

IMPARTIAL DUE PROCESS HEARING

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

STATE OF NEVADA

In the Matter of)	
)	DECISION OF THE HEARING
STUDENT ¹ , by and through Parent,)	OFFICER
)	
Petitioner,)	Date: 9/12/2022
)	
v.)	
)	Hearing Officer: David A. Stephens
SCHOOL DISTRICT,)	
)	
Respondent.)	

INTRODUCTION

This matter came on for hearing on August 31, 2022, at 9:00 a.m. The Student’s parents² were present and represented by Gregory Ivie, Esq.³; the Respondent was represented by Daniel Ebihara, Esq., and Yasnai Rodriguez-Zaman, Esq.; David A. Stephens was the presiding Hearing Officer. The hearing continued on September 1, 2022, starting at 9:00 a.m., and September 2, 2022, starting at 9:00 a.m.. The hearing ended each day around 5:00 p.m. The hearing

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

² Ibid.

³ Student’s Parents filed this matter in proper person. Student’s Parents subsequently retained Gregory Ivie, Esq., who appeared in this case for the first time on April 28, 2022.

was held in hybrid fashion with some testimony presented live and some testimony by video conference. The Record was closed on September 2, 2022.

The basis for jurisdiction of this matter is 20 USC §1415, 34 CFR §§ 300.508, 509, 510, and 511, NRS 385.080 and 388.520, and NAC 388.310.

PRELIMINARY MATTERS

This case arises out of a due process complaint filed by the Student on March 9, 2022. The Hearing Officer was appointed on March 22, 2022.

At the Status Conference the parties indicated that the hearing would take three days. Due to Student retaining an attorney just shortly before the decision deadline, the parties jointly moved to extend the decision deadline. Based upon the joint motion, on May 9, 2022, the hearing officer entered an order extending the decision deadline to July 8, 2022. Due to counsel and certain witnesses being unavailable for a hearing in June, 2022, the parties jointly moved to extend the decision deadline. Based upon the joint motion, on June 16, 2022, the hearing officer entered an order extending the decision deadline to September 12, 2022.

The Pre-hearing Conference was initially held on April 28, 2022. Due to the extension of the decision deadline, the Pre-hearing Conference was held on August 3, 2022, with a Pre-hearing Report and Order being prepared and served on August 4, 2022. At the August 3, 2022, Pre-hearing Conference the issues were outlined and decided by the parties in addition to other matters set forth in the Pre-hearing

Report and Order, including the decision of the Student's Parent that the Student that the hearing would be open.

A second Pre-hearing Conference was held on August 22, 2022. The Parties confirmed they were ready for the hearing. No order was issued as a result of this second Pre-hearing Conference.

Prior to the Hearing, the School district filed a Motion in Limine to preclude the testimony of the School District Assistant Superintendent and the School District Regional Superintendent, who had been listed as witnesses by Student. This motion was granted because the anticipated testimony was not relevant to the issues outlined in the Pre-hearing Report and Order. Student was also granted to leave to seek a reconsideration of the Motion in Limine if the anticipated testimony was not obtained from other witnesses

The following individuals testified during the hearing; Assistant Principal, LINKS team Coordinator, Special Education Teacher #1, Special Education Teacher #2, General Education Teacher, Special Education Instructional Facilitator, LINKS Team Supervisor, School district Purchasing Supervisor, Student's Mother, Student's Father, ABA Expert, BCBA #1, RPT, BCBA #2,

LINKS Team Director, LINKS Team member, and School District Assistant Superintendent.⁴

The Hearing was held both in person and by video conference. Student was represented by Gregory Ivie, Esq., and the School District was represented by Daniel Ebihara, Esq., and Yasnai Rodriguez-Zaman, Esq.

The School District offered Exhibits D-1 to D-23, which were admitted with no objection.

The Student offered Exhibits P-1 to P-10, all of which except P-6 were admitted without objection. Exhibit P-6 was not admitted.

ISSUES

The issues to be determined are as follows:

- A. Whether the IEPs developed in the two years prior to the filing of the complaint were individually tailored to allow the Student to receive FAPE, and if not, was that failure a denial of FAPE.
- B. Whether the student is required to receive ABA therapy during the school day in order to receive FAPE and if so was the failure to provide ABA therapy to the Student during the school day a denial of FAPE.

