

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

STATE OF NEVADA

In the Matter of

STUDENT¹, by and through
Parent,

Petitioners,

v.

SCHOOL DISTRICT,

Respondent.

DECISION OF THE HEARING
OFFICER

Date: October 29, 2019

Representatives:

Petitioners: Marianne Lanuti, Esq.

Respondents: Daniel Ebihara,
Esq.

Hearing Officer: Jamie Resch

Introduction

Through counsel Marianne Lanuti, Esq., a due process complaint was filed by the parent on July 10, 2019. The District was represented throughout by Daniel Ebihara, Esq. A preliminary order documenting the appointment of the Hearing Officer was issued on July 23, 2019. On August 5, 2019, the District

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

responded to the due process complaint. Resolution efforts were not successful during the thirty-day resolution period. Several status and pre-hearing conferences were held, and a final prehearing report and order was issued on October 2, 2019. The due process hearing took place on October 7 through 11, 2019. At the hearing, Hearing Officer Exhibits 1 through 15 were admitted without objection. Joint exhibits 1 through 23 were admitted without objection. Petitioner's Exhibits 1 through 6 were admitted without objection, except that as to Petitioner's Exhibit 6, the District's objection was overruled. District exhibits D1 through D3 were admitted without objection. By way of an order granting continuance requested by both parties for good cause, the decision in this matter is due November 1, 2019.

Preliminary Matters

The pre-hearing conference in this matter was held on September 9, 2019. Highlights of that hearing are that the Petitioners elected to have an open hearing. As a result, the hearing process was open with one exception, and during open sessions the hearing was attended by observers and members of the press.

The exception noted above is that the hearing was closed while a video of an incident on a school bus was played. At the prehearing conference, the District indicated a hope that other children depicted on the video could be redacted. However, during the due process hearing, the District stated it was not able to redact the video. As a result, the hearing was closed while the unredacted video was played. The District was ordered to continue redaction efforts and to bring copies of the video for distribution to Petitioners and the Hearing Officer the next day of the hearing. When the District provided the copies of the video, it indicated it had successfully redacted it after all. As a result, the video played during the due process hearing was unredacted, and the video admitted into the record was redacted and marked Joint Exhibit 23. In all other respects the video played during the hearing and admitted into evidence are identical.

The Hearing Officer has reviewed the redacted and unredacted videos and the decision below takes both into account. Ultimately, the video provided to Petitioners was redacted and therefore implicated no privacy concerns regarding other students.

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) Whether the child was substantively denied a free appropriate public education during the 2017-2018 and/or 2018-2019 school years as evidenced by allegedly inadequate goals and/or progress towards those goals in behavioral, social, or academic areas; (2) Whether the child was substantively denied a free appropriate public education during the 2017-2018 and/or 2018-2019 school years by alleged incident(s) concerning the child's safety that occurred during transportation; (3) Whether there was a procedural violation of the IDEA that resulted in a substantive violation of the child's right to a free appropriate public education because the parent was significantly impeded from participating in the IEP process due to a lack of information about incidents affecting the child's behavior that occurred during school hours, and/or the IEP team failed to act on information it received regarding those incidents; (4) Whether Angel Sense is required as a supplemental aid or service or assistive technology in order for the child to receive a free appropriate public education.

FINDINGS OF FACT

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

1. The student is nine years old and just started fourth grade in August, 2019. The student is eligible under the IDEA as a child with a disability under the category of autism spectrum disorder, and in that regard, attends "Elementary School 3" and is placed in the self-contained classroom with Student's current special education teacher "Current SET." (Testimony of Current SET).

2. A brief history of the schools within the district that Student has attended will be helpful in understanding Student's progression. The February 2016 IEP explains that Student received direct services prior to enrolling in kindergarten in January of 2016. Petitioner's Exhibit P3, p. 12. The annual IEP update was held in February, 2017. Exhibit J6. At that time, the student attended "Elementary School 1." An updated IEP was completed in May, 2017. Exhibit J7. At that time, the student attended "Elementary School 2." During attendance at both Elementary School 1 and Elementary School 2, the student was in First Grade. Student remained at Elementary School 2 for second grade. The next updated IEP was in January, 2018. Exhibit J8. Another updated IEP was completed in April, 2018. Exhibit J9.

3. Student attended third grade at "Elementary School 3" during the 2018-2019 school year. The next IEP meeting was February, 2019. Exhibit J10. That same school year, multiple additional IEP meetings were held including: March 2019 (Exhibit J11), April 2019 (Exhibit J12), and May 2019 (Exhibit J13), such that IEP team meetings were held every month February through May, 2019. The operative current IEP is the May 2019 IEP, and the next annual review is not scheduled until March 2020. Exhibit J13, p. 5.

4. A multidisciplinary team (MDT) assessment report was completed on August 30, 2013. See Pet. Exhibit 3, p. P13. For reasons that largely went unexplained during the hearing, the next multidisciplinary assessment was not completed until April 12, 2018. Exhibit J5, p. 6. At best, "Former SET" (Special Education Teacher) who was Student's special education teacher during the 2017-2018 school year explained that a "date" in the "confidential folder" did not match up which therefore resulted in a delay in requesting an update to the 2013 MDT report. (Testimony of Former SET). Relatedly, and for reasons that also largely went unexplained during the due process hearing, Student has a Behavioral Intervention Plan but the last time it was updated was November, 2017. Exhibit J14. No cogent

explanation for the lack of updates to the Behavioral Intervention Plan was provided during the hearing.

5. The assessment contains several pieces of information relevant to the issues presented in this matter. See Exhibit J5. It was not disputed that Student is only identified as eligible for Special Education Services under the category of Autism Spectrum Disorder. The assessment states that information was considered from a variety of sources, including Student's parents, Former SET, a "School Psychologist," and a school nurse.

6. Student's performance levels, as noted in the assessment, are generally very low in all areas. Student primarily communicated during the assessment via a picture communication system. Exhibit J5, p. 8. This system was repeatedly referred to during the due process hearing as PECS, a Picture Exchange Communication System. Cognitive functioning was extremely low, "at a level equal to or better than <0.1%. of her same aged peers." Exhibit J5, p. 9. To provide a proper general context, it is noted here Student could: trace words or simple sentences but would skip letters, could count to 14 without assistance, could demonstrate some 1:1 correspondence, could use the PECS system to verbalize "I want" using a sentence strip, could line up and follow the class, but engaged in a

variety of self-stimulating and avoidance behaviors during nonpreferred tasks. Exhibit J5, pp. 10-12. This is a general overview which generally establishes that Student had severe deficits to deal with in all areas of functioning.

7. Special mention is made of Student's toileting skills, because after reviewing the evidence including multiple IEPs and dozens of hours of testimony, it is apparent Student has made virtually no progress under the Student's generalized toileting IEP goal towards independently using the bathroom during the time period under review. By way of simple example, reference to the 2016 IEP (outside the period of review here but still a useful benchmark of progress during the review period), it is noted that Student "is in pull ups and is not yet able to indicate the need to use the restroom or follow the routine when going into the restroom." Petitioner's Exhibit 3, p. P14.

8. The assessment suggests there was improvement in toileting skills, but a careful review reveals any improvement had nothing to do with the actual act of using a toilet for its intended purpose. By way of example, the assessment states Student "is ready to follow a toileting routine, but requires a gradual release of adult supervision during the undressing stage." Exhibit J5, p. 13. It further notes behavior impacts toilet use, in that Student will play with "water" if unsupervised in

the bathroom. Further, it states Student wears Pull-Ups, but did not soil her Pull-Up "after 11/2017." Exhibit J5, p. 13. It further notes Student is able to void in a toilet. Exhibit J5, p. 13. Language identical to that found in the assessment is also found in the present levels of performance in the February 2019 IEP. Exhibit J10, p. 23. This is to say, the February 2019 "present levels" are not actually present at all, but merely a recitation of the assessment performed the year before.

9. Much more compelling on the issue of toileting are the updated present levels of performance contained in the March 2019 IEP. It makes sense to simply quote the present level here as it is short and utterly at odds with the assessment: "[Student] is still unable to complete a toileting routine independently. She still struggles to remain on task and requires prompting. She knows the steps in toileting but needs assistance. She still struggles with unbuttoning her pants independently. She also needs assistance with pulling down her diaper/pull ups. She will sit on the toilet bowl for 10-15 seconds. She does not void in the toilet bowl. She is able to put a new pull up and put her pants on but will still need help in buttoning her pants." Exhibit J11, pp. 12-13. This present level report is repeated in the most recent IEP. Exhibit J13, p. 16.

10. Toileting was thoroughly explored during the due process hearing. Former SET testified that, during the 2017-2018 school year, Student had a toileting goal but had a lot of accidents, that student would "hold it" all day then have a giant accident later in the day, and that in Former SET's opinion there were medical reasons for these issues. (Testimony of Former SET). Former SET also testified that Student did void in the toilet "sometimes" but that success for purposes of the toileting goal was measured not just on actually using the toilet, but also all of the tangential tasks that went with it, i.e. handwashing and getting dressed. (Testimony of Former SET). Although the "goal" during the 2017-2018 school year was 80% success in toileting, Former SET reviewed daily logs of bathroom use and was unable to point to even a single page where Student completed 80% of the entire toileting routine successfully. (Testimony of Former SET).

11. Current SET, Student's special education teacher this school year as well as during the 2018-2019 school year, explained that Student did not void in the toilet during any of Current SET's time with Student. (Testimony of Current SET). Current SET explained that, even this current school year, Student lags behind every other student in Current SET's special education classroom in the area of toileting skills. (Testimony of Current SET). Current SET testified that she believed no progress

would be made this year either unless a 1 to 1 aide was assigned to specifically work with Student on toileting skills. (Testimony of Current SET).

