IMPARTIAL DUE PROCESS HEARING

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

STATE OF NEVADA

In the Matter of STUDENT[1], by and through Parent, Petitioners, v. SCHOOL DISTRICT, Respondent.	DECISION OF THE HEARING OFFICER Date: August 2, 2018 Representatives: Petitioners: Erick Ferran, Esq. Respondents: Daniel Ebihara, Esq., also present as party representative: Michael Harley. Hearing Officer: Jamie Resch

Introduction

A due process complaint was filed by the unrepresented parent on May 15, 2018, although the student's parent ("Parent") eventually retained the services of attorney Erick Ferran. The District was represented throughout by Daniel Ebihara, Esq. A preliminary order documenting the appointment of the Hearing Officer was issued on June 1, 2018. On June 28, 2018, the District responded to the due process complaint. Resolution efforts were not successful during the thirty-day resolution period. Several status and

[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).

pre-hearing conferences were held, and a final prehearing report and order was issued on July 11, 2018. The due process hearing, at which time Petitioners were represented by Mr. Ferran, took place on July 23 and 26, 2018. At the hearing, Hearing Officer Exhibits 1 through 20 were admitted without objection. Petitioner's Exhibits 1 through 12 were admitted without objection, except that as to Petitioner's Exhibit 8, the District's objection was overruled. Proposed District Exhibits A through E were found to be redundant to Petitioner's exhibits and were not admitted. The decision in this matter is due August 4, 2018. No extensions to the due date were requested.

Preliminary Matters

The pre-hearing conference in this matter was held on July 11, 2018. The Hearing Officer will note two important issues which were discussed at the pre-hearing conference.

First, the parties reached several factual stipulations as to basic matters not in dispute at the hearing. These stipulations were that: (1) The student is eligible under the IDEA as a child with a disability under the category of autism spectrum disorder; (2) The student will be entering third grade; (3) The student's home-zoned school is "School B" (Hearing Officer note: original stipulation included the actual school name, see attached Appendix); (4) The last IEP team meeting was held May 15, 2018. The parents participated in that meeting; (5) The student previously participated in a primary autism program and is anticipated to move to an intermediate program this school year. These factual stipulations are set forth in the July 11, 2018 prehearing report and order, but were

also agreed to in writing, signed by both parties, and said writing was admitted into the evidentiary record during the due process hearing. (See Hearing Officer Exhibit 16.)

A second issue concerned the issuance of subpoenas. Petitioner's counsel orally requested subpoenas be issued for a service provide and a parent advocate who both had expressed significant hesitations about appearing at the due process hearing. A formal written request for the issuance of subpoenas was received on July 18, 2018. (See Hearing Officer Ex. 15). An order directing the issuance of the subpoenas was entered the same day. (See Hearing Officer Ex. 11). Ultimately, both subpoenaed witnesses appeared and testified. Post-hearing briefs were submitted in lieu of closing arguments and were received from both parties. (Hearing Officer Ex's. 19, 20).

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 are as follows: (1) substantively, whether the student was, or will be, denied a free appropriate public education by the proposed change from School A to School B, and (2) procedurally, whether the IEP team was required to, or did, consider the effect of the change in schools upon the student? For clarity's sake, it is noted the issues in the due process complaint primarily arose out of the District's decision to transfer the student from "School A," where the student attended second grade, to School B for the start of third grade.

FINDINGS OF FACT

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

1. The student is seven years old. The student initially enrolled in the District last year, and attended second grade at School A. The student is eligible under the IDEA as a child with a disability under the category of autism spectrum disorder, and in that regard, participated in the "primary" autism program at School A as determined by the student's IEP team. (See Hearing Officer Ex. 1 and 16, Testimony of "Coordinator," who was the District's LINKS coordinator for district-wide autism programming).

2. Prior to attending School A, the student resided in another country. Therefore, second grade was the student's first attendance at any school in the District. (See Testimony of "Teacher," who was Student's second grade special education teacher).

3. A multidisciplinary team assessment report was completed on September 25, 2017, based on data reviewed or gathered between September 11 and 13, 2017. (Petitioner's Ex. 5). At the time of the assessment, the student was not enrolled in school at all. (Ex. 5, p. 4). The student had previously been diagnosed with autism while outside the country, which gave rise to the need for the assessment in the first instance. (Ex. 5, p. 4).

4. The assessment contains several pieces of information relevant to the issues presented in this matter, and no party challenged the findings and conclusions contained in the assessment. For example, parent information provided as part of the evaluation process indicated that the student is "reported to make friends easily." (Ex. 5, p. 2). The results of an Autism Spectrum Rating Scale (ASRS) test shows the student rated in the 90th percentile with respect to "peer socialization" and the 88th percentile for "adult socialization;" both scores being "slightly elevated." (Ex. 5, p. 10). However, the

assessment stated that the student showed "relative weakness in social interaction." (Ex. 5, p. 12). An Adaptive Behavior Assessment revealed a general adaptive composite score of 66, which the report described as "equal to or better than 1% of [student's] same age peers." (Ex. 5, p. 9). The assessment describes this score as "very deficient." (Ex. 5, p. 9). Testimony at the due process hearing about the Adaptive Behavior Assessment confirmed that the scores therein were "all" low. (See Testimony of "Doctor"[2]). The assessment concluded, and the parties have stipulated, that student was eligible for special education services in the area of Autism Spectrum Disorder. (Ex. 5, p. 12).

