

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

In the Matter of

**FINDINGS OF FACT AND  
DECISION**

STUDENT<sup>1</sup>, by and through Parents  
Petitioners,

v.

Hearing Officer: Audrey Beeson

SCHOOL DISTRICT  
Respondent

**I.**

**INTRODUCTION AND PROCEDURAL HISTORY**

The following synopsis of the prehearing proceedings that took place in this matter is in chronological order. On December 13, 2023, School District (hereinafter “District” or “Respondent”) received *Petitioners’ Due Process Complaint* (hereinafter “Complaint”). (HO-1) District’s *Notice and Response to Due Process Complaint* (hereinafter “Notice”) was submitted on December 22, 2023. (HO-2) Petitioners submitted an *Opposition/Reply/Objection* to District’s *Notice* on December 23, 2023. (HO-3)

This Impartial Hearing Officer (hereinafter “IHO”) was appointed on or about December 27, 2023. (HO-4) Due to scheduling conflicts, the parties agreed to conduct the Status Conference via email. (HO-5) A *Notice of Status Conference, Status Conference Questionnaire, Preliminary Order, Hearing Process Guidelines, & Rights of Parties* was issued on January 11, 2024. (HO-5) Petitioners provided their Completed Status Conference Questionnaire on January 12, 2024 (HO-6) and District provided its Completed Status Conference Questionnaire on January 16, 2024. (HO-7)

<sup>1</sup> Personally identifiable information is attached as Appendix A to this Order and must be removed prior to public distribution.

On January 17, 2024, the IHO communicated with the parties via email to address the discrepancy Petitioners raised related to the receipt date of the *Complaint*. (HO-8) Petitioners provided documentation that the *Complaint* was signed for on December 13, 2023. Correspondence from Superintendent of Public Instruction states that District received the request on December 18, 2023. This IHO asked Respondent for clarification regarding the same and was advised that an incomplete copy of the *Complaint* was received by District on December 15, 2023, and a complete copy was received on December 18, 2023. Respondent did not state whether a Sufficiency Objection was made upon receipt of the December 15, 2023 copy. Based on Respondent's admission that at least a partial copy of the *Complaint* was received by the Office of Compliance and Monitoring on December 15, 2023, this IHO found that Petitioners' proof of signature on the certified mailing receipt along with the tracking information showed the *Complaint* was received on December 13, 2023 resulting in a decision date of February 26, 2024. Respondent was provided the opportunity to provide documentation to the contrary for reconsideration by the IHO, but none was provided. This decision was memorialized in the *Status Conference Report and Order* (hereinafter "Order") issued on January 19, 2024. (HO-9)

Upon review of each party's Completed Status Conference Questionnaire, they were unable to agree on a date and time to hold the Prehearing Conference. Therefore, this IHO set the Prehearing Conference on the one day that both parties had availability, and informed Petitioners that only one parent needed to be present if both parents were unable to attend. The IHO notified the parties that the Prehearing Conference usually takes a minimum of one hour, therefore, Petitioners' request for a time slot of 4:30 p.m. was not feasible to conduct the conference. The date and time of the Prehearing Conference was set forth in the *Order*. (HO-9)

On January 19, 2024, Petitioners notified District that they objected to District holding an Individualized Education Program (hereinafter "IEP") meeting while the due process request was pending. (HO-10) On January 22, 2024, Petitioners submitted *First Set of Request for Production of Document[s]* (hereinafter "Request for Production") to District. (HO-11) On January 24, 2024, Petitioners submitted an *Objection to Parental Prior Notice for IEP Meeting*. (HO-13)

A *Notice of Prehearing Conference and Hearing Process Guidelines* was issued by the IHO on January 23, 2024. (HO-12) A Prehearing Conference was held on January 25, 2024. Parent 1 was able to participate in the Prehearing Conference but only for a period of one hour due to the timeframe that the conference was scheduled. During the Prehearing Conference, Parent 1

incorrectly asserted that Student's IEP was "stayed" due to the pending *Complaint*. This IHO corrected Parent 1 stating that while Student's placement could not be changed pending the hearing, an IEP meeting could be held for Student with Parents. However, the new IEP could not be implemented during the pending due process proceedings unless both parties agreed. The due process hearing was scheduled for February 28, February 29, and March 1, 2024 based on the availability of the parties and IHO. (HO-25)

On January 26, 2024, Petitioners submitted an *Appeal of the District's Independently Decided IEP* (HO-15), and that same day, District motioned to extend the decision date. (HO-27)

On January 27, 2024, Petitioners submitted a *Motion for Subpoenas, an Initial Witness List and Document Production* and a *Motion to Strike District's Independently Decided IEP* (hereinafter "Motion to Strike IEP") based on Parents' inability to attend the IEP meeting. (HO-16; 17; 18)

On January 30, 2024, the IHO responded to Petitioners' inquiry raised during the Prehearing Conference related to whether there was a change in the law pertaining to the options for receiving a copy of the hearing transcript. The IHO informed Petitioners that there has not been a change in the law or policy related to the option of having a hard or digital copy of the transcript, as the law never stated a parent is entitled to an audio copy. Due to limited digital record availability, states used to offer audio in place of the electronic record. With developing technology, it is now standard practice among the hearing systems to provide a digital copy as set forth in 34 CFR § 300.512 and NAC 388.310(7) and the Nevada Department of Education now interprets the same as such. (HO-19)

On January 31, 2024, the IHO emailed the parties proposed draft language of the issue, the District's position, the relief sought by Petitioners, and requested feedback from the parties. The IHO also informed the parties that she does not have jurisdiction over Petitioners' allegations that District has engaged in "unwarranted harassment or retaliatory practices." District responded to the IHO's email with a proposed change to the phrasing of the issue. Petitioners responded as well but did not propose any changes or corrections to the issue as drafted by the IHO, and instead objected to District's position and interpreted the response as District trying to raise its own issues for determination. The IHO previously addressed this misconception during the Prehearing Conference, when she explained that the District's position was simply their response/defense to Petitioners' issues, as District has the burden of proof and production, and that these were not new

issues added to the *Complaint*. Petitioners thereafter inquired why the IHO does not have jurisdiction over Petitioners' allegations pertaining to District. (HO-20)

On February 2, 2024, District submitted a *Response to Petitioners' Request for Production*. (HO-21) On February 4, 2024, Petitioners submitted a *Reply to District's Response* (HO-22) and an *Errata to Motion for Subpoenas*. (HO-23) On February 6, 2024, District submitted a *Motion in Limine*. (HO-24)

On February 7, 2024, the IHO issued the *Prehearing Conference Report and Order* (hereinafter "Prehearing Order"). Within the *Prehearing Order*, District's Motion to Continue the decision date for a period of thirty (30) days was addressed and granted for good cause, and the decision date was continued from 2/26/2024 to 3/27/2024. (HO-25) That same day, Petitioners submitted an *Opposition/Reply/Objection* to the *District's Motion in Limine*. (HO-26)

*Determination on Petitioners' Request for Production of Documents* (hereinafter "Determination on Production") was issued by the IHO on February 13, 2024. During the Prehearing Conference on January 25, 2024, this IHO informed Petitioners that there is no right to discovery provided under the IDEA. 34 C.F.R. § 300.501 and NAC 388.287 provide that parents of a child must be afforded an opportunity to inspect and review all education records with respect to the identification, evaluation and educational placement of the child and provision of a free appropriate public education (FAPE) to the child. Further, 34 C.F.R. § 300.512(b); and NAC 388.310 set forth that at least five business days prior to a due process hearing, each party must disclose the evidence they intend to use at the time of the hearing and all evaluations completed by that date. The IHO set forth the issue to be determined at the time of the hearing and addressed in detail all twenty-two (22) of Petitioners' requests and why the IHO either did not have enough information to issue a ruling on a request or why a request was denied. Most of Petitioners' requests were denied because the documents were already in Petitioners' possession, or the Petitioners failed to state how the documents are relevant to the issue to be determined at the hearing. The IHO noted that nothing in the *Determination on Production* shall excuse Respondent from the requirements set forth in 34 CFR 300.501 and NAC 388.287, from allowing Petitioners the opportunity to inspect and review all education records (as defined by 34 CFR 300.611) with respect to the identification, evaluation and educational placement of the child and provision of a free appropriate public education (FAPE) to the child. (HO-27)

