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,

Petitioner,

v.

SCHOOL DISTRICT,

Respondent.

AMENDED DECISION OF THE HEARING OFFICER[2]

Hearing Dates: July 31, Aug. 1 & 2, 2019

Parties and Representatives:

Petitioner/Parent, Unrepresented. Also present with Parent, was the Parent's Sister/Student's Aunt

Respondent/School District was represented by Counsel also present for District were two Compliance Monitors.

Hearing Officer: Elizabeth S. Ashley

INTRODUCTION AND PROCEDURAL BACKGROUND

Present at the hearing was the Petitioner/Father ("Parent") who was unrepresented by counsel. Present with the Parent at the hearing was his Sister and the Student's Aunt, who assisted and supported the Parent throughout the hearing. On the final day of the hearing, also present in support of the Parent were two additional family members. Although the Student's parents are married, the Student's Mother did not participate in the due process proceedings, and the Student was not present at the

[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)

[2] Decision was amended to remove personally identifiable information and correct a grammatical error.

hearing. The District/Respondent ("District") was represented at the hearing by counsel. Also present at the hearing were two District Compliance Monitors.

The due process complaint dated April 17, 2019 was filed on April 23, 2019. The Hearing Officer was appointed to presided over the matter on April 30, 2019. On May 7, 2019 the District responded to the due process complaint. Several status, motion and pre-hearing conferences were held, and a final prehearing report and order was issued on July 23, 2019. To facilitate the scheduling of testimony by District employees, and the Parent's exploration of the possibility of retaining counsel or the services of an educational advocate, a continuance of the decision date was granted to August 31, 2019.

Numerous motions were made by Parent, including several motions to recuse the Hearing Officer, a motion to compel the testimony of the evaluator who performed an independent educational evaluation ("IEE") of the Student, to remove restrictions limiting the evaluator's testimony to relevant issues, and to amend the document production following the five-day deadline for the parties' document exchange. The motions to recuse the Hearing Officer were denied for lack of factual or legal justification, as the Parent failed to allege that the Hearing Officer was biased or had a conflict of interest, and merely claimed that she was incompetent to preside over the due process matter. The motion to compel the testimony of the evaluator was granted, and a subpoena ordering the evaluator's appearance at the hearing was issued by the Department of Education. The Parent's motion to eliminate restrictions as to the scope of the evaluator's testimony was denied, and the evaluator's testimony was limited to matters relevant to the issues to be decided. The motion to amend the Parent's document production following the deadline for the document exchange was denied as untimely and prejudicial to the District. The District's motion to strike witnesses from

the Parent's witness list, including District administrators and compliance staff, was granted.

Under the IDEA, the Parent has the right to elect that either a verbatim audio record, or a written transcript of the hearing be produced. The Parent chose an audio recording of the proceedings, which was obtained by All-American Court Reporters, and sent to the Department of Education for provision to the Parent. The court reporter also prepared a certified copy of a written transcript of the proceeding as is her practice under Nevada law. All citations to the record will be to the electronic record, as the parent requested.

The subject due process complaint is the third due process complaint filed by the Parent within a six-month period of time, and also within the same school year. The first of the due process complaints was filed in October, 2018, and resulted in a hearing in December, 2018. The Parent filed a second due process complaint in February, 2019 following a ruling by a State Review Officer upholding the Hearing Officer's decision. The second due process complaint was resolved in April, 2019 by way of the Parent's withdrawal of the complaint due to objection to an alleged conflict of interest and bias on the part of the second Hearing Officer. The subject, third due process complaint was filed later in the same month, April, 2019. (See testimony of principal.)

ISSUES

The issues to be determined in the pending matter are as follows: Whether the District committed a procedural violation by failing to obtain the Parent's written consent for the release the IEE report to the District, including any supporting documentation utilized in the preparation of the report such as the Student's medical records, prior to the release of the report to the Parent, and whether such procedural

violation seriously impeded the Student's right to a free appropriate public education ("FAPE") by significantly impeding the Parent's opportunity to participate in the individual educational plan ("IEP") decision making process, or caused a deprivation of an educational benefit to the Student; and, whether the District committed a substantive violation which deprived the Student of a FAPE by failing to prepare a new IEP for 122 days, the time which elapsed between the January 15, 2019 date of the IEE report, and May 17, 2019, the date of the Student's current IEP.