5. Based on the assessment, an initial IEP team meeting was held on September 25, 2017. (Petitioner's Ex. 1). Under the heading "effect on student's involvement and progress in general education curriculum or, for early childhood students, involvement in developmental activities," the following is noted: "Students are expected to follow all classroom/school rules, make transitions smoothly, and complete assignments. They are expected to interact appropriately with adults and peers. They are expected to adapt effectively to change, continue to maintain appropriate behavior even when frustrated, and identify behaviors which demonstrate self-control. Due to [student's] deficits in the areas of social, emotional, and behavioral skills, [student] will experience difficulty accessing the general education curriculum." (Ex. 1, pp. 6-7).

6. As a result, the 2017 iteration of the IEP team concluded that the student required special education services, that the appropriate placement was a "self-contained program"

[2] The term "Doctor" throughout does not mean a medical doctor but rather the District's doctoral level instructional coordinator. Please see the Appendix for specific reference.

with 29% of the school day spent in the regular classroom environment for services such as recess and lunch, and that the student required extended school year services. (Ex. 1, pp. 21, 22). The IEP is silent as to the specific physical location or name of school where the services are to be provided. No evidence was received at the due process hearing that there was any challenge by any party to the content of the 2017 IEP, and the IEP document itself indicates that the parent agreed with it. (Ex. 1, p. 23). The student was therefore subsequently enrolled in and began receiving services at School A. (Testimony of Coordinator, Teacher).

7. Parent does not challenge the progress made during the 2017-2018 school year by student. As the due process complaint itself acknowledges, the parent believes the student "has made significant progress attending at [School A]." (Hearing Officer Ex. 1).

8. The next IEP team meeting was held May 15, 2018. At some point prior to that meeting, Parent learned that the District had determined that the student would attend school at School B instead of School A starting with the upcoming (August 2018) school year. (Testimony of Teacher). Parent and Teacher had a phone call about the change in schools in early May, 2018. (Testimony of Teacher). Parent also communicated with office staff at School A shortly before the May 2018 IEP meeting and expressed a concern that the school was "evicting" Student. (Testimony of Parent). It is clear from this testimony that the District was aware of the parent's concerns about the change in schools going into the IEP meeting.

9. The actual IEP team meeting for the 2018-2019 IEP was held May 15, 2018. (Petitioner's Ex. 2, p. 1). The "Statement of Parent Educational Concerns" reads as

follows: "Parents are extremely concerned about [student] changing schools, and [student] regressing by being moved to another school. The parents feel this is discriminatory for her having to move schools at this time. Her behavior will deteriorate." (Ex. 2, p. 8). The IEP itself does not address the parents' concern in any way other than to make notation of it as per the above. The 2018-2019 IEP likewise does not specify the specific address or name of a school where services are required to be provided. (Petitioner's Ex. 2).

10. Parent informed Teacher either prior to, or at, the IEP team meeting that Parent received a letter which stated Student would be assigned to School B starting the next school year. (Testimony of Teacher). There was no written response to the parent's concern in the IEP, and, no one on the IEP team brought forward any ideas for easing the transition between schools. (Testimony of Teacher, also Testimony of "Advocate" and "Therapist"[3]). Instead, Teacher recalled that Parent wanted the student to remain at School A, and the other IEP team members advised that issues regarding what specific school a student attends are made by "case management." (Testimony of Teacher). Parent ultimately disagreed with the IEP in writing. (Petitioner's Ex. 2, p. 17).

11. On May 25, 2018, Parent received a "Notice of Intent to Implement IEP" which specifically addressed the school change issue. (Ex. 2 (first page)). The same notes that the District refused to take the following requested action: "Parents are requesting [student] remain at [his/her] current school for the upcoming school year 2018-2019 and

[3] Advocate is Parent's advocate. Therapist is the student's private therapist who worked with the student. Specific identities are set forth in the Appendix.

not be moved." The District's explanation for refusing to take the requested action was "Case Management decides student placement." Later the document further explains "This decision is made by Case Management and not by the current IEP team." (Ex. 2). Parent subsequently initiated this due process action.

12. It is apparent based on the documentation and testimony, as discussed thus far, that the decision that student would change schools was entirely initiated by the District. Parent likened the decision to that of an "eviction." (Testimony of Parent). At no time throughout the events described herein did Parent change addresses or request for the student to attend a different school. (Testimony of Parent).

13. Reasons for the change in schools, and the effect it may or may not have had on the student, were fully explored at the due process hearing. Coordinator testified that Coordinator works as a part of the District's "LINKS" team, which offers support to classrooms and parents throughout the District with issues related to autism. Based on the student's eligibility of Autism Spectrum Disorder, typical manifestations of the disability could include behavioral deficits and difficulty socializing, although these factors are highly individualized. (Testimony of Coordinator). Coordinator explained that problems with change are common in children with autism, and that some of the strategies used by the District to overcome those issues include purposeful changes to routines in order to teach tolerance and coping skills for when actual changes may occur, and efforts to make change "fun." (Testimony of Coordinator). Difficulty with change is also a highly individualized issue, in that some children with autism may be mad if their school day is mixed around, but not care if dinner is late. (Testimony of Coordinator).

Coordinator did not ever meet Student, and Coordinator's review of records prior to testifying was based on reviewing the two IEPs discussed earlier herein.

14. With respect to the fact Student was approved to attend extended school year services ("ESY"), the services provided at ESY could assist with changes, but are also limited to the goals identified in the IEP. (Testimony of Coordinator).

15. Unplanned transitions can have an effect on children with autism, although this depends on the individual child. (Testimony of Coordinator, Therapist). With respect to the individual student at issue here, Coordinator had not met the student, did not participate in the formulation of either IEP, and had not personally visited the autism programs at either School A or School B. (Testimony of Coordinator). However, Coordinator explained, credibly, that Coordinator is familiar with recommended practices for all special education classrooms throughout the District.

