

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

**STATE OF NEVADA**

In the Matter of

STUDENT<sup>1</sup>, by and through  
Parent,

Petitioners,

v.

SCHOOL DISTRICT,

Respondent.

DECISION OF THE HEARING  
OFFICER

Date: December 30, 2020

Representatives:

Petitioners: Greg Ivie, Esq.

Respondents: Daniel Ebihara,  
Esq.

Hearing Officer: Jamie Resch

**Introduction**

A due process complaint was filed by the represented parents on October 2, 2020. A preliminary order documenting the appointment of the Hearing Officer was issued on October 16, 2020. On October 14, 2020, the District responded to the due process complaint. Resolution efforts were not successful

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<sup>1</sup> 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).

during the thirty-day resolution period. Several status and pre-hearing conferences were held, and a final prehearing report and order was issued on November 23, 2020. The District filed a motion to dismiss, which Petitioners opposed. In an order dated December 9, 2020, the motion was denied. Hearing Officer Ex. 11.

The due process hearing took place on December 16 and 17, 2020. At the hearing, Hearing Officer Exhibits 1 through 15 were admitted without objection. Petitioner's Exhibits 1 through 3 were admitted without objection, except that as to Petitioner's Exhibits 4, the District's objection was overruled. District Exhibits 1 through 8, 13-14 were admitted without objection, except that as to Exhibits 9-12, the Petitioner's objection was overruled. All proposed exhibits were therefore admitted and made part of the record. The decision in this matter is due January 8, 2021 because good cause was previously found to extend the decision date based on the request of the parties.

### **Preliminary Matters**

The pre-hearing conference in this matter was held on November 23, 2020. There were two important issues determined during the prehearing conference that bear discussion.

First, among other requests, the complaint raised an issue regarding an Assistive Technology assessment. The parties stipulated, and again reiterated at the due process hearing on the record, that this issue had been resolved by way of an agreement to provide an assessment. As a result, no testimony was taken on this issue and this decision does not address the request for an Assistive Technology assessment.

Second, Petitioners maintained, and reiterated on the record at the due process hearing, that they did not seek to force the District to reopen schools or to directly provide in-person services of any kind. The parties agreed that in-person instruction ceased on March 16, 2020 in response to the pandemic, and as of the time of the due process hearing, in-person instruction had not yet resumed pursuant to adopted District policy. The parties were not able to completely round-out their agreement on how the District's response to the pandemic affected this due process hearing. As a result, more findings related to this issue are set forth below.

### **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, and

which are stated in the prehearing order, are as follows: (1) Whether the District's failure to provide services to the student except for "distance learning" resulted in a substantive denial of a free appropriate public education (FAPE) since March 2020, and (2) Whether, procedurally, the failure of the IEP team to consider whether Student needed services other than distance learning in order to receive a FAPE in fact resulted in a substantive denial of the FAPE standard.

### **FINDINGS OF FACT**

After considering all the evidence, this Hearing Officer's Findings of Fact are set forth below. The compacted hearing (less than ten total hours) was held in a 100% virtual format as a result of the ongoing pandemic. The parties are both complemented for their preparation and presentation, which given the circumstances, was notably efficient.

That said, the evidence largely falls into two groups; facts which were overwhelmingly demonstrated, and facts which require closer analysis to determine the preponderance of the evidence.

It would be easier to address the clearly established facts first, as many of them underpin the ultimate decision reached in this matter and are, at least in this Hearing Officer's opinion, virtually beyond dispute.

1. The student is seven years old. The student initially enrolled in the District at age three in the early childhood program, and has always attended the same Elementary School [ES]. The student is eligible under the IDEA as a child with a disability under the category of autism spectrum disorder, and in that regard, the Student's IEP called for Student to participate in the "primary" autism program at [ES] in the self-contained classroom during the 2019-2020 and 2020-2021 school years. (See Testimony of Special Education Teacher [SET]). The 2020-2021 school year was Student's first grade year.

2. An IEP meeting and resultant IEP were implemented on December 6, 2019. District Ex. 4, p. 38. As there noted, the next review date was May 22, 2020. The next IEP meeting was not held in May, but rather, a series of IEP meetings started on August 18, 2020, which culminated in an updated IEP dated September 3, 2020. (Testimony of Father, See also District Ex. 3, p. 10). The fact the IEP may have been updated "late" is mentioned here in passing only – the complaint did not particularly challenge this fact as a substantive denial of FAPE, nor did [Father] particularly attribute the delay to any loss of educational benefit, and parents participated in all IEP meetings.

3. A primary reason for the delay in holding the IEP meeting was the outbreak of the COVID-19 pandemic. The parties did not dispute the general existence of the pandemic, nor its general effect on schools. The District presented evidence from its Interim Chief Nurse [CN] that medical understanding of the pandemic and how it affects public health remains a fluid situation. (Testimony of [CN]). According to [CN], who has a Master's degree in nursing and decades of public health experience, the COVID-19 virus is in fact more serious than other prior viruses due to its extremely contagious nature and the serious health effects it can cause. Of note, [CN] testified that the virus is so contagious that the commonly understood six-foot minimum spacing recommended by the CDC (commonly known as "social distancing") is not really sufficient to contain the spread of the virus in a sustained, indoor environment such as schools given the type of protective wear (chiefly, cloth masks) available to the general public.

4. As a result of the above, the Governor of the State of Nevada closed schools throughout the State in response to the pandemic on March 16, 2020. Prior to this date, Student received in-person services at [ES]. After March 16, 2020, the District went to what it calls distance learning; a primarily (but not exclusively) online teaching format. (Testimony of Principal). While distance learning could include

things like online class, self-study, or phone calls, it had no in-person delivery component because the trustees of the District had ordered schools closed to in-person instruction following the Governor's order. (Testimony of Principal).

5. The parties do not dispute, and the evidence overwhelmingly shows then, that the decision to deliver services to Student by distance learning starting March 16, 2020 through the time of the due process hearing was not made because the IEP team determined that Student would excel in distance learning, but rather, distance learning for all students was selected by the Board of Trustees as a response to the pandemic. The "correctness" of any decision by the State or District to cease in-person services in response to the pandemic is beyond the scope of this opinion and Petitioners repeatedly stated they do not challenge that decision as part of their complaint.

6. That said, the evidence overwhelmingly demonstrated two facts which encapsulate the dispute between the parties. First, it is beyond reasonable dispute that the pandemic is a serious threat to individual and public health, and that in response, the District offered Student distance learning services with no in-person component. Second, the record shows beyond reasonable dispute that Student cannot benefit from distance learning services without the in-person assistance of

an adult – and not just any adult – but one with at least some level of training concerning behavioral issues.

