

IMPARTIAL DUE PROCESS HEARING

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

STATE OF NEVADA

In the Matter of)	
)	DECISION OF THE HEARING
STUDENT ¹ , by and through Parent,)	OFFICER
)	
Petitioner,)	Date: 10/4/2024
)	
v.)	
)	Hearing Officer: David A. Stephens
SCHOOL DISTRICT,)	
)	
Respondent.)	

INTRODUCTION

This matter comes before the undersigned hearing officer on Petitioner’s Notice of Due Process Complaint filed on or about May 20, 2024, (hereinafter “Complaint”), HO 1.² I was appointed as the hearing officer shortly thereafter. HO 2. Respondent’s Response to the Complaint was filed on or about May 24, 2024. HO 3. A resolution meeting was held. The parties, however, were not able to reach an agreement.

PRELIMINARY MATTERS

This case arises out of a due process complaint filed by the Student on May 20, 2024. The Hearing Officer was appointed on May 23, 2024.

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

² The Hearing Officer Exhibits will be referred to as HO followed by an exhibit number; Petitioner’s Exhibits will be referred to as P followed by an exhibit number’ and Respondent’s Exhibits will be referred to as R followed by an exhibit number. When citing any exhibit the second number will refer to the page number within the referenced exhibit.

At the Status Conference the parties indicated that the hearing would take three days. Due to Petitioner retaining an attorney just shortly before the initial decision deadline, the parties jointly moved to extend the decision deadline on July 9, 2024. Based upon the joint motion, the hearing officer entered an order extending the decision deadline to August 30, 2024. At the close of evidence in the hearing the Petitioner requested another extension of the Decision Deadline so written briefs could be submitted. Based upon the Petitioner's motion, on August 16, 2024, the hearing officer entered an order extending the decision deadline to September 26, 2024. Based on a joint request the Decision Deadline was again extended to October 4, 2024. Good cause was found for each extension of the Decision Deadline.

A Pre-hearing Conference in the matter was scheduled for, and held, on July 8, 2024. HO 4. The Pre-hearing Conference Report and Order was issued on July 9, 2024. HO 5. A Pre-hearing Conference in the matter was scheduled for, and held on August 2, 2024. HO 6. At the August 2, 2024, Pre-hearing Conference the issues were outlined and decided by the parties in addition to other matters set forth in the Pre-hearing Report and Order. The Pre-hearing Conference Report and Order was issued on August 2, 2024. HO 7.

The following individuals testified during the hearing; Student's Speech Language Pathologist, ("Student's SPL"), School District Supervisor of Speech Pathology, ("Supervisor"), Student's General Education Teacher, ("GE Teacher"), Student's principal, ("Principal"), School District's Director for Early Childhood Education, ("Director"), Student's parent, ("Mother"), and Petitioner's Speech Language Pathology expert, ("SLP expert").³

The hearing was held on August 14, and 16, 2024. The Hearing was held by video

³ See Appendix B for the identifying information regarding these witnesses.

conference. It was a closed hearing, and the Petitioners were represented by Hillary Freeman, Esq. Respondent was represented by Daniel Ebihara, Esq. Hearing Officer exhibits HO 1 through HO 6 were admitted. Petitioner offered into evidence exhibits P 6 and p 17 which were admitted. Exhibit P-6 was admitted for background only. Exhibit P-14 matched Exhibit R-11.⁴ Respondent offered into evidence exhibits R-2-4, 8-9, 11-23, and 25 which were admitted. Exhibit R-20 was admitted for background only. Following the hearing, the parties submitted written closing arguments.

The decision is due on October 4, 2024, and has been issued within the required timeline pursuant to 34 C.F.R. §§ 300.515(a)(1) and (2) and within a properly extended timeline pursuant to 34 C.F.R. § 300.515(c)(1).

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.,⁵ 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.

The basis for jurisdiction of this matter is 20 USC §1415, 34 CFR §§ 300.508, 509, 510, and 511, NRS 385.080 and 388.520, and NAC 388.310.

ISSUES

⁴ A more detailed list of Exhibits is attached as Appendix C to this Decision.

⁵ In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. See Pub. L. Chapter 388, and the Nevada Administrative Code (NAC), Chapter 388.