The IHO issued a memo regarding *Jurisdiction of an Impartial Hearing Officer Under Part B of the IDEA* on February 14, 2024 in response to Petitioners' February 1, 2024 inquiry why the IHO does not have jurisdiction over Petitioners' allegations regarding the Respondent's "discriminatory unwarranted harassment or retaliatory practices which denies my student equal access to her special education and public schools' program" wherein Petitioners cite to Title VI and 42 USC §1011 and asked this IHO to "state with specificity the laws, including any case laws that supports your position." This IHO reminded the parties that she is not a party to this action and therefore does not have a "position." The IHO explained that her jurisdiction derives from 34 CFR § 300.507, which addresses the filing of a due process complaint on any of the matters described in § 300.503(a)(1) and (2) as well as NAC 388.306 (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child). The IHO further explained that she does not have jurisdiction to enforce Title VI of the Civil Rights Act of 1964, and that the Office for Civil Rights is responsible for enforcing Title VI as it applies to programs and activities that receive federal financial assistance from the Department of Education. (HO-28)

The IHO issued an *Order Granting Respondent's Motion in Limine* on February 14, 2024. The IHO found that the Federal and Nevada Rules of Civil Procedure, Rules of Evidence and the Administrative Procedures Act do not apply to an IDEA hearing, although this IHO may use the rules of civil procedure and evidence by analogy when appropriate. An impartial hearing officer is expected to ensure that the due process hearing serves as an effective mechanism for resolving disputes between parents and the responsible public agency over issues relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. Apart from the hearing rights set out at § 300.508, decisions regarding the conduct of Part B due process hearings are left to the discretion of the hearing officer. These decisions, however, are subject to review under 34 CFR §§ 300.510-300.511 if a party to the hearing believes that the hearing officer has compromised the party's rights under 34 CFR § 300.508. A hearing officer should exercise his/her judgment considering the relevant facts and circumstances of the particular case and in a manner that is consistent with rights accorded the parties to the hearing under Part B. Parents and District both have the right to present evidence during the due process hearing and to confront, cross-examine, and compel the attendance of witnesses. When deciding whether to compel the attendance of a witness listed by

either party, this Hearing Officer first considers whether the witness has evidence that is relevant to the issue before the Hearing Officer. If the evidence is relevant, then this Hearing Officer next considers whether the evidence is merely cumulative/duplicative or cannot be provided in a different manner. If the Hearing Officer determines that the evidence is both relevant and not cumulative or duplicative, then the Hearing Officer will compel the attendance of a witness through a subpoena if the witness will not testify voluntarily. The IHO addressed all five of Petitioners' proposed witnesses and determined that Petitioners failed to provide a detailed explanation as to how each of the proposed witnesses have relevant testimony regarding the issue to be decided by this Hearing Officer, precluded the witnesses, and granted District's *Motion in Limine*. (HO-29)

On February 14, 2024, the IHO emailed the parties to seek clarification on whether Petitioners were requesting to amend their *Complaint* based on the *Motion to Strike IEP* to include the new issue raised by Petitioners related to the 2024 IEP which took place without the Parents' participation. Petitioners responded that they were not seeking to amend the *Complaint*. (HO-30) Therefore any issues or concerns raised by Petitioners pertaining to the 2024 IEP as set forth in the *Motion to Strike IEP* is not before this IHO.

On February 15, 2024, the IHO reached out to both parties to inquire whether either party had any additional information to add for the IHO's consideration pertaining to Petitioners' *Motion for Subpoenas and Errata* or whether District's *Response to Petitioners' Request for Production* should serve as its response. District confirmed that its *Response to Petitioners' Request for Production* would serve as its response to the *Motion for Subpoenas and Errata*. Petitioners objected to this IHO reaching out to the parties for a response because Respondent is represented by counsel and Petitioners believed the IHO was "leading the Respondent's counsel" and therefore biased and prejudiced Petitioners. This IHO reminded Petitioners that the rules they were citing to relating to unopposed motions do not apply to IDEA due process hearings, that it is this IHO's responsibility to ensure that **both** parties have the opportunity to respond to any motions submitted for the IHO's decision, and that a briefing schedule was only set for the *Request for Production*. The IHO further explained that because Petitioners are not represented by counsel, the IHO wanted to ensure that they were also given every opportunity to provide a response should they choose to do so, even if Respondent had nothing to add. (HO-31) Because Petitioners declined to provide any additional information, asserting that the lack of formal response by Respondent equates to a

consent to the granting of the *Motion for Subpoenas and Errata*, this IHO looked to Petitioners' *Reply to District's Response* ("Reply") for any pertinent information related to the *Motion for Subpoenas*. A *Determination on Petitioners' Motion for Subpoena Duces Tecum* (hereinafter "Determination on Subpoenas") was issued by the IHO February 15, 2024. Within that *Determination on Subpoenas*, the IHO set forth the issue before the IHO, an analysis of Petitioners' requests, the requirements that must be met in order for a subpoena to be issued and the IHO addressed the nine requests by Petitioners. All nine requests were denied, and the reasons for each denial are set forth in the *Determination on Subpoenas*. (HO-32)

On February 21, 2024, Respondent submitted its proposed List of Witnesses and Exhibit List and Petitioners submitted *First Supplement to Petitioners' Initial List of [Proposed] Witnesses and Document Production*. (HO-33; 34; 35) On February 22, 2024 District objected to five of Petitioners' proposed witnesses and Petitioners responded to the objection clarifying that they understood that two of the proposed witnesses had already been excluded by this IHO, thereby leaving three witnesses that District objected to. (HO-36) On February 23, 2024, the IHO emailed the parties to inquire whether either party needed additional time to review the other party's disclosures because they were exchanged a day late, requested that District reply to Petitioners' explanation related to the witnesses objected to, inquired whether the parties wanted to set a second prehearing conference to address the Petitioners' concerns about the authenticity of certain District disclosures, and inquired if there were any other issues that the parties needed addressed prior to the hearing. Both parties confirmed that they did not need additional time to review disclosures and declined a second prehearing conference. District replied about the remaining three witnesses that it objected to Petitioner calling. (HO-37)

A hearing was held virtually on February 28, February 29 and March 1, 2024. It was an open hearing. A Court Reporter was present keeping a record of the evidentiary hearing. Petitioners were unrepresented. Parent 1, along with the assistance of the Education Advocate put on Petitioners' case. Student was present for part of the first day of the hearing, but did not attend the second or third days of the hearing. Respondent was represented by their attorney.

After the opening statement by the Hearing Officer, Respondent's counsel and Petitioners confirmed that this Hearing Officer was not missing any pre-hearing correspondence that should be admitted as a hearing officer exhibit. District and Petitioners submitted pre-hearing documents that they intended to introduce as evidence. The parties did not stipulate to the admission of any

of the other party's proposed exhibits. This IHO then addressed the Petitioners' three proposed witnesses that District opposed. This IHO determined that the first witness did not have relevant testimony and would be protected by the attorney-client privilege as a staff member of the Office of Compliance and Monitoring and denied Petitioners' request to call that witness. District agreed to admit Petitioners' proposed Exhibit P-31, which contains testimony from the previous due process hearing by the second proposed witness, thereby making the testimony duplicative and therefore not relevant and the IHO denied Petitioners' request to call that witness. Based on Petitioners' offer of proof about the testimony the third witness could provide, the IHO overruled the District's objection and decided that the witness would be allowed to testify. Each party made an opening statement.

The following joint witnesses testified: Principal, General Education Teacher (hereinafter "English Teacher"), School 2 Special Education Instructional Facilitator (hereinafter "School 2 SEIF"), Instructional Coordinator (hereinafter "Coordinator"), and Itinerant Teacher of the Deaf/Hard of Hearing (hereinafter "DHH"). Additionally, Respondent called the Speech Therapist during their case. Petitioners called the following additional witnesses during their case: School Health Assistant (hereinafter "Health Assistant"), Case Manager, and School 1 Special Education Instructional Facilitator (hereinafter "School 1 SEIF"). Parent 1 chose not to testify and did not call the Education Advocate to testify. During the first day of the hearing, Parent 1 clarified that the *Complaint* is limited to the 2023-2024 school year, which was previously unknown to the IHO and District because Parent 1 did not clarify the same after the issue was drafted, revised or set forth in the *Prehearing Order*. Parent 1 also made a correction to the relief requested and stated that "physical therapist" set forth in HO-35, page 17, was a typographical error and that the same should be "speech and language therapist."

The following exhibits were admitted into evidence by stipulation of the parties: Hearing Officer Exhibits HO-1 through HO-37. The following exhibits were admitted into evidence during the hearing: Respondent's Exhibits R-1 through R-6; R-7 pages 1-6; R-8, pages 1-7 & 43-44; R-9 through R-10; Petitioners' Exhibits P-3; P-10 pages 063-084; P-11; P-16; P-17; P-26; P-30 pages 300-303, 322; and P-31. (The following exhibits were admitted into evidence over objections: R-2, R-4, R-8 pages 43-44, R-9, R-10 pages 5-32, P-3, P-10, pages 063-080, P-11, P-16, P-30 pages 300-303)

The record was closed on March 1, 2024. A decision is due on March 27, 2024.