⁴ See Appendix A for the identifying information regarding these witnesses.

C. Whether the IEPs developed in the two years prior to the filing of the complaint reasonably calculated to enable the Student to make progress appropriate to his circumstances, and if not, did that failure result in a denial of FAPE.

D. Whether the IEPs developed in the two years prior to the filing of the complaint were properly implemented to allow the Student to make progress appropriate to his circumstances, and if not, did that failure result in a denial of FAPE

FINDINGS OF FACT

A. BACKGROUND FACTS

1. Glossary of terms:

a. BCBA means a person who is Board Certified Behavior Analyst, as certified by the Behavior Analyst Certification Board;

b. Behavior Analyst means a person who is licensed in Applied Behavior Analysis by the Aging and Disability Services Division of the State of Nevada;

c. RPT means Registered Behavior Technician, as certified by the Behavior Analyst Certification Board;

d. Behavior Technician means a person who is licensed in as a Behavior Technician by the Aging and Disability Services Division of the State of Nevada;

e. IDEA means the Individuals With Disabilities Education Act, codified as 20 USC⁵ §§1400, et seq.;

f. IEP means an Individualized Education Program under the IDEA;

g. IEP Team means the team of persons who meet to formulate or amend an IEP and is composed of at least the following persons; LEA, (representative of the local education agency, in this case the School District), parents, the Student's special education teacher, and the Student's general education teacher. See, 34 CFR 300.28 and 300.321;

h. LINKS is the acronym for the Linking Instructional Needs and Key Supports program provided by the School District. It provides direct services, classroom consultation, training, and supplemental programming for Autism and Social/Emotional Teaching, among other things;

i. LINKS Team means the individuals working in the LINKS program for the School District;

⁵ USC refers to the United States Code.

j. IIS means individual intervention services which is a part of the LINKS program;

k. BIP means a Behavior Intervention Plan;

l. MDT means multidisciplinary team which assesses students for disabilities and eligibility for special education;

m. AP means Autism Partnership Foundation which provides training and consultation services to the School District personnel in the areas of autism and ABA Therapy.

2. Student is described as a bright and smart child. Student was nine years old and in the fourth grade at the time of the hearing. (Testimony of Parents, General Education Teacher, Special Education Teacher #'s 1 & 2).

3. According to the MDT report on January 23, 2019, the Student is eligible for special education under the category of Autism Spectrum Disorder. He demonstrates delay in academics (math, reading, writing, spelling), social/emotional and behavioral skills and in receptive and expressive language. (See Exhibit D-3, pp. 9 and 13.)

4. Based on the findings of the MDT, an IEP was developed for the Student.⁶ (See Exhibit in D-3.)

⁶ This IEP was not introduced into evidence in this case. Exhibit D-3, which is the first IEP introduced into evidence, is a revision of that IEP.

5. From August, 2019 through May, 2020, the Student was attending the second grade in a public elementary school. Student had an IEP in place at this time. (Testimony of Mother and Exhibit D-3).

6. On March 15, 2020, the Governor of the State of Nevada issued a Declaration of Emergency Directive. It stated, in part, “All kindergarten through 12th grade schools will close to students effective March 16, 2020 until this Order is rescinded.”⁷

7. As a result of the school closure, the School District provided distance education to all School District students, including the Student, from the March 16, 2020, (the date of school closure), until May 24, 2020 when the 2019/2020 school year ended. (Testimony of Assistant Principal).

8. During the summer months of 2020, the Board of Trustees for the School District determined that the School District would start the 2020/2021 school year with distance education.⁸ This decision was made for the safety of students, teachers, and staff and it applied to all students attending public schools within the School District. (Testimony of Assistant Principal).

⁷ The school closure was testified to by the Assistant Principal, but the specific date was not introduced into evidence. The Hearing Officer is taking judicial notice of the exact date that the public schools were closed.

⁸ There were some exceptions to the distance learning requirement for certain rural schools that met certain COVID-19 criteria.

9. During the 2020-2021 school year Student was attending the third grade in a public elementary school. The Student started the school year in distance education. (Testimony of Mother).

10. The Student's IEP was revised on September 22, 2020, to provide for special education services for distance education. (Exhibit D-3).

