SEIF], who both felt Student could benefit from exposure to nondisabled students as well benefit educationally in a less restrictive environment.

Analysis of these issues is surprisingly straightforward, since this apparently is not the first time a parent has contended a placement decision failed to account for the less restrictive environment requirements of the IDEA. In this jurisdiction in particular, there is controlling authority that explains how to determine the issue. *Sacramento City Unified Sch. Dist. v. Rachel H. by and through Holland*, 14 F.3d 1398 (9th Cir. 1994).

In *Rachel H.*, the Ninth Circuit adopted a four-part test to determine compliance with the mainstreaming requirements of the IDEA. The factors are (1) the educational benefits of placement full-time in a regular class, (2) the non-academic benefits of such a placement, (3) the effect the student would have on the teacher and students in the regular class, and (4) the costs of mainstreaming. *Id.*

Considering first the educational benefits of a less restrictive placement, the testimony established Student generally gets passing grades doing grade level work. A transcript shows a cumulative GPA of 2.739. Exhibit D4. If anything,

Student expressed an interest in receiving even more academically challenging work. Testimony of [Student]. Student's IEP anticipates earning a standard or advanced high school diploma. J3, p. 20. The IEP also calls for supplementary services such as access to recorded lessons, implementation of the BIP, extra time for tests, and weekly progress reports. J3, p. 15. All of these are easily implemented in any placement setting. There is little question the educational benefits to the student favor placing the Student at a less restrictive environment.

As to non-academic benefits, as in *Rachel H.*, there is no opportunity for modeling good behaviors at SS because all of the students there have severe emotional and behavioral problems. Testimony of [SET]. This is acknowledged in the IEP. J3, p. 17 (potential harmful effects of placement include "no interaction with non-disabled peers").

The IEP concludes in cursory fashion that Student is "unable to model appropriate behavior in a less restrictive setting." J3, p. 17. But as set forth in the factual components of this decision, that conclusion is self-fulfilling because Student's placements at SS or Facility resulted in no exposure to non-disabled peers. There was no one to model. Further, neither SS nor Facility directly translate

to a general education campus given the significant differences in how those campuses operate.

The non-academic benefits of a placement less restrictive than SS favor Student, because Student is not learning any positive modeling due to a lack of opportunity at SS. Evidence at the hearing disclosed that Student is capable of learning behaviors from non-disabled students because Student has non-disabled friends.

The closest issue is that which asks for consideration of the effect on the teacher and children in regular class. There are several points to consider here, first being of course the *Rachel H.* test is being adapted here to a less restrictive environment. No witness suggested placing Student in the general education program of any school. Rather, [SEIF] believed the Student could benefit from special education if placed in a self-contained classroom that utilized the STAR behavioral program. The [SET] testified similarly, albeit to a preference that Student attend part-time in such a program and part-time at SS. [SSD] testified that only a placement at SS was appropriate until the District had more data. And finally Student testified that she did not want to spend part of the day at two

different campuses as the transportation time would just be more lost opportunity for learning.

The District's concerns aren't without some weight – while the setting is not particularly analogous, Student's behavior at Facility was unacceptable. Notwithstanding any other part of this decision, Student must understand, if placed somewhere less restrictive than SS, that decision can easily be subject to revision by the IEP team if the types of behaviors demonstrated at Facility return and revisions to the IEP or behavioral plan can't resolve the issue. The District need not tolerate violence, threats, or sexually motivated expletives from Student and any placement decision ultimately made in this decision is certainly not immune to revision should those behaviors occur.

That said, Student testified credibly at the hearing that she understood what was at stake, and that those behaviors cannot happen. Student is in eleventh grade now, and the IEP contemplates a timely graduation and possible career as a 911 dispatcher. J3, p. 12. Student seemed to understand, and must understand, there is no time to waste in terms of building the communication and behavioral skills needed for such a career.

On the whole, this third factor slightly favors placing Student in a less restrictive environment. Despite the alleged lack of data, [SET] and [SEIF], who both personally knew Student, testified that Student could receive an educational benefit in a self-contained STAR program. Such a placement would not take up too much general education time, because the program operates in the self-contained classroom and there was never a suggestion from anyone that Student should be placed in general education 100% of the time.

But it is clear that Student's current 0% of time assigned to general education is entirely at odds with the IDEA's "least restrictive environment" requirements. The IEP as contemplated utterly deprives Student of the positive behavioral modeling that Student requires.