The issues to be determined are as follows:

A. Whether a Student, who reaches the age of five years prior to August 1, 2024, is required to be placed in kindergarten, rather than Pre-K, and if there is a conflict between the IDEA and Nevada Revised Statutes as to this issue, which law must be followed?⁶

B. Whether the Student's May 17, 2024 IEP was reasonably calculated to enable the Student to make progress appropriate to the Student's circumstances with respect to the Student's expressive speech deficits, and if not, was the Student denied FAPE?

C. Whether for May 17, 2024 IEP, the School District failed to appropriately assess the Student for expressive speech deficits, and if so, was Student denied FAPE?

D. Whether the May 17, 2024 IEP provides Student the reasonable accommodations and services that Student needs to be reasonably calculated to enable the Student to make progress appropriate to the Student's circumstances, in light of Student's expressive speech deficits, and if not, was Student denied FAPE?

E. Whether the May 17, 2024 IEP failed to provide Student an IEP that appropriately addressed the Student's expressive speech deficits, failed to consider input from Student's parents in formulating Student's IEP, and failed to collect sufficient data to determine if Student's IEPs were providing FAPE or needed amendment, and if so, whether these procedural violations denied the Student FAPE?

Petitioner requests relief in the form of the student attending in Pre-K for another school year.

FINDINGS OF FACT

⁶ The Parties provided short briefs to the Hearing Officer as to this issue with their lists of

A. BACKGROUND FACTS

1. Glossary of terms:

a. IDEA means the Individuals With Disabilities Education Act, codified as 20 USC⁷ §§1400, et seq.;

b. IEP means an Individualized Education Program under the IDEA;

c. IEP Team means the team of persons who meet to formulate or amend an IEP and is composed of at least the following persons; LEA, (representative of the local education agency, in this case the School District), parents, the Student's special education teacher, and the Student's general education teacher. See, 34 CFR 300.28 and 300.321;

d. MDT means multidisciplinary team which assesses students for disabilities and eligibility for special education;

e. Phonology is a set of rules governing how sounds are used to make syllables and words.

f. Pre-K as used in this decision refers to the Early Childhood Inclusion (ECI) program provided by the School District.

g. Receptive language is the ability to understand and comprehend spoken language that heard or read

h. Expressive language is the ability to request objects, make choices, ask questions, answer, and describe events.

i. Retention for purposes of this decision means holding a student back, rather than advancing a grade

witnesses and documents.

j. FAPE means a free and appropriate public education as defined by the IDEA.

2. The District Early Childhood Study Team found that the Student was eligible for special education on July 14, 2022. This eligibility was based on developmental delays in accordance with Nevada regulations (NAC 388.430) and the IDEA. Assessments revealed the Student was within the Potential Delay range in receptive and expressive language as well as self-help skills. Consequently, the team recommended the student attend a Pre-K program at a public elementary school in the School District for four half days per week. (R-5, p. 3, 6-8, 10-11).

3. Specifically, the Child Study Team found on the Receptive-Expressive Emergent Language Test-Third Edition (REEL-3), the Student demonstrated age-appropriate receptive language skills. However, he demonstrated a 26% expressive language delay, which correlated to the skills of a 25-month-old. At the time the assessment was administered, the Student was 34-months old.

4. Based on the findings of the MDT, an IEP was developed for the Student on July 2, 2022. (See R-6). A second IEP for the Student was developed on May 12, 2023. (R-7). A third IEP was developed for the Student on September 29, 2023. (R-8).

5. The Student is male and turned five years of age just before August 1, 2024.

6. The Student has been attending School District provided Pre-K for the last two academic years, and is in the disability category of developmental delay. The Pre-K class included special education and general education.

7. The Student's SPL worked with the student in the 2022-2023 and 2023-2024 school

⁷ USC refers to the United States Code.

years on speech and language in the speech room.

8. For the school year 2022-2023, the Student's SPL did not use a lot of language development. Rather, the Student's SPL worked with the Student on identification and location of items, and actions, and stating names of items and actions and locations.

9. During the 2022-2023 school year the Student improved in receptive and expressive language skills. Receptive is understanding language. Expressive is speaking language.

10. At the end of his first year in Pre-K, the Student's parents were concerned about his language development. According to Mother, "Over the course of the year, it appeared that it became less about expressive language needs and more about potentially having issues with sound correction or phonology." Tr. August 16, 2024 at 57:6-11. In the annual IEP meeting that occurred in May 2023, the parents along with the speech language pathologist agreed that it would be developmentally appropriate for the Student's speech language focus to include phonology. Id. at 57:12-19. The parents signed a consent to evaluate in that meeting. Tr. 8/16/24 at 57:19-24.