7. On the first point, [Principal] testified that the exact nature of services offered depended on the time period in question, and the Hearing Officer finds this is a useful distinction. Three such periods were identified: (1) The time from the order closing schools to the end of the 2019-2020 school year – March 16, 2020 to May 20, 2020, (2) Extended School Year (ESY) which was from June 24, 2020 to July 20, 2020, and (3) The 2020-2021 school year which started August 24, 2020 and continues to present.

8. The first two of these time periods were unique in that they were governed by the December 2019 IEP, which did not contemplate the need for distance learning. Additionally, because the pandemic was a surprise event, teaching strategies during the March to July time period were based on maintaining existing skills, with no new standards taught. The focus on maintaining existing skills was a District decision, not a school-level decision, for all students. (Testimony of Principal).



9. [Principal] further explained that ESY services were also virtual, and it combined goals set out in IEPs as well as a focus on continued maintenance of existing skills.

10. In comparison, strategies related to the 2020-2021 school year were undertaken with the understanding the school year would be taught virtually and therefore the plan was to create virtual instruction that mirrored, to the extent possible, a "normal" in-person school day. (Testimony of Principal). In that regard, many more online platforms were available for the school year such as Clever, Canvas, and other digital platforms. Instruction is either synchronous (live with an instructor) or asynchronous (not in real time). (Testimony of Principal).

11. Given the virtual format, the District mandated that all students receive 60 to 90 minutes of instruction daily. (Testimony of Principal). Instructors are to attempt to provide minutes as specified in the IEP, and could therefore provide more than the 60 to 90 minutes of instruction as needed. (Testimony of Principal). Specific to this student, [SET] testified that Student was offered 100 minutes of live sessions per school day, but that Student only attended one twenty minute session daily which happened to be when math was taught. It appears the IEP called for closer to 150 minutes per day of live instruction. District Ex. 4, p. 25. The parties

agree that Student did not particularly prefer math, but rather, attended it because it was taught at a time of day when the parents chose to have Student attend virtual instruction through the District. (Testimony of Father, [SET]). Student also previously attended some writing sessions through distance learning during August and September. (Testimony of [SET]).

12. Turning to the second point above regarding Student's ability to benefit from distance learning, it was abundantly clear to all involved that Student could not benefit from distance learning without the assistance of an adult. Student's intellectual deficits are severe, and Student lags behind peers in the lower single-digit percentile in most areas. Despite this, Student is verbal and has shown progress in various academic areas. District Exhibit 4, pp. 5-8.

13. The evidence establishes that a much greater concern that affects Student's ability to learn is accompanying behavioral concerns. Student operates under a Behavioral Intervention Plan (BIP) that was in effect as of February 2020 – before schools closed. See District Ex. 5. The BIP is a required component of the most recent IEP. District Ex. 4, p. 26. The BIP notes behavioral concerns such as that Student does not transition well from preferred to non-preferred activities. Unwanted behaviors included crying, looking away, slapping, and other behaviors.

District Ex. 5, p. 1. A prior BIP dated October 2019 noted similar issues, including what was styled as an “average of 8 redirections in a 3 minute period” for task transitions. District Ex. 5, p. 3. Positive reinforcements are identified, but these are all physical items like toys, CDs, or a sensory bin. District Ex. 5, pp. 2, 4. [SET] acknowledged that although she could show Student a video that Student might like as a reinforcement, it would be impossible to provide physical reinforcements in a distance learning format, and that there was “absolutely nothing” [SET] could do to get Student to return to virtual learning when Student would walk away from the delivery device (typically an Ipad). “Video” is not identified in the IEP as one of Student’s preferences or interests. District Ex. 4, p. 19.

14. Aside from these obvious points presented in the BIP, the history of District’s attempts to deliver distance learning to Student informed District, certainly by August 2020, that those services would be ineffective unless an adult was physically present to assist Student with receiving them. See generally, District Ex. 3. This is also shown by the testimony of the special education teacher, discussed below.

15. The testimony establishes that during the March to May time period, Student attended individual distance learning with [SET], as well as a couple group sessions with other students. (Testimony of [SET]). During those sessions, Student was

largely aided by Student's mother, who at times appeared to have a hard time getting Student to sit down and engage in distance learning. (Testimony of [SET]). [SET] therefore instructed the mother on behavioral interventions that seemed to help, such as the use of a token board.

16. During the March to May time period, evidence in the form of status reports show Student attended individual and group distance learning sessions, parents remained in near-constant contact with [SET], Student received services that included occupational therapy and speech therapy, parents assisted with behavioral issues such as by attempting to utilize a token board at home, but that on two occasions, had behavioral outbursts that impeded learning. District Ex. 3, pp. 14-17.

17. As for the ESY period, [SET] explained that services were held online daily, but that Student only attended once a week. [SET] testified that Student's limited attendance was due to Student's parents' schedule, and that Student had "things" throughout the day and could not attend ESY until after 1pm. The teacher was aware Student received daily therapy at the Autism Building Blocks (ABB) center as a result of the parents' preference for in-person education. However, Father testified that Student only attended ESY once a week because he believed that was

Student's assigned slot and that no more services were available. Father's position is contrary to the 2019 IEP, which set out the need for ESY services and documented that said services would at least be delivered in the amount of 100 minutes per month. District Ex. 4, pp. 52-53. [SET] unambiguously, and credibly, testified that the delivery of ESY services to student was limited to once a week based on the parents' request. Regardless, [SET] further explained that she did not feel Student would have particularly benefited more had Student attended ESY more frequently, said opinion a combination of the fact ESY was limited to maintenance topics and Student's negative behaviors limited Student's ability to participate virtually in the first instance.

18. [SET] and both parents testified to what is found here to be indisputable: Given Student's deficits there is no conceivable way Student could be expected to wake up in the morning and "attend" distance learning without substantial adult intervention.

19. But physically getting Student in front of a distance learning delivery device like an Ipad is but half the battle. It is likewise established beyond reasonable dispute that active intervention is required to address behavioral problems that,

unless addressed, completely negate Student's ability to benefit from distance learning. (Testimony of [SET], Father).

20. The experience base is limited with respect to the current school year, because Student only even attempts to attend but a single online class daily. Yet, [SET] explained that when she logs on for Student's daily math class, Student is already sitting at the delivery device and ready to work. What [SET] acknowledged that she did not see is the work that goes into making that happen. [SET] was aware that staff at the ABB were responsible for getting Student ready to participate in the math session.

