STATE OF NEVADA DEPARTMENT OF EDUCATION

REVIEW OFFICER DECISION

In the matter of

STUDENT by and through his[1] PARENTS,[2]

Petitioner-Appellant

v. Perry A. Zirkel, State Review Officer

DISTRICT,

Respondent-Appellee

I. GLOSSARY OF ACRONYMS

As a prefatory matter, the acronyms that appear in this decision are as follows: ABA = applied behavior analysis; BCBA = board certificed behavioral analyst; BIP = behavior intervention plan; ESY = extended school year; FAPE = free appropriate public education; IDEA = Individuals with Disabilities Education Act; IEP = individualized education program; IHO = impartial hearing officer; IIS = individual intervention services; LINKS = Linking Instructional Needs and Key Supports; OT = occupational therapy; RBT = registered behavior technician; SLT = speech/language therapy; and SRO = state review officer.

II. PROCEDURAL BACKGROUND[3]

On March 9, 2022, the Parents filed the complaint in this matter under the IDEA[4] and Nevada's corresponding state statute and regulations.[5] (IHO-1). After several status and

prehearing conferences, the IHO conducted three consecutive hearing sessions from August 31 to September 2, 2022. (IHO-1 – IHO-14). The ultimately agreed upon issues, per the August 4, 2022 pre-hearing report and order (IHO-14, at 2), were as follows:

A. Whether the IEPs developed in the two years prior to the filing of the complaint were individually tailored to allow the student to receive FAPE, and, if not, was the failure a denial of FAPE.

B. Whether the student is required to receive ABA therapy during the school day in order to receive FAPE and if so was the failure to provide ABA therapy to the student during the school day a denial of FAPE.

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

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

On September 12, 2022, the IHO issued a final decision that ruled in favor of the district for the first three of these four issues and in favor of the parent for the last one. More specifically, for issues A–C, the IHO concluded: A - the IEPs "were individually tailored to allow the Student to receive FAPE"; B - "Because the District has provided ABA services through ISS . . . it has not failed to provide FAPE to the Student"; and C - the IEPs "provided the Student a FAPE because . . . the [S]tudent made appropriate progress."[6] Conversely, for issue D, the IHO concluded that "the failure of the IIS to regularly collaborate with the Student's BCBA is a material failure to implement the February 22, 2021 IEP" and "the failure ot the IIS team to share with the Parents and the BCBA the data it should be collecting as to the ABA services provided for the Student is also a material breach of the February 22, 2021 IEP."[7] The IHO's resulting orders were to amend the February 22, 2021 IEP to require (a) at least monthly collaboration between the IIS team and the BCBA; (b) at least monthly sharing of the

IIS ABA data with the BCBA and the Parents; and (c) an increase in the monthly IIS from 16 to 20 hours.

On October 12, 2022, the state superintendent received the Parents' appeal of the IHO's decision and appointed me as the SRO for it, specifying a due date of November 12, 2022 for my decision. (SRO-1).

On October 12, 2022, after a scheduling e-mail, I held a status conference with the parties, with an immediate follow-up e-mail summarizing the results, which included a firm deadline of November 2, 2022 for written arguments. (SRO-2).[8] Inasmuch as the District did not file an appeal in this case, the scope of the written arguments and this SRO decision is limited to the IHO's rulings for issues A–C, not the IHO's ruling and order for issue D.

On November 2, 2022, per this deadline, the parties submitted their written arguments. (SRO-3A&B).

III. STANDARD OF REVIEW

The standard of review for a SRO under the IDEA is for an "independent decision" after examining the entire record.[9] The SRO finds persuasive the interpretation of the Third Circuit in *Carlisle Area School District v. Scott P.,* 62 F.3d 520 (3d Cir. 1995), requiring "plenary review" with one narrow exception: "[the SRO] should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." (*Id*. at 529).[10]

IV. ISSUES

Within the aforemented scope of this decision, issues A–C are conflated within the applicable, controlling substantive standard for FAPE, which the Supreme Court enunciated in

Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017). Specifically, the over-arching question is whether the IEPs at issue in this case were "reasonably calculated to enable [the Student] to make progress appropriate in light of [his/her] circumstances." (*Id*. at 999 and 1002). This language parallels the breadth of issue C and includes the "individual tailoring" of issue A and the disputed role of ABA therapy during the school day of issue B to the extent relevant to *Endrew F*.