BURDEN OF PRODUCTION AND PROOF

Under Nevada law the District has both the burden of production and the burden of proof concerning all issues (NRS 388.467.)

EXHIBITS

The parties did not comply with the Hearing Officer's instructions to prepare a joint exhibit list to avoid submission of duplicate exhibits. Further, despite the fact that neither party objected to the Hearing Officer's summary of the issues to be decided at hearing, neither party narrowed their lists of proposed exhibits to reflect the specific issues, as documented in the pre-hearing report and order. Instead, each party offered many irrelevant documents. After extensive consideration of the exhibits offered by each party, the Hearing Officer ruled at the hearing which exhibits which would be admitted into evidence as relevant to the issues to be decided.

FINDINGS OF FACT

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

1. The Student was enrolled in the District in the fall of 2014 for pre-kindergarten, and has continued to attend the same school to the present. (See testimony of principal.)

2. At the time of the hearing, the Student was a rising third grader who receives special education services from the District pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400 et seq., 34 C.F.R. 300.100 et seq., Nevada Revised Statutes ("NRS"), Chapter 388 et. seq., and Nevada Administrative Code ("NAC"), Chapter 388. (See testimony of principal, general education teacher and teacher of record ("TOR"), audiologist and speech pathologist, and Exhibit D-3.)

3. The Student's specific eligibility category for the provision of special education services is irrelevant to a determination of the issues, as the Parent has no dispute with the Student's current eligibility determination. (See complaint and admission by Parent.)

4. The substance of the IEE, including the findings and opinions of the evaluator, are irrelevant to the determination of the issues, as the Parent has no dispute with the results of the IEE. (See complaint and admission by Parent.)

5. The substance of the Student's current IEP, prepared on May 17, 2019, is irrelevant to a determination of the issues, as the IEP was not in existence on April 23, 2019 when the pending due process complaint was filed, and the Parent admits that he does not have any objection to the IEP. (See admission by the Parent.)

6. The evaluator who performed the IEE had no duty to allow the Parent to review the IEE report prior to transmitting it to the District. (See testimony of evaluator, coordinator of psychological services and Exhibit 20, pg. 12.)

7. The evaluator who performed the IEE had a duty to obtain the Parent's prior written authority for the provision of the IEE report to the District. (See testimony of director of psychological services and evaluator and Exhibit 20, pg. 12.)

8. The District had no duty to obtain the Parent's prior written consent for the evaluator's release of the IEE report to the District. (See testimony of director of psychological services and evaluator and Exhibit 20.)

9. The District's IEE procedures required the evaluator to release the IEE report to the District in order to receive payment for the report, and to also provide the report to the Parent prior to or on the same date the report was provided to the District. (See testimony of evaluator and Exhibit 20, pg. 12.)

10. The District was not involved in the evaluator's decision to release the IEE report to the District two hours prior to releasing the report to the Parent. (See testimony of evaluator and Exhibit 20.)

11. At the beginning of the IEE process, the evaluator obtained written authorization from the Parent entitling the evaluator to release the IEE report to the District. (See testimony of evaluator.)

12. The parties agreed to defer the preparation of a new IEP until after the issuance of the IEE report, despite the November, 2018 renewal date for the Student's IEP. (See Parent's admission.)

13. The District believed in good faith that the Parent did not wish to proceed with the development of a new IEP during the pendency of due process actions, the second of which was filed in February, 2018, and withdrawn by the Parent in April, 2019. (See testimony of speech pathologist, TOR and coordinator of psychological services and Exhibit D-18.)

14. The District commenced efforts to schedule the IEP team meeting with the Parent following the Parent's withdrawal of the second due process complaint by way of the TOR placing a phone call to the Parent on April 10, 2019 and, after Spring Break which was from April 15th to the 19th, sending an email to the Parent on April 25th, and by May 1st the parties had scheduled the May 17th IEP team meeting. (See testimony of TOR and Exhibit D-2.)

15. The Parent and the District worked cooperatively together from May 1st to May 17th exchanging information and coordinating for the preparation of a mutually acceptable IEP, including the District providing the Parent with a draft copy of the IEP on May 10th, and an updated draft of the proposed IEP on May 15th. (See Exhibit D-2.)

