

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

**DECISION AND ORDER OF THE
HEARING OFFICER**

STUDENT, Petitioner

V.

Decision Date: August 14, 2023.

Hearing Officer:

SCHOOL DISTRICT, Respondent

Kevin P. Ryan, Esq.

Parties and Representatives:

Lyssa E. LeMay, Esq. on behalf of Petitioner.

Andrea Schulewitch, Esq. on behalf of
Respondent.

I.

INTRODUCTION

1. The parties to this action are Petitioner / Student, and Respondent / School District. Petitioner is represented by Lyssa E. LeMay, Esq. Respondent is represented by Andrea Schulewitch, Esq. The presiding hearing officer is Kevin P. Ryan, Esq. ("IHO").

2. Petitioner's Request for Due Process Hearing was received by Respondent and the IHO on March 31, 2023 ("RDP"). The IHO was appointed to this matter the same day. The original decision deadline was June 17, 2023.

3. On April 10, 2023, the IHO entered the Preliminary Order. The primary purpose of this Order was to set the telephonic Status Conference to occur on April 17, 2023.

4. On April 10, 2023, Respondent filed its Response to Request for Due Process Hearing.

5. On April 17, 2023, a telephonic Status Conference occurred. Legal counsel for both parties were present. The Status Conference Report and Order was filed the same day. It was disclosed at the Status Conference that the parties had agreed to participate in mediation, and that the mediation date was to be chosen in mid-May, 2023. As a result, the parties set a second Status Conference to occur on May 16, 2023.

6. On May 16, 2023, a telephonic Status Conference occurred. Legal counsel for both parties were present. At this time the parties reported that mediation was not successful, but that a settlement agreement was being circulated and settlement was still possible. As a result, the Status Conference was continued until May 18, 2023. The Status Conference Report and Order was entered on May 16, 2023.

7. On May 18, 2023, a telephonic Status Conference occurred. Legal counsel for both parties were present. The Status Conference Report and Order was entered the same day. The parties reported that they continued to negotiate. Based upon ongoing settlement negotiations, a subsequent Status Conference was set for May 25, 2023.

8. On May 25, 2023 a telephonic Status Conference occurred. Legal counsel for both parties were present. The Status Conference Report and Order was entered the same day. At the Status Conference the parties reported that they had not reached a resolution and that a 2 day hearing would be needed. Respondent indicated that they would research the availability of their witnesses as a result of summer break. The parties also agreed to set a subsequent Status Conference to occur May 30, 2023.

9. On May 30, 2023 a telephonic Status Conference occurred. Legal counsel for both parties were present. The Status Conference Report and Order was entered the same day. At the Status Conference, hearing witnesses were discussed and the parties and the IHO looked for

available dates for the hearing and pre-hearing conference. As a result of the parties' schedules and witness unavailability, good cause was demonstrated for the continuance of the decision deadline. At the Status Conference the parties set the 2 day hearing for August 1st and 2nd, 2023, and the Pre-Hearing Conference ("PHC") was set for July 20, 2023. The decision deadline was continued to August 14, 2023.

10. On May 30, 2023, the Notice of Pre-Hearing Conference was also entered.

11. On June 30, 2023, Petitioner filed Petitioner's Motion to Obtain Copies of Petitioner's Education Record. This Motion and the Order adjudicating it are addressed below.

12. On July 3, 2023, the IHO entered the Order Setting Briefing Schedule regarding Petitioner's Motion.

13. On July 10, 2023, Respondent filed its Opposition to Petitioner's Motion to Obtain Copies of Petitioner's Education Record.

14. On July 14, 2023, Petitioner filed their Reply to Opposition to Petitioner's Motion to Obtain Copies of Petitioner's Education Record.

15. On July 19, 2023, the IHO entered the Order Addressing Petitioner's Motion to Obtain Copies of Petitioner's Education Record.

16. On July 20, 2023, a telephonic Pre-Hearing Conference occurred. Legal counsel for both parties were present. The Pre-Hearing Conference Report and Order was entered the same day. The hearing issues and requested relief were confirmed, as were the hearing dates and decision deadline. In addition, and regarding admitted facts, Respondent admitted that, "On November 22, 2022, a restraint did occur on Student and the restraint was not permissible." In addition, Respondent admitted that this restraint was reported to the Nevada Department of Education.

17. On July 21, 2023, Respondent filed its Motion for Summary Judgment. This Motion and the Order adjudicating same are discussed below.

18. On July 23, 2023, following emails from both parties about certain language in the Pre-Hearing Conference Report and Order, the IHO entered the Amended Pre-Hearing Conference Report and Order ("PHC Order").

19. On July 24, 2023, the IHO entered the Order Regarding Respondent's Motion for Summary Judgment. In this Order, the IHO set a briefing schedule and attempted to clarify what if any issues, over which he had jurisdiction, remained for adjudication.

20. On July 25, 2023, Respondent filed School District's Due Process Hearing Witness List.

21. On July 25, 2023, Respondent filed School District's Exhibit List and the parties' Joint Exhibit List.

22. On July 25, 2023, Petitioner filed Petitioner's Witness List and Petitioner's Exhibit List.

23. On July 26, 2023, Petitioner filed their Opposition to Motion for Summary Judgment and Countermotion for Summary Judgment.¹

24. On July 28, 2023, Respondent filed its Reply in Support of Motion for Summary Judgment.

25. On Sunday, July 30, 2023, the IHO entered the Order Addressing Respondent's Motion for Summary Judgment; Petitioner's Countermotion for Summary Judgment.