V. FINDINGS OF FACT[11]

During summer 2020, the Board of Trustees for the District decided to continue distance learning for the coming school year, which had started in soon after the Governor's school-closure order in March 2020. The previous annual IEP for the Student, issued in February 2019 is not in the record of this case. Nevertheless, the record shows that the IEPs at issue were during grades 3 and 4 for the Student.

Grade 3

The September 22, 2020 revised IEP for the Student, who was in grade 3 and eligible under the classification of autism spectrum disorder, included annual goals in reading fluency, reading comprehension, written language, math, communication, and social/emotional/ behavioral. Each goal, including the two for social/emotional/behavioral, had 3–5 benchmarks. The specially designed instruction in each area was as follows in the context of distance learning: reading – 150 minutes/week, written language 150 minutes/week, math – 150 minutes/week, communication - 150 minutes/week, and social/emotional/behavioral - 500 minutes/week. The related services included SLT - 120 minutes/month and OT - 30 minutes per month. The designated placement on the LRE continuum was self-contained, with 60% of the school day in the general education environment. (D-3, at 9–29).

In light of the District-wide transition to hybrid and, subsequently, in-person instruction (D-18) and the Student's noted progress, the February 22, 2021 annual IEP included adjustments in the goals and services provisions. The goals and benchmarks were largely adjusted to a higher level, whereas the adjustments in the allocation of specially designed instruction and related services were not subject to direct comparison to the earlier IEP due to successive specifications for distance, hybrid, and in-person learning, including differentiation of synchronous and asynchronous instruction, for the first delivery approaches. The self-contained placement was changed from 40% to 35% in the general education environment. (D-4, at 1–20).

These IEPs and the progress reports for grade 3, including ESY, designated the Student's progress as "satisfactory," which was less than meeting each of the specified goals (e.g., D-3, at 1–7; D-7, at 34–35). Nevertheless, these reports included more specific information, including quantitative levels as well as subjective assessment showing benchmarked progress both behaviorally and academically. (*Id*.).

Grade 4

First for grade 4, in response to the Parents' request for more minutes in general education, the May 21, 2021 IEP revision provided limited adjustments in the allocation of services in connection with the revision from 35% to 40% in the general education environment. (D-5, at 2–21; Tr. at 86).

After the start of grade 4, in response to another Parent concern, the IEP team reconvened on October 11, 2021 and added accomodations to address the Student's increased "scripting"[12] behavior. (D-6, at 11, 18; D-14, at 10; Tr. at 89). On October 20, 2021, per the provision in the previous IEPs (e.g., D-3, at 25)[13] and after receiving from the Parents the BIP

from the Student's private BCBA (D-11/P-2), the District developed a BIP for the Student. (D-12; Tr. at 135–36).

On November 22, 2021, based on the Parents' request for ABA services during the school day[14] and after a specific assessment by the District's LINKS department (e.g., Tr. at 165, 277; D-13), the IEP team further revised the IEP to include 16 hours per month of IIS via the LINKS department. (D-7, at 19). The LINKS IIS includes 1:1 ABA (e.g., Tr. at 181, 262), but only one of its providers to the Student is an RBT, and none of them receive direct supervision from a BCBA for these services to the Student. (E.g., Tr. at 173, 262, 283).

After reports of further "satisfactory" progress (D-7, at 32–33; D-8, at 26–27), the IEP team met for its annual review on February 14, 2022, whereupon the Parents requested that the IEP be revised to have the ABA services provided by their outside BCBA-supervised RBTs rather than via the District's IIS. The IEP team denied this request while making other revisions to the IEP, including generally higher goals and benchmarks and an increase from 40% to 60% in general education. (D-8, at 1–25).

The Parents did not agree to this IEP, opting instead for the aforementioned filing for the due process on March 9, 2022.

VI. CONCLUSIONS OF LAW[15]

The primary problem with the Parents' appeal, which is not at all uncommon in both the IDEA litigation and IDEA literature, is confusion between personal or professional norms and legal requirements. More specifically, the controlling standard for substantive appropriateness that, as the Parents' closing brief recognizes (SRO-3A, at 2), over-arches the three issues in this case is the aforementioned holding of *Endrew F.*, requiring the IEP to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. However,

in explaining the specific components of this standard, the Supreme Court clarified that the "'reasonably calculated' qualification reflects that crafting an appropriate [IEP] requires a prospective judgment by [the IEP team]," with the adjudicative review *not* being whether the IEP is "ideal." (137 S. Ct. at 999). Although rejecting "'merely more than *de minimis*'" as the level of reasonably calculated progress (*id*. at 1000), the *Endrew F.* Court left to the individualized determination of the other component, "progress appropriate under the child's circumstances," to subsequent case law. The Ninth Circuit's post-*Endrew F.* court decisions and those in other circuits have made rather clear various contours of this standard that are applicable in this case.[16]