16. During the 122 days between the issuance of the IEE report and the preparation of a new IEP, ("the period in question"), the District continued to provide special education services to the Student despite the passage of the November, 2018 annual deadline for review of the Student's IEP. (See testimony of principal, general education teacher, TOR, audiologist and speech pathologist, and Exhibits D-2, D-3, D-14, D-15 , D-17 and D-19.)

17. During the period in question, the Student performed academically at or above the average for other second grade students, including receiving mostly As and Bs and receiving an honor roll award at the end of the school year. (See testimony of principal, general education teacher, TOR, audiologist and speech pathologist, and Exhibits D-2, D-3, D-14, D-15, D-17 and D-19.)

18. The testimony of the highly qualified audiologist established that the Student performed at an exceptional level in utilizing her assistive listening devices, and

achieved remarkable growth during the period in question in overcoming a hearing impairment. (See testimony of audiologist.)

19. The testimony of the very qualified speech pathologist proved that during the period in question, the Student made "great gains" in speech pathology, generally scoring 80 to 100% in her schoolwork. (See testimony of speech pathologist.)

20. The Student performed as expected for a second grader, was generally attentive and focused in the classroom, and did not suffer from behavioral challenges during the period in question. (See testimony of principal, general education teacher, TOR, audiologist and speech pathologist and Exhibits D-2, D-3, D-14, D-15, D-17 and D-19.)

21. In evaluating the Student's academic achievement and performance it the classroom, the Parent placed undue weight on two factors, the cautionary report issued by the District at the end of the year that the Student was at risk for not meeting the criteria for Read by 3, and an isolated low assessment score in Math, both of which were not reflective of the Student's overall ability and achievement, and the Parent disregarded the interventions provided to the Student to address her unique needs. (See testimony of principal, general education teacher, TOR, and Exhibits D-2, D-3, D-14, D-15, D-17, D-19 and P-14.)

22. During the period in question, the Student continued to make academic progress, and the Student's well qualified general education teacher and TOR were not concerned that the Student would not meet grade level expectations by the end of the school year; nor were the audiologist or speech pathologist concerned that the Student was not receiving needed services or was not progressing well during the period in

question. (See testimony of general education teacher, TOR, audiologist and speech pathologist, and Exhibits D-2, D-3, D-14, D-15, D-17, D-19.)

23. The only remedy requested by the Parent at the hearing was an award of compensatory education or reimbursement of the cost for services the Parent claimed in his closing argument were provided for the Student; however, the Parent failed to produce of any evidence of a need for, or cost of, any services provided to the Student at the Parent's expense.

24. The Parent rejected multiple suggestions by the Hearing Officer that he testify at the hearing, and also failed to elicit any evidence by way of cross examination of the witnesses, or introduction of documentary evidence, regarding the need for any additional services for the Student, or to document any services that the Parent may have provided to the Student during the period in question and, thus, there is no basis in fact for any award the Parent, even in the event the Hearing Officer found in favor of the Parent.

CONCLUSIONS OF LAW

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

A. The District did not commit a procedural violation by failing to obtain the Parent's prior written consent for the evaluator's release the IEE report to the District, including any supporting documentation, prior to the evaluator's release of the report to the Parent.

The Parent misinterpreted the District's IEE package provided to parents as a guideline for navigating the IEE process as providing for a duty on the part of the District to obtain prior written authorization from the Parent for the evaluator's release of the report to the District. (See Exhibit 20.) There was no evidence produced at the

hearing to establish any such duty exists under the law, or was created by the District's IEE package. (See testimony of evaluator and director of psychological services.) Rather, the District's IEE package provides information to assist parents in dealing with the evaluator, who is ultimately responsible for respecting the privacy rights of the Parent and Student in connection with the dissemination of the IEE report. 34 CFR §300.620 provides protection for the confidentiality of personally identifiably records collected or maintained by a District, and §300.622 provides that parental consent must be obtained before such personally identifiable information is disclosed. There was no dispute at the hearing that the IEE report was a confidential record, and that the Parent was required to provide consent prior to the evaluator's release of the report to the District.