**II.**  
**JURISDICTION**

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 388, and the Nevada Administrative Code 388.

**III.**  
**ISSUE**

The issue to be determined and each of the parties’ basic position concerning each are as follows:

Whether the District failed to implement Student’s 5/18/2022 IEP during the 2023-2024 school year regarding the following (1) complete a Functional Behavior Assessment (FBA); (2) to provide “Full In Person” Self-Advocacy/Vocabulary – Teacher of the Deaf/Hard of Hearing 1:1 direct services; (3) to hold monthly meetings with the Teacher of the Deaf/Hard of Hearing regarding Student’s hearing related needs; and (4) to conduct weekly communication between home and school, and if so, whether the failure to implement resulted in a denial of FAPE for Student?

**Explanatory Synopsis**

Student entered the 2023-2024 school year with the 2022 IEP from the 2021-2022 school year. An annual IEP Team meeting was initiated in February 2023 during the 2022-2023 school year but had to be continued due to the unavailability of all required Team members. The subsequent continued IEP meetings were cancelled by Parents. Thereafter, Parents filed a due process complaint. Numerous communications have been exchanged between Parents and District pertaining to the scheduling of an annual IEP in the 2023-2024 school year, but Parents have not yet agreed to participate in an annual IEP meeting due to requests and concerns that they want addressed before an IEP meeting takes place.

**Relief Sought:**

- District to instruct the Student Intervention Team to conduct the FBA and to discuss the findings with Petitioners before holding an IEP meeting.
- Compensatory education services provided by a certified nonpublic agency and funded by the District including:
  - o 600 minutes of Speech/Language services to be delivered in a 1:1 setting by a credentialed Speech/Language Pathologist; 60 minutes per month with Speech/Language therapy services to be delivered in a 1:1 setting by a credentialed speech and language therapist (mutually agreed upon certified non-public agency to provide such services), for 30 minutes per session, 2 sessions per month, which ends on the last day of the month for the last month of the school years 2026-2027. Any services not used by that day shall be forfeited and shall no longer be available to Student. Such services shall be provided to Student at dates and times chosen by Parents that do not conflict with regular school hours. The average daily rate of \$175 per hour x 20 months = \$3,500.
  - o After school tutoring in core areas of vocabulary, math, and written language. Such tutoring shall be delivered in a 1:1 setting and will be provided either by a credentialed teacher or by qualified reading and math specialist, at the sole discretion of the Parents, for 60 minutes a week per session, 4 sessions per month, which ends on the last day of the month for the last month of the school years 2026-2027. Any services not used by that day shall be forfeited and shall no longer be available to Student. Such services shall be provided to Student at dates and times chosen by Parents that do not conflict with regular school hours. The average daily rate is \$21.70 per hour x 240 minutes per month x 20 months = \$4,800.

**Respondent’s Position/Argument:**

District argues the following: that District fulfilled its obligations by implementing the accommodations in the 2022 IEP by (1) completing the FBA; (2) providing full in person self-advocacy/vocabulary; (3) the DHH teacher provided direct monthly services to Student, and that although not in person, ongoing communication is occurring between the DHH and staff related to Student’s needs and to address any issues Student has; and (4) that there were weekly communications going to the home through the District’s communication portal that detailed

missing assignments or issues regarding Student's classes. Student is not in a self-contained program, does not have significant needs and is not below grade level. Student is 98% in the general education classroom. All classes are in general education and Student is earning mostly A's and is above average in almost every subject. While there may not have been strict compliance with the implementation of the IEP, there has been substantial compliance and therefore did not result in a denial of a FAPE.

**Parents' Position/Argument:**

Parent argues the following: that Student has been denied a FAPE and School 2 has failed to provide Student with the supportive services necessary to ensure Student's academic success. District failed to implement Student's IEP and manipulated Student's special education records and provided fraudulent documents for the purposes of this due process hearing. District should have provided the information from the alleged FBA assessment to the MDT team and the parents prior to the MDT meeting. Had Parents been notified that the FBA assessment was completed, they would not have included the failure to complete the assessment in their Complaint. Parent further argues that no parental interview took place for the FBA assessment and the documentation was not provided to Parent prior to this due process hearing. During this school year the DHH did not collaborate with Student's teachers on Student's curriculum as required.

**IV.**

**FINDINGS OF FACT**

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

***Background***

1. Student's eligibility category is Hearing Impairment/Deaf on Student's May 18, 2022 Annual IEP (hereinafter "2022 IEP") from Elementary School. Student spends 98% of the school day in the regular education environment. Parents agreed to Student's 2022 IEP on May 18, 2022, however, on May 19, 2022, Parents said that they disagreed with the 2022 IEP and requested that their additional concerns be added to the IEP regarding behavior/attending data that were collected during the 2021-2022 school year. District refused to add the additional information to the 2022 IEP because Parents had already agreed to the 2022 IEP in person at the meeting on May 18, 2022 and again in writing on

May 18, 2022, so the addition of that information would require a revision. District instead included the statement of parent concerns as an addendum to the 2022 IEP and made it a permanent part of the permanent confidential folder. (R-9, P-26, R-3; School 2 SEIF's testimony)

2. Student's 2022 IEP required Student's upcoming middle school (School 1) team to collect data for an FBA on Student's attending to include date, time, duration, intensity, setting, activity, antecedent, and frequency, including consequences, functions and needs. A Behavior Intervention Plan (hereinafter "BIP") was to be developed if warranted. (R-9, pg. 23; P-26, pg. 243; Coordinator's testimony)
3. Student attended School 1 for the 2022-2023 school year which started on August 8, 2022. (R-3; R-1)
4. Coordinator has been involved with Student since Student's attendance at Elementary School. As part of the 2022 IEP, there was an agreement that District would continue to flush out the difference between Student's auditory fatigue and what the family was claiming as inattention. Coordinator was tasked with collecting data to start that process. (R-9; P-26; Coordinator's testimony)
5. The 2022 IEP contained the following parent concern in part: "Parents received a one-page alleged FBA in support of Student's alleged improvement for attending behavior that did not include assessment data to cover the whole year with at least 5 days of observation in each tested phase. Also, information regarding tested date, time, duration, intensity, setting, activity, and antecedent, and the frequency including consequences, function and needs were omitted from District's represented data collection report for school years 2021-2022. Although Student's attending behavior impedes Student's learning." (R-9, pg. 15; P-26, pg. 235)
6. Parents informed District that they had a behavioral concern related to Student's attending. Parents stated that Student loses focus when distracted and this happens throughout the day. Although the school site and staff did not have the same concern about Student's behavior, District wanted to see if they could find enough data to support whether they needed to move forward to address Parents' concern. District collected "ABC" data – antecedent, behavior and consequence data - on a Google form that included the dates, the antecedent, the behavior and the consequence. Parent consented via telephone on or about

8/12/2022 for District to conduct the FBA. Parent consented in writing for District to conduct academic performance achievements and observations on or about 9/20/2022. The behavior specialist from the region provided the Google form to School 1 SEIF to collect the ABC data. School 1 SEIF distributed the ABC data form to all of Student's teachers. ABC data was collected from teachers in the classroom with Student between the period 9/13/2022 – 9/26/2022. A monthly staff meeting took place on September 27, 2022 with Parent 1 and Education Advocate participating in that meeting. Student's Education Advocate requested to see the behavior data that was collected. Paper copies of the ABC data collected from Student's teachers were placed in an envelope and sent home to Parent 1 on October 5, 2022 with Student. Parent and Education Advocate did not testify to refute this evidence. (R-6; R-8, pages 43-44; R-10, page 29; Coordinator's testimony; School 1 SEIF's testimony)

7. District started with an "indirect" FBA assessment form and used it as part of their informational tool to house the data for the FBA. District uses a standard expandable form for the "indirect" assessment. The "indirect" FBA assessment completed on Student includes information gathered from Student's MDT report dated 11/08/2019; IEE dated 1/12/2019; teacher interviews on 9/22/2022; Parent interview on 9/26/2022 (which could have been a survey or questionnaire); Student interview on 9/23/2022; attendance/enrollment history; IEP dated 5/18/2022; services and interventions from the IEP Accommodations dated 5/18/2022, and data collected from 9/13/2022 – 9/26/2022. Parent did not testify to refute this evidence. During this information gathering stage, District was looking for behaviors that impacted Student's educational or social progress. The problem "off task behavior" was defined as "engagement in any tasks other than the assigned task or ongoing activity for more than  $x$  seconds." There was no determining function for the behavior because it did not occur at a rate that justified moving forward into a hypothesis as Student only engaged in the off-task behavior for a couple of minutes three times in a two-week period between 9/13/2022 and 9/26/2022. When Student displayed the off-task behavior, Student's teachers verbally or non-verbally prompted Student to get back on task and/or allowed Student to take a short break. (R-6; Coordinator's testimony; School 2 SEIF's testimony)