12. Progress reports are limited on this issue and do not appear to exist after the February 2019 IEP. The last two reports available are inconsistent. A report dated December 21, 2018 states that Student "is able to complete a toileting routine without the use of verbal and non verbal prompt." Exhibit J9, p. 43. Meanwhile a report dated March 15, 2019 states that Student "still needs prompting with completing a toileting routine," struggles to stay on task, but knows "the steps when given non verbal prompts." Exhibit J10, p. 40. Interestingly, both progress reports are marked "satisfactory."

13. The progress reports are not consistent with the testimony received during the due process hearing, which was that Student never initiated communication for the purpose of using the bathroom, that Student never completed a toileting routine on her own, and that in fact Student typically would stand up either during class or at home and would simply attempt to void in her pull up. (Testimony of Current SET, Testimony of Mother). The evidence instead strongly shows that Student is no closer at present to initiating communication to use the bathroom than Student was in 2016. Likewise, Student's only progress in toileting tasks is

related to tangential tasks such as hand washing or dressing – the actual act of using a toilet continues to elude Student.

14. A brief review of IEP goals related to toileting reveals that Student was to use a “variety of communicative means” to indicate wants and needs, including “bathroom,” by February, 2018. Exhibit J7, p. 20. The only progress report that addressed this goal is silent as to whether any specific progress was made towards communicating a desire to use the bathroom. Exhibit J7, p. 33.

15. In January, 2018, a measurable annual goal specifically related to toileting was developed. Exhibit J8, p. 24. The objectives were that Student would independently complete a toileting routine, to include actually using the toilet. A progress report from March, 2018, states that Student uses the bathroom and completes the routine “most days” without assistance. Exhibit J8, p. 35. This report is irreconcilable with the testimony of Former SET, who at best stated Student would actually void into the toilet only “sometimes.” (Testimony of Former SET). Further, the progress note is wholly belied by the available data, which reveals not one single instance of Student actually depositing anything into the toilet. See District Exhibit 3A, Bathroom Logs. Despite data for dozens of school days there is not one notation that Student ever actually utilized a toilet for any purpose other

than occasionally just sitting on it. Further, the logs reveal that in the vast majority of logged instances, no one asked the student about wanting to use the bathroom; student was instead simply taken to the bathroom. District Exhibit 3A. In short, the so-called progress report indicating some level of mastery in requesting and using the bathroom is incredible in light of the evidence adduced at the due process hearing.

16. The current toileting goal in the May 2019 IEP is even more generalized, in that it requires Student to “stay on task while completing a toileting routine.” Exhibit J13, p. 22. While this addresses various behaviors, discussed below, which may interfere with learning, it completely neglects to address the two glaring areas of need for the student: communication of a need to use the bathroom and actually utilizing the toilet for bathroom purposes.

17. Turning to the issue of behavior, the parties do not dispute that various behaviors affected Student’s education. The cause of those behaviors, and what to do about them, are extremely complicated and not something the parties agreed upon. To address the basic point first, it is noted Student had three Behavior Intervention Plans (BIP) and the most recent of these was dated November 27, 2017. Exhibit J14, p. 5. According to Current SET, the plan was

required per District policies to be updated "quarterly." (Testimony of Current SET). However, according to the student services director, the BIP was supposed to be reviewed however often it said to do it in the actual plan itself. (Testimony of SSD). For point of reference, the plan says that it should be reviewed "quarterly." Exhibit J14, p. 6.

18. The plan was not revisited quarterly. (Testimony of Current SET). It is not clear that the BIP was ever discussed during any IEP team meeting, and at least one witness testified it was not. (Testimony of Current SET). There is a single note in the confidential file that Current SET called Mother on the phone and they discussed the BIP on November 8, 2018, at which time they apparently concluded the current plan "still works for current behavior." Exhibit J4, p. 6.

19. Testimony during the hearing established that the current behavior plan is not sufficient to address Student's behavior. This is not merely a function of the plan failing to be updated, although that certainly is a component. One witness, an autism itinerant with the LINKS program (which itself provides intervention with a wide variety of special education issues directly to staff) explained she would be concerned if the BIP was merely the same, year to year. (Testimony of Autism Itinerant). Testimony established that Student's reinforcers (positive behavioral

supports) changed as Student aged. (Testimony of Mother). Reinforcements were described by Current SET as very important, because they drive any student's positive behavior. (Testimony of Current SET).

20. One of the main problems here concerns the heavy and continued reliance on non-nutritious foods as reinforcers. While a certain amount of freedom was surely permissible, the only named food reinforcers in the BIP are "crackers, goldfish [also believed to be crackers], or cookies." Exhibit J14, p. 6. Food can be a strong reinforcer for autistic students, and it is fine to use food as an initial reinforcer to kick-start positive behavior. (Testimony of Autism Itinerant). However, "health reasons," among other reasons, would make it desirable to quickly find replacement reinforcers. (Testimony of Autism Itinerant).

21. The fact the BIP has not been updated since November, 2017, and the fact the IEP team did not discuss the effect of behavior on education and/or the need to review or update the BIP during team meetings is problematic for the simple reason that Student's behavior did not remain static over the time period in question. The February 2017 IEP noted that behaviors do impede learning, and accordingly the IEP incorporated the BIP. J6, pp. 13, 18. The present levels in that same IEP noted that Student's behavior featured difficulty maintaining attention

and the need for much prompting when transitioning between tasks. Exhibit J6, p. 9.

22. The next annual IEP was in January 2018. It is noted here, and will be addressed below in greater detail, that this annual IEP continued to rely on the out-of-date 2013 assessment without anyone apparently bringing that fact up during the IEP team meeting. The continued reliance on stale data is a continuing problem throughout the time period under review in this proceeding. Regardless, present levels from this IEP identify a series of new and less-than-desirable behaviors including: stacking chairs, self-stimulation including vocalization, finger clenching, playing with hair, and verbal or physical tantrums. J8, p. 15. Specific mention was made that denial of preferred "food or beverage" was highly correlated with increased behavioral problems. The present level went to address that these behaviors could be proactively prevented "by picture and modeling prompts." Exhibit J8, p. 15. An updated present level in the April 2018 IEP notes that yet another new behavior emerged in that Student started grabbing staff. Exhibit J9, p. 22.

23. The 2018-2019 school year brought a series of new behavioral developments that were never addressed by any IEP team and obviously were not and could not

have been addressed in a BIP last updated in 2017. Student receives curb-to-curb transportation as a related service. Exhibit J9, p. 33. First, evidence established including parent/teacher electronic communications over a messaging program called "Class Dojo" that 1) on September 24, 2018, Student's bus was over an hour late in arriving home after the school day and, 2) when it did arrive home, Student was wearing different pants than what she wore to school that day. Exhibit J22, pp. 4-5. Mother frantically communicated with Current SET over Class Dojo but did not receive a response until the next day. Exhibit J22, p. 6. The response did not address the lateness of the bus, but did explain that the change of pants was due to Student spilling water on herself at school. Exhibit J22, p. 6. The due process hearing testimony revealed that the change of pants was into a secondary pair of pants that Student possessed for precisely this purpose. (Testimony of Mother).

24. While the series of events described above may have constituted poor customer service, and were undoubtedly upsetting to Mother, testimony established that teachers have contract hours and are not available on a 24-7 basis. (Testimony of Principal). Further, it is the effect (if any) these events had on Student's ability to receive a free appropriate public education that is at issue here; not the effect the events had on Student's parents.

25. That said, the effect on Student's behavior from this event was not zero, as evidenced by an increase in documented behavioral problems around this same time frame. Testimony established at least one other incident of the school bus bringing Student home late in September 2018. (Testimony of Mother). Following this, Mother recounted that from September 2018 forward Student was less social, did not "skip or dance" up to people anymore, and would not let parents or grandparents change her pull up unless she was able to maintain eye contact the entire time. (Testimony of Mother). Mother suspected, and not without at least some reason, that Student had been abused following this September incident. Although Mother stated she contacted police about the incident, Student was not examined medically for abuse at that time. (Testimony of Mother).

26. Additional testimony established Student had continued behavioral problems at home following the September bus incident. In particular, by November 2018, Student started to have difficulty sleeping to include nightmares and yelling "no" during her sleep. (Testimony of Grandma 1), (Testimony of Mother). Current SET was asked if she noticed anything around this November time period, and she stated that in November an "aggressive" child had joined her

special education classroom but only for a period of around two weeks before leaving the class. (Testimony of Father).

27. Between September and November, behavioral problems were also noted at school. Current SET testified at length to increased crying and refusing to stay seated "after Thanksgiving," leading to a request for assistance by the teacher to LINKS that was made on November 28, 2018. (Testimony of Current SET). However, critical analysis of daily logs revealed the only school day after Thanksgiving break was November 26 and 27, and on the 27th no particularly poor behavior was noted while on the 26th there was some crying. Exhibit J21, pp. 18-19. In fact, the behavior logs indicate that trouble staying seated started as early as September 12, 2018. Exhibit J21, p. 40. Additional logs noted Student would cry or leave her seat several times from September 12 through November 26. As a result, little weight is given to the allegation that these behaviors were something "new" after Thanksgiving, as they are documented to have started as early as September 2018. (Testimony of Current SET).

28. The first IEP to address these "new" behaviors was the one dated March, 2019. See Exhibit J11, p. 12a. There, the present level noted "increased task avoidance behavior after returning from Thanksgiving break," which as discussed

above is an inaccurate statement of when those behaviors began. Additional behaviors noted are that Student stands up to defecate during class, hums, throws tantrums, and tried to grab or bite staff. Exhibit J11, p. 12a. Notwithstanding this documentation, the behavior plan was not updated at this time, or any time thereafter, to address these new behaviors.

