

STATE OF NEVADA DEPARTMENT OF EDUCATION

In the matter of

WASHOE COUNTY SCHOOL DISTRICT,
Respondent-Appellant,
v.

John V. Robinson,
State Review Officer (SRO)

STUDENT¹ by and through his parent(s),
PARENT,
Petitioner-Appellee.

REVIEW OFFICER DECISION

BACKGROUND:

The Student was born in 2017 and is eligible to receive special education services under the eligibility category of autism spectrum disorder (“ASD”) pursuant to the Individuals with Disabilities Education Act (as amended, the “IDEA”), 20 U.S.C. § 1400 et seq., the Nevada Revised Statutes (the “NRS”), Chapter 388, and the Nevada Administrative Code (the “NAC”), Chapter 388.

By due process complaint dated and filed March 31, 2023, the Student, by and through the Parent, filed a due process complaint against Washoe County School District (“WCSD”) raising various issues pertaining the Student's rights under the IDEA, the provision of a free appropriate public education (“FAPE”) to the Student and the implementation of Student's Individualized Education Program (“IEP”) dated April 7, 2022.

Pursuant to NAC 388.306(10), on July 19, 2021, the Nevada Department of Education (the “SEA” or “NDE”) appointed Kevin P. Ryan as the due process hearing officer (the “IHO”).

¹ The Student is referred to generically to preserve privacy – See Appendix A for generic designations.

ISSUES:

The delineated issues for the hearing were:

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

See, IHO Decision at 5-6.

The parties, by counsel, agreed that the review concerned solely Issue 2 above. *See*, Decision Concerning Motion for Continuance & Status Report dated October 2, 2023. More specifically, the parties, by counsel, agreed that the issues for this review are those framed by the School District in its Notice of Appeal of September 13, 2023.

The Parent has challenged the School District's decision to hold the implementation of the hearing officer's award of compensatory education in abeyance pending the appeal. The parties briefed this issue.

Under the plain language of Nevada's Administrative Code regarding the finality of decisions, the IHO's August 14, 2023, Order is not final and binding on the parties because it is being appealed: "The decision of a hearing officer pursuant to this section is final unless the decision is appealed . . ." NAC 388.310(17). As WCSD recognizes in its Review Appellate Brief of October 18, 2023 (at page 35), the requested order of stay is unnecessary, and, accordingly, the SRO did not impose it.

The School District also wanted the hearing officer to review *in camera* the video of the impermissible restraint. Counsel for the Parent objected because counsel for the Parent

was prevented from seeing the video based on opposition from the School District and the IHO's decision that the video was inadmissible as it was not an educational record. The parties again briefed the issue.

The IDEA mandates that, on review of an administrative decision, the district court "shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(C)(ii). "But not all evidence is 'additional evidence.'" *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, 1005 (9th Cir. 2011). For instance, "a district court need not consider evidence that simply repeats or embellishes evidence taken at the administrative hearing, nor should it admit evidence that changes "the character of the hearing from one of review to a trial de novo." *Id.* (quoting *Ojai*, 4 F.3d at 1473). In this proceeding, the IHO did not view the surveillance video in the wake of, and largely due to, rigorous opposition from WCSD.

The Ninth Circuit has "observed that after-acquired evidence 'may shed light' on the objective reasonableness of a school district's actions at the time the school district rendered its decision." *Pajaro*, 652 F.3d at 1004 (quoting *Adams*, 195 F.3d at 1149). "The clear implication of permitting some hindsight is that additional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date." *Id.* at 1006. Accordingly, "evidence that is non-cumulative, relevant, and otherwise admissible constitutes 'additional evidence' that the district court 'shall' consider pursuant to 20 U.S.C. § 1415(i)(2)(C)(ii)." *Id.* at 1004-05.

Here, the video only repeats and embellishes substantial evidence already admitted at the hearing, including three reports created by WCSD personnel describing the impermissible restraint on November 22, 2022. Exhibits J-17, J-19, and P-2; Tr.at 49, 68 and

70. The WCSD Police Incident Report (P-2) concerning the contents of the video is detailed, as was certain testimony, including that of the school principal (Tr. at 67- 75) and the student’s parents (Tr. 369- 370 and 419 – 421).

The parents requested access to the video immediately on November 22, 2022, but were only permitted to view the video on February 10, 2023. Tr. at 369. On June 30, 2023, Petitioner-Appellee filed a Motion to obtain the video. WCSD opposed that Motion and the IHO denied the Motion. Accordingly, the SRO decided not to review the video *in camera*.

HEARING & HEARING DECISION:

The due process hearing was held over a two-day period on August 1 and 2, 2023. The Parents were present at the hearing and were represented by their counsel of record, Lyssa E. LeMay, Esq. The District was represented by its counsel, Andrea L. Schulewitch, Esq.

The District called the following 5 individuals as witnesses, in this order: Principal of Elementary School; Elementary School Long Term Substitute Teacher; WCSD Associate Chief of Specialized Instruction (“Associate Chief”); WCSD Board Certified Behavior Analyst (“BCBA”); and WCSD Director of Special Education (“SPED”). The Parents both testified in their case-in-chief.