11. For the 2023-2024 school year Student's SPL did a reassessment of the Student. The Speech and Language Evaluation, ("HAPP-3"), was administered on August 14, 2023 and ultimately reviewed with the parents in a "Revision IEP meeting" held on September 29, 2023.

12. The HAPP-3, a standardized assessment used to evaluate students' phonological abilities, was administered as part of the evaluation and ultimately revealed, inter alia, that the Student's "Consonant Category Deficiencies Sum was 70" and he performed two standard deviations below the norm at less than one percent. The student fell into high moderate range for speech sound errors, and qualified for speech sound production services. The Student was just a

few points away from severe. The student had a high frequency of errors. See R-12 at 1 Tr. 8/16/24 at 59:1-20.

13. Per the evaluator, “[The Student’s] speech was consistently unintelligible with occasional words understood. His lack of speech intelligibility interfered with his overall communicative abilities.” Id. “Based on the comprehensive evaluation, [the Student] exhibits difficulties producing phonological speech patterns. These deficits impact the Student’s ability to effectively communicate in the classroom. The Student is recommended to receive therapy services in speech sound production.” Id. at 2. His IEP was amended accordingly. Ex. R-8 at 41; Tr. 8/16/24 at 60:17-61:4.

14. Based on this assessment a revised IEP was prepared on 9/22/2023, (R. 8).

15. The Student’s IEP dated September 29, 2023, (exhibit R-8), in addition to other goals, provided for phonological goals of related to specific sounds. (Exhibit R-8, p. 24). It provided for services in the general education class room and for speech language services of 120 minutes per month, which works out to 30 minutes per week. (Exhibit 8, p. 25, and Exhibit 13).

16. Under the revised IEP the Student began to work on speech sound production for which the Student was qualified in the revised IEP. Student’s SPL began focusing on speech sound errors, fronting errors, tongue forward in lieu of backward, stopping errors, added or molted t, sequence deletion, spoon was tough, l or r substituted for w.

17. By end of the 2023-2024 school year Student’s speech as to the letters K and P was emerging with some accuracy. Verbal modeling and prompting to not add a t sound were also emerging, but not as successful, except in speech room where there are prompts. The student

was familiar with the alphabet letters Student's SPL worked on, but Student's SPL does not work on the whole alphabet in Pre-K.

18. For 2023-2024 school year, while progress reports reflected satisfactory progress, the Student's parents did not observe the same. Mother stated: "We still could not understand him on a daily basis about day-to-day things...what happened in school? Just anything." Tr. 8/16/24 at 73:6-20. When the Student's Parents expressed their concern to the Student's SPL, "she would say that he's making really great growth and progress on whatever sound production she was working on." Id. at 74:10-75:13.

19. Mother shared with the GE Teacher that she had "extreme concerns about his speech deficit because – because he isn't able to hear the sounds that we are saying or repeat sounds in the correct way. That problem . . . was going to have, some direct impact on his ability to pick up on awareness skills and phonic skills, and that they would bleed into his ability to use writing also string same sounds together." Tr. 8/16/24 at 77:23 to 78:11. She continued: "[H]e needs more time to work on these specific phonology skills as the foundation of all future school readiness stuff." Id. at 78:11.

20. On February 14, 2024, Mother contacted the Director to inquire whether the Student was required to start kindergarten in the Fall of 2024, given the timing of the Student's 5th birthday or whether he could remain in preschool for a third year. R-4 at 22.

21. The Mother's hope was that by the Student receiving a third year of Pre-K his phonology deficit would be addressed. 8/16/24 at 85:19-86:8. The Parent's concern in wanting to address it specifically in a third year of pre-k was "because he didn't have the skills ready to be successful for a kindergarten year." 8/16/24 at 86:9-12.

22. In response, to Mother 's request for a third year of Pre-K for the Student, the Director advised the Petitioner that “there is no option for retention in Pre-Kindergarten. Since Kindergarten is the school entry grade and Pre-Kindergarten is supplemental, retention options begin with Kindergarten.” R-4 at 21. The School District was looking at the Parents’ request for a third year of Pre-K for the student as a retention.