The evaluator testified that she agreed that her ethical and legal duties require her to obtain a written release from the Parent allowing her to submit a copy of the IEE report to the District, and to also provide the report to the Parent before, or on the same day that she submitted it to the District, both of which she testified occurred in this case. Although the evaluator's confidentiality waiver form signed by the Parent was not produced at the hearing, the Hearing Officer found the evaluator's testimony credible, and concludes that the evaluator complied with her stated practice, and required the Parent sign a privacy waiver form at the initiation of the IEE process. There is no logical reason the evaluator would not have complied with generally accepted policies and procedures and obtained a privacy waiver from the Parent in connection with the anticipated submission of the IEE report to the District, in order to receive payment for the report. The Parent was in full agreement with the findings of the report, which further negates any inference that the evaluator was in some way biased in favor of the

District, and turned over the report to the District without parental authority to insult or disadvantage the Parent and Student.

Cross-examination of the evaluator revealed that if, prior to the transmittal of the report, the Parent had expressed a desire to change the evaluation from a District provided IEE to a parent-initiated evaluation, the evaluator would have agreed, so long as the Parent paid the evaluator's fee. However, despite the fact that the evaluation results were favorable to the Parent, through his cross-examination of the evaluator the Parent indicated at the hearing that he believed the evaluator should have asked him at some point in the process whether he wanted to convert the IEE approved by the District at Parent's request into a parent-initiated evaluation at his expense. The Hearing Officer believes that the effect of such a solicitation by the evaluator would have been to create the impression that the report was not going to be favorable to the Parent, thus further injecting insecurity into an already extremely contentious relationship between the Parent and the District.

Reflective of the level of tension between the parties was the Parent's request that the evaluator be compelled to appear at the hearing via subpoena, and that the evaluator was represented at the hearing by counsel, John A. Hunt, Esq. However, the evaluator testified in a forthright and credible manner, and appeared to be neutral to the parties' dispute. From the evidence produced at the hearing, the Hearing Officer concludes that the Parent simply forgot that he had signed a form allowing the evaluator to release the IEE to the District. The Parent's suspicious view of all aspects of the special education process led him to conclude that there was a violation of his privacy, when he had actually granted the evaluator the authority to transmit the report to the District. There was no evidence indicating that the evaluator's duties regarding the dissemination of the

report were in any way impacted by the existence of any supporting documentation for the report, such as the Student's medical records. (See testimony of the evaluator.)

The District sustained its burdens of production and proof regarding the lack of any duty owed to the Parent by the District to document the Parent's provision of authority to the evaluator for the dissemination of the IEE report to the District. The evaluator elected to release of the IEE report to the District on the same day, but two hours prior to releasing the report to the Parent. The evidence established that the District had no advance notice, let alone control over, the evaluator's decision regarding the timing of the transmittal of the report. Therefore, the evaluator's decision to transmit the report first to the District by email, and then two hours later to provide the report to the Parent in a face to face meeting scheduled for the convenience of the Parent, cannot constitute a procedural violation by the District.

The Parent misunderstood who had the duty to obtain his written authority for release of the IEE report to the District. The District's IEE packet warned the Parent that he had rights regarding the dissemination of the IEE report, but that warning did not place any duty on the District to obtain the Parent's written authorization prior to receipt of the report. Rather, the evidence established that the warning was designed to alert the Parent of their right to ensure that the evaluator did not release the report without the Parent's authorization. The evaluator testified persuasively that she obtained written authorization from the Parent for the release of the report to the District and, further, that she only transmitted the report to the District two hours prior to providing it to the Parent as she wanted to send it out before the end of the day, but had been requested by the Parent to meet with him at 6:00 p.m. that same day.

The Parent has no disagreement with the findings of the evaluator, or any aspect of the IEE report, but incorrectly assumed that he had the right to review the report with the evaluator prior to her transmittal of the report to the District, and apparently did not recall that when he initially met with the evaluator regarding the IEE, he provided the evaluator with a written authorization at that time to allow the evaluator to release the report to the District.

Even assuming for the purposes of argument, that there was a procedural violation by the District in connection with the District's requirement that the evaluator provide the District with the report in order to obtain payment, there was no evidence produced at the hearing to established that the Student suffered a denial of a FAPE, any deprivation of an educational benefit, or that the Parent's opportunity to participate in the IEP decision making process was impeded by the District obtaining the IEE report two hours prior to the Parent receiving the report. The Parent concedes he found the IEE report to be favorable. Further the report appears to have facilitated the District's continued provision of beneficial special education services tailored to the Student's unique circumstances, and the parties' moving forward successfully to development of a new IEP.