11. During the 2020/2021 school year the School Board authorized the School District to commence hybrid learning, which could include in person instruction and distance learning. The School District instituted such a program. During the 2020/2021 school year the School Board authorized the School District to commence in person instruction. The School District instituted such a program. (Testimony of Assistant Principal).

12. On February 22, 2021, an annual review IEP meeting was held to update the Student's IEP. This IEP was designed to cover both hybrid and in person models of education. (See Exhibit D-4, page 1.) It reflected the same deficits that the Student had in the prior IEP. (See Exhibit D-4, page 5.) This IEP reflected satisfactory progress in all areas, and that the Student had not completed any goals from the prior IEP. (See Exhibit D-4, pp. 11-13). The Student was placed in a self-contained environment with 35 percent of his time in regular education environment, which included general education and special education. The Students' Parents agreed with this IEP. (Exhibit D-4, p. 1).

13. On May 21, 2021, an IEP was developed as a revision of the prior IEP. The revision increased the Student's general education minutes. The Students' Parents agreed with this IEP. A Notice of Intent to implement the IEP was sent to the parent on May 21, 2021. (See Exhibit D-5).

14. During the 2021-2022 school year, the Student was also receiving compensatory education after school in safekey. This compensatory education was awarded to the Student in a prior Due Process matter. (Testimony of LINKS Team member).

15. An IEP meeting was held on October 11, 2021 (Exhibit D-6). The IEP meeting was attended by the parents, the LEA representative, the special education teacher and the regular education teacher and additionally by the Students outside BCBA.

16. In the October 11, 2021, IEP Meeting the teachers reported that the Student was attending with a good attitude, but that the Student struggled with behaviors that took him off task, such as singing, leaving his seat and running around the room, making loud noises and protesting doing work. They also noted that it took several prompts to get the Student back on task. (Exhibit D-6, pp. 10-11).

17. In the October 11, 2021 IEP meeting the Parents reported the Student had several additional behavior problems, including scripting and perseverating on

inappropriate topics. The Student was repeating phrases that were inappropriate due to sexual or violent content. She believed the Student was doing this to get attention. Student's Parents expressed concerns that the Student's behavior was regressing, especially during distance education (Testimony of Student's Mother). She also noted that his outside ABA therapy providers had noted these problems and were working on these problems. (See Exhibit D-6, p. 11, and Parents' testimony.) 18. On October 11, 2021, an IEP meeting was held and the prior IEP was revised. The revision included the preparation of a BIP for the Student, dealing with many behaviors, including specifically dealing with scripting by the Student.⁹ It continued the Student's token economy to encourage and increase positive behavior.¹⁰ It also provided that the Student would be placed in a self-contained program and would spend 40% of his day in a regular education environment. These restrictions were based upon findings that the Student, to succeed, needed more attention than could be given in a general education classroom where the student and teacher ratio was higher than in a special

⁹ Scripting is repeating phrases a person picks up from videos, video games, youtube, etc. (Testimony of Student's Mother and BCBA.)

¹⁰ In a token economy the Student receives tokens for performing a certain task in a timely and acceptable way and would not get tokens if he acted outside of the expectations of the token economy.

education environment. (Exhibit D-6). This IEP was agreed to by the Student's parents. (Exhibit D-6, p. 1).

19. Beginning with the IEP dated November 22, 2021, the IEP Team discussed ABA therapy at length and recognized that it was an important part of the Student's education.

20. The IEP set forth a specific measurable annual goal that by the annual review date the Student would remain on task, and refrain from off task behavior such as running around the room, making loud noises, singing, rolling on the floor, etc. based on 80% criteria as measured by the special education teacher and the staff. The IEP also provided that BIP would be developed and implemented for the Student. (Exhibit D-6, p. 18).

20. On October 16, 2021, Student's BCBA, who provided Applied Behavioral Analysis therapy, ("ABA") to the Student outside of school, did an assessment of the Student and prepared a BIP which she provided to the Student's Parents. The Student's Parents provided this BIP to the School. (See Exhibit D-11).

21. On October 20, 2021, the School developed a BIP for the Student which was implemented. (Exhibit 12).

22. In November, 2021, the Student's Parents began requesting that the School District provide ABA therapy for the Student. (See, Exhibit D-7).

23. Student's Mother testified that she began requesting ABA therapy services for the Student prior to this IEP, but those requests do not appear in the Exhibits. (See Mother's Testimony).