8. A three-year evaluation Multi-Disciplinary Team (hereinafter “MDT”) meeting took place on December 7, 2022. On January 13, 2023, School Psychologist noted a message from Parent 1 stating that Parent 1 wanted to have Student’s IEP meeting on the same day as the MDT meeting. On February 3, 2023, Parent 1 emailed School 1 Case Manager stating the same request. A second MDT meeting took place on February 17, 2023. School 1 SEIF did not provide the ABC data to the School Psychologist for the MDT meeting because the ABC data was being collected for the sole purpose of determining whether Student needed a BIP. The results of the assessment were not discussed during the MDT meeting because the purpose of the MDT meeting was to determine eligibility and was run by School Psychologist. School Psychologist explained to Parent 1 that an FBA is not part of the requirements for an evaluation pertaining to autism or any of the eligibility areas that they were looking at. The annual IEP meeting was started after the MDT meeting on February 17, 2023, however not all the IEP Team members were available to participate in a full IEP meeting, therefore the meeting was continued to March 10, 2023. (R-10, pages 22; R-10, page 11; P-31, pg. 416; School 1 SEIF’s testimony)
9. The FBA “indirect” assessment form was not given to Parents because it is normally presented to a parent at an IEP meeting. School 1 SEIF attempted to schedule a continued IEP meeting for Student after February 17, 2023, but Parents cancelled the rescheduled IEP meeting. If the IEP meeting had not been cancelled the form would have been presented to Parent(s) at the continued IEP meeting. The data from the assessment was uploaded into the present levels of the draft IEP for the upcoming IEP meeting and the draft IEP was shared with Parents. Had the meeting occurred, the IEP Team would have discussed the information in the draft IEP to determine if Student needed a BIP based on the information from the FBA “indirect” assessment. (R-10, pages 5-9, 11, 14-15, 22-23; School 1 SEIF’s testimony)

***2023-2024 School Year***

10. Student is enrolled at School 2 for the 2023 – 2024 school year and is currently in the seventh grade. The first day of school was August 7, 2023. When Student began the 2023-2024 school year at School 2, Student’s active IEP was still the 2022 IEP from fifth grade. Student continues to be in a general education class environment 98% of the school day. (R-3; R-1; R-9, pg. 25; P-26; Principal’s testimony; School 2 SEIF’s testimony)

11. School 2 SEIF reviewed Student's 2022 IEP at the beginning of the 2023-2024 school year, as the School 2 SEIF does for incoming students to School 2, to ensure that School 2 can accommodate all of Student's needs. School 2 SEIF was unaware of what happened at Student's previous school or why Student still had a 2022 IEP, as IEPs should be reviewed at least annually. Student is the first student School 2 SEIF has had with a hearing aid. School 2 SEIF gave all of Student's teachers Student's accommodations so that they have a list and can see what they need to follow for Student's 2022 IEP. School 2 SEIF had a meeting at the beginning of the school year with all of Student's teachers and School 2 SEIF personally gave them a copy of Student's accommodations. School 2 SEIF ensures that Student's accommodations are being implemented not only by the special education teacher (that has knowledge of IEPs and of certain accommodations that can help) assigned to the classroom to assist the general education teachers but by also making himself available for the teachers if they have any questions. (School 2 SEIF's testimony)
12. Student's first semester grades include an A in English, Math, History, Computer Design and Advisory and a B in Science. Student's citizenship grades include an O (for outstanding) in every class except Math where Student has a citizenship grade of S (for satisfactory). Citizenship grades at School 2 are based on a "PBIS" system, which stands for positive behavior and intervention support system. The PBIS system rewards students for behaviors that School 2 wants the students to engage in rather than providing consequences or punitive actions for things that they do not want students to do. The PBIS system is made up of a matrix called "PACT" which stands for positive, accountable, considerate, and trustworthy. Student does not have any behavioral infractions noted in Student's record. (R-4; Principal's testimony)
13. English Teacher received Student's 2022 IEP on the first day of school. English Teacher has been implementing Student's 2022 IEP by using subtitles during videos shown in class, using the device that transmits sounds into Student's hearing aids, ensuring Student is in a quieter learning environment for certain tests and test taking, giving Student guide along notes in a notebook<sup>2</sup>, has Student sit up front closer to the teachers so Student can hear and see more clearly, receives communication from the DHH via email once a month about how English Teacher can make the classroom environment better for Student so Student

<sup>2</sup> Student receives physical copies of notes that are glued into notebooks for each skill.

can be more successful, and English Teacher tries to monitor the level and pace when speaking so that there are minimal misinterpretations. Student earned an A in English in both the first and second quarter. Student perseveres when faced with difficulty by asking questions and trying Student's best. Student strives and works hard to push through difficult situations by advocating for self, asking questions, even asking peers for clarification if working in a group project. Student attends class every day ready and willing to learn and demonstrates a positive work ethic by coming to class on time every day and demonstrates a willingness to take direction and motivation to accomplish the task at hand. Student earned an O in citizenship in English. English Teacher gives an O for citizenship in class when students show respect among peers and teachers, ask clarifying questions, makes sure they are on top of assignments, and do their very best, which Student has always done. If Student has any problems during class Student is able to express that to English Teacher and recently discussed an issue with English Teacher. English Teacher checks on Student daily to ensure Student is wearing hearing aids. (R-9; P-26; R-4, pg. 1; R-5; English Teacher's testimony)

14. Speech Therapist works with Student on Student's Articulation goal in the 2022 IEP. The goal states: Student will produce target sounds (/s/ & /z/) during conversational speech achieving a criteria of 80% as measured by speech therapist observation, documentation, and progress monitoring using baseline protocol data as implemented by Speech/Language Pathologist. Student's short-term objectives include: (1) Student will produce target sounds /z/ in all selected positions of words; (2) Student will produce target sounds /z/ in all positions of words in phrases and sentences; (3) Student will produce target sounds /s/ & /z/ while answering questions and in structured activities; and (4) Student will produce target sounds /s/ & /z/ during structured readings, tongue twisters, and selected narratives using self-monitoring skills. Student achieved this goal. (R-9, pg. 19; pg. 37; P-26, pg. 239; Speech Therapist's testimony)
15. Student does not currently have any speech language deficits that Speech Therapist is aware of. Student has been working towards generalization, where Student produces those accurate speech sounds without prompts and cues and is doing well with that. Student is not having difficulty with any other speech sounds. Student's speech logs contain the speech sounds being worked on, how many trials, and any other information that is



pertinent to that particular goal during a session. Student's sessions are 30 minutes, generally.<sup>3</sup> The sessions occurred 60 minutes each month pursuant to the 2022 IEP. (R-11; R-9, pg. 23; P-26, pg. 243; Speech Therapist's testimony)

16. Student's Progress Report dated 12/15/2023 created by School 2 SEIF notes that Student has made progress and mastered a lot of the goals because the goals were created in the fifth grade and Student is now in the seventh grade. Student has already mastered a lot of the curriculum because Student has had two years to work on the 2022 IEP goals. (R-9, pgs. 37-41; School 2 SEIF's testimony)
17. On October 5, 2023, Assistant Principal responded to an email from Parent 1 confirming that School 2 was working on scheduling a meeting requested by Parents.<sup>4</sup> Parent 1 responded that Parent 1 previously omitted a request that the Speech/Language Pathologist also join the meeting requested by Parents. (P-11, pgs. 097-098)
18. On a date unknown Parent 1 emailed Assistant Principal stating, "please review Student's existing IEP and arrange parents requested meeting, as prescribed in Student's preexisting IEP. I anticipate that you will refrain from delaying my requested meeting and that you will provide me with a date for my intended meeting with Student's classroom teachers and specialist upon receipt of this message." (P-11, pg. 100)
19. On October 17, 2023, Assistant Principal emailed Parent 1 stating in part, "thank you for your email to School 2 SEIF. If you'd like special education staff present, including related service providers, they can and will be present during an upcoming annual IEP meeting, but they will not be present during the meeting you requested with Student's general education teachers. Please let us know if you'd still like to schedule a meeting with Student's general education teachers to discuss Student's progress to date. We are available on 10/23, 10/23 and 10/31." (P-11, pg. 100)
20. On October 18, 2023, in an email to Parent 1 titled "Clarifying meeting," Assistant Principal stated, "to avoid any misunderstanding, please reply back to this email stating that you are requesting a formal IEP meeting. We just need you to be clear. Once you have confirmed your exact request, we can begin the formal process, including scheduling notices, and planned attendance for all required members of the IEP Team." (P-11, pg. 99)

<sup>3</sup> The service provided on 10/17/2023 was 40 minutes. (R-11, pg. 8)

<sup>4</sup> The email that Assistant Principal is responding to was not provided by Respondent as part of this Exhibit.