16. "Teacher" was Student's special education teacher at School A. Teacher has a Master's Degree in special education and over thirty years of employment with the District. (Testimony of Teacher). The IEP was implemented at School A until May of 2018, and there was nothing in the IEP that Teacher was unable to implement. (Testimony of Teacher).

17. Student had some behavioral issues upon initial arrival to the classroom. (Testimony of Teacher). Student was shy when the student first arrived to class, and "struggled with a couple things." Student did not become more comfortable in the classroom until approximately January/February 2018 and more specifically after the two-week winter break. (Testimony of Teacher). Teacher was not aware of any

"transition problems" with student other than to the extent of going from preferred to non-preferred activities. When asked if Student's behavior plan addresses transition, there was a long pause after which Teacher explained Teacher was "not sure" how to answer, in that the IEP and/or behavior plan only addressed going from preferred to non-preferred activities. The behavioral plan, which speaks for itself and is part of the record, is very general and does not specifically address recommended actions for environmental transitions. (Petitioner's Ex. 9).

18. At the 2018 IEP team meeting, Teacher explained that Student would have had a new teacher in the upcoming school year, as the student was moving to third grade, which meant also moving from the primary autism program to an intermediate autism program. (Testimony of Teacher). Teacher wrote the actual substance of the 2018 IEP, and Teacher did understand the student had "some difficulties with transition." Teacher explained that changing schools is a transition, but so are most aspects of a child's life. Teacher also acknowledged that Parent raised concerns about regression at the IEP team meeting based on the proposed change in schools. Teacher reiterated the student would have had a new teacher anyway by reason of upgrading to the intermediate autism program. However, while the primary and intermediate autism programs at School A are in two separate classrooms, there are interactions between them including weekly activities, "holiday time," games, and special recess events. (Testimony of Teacher).

19. Doctor has a Ph.D. in administration with the District and is an instructional coordinator who supports 19 schools including both School A and School B. In that regard, Doctor was specifically familiar with the autism programs at both schools.

Doctor was familiar with the student and had reviewed the IEPs but did not actually meet or assess the student. Doctor explained the reason for the change in schools: The classroom size for "pupils with autism" is limited by the Nevada Administrative Code to 8 students. Doctor was aware there is a provision in the code to seek an exception to that class limit but had never seen it exercised. Here, School A's primary autism program is full to that class limit for the upcoming school year. Meanwhile, School B has an available opening. The decision to move Student to School B was based on the availability of services in that School A was full and School B had an opening, along with the fact School B is the student's home-zoned school. (Testimony of Doctor).

20. The basis for the change in schools was fully explored at the due process hearing, and in particular, via a manager from the District's case management office. The District's policy is to limit class sizes to the Nevada Administrative Code, which in this instance is eight students. (Testimony of "Manager"). While the code provides an exemption provision, Manager explained that the District has never sought an exemption and did not do so here because the class limit was never exceeded, and the exemption is to be requested only after the limit is exceeded. (Testimony of Manager). While this is somewhat circular, Manager also explained that the class limits are not arbitrary. The eight-student limit is adhered to by the District because it ensures adequate attention can be paid to all students in the program, and that eight is really the limit for proper instruction and supervision. (Testimony of Manager). The District in fact prefers to have classes with less than eight students, in part because it uses Applied Behavior Analysis therapy which involves a lot of one-on-one teacher/student interaction. Parent's own

testimony was consistent with this finding, as Parent acknowledged his own observation that different aides were used throughout the school year at School A due to what appeared to be the challenging nature of the work involved. (Testimony of Parent).

21. Moreover, this particular student was selected to change schools for the following reasons. First, School B is the student's home-zoned school. (Testimony of Manager). Manager was 100% certain School B did not have an opening in a primary autism program when the student first entered the District, either by way of the program not existing at all or being full. For that reason, Student was placed at School A. However, the District only considers location changes at the time of program transitions and here Student is slated to move from a primary autism program to the intermediate program. (Testimony of Manager). The intermediate program at School A is full for the upcoming year, either with returning intermediate students, student's home-zoned to School A, or students placed at School A because their home zoned school does not have an intermediate autism program. (Testimony of Manager). Because Student was making a change from primary to intermediate programming, and Student was home-zoned to a School B that now had an open seat, Student was selected to move to School B. The District would not expect to move the student out of the intermediate autism program at School B until the completion of elementary school as location changes are not made mid-program. (Testimony of Manager).

22. Comparing the two IEPs, Doctor noted the 2018 IEP does not note difficulties with change, but that the 2017 IEP does indicate difficulties the student has forming relationships. Specific to the issue of the parent's concern about changing schools,

Doctor noted the IEP does not specifically address that issue. The Hearing Officer notes here Doctor's demeanor as to the issue of whether Parent's concern had any validity was somewhat dismissive, and that Doctor stated it was not possible to know if there was a risk of regression due to the change in schools because it had not happened yet, rather this was "just" the parent stating what Parent believed would occur. Doctor did note the Student was recommended to attend ESY, and a specific purpose of doing so was to prevent a future loss of skills, i.e. something that had not happened yet. (Testimony of Doctor). Doctor stated a belief that Student failed to actually attend ESY over this summer.