24. The Student's Mother testified that she had ongoing concerns with the Student's behaviors. The behaviors included perseverating on topics that others could perceive as violent or sexual, and also scripting. The Student's Mother testified that they were following ABA therapy at home and that had been helping with these behaviors. She wanted to assure that there was continuity into the classroom.

25. The BCBA who is the Student's outside provider of ABA therapy testified that while not all autism students are helped by ABA therapy, it was clear that ABA therapy was assisting the Student.

26. All of the School District witnesses testified that ABA services would be helpful to the Student to make progress academically and particularly socially and emotionally.¹¹

¹¹ The only witness involved with the Student who did not testify to this was the Student's general education teacher and no one asked the general education teacher if she believed that ABA services would be helpful to the Student.

27. Additionally ABA is widely recognized as a superior method for teaching children with autism. (Testimony of Petitioner's Expert, and BCBA).

28. Based on the Parents' request, an IEP meeting was held on November 22, 2021 to revise the Student's IEP. This meeting was attended by the parents, LEA, special education teacher and general education teacher and additionally a representative of LINKS and the Student's outside ABA provider. (Exhibit D-7)

29. Beginning with the IEP dated November 22, 2021, the IEP Team discussed ABA therapy at length and recognized that it was an important part of the Student's education.

30. The IEP included a parental concerns letter sent by Student's Parents describing the problems they were having and how the effective use of ABA therapy by an outside provider was assisting the Student both academically and socially. (D-7, page 25-26.) The letter included a request that the Student be allowed to receive ABA services through his current provider in the school setting. They also raised concerns that because of the extensive ABA therapy provided to him after school hours he was not having the opportunity to be a typical child because he went right from school to ABA therapy every day for a significant number of hours.

31. During the IEP Meeting the IEP Team offered to provide the Student ABA therapy for ten hours per month through its IIS program. Student's Mother

did not believe ten hours per month was enough and the School District agreed to provide the Student with sixteen hours of ABA therapy per month through its IIS program. (See Exhibit D-7 and D-14, pp. 5-6)¹². (Testimony of LINKS Team supervisor).

32. IIS was specifically developed by the School District to provide ABA services to School District students diagnosed with from Autism and in need of their services. The School District currently provides ABA services to approximately 75 to 80 students in the School District.

33. The School District provides for training for the persons involved in IIS through AP. That training includes coming to the School District on a regular basis to train teachers and IIS personnel in providing ABA services. (Testimony of LINKS Team Supervisor.)

34. The evidence was not clear whether AP also provides oversight of the services being provided to specific students.

35. On November 22, 2021, the Student's IEP was revised by providing that the Student would receive ABA therapy at school. The ABA therapy would be provided by IIS, which would address the Student's behavior and communication goals. IIS would provide 16 hours per month with the Student. The maximum

¹² Note that the pages in Exhibit D-14 are in reverse order, with the oldest notes being last and the most recent notes being first.

hours that IIS provides at this time is 20 hours per month. (Testimony of LINKS Team Supervisor). IIS would also consult with Student's teachers. The consultations with the Student's teachers would be one hour per month. (See Exhibit D-7, pp. 18-19). The Students' Parents agreed with this IEP revision. (See Exhibit D-7).

36. Commencing with the IEP dated November 22, 2021, (Exhibit D-7), the Student has been receiving ABA services through IIS at the rate of 160 minutes per month.

37. On February 14, 2022, the annual review IEP meeting was held. (Exhibit D-8). Student's Parent requested that the Student's ABA therapy be provided by the Student's outside ABA provider during the Student's school day. She testified that this ABA therapy was being paid for by the health insurance of the Student's Parents, so there would be no cost to the School District. (Testimony of Mother). The IEP Team refused this request. They maintained that the Student was receiving ABA through IIS. However, the IEP Team did agree that collaboration between the the Student's BCBA and the LINKS team would help to meet the Student's needs for ABA therapy. (Exhibit D-8, page 1).

38. The LINKS Team Supervisor and LINKS Team Coordinator testified that at the time of the IEP Meeting and at this time the School District had no need to seek outside services to provide ABA therapy because the IIS Team provides

proper ABA services to students in the School District who are diagnosed with Autism and in need of ABA therapy.

37. The School District has a process to follow for outside service providers to work within the School District. (Testimony of LINKS Team Supervisor, LINKS Team Coordinator, and Purchasing Supervisor.)