23. After receiving the Director’s email referring to Pre-Kindergarten as “supplemental,” the Mother contacted Nevada’s Division of the U.S. Department of Education’s Office of Special Education Programs (OSEP) to clarify whether Pre-K programming is supplemental for a student with disabilities and corresponding IEPs and as such, could Respondent require the Student to begin Kindergarten at age five, simply due to his age. R-4 at 20.

24. On February 28, 2024, Mrs. M. received a general response referring to Part B of the IDEA which affords protections to preschool age and school age children as well as provides safeguards for development of IEPs and parent involvement with the same. R-4 at 19-20. It also stated, “In all cases, placement decisions must be individually determined on the basis of each child’s abilities and needs and not solely on factors such as category of disability, severity of disability, configuration of service delivery system, availability of space, or administrative convenience.” R-14 at 19, Tr. 8/16/24 at 88:24-89:4.

25. During this time Mother obtained a private assessment speech language assessment of the Student. This assessment was done by Petitioner’s Expert.

26. This private assessment showed the Student was making the same errors as shown in the prior 9/29 assessment. (Exhibit R-11). Thus, Student was not making progress.

27. Mother shared Exhibit R-11 with the IEP Team. However, the IEP Team found that

the Student met kindergarten standards.

28. During the IEP Meeting on May 17, 2024, Student's Parent specifically requested that the Student be allowed to attend another year of Pre-K in lieu of being assigned to kindergarten for the 2024-2025 school year.

29. The IEP team did not discuss, and denied, the request to keep the student in Pre-K another year, apparently because the IEP team believed that the Student could not attend a third year of Pre-K in the School District. (Exhibit R-11).

30. Student's SPL received consent to collaborate with Petitioners' Expert. They determined they were seeing the same errors, although the assessment of Witness 7 as to cause was different.

31. The Student continues to have issues with the pronunciation of the letter "j" and consonant blends. Consequently, the IEP team, in consultation with the Petitioners' Expert increased the number of direct speech-language therapies. Specifically, Student's SPL testified that the Student has made progress over these two years in the Pre-K program, but he continues to have issues with tongue placement and consonant sequences. Consequently, the Student's SPL testified that she had reviewed the Independent Educational Evaluation (IEE) from Petitioners' Expert. Together, they agreed that the Student's speech therapy minutes should be increased for the following school year. Id. at 39; 22-40.

32. The GE Teacher testified that the Student would gain an educational benefit by being with his same-age peers in terms of social-emotional development as well as phonological development. Id. at 172-174.

33. Student's SPL believed that the Student should move to kindergarten and the

Student would rise to occasion. While there was minimal regression, this minimal regression did not change the opinion of Student's SPL as to Student moving to kindergarten. Student's SPL also testified that the Student would benefit from being with peers to hear how they speak in addition to adults, and that the student would not benefit much from being with Pre-K classroom again.

34. The GE Teacher also testified that the Student could not always stay on task for 10 minutes. The Student sometimes needs additional redirection to get on task.

35. The GE Teacher testified that Student was ready for kindergarten.

36. The GE Teacher was involved in drafting the Student's IEPs, including the May 17, 2024 IEP. The GE Teacher drafted most of the present academic levels. At that time the Student could identify 26 upper and lower case, and 25 sounds. The Student showed improvement in counting. The Student struggled with the J sound. The Student could write his first name. The Student met the Pre-K standard for cognitive ability. There is no reading standard in Pre-K so that was not included in the May 17, 2024 IEP. .

37. A fourth IEP was developed for the Student on May 17, 2024, which is the IEP at issue in this case. (R-9). This IEP is for the 2024-2025 school year. In this IEP the Student was found to be eligible for special education based on developmental delay. (R-9, p. 5). The Student suffers from delays in speech sound production which impacts his ability to speak and be understood in everyday situations. (R-9, p. 11). The Student also suffers from delays in social and emotional skills, including staying on task to keep pace with the Pre-K curriculum. (R-9, p. 11).

38. The Student's IEP dated May 17, 2024, (exhibit R-9), in addition to other goals,

provided for phonological goals of related to specific sounds. (Exhibit R-9, p. 27). It provided for services in the general education class room and for speech language services of 360 minutes per month, which works out to 120 minutes per week. (Exhibit R-9, p. 29). This works out to three one-half hour sessions per week in the speech room.

39. This significant increase in Speech language minutes was a result of the collaboration of Student's SPL and Petitioners' Expert.