21. The owner of ABB testified and explained that she has a psychology degree in applied behavior analysis, further education with University of Nevada – Reno's early autism program and prior related work experience. (Testimony of [Owner]). According to Owner, Student attends distance learning while physically present at the ABB, where Owner employs both a tutor of unspecified experience, as well as a BCBA (Board Certified Behavior Analyst). Owner implied, and Father specifically testified, it takes some 10 or 15 minutes of preparation to get Student in front of the delivery device and "calm" enough to use it. According to Father, neither the

parents nor the babysitter they hired were able to calm Student in the way the ABB staff could by way of Owner, the tutor, and/or the BCBA.

22. Even more evidence supports the finding that Student required not just adult help with receipt of virtual services, but some level of trained help to manage behaviors. As earlier noted, the IEP process for the current school year took place at the very beginning of the year and culminated in an IEP dated September 3, 2020. The record unambiguously shows parents raised their concerns about Student's ability to benefit from distance learning through the IEP process. (Testimony of [SET], Father; see also District Ex. 4 generally and at p. 1).

23. At the hearing, an instructional coordinator from the student services division testified (Testimony of [SSD]). The witness explained what should already be apparent from this decision generally – that for the 2020-2021 school year the District only offered distance education and no in-person services. See also District Ex. 4, p. 1. The SSD testified that he attended the IEP meetings along with the parents and [SET], that the parents did not agree with distance learning and did not believe it was effective for Student, but that they were told that was all the District offered. (Testimony of [SSD], corroborated by Father). A notice of intent

to implement IEP dated September 14, 2020 expressly rejected these parent concerns. District Ex. 4, p. 1.

24. Therefore, what is known at this point in the decision, and again overwhelmingly established, is that student education for the 2020-2021 school year is exclusively offered by way of distance learning, and, Student cannot meaningfully participate in distance learning without trained, in-person assistance.

25. The question of whether Student can benefit from distance learning at all, much less in a way that comports with FAPE requirements, is a much closer determination and a point of conflict between the parties. The parents contend Student cannot benefit from distance learning and so they unilaterally largely rejected distance learning services except for the one class that fit Student's schedule at ABB. The District contends it could offer no in-person services due to District policy, and in that regard did not really reach the substance of whether such services were appropriate for the Student. (Testimony of [SSD]). Indeed, the notice of intent to implement the most recent IEP specifically says the team considered "The parent's request for face to face in person instruction and assistance with providing this delivery method through a private organization."



This was apparently a function of the District providing full-time distance learning “for all students.” District Ex. 4, p. 1.

26. After hearing the evidence it is determined that Student can benefit from distance learning, to include receipt of a FAPE, as long as the appropriate adult assistance is provided to address unwanted behaviors. Several points of evidence support this conclusion. At the most general level, based on the totality of evidence, it is apparent Parents do not like the distance education model. It is accepted there were at times technical glitches with the technology involved. (Testimony of Father, see also District Ex. 3, p. 2). Still, there is a reasonable record of the Student successfully connecting to and benefiting from distance learning prior to the 2020-2021 school year as discussed above. Parents simply preferred the program of instruction at ABB to the distance learning delivery model offered by the school, which makes perfect sense as [SET] testified in-person instruction was better for Student and virtual instruction was only selected due to the pandemic.

27. But, as will be explained in the conclusions of law, what is “best” for Student is of no moment here. The concern here is with Student’s ability to receive a FAPE through distance learning. In that regard, the evidence showed Student was

capable of doing so. According to [SET], it appeared Student could benefit from additional distance learning. Specifically, there were days when Student did "ok" getting online and participating in distance learning, but other days if Student did not want to participate, the student could have a "meltdown" or require two or three people to support getting Student into the mindset to participate in classwork.

28. [SET] candidly explained there was no way Student, or any other child in her classroom, could sit for a full hour or more at a computer for distance learning. However, she felt Student could participate in chunks of time. Student had the assistance of the BCBA to help Student participate in the twenty minute session Student attended. (Testimony of [SET]). [SET] further stated Student previously attended a writing session online at 1:30 pm. Parents explained Student's ability to concentrate typically degraded by the afternoon. (Testimony of Father).

29. [SET] explained that Student did not especially mind math class, so that was a reasonable class for Student to attend. Other potential areas where Student could benefit were writing and speech therapy, although of all subjects, [SET] believed writing was Student's least favorite. (Testimony of [SET]).

30. With respect to writing, [SET] explained writing is a nonpreferred task for Student. As a result, behaviors impede Student's progress. A brief review of Student's writing progress is as follows: As of February 2020, Student was apparently capable of writing Student's first name and tracing the last name. District Ex. 4, p. 8. Prior progress documented the ability to write most uppercase letters, some lowercase letters, and most numbers. An October 9, 2020 progress report shows similar progress and notes Student attended live writing sessions until September 11, 2020. District Ex. 6, p. 11. A December 9, 2020 report from ABB notes Student has "started" writing Student's name, can write most uppercase letters and some lowercase letters, and that Student has improving penmanship. Petitioner Ex. 1-2. This evidence tends to suggest Student's present writing skills are similar to, or perhaps very slightly improved from where they were before schools closed in March.

31. As to speech therapy, the evidence is more clear. District provided Student's speech and language pathologist as a witness [SLP]. According to [SLP], she had been Student's speech and language pathologist the past three years. [SLP] explained that she offered speech services from March through May, but the parents declined the services. She was able to "push" her way into one group

special education class by logging on at that same time, and deliver services to Student that way, which Student appeared to benefit from. [SLP] explained, and it is so here found, that skills like following directions, increasing sentence length, and vocabulary building can all be taught virtually.

32. [SLP] also explained that for the 2020-2021 school year, she logs in weekly (Mondays at 1:55 pm) hoping to see Student, but Student never attends and she logs off after ten or fifteen minutes. [SLP] testified, credibly and clearly, that she believed Student could benefit from virtual speech therapy if some supports were put in place – chiefly a trained adult to help with behaviors. This was based on at least one observation where the mother helped during delivery of [SLP]’s services, but there was at least one unsuccessful effort where Student’s babysitter was not able to control Student’s behavior during an online speech therapy session.

33. Parents explained, quite simply, that they would “rather not” use [SLP] for speech services and therefore instead chose to pay for a different speech and language pathologist to spend one hour a week with Student at the ABB. (Testimony of [Father]).

34. A brief review of speech progress is as follows. Immediately prior to the school closure in March, Student could usually follow one step instructions and

could sometimes imitate three to five word sentences. District Ex. 4, p. 12. Student could use a PECS strip (picture strip designed to aid in basic communication) to form "I want" sentences and would verbally inform school staff when Student needed to use the restroom. The October 9, 2020 progress report is limited due to Student's lack of attendance of District-provided speech services, but since communication is involved in any online class setting, [SET] did observe Student can respond to peers' greetings and farewells. District Ex. 6, p. 10. The ABB report of December 2020 indicates Student sometimes uses five to seven word sentences, and has learned 50 words in the last six months. Petitioner Ex. 1-3.