29. However, behaviors such as leaving the seat were the reason for the LINKS referral, resulting in observation and recommendations by LINKS. (Testimony of Autism Itinerant). The recommendations, provided to parents and teachers but not actually ever incorporated into a revised behavior plan, were to position Student closer to the instructor and to increase expected behavior with further use of a token board. (Testimony of Autism Itinerant). To place this review in context, the first LINKS observation of Student occurred January 9, 2019, and the last was May 14, 2019. The request for assistance was closed at that time since the school year was almost over. (Testimony of Autism Itinerant).

30. There is one more behavioral timeframe to discuss and it is of course the events of May 2, 2019. The District provided what it contended was a four-camera video from Student's morning bus ride on that date. See Exhibit J23. To note here, the video viewed during the hearing was "unredacted" in that it showed (in

surprisingly high quality) the faces of other students on the bus. The admitted copy of the video is redacted. Both videos show the same thing: an incident where another student approaches Student while she sits in her bus seat, and that student then waves a sippy cup towards Student. The bus driver is heard to issue commands to the student with the sippy cup the entire time, and eventually physically blocks (without ever really grabbing) the sippy cup-waving student. The student with the sippy cup then exits the bus, while the bus driver appears to console Student for a moment before also exiting. Mother is then heard off camera, aggressively screaming for Student to exit the bus.

31. The parties vigorously dispute whether Student was struck with the sippy cup during this incident. District witnesses generally said no. (Testimony of Transportation Director). The parents said yes. (Testimony of Father, Mother). Regrettably, it simply is not clear (despite the high quality of the video) whether Student was struck or not. Even if Student was, there has never been any allegation that the actual incident resulted in physical injury. The alleged trauma here has always been the nature of the incident itself and not actual physical injury. The transportation director who testified did plainly state that incident, physical contact

or not, could constitute bullying under District guidelines. (Testimony of Transportation Director).

32. The parties also vigorously dispute that the video offered into evidence even depicts the incident at all. Parents testified that they recalled some other student altogether assailing Student. These allegations simply are not credible on this record, despite Petitioners' testimony. (Testimony of Mother, Father, Law Clerk). To note, Petitioners offered a law clerk who was present when parents were first shown the video, presumably as a more independent source of testimony that the video entered into evidence was not the same. District presented a witness, director of safety and compliance in transportation, who testified that the video (Exhibit J23) fairly and accurately depicts the events of May 2, 2019. (Testimony of Safety Director). Relatedly, the only reason Mother knew about the May 2, 2019 incident at all was that she had equipped Student that day with "Angel Sense" which is a two-way listening and GPS electronic device. (Testimony of Mother). Mother was quite clear that May 2, 2019 was the first time she used the device, and there was no other use of the device noted. (Testimony of Mother). As a result, it cannot be that video of the wrong date was provided because the video clearly showed Mother responding to the bus, having heard an incident using Angel

Sense. Claims that the video was altered somehow are likewise incredible. It is well established that the video entered as Exhibit J23 fairly and accurately depicts the events of May 2, 2019, and those events are the only events anyone testified to that involved Angel Sense. This is known because the transportation investigator who actually downloaded the video from the memory card installed in the bus testified that the video was unaltered. (Testimony of Investigator).

33. On another brief note, multiple witnesses were asked about mandatory reporting requirements. (Testimony of Current SET, Testimony of Principal). It is not particularly germane to the material issues of this hearing, but it would not appear there was anything to mandatorily report with regard to either the September or May bus incident. For both cases, Mother called the police and informed school officials that she had done so. (Testimony of Mother). Further, the "harm" was very limited in both instances, and was not caused by someone "responsible for the welfare of the child." NRS 432B.020. The testimony established, as did the video, that the driver of the bus in the May incident did nothing wrong. (Testimony of Safety Director, Testimony of Principal, Exhibit J23).

34. Although the May incident itself did not appear to result in physical harm, there is evidence of record that it either led to, or aggravated, Student's existing

behavioral problems. Student continued to have nightmares after the incident, and started to see a psychiatrist. Medical records show that Student was diagnosed on May 7, 2019 with anxiety and placed on prescription medication for it. Petitioner Exhibit, P38. The treatments apparently worked: Records from June 21, 2019 indicate Student was sleeping better and calmer. Petitioner's Exhibit, P40. These records indicate they were based on bullying as reported by the Mother. Petitioner's Exhibit, P42. Student was also examined by a medical doctor for possible sexual abuse on May 3, 2019. The exam could not be completed due to Student's behavior, but a report stated that there was "no need" for evidence collection due to "no evidence" of sexual assault. Petitioner's Exhibit, P47.

35. A particularly troubling fact here is that an IEP team meeting was held on May 10, 2019, and for reasons that completely escape explanation, there is no record that the events of May 2, 2019 were actually discussed during the meeting. In fact, Current SET testified that Mother did not even bring the incident to the team's attention. Note is made here, Current SET appeared confused or evasive during this testimony and it is found to be incredible. First off, both the principal and the special education teacher discussed the incident with Mother the day it happened. (Testimony of Current SET, Testimony of Principal, Testimony of

Mother). Second, the record reflects Mother wrote a letter detailing the incident which Principal received on May 8 or 9, 2019. Petitioner's Exhibit, P34. Finally, having observed Mother at the due process hearing for some 40+ hours, it seems highly unlikely that Mother would have wanted to talk about anything **other than** this incident at the May IEP meeting. Mother testified she did bring the incident up during the meeting, and really, that is the only conclusion that makes sense. (Testimony of Mother). Parent concerns from the meeting state that Mother was concerned with Student's "attention and gastrointestinal problems. She wants to bring her to therapy again." Exhibit J13, p. 17. Between all of the above evidence, and the parent statement that the child might require therapy, the IEP team had everything it needed to know to facilitate a discussion about the May bus incident and/or Student's ongoing behavioral issues.

36. The failings of the IEP team with respect to toileting and behavior are documented above. The source of those failures requires reconstruction of a series of events all the way back to the MDT assessment performed in 2013. The five-year delay in performing an updated assessment looms large here. But there is even more at work.

37. A critical mistake that underpins everything that followed was false statement by a school nurse in the 2018 MDT report that "Health does not appear to affect education." Exhibit J5, p. 8. This crucial error in the assessment caused, as discussed below, the IEP team to effectively ignore Student's health and its possible effect on education. That a blind eye was turned to Student's health is beyond reasonable dispute, as several district witnesses including the District's chief nurse testified that this statement was in error. (Testimony of Current SET, Testimony of Chief Nurse). In fact the chief nurse, upon reviewing the joint exhibits, expressly concluded that health does affect Student's education. (Testimony of Chief Nurse).

38. Having definitively established that health did impact Student's ability to be educated, the question of "how" can also easily be answered. Student has a documented history of gastrointestinal problems to include constipation. (Testimony of Current SET, Testimony of Mother). Such problems are, unfortunately more common in autistic children, possibly due to various aversions to certain foods. (Testimony of Chief Nurse). Non-nutritious foods, such as goldfish, crackers and cookies, could contribute to constipation. (Testimony of Chief Nurse). The District was well aware, from Student's medical records, that she

suffered from constipation. District Exhibit D2A, see p. 1. Constipation is a problem because, among other things, it can cause painful bowel movements which can lead to an aversion to wanting to actually have bowel movements. (Testimony of Chief Nurse).

39. So-called "stomach problems" were an ongoing challenge during the 2017-2018 school year. (Testimony of Former SET). As previously discussed, during the 2018-2019 school year, Student would stand and attempt to defecate during class. (Testimony of Current SET). The current teacher noted that Student had a constipation problem, and that it seemed like it was worse towards the end of the week, possibly because Student would receive enemas on the weekend. (Testimony of Current SET).

40. The most glaring effect health had on education was the student's attendance history, which reveals in excess of 60 absences each of the 2017-2018 and 2018-2019 school years. See generally Exhibit J3. Testimony was conflicting as to what degree absences affected Student during the 2017-2018 school year. Father testified that Student made reasonable progress in his view during the 2017-2018 school year. (Testimony of Father). Mother generally echoed this belief, although she also testified to a general lack of progress over the "last four years."

(Testimony of Mother). Meanwhile, the special education teacher for that year did testify that absences affected Student's socialization, and impeded Student's ability to retain information. Specifically, Student was slow to master Phase One of the PECS system during the school year. (Testimony of Former SET). The teacher further recalled that the IEP team did discuss attendance, but never considered incorporating attendance as a goal in the IEP. (Testimony of Former SET).

41. The testimony regarding the 2018-2019 school year was more critical of the effect absences had on Student's education. Although there were four IEP meetings during the 2018-2019 school year (Reference Exhibits J10-13), the topic of attendance never came up during any IEP meeting. (Testimony of Current SET). This was so even though the special education teacher testified that absences exceeding 10% of the school year were "a problem" and acknowledgement that Student crossed that threshold by December 2018, a/k/a prior to even the first of those four IEP team meetings. (Testimony of Current SET). Quite specifically, the teacher testified that absences affected Student's functional communication, and that teacher believed an inability to communicate was at the root of Student's behavioral problems previously discussed. (Testimony of Current SET).

42. As the school psychologist explained, Student had a significant attendance history, many of those absences were documented as medical in nature, and that if absences are due to medical reasons, the IEP team should discuss what additional services the Student might require to ensure an appropriate education remains delivered. (Testimony of School Psychologist). These services could, according to the witness, include supplemental home services. (Testimony of School Psychologist).

43. Already examined at length were toileting issues and behavior issues. The only other area that it appears there was a notable impact due to absences was regarding communication. The issue of communication with respect to this Student is complicated, and involves a secondary storyline regarding assistive technology.

44. Student could not communicate wants or needs at the start of the 2017-2018 school year and had limited verbal ability. (Testimony of Former SET). Student was started on PECS, which was effectively a picture book used by nonverbal students to communicate basic wants and needs. Student learned to use PECS, eventually was able to hand a picture of a desired item to a communication partner, sometimes even traveling a short distance to do so.