40. The May 17, 2024 IEP set forth a specific measurable annual goal for the Student in speech language and focus.

\ 41. According to the Student's SPL, the Student also needs down time for brain to process what is being learned in the speech room.

42. The Director testified that the goals portion of an IEP does not require specific methodology. Implementation and methodology are driven by student's needs. The teacher starts there and then works on next sound in same cluster as the student masters the goal.

43. The Director testified that kindergarten is entry grade in the School District and the Pre-K is just a supplemental program. Not every student that applies to get into Pre-K is admitted. A student does not have to be ready to attend kindergarten. The student must only be five years of age by August 1 of that school year to qualify for kindergarten. .

44. The Student is currently attending Kindergarten in the School District. (GE Teacher and Mother).

45. At present the Student is described as happy, easy to care for, basically normal and occasionally cranky. (R-5, p.1) Student struggles with oral expressive communication skills which frustrates him. (R-5, P.1).

46. Mother testified that even those who know the Student well struggle to understand what the Student is saying.

47. The circumstances which prompted the Parents to file this due process petition was the parents' desire to keep the Student in Pre-K one more school year, rather than starting kindergarten.

48. Research shows a direct correlation between oral language and ability to read and write.

49. The IEP team determines placement of the student. Placement does not include the grade the student is in.

50. The Pre-K program provided by the School District is for half a day and four days a week. It is a general education class.

51. Kindergarten is a general education class where the Student will be constantly exposed to his general education peers. A kindergarten class is a full day and five days a week.

52. The Speech Center class has only special education children. The classes for the speech centers are half day classes depending on the needs of the student. Typically, students will go half days, either morning or afternoon for two or four days per week. Additionally, students in that class are preschool-age students who have a severe to profound phonological disorder and typically are between the ages of three and four, making them one to two years younger than the Student. (Tr. 8/14/24 at 126; 16-24).

53. Students who are four may turn five during that same school year and can remain in the speech center, but at any time the student makes adequate progress from a profound to moderately severe rating, a return to a general education class will occur.

54. The IEP Team consistently stated that it would not place the Student in Pre-K for another year or the Speech class.

CONCLUSIONS OF LAW

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

1. The Hearing Office has jurisdiction over the parties and the subject matter of this Due Process Hearing. The basis for jurisdiction of this matter is 20 USC §1415, 34 CFR §§ 300.508, 509, 510, and 511, NRS 385.080 and 388.520, and NAC 388.310.

2. The IDEA requires that states receiving federal education funding provide "free appropriate public education (FAPE) . . . to all children with disabilities residing in the state between the ages of three and twenty-one." 20 USC §1414(a)(1). It also establishes a procedure for creating an IEP which is a written statement of present levels of academic achievement and functional performance and goals in those areas. See 20 USC §1414(d)(1). The IEP must also include a "statement of special education services and accommodations being provided to the child." 20 USC §1414(d)(1)(A). It also requires measurable goals and periodic progress reports. See, 34 CFR 300.320(a)(2)(i).

3. A parent with a child with a disability who alleges a violation of the IDEA may present a due process complaint setting forth the allegations that form the complaint. See 20 USC §1415(b)(6).

4. A FAPE "consists of educational instruction specially designed to meet the needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Board of Education v. Rowley*, 458 S.Ct. 176, 188-189, 102 S.Ct.

3034, 73 L.Ed.2d 690 (1982). An IEP must provide the Student the services “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. vs. School District*, 137 S.Ct. 988 (2017).

5. The instruction offered must be “specially designed” to meet a child's “unique needs” through an “individualized education program,” (IEP). 20 USC §§ 1401(29), (14). The IDEA guarantees individually-tailored educational services for children with special educational needs. See 20 USC §§ 1400(d)(1)(A), 1401(29).

6. The IDEA provides for a FAPE that must conform to a student’s IEP, which is a program detailing the student’s abilities, educational goals, and specific services that are designed to achieve those goals within a designated time frame. See 20 USC §§ 1412(a)(4), 1436(d).

7. *Amanda J. v. Clark County School District*, 267 F.3d 877, 894 (9th Cir. 2001), states: “A FAPE, as required by the IDEA, must be tailored to the unique needs of each individual child. Each child has different needs, different skills, and a different time frame for effective treatment. . . . These programs often must address a wide range of skills, ranging from academic to social to functional living skills, depending on the severity of the particular child's condition.”