A decision was rendered on August 14, 2023 (the “IHO Decision”). Concerning Issue 1 above, the IHO decided that during the time period from August 15, 2022, through August 14, 2023 (the “Period”), Student was properly assessed by WCSD. IHO Decision at 14.

However, the IHO decided that during the Period, Student was denied a free appropriate public education (“FAPE”) as a result of WCSD’s material failure to implement Student’s April 7, 2022 IEP.

Based on the IHO's findings and conclusions of law, the IHO ordered that the Petitioner was entitled to certain relief from the District:

1. Respondent shall use best efforts to schedule parent/ teacher conferences or other meetings in such a manner that Student's Parents and/or Student are not on the Elementary School campus at the same time as Teacher Aide. This form of relief is supported by the fact that Student saw Teacher Aide on 2 occasions after the Incident. On both occasions Student experienced severe physical and emotional problems.
2. Commencing 7 days after Student begins the 2023-2024 school year, Student's primary educator(s) shall provide Student's Parents with ongoing and updated written data/ reports regarding Student's academic and behavioral progress each week on Fridays when school is in session. This form of relief is supported by Student's Mother's testimony that prior to the Incident she was not kept apprised of Student's progress/ problems.
3. Respondent shall provide Petitioner with a School District funded Psychoeducational Evaluation ("IEE") to include an academic assessment. Student's IEP team shall be convened within **30** school days after receiving the IEE to consider it. Student's Parents shall cooperate and provide Respondent with the necessary consents for evaluations.
4. Respondent shall provide Student with compensatory education to include:
 - Applied Behavior Analysis Consultation Services; During the first quarter of the 2023-2024 school year a Board Certified Behavior Analyst (BCBA) shall provide **5 hours** of training for all school staff who will enact Student's IEP. Thereafter, school staff shall consult with a BCBA on a quarterly basis for a minimum of **5 hours** for the remainder of the 2023-2024 school year. Respondent shall provide Petitioner with Technical Assistance Reports on a quarterly basis.
 - a total of **110 hours** of academic tutoring at a qualified provider of Petitioner's choosing to be administered over all of Student's subjects as needed, which need shall be determined jointly by Respondent and the qualified educational service provider (currently Learning Center). Petitioner shall sign a release permitting Respondent to communicate with the education services provider and obtain any and all of Student's progress data. This tutoring is to be paid for by Respondent, together with travel reimbursement for Student's transportation to And from tutoring. This tutoring shall be completed within 2 years of the date of this Order;
 - a total of **11 hours** (1 hour per in-school month) of in-school mental health

counseling to be provided by Elementary School's counselor and to be completed by Respondent in the 2023-2024 school year;

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

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

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

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

IHO Decision at 22-24.

REVIEW:

The State Review Officer (“SRO”) was appointed to this due process appeal of the Student on September 14, 2023. The request for appeal was emailed by counsel for the Student to the Nevada Department of Education (the “SEA”) on September 13, 2023. Unless a continuance is warranted for good cause, the SEA must ensure that not later than 30 days after the receipt of a request for review, a final decision is reached in the review. 34 C.F.R. §300.515(b)(1) & (c). Accordingly, initially, a final decision concerning this administrative review was required by October 13, 2023.

The SRO and the parties, by counsel, participated in a status conference call on Friday, September 29, 2023, at 10:00 am. The parties discussed the statement of issues for the review and other matters salient to the review, including the items in NAC §388.315.

The parties, by counsel, informed the SRO that no additional evidence is required for the review.

CONTINUANCE:

The School District, by counsel, moved for a short continuance because of significant work demands and pressures. The Parent, by counsel, did not object provided that the Parent could file its brief after the School District. The hearing officer found that a continuance was warranted for good cause and the parties agreed on the briefing schedule below.

The School District, by counsel, was to file with the hearing officer and submit to opposing counsel the opening brief by 5 pm on Wednesday, October 18, 2023.

The Parent, by counsel, was to file with the hearing officer and submit to opposing counsel the response brief by 5 pm on Friday, October 20, 2023.

Neither the parties nor the hearing officer desired additional oral argument.

The hearing officer was to render his decision no later than Friday, November 3, 2023.

The parties, by counsel, agreed that email alone is an acceptable means of communication, unless other means are required by applicable law. However, to clarify the directions above, “file” or “submit” as used herein means each party shall ensure that he or she delivers by hand, overnight courier, e-mail or other appropriate form of electronic delivery, his or her proposed briefs.

Both parties timely filed their respective briefs.

Pursuant to NAC 388.315(b), the SRO must ensure that the procedures of the hearing officer below were consistent with the requirements of due process. Neither party on appeal challenged the procedures of the hearing officer below, nor did this SRO find any inconsistencies. The SRO must render and renders his decision on Friday, November 3, 2023.