38. This IEP was not signed by the Parents. A Notice to Implement was mailed to the Parents on February 15, 2022 with a proposed implementation date of February 24, 2022. (See Exhibit D-8). (See Exhibit D-8). This Notice led to the Parents initiating this due process proceeding. (Testimony of Mother).

39. The Student's Parents did not agree to this IEP and refused to sign the IEP because the Student was receiving ABA through IIS which they maintained did not provide a sufficient number of hours and that the IIS providers were not adequately trained or supervised. (Testimony of Mother).

40. The BCBA also testified to being was ready, willing and able to collaborate with the School District and had in fact collaborated with the School District one time in observing the Student in the classroom and had made suggestions. However, no further collaborations occurred.

41. The Student's Mother testified that IIS had failed to collaborate more than once with the Student's outside provider of ABA therapy services which

collaboration would make the ABA services provided by IIS much more effective as the goals could be similar.

42. Both Mother and the BCBA testified that they had not been provided any ABA data from IIS. This data is collected from observations of the persons providing ABA therapy. This sharing of collected data is important, if not essential, because ABA therapy is driven by data collected and analyzed by the Student's BCBA. This data can help the BCBA formulate a plan and also the IIS team to formulate additional plans and modify the existing teaching plan for the Student. (Testimony of Petitioner's Expert).

43. Given that ABA therapy is data driven sharing the data that is being collected by IIS is important to the successful collaboration and implementation of ABA therapy. (Testimony of Petitioner's Expert and BCBA).

44. No evidence was provided that the IIS team was even collecting and analyzing ABA data as part of their work with the Student.

45. The BCBA testified he was open to more collaboration and sharing data.

46. The BCBA also testified that he did not believe the token board, which has been part of several of the Student's IEPs, (See Exhibit D-3, D-4, D-5, D-6, D-7, and D-8), was effective because the Student's behavior was not for purposes of getting attention, but was rather for purposes of escaping, for example, from the general education environment to the self-contained room.

47. Under the current IEP the Student receives 160 minutes per month of ABA Therapy during school through IIS. That 160 minutes per month works out to about 45 minutes per school day of IIS services. (See Exhibit D-8).

48. Student's mother testified that the number of hours provided for in the IEP were not sufficient for the Student to make progress under the IEP, particularly given the Student's current social and behavioral problems.

49. Some members of the IEP Team testified that they had looked at providing more IIS services to the Student but felt that more services had a risk that the Student would become dependent on such services. (Testimony of LINKS Team coordinator and LINKS Team Supervisor).

50. The BCBA and Petitioner's expert both testified that there was some risk of the Student becoming dependent on the ABA services, but that that risk could be minimized by collaborating and regularly reviewing the data being collected. They also testified that the Student would benefit from more ABA therapy in school.

51. The Student's mother testified that she was concerned that the team members of the IIS were not qualified because they were not licensed as BCBAs or RBTs, or under Nevada law.

52. The LINKS Supervisor testified that the members of IIS are trained by AP. She also testified that they are supervised by AP.

53. The persons providing IIS to the Student are not licensed as behavioral analysts or registered behavioral technicians although one of the individuals specifically providing ABA services to the Student is licensed as an RPT, but there is no direct oversight to this person given by an applied behavioral analyst.¹³ (Testimony of LINKS Team Supervisor).

54. There is no evidence that the IIS members providing ABA therapy to the Student do not have sufficient knowledge and training to provide appropriate ABA therapy to the Student.

55. The Student has been receiving outside services for ABA through a BCBA who supervises the RBTs providing the services to the Student outside of school. The services currently take about 15 hours per week and are done at Safe Key or at home, or both. (Testimony of Mother and BCBA).

53. The Student has never completed even one goal in the various IEPs which have been formulated to assist him in his academic and social development. (Testimony of Special Education Teacher #1, Special Education Teacher #2, and Parents).

54. While the Student's teachers and parents disputed about how much progress the Student made, all witnesses agreed that the Student was making

¹³. This person does have a BCBA who supervises her activities outside of the school district work, but that supervision would not apply directly to this work.

academic progress under the IEPs. (Testimony of Special Education Teacher #1, Special Education Teacher #2, and Parents).