8. Based on the findings of fact and the law, the Student’s IEPs, (Exhibits R-6, R-7, R-8, and R-9), were individually tailored to allow the Student to receive FAPE given the Student’s disabilities.

9. NRS 392.040(2) states that a student that turns five before August 1 of a school year “may” be admitted to kindergarten. Nevada Revised Statutes (NRS) 392.040 states that a

student who is five years of age before the first day of school may be enrolled in kindergarten. Thus, the Student, who turned five years of age before the first day of school for this school year, is not mandated to attend kindergarten by that statute. Thus, the Student was not required to attend to kindergarten for the 2024-2025 school year.⁸

10. Pre-K in the School District is for children ages three to five. The Student fits within this age group.

11. The Student's May 17, 2024 IEP, (R-9), was reasonably calculated to enable the Student to make progress appropriate to the Student's circumstances with respect to the Student's expressive speech deficits and phonological goals. It provided specific goals regarding expressive speech sounds and a significant increase in speech language minutes in the speech room.

12. There was no failure by the School District to appropriately assess the Student for expressive speech deficits. The School District's assessment matched the private assessment as to expressive speech in most areas.

13. The May 17, 2024 IEP provides Student the reasonable accommodations and services that Student needs to be reasonably calculated to enable the Student to make progress appropriate to the Student's circumstances which includes Student's expressive speech deficits. It included significant additional time in the speech room to work on expressive speech deficits at the request of the Mother and Petitioners' Expert.

14. In this case, the May 17, 2024 IEP provided Student an IEP that appropriately

⁸ Petitioner argues that the Supremacy Clause would overrule the Nevada rule, but this matter can be decided without reference to the Supremacy Clause in that Nevada law does not require that the Student be placed in kindergarten.

addressed the Student's expressive speech deficits, and it collected sufficient data to determine if Student's IEPs were providing FAPE or needed amendment.

15. The Petitioner complains that the methodology was not included in the IEP date May 17, 2024.

16. Methodology is generally not required to be placed in an IEP. The Ninth Circuit Court of Appeals in *Crofts and Sanders v. Issaquah School Dist*, No. 411 80 IDELR 61 (9th Cir. 2022), held that IEPs do not need to delineate the methodology used to implement the program. It stated:

Crofts also contends that the District's IEP denied A.S. a FAPE because she would have progressed more had she been taught using the Orton-Gillingham Approach. However, a district is not required to use the methodology a parent prefers when providing special education services for a child. School districts are "entitled to deference in deciding what programming is appropriate as a matter of educational policy." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 945 n.5 (9th Cir. 2010); see also *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 208(1982) ("Once a court determines that the requirements of the [IDEA] have been met, questions of methodology are for resolution by the States."); *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1122 (9th Cir. 2011) ("The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit."). Districts need not specify an instructional method unless that method is necessary

to enable a student to receive a FAPE. *Mercer Island*, 592 F.3d at 952. Rather, to meet its substantive obligations, a district must merely provide an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001.

Crofts and Sanders v. Issaquah School Dist, No. 411 80 IDELR 61 (9th Cir. 2022).

17. Methodology is best left to the School District. *J. L. v. Mercer Island School District*, 592 F.3d 938, 952 (9th Cir. 2009).

18. However, the IEP team failed to consider input from Student's parents in formulating Student's IEP.

19. It is clear that the Student's parents were seeking an additional year of Pre-K. However, the IEP team refused to even discuss such a request. The IEP Team had predetermined that the Student would attend Kindergarten.

30. The IEP Team also refused to consider placing the Student in the Speech class which specifically deals with expressive speech. While the Student did not exactly fit the parameters of that class, the Student was not far off from those parameters.

31. "In the Ninth Circuit, '[a] school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement.'" *K.D. ex rel. C.L. v. Dep't of Educ., Hawaii*, 665 F.3d 1110, 1123 (9th Cir. 2011)."
M. S. v. L. A. Unified Sch. Dist., 913 F.3d 1119 (9th Cir. 2019).

32. It is clear that the IEP Team predetermined the placement of the Student which is a procedural violation of the IDEA.