26. The 2 day hearing in this matter was held on August 1, 2023, and August 2, 2023.

¹The Countermotion for Summary Judgment was not supported by Points and Authorities and was not opposed by Respondent. The Countermotion was adjudicated in the same order as Respondent's Motion for Summary Judgment.

Pursuant to stipulation between the parties, the hearing was held via simultaneous electronic audio / visual means ("Zoom"). As set forth in the PHC Order, Petitioner opted for an "open hearing" and elected a "written record" of the hearing and a written Decision and Order. Student did not attend the Hearing. The due process hearing was held, and a decision in this matter is being rendered pursuant to the Individuals with Disabilities Education Act (hereinafter, "IDEA"), 20 U.S.C. § 1400 et seq., and its implementing regulations, 34 C.F.R. §300 et seq., the Nevada Revised Statutes (NRS) Chapter 388, and the Nevada Administrative Code (NAC) Chapter 388.

II.

BACKGROUND PRELIMINARY MATTERS

Based upon Petitioner's March 31, 2023, RDP, the original decision deadline was June 17, 2023. As noted above, after the parties participated in mediation and engaged in significant settlement negotiations, no resolution was reached. In addition, the summer break from school was upon the parties and locating School District witnesses for hearing who were off contract became an issue. In addition, the parties and the IHO had scheduling conflicts. However, based upon the following demonstration of good cause, together with the stipulation of the parties, the decision deadline was extended to August 14, 2023.

On June 30, 2023, Petitioner filed their Motion to Obtain Copies of Petitioner's Education Record. The evidence requested in the Motion was a copy of the November 22, 2022, videos depicting the improper restraint on Student. This Motion was fully briefed and submitted for decision. In the IHO's Order entered on July 19, 2023, the IHO determined that the videos were not part of Student's educational record as defined by 34 C.F.R. 99.3. In addition, the IHO reasoned that even if the videos were part of the education record, the Respondent had no obligation to provide copies to Petitioner, only to allow review and inspection. In their Motion,

Petitioner admitted that they did review the videos and were aware of the content. Good cause appearing the Motion was denied.

On July 21, 2023, Respondent filed its Motion for Summary Judgment. This Motion was fully briefed and submitted for decision. In the Motion, Respondent argued that the RDP should be dismissed for mootness. This argument was based upon discussions between legal counsel and the IHO at the parties' July 20, 2023, Pre-Hearing Conference and an admission by Petitioner's counsel that the only unresolved issue is "attorney's fees"; an issue over which the IHO had no jurisdiction.

On July 30, 2023, the IHO entered its Order addressing Respondent's Motion for Summary Judgment. After setting forth the legal standard for summary judgment, the IHO confirmed his jurisdiction to entertain, adjudicate and potentially grant Respondent's Motion. In the analysis, the IHO pointed out that neither party submitted affidavits in support of their paper and that as a result, there was no actual "evidence" before the IHO upon which to base an order granting the Motion. In addition, the IHO determined that the parties never reached a clear and enforceable resolution. Regarding Petitioner's issues for hearing, Respondent disputed that it denied Student a FAPE. Moreover, there was no agreement between the parties that all of the relief requested by Petitioner as set forth in the PHC Order was agreed to by Respondent. The only admitted fact was that the November 22, 2022, restraint on Student did occur and that it was not permissible. All other facts regarding whether or not Student was provided a FAPE, whether Student suffered any damages, and what if any relief was Petitioner entitled to **remained in dispute**. Good cause appearing, the IHO denied Respondent's Motion for Summary Judgment.²

² Petitioner's Countermotion for Summary Judgment was also denied because it was unsupported. (See Nevada District Court Rule 13(2))

III.

HEARING ISSUES

As set forth in the PHC Order, the issues to be decided by the IHO at the due process hearing were:

1. During the time period August 15, 2022, through the present, was Student denied a FAPE as a result of Respondent's alleged failure to properly assess Student?
2. Regarding Student's April 2022 IEP, during the time period August 15, 2022, through the present was Student denied a FAPE as a result of Respondent's alleged failure to provide Student with services and accommodations in conformance with Student's April 2022 IEP?

IV.

FINDINGS OF FACT

After considering all the evidence, the IHO's Findings of Fact are as follows:

1. Student was initially assessed and qualified for special education services ("SPED") in February 2020. At that time Student was deemed eligible for SPED under the disability category Autism Spectrum Disorder ("ASD"). (EX J26) Student's Statement of Eligibility is dated February 21, 2020. (EX J3) During the 2022-2023 school year, Student was a kindergartner at Elementary School. (Student's Mother's testimony) Student also suffers from epilepsy. (Student's Mother's testimony)
2. According to Student's April 7, 2022, Individualized Education Plan ("IEP") Student's current eligibility category is ASD. (EX 114) Pursuant to the IEP, Student's related services included 180 minutes per month of "direct speech and language" and 30 minutes per quarter of consultation in occupational therapy. The IEP also provides that, "Student struggles

with transitioning well and transitioning when there are new things in the routine." (EX J14, p. 131) Among the accommodations for Student was the use of a token board. (EX J14, p. 143) Student's Mother agreed to the components of Student's IEP. (EX J14)

3. During the 2022-2023 school year, Teacher Aide was a staff member at Elementary School who had contact with Student. Teacher Aide complained about Student's behavior to Student's Mother during the 2nd week of school. (Student's Mother's testimony) However, Student's Mother was never provided with written information or reports from Elementary School pertaining to Student's alleged behavior issues. (Student's Mother's Testimony) Moreover, Teacher Aide was the only Elementary School employee who complained about Student to Student's Mother. (Student's Mother's Testimony)