35. Math was the most observed subject. Briefly – before schools closed to in-person instruction, Student could count to 59 without skipping numbers, could not add or subtract two numbers, and could count by tens. District Ex. 4, p. 12. According to the October 2020 progress report, Student can now sometimes "add within 8 using manipulatives." District Ex. 6, p. 11. The ABB report notes Student does well using manipulatives but has trouble understanding zero. Petitioner's Ex. 1-3.

36. ABB's [Owner] also testified about safety measures to prevent the spread of coronavirus, including use of masks, social distancing when possible, and policies

instructing staff to stay home if they felt unwell. The evidence showed Student typically wears a mask or face-shield at ABB. (Testimony of Father, Owner). The evidence also showed staff must often sit near Student or even engage in “hands-on” guidance to control behavior. (Testimony of [SET]). ABB’s [Owner] also explained that ABB was identified as an essential business by the State. See Emergency Amendment to NAC 414 dated March 20, 2020. <https://nvhealthresponse.nv.gov/wp-content/uploads/2020/03/3.20-Emergency-regulations.pdf> (noting among other businesses, “child care facilities”).

37. The parties filed written closing briefs after the due process hearing, from which certain points bear further discussion. In its brief, the District argued that the State of Nevada precluded “Student from coming to school” and that as a result of Governor’s Directive 22, it was “legally impossible for schools to provide any in-person education services to any student.” Hearing Officer Ex. 14, pp. 2-3. These arguments are not necessarily wrong, but there is more nuance involved than what the District credits given the history of directives related to the pandemic.

38. Directive 22 was issued on June 9, and built upon prior directives that closed school buildings “for onsite education.”

[https://gov.nv.gov/News/Emergency\\_Orders/2020/2020-06-09\\_-\\_COVID-](https://gov.nv.gov/News/Emergency_Orders/2020/2020-06-09_-_COVID-)

[19\\_Declaration\\_of\\_Emergency\\_Directive\\_022\\_-\\_K-12\\_School\\_Re-](#)

[Opening\\_for\\_Summer\\_Learning\\_and\\_Activities\\_\(Attachments\)/](#). See also District

Ex. 11. The original directive closing schools was issued March 15, and stated all K-12 schools “will close to students effective March 16” until rescinded.

[https://gov.nv.gov/News/Emergency\\_Orders/2020/2020-03-15\\_-\\_COVID-](https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-15_-_COVID-)

[19\\_Declaration\\_of\\_Emergency\\_Directive\\_001/](#). Under Directive 14, issued April 14, the soonest schools could reopen to in-person instruction was April 30.

[https://gov.nv.gov/News/Emergency\\_Orders/2020/2020-04-14\\_-\\_COVID-](https://gov.nv.gov/News/Emergency_Orders/2020/2020-04-14_-_COVID-)

[19\\_Declaration\\_of\\_Emergency\\_Directive\\_014/](#). Directive 22 required that all school districts develop reopening plans for approval by their Board of Trustees, with options to include in-person or individualized tutoring. Section 2 of Directive 22 discussed reopening in-person activities such as the holding of IEP team meetings.

District Ex. 11. This was followed by Directive 28 which addressed school district policies for reopening for the 2020-2021 school year.

39. In response to these directives, the Clark County Board of School Trustees approved a full-time distance learning plan for the 2020-2021 school year at a meeting held July 21, 2020. District Ex. 9. While the minutes of that meeting show substantial discussion of topics such as whether classes should be a semester long

or a year long, it does not appear special education was discussed at all, or certainly not in any substantial manner. District Ex. 9.

40. Schools were closed to in-person instruction from March 16 to the conclusion of the 2019-2020 school year based on this record. See District Ex. 11 (noting schools were to “remain closed for onsite education...”). But it doesn’t fully encompass the issue to say schools “closed” as the District suggests. Rather, they did close to in-person instruction but were “open” for distance learning through the conclusion of the 2019-2020 school year. See also, (Testimony of [Principal]).

41. None of these directives specifically addressed the delivery of special education services. For that, we must turn to the U.S. Department of Education, which was consistent in its messaging that the FAPE standard was unchanged throughout the pandemic. As early as March 12, OSEP guidance was promulgated which recognized distance learning as a delivery model, except where “exceptional circumstances could affect how a particular service is provided.” <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/#Q-A-1>. As of March 21, the Department recognized the national emergency brought about by the pandemic, and the requirement that provision of a FAPE could be



made remotely “as appropriate.”

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiGmYbVnPHtAhU9CjQIHXTACakQFjAAegQIBhAC&url=https%3A%2F%2Fwww2.ed.gov%2Fabout%2Foffices%2Flist%2Focr%2Ffrontpage%2Ffaq%2Fpolicyguidance%2FSupple%2520Fact%2520Sheet%25203.21.20%2520FINAL.pdf&usg=AOvVaw3-Xyu7-rmm5UTuy4ywf\\_H4](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiGmYbVnPHtAhU9CjQIHXTACakQFjAAegQIBhAC&url=https%3A%2F%2Fwww2.ed.gov%2Fabout%2Foffices%2Flist%2Focr%2Ffrontpage%2Ffaq%2Fpolicyguidance%2FSupple%2520Fact%2520Sheet%25203.21.20%2520FINAL.pdf&usg=AOvVaw3-Xyu7-rmm5UTuy4ywf_H4). (Supplemental Fact Sheet: Addressing the Risk of COVID-19...). That early document recognized that distance learning would not work for all special education students, and advised IEP teams to expect to “make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.”

Fact Sheet at p. 2.

42. By April 27, the Secretary of the Department of Education publicly “reaffirmed her long-held position that individualized education must take place for all students, including students with disabilities.”

<https://www.ed.gov/news/press-releases/secretary-devos-reiterates-learning-must-continue-all-students-declines-seek-congressional-waivers-fape-lre-requirements-idea>. The Secretary informed Congress of the Department’s position that no legislation should be passed to “waive” FAPE requirements during the

pandemic, and the record here (public or as presented during the due process hearing) is devoid of any information that Congress ever waived or changed the FAPE requirement since the pandemic started. The fact the requirement to provide FAPE to all students during the pandemic never changed was conclusively stated in yet another guidance letter dated September 28. See Hearing Officer Ex. 11 (noting, “no matter what primary instructional delivery approach is chosen, SEAs, LEAs, and individualized education program (IEP) teams remain responsible for ensuring that a free and appropriate education (FAPE) is provided to all children with disabilities”).