(Testimony of Former SET). As the year progressed, Student learned to select multiple common pictures, use a "I want" sentence strip, and occasionally even verbalize "I want." (Testimony of Former SET).

45. The most requested item by Student was a cookie. (Testimony of Former SET). However, as Student progressed into Phase Two of PECS, emphasis was placed on traveling to a communication partner, who might be some distance away. Logs were kept of Student's progress. These logs reveal #1, that Student in fact requested a cookie the vast majority of the time, but, #2 that the one logged time Student traveled further than nine feet to both the desired item and the communication partner was for an Ipad. See District Exhibit 3A, p. 2. Teacher explained that Student's use of an Ipad during the school year was not especially productive, but was instead merely as a positive reinforcer. (Testimony of Former SET).

46. The parents reported that Student's brother had an Ipad at home and that Student had some ability to use it. (Testimony of Former SET). No other child in the teacher's class used an Ipad for communication purposes, and the teacher firmly believed Student needed to master the PECS book system first before use of

an Ipad would be of any value for actual communication. (Testimony of Former SET).

47. Despite these beliefs, Student was evaluated to be issued an Ipad for communication. The IEP team, which necessarily included the parents, decided that Student would not benefit from an Ipad at that time. (Testimony of Former SET). This was so because #1 Student needed to master PECS Phase One and was still inconsistent in her use of pictures to communicate despite advancement to Phase Two, and #2 behavioral issues did not ensure Student would take proper care while using the Ipad. (Testimony of Former SET). Therefore no Ipad was issued during the 2017-2018 school year.

48. Student's use of PECS continued in the 2018-2019 school year, culminating in arrival at PECS Phase Four sometime during Spring. (Testimony of Current SET). As a result, an assistive technology assessment was performed again, this time concluding that Student used PECS including 10+ picture symbols, and demonstrated ability to use an Ipad to form a sentence request for highly reinforcing items. Exhibit J13, p. 17. Student was recommended for use of an Ipad at that time, and Student currently has the Ipad, although the exact date it was issued remains unclear. (Testimony of Current SET). The Ipad would include a

program called "PECS 4+" which is basically the same as the picture book system, although it is highly customizable depending on the particular student's wants and needs. (Testimony of Current SET). The teacher testified, credibly, that reaching PECS Phase Four was an important milestone before an Ipad would add anything to the educational process. (Testimony of Current SET). The assistive technology (AT) witness said the exact same thing, and went on to note giving an Ipad before the student can handle it typically devolves into the student using it to play games or watch YouTube. (Testimony of AT). Student currently has the Ipad for communication during the 2019-2020 school year and is going well with it for communication. (Testimony of Current SET).

49. The facts laid out above establish, quite convincingly, that Student would not have particularly benefited from having an Ipad for communication purposes any sooner than when one was actually provided. To be sure, Student would have enjoyed having an Ipad as the item is documented as highly reinforcing for this student; potentially the most positive item that could be used for reinforcement. But the PECS book system and the PECS Ipad app performed the same exact function, and there was no meaningful difference between Student using one system or the other.

50. Although the Ipad itself does not appear to have affected Student's ability to make progress with communication, the aforementioned absences did. Testimony established that every student is different, but that a request beyond "I want" would typically require a student to reach PECS level five or six. (Testimony of AT). As mentioned, the special education teacher felt that an inability to communicate affected Student's behavior. (Testimony of Current SET). These factors are all interrelated and the IEP team erred by not considering the glaring series of events that led to these conclusions.

51. Despite the above, there was conflicting evidence on the topic of how deficient, if at all, Student's current communication deficits are. As parents explained, they noticed communication issues. It appears the actual speech therapists who worked with Student were either no longer with the District or otherwise unavailable. As a result, the director of speech language and audiology conducted a review of Student's records and testified about the reasonableness of Student's progress in the area of communication. (Testimony of Speech Director). This witness explained that in children with limited verbal capabilities, multimodal communication methods are taught to include PECS, dynamic displays and voice

output systems. (Testimony of Speech Director). Speech and language therapists support the special education teacher in implementing those concepts.

52. According to the director, Student made reasonable progress using the PECS system including sentence strips. (Testimony of Speech Director), See also Exhibit J10, p39. The director was adamant that Student's progress in communication was "more than reasonable," and that the witness considered the excessive absences in reaching that conclusion. (Testimony of Speech Director). The director explained this was so because there was "clear progress" in communication even after absences, and the director expressly stated she disagreed with any conclusion to the contrary that may have been provided by the child's special education teacher. (Testimony of Speech Director). It was forcefully pointed out that, in the May 2019 IEP, the total minutes of speech language services was reduced from 160 minutes per month to 120. (Testimony of Speech Director), Compare: Exhibit J10, p. 34 and Exhibit J13, p. 25.

53. On the flip side, Student's family testified about their observations of Student's communication. On a positive note, Student appears to be substantially more verbal as of the Summer of 2019 than at any time before, with an expanded vocabulary that is used to request wants and needs, although these are again

apparently limited to highly reinforcing items like food or bubbles. (Testimony of Grandmother 2). Student's family apparently does not utilize the PECS system with Student at home. (Testimony of Father, Mother). As an example, it was indicated that if Student was hungry, Student would typically help herself to the fridge rather than engage in the communication partner rubric under the PECS system. (Testimony of Grandmother 2). The mother testified the main thing she wanted addressed in the IEP was toilet skills. (Testimony of Mother). In that regard, the mother testified that, even now, Student still requires prompting to even try to use the toilet and has no demonstrated ability to actually use the toilet for its intended purpose. (Testimony of Mother).

54. The question of communication skills is probably the most difficult evidentiary issue presented in this hearing. Taking everything into account, the Student's progress was slightly less appropriate than it should have been and this manifests itself chiefly in the areas of progression through the PECS system and ability to communicate regarding toileting needs. To be sure, the Student has made progress in most areas of communication with the glaring exception of toileting. While Student can request, possibly even verbally, certain highly desired items, there remains an undue focus on food items. The Testimony of Speech

Director is compelling, but it also is not based on personal observations of the student such as was the testimony of Current SET.

55. Another consideration is that the Testimony of Speech Director, although having purportedly given consideration to Student's excessive absences, too broadly dispenses with the effect of those absences. That is, a reasonable approach might almost be to conclude there was a per se deprivation of educational benefit when a severely disabled student misses 1/3 of the school year two years in a row. The specific evidence here does show Student made progress in communication, and that the current IEP goals are appropriate in that Student continues to need, and continues to receive, speech services.

56. That said, the Testimony of Speech Director was overly rosy in light of Student's most recent present levels. Based on data purportedly gathered August 2018 to March 2019, it was noted that behaviors continued to impede learning including in the areas of functional communication, which again was the specific area of concern stated by the current special education teacher. See Exhibit J13, p. 14. The majority of the present level report by the speech therapist is dedicated not to Student's progress in communication, but to listing a long list of behaviors that interfere with learning. When the topic of actual progress is reached, it is

revealed that Student still cannot answer yes/no questions appropriately, but can verbalize one word wants and can use PECS pictures with 100% accuracy. Exhibit J13, p. 15. The level report concludes by noting Student “does not use words to functionally communicate.” Exhibit J13, p. 15.

57. Would Student use words or PECS to functionally communicate about needing to use the bathroom had the errors previously noted concerning health, absences and behavior been appropriately addressed? This appears likely, and therefore Student’s progress was less than appropriate in this regard. Specific support for this finding, aside from what has already been noted, is found in the speech therapy logs. Said logs document the substantial amount of speech services student missed due to absences. See for example, Exhibit J19, p. 12. Other pages show Student continued to be absent, and had significant behavior problems that rendered services of questionable efficacy when they were provided. See for example, Exhibit J19, p. 14.

58. Digging deeper into the logs, they appear to generally show that, despite absences, Student typically received the required amount or close to the required amount of speech services during the 2017-2018 school year. See generally J19, pp. 1-12. However, during the 2018-2019 school year, which was at a different

school and featured a different provider as documented in the logs, the results were not nearly as compelling. An analysis of the logs reveals Student received the following amounts of speech services which were supposed to be at a level of 160 minutes per month except starting March 20, 2019 when reduced to 120 minutes per month:

September	100 total minutes
October	100 total minutes
November	45 total minutes
December	0 total minutes
January	85 total minutes
February	80 total minutes
March	100 total minutes
April	0 total minutes
May	30 total minutes
Total	540 total minutes of a required 1,360

59. Thus, Student received less than half the speech services allotted for the 2018-2019 school year, and even when services were delivered, behaviors greatly and negatively affected the ability to learn from the services. The speech logs, in what is now a recurring theme, noted that an IEP meeting took place in March 2019 including with someone from "medical" present, and yet there remains no indication that any team member discussed the effect health may have had on the Student's absences, behavior, and thus education. Exhibit J19, p. 19.

60. So that further confusion by the IEP team can be avoided, the sequence of events will be spelled out for the parties: Student's education was during the two school years in question obviously affected by her health. This manifests in two ways, constipation and excessive absences. Presently, there is a newer additional health factor which is anxiety, which arose during the period of time under review. These factors lead to a lack of appropriate progress at school in certain areas to include toileting, behavior, and communication chiefly related to toileting. The fact Student has apparently mastered asking for crackers and cookies is a symptom of the problem here, not a hallmark of reasonable progress.

61. Having heard the 40+ hours of testimony from the due process hearing and after a thorough review of the exhibits, it appears Student made appropriate progress in all other academic and social areas of education. As discussed previously, Student's disabilities are significant and place Student below the 1% mark compared to same age peers. As a result, the decision was made early on, and correctly, to focus on functional skills as opposed to rote academics. (Testimony of Former SET).