4. In September and October 2022, at Student's Mother's request, Psychologist conducted an evaluation on Student and prepared a Psychological / Neuropsychological Report dated October 19, 2022. Student's Mother reported to Psychologist that Student had significant problems with attention and hyperactivity. (EX P1) The Psychologist's recommendations included an evaluation by a Board Certified Behavior Analyst ("BCBA") who's recommendations would be incorporated into Student's curriculum in the "Strategies" classroom at Elementary School. (EX P1) In addition, Psychologist sought to confirm that Student's teachers were using ABA principals to help Student do well. (EX P1) Psychologist also concluded that Student should continue to receive Occupational Therapy and Speech Therapy. (EX P1) On or about October 19, 2022, Student's Mother provided the Summary and Recommendations portion of Psychologist's report to Elementary School. (EX D1) The entire report was never provided to Student's IEP team and it is not a part of Student's educational record. (Principal's Testimony)

5. On October 20, 2022, when Student's Father went to Elementary School to pick up Student, Student could not be located. One of Student's teachers told Student's Father, "we did not lose Student on purpose." (Student's Father's Testimony) Student was located without incident and returned to their parents.

6. On October 24, 2022, Student's Mother attended a parent/ teacher conference to discuss Psychologist's report with Student's teachers. At this meeting Student's Mother requested the services of a BCBA to prepare a Functional Behavior Assessment ("FBA") based upon the report prepared by Psychologist. (Principal's Testimony)

7. On October 28, 2022, Student's Mother signed a Consent for Evaluation form regarding Student. The area of concern was "Social / Emotional". (EX JI 5) According to Director of SPED, this evaluation would include the FBA requested by Student's Mother. (Director of SPED Testimony)

8. According to Student's November 3, 2022 Progress Report, Student was likely to meet all goals by the next annual review. (EX 116)

9. On November 22, 2022, while attending Elementary School, Student was dragged by their left arm out of a room and down a hallway by Teacher Aide ("Incident"). (EX P2; Student's Mother's Testimony) The November 22, 2022, restraint on Student did occur and School District admitted that the restraint was not permissible. (EX J 36) On November 22, 2022 after Student was released to Student's Mother's care, Student stated that "they made a teacher angry and the teacher hurt them." The night of the Incident Student had nightmares and cried during sleep. The next morning Student woke up crying and also experienced a grand mall seizure, the first seizure they had in approximately 23 months. (Student's Mother's Testimony)(EX P4) On November 23, 2022, Student's Mother emailed Elementary School and

stated that Teacher Aide could never again be around Student. Student's Mother also requested to see the security videos of the Incident. (Student's Mother's Testimony)

10. Teacher Aide's child attends Elementary School. Student's Mother was told by Elementary School administration that while Teacher Aide would no longer work at Elementary School, Teacher Aide may be on campus to attend routine parent / teacher or parent / student events. (Student's Mother's Testimony)

11. Following the Incident, Student's Mother removed Student from Elementary School and would not allow Student to return until after it was confirmed that Teacher Aide would no longer work at Elementary School and Student's Parents were able to review the security videos of the Incident. (Student's Mother's Testimony; EX J33, p. 282)

12. Student's transitional chart was not in use when the Incident occurred.³ (EX J33, p. 282) Principal confirmed that despite the inclusion in Student's IEP, Student was not given his token board the day of the Incident and Teacher Aide failed to use positive behavior interventions when Student did not follow directions. (Principal's Testimony; EX J14)

13. On November 30, 2022, Director of SPED sent Student's Parents a letter and a Prior Written Notice ("PWN"). (EX J18) In these documents School District proposed to fund The Educational Evaluation ("IEE")⁴ requested by Student's Parents in November, 2022. The proposed IEE was a comprehensive Neuropsychological Evaluation. (EX J18)

14. During the months of December 2022 and January 2023, the period of time that Student remained out of school, Student stabilized but did not want his siblings to go to school because the "monsters will hurt or kill them." (Student's Mother's Testimony) Two of

³ This chart allowed Student to be more comfortable regarding transitions.

⁴ An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child's education. (34 C.F.R. § 300.502 (a)(3)(i)).

Student's teachers confirmed that Student mentioned "monsters" at least once when they returned to school after the Incident. (Testimony by Long Term Substitute)

15. On January 9, 2023, School District prepared a PWN and proposed to conduct an FBA on Student and reconvene Student's IEP team thereafter to consider the analysis and discuss Student's Parent's concerns. (EX J20)

16. On January 10, 2023, Student's Mother received the requested confirmation that Teacher Aide would not be returning to Elementary School as a staff member. (EX J33, p. 284)

17. On January 11, 2023, School District prepared a PWN and proposed to reevaluate Student because Student's 3-Year reevaluation was due on February 21, 2023. (EX J21)

18. On January 18, 2023, Student's Mother took Student to a 5th Grade presentation at Elementary School. Student saw Teacher Aide at the event and had an accident.⁵ After seeing Teacher Aide, Student did not want to return to Elementary School because there were "monsters." (Student's Mother's Testimony)

19. According to Student's January 20, 2023, Progress Report, regarding Student's first 3 goals the report indicates that Student "is likely to meet the goal by the next annual review." Regarding the fourth goal, the same progress report provides that "student is not likely to meet the goal" and that sufficient "data is unavailable" due to Student's extended absence from school. (EX J22)

20. On January 25, 2023, Student's Parents and Elementary School staff participated in a "reintegration meeting"⁶ for purposes of figuring out the best way to bring Student back to school after being absent since November 22, 2022. (Student's Mother's Testimony) In addition,

⁵ The term "accident" refers to urinating in one's clothes.