21. On October 18, 2023, in an email to Parent 1 titled "Meeting Request," Assistant Principal stated, "I am confirming that you are seeking to meet with Student's general education teachers only to review Student's progress in the general education setting. This means that no special education staff (DHH and speech teachers or the SEIF) will be present for this meeting. The team that will be present are the general education teachers, counselor, and administration. (P-11, pg. 102)
22. A general education meeting took place on October 26, 2023 with the following participants: Assistant Principal, Computer Design Teacher, Math Teacher, History/Geography Teacher, English Teacher, Science Teacher, Counselor, Student, Parent 1, and Education Advocate. (P-16)
23. On October 26, 2023, in an email titled "Parent requesting meeting with the SEIF/CASE MANAGER for student," Parent 1 emailed Assistant Principal, Principal and School 2 SEIF to request a parent meeting with the SEIF/Case Manager to discuss Student's preexisting IEP along with a review of Student's confidential folder prior to holding an annual IEP meeting. (P-11, pgs. 095-096; P-17, pgs. 165-166)
24. On October 31, 2023, in an email to Parent 1 titled "Proposed IEP Dates," School 2 SEIF proposed annual IEP meeting dates of 11/15/2023, 11/16/2023 and 11/17/2023 adding that they did not forget about the request to review Student's confidential folder and the pre-meeting, but that those topics would be addressed in separate emails. (p-17, pg. 164-165)
25. On November 1, 2023, in an email to School 2 SEIF titled "Parent requesting meeting with the SEIF/CASE MANAGER for Student prior to your proposed IEP Dates," Parent 1 stated in part, "I appreciate your [sic] acknowledging that I've now requested three meetings, one with the District's designated person(s) to discuss a Restorative Plan for my Student, the second with the SEIF only [to review Student's confidential folder] prior to holding a schedule[d] IEP meeting with my child's specialist and related service providers....Parents requested meeting[s] are nonnegotiable, these meetings will take place because we have the right to request these meetings....Parents will decide on the IEP meeting date after the dates for parents requested meeting[s] are scheduled." (P-11, pgs. 106-107)
26. On November 1, 2023, Coordinator responded to parts of Parent 1's 11/1/2023 email stating (1) the meeting to discuss a restorative plan is not an IDEA request and that meeting needs to be scheduled with the principal; (2) that the IEP Team would not be scheduling

nor participating in these meetings; (3) the meeting with the SEIF, specialists, and related service providers prior to the IEP is not required under IDEA and any concerns could be raised during the IEP meeting; (4) the SEIF or Admin will send a communication to set up a time to review the confidential folder, which will only be a folder review and will not be a meeting with the SEIF, specialists or related services; and (5) the proposed IEP dates as previously communicated were 11/15, 11/16 or 11/17. (P-17, pgs. 157-162)

27. On November 2, 2023, Parent 1 replied to Coordinator in the same 11/1/2023 thread and included a request that District respond in writing with regard to Student's 2022 IEP with responses to eight questions, one of which included the following, "For the past three years Parents have requested that the District complete the [FBA] assessments and we have yet to receive them. Nor has the District made any attempts to arrange a meeting to discuss any outcomes for any FBA assessments...What is the status of Student's FBA intervention assessments?" Coordinator did not subsequently respond to this question because Coordinator's intent was to get everyone at the table for Student's IEP meeting. Coordinator did not respond to the questions that did not relate to scheduling the IEP meeting. (P-17, pgs. 156-164; Coordinator's testimony)
28. On November 3, 2023 in an email titled "Request to Schedule Meeting," Assistant Principal offered three proposed dates for a meeting as requested to discuss the District's restorative disciplinary practices and safety plans. The meeting was subsequently scheduled for November 9, 2023. (P-11, pg. 104; pg. 103)
29. On November 3, 2023, School 2 SEIF emailed Parent 1 to confirm Student's annual IEP meeting date of November 30, 2023. (P-10, pg. 079)
30. On November 4, 2023, Parent 1 responded to the 11/3/2023 email regarding Student's annual IEP meeting stating in pertinent part, "Parents are requesting Student Intervention Team (SIT)<sup>5</sup> assessments....because we have concerns with Student's executive functioning skills and particularly how Student process[es] multi-tasks [sic] steps...Parents are expecting that SIT will have an independent discussion with Parents concerning their findings and that the SIT designee will share his/her findings at the scheduled IEP meeting for school years 2023-2024 meeting.....Parents are requesting English teacher's

<sup>5</sup> Student Intervention Team assessments are not required under the IDEA or the NAC's special education provisions.

- participation, considering English teacher is the most qualified to engage in discussions on Student's academic progress in reading/language arts. Further, English Teacher's participation is nonnegotiable. If English Teacher is not available on the tentative date set for the IEP meeting, we will need to reschedule the meeting." (P-10, pgs. 078-079) This communication was forwarded a second time on November 12, 2023. (P-10, pgs. 076-077)
31. On November 14, 2023, in an email titled "Parent request for FBA, Student Intervention Team Intervention and assessments and cancellations for Confidential Folder Review, Parent 1 stated in part, "Parents are canceling the appointment set for November 16, 2023 for the Confidential Folder Review until after the SIT assessments are completed. Furthermore, the District will need to reschedule the IEP if it fails to complete the FBA one week prior to the date set for November 30, 2023 meeting." (P-10, pgs. 074-075)
  32. On November 17, 2023, in an email titled "Proposed IEP dates notice 2" School 2 SEIF offered three new dates for the IEP meeting and Parent 1 chose a date. Parent 1 also reiterated the request for a SIT. (P-10, pg. 073; 072)
  33. On November 20, 2023 Parent 1 sent District concerns pertaining to the proposed members of the IEP Team, the lack of response regarding the request for SIT assessments, a request that English Teacher be part of the IEP Team, and notice that if District could not meet the Parents' requests, then they consent to "staying the IEP meeting." (P-10, pgs. 070-071)
  34. On November 20, 2023, Parent 1 sent a second email inquiring who Case Manager is, as Case Manager was listed on the Parental Prior Notice and Parent 1 was not familiar with this person. (P-10, pgs. 069-070)
  35. On November 22, 2023, School 2 SEIF responded to Parent 1 stating, "We have received your concerns and they have been noted. We can discuss all your concerns at our upcoming IEP meeting." (P-10, pg. 069)
  36. On November 22, 2023, Parent 1 listed previous concerns/requests which had not been responded to in writing or completed by District. (P-10, pgs. 066-067)
  37. On December 4, 2023, Parent 1 wrote correspondence to District to document Parents' concerns related to the IEP meeting scheduled for December 8, 2023 including Parents' belief that Student's 2022 IEP was not being implemented regarding the FBA assessment, monthly meetings, ongoing communication between home and school and 1:1 direct

services by the DHH. This correspondence was emailed on December 5, 2023. (P-10, pgs. 081-084)

38. On December 5, 2023 in an email titled “Notice of Parent Requests,” School 2 SEIF acknowledged Parents’ cancellation of Student’s proposed IEP meeting scheduled for December 8, 2023 and notified Parent 1 that due to Parent 1’s availability and the winter break the next available dates were in January 2024<sup>6</sup>. School 2 SEIF also advised Parent 1 that “there is no provision of the IDEA or NAC that vests a parent with unilateral authority to demand the district complete an FBA. The behaviors you believe support the need for an FBA have not been observed by school staff. During the IEP meeting you can express your concerns to the full IEP team, and the team can review your concerns along with other available information, and then determine whether there is a current issue related to the student’s disability that supports the need for an FBA.” (P-10, pg. 063)
39. On December 7, 2023, Parent 1 notified School 2 SEIF that Parents and Education Advocate selected January 5, 2024 to attend the meeting, which was not one of the dates offered by School 2 SEIF. (P-10 pgs. 64-65)