62. To briefly walk through those other areas of progress: In the area of socialization, when Student first started the 2017-2018 school year the student

played alone and would not interact with others. (Testimony of Former SET). As the year progressed, Student would seek out peers perhaps not for play, but to at least be around. (Testimony of Former SET). By the time of the most recent IEP, Student had learned to identify and even say the name of peers and teachers in the classroom. Exhibit J13, p. 15. Student continues to prefer to play alone, but shows interest in peers and will engage with them with prompting. Exhibit J13, p. 15.

63. With respect to reading, when Student started the 2017-2018 school year, Student could not identify any letters. (Testimony of Former SET). As the year progressed, Student read picture books, learned to identify letters, and moved on to attempting to read/identify "CVC" words. (Testimony of Former SET). Turning again to the May 2019 IEP, present level reports indicate Student can identify with 100% success every uppercase and lowercase letter, and all consonant and vowel sounds. Exhibit J13, p. 10. Student is not able to read CVC words, but shows emerging skills identifying various letters when given word sounds. Exhibit J13, p. 11. Student is able to match pictures with 70% accuracy. Exhibit J13, p. 11.

64. As to writing skills, Student entered the 2017-2018 with virtually no ability to write cogently, and required significant hand-over-hand assistance to perform any writing. Exhibit J7, p. 12. As the school year progressed, Student learned to

write Student's name and to trace letters. (Testimony of Former SET). By the time of the most recent IEP, Student could write Student's first name correctly and last name with assistance, can copy some letters without assistance, and can trace CVC words. Exhibit J13, p. 11. Student also started to use a typewriter to build typing skills as an adjunct to written skills. (Testimony of OT 1, OT 2). Specifically, Student had the same occupational therapist in the 2018-2019 school year as well as during this current school year. The witness explained Student has made "great" progress learning to type, although behavior can lead to just pressing random keys. (Testimony of OT 2). Still, Student is also learning writing skills such as learning to write Student's phone number and address. (Testimony of OT 2). This continued functional approach is appropriate in light of Student's deficits.

65. Similarly, a functional focus was adopted for math skills due to Student's deficits. (Testimony of Former SET). At the start of the 2017-2018 school year, Student effectively had no math skills to speak of. Throughout the year, Student learned to count not just to ten but to fourteen. (Testimony of Former SET). Student also learned to exhibit one to one correspondence, such as with a specific example relayed where student crossed monkey bars at the playground and started verbally counting each bar as it was crossed. (Testimony of Former SET). As a result, even

more vigorous math goals were introduced, specifically related to money. As the year progressed, Student learned to identify coins and bills with increasing accuracy. (Testimony of Former SET). Turning to the May 2019 IEP, it is first noted that the present levels specifically state that Student's success in math has been negatively affected by long absences. Exhibit J13, p. 13. Why again the IEP team saw fit to notate but never discuss the effect of absences on education remains unclear despite significant attempts to develop that issue during the due process hearing. Regardless, the most recent present levels indicate success in identifying money, but an inability to identify numbers (possible a function of Student's deficits in reading). Exhibit J13, p. 13. Student did show an ability to count items, such as cookies, and can identify the largest cookie. Exhibit J13, pp. 12-13.

66. To reiterate, the focus on functional education was reasonable and really the only option in light of Student's significant academic deficits. Student is way below grade level in the basic areas of reading, writing and math. The record here does not establish, without resort to pure speculation, where Student would be academically had additional instruction time been provided in these areas. It is unlikely, based on the testimony and exhibits, that significant progress in any of these academic areas given the deficits involved and greater focus placed on

functional skills. Note is made here again that parents were more concerned with what they called regression during the 2018-2019 school year than a lack of opportunity provided during the 2017-2018 school year. (Testimony of Father, Testimony of Mother). However, the record here shows appropriate progress towards reasonable goals in academic areas in light of the student's abilities.

67. Progress towards more functional-based goals was also appropriate. Student attended adaptive physical education and instructors from both the 2017-2018 and 2018-2019 school year testified about Student's progress. (Testimony of PE 1, PE 2). By way of example, to start the 2017-2018 school year, Student could not even wait in line properly. (Testimony of PE 1). As the year progressed, Student learned to wait in line, take a turn doing a one step activity (i.e. kicking a ball) and then return to the end of the line. (Testimony of PE 1). In the 2018-2019 school year Student learned to find Student's spot to line up unprompted, take a turn, and learn new functional skills like throwing a ball. (Testimony of PE 2). Student still needed prompting with multiple step activities like kicking a ball and running to a base. (Testimony of PE 2). These facts document steady functional and social progress.

68. The last topic of inquiry during the hearing involved the use of Angel Sense. It was established that Angel Sense is a small electronic device that can be affixed to a human in a tamper-proof manner and which then allows someone else to remotely track the device's location via GPS, and initiate one way or two way communication with the device. (Testimony of Mother), See also Petitioner Exhibit P56. Other witnesses believed the device could activate itself in times of distress. (Testimony of Grandmother 2). However, it is conclusively established here the device is activated not in that manner, but by the remote operator choosing to activate it. (Testimony of Mother).

69. In that regard, parents armed student with Angel Sense on May 2, 2019, and this was the first time they sent Student to school with the device. Mother activated the device, apparently out of curiosity, at the exact correct moment to hear the audio of the previously described incident on the school bus. (Testimony of Mother). The Mother immediately responded to the location of the school bus, and confronted the driver that she had "Angel Sense" and knew someone was "hitting" on Student. (Testimony of Mother).

70. The testimony establishes that, in large part due to Student's deficits, Student has no ability to use the communication initiation features of Angel Sense

and likely would not even be aware of whether or how it worked to any degree. Student continues to ride the bus this school year without the Angel Sense device, chiefly because the principal of the school informed parents that the device is not allowed per District policies and therefore Student would not be allowed at school with it. (Testimony of Principal).

71. With respect to the GPS features of Angel Sense, the record here does not show that Student would particularly benefit from being tracked by GPS. There is no evidence Student ever even attempted to abscond from school, and the special education teacher explained that was not an issue for this Student. (Testimony of Current SET). The chief beneficiary of GPS tracking would be Mother, and the only time it would be of any benefit is in knowing where Student was while riding the school bus. To be sure, the lateness of school busses is a factor here and will be addressed, but there are other more reasonable means of accommodating that issue for the Student's benefit.

72. With respect to the listening-in features of Angel Sense, this again appears to be a feature that would solely benefit the parents. Student does not have the capability to initiate communication with the device in an emergency. Further, Student's ability to "take comfort" or similar peace of mind from the device simply

doesn't exist in a meaningful way. The Student will be no more at ease to receive educational benefits with the device than without. Student receives transportation services and implicit in that receipt is the notion that the services will be provided in a safe manner. The evidence reveals reasonable steps to do so, including cameras on the bus and a bus driver that acted reasonably to intervene in the May 2, 2019 incident at issue in this matter. As explained by one witness, it is a special education bus that Student rides and there are occasionally negative behaviors by the students on it. (Testimony of Safety Director). It is impracticable and unreasonable to require Angel Sense to be provided to the Student **as a function of receiving a free appropriate public education.**²

73. Moreover, Angel Sense would not generally assist with the harm at issue here unless the parents monitored every single minute of Student's bus rides, and were somehow able to intervene instantly no matter whether the bus was in motion or stopped. That is, Angel Sense, like a report from the bus driver or footage saved on a camera, doesn't stop any actual incident from occurring, but instead simply provides information that the incident occurred. The record does support that

² This decision does not reach the surely closer and more difficult question of whether Student would be entitled to or require Angel Sense as a reasonable accommodation under §504 or the ADA or any other similar provision.

transportation incidents have caused additional health problems in Student, leading to additional behavioral issues, which impede the ability to receive an education. However, these can be addressed in a more appropriate and simpler fashion than requiring Angel Sense to be provided to the Student, because timely and safe transportation on the bus is tangential to Student's receipt of education. No actual instruction occurs on the school bus. (Testimony of Transportation Director). Parent responding to a perceived incident while the bus was in motion would endanger Student, every other person on the bus, and the general public. Moreover, Parent's response to the May 2, 2019 incident involved loud shouting from outside the bus. While Parent surely was operating under the stress of the perceived situation, this reaction is not particularly countenanced by this decision and may very well have caused additional anxiety in either Student, or any of the other similarly disabled students still present at the time.

74. The District has argued Angel Sense cannot be provided as a remedy here at all as it violates state law by effectively eavesdropping on anyone around the wearer. Hearing Officer Exhibit 10. Parents respond that they seek to use Angel Sense at their own expense. Hearing Officer Exhibit 11, p. 5. But this argument further belies the claim that Angel Sense is something the student requires in order

to receive a free appropriate public education, because if that were true, the District would have to provide it. Parents also assert Angel Sense is required for them to receive information about incidents during transportation, but there has been no showing that Parents cannot receive that information adequately by communicating with school staff such as the special education teacher, principal, or even the bus driver personally. (Testimony of Principal). The video of the bus incident specifically showed the bus driver engaging in a lengthy discussion with what appeared to be a parent at a stop, so it is reasonable to presume if parents had questions about how Student was doing on the bus, they can ask the bus driver. Exhibit J23. Parents may not "trust" the District but that is a situation both parties need to work to overcome as Student is slated to be in school for potentially a decade or more from the time of this decision. Secret electronic monitoring of conversations is not the path to building trust here.

CONCLUSIONS OF LAW

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

Basic requirements of the IDEA:

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

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 be developed by a team of individuals, including the parent, 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 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." *Andrew F.*, 137 S.Ct. at 999. Notably, the IEP must be reasonable – there is no requirement that it provide what is best or ideal. *Id.* 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).

With those basics in mind, the issues raised at the due process hearing are examined below.