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

Of particular relevance to the instant matter, the IDEA provides that in the development of the IEP, parents must be afforded the opportunity to attend and participate and that the parent’s participation must be meaningful, including giving consideration to their concerns about their child and providing parents with a copy of the IEP. 34 C.F.R. §§300.321(a)(1), 300.322(f), 300.324(a)(ii); NAC 388.284(2)(a). That is, the IEP needs to include not only special education and related services, but also must address behavior concerns as needed. 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” for pupils who require “positive behavioral strategies, supports and interventions.” NAC 388.284(3)(b)(1).

The United States Supreme Court has twice addressed the substantive standard of the IDEA in the provision of FAPE, first in *Board of Education v. Rowley*, 458 U.S. 176 (1982) and much more recently in *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017). The basic requirements of the act, and especially those relevant to the procedural requirements of the act, have remained the same since *Rowley*.

“[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g. 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP...demonstrate[s] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”

*Rowley*, 458 U.S. at 205-206.

To meet its substantive obligations under the IDEA, the District must offer an individualized educational program developed through the Act’s procedures

“reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S.Ct. at 999. Notably, the IEP must be reasonable – there is no requirement that it provide what is best or ideal. *Id.* Where a procedural violation is alleged, the hearing officer would first examine whether the school district has complied with the procedures of the IDEA, and if not, whether the procedural violations in fact resulted in a substantive deprivation of a FAPE. *Rowley*, 458 U.S. at 205-206.

In fact, the act clearly spells out that:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies-

- (i) impeded the child’s right to a FAPE;
- (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
- (iii) caused a deprivation of educational benefit.

34 C.F.R. §300.513(a).

The issues under consideration in this case are fairly narrow, and ask whether a substantive violation occurred in the failure to provide in-person assistance to Student, or, whether a related alleged procedural violation occurred that deprived the student of a FAPE. If so, the question of what to do about the violation must be addressed.

**After consideration of the evidence, the September 2020 IEP was not reasonably calculated to confer an educational benefit because it failed to provide Student required in-person assistance so Student could benefit from special education. Any related procedural violation is denied because it is subsumed by the substantive finding.**

The ultimate issue presented here has both procedural and substantive components. It simply is less cumbersome to address the violation on a substantive basis. Therefore, to address the easier question first, it is found that no procedural violation of the IDEA occurred.

"Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." *Amanda J. v. Clark County School Dist.*, 267 F.3d 877, 892 (9th Cir. 2001). The IEP team was required to consider "the concerns of the parents for enhancing the education of the child." 34 C.F.R. §300.324. While the parent does not have veto power over the IEP, presentation of an IEP plan on a "take it or leave it" basis is a violation of the IDEA's procedural requirements. *Ms. S. ex rel G v. Vashon Island School District*, 337 F.3d 1115, 1131 (9th Cir. 2003).

Here, credit is given to the overwhelming testimony that the closure of schools was a public health emergency and not something anyone on the IEP team had any ability to control. Parents did provide the team with their concerns about distance education. The remainder of the team noted those concerns and rejected them because distance learning was the only option offered by the District to all students in non-rural Clark County. While this is a close call, and ultimately of no moment because as explained below there was a substantive deficiency with the IEP on the same topic, the procedural issue is better said to have not amounted to a violation at all where parents were operating with all relevant information but their concerns were addressed and rejected on a basis where the team had no real authority to come to any other determination concerning in-person instruction.

That said, because parents did provide their input to the IEP team regarding Student's ability to benefit from distance learning, and the team rejected it, this decision must address whether the IEP which was ultimately developed and implemented was designed to confer Student with a FAPE. Because the September 2020 IEP was not so designed, there has been a substantive violation of the right to a FAPE.

Special education under the IDEA is no-cost, specially designed instruction to meet the unique needs of a child with a disability. 34 C.F.R. § 300.39. 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.” 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). The Ninth Circuit more broadly referred to potential services as arising based on “a particular special education need caused by a child’s disability.” *Rachel H. v. Dept. of Educ.*, 868 F.3d 1085, 1092 (9<sup>th</sup> Cir. 2017).

Giving due credit to the FAPE standard, the evidence overwhelmingly established that Student could not benefit from distance learning without trained adult assistance, and Parents repeatedly so stated as part of the IEP team process. The IEP here, which implemented distance learning without any in-person services, was rather obviously not “reasonably calculated to enable the child to receive educational benefits.” *Andrew F.*, 137 S. Ct. at 997. The lengthy factual findings above support this. When Student received adult in-person help, and that adult received (or was already aware of) appropriate behavioral interventions, Student



was able to benefit from distance learning in a manner that complies with the IDEA. None of this was any secret to the District during the formulation of the IEP.

If society were not operating under the weight of an ongoing pandemic, these findings, which rest on longstanding IDEA principles, would represent a classic, almost simplistic, application of law to the facts presented in this matter. However, that's plainly not the case and the effect of the pandemic must be addressed.

**Nothing about the pandemic altered the longstanding FAPE standards set out above. As a result, the pandemic ultimately does not change the fact Student required in-person services to benefit from distance learning.**

At the due process hearing, the District appeared to argue that FAPE looks different somehow given the ongoing pandemic. While that sounds like a statement with some appeal, the simple fact is that the U.S. Department of Education has had many opportunities to adopt that position and not only has it not done so, it has reiterated time and again that the FAPE standard is unchanged in light of the pandemic. As laboriously explored in the factual components of this decision, the FAPE standard never changed and there would be no reason for the District to have thought otherwise. See findings #41, 42 above (discussing continuous Department of Education guidance).

The District filed a motion to dismiss in this matter, which was ultimately denied. Hearing Officer Ex. 11. As explained therein, available guidance including the U.S. Department of Education guidance letter dated September 28, 2020 shows that the FAPE standard has in fact not changed since the pandemic began. While the conundrum that may seem to exist where schools are closed yet districts remain responsible for providing FAPE including possible in-person services is easy enough to understand, the resolution of those competing factors does not favor the District.

Various hearing officer and review officer decisions have addressed FAPE claims arising from district decisions to switch to distance learning as a result of the pandemic. A survey of these cases finds varying results, but no particular on-point decision that addressed the specific issue presented in this case regarding private provider replacement of in-person services. *See Ringwood Bd. Of Educ.*, 120 LRP 36926 (N.J. SEA Nov 19, 2020); *Long Beach Unified Sch. Dist.*, 120 LRP 33840 (Cal. SEA Nov. 18, 2020).

Additionally, courts have not yet addressed the specific issue presented here. To be sure, courts have decided cases, typically class actions, where parents sought to force schools to provide in-person services. Courts, and specifically the Nevada

District Court, have rejected these requests at least as they arise in the context of whether a preliminary injunction should issue. *C.M. v. Jara*, No. 2:20-cv-1562-JCM-BNW (D. Nev. November 19, 2020).