***“Full In Person” Self-Advocacy/Vocabulary – Teacher of the Deaf/Hard of Hearing  
1:1 direct services***

40. Student has been receiving direct services for the 2023-2024 school year virtually from DHH since August 2023. DHH accessed Student’s 2022 IEP through the District’s communication portal. DHH addresses three of Student’s IEP goals including (1) Hearing Self Advocacy/Self Determination – Student will increase understanding of Student’s hearing loss, hearing needs and how to obtain appropriate supports achieving a criteria of 4 out of 5 trials as measured by observation and documentation as implemented by the DHH and support by the Special Education Staff; (2) Hearing Self-Advocacy – Student will demonstrate communication repair strategies through role play as they relate to communication breakdowns achieving a criteria of 80% accuracy as measured by observation and documentation as implemented by the DHH and supported by the Special Education Staff; and (3) Hearing Vocabulary – Student will use vocabulary strategies to identify the meaning of an unknown word across the curriculum achieving a criteria of 80% accuracy on 4 out of 5 trials as measured by observation and documentation as

<sup>6</sup> January 8<sup>th</sup> or January 11<sup>th</sup> were the dates offered for the IEP meeting.

implemented by the DHH and supported by Special Education and General Education Staff. (R-9, pages 18-19; P-26, pages 238-239; DHH's testimony)

41. The Hearing Self-Advocacy/Self Determination goal is important for students with hearing loss to know more about their hearing so that they can identify challenging listening environments, apply compensatory strategies and learn how to advocate for themselves in the general education environment. Student met this goal. (DHH's testimony)
42. The Hearing Self-Advocacy goal is important for students with hearing loss for students that are not used to communication breakdowns or are not used to identifying them. They role play to teach them how to acknowledge if there is a communication breakdown and if there is how to repair those breakdowns and provide them the strategies for that. Communication repair strategies are part of self-advocacy. Student met this goal. (DHH's testimony)
43. The Hearing Vocabulary goal is important because students with hearing loss often do not have access to incidental learning – the ability to hear conversations going on around them but not directed at them – and this can impact the vocabulary of the student if they are not an avid reader because hearing conversations going on around them would be another way to acquire vocabulary. The way this goal is written is a goal that all students are working on because they are consistently learning unknown vocabulary, therefore Student has not met this goal on 4 out of 5 trials. (DHH's testimony)
44. DHH spends 30 minutes a week with Student and has been implementing the 2022 IEP weekly since August 30, 2023. DHH keeps track of the dates, topics, lessons and notes for the work that DHH does with Student. Services were provided to Student on the following dates: 8/30/2023; 9/7/2023; 9/15/2023; 9/21/2023; 9/26/2023; 10/5/2023; 10/12/2023; 10/19/2023; 10/26/2023; 11/2/2023; 11/9/2023; 11/16/2023; 11/21/2023; 11/30/2023; 12/7/2023; 12/13/2023, for a total of 16 of 19 school weeks between the first day of school and the beginning of winter break on December 15, 2023. (R-7, pgs. 1-6; R-9, pg. 20; P-26, pg. 240; DHH's testimony)
45. On August 30, 2023, Student was able to define what self-advocacy is and give examples of how to advocate for self. On September 7, 2023, though Student was able to correctly answer some questions in each category to self-assess knowledge of accommodations, hearing loss and audiograms, Student required review in own hearing loss and audiograms.

On September 15, 2023, Student was able to answer comprehension questions regarding the auditory system and was observed assisting the other student in the session to answer questions as well. On September 21, 2023, Student was able to identify several parts of the ear with assistance, could explain how sound traveled through the ear but could not identify individual functions of the ear's anatomy, and was able to provide two solutions to repair communication breakdowns. On September 26, 2023, Student was able to provide a solution if the headphones/HAT was not functioning when using Chromebook and was able to identify some parts of the ear and vaguely describe the path of sound through the auditory system. On October 5, 2023, Student was unable to identify a solution when presented with a challenging listening situation, but by the end of the lesson was able to state Student's degree and type of hearing loss with support. On October 12, 2023, Student was able to list a repair strategy when given a challenging listening situation/scenario, was able to state the degree and type of hearing loss but could not state whether the hearing loss was bilateral or unilateral. On October 19, 2023, Student was able to state the type and degree of hearing loss and was able to state what an audiogram is and what information can be learned from audiograms. On October 26, 2023, when given a scenario, Student was able to state one way to advocate for self but it was not an appropriate strategy. By the end of the session, Student was able to identify frequencies and intensity levels on an audiogram and state if they were high or low. On November 2, 2023, Student was able to state an appropriate advocacy strategy when given a scenario, was able to provide information about the hearing loss, was able to state the degree and type, but required assistance when identifying sounds with high and low frequencies and intensity levels on a real sound audiogram. On November 9, 2023, Student was able to describe hearing loss when asked and when asked to identify the meaning of an unfamiliar word using context, was able to do so in half of trials. On November 16, 2023, when presented with a scenario, Student was able to provide an appropriate advocacy strategy independently, with support was able to identify specific thresholds on an audiogram and identify if those sounds had a low or high frequency or intensity and was able to use context to identify an unfamiliar vocabulary word in 2/4 trials. On November 21, 2023, with support, Student was able to identify thresholds given a frequency and identify a "better" hearing ear on a given audiogram, was able to use context to identify the meaning of an unfamiliar word 1 of 4

trials and did not use resources such as Google or a thesaurus to find the meaning. On November 30, 2023, Student was able to give an appropriate compensatory strategy when given a scenario but could not recall information learned in the prior session, therefore the majority of the session was spent reviewing, and Student was able to correctly define 1/3 unknown vocabulary words. On December 7, 2023, Student required redirecting during the session when observed using the phone or listening to music in ear buds during the session. Student was prompted to insert hearing aids but stated that it was dead and did not have any extra batteries to replace it. When given a vocabulary strategy, Student was able to correctly identify the meaning of an unknown word 3 of 4 trials with support. On December 13, 2023, Student was able to correctly use 2/4 strategies to correctly identify the meaning of an unfamiliar word, struggled to identify an antonym, and when asked about not using the HAT stated that there was nothing wrong with it, but that it echoes in English class. (R-7)

46. DHH has expanded Student's awareness goal as much as possible within the confines of the goal listed in the 2022 IEP, so a lot of review is done, and DHH includes some of the vocabulary within self-advocacy. Student's Progress Report dated 12/15/2023 lists an additional goal of DHH Self Advocacy: When given access to the audiogram, Student will demonstrate understanding of hearing loss by stating key information about hearing using appropriate vocabulary achieving a criteria in 4/5 trials as measured by observation, work samples and documentation as implemented by the DHH. Student continues to make gains toward understanding hearing loss by identifying parts and symbols on an audiogram, making connections between sound and personal experiences, and defining key words related to audiograms including air conduction, frequency and intensity. Student is able to state the degree and type of hearing loss. DHH has not communicated directly with Student's Parents and the first time that DHH met Parent 1 was during DHH's testimony. (R-7, pgs. 1-6; R-9, pg. 20; pg. 39; P-26, pg. 240; DHH's testimony)

***Monthly meetings with the Teacher of the Deaf/Hard of Hearing***

47. One of the accommodations in Student's 2022 IEP is that DHH is to consult with school staff regarding Student's hearing related needs by meeting with teachers for 10-15 minutes monthly. DHH consults with Student's teacher and staff via email monthly by sending out emails/newsletters to Student's teachers. The emails/newsletters are about students with



hearing loss and are reminders on how to best work with them. Within the body of the emails, the DHH includes an offer to teachers/staff to contact the DHH if there are any questions or concerns. DHH is a remote teacher and is not physically on campus, so DHH interacts with Student's teachers and staff via email. A concern about Student's technology not working in Student's English class was brought to DHH's attention and as a result the DHH brought this to the attention of the audiologist to see if they could get out there and troubleshoot to fix that problem. Tip of the Month newsletters sent out by DHH included the following: "Always Wear the Mic/HAT" sent on 9/26/2023; "Check for Understanding" sent on 10/10/2023; "Face Your Student" sent on 11/7/2023; "Speak One at a Time" sent on 12/4/2023; "Mild Hearing Loss is not Mild" marked January Tip of the Month. (R-9, pg. 22; P-26, pg. 241; R-8, pgs. 1-7; DHH's testimony)

#### ***Weekly Communication Between Home and School***

48. Student's 2022 IEP includes the accommodation of ongoing communication between home and school (General Education teacher, Special Education teacher, speech and therapy teacher for deaf/hard of hearing) upon occurrence at least once weekly. The 2022 IEP does not state the method of communication. (R-9, pg. 22; P-26, pg. 242)
49. English Teacher currently sends messages home once a week every Monday. Weekly communications began October 16, 2023. Communications include notifications that Student's grades have been uploaded to the District's communication portal, whether Student has any missing assignments, and whether Student requested any change to modifications, such as not having the teacher use the microphone device. (R-5; English Teacher's testimony)