Angel Sense is not required in order for the student to receive a free appropriate public education and using its communication features likely violates Nevada law, but Student is entitled to a remedy to address health effects related to transportation.

One issue raised in this proceeding asks whether Angel Sense is required in order for the student to receive a free appropriate public education. As noted above, there is no evidence any of the features of Angel Sense are known to the Student, so if the issue were narrowly construed, the answer simply has to be “no.” However, the issue can reasonably read to be broader, as the hearing focused on the safety of transportation provided by the District, and the Student expressly receives curb to curb transportation as a related service. Exhibit J13, p. 25. Further, a second issue expressly asked if there was a substantive denial of a free appropriate public education based on safety related transportation incidents. A third issue asked even more broadly if a procedural violation occurred based on a lack of information provided to the parents about these or other behavioral incidents. See generally Hearing Officer Exhibit 8, p. 1. These issues are difficult to unpack all at the same time, so each is broken down individually.

On the question of Angel Sense as a remedy arising broadly from any alleged substantive or procedural violation, the evidence firmly supports a conclusion that

Angel Sense is not a required service under the IDEA. Related services are defined broadly under the IDEA. See 34 C.F.R. §300.34. While there is a long list of examples provided in the regulation, it also includes “other supportive services.”

That said, a related service must also be “required to assist a child with a disability to benefit from special education...” 34 C.F.R. §300.34(a). Angel Sense cannot be classified as “required” here because it provides no actual service that Student would be able to perceive. It is acknowledged Angel Sense apparently includes the ability for a parent, listening in, to speak to the wearer of the device. But for Student, it is hard to see how this would provide a meaningful benefit and might more likely be confusing if, in a stressful situation, a parent’s voice was heard but no parent was nearby for the student to identify. Additionally, as previously discussed, the device does nothing to prevent the conditions that arguably led to Student developing anxiety. Further, the results of Angel Sense, should the parent listen in, are open to misinterpretation as the May 2, 2019 incident demonstrates, where Mother incorrectly accused the bus driver of having done something wrong.

These points are illustrated by the lone case cited by the parties which involved IDEA claims and a proposed recording device to be used on a child with autism. *Pollack v. Reg’l Sch. Unit 75*, 886 F.3d 75 (1st Cir. 2018). It should be noted,

the case chiefly dealt with whether the device was available as an accommodation under the Americans with Disabilities Act ("ADA"), a question that has already been identified as beyond the scope of the instant proceedings. Still, in *Pollack*, the court noted the recording device was not required under the IDEA because the IDEA hearing officer concluded it would provide "no demonstrable benefit" to the student, who the parties agreed had received a free appropriate public education. *Id.* at 82-83. It is recognized there is no such agreement here. But some of the same factors apply to this case, such as that there are at most in this case and *Pollack* a "handful" of incidents at issue and the students both made at least some progress in most areas. *Id.* at 82. The hearing office noted a concern, as has been noted here, that the device included some potential for misinterpretation and thus the ability to do more harm than good. *Id.* at 83.

The IDEA does not require the "furnishing or every special service necessary to maximize each handicapped child's potential." *NM v. Sch. Dist.*, 303 F.3d 523, 572 (4th Cir. 2002). Here, it again remains unclear how Angel Sense would provide any benefit at all to Student and misinterpreted events would be detrimental. The District has met its burden of proof in dispelling the notion that Angel Sense is a

required service without which Student will have, or did, suffer a substantive denial of a free appropriate public education.

Likewise, the lack of Angel Sense as a required service did not result in a procedural violation of the IDEA, as the lack of the device as a required service did not significantly impede the parent's participation in the IEP process. Parent had enough information to file police reports concerning both bus incidents, and contacted the school about both incidents. There **was** a procedural violation concerning what the IEP team did with that information, which will be discussed further herein – but there was no lack of information available to the parent concerning the incidents themselves. The parents may not believe they received accurate information concerning those events, but this is more a function of the damaged trust between the parties, and not something that would convincingly be resolved by use of Angel Sense.

As an alternative basis for denying Angel Sense as a remedy here, there is a convincing argument advanced that Angel Sense would not be permissible under Nevada law. The parties debated at the due process hearing the concept that the District was permitted to record audio on school busses while parents could not, but, it would appear Nevada law says exactly that. NRS 393.400. Cameras on

busses are, as a matter of common sense, part of a "system of security." Moreover, one witness testified to exactly that fact. (Testimony of Transportation Director). Conversely, a student armed with Angel Sense is not conducting electronic surveillance as part of any system, and therefore would not be protected by this law.

Instead, a secretive listening device like Angel Sense would appear to fall under NRS 200.650, which prohibits exactly the type of eavesdropping Angel Sense is apparently capable of. It is of no moment that Student may or may not be a party to such a conversation – Student lacks the capacity to consent to the monitoring of any conversation. Moreover, it isn't Student who would be choosing to monitor a conversation but rather the parents, and likely in a fashion where Student would not even know it was taking place. Petitioner's argument that Angel Sense would not be surreptitious because it could be written into the IEP is rejected. The people who need to be on notice that their conversations are being recorded are those around Student if Student were wearing the device; not the IEP team. Hearing Officer Exhibit 11, p. 7. The statute does not contain any exceptions for private or public places, or really any exception at all that could ever authorize a device like Angel Sense. See NRS 200.650. There is simply too much incongruity

between what Angel Sense is capable of and Nevada's strong privacy laws, particularly given the ability of someone remote from the device to activate it and start listening in without anyone near the device knowing.

Although Angel Sense is rejected as a required remedy here, that is not to say all was well in the transportation realm for Student. It was not. Student received in the school years at issue transportation services as a related service component of the IEP. See Exhibit J13, p. 25. The parties never disputed that transportation services are necessary for Student to benefit from special education. *Board of Educ. of the Dist. 130 Pub. Sch. v. Illinois State Bd. of Educ.*, 1997 U.S. Dist. LEXIS 12921, 46 (N.D. Ill. 1997). Aside from the fact the parties do not dispute the need for transportation, the record unequivocally shows Student requires transportation services and would be wholly unable to attend school without curb-to-curb service.

Because transportation was written into every single IEP considered at the due process hearing, the IEP team was on notice that transportation issues could potentially affect education. The bus incidents in this are troublesome, and the May incident in particular.

Parents clearly suspected something worse happened in September 2018, alluding to possible abuse. (Testimony of Mother). The evidence simply does not allow for a finding that Student was abused in any way on the bus in September. Of course, such a result is not ruled out by the evidence either, but taken at face value, the September incidents amounted to little more than the fact the bus ran late. Student's "change of pants" was, although not well explained to the parents at the time, was apparently the result of an entirely innocent incident. Although information about the lateness of the bus could have been better explained to parent, the fact it was not did not amount to a denial of a free appropriate public education.

More importantly, as discussed below, there are other more probable reasons for the degradation of Student's behavior around September 2018. The continued blind eye turned to Student's health including constipation issues, constant absences, and the presence of an "aggressive" child in the classroom were all much more likely sources of interference with Student's behavior than was one or two late busses.

The May incident is a different story. Although Student was not physically injured in the incident, it was classified as potential bullying by at least one

District witness, although the conduct at issue falls short of the statutory definition. See NRS 388.122. Regardless of what it is specifically called, the type of incident under review here could readily result in a substantive denial of a free appropriate public education.

Characterizing a violation as substantive or procedural can sometimes be challenging. Here, the distinction is less important as the bullying-like behavior resulted in what could be called either a substantive or procedural violation. It was substantive because it resulted in Student not receiving a meaningful education benefit. If one started counting the day of the incident (May 2, 2019), Student missed 10 of the remaining 16 days of the school year immediately following the incident. See Exhibit J3, p. 1. Student only received 30 minutes of speech services in May, having received zero minutes the month before due to absences. The May 2019 IEP is silent as to the supports or modifications Student may have required in response to the incident and in that sense, the violation here was substantive. *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3rd Cir. 2010).

Alternatively, the violation could be classified as procedural. "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs

of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed." *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).

It has already been found incredible but to reiterate, the testimony by the current special education teacher that the May incident was not brought up at the May IEP team meeting is rejected. The witness appeared confused and/or evasive during this particular testimony. (Testimony of Current SET). Moreover, and again having observed Mother in the due process hearing and referencing the letter Mother wrote about the May incident, the greater weight of credibility compels a

finding Mother did attempt to discuss the incident. But even if she did not bring it up at the meeting, the principal, special education teacher, and school in general were all on notice of the incident. Failing to discuss its effect on Student was a procedural violation, and as explained above, this procedural violation can be directly traced to a deprivation of an educational benefit.

Turning to the question of what to do about transportation issues, it is noted the chief concerns appear to be either a lack of information to the parents about the bus (where it is or what takes place on it), that the bus running late affect's Student's health, or that an incident of what even a District witness described as bullying affected Student's health.

One possible remedy that has been considered but rejected, at least at this time, is a one to one aide for purposes of riding the bus; what other courts have referred to as a "bus buddy." *B.B. v. Catahoula Parish Sch. Dist.* 2013 U.S. Dist. LEXIS 144164, 41 (W.D. La. 2013). In the context of an IDEA hearing, the focus must be on the student's ability to receive a free appropriate public education. To the extent the bus running late or other students threatening Student on the bus cause Student anxiety that interferes with Student's ability to receive special education

services, it seems likely this would solve both problems and potentially help Student learn “appropriate bus riding behaviors.” *Id.* at 17.

However, the record suggests this more drastic step is unnecessary. Student is apparently doing better with anxiety now that Student takes medication. Testimony established Student rides the bus this current school year, apparently without difficulty. (Testimony of Mother). Student has continued to grow older and more mature, and has made reasonable progress socializing. A bus buddy is not warranted at this time, although it is something the parties could consider if future incidents arise.