⁶ This was the term chosen by Elementary School administrators and is not a term of art.

on the same date, a Safety, Supervision and Support Plan for Student was prepared. (EX 123) Among the supports was the "token board" to be used for transitions. (EX 123) Student did not receive any SPED services from November 22, 2022, through the end of January 2023. (Student's Mother's Testimony) Elementary School sent Student 1 scissor "cutting" project to work on at home while Student was absent as a result of the Incident. (Student's Mother's Testimony)

21. On January 30, 2023, Student's Mother took Student to Elementary School to try and reintegrate Student back into school. Student's Mother stayed on campus the first few days to help with the transition. When Student arrived on campus Student ran and hid, and begged to go home. At one point Student was so upset they could not be consoled. When Student's Mother lay on the ground with Student to try and console them, Student hit their mother in the face and begged again to go home. (Student's Mother's Testimony) The following days Student exhibited much defiance and consistently ran away. The school drop offs took a significant period of time. Student's behaviors after the Incident were new and Student's Mother had never seen Student fearful before. (Student's Mother's Testimony)

22. On or about February 1, 2023, Student had an accident at school. One of Student's teachers helped change Student's clothes. (Student's Mother's Testimony)

23. On or about February 10, 2023, Student's Mother and Father were able to view the videos of the Incident. The videos were made available to them by the district's attorney's office. (Student's Mother's Testimony)

24. On February 16, 2023, Student and Student's Mother attended a parent/ teacher conference and book fair at Elementary School. Upon Student seeing Teacher Aide, Student had another accident and talked about "monsters" at school. In addition, that evening Student again

wet their bed and had a seizure the following morning. (Student's Mother's Testimony)

25. In February 2023, as part of Student's 3-year reevaluation, School District conducted a Multidisciplinary Psycho-Educational Evaluation on Student. (EX 126) The team that conducted the evaluation was properly comprised and the team report is dated February 28, 2023. (EX 126) The report provides that, "Student appears to require specialized instruction to meet Student's academic and social/emotional behavior needs." (EX 126) Among the recommendations for Student were, follow recommendations of speech/language pathologist and occupational therapist. (EX 126)

26. Following an IEP Team meeting, on March 10, 2023, the IEP Team issued a Statement of Eligibility whereby it was confirmed that Student qualified for SPED under the category of ASD. (EX 127) Student's Mother agreed with this Statement of Eligibility. (EX 127)

27. In April 2023 an FBA was conducted on Student. Observations for the assessment took place from February 2023 until April 2023. (EX 130) The FBA is dated April 14, 2023, and was prepared by Ph.D. In addition, Ph.D also prepared a Behavior Intervention Plan ("BIP") (EX 130) In summary, Ph.D concluded that Student's problem behaviors and frequency had gone down and that since Student's return to school, "Student was doing well." The report indicated that Student's elopement had decreased and Student was transitioning better. Ph.D saw no evidence that Student was scared or concerned about monsters. Regarding Petitioner's requests for relief, Ph.D indicated that the requested ABA Therapy "won't accomplish anything" and it is unnecessary for Student to access his SPED. (Ph.D Testimony) Ph.D also concluded that the requested Mental Health Counseling for Student was unnecessary and Student's file does not support this request. (Ph.D Testimony) On cross-examination, Ph.D confirmed that regarding his

FBA, Ph.D did not consider Student's nightmares, concerns about monsters, accidents or seizures because they were not occurring in the school environment. Ph.D was unaware the Student eloped 1x per week (Long Term Substitute Testimony) and Ph.D indicated that the present case was not unusual even with what happened to Student in November 2022.

28. According to Student's June 14, 2023, Progress Report, Student met all of his goals. (EX 132)

29. According to the July 19, 2023, attendance record for Student, Student had 25 days of un-excused absences and was considered "chronically absent" by federal standards. (EX 134) However, Student actually missed 37 days of school in 2022-2023 school year. (Associate Chiefs Testimony) Moreover, regarding attendance, Associate Chief confirmed that attendance is important for a student to meet goals and make progress; this is especially important for students with ASD because they need to keep their routines. (Associate Chief Testimony)

30. Regarding Student's Related Services as set forth in their IEP, Associate Chief confirmed that throughout the 2022-2023 school year, Student never received all of their 180 minutes per month for Speech/ Language. (EX D2; Associate Chief Testimony) On at least 3 occasions, the provider failed to show up for the Speech/ Language session, but no make-up sessions occurred. (EX D2) In addition, the required 30 minutes per quarter of consultation Occupational Therapy was not provided for Student. Records indicate that there was 20 minutes of Occupational Therapy for the entire 2022-2023 school year. (EX D2, Director of SPED Testimony)

31. Regarding Student's objectives in Speech/ Language and their accuracy, throughout ,2022-2023 school year Student typically achieved 60-75% accuracy. (EX D2) However in April 2023, one of Student's objectives accuracy went up to 80%. Yet, in Student's

last speech/ language session on May 24, 2023, their averages returned to 60-70%. (EX D2, p. 22) Student's June 14, 2023, Progress Report provides that Student met their speech and language goal; this conclusion is inconsistent with the SmartLogbook data. (EXS D2, J32)