First, the Parents' brief argued that the FBA-BIP on October 11 of grade 4 constituted denial of FAPE under *Endrew F*. in light of the determination in the September 22 IEP in grade 3 that the Student's behavior impeded learning without any resulting provision for an FBA-BIP. However, the only cited authority for this claim were two decisions from the Second Circuit and one from the Eighth Circuit, which were all before *Endrew F.* (L.O. v. N.Y.C. Dep't of Educ., 822 F.3d 95 (2d Cir. 2016); R.K. v. N.Y.C. Dep't of Educ., 2011 WL 1131522 (E.D.N.Y. Mar. 28, 2011), *aff'd sub nom*. R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003)).

The fatal problems with the cited Second Circuit cases are twofold. First, they are based on New York law, the only state law that expressly requires an FBA or BIP for learning-impeding behavior. (*See, e.g*., Perry A. Zirkel, *State Laws for Functional Behavioral Assessment and Behavior Intervention Plans: An Update*, 45 COMMUNIQUÉ 4 (Nov. 2016)). Second, as these pre-*Endrew F*. New York cases and those in the Second Circuit after *Endrew F.* have made clear, the absence of an FBA or BIP is not a per se denial of FAPE, rather only

applying if the IEP does not otherwise adequately address the behavior. (*E.g.*, J.P. v. N.Y.C. Dep't of Educ., 717 F. App'x 30, 32 (2d Cir. 2019) (ruling that lack of FBA was not a denial of FAPE because the IEP adequately identified and addressed the problem behaviors)).

For all of the remaining jurisdictions that parallel the IDEA by requiring an FBA-BIP only for a disciplinary change in placement (34 C.F.R. §§ 300.530(d)(ii), 300.530(f)(i)), the reliance on the 2003 Eighth Circuit case is misplaced because the Ninth Circuit and other recent appellate court decisions, including those not only after *Endrew F.* but also those earlier, including the Tenth Circuit's un-appealed relevant ruling in *Endrew F.*, have made quite clear, the IDEA's special IEP team consideration for learning-impeding behavior does not entitle the child to an FBA-BIP. (*E.g.*, Elizabeth B. v. El Paso Cnty. Sch. Dist., 841 F. App'x 40, 42–43 (10th Cir. 2020); Butte Sch. Dist. No. 1 v. C.S., 817 F. App'x 321, 326 (9th Cir. 2020); Parish v. Bentonville Sch. Dist., 896 F.3d 889, 895 (8th Cir. 2018); Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 798 F.3d 1329, 1337 (10th Cir. 2015); D.K. v. Abington Sch. Dist., 696 F.3d 233, 251 (3d Cir. 2012)).

The Nevada regulations provisions for learning-impeding behavior go beyond the IDEA by requiring IEP teams to provide, not just consider, parallel broad alternative measures without specifying or limiting them to an FBA-BIP.[17] Here, the District's successive IEPs complied with this requirement by including goals and specific measures that addressed the Student's behaviors.

Moreover, even if Nevada's regulations were somehow interpreted as inferably requiring an FBA-BIP, thus making the Second Circuit's special treatment applicable, the outcome would be the same for two reasons. First, unlike the factual context of the Second Circuit cases, the District provided the Student with a BIP, which was based on its agreed-upon

scheduling (*supra* note 13 and accompanying text). The evidence is not preponderant that this development was late, much less prejudicially late. Second, even if the proof had been preponderant that the Student should have had an FBA-BIP sooner, the previous IEPs met the Second Circuit test by adequately inghe Student's behaviors with reasonably responsive strategies, supports, and services.