Procedural violations by a District which do not result in a loss of educational opportunity, or which do not seriously infringe upon the parents' opportunity to participate in the IEP process, are insufficient to support a finding that a student has been denied a FAPE. See W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1483 (9th Cir. 1992). As the Student was not deprived of an educational benefit or a FAPE, and the Parent was not impeded in participating in the IEP process,

there can be no finding of any procedural violation by the District which caused harm, or was in any way detrimental to the Student or the Parent.

B. The passage of 122 days between the issuance of the IEE report on January 15, 2019 and the May 17, 2019 date of the Student's IEP did not constitute a substantive violation by the District, or the deprivation of a FAPE to the Student.

CFR §300.324 provides that while periodic reviews of a Student's IEP may take place, a District "must ensure" that a review of the Student's IEP occurs annually. See also 20 USC § 1414(d)(4)(A); 34 CFR §§ 300.323(a). While the IDEA statutes, regulations and case law all emphasize the importance of parental involvement and advocacy, even when parents and the district disagree, the statutes are silent as to the impact of a District missing the annual deadline for renewal of an IEP. In addition, while also emphasizing the importance of parental participation, case law fails to provide specific perimeters or consequences regarding a District's failure to achieve a review of an IEP by the annual deadline. See Amanda J. v. Clark County School District, 267 F.3d 877, 891, 892 (9th Cir. 2001) "[t]hose procedures which provide for meaningful parent participation are particularly important....[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA."

The case of Anchorage School District v. M.P. 689 F.3d 1047 (9th Cir. 2012) is similar to the subject case in that the parents in that case filed four due process complaints, and the relationship between the parents and the district was strained. However, the cases differ in that in M.P., the parties ultimately could not agree to a new IEP. In the M.P. case, the 9th Circuit overturned a lower court's ruling excusing the district's failure to timely update the IEP and ruling that the delay did not deprive the

student of a FAPE, because the court found the delay was mostly attributable to the parent's litigious approach to the special education process. The appellate court found that duties imposed on the district by the IDEA are not contingent upon parental cooperation or agreement to the district's preferred course of action, and that reliance on an obsolete IEP deprived the student of a FAPE because the outdated IEP did not satisfy the Rowley "educational benefit" standard.

In the M.P. case, the student's third grade teachers utilized third grade instructional materials, but relied upon an IEP developed for the student's second grade school year. Evidence presented at the parties' due process hearing indicated that the student had regressed in two subjects, math and reading, and in several behavioral goals. Evidence was presented that the parents incurred five months of expenses for private math and reading tutoring to replace services they believed the student required, but which were not being provided under the obsolete IEP. The hearing officer awarded the parents reimbursement for the tutoring expenses.

Upon review of the hearing officer's decision, the district court concluded that although the IEP was obsolete, there was no denial of a FAPE because the failure to develop an updated IEP was mostly attributable to the parent's litigious approach, and the court also reversed the award of reimbursement for the parent's tutoring expenses. The 9th Circuit ruled that faced with the inability to develop a mutually agreeable IEP, the district "had two options: (1) continue working with M.P's parent in order to develop a mutually acceptable IEP, or (2) unilaterally revise the IEP, and then file an administrative complaint to obtain approval of the proposed IEP." *Id.*

In the case at hand, the District elected to continue to work with the Parent, and was ultimately able to develop a mutually satisfactory IEP. Unlike in the M.P. case, the District never took a "take it or leave it" approach with the Parent, and continued to communicate with the Parent until agreement was reached on what the Parent admits is a fully satisfactory IEP. Further, in the subject case the evidence overwhelmingly established that the Student continued to progress, performing at average to above average levels in comparison to her classmates in a primarily general education setting. Further, the evidence proved that despite the passage of the deadline for the annual IEP review, during the subject school year the Student continued to receive beneficial special education services, especially to address a hearing impairment and in speech pathology, which allowed the Student to perform at exceptional levels and to achieve amazing progress in these areas, which will lay a good foundation for the Student's future academic progress.

The Parent failed to provide any evidence at the hearing to support any allegation that the Student regressed, failed to make progress, or that the Parent provided tutoring or other services for the Student to replace services which the District failed to provide during the period in question. The Hearing Officer advised the Parent several times throughout the due process hearing that neither his opening statement nor his closing argument were evidence, and that he either had to testify or elicit evidence through cross-examination or the introduction of documentary exhibits to establish facts upon which the Hearing Officer could rely in making a decision. Unfortunately, the Parent rejected such recommendations, and the Hearing Officer has no factual basis upon which to support any award to the Parent for reimbursement of the costs of any services

the Parents may have provided to the Student, assuming a ruling favorable to the Parent was reached by the Hearing Officer.