32. According to a letter prepared on July 24, 2023, by Neurologist, since June 2020 Student had been stable and seizure free. Thereafter, as a result of a traumatic event at Elementary School on November 22, 2022, Student started having sleep issues and nightmares. On November 23, 2022, Student had a breakthrough seizure which may have been caused by a stressful event. (EX P4) Neurologist suggested that the recommendations of Psychologist be followed along with additional BCBA services in school and compensatory tutoring. (EX P4) Student has been a patient at Neurology Clinic since December 2017 for Autism and Epilepsy. (EXP4)

33. Regarding the 2022-2023 school year, School District denied that it failed to provide Student with a FAPE. However, regarding the subject of compensatory education for Student, if any was ultimately awarded, Director of SPED testified that: (1) 10 hours of ABA Therapy was not missed by Student whereby it is not an appropriate award; (2) being mindful of Student's age, 50 hours of tutoring would be appropriate; (3) the request for 20 hours of mental health counseling is not appropriate because it is not in Student's IEP, and there is no data to support it; (4) the request for 10 hours of Occupational Therapy ("OT") is not appropriate because Student did not miss this much OT, but 2 hours of consultation OT is reasonable; (5) because Student will lose time in his general education classes, and because it would add time to Student's day, 10 hours of speech and language therapy is not appropriate; and (6) regarding the requested training of teachers and staff, School District will provide more than what was

requested by Petitioner and will do a school-wide training regarding permissible and impermissible restraints as well as reporting requirements. (Director of SPED Testimony)

34. Despite Request by Petitioner, and excluding the videos of the Incident, Respondent did not provide Petitioner with a complete copy of Student's educational record. As confirmed by Principal, the informal assessments and monitoring logs from Student's classroom, which are the basis for Student's Progress Reports, do exist and are part of Student's educational record. (Principal's Testimony) These informal assessments and monitoring logs were not provided to Petitioner in this case. (*See also* Director of SPED testimony)

35. Student's Mother signed Student up for private tutoring services at Learning Center. To date, Student's Mother paid a deposit of \$368. plus a \$100. assessment fee for Student. Based upon Student's assessment, Learning Center believes it will take at least 90 hours of tutoring to get Student to grade level and the cost, less deposit, will be \$5,500. Learning Center is 21 miles away from Student's residence. (Student's Mother's Testimony)

36. Student's Parents were justified in keeping Student home from school after the Incident and until they received assurances from Elementary School that Teacher Aide would no longer be working at Elementary School.

37. During the time period August 15, 2022 through the present, Student was properly assessed by Respondent.

38. During the time period August 15, 2022 through the present, Student was denied a FAPE as a result of Respondent's material failure to implement Student's April 7, 2022 IEP.

V.

CONCLUSIONS OF LAW AND DISCUSSION

Based upon the above Findings of Fact, the Conclusions of Law of the IHO are as follows:

1. NRS § 388.467 provides that whenever a due process hearing is held pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"), and a school district is a party, the school district has the burden of proof and the burden of production. Respondent met its burden with regard to Hearing Issue 1, but failed to meet its burden with regard to Hearing Issue 2.

2. As defined under the IDEA, "a FAPE comprises 'special education and related services' both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 158 (2017) (quoting 20 USCA § 1401). It is also well-settled that "education" under the IDEA includes behavioral components and extends beyond discrete academic skills. *Zachary J v. Colonial Sch. Dist.*, 2022 WL 580309 (E.D. Pa. Feb. 24, 2022) (citing *Sean C. v. Oxford Area Sch. Dist.*, 2017 WL 3485880 (E.D. Pa. Aug. 14, 2017) (quoting *M. v. Penn Manor Sch. Dist.*, 2015 WL 221086 (E.D. Pa. Jan. 14, 2015) ("In the context of the IDEA, 'education' extends beyond discrete academic skills and includes the social, emotional, and physical progress necessary to move the child toward meaningful independence and self-sufficiency consistent with the child's cognitive potential."); *See also, MC. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 393-94 (3d Cir. 1996) (holding that the District Court was within its right to find the denial of a FAPE where the student had "untapped potential" and non-academic needs that were not met by his IEP). "Where a student's behavioral problems are impeding [his or her] ability to learn, and the school district fails to address those problems in an appropriate way, such a failure may constitute a "denial of FAPE." *R.B. v. Downingtown Area Sch. Dist.*, 509 F.Supp.3d 339,347 (E.D. Pa. 2020).

3. The IDEA requires a school district to assess a student "in all areas of suspected disability." *See* 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4). Once a school district is on "notice that a child has displayed symptoms of a ... disability," the district must assess the child to determine the child's educational needs. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1118-20 (9th Cir. 2016). Subject to certain limitations, a parent has the right to request an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502 (a), (b)). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees." (34 C.F.R. § 300.502 (b)(5); *R.L.*, 363 F.Supp. 2d at 234-35). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502 (b)(2)(i)(ii); *Evans v. District No. 17*, 841 F.2d 824, 830 (8th Cir. 1988); NAC § 388.306 (1)); *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1185 (9th Cir. 2016).

4. Regarding eligibility reevaluations, although 34 CFR 300.305(a)(2)(i)(B) uses the phrase "such a disability" when discussing a reevaluation, 34 CFR 300.304(c)(6) provides that the evaluation of a student must be "sufficiently comprehensive to identify all of the child's special education and related service needs ". Moreover, 34 CFR 300.303 pertaining to reevaluations provides that the reevaluation must meet all the requirements of 300.304 in addition to others. 20 USC 1414(b)(3)(B), provides that a child will be assessed "in all areas of suspected disability". NAC 388.340(4)(b) provides that the pupil is to be assessed in "all areas of suspected disability". (*See also Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d

1105 (9th Cir. 2016). However, the appropriateness of the child's eligibility should be assessed in terms of appropriateness at the time of the child's evaluation, not with benefit of hindsight. *Adams v. Oregon*, 195 F.3d 1141 (9th Cir. 1999).