It is noted the loss of educational benefit specific to the May bus incident is limited: the school year was almost over by that point. The need for compensatory education is subsumed by the other violations, discussed below, that remained ongoing at the exact same time. Therefore, compensatory education beyond what is discussed in the next section of this order is unnecessary.

Therefore, since the specific nature of the violation here is limited so too shall be the remedy. To account for the effect of transportation issues on Student’s ability to receive a free appropriate public education, a representative from transportation shall attend the next IEP team meeting for Student. The director

testified that she has, in the past for other students, attended IEP meetings. (Testimony of Transportation Director). She, or someone of a similar hierarchical level, shall attend the next IEP meeting so that these issues can be **discussed and addressed** in the student's IEP. Discussion shall include topics including: making sure parent knows how to track late busses whether that is via an app, calling a phone number, or some other technique, actions to limit the potential that the Student is exposed to further incidents that could interfere with behavior or affect Student's health while on the bus, a discussion of Student's current health and behavioral condition as it relates to riding the bus, and what to do if Student experiences further problems riding the bus.

Student was substantively denied a free appropriate public education, independent of but also resulting from various procedural violations, during the 2018-2019 school year.

The topic of transportation and Angel Sense are exhaustively discussed above. Those were the main points of contention by the Petitioners, but having examined them in detail, they are a much smaller piece of the puzzle than the issue that follows. A much greater issue affected Student's ability to receive a free

appropriate public education, and it all stemmed from a delayed evaluation that, once completed, was grossly inaccurate in its assessment of how health affected Student's ability to receive special education services.

Even before the District failed to consider Student's new diagnosis of anxiety, the evidence plainly established that the IEP team, despite meeting multiple times per year, never discussed Student's health in any detail. The closest evidence offered suggested that, at the March 2019 IEP meeting, there was a discussion of how Student's constipation could cause pain leading to distraction and thus unwanted behavior. (Testimony of OT 2). But this is, again, suggestive of the problem. It was well-established that Student suffered from constipation, yet there was no discussion of what to do about it and no real support in the IEP to address it. The behavioral plan, lacking an update for approximately two years, contributed to the problem by suggesting the use of reinforcements that were likely to **cause** constipation.

In the end, despite notice of all these conditions, no IEP team ever discussed Student's excessive absences, the relationship of the absences to the student's health or how they might affect education. It stretches the very definition of "education" to suggest any student, special needs or otherwise, could miss a third

of the instructional year two years in a row and yet make appropriate progress. Yet, the parents and District appear to agree that is what happened at least as to the 2017-2018 school year. The parties greatly dispute that appropriate progress was made during the 2018-2019 school year and this order already explains the ways in which Student's overall progress was not appropriate.

A quick analysis of the specific ways the IDEA was violated during the 2018-2019 school year may be of use here. The IDEA provides that a reevaluation is required at least every three years unless the parties agree it is unnecessary. 34 C.F.R. §300.303. Here, the parties did not agree a reevaluation was unnecessary. The reevaluation was supposed to be thorough, covering all areas related to the suspected disability including health. 34 C.F.R. §300.304. Here, the evaluation completely glossed over health as it related to Student's disability. The lateness of the reevaluation and the gross inadequacy of it related to Student's health are procedural violations of the IDEA.

The Ninth Circuit addressed these types of issues in a remarkably similar case, and alternately seemed to find either that the procedural violations were so substantial as to amount to a substantive violation, or, deprived the parents of necessary information such that a substantive violation occurred. *Timothy O. v.*

Paso Robles Unified Sch. Dist. 822 F.3d 1105 (9th Cir. 2016). In fact, the court specifically addressed, in surprisingly strong language, an assessment of a child with autism that failed to consider the child's unique medical needs:

So that there may be no similar misunderstanding in the future, we will say it once again: the failure to obtain critical and statutorily mandated medical information about an autistic child and about his particular educational needs "render[s] the accomplishment of the IDEA's goals – and the achievement of a FAPE – *impossible*. (Emphasis in original, citations omitted).

Id. at 1126.

This reasoning holds equally well here. The procedural violations resulted in a substantive denial of a free appropriate public education because they directly caused a deprivation of an educational benefit, but also deprived the parents of information they needed to meaningfully participate in the IEP process. This is borne out in the IEP's themselves as well as the collective testimony about what was discussed at IEP meetings. Health and its effect on constipation and absences were simply not considered to be addressed in any IEP.

Second, the 2018-2019 IEPs were substantively deficient because they merely repeated the same general goal the Student failed to complete every single year regarding toileting. The May 2019 IEP is a good example: "Student will stay on task while completing a toileting routine..." Exhibit J13, p. 22. In the 2018-2019

school year, Student either made no progress towards this goal, or regressed depending on how believable the progress was from the year before. Student is severely disabled, so a focus on life and self-care strategies was wise. But toileting is probably **the** area of self-care most likely to improve Student's quality of life and sense of dignity. It should not have been an afterthought in the IEP. This "progress" is precisely the *de minimis* type of education the Supreme Court specifically said does not comply with the IDEA in *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S.Ct. 988, 1001 (2017) (Child should "make progress appropriate in light of the child's circumstances").

A free appropriate public education can include the teaching of life skills such as toileting. *N. Kingstown Sch. Comm. v. Justine R.*, 2014 U.S. Dist. LEXIS 182750, 34 (D.R.I. 2014), *citing Cedar Rapids Cmty. Sch. v. Garrett*, 526 U.S. 66, 73-74 (1999). That case highlighted a hearing officer's prior decision that implemented a toileting goal as part of an IEP, to include specific directives to be carried out by a paraprofessional. *Id.* at 23. Here, the toileting goal was inadequate because it failed to consider the effect of health, constipation, or absences on Student's ability to progress. Had these things been considered, it is apparent given the extensive testimony at the due process hearing that a more narrowly

tailored goal could have focused on the Student's communication of a need to use the bathroom as well as the actual act of using the toilet itself.

Third, and highly informative of the above point, is the fact the IEP did not address student's excessive absences. The failure of the IEP team to consider the effect of all these absences on Student was a procedural violation of the IDEA. *Simmons v. Pittsburg Unified Sch. Dist.* 2014 U.S. Dist. LEXIS 81085 (N.D. Cal. 2014) (School procedurally violated IDEA by failing to assess student who missed 58 school days), *see also Indep. Sch. Dist. No. 413 v. H.M.J.*, 123 F.Supp.3d 1100, 1111 (D. Minn. 2015). Likewise, the procedural violation here resulted in a substantive denial of a free appropriate public education because it caused a deprivation of an educational benefit, but also deprived the parents of information they needed to meaningfully participate in the IEP process.

Fourth, the behavior plan was not reviewed in a timely manner, i.e. as often as the plan said to do so which was every ninety days, and contained outdated and unhelpful directives such as the use of non-nutritious reinforcers instead of either foods that would not contribute to constipation, or currently preferred non-food items like bubbles. In Nevada, the behavior plan is incorporated as part of the IEP and must therefore be reviewed at least annually. NAC 388.284(3)(b). Here, the

last "review" of the plan apparently occurred when the special education teacher called the parent to discuss it on November 8, 2018. Exhibit J4, p. 6. This was not a substitute for the IEP team discussing the behavioral plan, which is what should have happened, nor does it cure the substantive problem with the behavior plan in that it contributed to the very health condition (constipation) that was behind most of Student's behavior issues. These procedural errors, like the others noted herein, deprived Student of an educational benefit and deprived parents of the ability to meaningfully participate in the IEP process.

These four areas of error resulted in substantive violations of the IDEA individually, but their collective effect was far more damning. A vicious cycle ensued where Student continued to suffer from constipation, contributed to by the behavioral plan. Student had limited verbal ability and could not communicate toileting needs, and that fact was amplified by the significant amount of school and especially speech services student missed, along with an IEP goal relating to toileting that failed to address either communication or constipation issues.

The remedies to all this are set forth below. Some immediate changes need to be made to the IEP, as the current version does not address these concerns and

the collective mistrust between the parties suggests leaving it to them to agree on what changes are needed will only continue the loss of educational benefits.

REMEDIES AND ORDER

Having found multiple violations of the IDEA's guarantees to Student, the following remedies are hereby ordered:

- 1. By Friday, November 22, 2019, the IEP team will meet to reformulate Student's toileting goal and related services as follows:** Heavy credit is given to the current special education teacher's testimony that a dedicated aide is necessary to assist Student in making reasonable progress in the area of toileting. (Testimony of Current SET). The teacher also felt that the use of pullups was an impeding factor as they were too much of a "safety net." (Testimony of Current SET). The current IEP does not address these issues at all. Exhibit J13, p. 22. Therefore, the IEP team will meet by November 22, 2019, and

will ensure that a dedicated paraprofessional is added to the IEP to assist in implementation of toileting to include both the use of PECS or Ipad and/or other method to communicate a need to use the toilet, and the actual act of toileting itself. A goal that incorporates communication about toileting, and which seeks to ultimately eliminate the use of pullups, can certainly be envisioned and shall be immediately implemented

To be sure, it is not as if this Hearing Officer is secreting away the hidden knowledge of how to toilet train students with autism, so what follows may or may not work and the parties are certainly directed to closely monitor the progress. Further, while a dedicated paraprofessional is called for, the paraprofessional can be intermittent or be assigned other tasks while not aiding Student with the toileting process. That said, frequent and consistent toileting is called for and should take priority over anything else the aide, or the Student, might be doing at any given moment. The paraprofessional shall be trained by and perform these tasks in conjunction with someone from assistive technology, the speech and language therapist, the school nurse so as to address any health related aspects, and the special education teacher.