23. The student in fact did not attend ESY over the summer of 2018, based on the parent's decision. (Testimony of Parent). Instead, Student was recommended to attend 30-40 hours per week of therapy at the Center of Autism and Related Disorders ("CARD"). (Petitioner's Ex. 4, Testimony of Therapist). Student has attended CARD all summer. (Testimony of Parent). Therapist did not ever overtly inform Parent to skip ESY but suggested that extensive time at CARD would be a benefit to the Student. CARD does offer extended hours seven days a week. (Testimony of Therapist).

24. As to the question of implementation of the IEP, the Hearing Officer finds that the IEP was able to be implemented **as written** at either School A or School B. All three District witnesses who discussed the matter testified credibly and consistently that there was nothing particular to School A that required that the IEP be implemented only at that school. (Testimony of Coordinator, Teacher, Doctor). The same three witnesses all expressed a belief that the IEP was in fact fairly typical of what one might see in

connection with a student with autism, and, that all three believed the IEP as written could be implemented at School B. Doctor's testimony is particularly compelling as to that fact as Doctor had specific, familiar knowledge with both schools and credibly explained that based on her personal knowledge their respective autism programs were substantially the same. Further, Parent has failed to rebut the testimony on this point in any meaningful way.

25. Parent "did not care" which school Student originally attended, but since that was originally School A and Student is doing great and on a "roll" at School A and does not want any disruption or risk of harm. (Testimony of Parent). Evidence was presented that a change in schools might trigger behavioral changes in the student including refusal to eat solid foods, toiletry issues, tantrums, or possible self-harm or death threats. (Testimony of Parent, Therapist). The combined effect of this testimony does not disrupt the fact the IEP, as written, can be implemented at either School A or School B. Rather, this testimony establishes there is a risk of behavioral regression based not on the curriculum of the autism programs at issue, but simply based on the fact the student would be making a change from one School B to another.

26. The question of whether the IEP team's handling of the parent concern regarding the change in schools as appropriate is a closer question that requires an in-depth explanation. The Hearing Officer finds that the District was aware that autism students have problems with change in general, and, that this specific Student suffered from the same deficits based on the very poor behavioral and social functioning as documented in the assessment. (See Petitioner's Ex. 5, Testimony of Coordinator, Parent, Therapist).

Further, Teacher was aware that Student had difficulty dealing with change, and specifically noted an adjustment period of approximately two to three months was necessary when Student first enrolled in School A. (Testimony of Teacher). Parent noted behavioral issues which increased when the student first started attending School A. (Testimony of Parent). Across-the-board improvements in numerous areas of deficit are noted at CARD over this summer from the time period of approximately June 24, 2018 to July 8, 2018. (See Petitioner's Ex. 7).

27. None of the District's witnesses were consistent regarding the ultimate question of the IEP team's handling of the parent concern. Coordinator stated that unless the concern was resolved during the IEP team meeting, or the school had information that the concern was in fact not an issue, Coordinator would typically expect the parent concern to be addressed in writing in the IEP. (Testimony of Coordinator). The evidence does not support a finding in favor of either of these exceptions. The issue plainly was not resolved during the IEP team meeting because, as explained by Teacher, no response was given to Parent other than to direct Parent to "Case Management." (Testimony of Teacher). Case Management, as explained by Manager, ultimately explained to Parent why Student was transferred, but did not propose any resolution to the parent's concerns. (Testimony of Parent). Likewise, as explained above, there was not information available to the District that belied the parent's concern, and in fact multiple witnesses echoed the parent's concern. (Testimony of Parent, Advocate, Therapist). If the IEP team had thought changing schools was going to be an issue, "they would have built in some transition." (Testimony of Coordinator).

28. Meanwhile, when Teacher was asked specifically if Teacher agreed with the parent's concerns regarding a change in school, there was yet another twenty to thirty second pause by Teacher before Teacher explained, unconvincingly, that Teacher "doesn't recall" if Teacher agreed with the parent concern at any prior time and could not answer if Teacher currently agreed with it. (Testimony of Teacher). Of the District's witnesses, Teacher was the only one to have in-person contact with Student and the lack of answer to this simple, key question weighs against the District having met its burden of proof as to this issue.

29. A similar finding is made with regard to Doctor, who readily concluded Student would suffer no ill effect whatsoever by the change in schools; an opinion Doctor admitted was not based on actually knowing the student. (Testimony of Doctor). Doctor ultimately would defer to the IEP team regarding that question, but as will be explored below, the IEP team never reached the merit of the question. The only witnesses of evidentiary value who had direct contact with the student were Teacher, Parent and Therapist. The Hearing Officer does not find great weight should be placed on the testimony of Advocate, as her limited education (high school diploma) and lack of training render her beliefs as to the effects of a change in school of limited value. Advocate's testimony was almost exclusively based on generic and anecdotal evidence. (Testimony of Advocate).

30. There is an ample evidentiary record which establishes that numerous options were available to assist Student with the move to School B if required. These include a possible "transition plan" wherein the current special education teacher could talk to the

new teacher about strategies to use with the student. (Testimony of Coordinator). Additionally, the student could visit the new school, or someone familiar with the student and behavioral plan could help support the student at the start of the school year. (Testimony of Coordinator, Doctor). Further strategies could include role-playing, explained here is "teaching interactions" to give the student strategies to deal with change. (Testimony of Coordinator). Yet another ideal solution could include the former teacher being present at the student's new school on the first day of School B to aid in any transition. (Testimony of Doctor). Parent, who strongly feels the only solution is for student to remain at School A, did acknowledge that some support service would be better than none if the change in schools did occur. (Testimony of Parent).