5. The failure of a school district to conduct a timely or appropriate assessment is a procedural violation. *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1031-33 (9th Cir. 2006). A procedural violation may amount to a denial of a FAPE if it "result[s] in the loss of educational opportunity, or seriously infringe[s] the parents' opportunity to participate in the IEP formulation process, or ... cause[s] a deprivation of educational benefits." *J.G. v. Baldwin Park Unified Sch. Dist.*, 78 F. Supp. 3d 1268, 1284 (C.D. Cal. 2015) (quoting *Amanda J.*, 267 F.3d at 892).

6. In the context of special education, to meet a pupil's needs the IEP serves as "the 'primary vehicle' for providing each child with the promised FAPE." *Fry*, 580 U.S. at 158 (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988)). Thus, a student's IEP serves as a procedural mechanism by which that student's substantive right to a FAPE is ensured. *See Rowley*, 458 U.S. at 206. The "degree" of progress and educational benefits "contemplated by the IEP must be appropriate in light of the child's circumstances." *Andrew F v. Douglas Sch. Dist.*, 580 U.S. 386, 400 (2017). "If these requirements are met, [the District] has complied with the obligations imposed by Congress and the courts can require no more." *Id.*

7. Substantively, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 580 U.S. at 399.7 The IEP must aim to enable the child to make progress." *Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248,255 (3^d Cir. 2018) (emphasis supplied). This means that the IEP must provide "more than a trivial educational benefit... but it does not have to maximize the child's potential."

Norristown Area Sch. Dist. v. F.C., 636 Fed. App'x. 857, 861 (3d Cir. 2016). Because individualization is the touchstone of this consideration, "whether an education is 'appropriate' depends on the individual child's abilities and needs." *Id.* The absence of a "bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Andrew F.*, 580 U.S. at 404. Yet, determining whether a student received a FAPE is a question of fact. *P.P.*, 585 F.3d at 735.

8. The law does not require that a school district perfectly adhere to an IEP; minor implementation failures will not be deemed a denial of FAPE. *Van Duyn v. Baker School Dist.*, 502 F.3d 811, 820-822 (9th Cir. 2007). However, a school district's "material failure to implement an IEP violates the IDEA." *Id.* "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." *Id.* Moreover, a "child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." *Id.*

9. "Compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting 'appropriate relief.'" *Student W v. Puyallup School District, No. 3*, 31 F.3d 1489 (9th Cir.), 21 IDELR 723 (1994). "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the Individuals with Disabilities Education Act." *Student W*, 31 Fed.3d at 1497. "The conduct of both parties must be reviewed to determine whether relief is appropriate." *W.G. v. Board of Trustees of Target Range School Dist.*, 960 F.2d 1479, 1486 (9th Cir.1992). Moreover, "there is no obligation to provide a day-for-day compensation for missed time." *Id.* However, there is no exact formula for awarding compensatory education; instead, the hearing officer and/or court

must take a fact-specific analysis. *Parents of Student W v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994). In addition, compensatory education services for a student may be made in the form of individualized instruction for a student's teachers. *Park v. Anaheim Union High School District, Greater Anaheim SELPA*, 444 F.3d 1149 (9th Cir.); 45 IDELR 178 (2006).

Regarding **Hearing Issue #1**, during the time period August 15, 2022, through the present, Student was properly assessed by Respondent. When Student began his 2022-2023 school year, Student's April 7, 2022, IEP was in place. Student's eligibility category was ASD and Student's Mother agreed to the components of Student's IEP. (EX J14) The IEP properly notes that, "Student struggles with transitioning well and transitioning when there are new things in the routine." (EX J14, p. 131) Among the accommodations for Student was the use of a token board. (EX J14, p. 143)

The evidence indicates that the only School District employee that complained about Student's behavior to Student's Mother was Teacher Aide. These complaints were made in the first two weeks of the school year and thereafter there were no additional complaints. These limited communications to Student's Mother by Teacher Aide did not put School District on notice that Student displayed symptoms of a disability that had not already being addressed in his IEP.

Thereafter, in October 2022, Student's Mother decided to have Student evaluated by Psychologist. Psychologist prepared a Psychological / Neuropsychological Report dated October 19, 2022. Only the Summary and Recommendations from this report were provided to School District. Of note, Psychologist recommended an evaluation by a BCBA, and concluded that

Student should continue to receive Occupational and Speech Therapy; services that were already a part of Student's IEP.

Also, in October 2022, School District and Student's Parent met to discuss Psychologist's report. At this time Student's Mother requested the services of a BCBA to prepare a FBA. School District agreed. On October 28, 2022, Student's Mother signed the necessary Consent for Evaluation form for the FBA. The FBA was not undertaken or completed before the Incident. Moreover, regarding the Incident, despite their inclusion in Student's IEP Teacher Aide failed to give Student his token board and also failed to use positive behavior interventions during the transition. (Principal's Testimony; EX 114) Despite Teacher Aide's failure to follow it, Student's IEP was proper.