Also instructive in evaluating the impact on the Student of the 122-day delay in renewing the IEP is the case of Doug C. v. Hawaii Department of Education, 720 F.3d 1038, 1043-1044 (9th Cir. 2013). This case is similar to the subject case as it also involved significant conflict between the parties which lead to delays in the scheduling of an IEP team meeting. In Doug C. the hearing officer and lower court found that the Department of Education did not deny the student a FAPE by holding an IEP without the parent's participation. The 9th Circuit Court reversed, concluding the Department violated the parent's rights to participate in the IEP process, especially given the parent in that case did not refuse to participate, but rather attempted to reschedule the IEP meeting several times due to his unavailability, and then due to illness. The circumstances in that case were shocking in that at the IEP meeting held without the parent's participation, the IEP team changed the 18-year-old student's placement from a private school he had attended since 5th grade at the Department of Education's expense, to a public school. At a subsequent meeting to review the IEP, the parent rejected the IEP on the grounds that he was excluded from the development process, and no changes were made to the IEP in order to attempt to reach an agreement with the Parent. While the due process and district court decisions rested on a determination that the parent was afforded an opportunity to participate in the IEP meeting. The 9th Circuit disagreed on the key issue of holding an IEP meeting without parental participation, and stated that an IEP meeting may only be conducted without a parent if

the agency is unable to convince the parents to attend, which was not the case in the Doug C. matter.

More critical to a determination of the issues in the subject case is the excuse by the Department in Doug C. that they could not reschedule the IEP meeting because of the impending annual IEP deadline. The 9th Circuit rejected the Department's argument that if the annual deadline expired without a new IEP, the services provided to the student would lapse. The Court ruled that when confronted with competing procedural requirements of the annual review deadline and the need for parental participation in the IEP process, the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA, and is least likely to result in the denial of a FAPE. The Court specifically found that "[i]n reviewing an agency's action in such a scenario, we will allow the agency reasonable latitude in making that determination." *Id*. See also A.M. Monrovia, 627 F.3d 773, 779 (9th Cir. 2010) where the 9th Circuit ruled that delays in meeting IEP deadlines do not deny a student FAPE where they do not deprive a student of any educational benefit.

The evidence produced at the subject due process hearing established that the District was aware of the November, 2018 renewal date for the IEP but, as the speech pathologist and TOR testified, believed their "hands were tied" in connection with scheduling a IEP team meeting due to the Parent's desire not to participate in such a meeting during the pendency of the litigation of a due process complaint. The witnesses testified they were aware of a letter sent to the District by the Parent (see Exhibit D-18) wherein the Parent withdrew authorization for any testing of the Student as would be required to develop an IEP.

The evidence produced at hearing indicated that the Parent did not initiate any request for scheduling of the IEP following his receipt of the IEE report, and prior to filing of the second due process demand. Rather, the evidence was that the District initiated communication with the Parent following the Parent's withdrawal of the second due process demand, and persisted in efforts to schedule the IEP team meeting and with other communication to facilitate the development of the mutually satisfactory May 17, 2019 IEP. Specifically, the TOR testified that following the Parent's withdrawal of the second due process complaint, he contacted the Parent by email regarding scheduling of an IEP meeting, and ultimately the Parent agreed to the scheduling of an IEP team meeting which resulted in an IEP dated May 17, 2019.

Witness testimony was uniform at the hearing, that other than one isolated low math assessment, and indications by the end of the second grade school year that the Student was at risk for not achieving the reading standards of Read by 3, which measures reading achievement by the end of third grade, the Student was performing at average or above-average level for second grade students. The Student was clearly receiving a substantial educational benefit from the special education services provided, especially in the areas of audiology and speech pathology. The Student's advancements in these areas was remarkable given the testimony that she was late to be identified as suffering from hearing impairment, and to be provided with hearing aids. The IDEA does not promise the best or most optimal educational outcome; however, for a child fully integrated into the regular classroom, as is the subject Student, the services provided to the student must be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Endrew F. v. Douglas County School District RE-1, 137 S.Ct. 988 (2017). The Hearing Officer concludes that the services

provided to the Student during the 122- day period in question met the required beneficial standard, were tailored to the Student's needs, and that the Student was not deprived of a FAPE by the District's delay in revising the IEP.