Further still, pre-pandemic guidance is not especially applicable either. In its motion to dismiss, the District relied on *N.D. v. Hawaii Dept. of Education*, 600 F.3d 1104 (9<sup>th</sup> Cir. 2010). But that case arose under stay put provisions and did not reach the ultimate question of whether FAPE had been provided. Also, there is a large distinction between the public health crises the nation faces now, and the seventeen Fridays schools were closed in the *N.D.* case as a result of financial issues. Moreover, at least one court has suggested that in-person services must be provided either by public school staff or private providers if required for a student to receive a FAPE, albeit with the provision that it must be done "safely." *L.V. v. New York City Dept. of Education*, 77 IDELR 15 (July 17, 2020).

None of these authorities is binding in this proceeding of course. Other hearing officer decisions are of limited value, particularly since they do not appear to reach the specific issue presented here. The Nevada District Court's strong acknowledgement of the serious nature of the pandemic is credited, but Petitioners here do not seek to force the District to re-open, or to directly provide in-person

services to Student. Decisions of other courts, other hearing officers, or even guidance letters are all merely persuasive authority.

That said, and as explained in the order denying the motion to dismiss, these authorities speak with one voice on the topic of whether districts must continue to provide FAPE during the pandemic. While not all authorities reach the topic, none that did conclude that the FAPE standard is any different now than it was before the pandemic. Moreover, the Department of Education informed school districts in March to expect to evaluate the need for compensatory education for all special education students because of the pandemic. As a result, and as already explained, Student's IEP was deficient to the extent it eschewed necessary in-person assistance because of the pandemic.

**Parents request for relief under the unilateral placement provisions of the IDEA and/or as compensatory education justifies reimbursement of at least some expenses.**

It is established that the September 2020 IEP was not reasonably designed to confer an educational benefit on Student because it lacked any accommodation for in-person services. Accepting that the District is closed for in-person instruction, Parents' request for replacement services was wrongly rejected by the

IEP team. As a result, Parents placed Student at ABB for what they believed to be appropriate replacement services.

The IDEA contains a unilateral placement provision that allows parents to seek private services and seek reimbursement for those expenses if the district “had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34 C.F.R. §300.148. Any such placement is at the financial risk of the parents. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). To determine if reimbursement is appropriate, the hearing officer would consider (1) whether the District showed that the student’s IEP actually provided a FAPE, (2) if it didn’t, whether the unilateral placement was appropriate, and (3) that the equities favor reimbursement. See §300.146, *Y.F. v. New York City Dept. of Educ.*, 2015 U.S. Dist. LEXIS 100980 (S.D.N.Y. 2015).

The first inquiry has already been resolved. The September 2020 IEP did not provide student with a FAPE. Student could not benefit from distance learning, synchronous or asynchronous, without active, in-person, trained adult assistance. An IEP that lacked those things would not confer any educational benefit at all on the student, much less a benefit that met the FAPE standard.

The second inquiry asks if the placement was “appropriate.” Courts have focused on the school’s capacity to implement an IEP in making this determination. For example, where district policies only provided for group occupational therapy, a student that required individual therapy could appropriately receive those services privately and seek reimbursement under the unilateral placement provisions. *B.R. v. New York City Dept. of Edu.*, 910 F. Supp. 2d 670, 678 (S.D.N.Y. 2012).

A similar issue is presented here, where the District’s policies prevent delivery of in-person services, even though Student requires those services in order to benefit from distance learning. Pandemic notwithstanding, if in-person services are required for Student to receive a FAPE, then in-person services must be provided. The District cannot currently provide those services, so Parents’ decision to seek those services from a private provider was appropriate. *See also Y.F.* at \*14-15.

Further supporting this finding is the fact that ABB attempted to implement Student’s IEP. Testimony of [Owner]. More importantly, ABB provided the necessary trained, adult supervision to allow Student to participate in at least some distance learning opportunities, including with assistance of both a BCBA and

tutor/aide. The ABB met some or most of Student's needs including educational and behavioral, and no testimony was provided of any need that went unmet.

Finally, the equities of Parents' decision must be considered. It is here that considerations regarding the pandemic have the most effect and several factors must be considered. To start with, there is no requirement that a private placement be made to an accredited school. 34 C.F.R. §300.148. The fact ABB is not licensed as a private school does not bar Parents from placing Student there. *See Shapiro v. Paradise Valley Sch. Dist. No. 69*, 317 F.3d 1072 (9<sup>th</sup> Cir. 2003). Nor do those facts bar potential reimbursement for expenses arising from ABB services, so long as those services benefit the student and are not more restrictive than necessary. *Madison Bd. of Educ. V. S.S.*, 77 IDELR 99 (September 4, 2020).

Wide discretion is provided to consider the equities between the parties, to include whether the Student was placed privately for reasons other than disabilities, whether there was a more suitable placement available, and the general cooperativeness of the District. *Forest Grove Sch. Dist. V. T.A.*, 53 IDELR 213 (D. Ore. 2009). Parents are required to give the district a good faith effort to meet its FAPE obligations. *Rockwell Ind. Sch. Dist. V. M.C.*, 816 F.3d 329 (5<sup>th</sup> Cir. 2016). The amount of any award of reimbursement may be reduced if the parents did not

inform the IEP team of their rejection of the proposed IEP, did not inform the school in writing of that decision, or if their actions were “unreasonable.” 34 C.F.R. §300.148(d). Reimbursement is not an “all or nothing” proposition and can include repayment of the cost of education, special education, and related services. 20 U.S.C. §1412(a)(10)(C)(i).

The question of the good faith of the parties is complicated, in that it is clear both did what they felt was the correct decision in response to the pandemic. That said, each side may have dug in a little too much. Despite a record that Student can benefit from distance learning, the testimony showed that Parents simply don’t like distance learning and weren’t especially invested in making it work – especially when what they saw as a highly preferable alternative (ABB) was available. For its part, the District/IEP team concluded it was unsafe to provide in-person services, but its refusal to consider private providers for those necessary services was somewhat closed-minded and ultimately (as explained above) not consistent with available Department of Education guidance which recognized the FAPE standard was unchanged.

It is the District’s burden to provide a FAPE, not that of the parents. As a result, the District’s expectation that parents would help implement distance



learning might be an option if the parents are willing and able to help out, but the responsibility cannot be placed on all parents in all cases. (See Testimony of [SET] regarding expectations of parent assistance, also District Ex. 3, p. 7). Here, the evidence shows that on the whole, the few times Parents succeeded with distance learning assistance, they were lucky that Student's behaviors were not especially disruptive. The testimony established times when Parents and/or their babysitter could not provide the necessary support, and that the BCBA and staff at ABB had much better success getting Student ready to engage in distance learning.