31. Evidence was presented that the risk of harm was very serious and outweighed any benefit to proceeding with the school move, no matter if the risk was "less than 1%." (Testimony of Therapist). While the Hearing Officer credits this testimony based on the numerous personal interactions between Therapist and student, and finds the Student suffered some behavior issues upon initial placement at CARD, the basis of the risk of harm was never fully explained and the chances of an occurrence were never quantified. The "transition" from School A to the summer CARD program is attenuated by what appeared to be reasonably rapid acclimation and growth on the part of the student towards various goals, although it is also noted this comes as part of an intensive therapy program. (Petitioner's Ex. 7). Student has, on the whole, successfully transitioned with a varying adjustment period, from an out-of-country setting to School A and from School A to CARD in just the last year. To the extent Therapist suggests Student is incapable of

making a transition from School A to School B, there is no credible evidentiary support in the record from which such a finding can be made.

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:

At the due process hearing, Parent testified he was not particularly concerned with "the law," but rather saw his position as one of common sense. Testimony of Parent. The Hearing Officer is certainly not required to disregard common sense but must carefully apply the law as may be applicable to the decision in this matter. In that regard, a brief overview of what that law is may be of assistance in understanding the remainder of this decision.[4]

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.

The IDEA contains extensive procedural requirements relating to the development of the IEP, including that it be a written document, reviewed at least annually, and that it

[4] During the hearing and post-hearing briefing, Parent and counsel repeatedly used the words "placement" and "location" interchangeably with reference to the change from School A to School B, along with "transition" and "regression." However, these words all mean something specific under the IDEA as explained herein.

be developed by a team of individuals with knowledge about the child, including a representative of the public agency who is knowledgeable about the availability of resources of the public agency, and that it be based upon the input of the IEP meeting participants as well as evaluation data derived from valid, scientifically based assessments in accordance with the IDEA's requirements. See generally 34 C.F.R. §§300.301-300.304; 300.320-300.324.

Of particular relevance to the instant matter, the IDEA provides that in the development of the IEP, parents must be afforded the opportunity to attend and participate and that the parent's participation must be meaningful, including giving consideration to their concerns about their child and providing parents with a copy of the IEP. 34 C.F.R. §§300.321(a)(1), 300.322(f), 300.324(a)(ii); NAC 388.284(2)(a). 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" in 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." *Endrew 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*. Where a procedural violation is alleged, the hearing officer would first examine whether the school district has complied with the procedures of the IDEA, and if not, whether the procedural violations in fact resulted in a substantive deprivation of a FAPE. *Rowley*, 458 U.S. at 205-206.

In fact, the act clearly spells out that:

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies-
>
> (i) impeded the child's right to a FAPE;
> (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
> (iii) caused a deprivation of educational benefit.

34 C.F.R. §300.513(a).

The change in schools in this matter is not a per se violation of the IDEA.

As noted, this matter has featured some loose use of language on the parent's part concerning the change in schools. For example, testimony at the hearing and some of the parent's arguments focused on the change from School A to School B as a "transition." (Testimony of Parent). However, the IDEA and related Nevada provisions only discuss "transition" in connection with the transition from attending public school to exiting the public school system, and typically at or after an age several years older than the student here or upon the occurrence of other factors not present here. See 20 U.S.C. §1414(d)(1) (transition services at age 16); NAC 388.284 (transition services at "14 years of age or older"). A recent Ninth Circuit Court of Appeals case purported to greatly expand the definition of "transition" as used in the IDEA to essentially *any* transition. *R.E.B. v. Hawai'I Dep't. of Education*, 870 F.3d 1025 (9th Cir. 2017), *opinion withdrawn at* 886 F.3d 1288 (2018). However, as the citation suggests, that decision was withdrawn pending further review by the Court, and no subsequent decision has been filed as of this writing. Therefore, based on existing case law within the 9th Circuit, transition services are limited to the transition from public school to exiting public school, and no per se violation of the IDEA occurred here based on the mere fact of a "transition" from School A to School B. *Rachel L. v. Hawaii,* 2012 U.S. Dist. LEXIS 137176, *41-43 (D. Haw. 2012) (collecting cases).

Further supporting this finding is the clearly established authority which effectively leaves the determination of what school a child will attend to the school district. The concepts of "placement" and "location" under the IDEA do not encompass the specific school where services are provided. Rather, the term placement means the

"general education program of the student." *Rachel H. v. Dep't. of Education*, 868 F.3d 1085, 1091 (9th Cir. 2017). Meanwhile, the term location is narrower and means the place where services will be delivered, such as a teacher's office, a resource room, etc. *Id.*, See also 34 C.F.R. §300.115(b)(1). More germane to the instant case, the *Rachel H.* court specifically rejected the argument that the term location requires identification of a specific school in every IEP. *Id*. at 1092; *See also AW v. Fairfax County School Board*, 372 F.3d 674, 681 (4th Cir. 2004) (…"we find little support in the IDEA's underlying principles for AW's assertion that 'educational placement' should be construed to secure his right to attend school in a particular classroom at a particular location").

It is possible, in a hypothetical case, for the identification of a specific school to be of such importance that it must be set forth in the IEP. *Rachel H*., 868 F.3d at 1092-1093 (Recognizing identification of a school could be required to "evaluate whether a proposed IEP satisfies the IDEA because of a particular special education need caused by a child's disability); *AW*, 372 F.3d at 682 (a change in schools may constitute a change in placement if it dilutes the quality of a student's education or is a departure from the student's least restrictive environment setting); *A.K. v. Alexandria City School Board*, 484 F.3d 672, 681 (4th Cir. 2007) (Identification of specific school necessary where individual needs of student so require).