The timeline of the filing of the due process complaints and an examination of the school year calendar, (see Exhibit D-1), reveals that there were few school days wherein the parties were not involved in litigating one of the three due process complaints. During the litigation of the three complaint, it appears the Parent became more focused on his perception of continuing violations and slights he believes he suffered at the hands of various individuals involved in the due process proceedings, as opposed to the significant educational benefits being provided to the Student by the District before, during and following the Parent's filing of the three due process complaints. It is also noted that the Student's mother expressed no concerns regarding the Student's academic progress or as to any behavioral issues, as documented by her exchange of numerous texts with the Student's general education teacher. (See Exhibit D-19)

The Parent overemphasized two isolated negative reports regarding the Student's academic performance, and disregarded the other substantial documentation that the Student is doing well academically. In the most startling example, the Parent disparaged the general education teacher for referring the Student for evaluation for the Gifted and Talented Education Program, arguing that his daughter was not qualified as she was "not a self-starter" and discounting the teacher's praise for the Student as "a creative thinker" who "thinks outside the box." See testimony of general education teacher and Exhibit D-13. The Parent also implied at the hearing that the Student's good grades were altered and do not reflect the Student's actual lack of ability, and that copies of the

Student's school work provided by the District to support the Student's grades were not hers as they were not signed by the Student. (See testimony by TOR.)

Even if parents prefer another program, and even if the parents' program would likely result in a greater educational benefit, if a District has offered services which address a student's unique needs and which provided an educational benefit, then the district has provided a FAPE. See Gregory K. V. Longview Sch. Dist., 8112 F.2d 1307, 1314 (9th Cir. 1987) and L.J. by and through Hudson v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1003 (9th Cir. 2017.)

The District sustained its burden of production and proof and established through credible evidence that their failure to prepare a new IEP for 122 days following the issuance of the IEE report did not constitute a substantive violation, and did not deprive the Student of a FAPE, as the Student continued to receive significant educational benefit through the District's ongoing provision of special education services tailored to the Student's unique needs and circumstances, especially in the areas of audiology and speech pathology, and the Student continued to perform at or above other second grade students while the District worked cooperatively with the Parent to prepare a new IEP. While the situation was not optimal, ultimately the District deserves praise for its efforts to continue communication with the Parent to reduce the tension between the parties, and thereby created an opportunity to work cooperatively with the Parent to successfully develop a mutually satisfactory IEP.

D. There was no evidence offered at the hearing to support an award of any remedy to the Parent, assuming the Parent had prevailed in establishing a compensable violation on the part of the District.

While the Parent stated in his closing argument that he provided educational services to the Student outside of school due to the failure of the District to update the Student's IEP until May 17, 2019, he failed to produce any evidence, either by documentary production, his own testimony, or cross examination to prove that any such services were required or provided, or the cost of such services. It should be noted that the Parent rejected numerous suggestions from the Hearing Officer that he testify, or as to additional areas for cross examination which would have been helpful to the Hearing Officer in reaching a determination as to the nature and cost of such alleged outside services, but the Parent failed to offer any evidence documenting any services provided to the Student by the Parent. Therefore, there was no evidence to support an award to the Parent, even in the event the Hearing Officer had found a violation on the part of the District entitling the Parent to a remedy.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby decided that the District had no duty to obtain the Parent's written consent for the evaluator's release the IEE report to the District prior to releasing the report to the Parent, nor did the District's failure to prepare a new IEP for 122 days, the time which elapsed between the January 15, 2019 date of the IEE report, and the May 17, 2019 date of the Student's current IEP, constitute a substantive violation or the deprivation of a FAPE to the Student, nor was the Parent impeded in participating in the IEP process, and the Parent's complaint is found to be without merit. The Student's assessments, progress reports and grades document that the student continued to make progress and received a significant educational benefit from the special education services provided by the District, and that she was not denied a FAPE, nor was the Parent impeded in

participating in the IEP process, by the delay in the creation of a new IEP until May 17, 2019.

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 of Education from a list of State Review Officers maintained by the Department of Education shall impartial review of the hearing pursuant to NAC 388.315.

Dated: September 30, 2019

Elizabeth S. Ashley
Impartial Hearing Officer
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