Thereafter, on November 30, 2022, School District agreed to fund the IEE requested by Student's Parents. As a result of the Incident, Student was out of school for the months of December 2022 and January 2023. Student's trauma and absence from school delayed and/or prevented further evaluations by School District. However, on January 9, 2023, School District prepared a PWN and proposed to conduct the requested FBA. The FBA was conducted and was ultimately concluded in April, 2023. In addition, as part of Student's 3-year reevaluation, School District also conducted a Multidisciplinary Psycho-Educational Evaluation. Among the evaluation recommendations for Student were Speech/ Language and OT. (EX J26) The same services/ accommodations that were included in Student's April 7, 2022 IEP. Finally, following an IEP Team meeting in March 2023, Student's IEP Team issued a Statement of Eligibility whereby it was confirmed that Student once again qualified for SPED under the category of ASD. (EX J27) Student's Mother agreed with this Statement of Eligibility. (EX J27)

The foregoing evidences that Respondent properly assessed Student and addressed their needs in an appropriate way. The Incident may have been avoided had Teacher Aide followed the directives of Student's IEP. The point being, the IEP was appropriate and it included a reference to Student's difficulty with transitions. Further, when Student's Mother wanted her evaluation considered or she requested an additional evaluation, School District agreed. While completion of the FBA was delayed, the intervening cause was the Incident. Moreover, Student's absence from school delayed the process. School District assessed Student in all areas of suspected disability and the timing of Student's assessments did not result in a loss of educational opportunity.

Based upon the foregoing, the IHO concludes that School District properly assessed Student during the relevant period of time. Respondent met its burden of proof and production with regard to Hearing Issue #1.

Regarding **Hearing Issue #2**, during the time period August 15, 2022 through the present, Student was denied a FAPE as a result of Respondent's material failure to implement Student's April 7, 2022 IEP.

The evidence demonstrates that School District failed to implement Student's IEP during the relevant period of time and that its failure was material. The evidence also indicates that prior to and after the Incident, Student did not receive the services they were entitled to under their IEP. Regarding Student's Related Services as set forth in their IEP, Associate Chief confirmed that throughout the 2022-2023 school year, Student never received all of their 180 minutes per month for Speech/ Language. (EX D2; Associate Chief Testimony) And, on at least 3 occasions when the provider failed to show up, no make-up sessions occurred. (EX D2) In addition, the required 30 minutes per quarter of consultation Occupational Therapy was not

provided for Student.' The evidence indicates that only 20 minutes of OT was provided during the entire 2022-2023 school year. (EX D2, Director of SPED Testimony)

In addition, during the lengthy period of time that Student was out of school as a result of the Incident, Student did not receive any of the services mandated under their IEP. Yet, it was confirmed that school attendance is important for a pupil to meet their educational goals and make progress, and it is especially important for students with ASD because they need to keep their routines. (Associate Chief Testimony) Elementary School only made token efforts to provide ongoing education to Student while they were home bound. Student's Mother testified that Elementary School only sent home 1 "scissor cutting" exercise for Student. (Student's Mother's Testimony) These were not "minor implementation failures."

Throughout the 2022-2023 school year and regarding Student's speech/ language accuracy, Student typically achieved 60-75% accuracy. Consistent therewith, in Student's last speech / language session on May 24, 2023 the accuracy was 60-70%. (EX D2, p. 22) Yet, according to Student's June 14, 2023 Progress Report Student met their speech and language goal. The conclusion in the report is inconsistent with underlying data. (EXS D2, J32) Moreover, the evidence also proved that despite proper request by Petitioner, Respondent did not produce some of the raw data that was used in preparation of Student's Progress Reports. As a result, a negative inference was drawn by the IHO in favor of Petitioner.

Finally, based upon Student's level of education and their June 14, 2023 Progress Report, conclusive proof that Student suffered demonstrable educational harm is absent. Yet, prior to June 14, 2023, Student was not meeting their goals. And, it is undisputed that there was a shortfall in the provision of required services to Student. Based upon the foregoing, the IHO

finds that as a result of Respondent's material failure to implement Student's IEP, Student was denied a FAPE and is entitled to appropriate relief.

Regarding **Appropriate Relief** for Petitioner based on Respondent's denial of FAPE, Petitioner's request for relief has 2 prongs, direct compensatory education for Student and individualized training for the administrators, teachers and support staff at Elementary School; both are appropriate forms of relief.

Equity requires that Student be awarded compensatory education together with restraint training for administrators, teachers and staff at Elementary School. When considering the "conduct of both parties" Student was a victim. While Respondent argued that Student was habitually absent, the evidence indicates that the majority of absences occurred after the Incident. And, as previously determined by the IHO, Student's Parents were justified in keeping Student home after the Incident and until they received assurances from Elementary School that Teacher Aide would no longer be working at Elementary School. While the IHO notes that the Incident involved one bad actor, and that the acts by Teacher Aide were not systemic, those acts were none the less harmful to Student. Prior to the Incident Student was a happy, loving and fearless child. After the incident, Student began to have seizures, accidents, and sleeping issues that involved nightmares. Student feared going to school and was concerned about the "monsters" that were there. Student also feared for the safety of their siblings. After the Incident Student no longer felt safe at school. During Student's time at home after the Incident, Student did not receive any of the special education services set forth in their IEP. In fact, the evidence demonstrated that before the Incident and after returning to school in January, 2023, Student did not receive all services set forth in their IEP. In addition, Neurologist concluded that the

recommendations of Psychologist should be followed along with Student being provided additional BCBA services and compensatory tutoring.