However, the change in schools from School A to School B here was not a change in placement as defined above. Of course, it was a change in "location" using a common definition of the word, as the Student is scheduled to attend school at a new school this coming school year. But, turning to the Student's IEP to better understand these

concepts in motion, the Student's "placement" is "self-contained program" and the "location" where services are to be provided varies depending on what specific services is being provided at that time – largely this means "self-contained classroom" but the Student is also slated to receive services in the general education and school campus setting. (Petitioner's Ex. 2). Nowhere in the IEP does it specify that services must be provided at a specific school.

To the extent Rachel H. may allow a claim based on a failure to identify the specific school where services will be provided in the IEP, no such claim can be sustained here.

Nor must the services be provided at a specific school. Petitioner's complaint is really limited to the fact of the change in schools and not directed towards the actual education program that is anticipated to be implemented. (Hearing Officer Ex. 1). Petitioner has not identified anything about the program itself that could only be implemented at School A and not at School B.

To be sure, the District bears the burden of proof and persuasion on this issue, but the Hearing Officer further disagrees with Petitioner's post-hearing brief to the extent Petitioner contends there is a lack of evidence regarding the intermediate autism program at School B or how the IEP could be implemented there. Coordinator testified, for example, very specifically and credibly that the IEP at issue in this matter was "typical" of those used with students with autism, and that it could be implemented at any school in the District including specifically School B. (Testimony of Coordinator). Coordinator's team provides training to "all of our autism teachers in the District, specifically in applied

behavior analysis." (Testimony of Coordinator). Coordinator testified credibly that there is a level of consistency between autism programs in the district.

Further, Coordinator's testimony was echoed by both Teacher and Doctor. Teacher explained that there was nothing particularly complex about Student's IEP and although Teacher did not know the staff at School B, Teacher believed the IEP and behavior plan could be implemented at any school in the district. (Testimony of Teacher). Doctor was familiar with both School A and School B and specifically and credibly testified that the IEP could be implemented at either school. (Testimony of Doctor).

Meanwhile, Petitioner's witnesses did not rebut this testimony in any meaningful way. Advocate lacks the necessary expertise to comment on the implementation of the IEP in the first instance, and in fact specifically declined to offer any opinion about it. (Testimony of Advocate). Therapist and Parent offered no criticism of the items written in the IEP, and both instead took issue with the issue of the change in schools – which as previously noted was not actually a part of the IEP itself. (Testimony of Therapist, Parent).

Taken on the whole, the District has met its burden to demonstrate as a substantive matter that the IEP, as written, can be implemented at School B. The testimony on the point from individuals familiar with district-wide operations, and Teacher's testimony about the lack of complexity of the IEP itself, were credible and unrebutted.

Further supporting this finding was the testimony of Manager, who explained in explicit and credible detail how the decision to move Student to School B came about.

The District contended in its pre-hearing brief that the IDEA and Nevada law presume education of the student at their home-zoned school. (Hearing Officer Ex. 12). The law does indeed so state. See 34 C.F.R. §300.116 (…"unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled); NAC 388.245. It is undisputed that the Student's home-zoned school is School B. (Hearing Officer Ex. 16). There is nothing untoward about the placement of Student at School B in the first instance, since that is the school the Student would attend if not on an IEP. It is noted here that testimony was received that School A might be geographically closer to the student's home. (Testimony of Parent). The cited provisions above focus on what school the student would attend, presumably via zoning, and not what school might be closer/easier to reach/etc. Student is zoned for School B and that is the home-zoned school.

The explanation for why Student did not attend School B to begin with made tremendous sense, although it was left unresolved if the issue was a lack of a seat or lack of a program. (Testimony of Manager). Either way, it is clear in 2017 there was no open seat for student at School B, and Student was thus placed at School A. Student is now slated to move from the primary autism program to the intermediate program. Manager testified, credibly, that while the district prefers to keep students in programs, there are competing interests to balance including availability of resources and class size limits. (Testimony of Manager).

Here, as already explained, Student was going to undergo a program change and would have a new teacher this upcoming school year even if the student remained at

School A. The remaining students at the intermediate program at School A either are home-zoned to that school, already in the intermediate program, or come from a home School B that has no intermediate autism program. (Testimony of Manager). The decision to move Student to Student's home-zoned school under these unique circumstances did not constitute a per se deprival of a FAPE, and offers a reasonable explanation as to why the District did not remove some other student from the intermediate autism program at School A.

In addition, Parent's suggested solution that the class limit size at School A be exceeded, with Student being a ninth student in a class built for eight, was properly rejected by the District. Parent's own testimony acknowledged the difficulties of properly educating students in the special education environment. (Testimony of Parent). Manager explained that the District's preference is to avoid even hitting the eight-student limit set forth in NAC 388.150. (Testimony of Manager). As already found herein, that explanation was specific and credible, and the class limits are there for a good reason. It would not benefit Student, or other pupils in the class, to exceed the class limit.

The District's explanation as to never seeking an exemption to the class limit was somewhat circular, but still within reason. The District essentially never seeks an exemption because the exemption cannot be sought until after the limit is exceeded – but since the District never exceeds the limit, it never has cause to seek an extension. (Testimony of Manager). This policy did not deny Student a FAPE, and if anything helped ensure it by maintaining an appropriate balance of staff and students in the self-contacted classroom setting.