55. A review of the IEPs and progress reports shows that the Student has made progress under those IEPs even though the Student has not completed even one goal in those IEPs. (See Exhibit D-3, D-4, D-5, D-6, D-7, and D-8).

56. Under the social and emotional goals the Student's Parents testified that the Student went backwards and got worse during distance education. They agreed the Student was making progress, although it is slower than they hoped, since the public schools returned to in school attendance. (Testimony of Parents).

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel and the Hearing Officer's own research the Conclusions of Law of this Hearing Officer are as follows:

1. The Hearing Office has jurisdiction over the parties and the subject matter of this Due Process Hearing.

2. The Federal Regulations define autism as a neurodevelopmental disorder generally marked by impaired social and communicative skills, "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i) (2016)

3. The IDEA requires that states receiving federal education funding provide “free appropriate public education (FAPE) . . . to all children with disabilities residing in the state between the ages of three and twenty-one.” 20 USC §1414(a)(1). It also establishes a procedure for creating an IEP which is a written statement of present levels of academic achievement and functional performance and goals in those areas. See 20 USC §1414(d)(1). The IEP must also include a “statement of special education services and accommodations be provided to the child.” 20 USC §1414(d)(1)(A). It also requires measurable goals and periodic progress reports. See, 34 CFR 300.320(a)(2)(i).

4. A parent with a child with a disability who alleges a violation of the IDEA may present a due process complaint setting forth the allegations that form the complaint. See 20 USC §1415(b)(6).

5. A FAPE “consists of educational instruction specially designed to meet the needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” *Board of Education v. Rowley*, 458 S.Ct. 176, 188-189, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). An IEP must provide the Student the services “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. vs. School District*, 137 S.Ct. 988 (2017).

6. The instruction offered must be “specially designed” to meet a child's “unique needs” through an “individualized education program.” 20 USC §§ 1401(29), (14). The IDEA guarantees individually-tailored educational services for children with special educational needs. See 20 USC §§ 1400(d)(1)(A), 1401(29).

7. The IDEA provides for a FAPE that must conform to a student’s IEP, which is a program detailing the student’s abilities, educational goals, and specific services that are designed to achieve those goals within a designated time frame. See 20 USC §§ 1412(a)(4), 1436(d).

8. *Amanda J. v. Clark County School District*, 267 F.3d 877, 894 (9th Cir. 2001), states:

“A FAPE, as required by the IDEA, must be tailored to the unique needs of each individual child. Each child has different needs, different skills, and a different time frame for effective treatment. Autism is a developmental disorder; those affected by autism exhibit significant deficiencies in communication skills, social interaction, and motor control. Early intervention can lead to positive outcomes, particularly when children are placed in highly structured, specialized, and individualized programs. These programs often must address a wide range of skills, ranging from academic to social to functional living skills, depending on the severity of the particular child's condition.”

9. Based on the findings of fact and the law, the Student's IEPs, (Exhibits D-3, D-4, D-5, D-6, D-7, and D-8), were individually tailored to allow the Student to receive FAPE given the Student's disabilities.

10. Given that the Student has Autism Spectrum Disorder and the testimonies of the parties and witnesses that ABA therapy is important for the Student's education, the IEP Team determined in November, 2021, that the Student would receive ABA therapy as part of his IEP.

11. The IIS team members are trained to provide ABA therapy to autistic students, including the Student in this matter. Because the School District has provided ABA services to the Student through IIS since November 22, 2021 and it continues to provide those services, it has not failed to provide FAPE to the Student.

12. In determining whether educational benefits have been provided to a student with a FAPE it is important to note that the goals and objectives in the IEP are not guarantees, but rather targets that the service provider is striving to assist the student to reach. The issue is more of one of whether the Student has made satisfactory progress toward the Petition's goals and objectives in the IEP. *Ojai Unified School District v. Jackson*, 4 F.3d 1467 (9th Cir. 1993).

13. Based upon the testimonies of the parties and witnesses and the documents produced at the hearing, although the Student has not completed any IEP goals during the relevant time period, The Student has made social and academic

progress appropriate to the Student’s circumstances. The Student made meaningful progress toward the IEP goals. The evidence supports the conclusion that the student’s IEP provided the student a FAPE since it was tailored to the student’s needs and the student made “appropriate educational progress. See, *Crofts v. Issaquah School District*, 22 F.4d 1048, 80 IDELR 61 (9th Cir. 2022).