33. The School District correctly notes that the IDEA due process hearing is limited to

determining identification, evaluation, placement, and the denial of free appropriate public education (FAPE). Thus, special education due process hearing officers lack jurisdiction over a grade-level dispute. 34 C.F.R. §§ 300.507, 300.508, and 300.510. See *Hacienda La Puente Unified Sch. Dist.*, 27 IDELR 885 (SEA CA 1997) (stating that the IHO presiding over the dispute lacked jurisdiction regarding the student's credits earned during the eleventh grade). Grade promotion occurs without the approval of an IEP team. Nothing in the IEP states what grade any special education student should be. As stated previously, the requirements of each grade are determined by state and local law, not through the IDEA. See *Hacienda La Puente Unified Sch. Dist.*, 27 IDELR 885 (SEA CA 1997), (stating that the IHO presiding over the dispute lacked jurisdiction regarding the student's credits earned during the eleventh grade). See also, *Letter to Anonymous*, 35 IDELR 35.

34. However, the issue in this case is not grade promotion and retention. The issue is what the appropriate placement is for the Student given the disabilities with which the Student struggles.⁹ 35. The IDEA and OSEP define "placement" as the amount of exposure to the Student's general education peers.

36. Under the IDEA, a "change in placement" is defined as a fundamental change in, or elimination of, a basic element of a child's educational program. *Lunceford v. District of Columbia Board of Education*, 745 F.2d 1577, 1582 (D.C.Cir.1984).

37. The Office of Special Education Programs (OSEP) stated that the determination as to whether a change in placement has occurred must be made on a case-by-case basis. The following factors are relevant to this analysis:

⁹ Petitioners may have complicated this issue by asking for the Student to be "retained" in Pre-K.

1. Whether the educational program set out in the child's IEP has been revised;
2. Whether the child will be able to be educated with nondisabled children to the same extent;
3. Whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and
4. Whether the new placement option is the same option on the continuum of alternative placements.

Letter to Fisher, 21 IDELR 992 (OSEP 1994).

38. Under the requirements of *Letter to Fisher* placing the Student in kindergarten was a change in placement. The IEP revised the Student's educational program.

39. Like the case of *HB v. Las Virgenes Unified School District*, 370 F.Appx 843 (9th Cir. 2010), the IEP team never discussed the possibility of keeping the student in Pre-K or placing the Student in the Speech Class. It had predetermined that the Student would be in kindergarten for the next school year.

40. *R.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019), stated regarding whether a procedural violation results in the denial of FAPE:

However, "[i]n matters alleging a procedural violation", an ALJ "may find that a child did not receive a [FAPE]" if the ALJ determines that a procedural right was violated and that the violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child." *Id.* § 1415(f)(3)(E)(ii)(II).

Under § 1415(f)(3)(E)(ii)(II), an ALJ must answer each of the following in

the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs "alleg[ed] a procedural violation," (2) whether that violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child," and (3) whether the child "did not receive a [FAPE]" as a result. *Id.* § 1415(f)(3)(E). Unless an ALJ determines that a given procedural violation denied the child a FAPE, she may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education. See *Fry v. Napoleon Cnty. Schs.*, — U.S. —, 137 S.Ct. 743, 754 n.6, 197 L.Ed.2d 46 (2017) ("Without finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the [IDEA's] various procedural requirements.").

R.F. v. Cecil Cnty. Pub. Sch., 919 F.3d 237, 248 (4th Cir. 2019), see also 34 CFR §300.513(2).

41. Here, the parents alleged and proved a procedural violation of the IDEA. That violation significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE to their child. However, this procedural violation did not result in the denial of FAPE to the child.

42. Placement is based on services needed by student, not vice versa. Placement must be based on Student's needs which come from assessments and parental input.

ORDER

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

IT IS HEREBY ORDERED, as follows:

1. The School District shall continue to implement the current IEP unless it is changed by the IEP team.
2. The School District shall comply with all provisions of the IDEA.

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by this Decision has the right to appeal within thirty (30) days of the receipt of this decision pursuant to NAC §388.315. A party to the hearing may file a cross-appeal within ten (10) days after receiving notice of the initial appeal. If there is an appeal, a state review officer appointed by the Superintendent from a list of officers maintained by the Department shall conduct an impartial review of the hearing pursuant to NAC 388.315. Since this decision is being delivered in both electronic and hard copy, receipt of a copy of this Decision and Order will be determined by either the date of actual delivery or the date of the first attempt to deliver by the U.S. Postal Service.

Dated this 4 day of October, 2024.



David A. Stephens
PO Box 33130
Las Vegas, Nevada 89133
Telephone: 702-656-2355
Facsimile: 702-656-2776
Email: dstephens@davidstephenslaw.com
Hearing Officer