Finally, it is noted the fact of a change in schools was not secreted from Parent – as Parent knew that such a change was contemplated. (Testimony of Parent, Therapist). The Ninth Circuit suggests a claim could lie if a parent lacked knowledge of the particular "school, classroom, or teacher" at School B at the time the IEP was formulated. *Rachel H*., 686 F.3d at 1092. But that lack of knowledge has been resolved through the due process hearing here. Parent was aware at the time of the IEP meeting of the school and classroom at issue – those being the self-contained room at School B. At best, Parent did not know the specific teacher at School B who would be teaching special education, but that information was not required to be in the IEP in the first instance. *Id*. And here, the great weight of the testimony established that the intermediate autism programs at School A and School B were substantially the same. (Testimony of Coordinator, Doctor, Manager).

In short, there was no per se denial of a FAPE simply because District involuntarily moved Student from School A to School B for the upcoming school year. Further, the evidence here establishes that the intermediate autism programs at School A and School B are substantially similar, and that the IEP as written can be implemented at School B. Accordingly, relief on a substantive claim that the change in schools denied the Student a FAPE must be denied.

The District's refusal to give any consideration to the Parent's concerns regarding the change in schools constituted a procedural violation of the IDEA.

The constant reference above to the viability of the IEP "as written" is no accident, as there also remains to be resolved a procedural question regarding the District's

handling of the parent's concerns about the change in schools. The District was specifically asked at the hearing to address the potential procedural violation claim in its closing brief, but upon review of the closing brief it appears the District has declined to do so. (Hearing Officer Ex. 20). At best, the District's post-hearing brief suggests there was no evidence of regression beyond what could be addressed through ESY, and/or that Parent's evidence of regression was speculative.

As an initial matter, the IEP team's refusal to address the Parent's concerns at the IEP meeting was flatly improper and constituted a procedural violation of the IDEA. The District bears the burden of proof and burden of persuasion in this matter and has not met it with regard to the reasonableness of the IEP team's response to the parent concern. The Hearing Officer finds that the IEP team did not meaningfully consider the Parent's concern as required by the IDEA. 34 C.F.R. §300.324(a)(2). While the parent's use of the term "regression" was not particularly artful, the team should have understood what Parent plainly meant: Parent was worried Student's education would suffer by way of being forced to change schools. The extent of consideration of Parent's issue was that the IEP team effectively stated there was nothing the team could do to address Parent's concern.

However, it was simply not true that the IEP team was powerless to address Parent's concern. The District's witnesses explained there are numerous techniques available to ease change generally by students, whether that be from activity-to-activity, or the specific change from one school to another. (Testimony of Coordinator, Teacher). Possible considerations could have included teaching interaction strategies, as well as

role playing potential new scenarios. (Testimony of Coordinator). Further techniques could have included assistance from "robust" staff, facilitation of communication, intervention by a behavioral mentor, a visit to the new school before the start of the school year, or a possible introduction to the new special education teacher by the former teacher. (Testimony of Doctor). The Hearing Officer finds there was a panoply of options available to assist the student with the change to the new school and finds that the IEP team failed to consider whether any of those options were appropriate for the student in the first instance. (Testimony of Teacher, Parent).

"Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." *Amanda J. v. Clark County School Dist*., 267 F.3d 877, 892 (9th Cir. 2001). The IEP team was required to consider "the concerns of the parents for enhancing the education of the child." 34 C.F.R. §300.324. Categorical rejection of a parent concern constitutes a procedural violation under the IDEA. *S.Y. v. N.Y. Cirt Dep't. of Education*, 210 F.Supp.3d 556, 573 ("This procedural violation significantly impeded the Parents' right to participate in the decision-making process by failing to even consider their input on a key component of the IEP; in doing so, the DOE denied R.Y. a FAPE"). Participation in the IEP process requires the IEP team to meaningfully consider the parent's concerns. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1036 (3rd Cir. 1993). While the parent does not have veto power over the IEP, presentation of an IEP plan on a "take it or leave it" basis is a violation of the IDEA's procedural requirements. *Ms. S. ex rel G v. Vashon Island School District*, 337 F.3d 1115, 1131 (9th Cir. 2003).

Here, the response was, for all purposes, "take it or leave it." Parent attended an IEP meeting and raised a concern about how the proposed change in schools would affect Student's education. The IEP team refused to even so much as consider the issue, either with respect to the wisdom of the change in schools in the first place, or, to the extent of whether any additional supports could alleviate the Parent's concern. The failure to consider the parent concern at the IEP team meeting was a procedural violation of the act.

The question then turns to whether this violation resulted in the denial of a FAPE, specifically in this case; whether the procedural error seriously infringed on the parents' opportunity to participate in the IEP formulation process. *Ms. S.*, 337 F.3d at 1131. The District has not met its burden of proof on this issue either, as the weight of the evidence reveals that the IEP would have included some additional requirements had the school change issue actually been meaningfully considered at the IEP team meeting.

Again, while the change in schools here did not arise to a change in placement, it did trigger an obligation to consider potential harmful effects on the student as a result of the change. The Ninth Circuit in *Rachel H.* more broadly referred to these potential services as arising based on "a particular special education need caused by a child's disability." *Rachel H.*, 868 F.3d at 1092. Still other courts have considered the potential harmful effects of a change in schools as arising under the "related services" provisions of the IDEA. *E.R. v. Spring Branch Indep. School District*, 2017 U.S.Dist.LEXIS 110524, *50-51 (S.D. Tex. 2017). Procedural violations that interfere with a parent's participation in the IEP process will "often" actually interfere with the provision of a FAPE to the child. *Dibuo v. Board of Education*, 309 F.3d 184, 191 (4th Cir. 2002). If

there was an individualized concern that affects the student's ability to receive a FAPE, the IEP team was obligated to consider it. They did not do so here.