With that said, the Parents' decision to completely forgo distance learning except for a single class a day is slightly unreasonable. According to both [SET] and [Owner], Student could participate more in distance learning every day than Student currently does. Parents' reasons for declining additional distance learning opportunities are the result of wanting what is "best" for Student and not a function of attempting to replicate what a FAPE looks like such as the District would provide.

This is especially apparent in the area of speech therapy, where Parents hardly gave the District's SLP a chance to provide services – certainly not a good faith opportunity since the District's SLP made ongoing efforts to provide the speech services via distance learning. Father's own testimony was that they did

not “click” with the District’s SLP, so they replaced those services with those of a private, in-person provider. There is no question Student has benefited from those private services, but the issue here is whether Student would benefit from speech services provided virtually by the District if Student has proper adult support during those services. The evidence shows that Student would so benefit.

The IEP calls for 120 minutes of speech services per month; approximately then thirty minutes per week. District Ex. 4, p. 27. The parties agreed the IEP provisions and goals were correct in all respects other than the distance learning issue. As a result, the Student should receive speech services of 30 minutes per week. But Parents have elected to have student receive double that amount of services in the form of a private SLP that meets with Student 60 minutes per week. That Student has progressed in Student’s speech is no surprise then, but again, the focus here is on what FAPE looks like, and what it looks like is 30 minutes per week which [SLP] testified can be delivered virtually. It is noted that [SLP] also explicitly testified that an adult would need to be present to help Student log on and to reinforce positive behaviors during virtual speech services.

As for the other components of the IEP, the evidence showed that the Parents wanted Student to focus on academic areas. District Ex. 3, p. 2. Student

did not appear to receive occupational therapy services specifically at ABB, but ABB did work on and document progress towards Student's other/academic IEP goals. Petitioner's Ex. Pp. 1-2 to 1-4. The evidence showed that [SET] communicated by email with ABB to give Student credit for progress made during the 2020-2021 school year while at ABB. Petitioner's Ex. 5-10 (reiterating Student's IEP goals).

Turning again to the IEP, it appears to call for 1665 minutes of instruction (asynchronous plus synchronous) per week which works out to approximately 5.5 hours per school day. This largely mirrors Student's time per week at the ABB, which [Owner] explained was about five hours per day.

Two factors guide the ultimate decision here. First, the evidence overwhelmingly establishes that Student needs adult assistance to participate in distance learning – certainly the live and online portion, but the asynchronous portion as well. There can be no reasonable expectation Student will self-study without significant guidance by a trained adult. Second, the evidence established that Student may be able to participate slightly more in distance education, but it would be unlikely Student could participate in the full distance learning experience due to behavior problems. (Testimony of [SET]).

[Owner] explained that the cost for services at ABB is as follows: There is a charge of \$37.50 per hour for all services, and a monthly fee for the assistance of the BCBA which is \$200. ABB's billing to parents was provided, and shows these charges for the school year, noting the billing appears to run a month behind: August=\$3,237.50, September=\$2,900, October=\$3,702.50, November=\$2,855.00. According to [Owner], the \$37.50 rate is below the market rate of \$50 per hour or more that competitors charge. To the extent it matters, the \$37.50 rate is determined to be reasonable.

These amounts all appear to be below what it could cost if a straight formula were applied for the time per day stated in the IEP (5.5 hours) multiplied by the hourly rate of \$37.50. Therefore, considering the equities of the situation the monthly amounts appear to reasonably confer the necessary service of trained in-person adult assistance upon Student which would be necessary to replace the services described in the IEP. To be clear, the cost appears to be the same whether ABB entirely provides an educational component itself, or if it assists student with distance learning through the District's virtual program. The amount for August must be prorated since school did not start until August 24, 2020. Therefore

District is ordered to reimburse parents for their costs at the ABB for September, October, and November in full, and \$809.36 for August.

Student would be entitled to reimbursement for expenses at ABB for December and January as well at a rate not to exceed 5.5 hours per day at \$37.50 per hour plus the \$200 fee for the assistance of a BCBA. Any such reimbursement must be limited to actual hours the Student was present at ABB and is subject to further reduction as stated below.

Reimbursement for speech services will be denied at this time because (1) the IEP is reasonably calculated to meet the FAPE standard for speech services so long as a trained adult is present to aide in the delivery of those services, and (2) the staff at ABB can provide the "trained adult" component as part of its regular monthly charge. As a result, there is no need for the additional service of a separate, privately paid speech and language pathologist for Student to receive a FAPE. Parents may wish to continue that additional service, but it would be at their expense. It is understood this decision is being made over the District's winter break. Student should endeavor to attend virtual speech language services of thirty minutes per week with the District's SLP, whether in one sitting or multiple sessions. If parents decline to have Student do so, then four hours (to allow for

thirty minutes instruction and reasonable time to get Student "ready to work") shall be deducted from any reimbursement for January.

The IEP team will meet before the end of January to consider the Student's progress in the area of speech therapy and to discuss whether Student has benefited from or can continue to benefit from virtual delivery of those services, or whether in-person services are required. If in-person services are required, the team should consider whether parents should be reimbursed for those services if they are provided by a private provider. The team shall also discuss whether in-person instruction has resumed at the end of January and if it hasn't, what further adult supports Student needs to continue to receive a FAPE, such as continued assistance from staff at the ABB center at District expense.

In their closing briefs, the parties both discussed the effect of delayed/missing written notice by the parents on any potential reimbursement, citing 34 C.F.R. §300.148(d). A review of the record reveals that in the September 3 notice of intent to implement the IEP, the District informed parents it rejected their request of a "delivery method through a private organization." District Ex. 4, p. 1. The topic was therefore discussed as part of the several IEP team meetings. Whether or when parents requested reimbursement for a private placement in

writing is a little more fuzzy. However, the record contains an August 11 email from parents to [SET] that requests among other things help to include “funding for alternative services.” Petitioner Exhibit 5-3.

While the email does not cite the IDEA or use the word “reimbursement” it is part of ongoing communications about Student’s placement at ABB and could reasonably be understood to request the District pay for those services. On this record, given the communications described above, the fact reimbursement is limited to services provided starting August 24, and the direct discussion of this issue at IEP team meetings between August 24 and September 3, nothing about the parents’ alleged lack of a written communication would alter the decision set forth regarding reimbursement under the permissive reduction provisions of 34 CFR §300.148(d).

Moreover, as an alternative and wholly separate basis for making the award set forth herein, it is also found that Student is entitled to compensatory education for the loss of an educational opportunity in the amounts previously described. Such an award would not be subject to prior notice or a reduction based on lack of notice at all. Courts have explained that reimbursement for privately delivered services is a form of compensatory education. *R.S. v. Board of Dirs. Of Woods*

*Charter Sch. Co.*, 2019 U.S. Dist. LEXIS 333760 (M.D.N.C. 2019), *affirmed*, 806 Fed. Appx. 229 (4<sup>th</sup> Cir. 2020).