### **V.**

#### **CONCLUSIONS OF LAW AND DISCUSSION**

Based upon the above Findings of Fact, the arguments of counsel and Petitioners, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

#### **A.**

***Whether the District failed to implement Student's 5/18/2022 IEP during the 2023-2024 school year regarding the following (1) complete a Functional Behavior Assessment (FBA); (2) to provide "Full In Person" Self-Advocacy/Vocabulary – Teacher of the Deaf/Hard of Hearing***

*1:1 direct services; (3) to hold monthly meetings with the Teacher of the Deaf/Hard of Hearing regarding Student's hearing related needs; and (4) to conduct weekly communication between home and school, and if so, whether the failure to implement resulted in a denial of FAPE for Student?*

## LEGAL AUTHORITY

### **i. Individualized Education Program**

A student's IEP Team must review the IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved.<sup>7</sup> Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed on time and place.<sup>8</sup>

The Ninth Circuit held that an agency cannot blame a parent for its failure to ensure meaningful procedural compliance with the IDEA because the IDEA's protections are designed to benefit the student, not the parent. Parental participation is key to providing the *student* an adequate education because “[a]n IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved.”<sup>9</sup> The Ninth Circuit also addressed what a public agency must do when confronted with the difficult situation of being unable to meet two distinct procedural requirements of the IDEA, (1) parental participation and (2) timely annual review of the IEP. In considering this question, the court kept in mind the purposes of the IDEA: to provide disabled students a free appropriate public education and to protect the educational rights of those students. It also considered the standard for determining when a procedural error is actionable under the IDEA. Procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE. When confronted with the situation of complying with one procedural requirement of the IDEA or another, the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least

<sup>7</sup> 20 USC § 1414(d)(4)(A); 34 CFR § 300.324(b)(1); NAC 388.281(13)(c)

<sup>8</sup> 20 USC § 1414(d)(1)(B); 34 CFR § 300.322(a); NAC 388.281(2)(d)

<sup>9</sup> *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1045 (9th Cir. 2013)

likely to result in the denial of a FAPE. In reviewing an agency's action in such a scenario, the court will allow the agency reasonable latitude in making that determination.<sup>10</sup>

## **ii. Functional Behavior Assessment**

When developing, reviewing and revising an IEP, the IEP team must consider when a child whose behavior impedes the child's learning or that of others. In such case, the Team must consider the use of positive behavior interventions, supports and other strategies to address the behavior.<sup>11</sup> An FBA is not a required component of an IEP.<sup>12</sup> The required components of an IEP include (I) a statement of the child's present levels of academic achievement and functional performance; (II) a statement of measurable annual goals, including academic and functional goals; (III) a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the process the child is making toward meeting the annual goals will be provided; (IV) a statement of the special education and related services and supplementary aids and services, based on peer reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child; (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and the activities; (VI) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments and if the IEP determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement why; and (VII) the projected date for the beginning of the services and modifications and the anticipated frequency, location and duration of those services and modifications.<sup>13</sup>

The IDEA explicitly mandates the development of a BIP, as opposed to behavior supports, interventions and strategies, in only one circumstance. If a student is subjected to a disciplinary change of placement and the conduct is found to be a manifestation of a disability, the district must either: (1) conduct a functional behavioral analysis, unless the local educational agency had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a BIP for the child; or (2) if a BIP already has been developed, review the BIP and

<sup>10</sup> *Id.* at 1046

<sup>11</sup> 20 USC § 1414(d)(3)(B)(i); 34 CFR § 300.324(a)(2)(i)

<sup>12</sup> 20 USC § 1414(d)(1)(A)(i); 34 CFR § 300.320; NAC 388.284; 71 Fed. Reg. 46629 (2006)

<sup>13</sup> *Id.*

modify it, as necessary, to address the behavior.<sup>14</sup> The U.S. Education Department rejected the recommendation that positive behavioral interventions and supports for all children identified as having a particular disability be required because such decisions should be made on an individual basis by the student's IEP Team.<sup>15</sup> They also declined to specify through regulation what constitutes a "current" or "valid" functional behavioral assessment as such decisions are best left to the LEA, the parent, and relevant members of the IEP Team who are responsible for making the manifestation determination.<sup>16</sup>

Under the NAC, if the functional behavior of a student is assessed, the assessment must include (a) systematic observation of the occurrence of the targeted behavior for an accurate definition and description of the frequency, duration and intensity of the behavior; (b) systematic observation of the events that immediately precede each display of the targeted behavior and are associated with the display of the behavior; (c) systematic observation and analysis of the consequences following the display of the targeted behavior to identify the specific environmental or physiological outcomes produced by the behavior in order to determine the function that the behavior serves for the pupil. The communicative intent of the targeted behavior must be identified in terms of what the pupil is either requesting or protesting through the display of the behavior; (d) analysis of the settings in which the targeted behavior occurs most frequently; (e) review of records for health and medical factors which may influence the targeted behavior, including, without limitation, levels of medication, sleep cycles, health and diet; and (f) review of the history of the targeted behavior to include the effectiveness of any intervention previously used.<sup>17</sup> Informed, written consent must be obtained from the parents before conducting an assessment of the functional behavior of a student.<sup>18</sup>

Written notice must be given to the parents of a child with a disability a reasonable time before the public agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. The notice must include a description of the action refused by the agency, an explanation of why the agency refuses to take the action, a description of each evaluation procedure, assessment, record, or report the agency used as a basis

<sup>14</sup> 20 USC § 1414(k)(1)(F); 34 CFR § 300.530 (f)

<sup>15</sup> 71 Fed. Reg. 46,683 (2006)

<sup>16</sup> 71 Fed. Reg. 46,721 (2006)

<sup>17</sup> NAC 388.386(1)

<sup>18</sup> NAC 388.386(2)

for the refused action, a statement that the parents have protection under the procedural safeguards of the IDEA, sources for parents to contact to obtain assistance in understanding the IDEA, a description of other options that the IEP Team considered and the reasons why those options were rejected; and a description of other factors that are relevant to the agency's refusal.<sup>19</sup>

### **iii. Implementation of IEP/Denial of FAPE**

A student's IEP must be accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation.<sup>20</sup> Each teacher and provider must be informed of his or her specific responsibilities related to implementing the student's IEP and the specific accommodations, modifications, and supports that must be provided for the student in accordance with the IEP.<sup>21</sup>

The IDEA defines a FAPE in part as special education and related services that meet the standards of the SEA, include an appropriate secondary school education in the State and are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.<sup>22</sup> Pursuant to the impartial due process hearing provisions, a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE.<sup>23</sup>

The Supreme Court determined that in order to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. A review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether it is deal.<sup>24</sup> The IEP must aim to enable the child to make progress, as the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. A substantive standard

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<sup>19</sup> 34 CFR § 300.503

<sup>20</sup> 34 CFR § 300.323(d)(1)

<sup>21</sup> 34 CFR § 300.323(d)(2)

<sup>22</sup> 20 USC § 1401(9); 34 CFR § 300.17

<sup>23</sup> 20 USC § 1415(f)(1)(A); 34 CFR § 300.513(a)(1)

<sup>24</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017)

not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.<sup>25</sup>

A focus on the particular child is at the core of the IDEA. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth.<sup>26</sup> The IDEA requires that children with disabilities receive education in the regular classroom whenever possible. When this preference is met, “the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material.” Progress through this system is what our society generally means by an “education.” And access to an “education” is what the IDEA promises. Accordingly, for a child fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>27</sup> It is through the IEP that “[t]he ‘free appropriate public education’ required by the Act is tailored to the unique needs of” a particular child.<sup>28</sup> The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue.<sup>29</sup>

The Ninth Circuit held that “a failure to implement an IEP may deny a child a FAPE and thus result in a claim under the IDEA. The [substantive grounds determination] language also counsels against making minor implementation failures actionable given that ‘special education and related services’ need only be provided ‘*in conformity with*’ the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE.”<sup>30</sup> The IDEA allows a party to challenge an IEP because of procedural flaws in the IEP's formulation as well as “on substantive grounds based on a determination of whether the child received a free appropriate public education. A failure to implement an IEP may deny a child a free appropriate public education and thereby give rise to a claim under the statute. A material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides

<sup>25</sup> *Id.* at 400, 999, 335.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 400–01, 999, 335.

<sup>28</sup> *Id.* at 401, 1000, 335.

<sup>29</sup> *Id.* at 404, 1001, 335.