The Parents' second claim upon appeal is that the Student's failure to meet the goals in the IEPs at issue constituted a violation of the *Endrew F.* standard. Here, despite the aforementioned specification for the written arguments (*supra* note 8), the Parents' brief failed to cite any case law authority. Instead, based on the "reasonably calculated" qualification as of the time of the respective IEP meetings (*e.g*., Daniels v. Northshore Sch. Dist., 2022 WL 3083313, at *2 (9th Cir. Aug. 3, 2022)), the relevant rulings that have applied *Endrew F.* concluded that, although of clear concern, the lack of mastery is not a per se denial of FAPE (*e.g*., Downingtown Area Sch. Dist. v. D.S., 2022 WL 523563, at *10 (E.D. Pa. Feb. 22, 2022); N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *7 (D.D.C. July 30, 2021)). Instead, as the concomitant assertion in the Parents' brief acknowledged and the case law confirms, the key is whether the IEP team responded by revising the IEP per the *Endrew F.* reasonably-calculated standard. (*E.g*., K.D. v. Downingtown Area Sch. Dist., 904 F.3d 248, 256 (3d Cir. 2018); F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 F. App'x 38, 40 (2d Cir. 2018)). In this case, the District's six successive IEPs within the two-year period at issue conformed to this standard based on the responsive and reasonable adjustments in the goals and, more frequently, the services and the minutes in general education.

The next and related claim in the Parents' written arguments is that the District's progress reports were substantively violative due to their "subjective nature." Although, again,

the brief lacked any cited case law in support of this claim, the courts often rely heavily on teachers' subjective assessments of progress in applying *Endrew F.* (*E.g*., Albright v. Mountain Home Sch. Dist., 926 F.3d 942, 948–49 (8th Cir. 2019); S.M. v. District of Columbia, 2020 WL 7230266, at *6 (D.D.C. Dec. 8, 2020); T.M. v. Quakertown Cmty. Sch. Dist., 251 F. Supp. 3d 792, 812 (E.D. Pa. 2017)). Indeed as the Ninth Circuit has made clear both before and after *Endrew F*., "there is no specific form of measurement required by statute or caselaw." (Capistrano Unified Sch. Dist. v. S.W., 21 F.3d 1125, 1134 (9th Cir. 2021 (citing R.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1122 (9th Cir. 2011) ("goal measurement can be 'based on teachers' subjective observations'")). In this case, the District's witnesses agreed, based on both data and expertise, that the Student showed notable improvements in his goal areas. (E.g., Tr. at 87, 103, 114, 141–42, 177, 193–94, 252, 329). Conversely, the Parents' witnesses offered no countervailing evidence, instead focusing on ABA services.

The Parents' brief attributed the Student's progress to the outside ABA tutoring. The lack of supporting case law is not surprising because many IDEA cases include outside tutoring but, like the various other intervening or concomitant factors, they are too difficult to sort out as to the extent and direction of their effect. Indeed, in light of the Parents' successful claim with regard to the need for collaboration, the lack of complementarity between the IEP services and private outside services could alternatively mean that outside services contribute negatively rather than account solely or primarily for a child's progress. (E.g., Tr. at 287, 511–12). The proof in this case is far from preponderant that the Student's progress in school is attributable exclusively or primarily to the outside rather than the school services. Indeed, the RBT's testimony that claimed credit for the Student mastering one or more of the IEP goals contradicts the Parents' claim that was predicated on not meeting any of the goals. (*Id*. at 646).

The final and most detailed claim in the Parents' brief is that the only "true" ABA is via BCBA-supervised RBTs, such as their privately provided services, thus excluding the District's provision of IIS. This assertion is clearly wrong in the context of the IDEA for several overlapping reasons. First, the Parents' narrow definition of ABA is contrary to the broad conception in the relevant case law. (*E.g.*, L.M.P. v. Sch. Bd. of Broward Cnty., 879 F.3d 1274, 1277 (11th Cir. 2018); M.A. v. Jersey City Bd. of Educ., 592 F. App'x 124, 126 n.1 (3d Cir. 2014); D.C. v. N.Y.C. Dep't of Educ., 950 F. Supp. 2d 494, 503 n.15 (S.D.N.Y. 2013)). Moreover, the definitions in the licensing legislation at NEV. REV. STAT. § 641D.010 *et seq*. expressly do not apply to school employees (*id*. § 641D.110), whereas the individuals who provided IIS to the Student met applicable state certification requirements (e.g., NEV. ADMIN. CODE § 388.165).