Here, the district did not present any evidence that it provided or even planned to provide any compensatory services to student, even though OSEP guidance as early as March indicated the need for at least a discussion of whether compensatory education was necessary. In-person instruction has not yet resumed, so maybe the District had some undisclosed plan it means to implement when schools reopen. But the fact parents have sought compensatory education arising from the pandemic is something school districts were told to expect by the Department of Education and no known authority or guidance would require parents to wait until schools reopen to seek relief. Rather, as fully explored in this decision, longstanding IDEA principles allow parents to seek compensatory education or make a private placement in response to a school district's failure to offer a FAPE.

Whether styled as a unilateral placement reimbursement or as compensatory education, the reimbursement ordered in this decision is necessary to compensate Student for the lost educational opportunity.



**Given the equities of the parties, reimbursement for costs incurred prior to the start of the 2020-2021 school year will be denied.**

Turning to the time periods prior to the current school year, it is less clear that Student was denied a FAPE at all, and alternatively, if FAPE was denied, the remedies set forth above, to include reimbursements targeted to the current school year, are sufficient to compensate Student for any lost educational opportunity.

Looking first at the March to May time period, it is noted this short period of time included the spring break, and that no instruction was provided to any student between April 4, 2020 and April 13, 2020. District Ex. 1, p. 4. Second, this time period was the truest “emergency” period of time involved in the pandemic. The State had declared a public health emergency, schools were ordered closed, and much less was known about the COVID-19 virus. (Testimony of [CN]).

According to [Principal], when schools closed during this time period, the instruction provided to all students was distance learning with the goal of maintaining skills. Guidance available in March 2020 generally required that FAPE continue to be provided. One document stated the following:

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must

ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§104.4, 104.33 (Section 504) and 28 CFR §35.130 (Title II of the ADA)). SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504. (34 CFR §§300.101 and 300.201 (IDEA), and 34 CFR §104.33 (Section 504)).

See, "Questions and Answers on Providing Services to Children with Disabilities During A COVID-19 Outbreak," U.S. Dept. of Education, March 2020 (see <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>). Other relevant guidance is discussed in detail earlier in this decision.

Further still, the Student's ability to learn through distance learning was an unknown during this timeframe. Ultimately, Student participated heavily in available distance learning opportunities through this time period with parental assistance. District Ex. 3, pp. 14-17. Student advanced to the next grade following the end of the 2019-2020 school year in May. A progress report from July 2020 indicated Student had maintained existing skills and no regression was documented. District Ex. 6, p. 9.

On the whole, the District has met its burden to show that Student received a FAPE between March and May. This is an extremely fact-based, individualized decision from which no particular rule should be extracted. It is entirely possible

given some other set of facts that the school closure from March to May could just as easily result in a denial of FAPE. But here, aside from the above finding, it is alternatively noted that any denial of FAPE during this time period has been remedied by the award of compensatory education and reimbursement set forth earlier. Therefore, even if Student was denied a FAPE during this time period, Student has already been compensated for any alleged loss of an educational opportunity by way of the reimbursed services ordered in this decision.

With respect to the ESY period, parents' testimony that they were only offered ESY services one day a week is not credible. Their own exhibits confirm they were offered a 9:00 am daily group session, which they elected not to utilize. Petitioner Exhibit 5-6. Student ultimately maintained skills over the Summer. District Ex. 6, p. 9. And again, even if a loss of educational opportunity occurred during the ESY period, it was remedied by the subsequent and extensive compensatory education Student received at ABB in the following months for which parents are to be reimbursed.

A brief note on the alleged technical issues that arose during distance learning. This decision places limited stock in those concerns, because the evidence showed Student did not necessarily benefit from in-person education at

a 100% efficiency rate either. (Testimony of [SET]). That is, behaviors frequently impeded in-person learning, which is similar to a technical glitch impeding distance learning in that when the undesired issue occurs, learning is decreased. Overall, given this record, technical issues did not in and of themselves amount to a denial of FAPE.

Finally, returning to the District's closing brief, it suggests the State and not the District would be responsible for providing a remedy if Student's rights under the IDEA were violated. Hearing Officer Ex. 14, p. 4. That is not how the system works. In Nevada, District is responsible for providing special education to Clark County students with individualized educational needs. NAC 388.464. As a straightforward application of longstanding IDEA law, if compensatory education is required, the District has to provide it. That is what is ordered here.

To the extent the District argues it provided distance learning and had no further obligations, its position is ultimately rejected. The District's own documents discuss consideration of "hybrid learning" as a potential instructional option. District Ex. 10, p. 4. [Father] testified that on his research other states offer this type of model. The District ultimately settled on distance learning for all students

in urbanized Clark County. As explained herein, that decision did not take into account the individualized needs of Student.

Courts simply have not yet accepted, and this decision does not accept, District's position that its obligation to provide a FAPE was met by providing distance learning to students who cannot meaningfully benefit from it. While the District's sweeping proposition is rejected throughout the time period under review here, it is particularly unsustainable for the 2020-2021 time period for which relief has been granted.

### **ORDER**

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

#### **Reimbursement:**

- 1) The District will reimburse parents for expenses at the ABB in the amount of \$10,266.86 representing amounts already spent between August and the end of November, 2020.
- 2) The District will reimburse parents for expenses at the ABB for December 2020 and January 2021 in an amount equal to the lesser of any expenses actually incurred or an amount computed by multiplying

the number of instructional days per month by 5.5, then multiplying that result by \$37.50, then adding an additional \$200 to that amount.

- 3) Parents are not entitled to reimbursement for speech services (See Petitioner's Ex. 4-15 to 4-16.

**No later than January 29, 2021, the District will:**

- 1) Hold an IEP team meeting to determine Student's progress in speech therapy and to discuss whether Student has benefited from or can continue to benefit from virtual delivery of those services, or whether in-person services are required. If in-person services are required, the team must consider whether parents should be reimbursed for those services if they are provided by a private provider. The team shall also discuss whether in-person instruction has resumed at the end of January and if it hasn't, what further adult supports, such as continued assistance from staff at the ABB center at District expense, Student needs in order to receive a FAPE in all areas of need.

**Starting January 4, 2021, parents will:**

- 1) Ensure that Student participates in weekly speech therapy services by online instruction provided by the District. If they decline to do so, the amount of

reimbursement to Parents for January 2021 under the formula above will be reduced by the sum of \$150.

### **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: December 30, 2020.

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Jamie Resch, Hearing Officer

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