Regarding Petitioner's request for a School District funded Psychoeducational Evaluation ("IEE"), to include an academic assessment, this was agreed to by Respondent and is appropriate relief. (EX JI 8) Petitioner has also requested that the IEE include the assessments set forth at NAC 388.415(5) which are necessary assessments when considering the eligibility category "Emotional Disturbance." The IHO does not find that these additional assessments are supported by the evidence and will therefore not require them.

Regarding Petitioner's request for 10 hours of Applied Behavior Analysis ("ABA") services, the evidence indicated that Student was eloping (escaped) 1 time per week. In addition, Psychologist recommended that Elementary School provide BCBA services to ensure Student's teachers are using ABA principals to help Student do well. And, Neurologist also recommended BCBA services. Both parties offered argument regarding the appropriate number of hours for ABA services. Based upon the Psychologist's and Neurologist's recommendations, Student's propensity to escape and the Incident, the IHO believes such services are appropriate relief.

Regarding Petitioner's request for 208 hours of academic tutoring, the amount is excessive. Petitioner's evidence was that **a minimum of 90 hours of tutoring** at a qualified provider would return Student to grade level. Moreover, to the extent any tutoring was awarded, Respondent suggested 50 hours. Based upon the evidence, academic tutoring is an appropriate award in this case. In addition, Respondent should be responsible for paying for the tutoring as well as the cost of travel to and from the tutoring facility.

Regarding the request for mental health counseling, the evidence and argument indicated that this "counseling" could be provided in-school by the school counselor. Based upon the severity of the Incident, an award of mental health counseling is also appropriate.

Regarding the request for OT, and speech/ language therapy, both requests are appropriate. Student's IEP includes both, yet neither were fully provided to Student during the 2022-2023 school year. And, Student did not receive any services when they were absent after the Incident.

Finally, based upon the occurrence of the Incident, the requested staff "training" at Elementary School regarding permissible and impermissible physical restraints, aversion intervention, corporal punishment and proper reporting is also appropriate.

VI.

ORDER

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

1. Respondent shall use best efforts to schedule parent / teacher conferences or other meetings in such a manner that Student's Parents and/or Student are not on the Elementary School campus at the same time as Teacher Aide. This form of relief is supported by the fact that Student saw Teacher Aide on 2 occasions after the Incident. On both occasions Student experienced severe physical and emotional problems.
2. Commencing 7 days after Student begins the 2023-2024 school year, Student's primary educator(s) shall provide Student's Parents with ongoing and updated written data/ reports regarding Student's academic and behavioral progress

each week on Fridays when school is in session. This form of relief is supported by Student's Mother's testimony that prior to the Incident she was not kept apprised of Student's progress/ problems

3. Respondent shall provide Petitioner with a School District funded Psychoeducational Evaluation ("IEE") to include an academic assessment. Student's IEP team shall be convened within **30** school days after receiving the IEE to consider it. Student's Parents shall cooperate and provide Respondent with the necessary consents for evaluations.
4. Respondent shall provide Student with compensatory education to include:
 - Applied Behavior Analysis Consultation Services; During the first quarter of the 2023-2024 school year a Board Certified Behavior Analyst (BCBA) shall provide **5 hours** of training for all school staff who will enact Student's IEP. Thereafter, school staff shall consult with a BCBA on a quarterly basis for a minimum of **5 hours** for the remainder of the 2023-2024 school year. Respondent shall provide Petitioner with Technical Assistance Reports on a quarterly basis.
 - a total of **110 hours** of academic tutoring at a qualified provider of Petitioner's choosing to be administered over all of Student's subjects as needed, which need shall be determined jointly by Respondent and the qualified educational service provider (currently Huntington Learning Center). Petitioner shall sign a release permitting Respondent to communicate with the education services provider and obtain any and all of Student's progress data. This tutoring is to be paid for by

Respondent, together with travel reimbursement for Student's transportation to and from tutoring.⁷ This tutoring shall be completed within 2 years of the date of this Order;

-a total of **11 hours** (1 hour per in-school month) of in-school mental health counseling to be provided by Elementary School's counselor and to be completed by Respondent in the 2023-2024 school year;

-a total of **60 minutes per quarter** of in-school, consultation Occupational Therapy to be completed by Respondent in the 2023-2024 school year; and,

-a total of **10 hours** of direct speech and language therapy to be completed by Respondent in the 2023-2024 school year.

-The payment and reimbursement for all compensatory education services must follow Respondent's payment and reimbursement procedures. *(See attached Appendix B)*

5. During the 2023-2024 school year, Respondent shall complete the currently scheduled training for all staff who will have a direct or supervisory roll with Student regarding permissible and impermissible physical restraints, aversion

⁷ Based upon the IHO's research, for tax year 2023 the United States Internal Revenue Service set the per mile reimbursement rate at approximately 65 cents. The uncontradicted evidence from Student's Mother was that the tutoring company was 21 miles away from Student's residence or 42 miles round trip. Based upon the reimbursement rate set forth above, the total reimbursement per tutoring session equals \$27.30. Petitioner shall provide Respondent proof of attendance when requesting reimbursements.

intervention, corporal punishment and proper reporting.

VII.

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by the hearing officer's decision may appeal it by filing with the Superintendent a notice of appeal which identifies the specific findings and conclusions being appealed and forwarding a copy of the notice of appeal to the other parties within 30 days after receiving the decision. A party to the hearing may file a cross appeal by filing a notice of cross appeal with the Superintendent which identifies the specific findings and conclusions being appealed and forwarding a copy of the notice of cross appeal to the other parties within 10 days after receiving notice of the initial appeal. If an appeal is filed, 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. NAC 388.315(1).

DATED this 14th day of August, 2023.


Hearing Officer
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