Second, regardless of what is the gold standard is for ABA in other contexts, *Endrew F.* is the applicable standard in the context of this case. (*See, e.g.*, *T.M. v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d at 805–06). Based on the longstanding deference to public school authorities for issues based on educational expertise that *Endrew F.* repeated (137 S. Ct. at 1001), it is well settled in the Ninth Circuit and elsewhere that school districts have ample discretion in determining whether to use ABA and, if so, its particular form or version. (*E.g.*, Elizabeth B. v. El Paso Cnty. Sch. Dist. 11, 841 F. App'x 40, 43–44 (10th Cir. 2020); K.S. v. Fremont Unified Sch. Dist., 426 F. App'x 536, 538 (9th Cir. 2011); Does v. Key, 2021 WL 5441829, at *4 (E.D. Ark. Nov. 19, 2021); D.S. v. Parisppany Troy Hills Bd. of Educ., 2018 WL 6617959, at *15 (D.N.J. 2018); Bd. of Educ. of Albuquerque Pub. Schs. v. Maez, 2017 WL 3278945, at *5 (D.N.M. Aug. 1, 2017); M.N. v. N.Y.C. Dep't of Educ., 700 F. Supp. 2d 356, 367 (S.D.N.Y. 2010); *cf.* R.E.B. v. Dep't of Educ., Haw., 770 F. App'x 796, 800–01 (9th Cir.

2019) (according this deference to not require ABA or related staff qualifications in the IEP)).[18] The courts have also been rather clear that this deference applies to the IEP team's determinations as to the provider qualifications and location for ABA during the school day. (*See, e.g.*, Smith v. Orcutt Union Sch. Dist., 2022 WL 3230595, at *2 (9th Cir. Aug. 10, 2022); A.W. v. Tehachapi Unified Sch. Dist., 810 F. App'x 588, 589 (9th Cir. 2020); M.S. v. New Hyde Park -Garden City Park Union Free Sch. Dist., 2021 WL 903099, at *7–8 (S.D.N.Y. Feb. 3, 2022); S.M. v. Branchburg Twp. Bd. of Educ., 80 IDELR ¶ 50, at *11–12 (D.N.J. 2021); Hills & Dales Child Development Ctr. v. Iowa Dep't of Educ., 968 N.W.2d 238, 247 (Iowa 2021)).

Based on *Endrew F.*'s substantive standard that provides the overriding boundary for this deference, the District's choice of IIS, which included ABA in its broad accepted meaning as well as its choice to use its own employees rather than the Parents' outside BCBA-supervised RBTs as the providers during the school day, was clearly not an abuse of this well-established discretion.

In sum, although the District's characterization of the Student's progress as "tremendous" and "exceptional" is far from objectively accurate and the Parents' frustration with the District's failure to reach such an optimal level is understandable, the IEPs at issue in this case met the applicable legal standard for substantive appropriateness. Under that standard, reasonable calculation and individualization are the key rather than the particular methodology (*e.g.*, Crofts v. Issaquah Sch. Dist., 22 F.4th 1048, 1057 (9th Cir. 2022), with the ultimate progress in some individual circumstances being maddeningly slow and non-linear (*e.g.*, K.D. v. Downingtown Area Sch. Dist., 904 F.3d 248, 255 (3d Cir. 2018); D.F. v. Smith, (2019 WL 1427800, at *7 (D. Md. Mar. 28, 2019); E.G. v. Great Valley Sch. Dist., 2017 WL 2260707, at

*4 (E.D. Pa. May 23, 2017)).

VII. DECISION AND ORDER

The IHO's decision is affirmed for the appealed issues A–C.

Dated: November 10, 2022 Perry A. Zirkel, State Review Officer

NOTICE OF APPEAL RIGHTS

The decision of this SRO is final unless a party appeals the decision. A party may appeal from the decision of this SRO by initiating a civil action in a court of competent jurisdiction within ninety (90) days after receipt of this decision (NAC § 388.315).

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[1] The terms "he," "his," and "him" are used generically herein instead of designating the actual gender of Student or the Parent.

[2] "Parents" is also used generically herein and, except when necessary for clarity, without differentiation as to father and/or mother and, thus, as to singular or plural.

[3] The record in this matter includes four volumes of exhibits along other documents, such as the impartial hearing officer's decision. The exhibits are labelled herein as "P" for those of the Petitioner-Parents, "R" for those of the Respondent-District, and "IHO" for those of the impartial hearing officer. The record also includes a transcript consisting of three volumes corresponding to the hearing sessions. Because the pagination is consecutive across the three volumes, the citations are to "Tr." generically, followed by the page number(s). Cross references in the footnotes are, per legal citation style, via "*supra*" (above) or *infra* (below).

[4] 20 U.S.C. §§ 1401 *et seq*. (2018); 34 C.F.R. §§ 300.1 *et seq*. (2019).