14. Nothing in 20 USC §1414(d) indicates that an IEP must specify the qualifications or training of service providers. *REB v. State*, 870 F.3d 1025, 1028 (9th Cir. 2017).¹⁴

15. Nevada Revised Statutes 641D.110 states

“The provisions of this chapter do not apply to:

“(11) an employee of a school district or charter school when providing services to a pupil in a public school in a manner consistent with the duties of his or her position, if such person does not commit and act described in NRS 641d.910 or represent himself or herself as a behavioral analyst or an assistant behavioral analyst or registered behavioral technician.”

¹⁴ The Hearing Officer recognizes that this opinion has been withdrawn and replaced with an unpublished opinion. However, this language is nearly identical in both opinions.

16. Under the law the employees of the School District who are providing ABA services consistent with the duties of their position are not required to be licensed as behavioral analysts or registered behavioral technicians.

17. The IIS members have been appropriately trained to provide ABA services to students diagnosed with autism and in need of their services.

18. Minor discrepancies between the services provided and the services called for in the IEP do not give rise to an IDEA violation. A material failure does give rise to an IDEA violation and occurs when the services provided fall significantly short of the services set forth in the IEP. The Student's education progress, or lack of it, may be probative of whether there has been a significant short fall. See *Van Duyn v. Baker School District*, 502 F.3d 811,817 (9th Circuit 2007).

19. In this case the failure of IIS to regularly collaborate with the Student's BCBA is a material failure to implement the February 22, 2021 IEP. It is material because it was an important part of that IEP. The collaboration provision requires the IIS providers to collaborate with the Student's BCBA. Additionally, given the BCBA's extensive work with the Student after school, his knowledge and skills are useful to the IIS team to be certain the Student gets appropriate ABA therapy. And, the information of the IIS providers will assist the BCBA in treating the Student.

22. In this case the failure of the IIS team to share with the Parents and the BCBA the data it should be collecting as to the ABA therapy services provided for the Student is also a material breach of the February 22, 2021 IEP. It is material because the data collected from ABA therapy treatments is what drives ABA therapy goals moving forward, and that information is an essential part of collaboration.

ORDER

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

IT IS HEREBY ORDERED that the Student's IEP dated February 22, 2021, shall be amended to require at least monthly collaboration between the IIS team members providing services to the Student with the Student's BCBA¹⁵ and to share, at least monthly, the data obtained from IIS ABA Therapy with the Parents and BCBA, a least monthly.^{16 17}

¹⁵ This collaboration may include observing ABA therapy being provided to the Student, but it does not include actually providing ABA therapy to the Student during school hours unless all parties agree to that.

¹⁶ The Parties shall sign all consents that are required, if any, to allow the collaboration and the sharing of data to occur.

¹⁷ The Hearing Officer likely does not have authority to order the BCBA to share the data the BCBA is collecting from the ABA services being provided after school hours to the Student. However, it is hoped that the sharing can go both ways.


IT IS FURTHER ORDERED that the Student is entitled to compensatory education such that the Student's IIS services shall be increased from 16 hours per month to 20 hours per month until the next annual IEP review. This number was calculated to require the School District to provide the maximum hours of service currently available to a student through IIS.¹⁸ These additional services shall be provided during the regular school day.

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by this Decision has the right to appeal within thirty (30) days of the receipt of this decision pursuant to NAC §388.315. A party to the hearing may file a cross-appeal within ten (10) days after receiving notice of the initial appeal. If there is an appeal, a state review officer appointed by the Superintendent from a list of officers maintained by the Department shall conduct an impartial review of the hearing pursuant to NAC 388.315. Since this decision is being delivered in both electronic and hard copy, receipt of a copy of this Decision and Order will be determined by either the date of actual delivery or the date of the first attempt to deliver by the U.S. Postal Service.

¹⁸ This is not a finding or conclusion that providing 20 hours per month of ABA therapy through IIS is the maximum the School District has to provide. It is expected at the annual IEP review that this number of hours and the Student's progress will be reexamined to determine the hours of ABA therapy needed by the Student to meet the School District's duty to provide the Student FAPE. It may be more than that number or less.

Dated this 12 day of September, 2022.

A handwritten signature in black ink, appearing to read "David A. Stephens", is written over a horizontal line.

David A. Stephens
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Hearing Officer