There's two components to the toileting goal that the IEP team shall implement, although the specific frequency and duration will be left to the IEP team to determine. First, at frequency determined by the IEP team, the dedicated paraprofessional should initiate communication with Student about the need to use the bathroom, using PECS, Ipad, and/or some other method as determined by the IEP team. Second, Student then is taken to the bathroom and will sit for a duration determined by the IEP team, with urination and bowel movements to be reinforced with highly preferred non-food items. Data should be gathered including whether Student's pullup was dry or wet at each bathroom break, whether Student communicated a desire to use the bathroom, and whether Student actually urinated or had a bowel movement in the toilet, along with any behavioral observations. In light of the Thanksgiving break, the actual implementation of this goal and service can begin December 2, 2019. Parent is encouraged to practice the goal, including the communication component, at home over the Thanksgiving break.

Further objectives should focus on increasing communication about the need to use the bathroom, and ultimately build towards reducing Student's use of pullups. However, the parties are directed to revisit the initial protocol

informally (i.e. parent/teacher conference) no later than two weeks after implementation to assess any data gathered. Copies of the logs of any data gathered pursuant to this goal shall be provided to Parent daily.

The communication about and actual trip to the bathroom should be provided by a paraprofessional made available by the District for this exclusive purpose (i.e. the service is not primarily delivered by the special education teacher or assigned classroom aide). That said, staff assigned to the classroom are not absolved of their duty to assist with this process – if classroom staff notice Student in discomfort related to potential bathroom issues or if Student communicates a desire to use the bathroom, classroom staff will implement this goal if the assigned paraprofessional is unavailable at that exact moment.

This entire process is intended to provide Student with a meaningful goal that will enable reasonable progress towards self-care. Again the frequency and duration of services are left to the IEP team. However, so that a good faith effort may be made towards implementation, this order directs that the assistance of a dedicated one to one paraprofessional for toileting goals shall remain in place for at least 120 calendar days from the date this goal is implemented.

2. An accommodation is hereby added to Student's current IEP as follows: "Positive reinforcements shall focus on non-food items such as bubbles, Ipad, music, or other preferred items."

It is exhaustively explained throughout this order that the behavioral plan, outdated as it may be, actually contributed to poor behavior by overuse of non-nutritious foods as a positive reinforcer. That has to stop immediately, although again based on the testimony and exhibits there would be a legitimate concern that a cold turkey approach will only amplify behavioral problems.

This accommodation directs all school staff to themselves "prefer" non-food reinforcers for Student, while retaining necessary discretion to utilize food items if absolutely necessary. Further, as directed below, the IEP team must meet and update the behavioral plan after receiving all necessary input, as set forth in detail below. It would be premature to re-write the plan here and now, to include eliminating the use of all food-based reinforcements, without updated and correct information. Therefore that task will fall to the IEP team as directed below.

3. At the IEP team meeting that is being held by November 22, 2019, the team will comply with these additional directives: Determining an

updated and appropriate toileting goal supported by a dedicated paraprofessional is but one task the IEP team must undertake in the near future.

Additional topics that must be addressed at the meeting are:

(1) The late assessment and its outlandish conclusion that health does not affect Student's education are a core cause of perhaps all of the deficiencies explored throughout this order. The IEP team therefore **will** receive updated and correct health information regarding Student. It will do this by offering both Student's general physician and psychiatrist the opportunity to attend, in-person or by phone, the IEP team meeting that is ordered as part of this decision. As credentialed physicians, these individuals' time is valuable. Any cost of attendance of the physician and psychiatrist shall be paid by the District. It is not necessary that these individuals attend the entire meeting, but they, if they choose to attend, shall be given an opportunity to provide health information to the IEP team and answer any questions about Student's health for the team.

(2) The fact absences were so pervasive and yet never meaningfully addressed by the IEP team is unacceptable. The IEP team **will** discuss absences and shall formulate a plan, accommodation and/or goal to be included in the IEP to deal with absences as thresholds are crossed (10% of school year, 15%, etc.).

This must include consideration of whether Student requires homebound services, additional health or other supports, or any other required service to minimize the amount of instructional time missed due to absences.

(3) As previously ordered in the earlier section, a director-level employee from transportation shall attend this IEP meeting, and shall discuss current transportation needs and if transportation safety is affecting education or behavior, and if so the team will consider the need for specific seating location on the bus, a bus buddy, or other remedies to be included in the IEP.

(4) The behavioral plan **will** be updated to reflect Student's updated health information, behaviors, and updated preferred reinforcements with a strong emphasis on moving away from food and especially unhealthy food as a reinforcer.

4. Compensatory education is awarded as follows:

The parties were already provided an exhaustive look at how remedies, including compensatory education, would be viewed during the hearing. Hearing Officer Exhibit 9. To reiterate the basics regarding compensatory education, the following accurately reflects Ninth Circuit law as summarized in *J.T. v. Dept. of Education*, 2014 U.S. Dist. LEXIS 38274 (D. Haw. 2014):

Compensatory education services can be awarded as appropriate equitable relief. *20 U.S.C. § 1415(i)(2)(B)(iii)* ("shall grant such relief as the court determines appropriate"); *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1496-97 (9th Cir. 1994). Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the [Individuals with Disabilities Education Act]. The courts have discretion on how to craft the relief and "[t]here is no obligation to provide a day-for-day compensation for time missed." .

..
*2012 U.S. Dist. LEXIS 105837, 2012 WL 3985686, at *23* (some alterations in 5/31/12 Order) (quoting *Park ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006) (some citations and quotation marks omitted)). Equitable considerations, including the conduct of both parties, are relevant to the determination of an appropriate compensatory education award. *Parents of Student W.*, 31 F.3d at 1496 (quoting *School Comm. of Burlington v. Department of Education*, 471 U.S. 359, 374, 105 S. Ct. 1996, 2005, 85 L. Ed. 2d 385 (1985); [*32] *W.G. v. Board of Trustees of Target Range School Dist.*, 960 F.2d 1479, 1486 (9th Cir. 1992)). Further, this district court has recognized that a "compensatory education award is designed to catch a child up to where he or she would be if the school district had provided a FAPE." *Dep't of Educ., Hawai'i v. Ria L. ex rel. Rita L.*, Civil No. 12-00007 HG-KSC, 2012 U.S. Dist. LEXIS 155484, 2012 WL 5383543, at *5 (D. Hawai'i Oct. 30, 2012) (citing *Brennan v. Regional Sch. Dist. No. 1 Bd. of Educ.*, 531 F. Supp. 2d 245, 265 (D. Conn. 2008)).

Because substantive violations of the IDEA have been found, an award of compensatory education is appropriate to help catch Student up on the areas where an educational opportunity was lost during the 2018-2019 school year which again were in the areas of self-care, behavior, and communication. The equities of

the situation are considered. Positive factors for the District include that, according to Parents and their witnesses, Student did make some progress in some areas. On the flip side, negative factors are that the late and inaccurate assessment, and two school years' worth of excessive absences, are flagrant violations that are still as of this writing uncorrected. Student missed **a lot** of school there is simply no other way to categorize this attendance record.

As for the parents, it is mixed bag as well. Parents acknowledge Student made progress in some areas, although this order necessarily finds the minimal progress in academic areas does not outweigh the overall lack of progress in functional and life skills, which for this Student, are the most important areas in which progress should be sought. Also of concern, Student was offered extended school year (ESY) services but parents stated they did not take advantage of those services. (Testimony of Father, Mother). While various reasons for failing to enroll Student in ESY were provided, such as it was at a different school, the rationales offered were not compelling. Student needs all the help available and eschewing ESY due to convenience weighs against the equities here.

A rote hour-for-hour recompense is not required. However, it is noted Student was shorted 820 minutes of speech services due to absences, which is a

loss of almost 14 hours. There is no requirement under the IDEA that a decision awarding compensatory education provide an exhaustive formula for how the amount awarded was computed.

That said, after considering the equities of the parties, to include the middling progress in academic areas and the lack of progress in more crucial functional areas of development, and the strong evidentiary link presented at the due process hearing between Student's lack of communication skills and poor behavior, **the most sensible outcome is in fact to award Student 14 hours of compensatory education in the area of speech services and communication.**

These services shall be provided by a Speech and Language Pathologist, or staff member trained in speech working under the supervision of the Speech and Language Pathologist. The services should focus on either advancing Student's communication skills with regard to self-care, or advancing Student's PECS usage (via book, Ipad, or other) to a higher mastery level of Phase 4 or advancing to Phase 5 or 6.

It is noted Student already receives speech services, albeit at a reduced rate for this school year. While this is an extremely close call, this decision will defer to the District's expert that Student can still benefit from speech services going

forward at the reduced rate of 120 minutes per month. Exhibit J19, p. 19. That said, the award of compensatory education is not concerned with future services but rather with services that went entirely unprovided. Any argument that zero minutes per month of speech/communication services, which is what Student frequently received during the 2018-2019 school year somehow provided a free appropriate public education is rejected.

The 14 hours of compensatory services should be provided at a rate which will allow Student to benefit from those service, but in any event and to ensure serious effort is made to providing these services: **The 14 hours of compensatory education are (naturally) in addition to any similar services provided in any IEP, and shall be delivered to Student in a manner that allows the 14 hours to be completely provided by February 7, 2020, at a frequency and duration determined by the speech and language pathologist.** Documentation of these services shall occur in a manner similar to what is typically done. See generally, Joint Exhibit 19.

Additional compensatory education has been considered and rejected. First off, this order already put in place a detailed toileting plan and to some degree it is anticipated that plan will serve a compensatory purpose of advancing Student's self-care skills. Second, while evidence concerning academic areas was at times

conflicting, those conflicts are resolved to find the Student has made at least some basic progress in math, reading and writing.

While a perfect solution to the parties' disputes is difficult to fashion, it is strongly believed the implementation of this decision and order will get Student closer to the basic floor of opportunity promised in *Rowley*, and, will arm the parties with the information they need to meaningfully address Student's needs in future IEP team meetings.

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: October 29, 2019

Jamie Resch, Hearing Officer

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