Nor was the parent's concern frivolous as the District suggests in its closing brief. Coordinator acknowledged that if the IEP team thought the change in schools was going to affect the Student, it should have been addressed in the IEP document. (Testimony of Coordinator). As Teacher explained, there was an effect on the Student's ability to take advantage of educational opportunities when the Student started at School A. (Testimony of Teacher). Contrary to the District's assertion in the post-hearing brief, Therapist did testify that negative behaviors were observed when Student first started treatment at CARD. (Testimony of Therapist). There was an ample evidentiary record available, if the IEP team members had asked about it, from which the IEP team could have concluded that the student required assistance with the involuntary transfer from School A to School B.

The remedy here is to provide assistance to the student with the change in schools, not to cancel the change in schools.

As to the question of remedies, the parties have taken an all-or-nothing approach throughout this proceeding. Parent never considered any outcome other than having Student remain at School A. (Testimony of Parent). The District never considered any outcome other than to advise Parent that the District, and specifically Case Management, gets to pick which school Student attends. (Petitioner's Ex. 2) (Notice of Intent to Implement). But as explained above, and fully explored at the due process hearing, there was at least one more option to consider: That perhaps the Student would change schools

but might require some type of related or supportive service to ensure the change did not result in the loss of an educational opportunity.

The question of whether the Student requires some supportive and/or related service as a result of the change in schools is very close based on the testimony and evidence provided at the due process hearing. However, the evidence on the whole establishes that the student had difficulties with prior environmental changes, such as from another country to School A, and again from School A to CARD. The evidence also establishes that the student eventually did overcome whatever adversity accompanied those changes. Thus, the solution here is not to cancel the change in schools, but rather to determine what support services are required either in order to allow the student to meaningfully take advantage of educational opportunities during a reasonable period surrounding the change to School B, or which probably would have been included in the written 2018 IEP had the parent not been impeded from having issue considered at the IEP team meeting. The evidence here also generally establishes a common-sense point: That change, sometimes even undesirable change, is a part of life. Helping Student succeed with the change in schools here is itself core to the student's receipt of a FAPE and therefore must be included in the IEP.

Parent raised a concern at the due process hearing that any solution less than ordering District to place Student at School B was "baby-splitting." (Testimony of Parent). To address the point for a moment, this decision is absolutely not an effort to compromise on the Hearing Officer's part. It is instead an example of the outcome required here by the law. There is no question that it would be "best" for the student to

remain at School A. However, for reasons completely outside of Student's control, District is moving Student to School B. A FAPE is, for better or worse, simply not the absolutely best education available to a student. *J.W. v. Fresno Unified School District*, 626 F.3d 431, 439 (9th Cir. 2010). Rather, a FAPE is that which represents a basic floor of opportunity. *Id.* Staying at School A would be the "best" outcome for the student but moving to School B with some support during the move meets the definition of FAPE. These supports, set forth below, are found to be required to assist student to benefit from special education, during the duration of a reasonable period of transition from School A to School B. See 34 C.F.R. §300.34, 34 C.F.R. 300.116(d).

The order below sets forth the services which shall be included in the 2018-2019 IEP. As a brief note, the Hearing Officer credits the testimony of Therapist, who suggested merely visiting an empty school would be of minimal assistance to Student. As such, the order below includes supports which must be implemented both prior to and during the upcoming school year.

Further, the Hearing Officer gives little weight to the fact Parent never specifically requested supportive services as part of the due process complaint. Parent was only ever required to request remedies "…to the extent known…" 34 C.F.R. 300.508(b)(6). As explained herein, the fact Parent did not know until the due process hearing that any other options were available is, in and of itself, strong evidence that the IEP team failed to meaningfully consider Parent's concerns about the change in schools in the first instance. (Testimony of Parent). Had these options been raised by the IEP team, as they should have been, it is possible this entire proceeding would have been unnecessary.

ORDER

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

Prior to close of business on August 10, 2018, the District will[5]:

1) Make available no less than two hours of "parent counseling and training," during regular school hours, to Parent to assist Parent in understanding strategies and techniques Parent can use to address behavioral concerns about Student related to the change in schools. This training shall be provided by someone with experience addressing behavioral issues in children with disabilities, such as by special education staff who is familiar with the behavioral needs of children with disabilities or a behavioral specialist.

2) Provide no less than three hours of services directly to Student to assist with the social and behavioral aspects of the change in schools. These services shall include at a minimum a) at least thirty minutes of in-person meeting and/or interaction with the Student's upcoming special education teacher at School B, and b) at least two hours of role-playing/direct interaction with a staff person who is familiar with the program at School B which Student will be enrolled in, such as a paraprofessional or

[5] The school year starts August 13, 2018.

other staff person assigned by the school, which will occur in the School B environment so that Student may be familiar with both individuals on staff and physical locations at School B prior to the start of the school year.

Between August 13, 2018 and September 24, 2018, the District will:

1) Provide no less than one hour a week of supportive services to Student for the purpose of obtaining and interpreting information about Student's behavior related to the change in schools, and, the purpose of assisting Student with or addressing Student's concerns about the change in schools. These services shall be provided by professional staff members or any combination thereof, such as a special education teacher, a behavioral specialist, or a counselor, to be determined by the school.

Between September 17, 2018 and September 28, 2018:

1) An IEP team meeting shall be convened to consider data gathered pursuant to this decision; and to determine what, if any, behavioral problems the student exhibited related to the change in schools; and what further services, if any, the Student may require as a result.

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: August 2, 2018.

Jamie Resch, Hearing Officer

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