[5] NEV. REV. STAT. §§ 388.419 *et seq*. (2018); NEV. ADMIN. CODE §§ 388.460 *et seq*. (2019). This decision refers to this corollary state statute and administrative code only to the limited extent that they add in relevant respect to the IDEA legislation and regulations.

[6] IHO-15, at legal conclusions 9, 11, and 13.

[7] *Id*. at legal conclusions 19 and 22.

[8] SRO-2 also confirmed (1) the need for specific citation of supporting judicial and any other applicable legal authority, and (2) the parties' agreement that there was no need for additional evidence and no claim that the hearing was inconsistent with the requirements of due process.

[9] 34 C.F.R. §§ 300.514(b)(2)(i) and 300.514(b)(2)(v) (2019).

[10] In this decision, the Third Circuit explained that "beyond this rather narrow class of record-supported, credibility-based factual findings, we think that, to give the statute's language about 'independent' decisions effect, the [SRO] must have much more leeway in reviewing other non-credibility based findings of the hearing officer." 62 F.3d at 528–29 (citing Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeal Panel,* 3 WIDENER J. PUB. L. 871, 892 (1994). The Ninth Circuit indirectly appeared to approve of this approach. Amanda J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 888–89 (9th Cir. 2001).

[11] Based on the applicable review standard, these factual findings are independent of those of the IHO, although largely squaring with them and affording the prescribed deference to those based on credibility.

[12] Scripting, which is known clinically as "echolalia," refers to an individual's parrot-like repetition of the words the individual hears either on an immediate basis, such as in direct conversations, or on a delayed basis, such as from videos games and movies. E.g., Tr. at 427–28.

[13] In light of the pandemic, the IEP team agreed via this provision that the development would be within one month after Student returned to in-person instruction.

[14] [Brackets denotes redaction of personally identifiable information] Since 2020–2021, these BCBA-supervised RBT services, which amounted to approximately 15 hours per week, were not only at home, but also at the YMCA and at a public after-school program. E.g., *id*. at 418, 597, 662. Their specific request for this IEP was for ABA services from his then current outside provider "during *some* of the 7 hour and 11 minute school day" (D-7, at 25–26) (emphasis added).

[15] Although reciting various parts of the record, neither the Parents' nor the District's written arguments (also referred to herein as briefs) specifically and clearly disputed any of the IHO's factual findings. Thus, the focus here is on the applicable legal analysis.

[16] Unlike the Tenth Circuit's "more than de minimis" standard that the *Endrew F.* Court superseded, the Ninth Circuit's pre-existing substantive standard comported with the result in *Endrew F. See, e.g*., E.F. v. Mesa Unified Sch. Dist., 726 F. App'x 535, 537 (9th Cir. 2018).

[17] NEV. ADMIN CODE §§ 388.070, 388.284(2)(b) (requiring the IEP team to "*provide* positive behavioral strategies supports and interventions, *or other strategies, supports and interventions to address that behavior*") (emphasis added).

[18] In contrast, none of the court decisions cited for purported support in the Parents' brief were after *Endrew F*., and they are all clearly distinguishable. The pair of New York cases concerned whether the child needed individual rather than group ABA services, an issue not in dispute in the present case. A.M. v. N.Y.C. Dep't of Educ., 845 F.3d 523 (2d Cir. 2017); R.K. v. N.Y.C. Dep't of Educ., 2011 WL 1131522 (E.D.N.Y. Mar. 28, 2011), *aff'd sub nom*. R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012); M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217 (2d Cir. 2012). The New Jersey decision was specific to whether the child needed ABA services, not whether the ABA services must be provided by an RBT or supervised by a BCBA. S.A. v. Riverside-Delanco Sch. Dist. Bd. of Educ., 2006 WL 827798 (D.N.J. Mar. 30, 2006). The Sixth Circuit decision only remanded the methodology issue and ultimately decided it in favor of the district. Deal v. Hamilton Cnty. Dep't of Educ., 392 F.3d 840, 865 (6th Cir. 2004), *further proceedings*, 258 F. App'x 863, 865 (6th Cir. 2008). The District's brief similarly only provided sparse and largely pre-*Endrew F*. case law support. Otherwise, the District's brief unduly focused on whether the Student is entitled to 1:1 ABA services for the entire school day, whereas, in contrast, the Parents only requested such services for a portion of the school day. *Supra* note 14.