The last factor takes a look at the costs involved, but here, no specific testimony was provided other than that the District does not place students at SS as a means of profiting. Testimony of [SSD]. Therefore, cost is not a factor that favors either party.

In the end two things carry this case into Student's favor. First thing is the testimony of [SET] and [SEIF] that Student can receive an educational benefit in a self-contained classroom. Second thing is Student's testimony is found to be

exceptionally compelling. If Student can present herself for daily classwork at even a fraction of the composure level shown at the due process hearing, Student's chances of success in a less restrictive environment are virtually certain. Student receives no exposure to the general education environment whatsoever as things stand now, and "lack of data" cannot justify that result where better probing of the teachers that know student best and/or student herself would have provided the data necessary to show a less restrictive placement was appropriate.

There are concerns here. Prevention of sexual harassment is crucial, and behaviors such as those shown at Facility might very well result in a consideration of whether a change of placement to include back to SS. *See Clyde K., v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1401 (9th Cir. 1994) (Sexual comments and disruptive behavior interfered with other student's ability to learn and justified off-campus placement). Student's behavior plan, as written, can be implemented in a less restrictive setting so long as common-sense replacements for the few "virtual" services provided in it are utilized. For example, while Student cannot be "muted" in the real world like can be done online, Student can be asked to be quiet, take a time out, or leave the class if disruptive. See D10. Without having actually tried

these things in a less restrictive setting, there is no experience base to conclude that they would not work.

This decision simply finds the behaviors documented at Facility too remote in time and too tightly tied to the restrictive, in-patient environment to be relied on as a basis to deny a less restrictive placement at this time.

Likewise, while assigning blame for the alleged lack of data is not really germane to the decision, it is noted here several opportunities for in-person learning were eschewed by Student such as when the District returned to a hybrid model in the Spring of 2021, or ESY. Parent explained the pandemic prevented participation in those services in-person until Student was fully vaccinated which did not occur until late June or early July. Testimony of [Parent]. Therefore parent did not unreasonably prevent the District from gathering relevant data. *See Basquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179 (9th Cir. 2016) (excusing procedural violations that were caused by parental interference).

In fact, it is better stated the District prevented the District from gathering the required data. It still isn't very clear why, given that [SET] and [SEIF] were on the IEP team, that they did not share their beliefs concerning a less restrictive placement sooner than the due process hearing. It feels like a lot of resources

could have been saved had those discussions occurred during the team meeting, as they are supposed to. Likewise, Student is plainly capable of providing data about her own self-awareness, social standing, and extreme motivation to excel academically at a general education campus. The IEP team could have gathered that data at any time by talking to Student directly.

Is there a risk Student will fail? Yes. But Student acknowledged this at the due process hearing, and largely just wanted the opportunity to stand or fail on her own merits. Student's desire to participate in a less restrictive environment should have been fostered, not put off by a lack of data. The IDEA demands nothing less.

The parties did not address remedies beyond a change in placement. Regardless, the need for compensatory education has been considered and is found to be unnecessary. The IEP identified that as of August 2020, Student was interested in things like music, wrestling, friends, computers, and more. J3, p. 10. It isn't clear how Student could be compensated for missing those experiences other than to order they be made available in the future, which this decision does. Further, the relief requested was a prospective change in placement for the

upcoming school year, and there is no allegation of a prior denial of FAPE. As a result no compensatory education award is made here.

It is also required to determine the percentage of time Student should spend in the general education environment. Zero will not do. But Student did not request to spend 100% of her time in general education either. Student's IEP has modest behavior and social goals that focus on attendance and positive interactions with peers. As a result, a modest percentage of the day should be spent in general education to start, with a focus on interaction with nondisabled peers, which can of course be adjusted as time progresses.

ORDER

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

IEP:

- 1) The May 12, 2021 IEP is modified as follows: Placement is changed from special school to self-contained program which will be the STAR program or equivalent Social/Emotional Teaching and Reinforcement classroom. Student to spend 25% of time in the general education environment to allow the student interaction with non-disabled

students in areas such as: nonacademic activities and/or the student's strongest academic areas.

No later than September 10, 2021, the District will:

- 1) Hold an IEP team meeting to determine Student's progress towards behavioral and attendance goals as set forth in the IEP. The team will consider whether any adjustment to the percentage of time spent in the general education environment is required, whether any additional supports or aids are necessary for Student to receive an educational benefit and revisions, if any, to the student's behavior intervention plan.

NOTICE OF RIGHT TO APPEAL

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

Dated: July 30, 2021.



Jamie Resch, Hearing Officer

Jamie Resch, Esq.
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