<sup>30</sup> *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 821 (9th Cir. 2007).

to a disabled child and the services required by the child's IEP. The materiality standard does not require that the child suffer demonstrable educational harm to prevail. However, the 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.<sup>31</sup>

In reaching this determination, the Ninth Circuit looked to cases and findings made by the Fifth and Eighth Circuits because the Ninth Circuit had not yet articulated the standard for assessing an IEP's implementation. The Fifth Circuit held that “to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” Employing this standard, the court concluded that conceded implementation failures did not violate the IDEA because “the significant provisions of [the child's] IEP were followed, and, as a result, he received an educational benefit.”<sup>32</sup> The Eighth Circuit held that the IDEA is violated “if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit.” The court considered both the shortfall in services provided and evidence regarding the child's progress in several areas. The court concluded that the IDEA was indeed violated because the actions taken by the school “did not appropriately address [the child's] behavior problem,” and “any slight benefit obtained was lost due to behavior problems that went unchecked and interfered with [the child's] ability to obtain a benefit from his education.”<sup>33</sup>

## B.

### ANALYSIS

#### i. Functional Behavior Assessment

While an FBA is not a required component of an IEP, the 2022 IEP Team agreed to conduct an FBA to determine whether Student needed a BIP. Therefore, District was legally required to

<sup>31</sup> For instance, if the child is not provided the reading instruction called for and there is a shortfall in the child's reading achievement, that would certainly tend to show that the failure to implement the IEP was material. On the other hand, if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material. We also emphasize that nothing in this opinion weakens schools' obligation to provide services “in conformity with” children's IEPs. § 1401(9). IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute—not to decide on its own no longer to implement part or all of the IEP. *See* §§ 1414(d)(3)(F), 1415(b)(3). *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 821–22.

complete the FBA for Student. (FOF 2; 4) Here, District took the appropriate steps by gathering ABC data, included the same in an “indirect” FBA assessment, and determined that although the behaviors occurred, there was no determining function for the behavior because it did not occur at a rate that justified moving forward into a hypothesis as Student only engaged in the off-task behavior for a couple of minutes three times in a two-week period. (FOF 6; 7)

Parents agreed to the 2022 IEP in person and again in writing and their parent concerns were included as an addendum to the 2022 IEP and made a permanent part of the permanent confidential folder. (FOF 1) Parent 1 consented via telephone on or about 8/12/2022 for District to conduct the FBA. Parent 1 consented in writing for District to conduct academic performance achievements and observations on or about 9/20/2022. Parent 1 did not testify to refute this evidence. Further, a comparison of Parent 1’s signature on the consent dated 9/20/2022 matches Parent 1’s signature on documents produced by Parent 1 during this due process.<sup>34</sup> While Parent 1 argues that no parent interview took place, the “indirect” FBA assessment included information from a Parent interview (which could have been a survey or questionnaire) on 9/26/2022, and during a meeting that took place on 9/27/2022 Education Advocate requested to see the behavior data that was collected. Parent 1 and Education Advocate did not testify to refute this evidence. (FOF 6; 5) While it is clear from the record that Parent 1 did not realize that the FBA assessment was in fact completed, and it is also clear from the record that District had several opportunities to respond to several of Parent 1’s emails directly inquiring about the completion of the FBA, the lack of a clear written response to Parent 1 prior to the District’s disclosures in this due process hearing does not negate the fact that the FBA was completed in September 2022. (FOF 27; 31; 36; 37; 38)

***Therefore, District completed an FBA for Student in September of 2022 thereby complying with Student’s May 18, 2022 IEP. District did not fail to implement this accommodation.***

**ii. “Full In Person” Self-Advocacy/Vocabulary – Teacher of the Deaf/Hard of Hearing  
1:1 Direct Services**

Student has been receiving virtual 1:1 direct services from DHH since the beginning of the 2023 school year. DHH works directly with Student on three of Student’s 2022 IEP goals. Student

<sup>34</sup> This IHO compared Parent 1’s signature on R-6, page 8 to Parent 1’s signature on HO-35, page 19 and HO-26, page 13.



has met two out of three of those goals. The third goal as written is not a goal that can be completed due to the ongoing nature of learning. DHH spends 30 minutes each week with Student and keeps track of Student's progress during each session. (FOF 40-46)

There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE."<sup>35</sup> A material failure occurs when there is more than a minor discrepancy between the services a school provides, and the services required by the IEP. The materiality standard does not require that the child suffer demonstrable educational harm to prevail. However, the 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.<sup>36</sup> Although DHH has only provided virtual, as opposed to in-person, direct 1:1 services to Student 16 out of 19 weeks of school, these are minor discrepancies, and neither the virtual component of the services nor the missing three weeks has risen to the level of a material failure to implement Student's IEP as proven by Student's educational progress. Student has met two of three DHH goals (the third of which is an ongoing learning process), continues to make progress with the DHH, and has earned five A's and one B for the first semester. (FOF 44-45; 41-42; 46; 12)

***Therefore, District has not materially failed to implement Full In Person" Self-Advocacy/Vocabulary – Teacher of the Deaf/Hard of Hearing 1:1 Direct Services from Student's May 18, 2022 IEP.***

### **iii. Monthly Meetings with the Teacher of the Deaf/Hard of Hearing**

While monthly in-person meetings are not occurring between the DHH and Student's teachers and staff because DHH works remotely, monthly *communication* is occurring via email with DHH sending monthly tips and reminders to teachers and staff on how best to work with and teach students with hearing loss. DHH is also available to the teachers and staff if there are any issues and has acted in response upon request. (FOF 13; 47) Further, there is no evidence that email versus in person communication between the DHH and the teachers/staff is having a negative impact on Student's educational progress. Student's first semester grades include an A in English, Math, History, Computer Design and Advisory and a B in Science. Student's citizenship grades include an O (for outstanding) in every class except Math where Student has a citizenship grade

<sup>35</sup> *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 821 (9th Cir. 2007)

<sup>36</sup> *Id.*

of S (for satisfactory). The difference between in-person meetings and email communications on a monthly basis is not a material failure as Student continues to progress.

***Therefore, District has not materially failed to implement Monthly Meetings with the Teacher of the Deaf/Hard of Hearing from Student's May 18, 2022 IEP.***

**iv. Weekly Communication between Home and School**

Weekly communication has only been occurring since October 16, 2023, from Student's English Teacher. (FOF 49) No evidence was provided to explain why weekly communication has not been provided by the other staff to Parents. District failed to implement this accommodation in Student's 2022 IEP. A material failure occurs when there is more than a minor discrepancy between the services a school provides, and the services required by the IEP. The materiality standard does not require that the child suffer demonstrable educational harm to prevail. However, the 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.<sup>37</sup> This failure by District was not material because it did not affect Student's educational progress and was not necessary for Student to receive an educational benefit. Here, Student has met goals in the 2022 IEP, earned five A's and one B for the first semester, and received a citizenship grade of O in five classes and an S in one class. (FOF 12; 14-16) Student continues to make progress and mastered a lot of the goals and curriculum from the 2022 IEP because it is now almost two years old. (FOF 16)

***Therefore, while District failed to implement weekly communication between home and school by the required staff, it was not a material failure.***

**v. Provision of FAPE**

When issuing a decision on whether Student was provided a FAPE, this IHO is limited to the issue(s) that are before the IHO and set forth in the *Complaint*. This IHO was tasked with determining whether four accommodations listed in Student's 2022 IEP were implemented, and if they were not implemented, whether the failure to implement them resulted in a denial of a FAPE. There is no statutory requirement of perfect adherence to an IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE. While District did not provide Parent with a clear written response to any of the direct communications about the FBA assessment required by the 2022 IEP, the District completed the FBA assessment and determined that the results did not warrant further action. District substantially complied with implementing

<sup>37</sup> *Id.*

the accommodations related to the direct 1:1 services by the DHH as well as the monthly communication between DHH and Student's teachers and staff. While District failed to implement the weekly communication between home and school, the failure was not material to Student's educational progress. Further, the record is replete with ongoing communication between Parent 1 and District related to Parent 1's concerns. Here, Student not only received an educational benefit from the 2022 IEP but has excelled, achieving above average grades, in the general education classroom and continues to advance from grade to grade. Therefore, District did not deny Student a FAPE.

## VI.

### 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 by filing with the Nevada Department of Education, Superintendent of Public Instruction, 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. At the parties' request, this decision is being delivered to the parties electronically by e-mail. Receipt of this Decision and Order will be determined by the date of actual delivery of the email noted by the 'delivery receipt' this Hearing Officer receives and provides to the parties after issuance of the decision.

Dated: March 27, 2024

/s/ Audrey J. Beeson  
Hearing Officer

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