STANDARD OF REVIEW:

With respect to the standard of review, the SRO is required to make an independent decision, reviewing the entire record of the hearing below. (20 U.S.C. § 1415(g); NAC 388.315(f).) This review officer has done so here, having reviewed the decision of the hearing officer, the transcript, the exhibits, the certified record and any memoranda submitted by the parties on the issues on appeal.²

Though not expressly adopted by the Ninth Circuit, this SRO finds persuasive the standard of review language articulated in *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 23 IDELR 293 (3d Cir. 1995), cert. denied, 517 U.S. 1135, 109 LRP 34841 (1996). The Court there noted that in two-tier systems under the IDEA, the review officer must exercise "plenary review" to make the independent decision the IDEA requires. However, in doing so, it held a review officer should defer to the hearing officer's credibility determinations, unless the non-testimonial, extrinsic evidence in the record will justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. Accordingly, this is the standard of review that this SRO uses. *See also, Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 103 LRP 33278 (9th Cir. 2001) (impliedly approving the Third Circuit's approach in *Carlisle*).

FINDINGS OF FACT:

1. The following Hearing Officer's Findings of Fact (IHO FOF), as stated in the IHO Decision, are incorporated herein by reference: Introduction paragraphs 1-26; all paragraphs in the section titled "Background Preliminary Matters"; in the section titled "Findings of Fact",

² References to the verbatim transcript of the IDEA hearing held on August 1-2, 2023 are cited as "Tr. <page number>." References to the District's Opening Brief are cited in the following format: "DOB<page number>". References to the parties exhibits are to the designations at the hearing e.g., "SD <Exhibit Number>", "PE <Exhibit Number>" and for Joint Exhibits, "J <Exhibit Number>".

paragraphs 1-8; concerning paragraph 9, the words “grand mal seizure” is substituted for “grand *mall* seizure” – the rest of the paragraph is incorporated; paragraph 10; concerning paragraph 11, the words “and Student’s Parents were able to review the security videos of the Incident” are deleted – the rest of the paragraph is incorporated; the first sentence of paragraph 12 is deleted – the rest of the paragraph is incorporated; paragraph 13; paragraphs 15-17; paragraph 19; concerning paragraph 20, the last two sentences are deleted – the remainder of the paragraph is incorporated; paragraph 23; paragraphs 25-29; concerning paragraph 30, the second to last sentence is deleted – the rest of the paragraph is incorporated; paragraph 31; paragraphs 33-35; and paragraphs 37-38.

The IHO FOFs are supplemented as follows.

2. The Student was born in 2017 and is eligible to receive special education services under the eligibility category of Autism Spectrum Disorder (“ASD”). J26; J23. Student was first made eligible through a comprehensive Child Find evaluation on February 21, 2020, and was found eligible under the category of ASD. Tr.240-241; Ex. J-1; J-2; J-3.
3. During the 2022-2023 school year, Student was enrolled in WCSD in Kindergarten at Elementary School.
4. The operative Individualized Education Program (the “IEP”) during the 2022-2023 school year, was Student’s April 7, 2022 IEP. Ex. J-14. Pursuant to the IEP, Student was to receive specially designed instruction in the areas of language arts (600 minutes weekly), math (600 minutes weekly), and social/behavioral skills (150 minutes weekly), all in the special education classroom. Ex. J-14 at p. J142.
5. Under the IEP Student’s related services included 180 minutes per month of direct speech and language and 30 minutes per quarter of consultation in occupational therapy (OT). Ex. J-

14 at p. J143.

6. The IEP notes that Student's special education and related services are "Subject to the School Board Calendar" which means that services are subject to a reduction in time based on holidays and breaks where school is not in session. *Id.* at J142-43; Tr. at 149-150.
7. Student's April 2022 IEP also included accommodations, such as a token board; use of positive behavioral intervention techniques, including positive reinforcement/praise when student is behaving appropriately; visual schedule if allowable; appropriate use of consequences when predetermined rules are violated. The accommodations functioned, amongst other things to help Student with transitions throughout the day. Ex. J-14 at p. J131 & J143.
8. Because of behavioral concerns, Parents had an outside Psychological/Neuropsychological evaluation conducted on Student. Report dated October 19, 2022. Ex. P-1. However, Parents only provided a partial, five-page copy of the report with only the summary and recommendations to Student's IEP team for consideration. Ex. D-1; Tr. at 42 & 334. The report recommended use of a Board Certified Behavior Analyst (BCBA) and stated that it is possible that Student's "behavior is escalated because there are more demands now that he is in kindergarten." The report went on to state that "mother can request a functional behavior analysis if [Student] continues to have behavior issues". Ex. D-1 at p. D4.
9. On October 24, 2022, during a meeting to discuss the partial October 19, 2022 outside Psychological/Neuropsychological report, Parent requested the school conduct a Functional Behavior Assessment (FBA). Tr. at 45; Ex. J-15.
10. On November 22, 2022, the Teacher Aide performed the impermissible restraint described in the IHO FOF ¶ 9, incorporated by reference above (the "Incident").

11. Upon learning of the Incident, Principal immediately checked the cameras, sent the aide home, and then notified the Parent, the District's Department of Labor Relations, Special Education office, the Associate Chief, and school police of the restraint. Tr. at 48. The District complied with Nevada state law when it self-reported the impermissible restraint and its proposed a corrective action plan to the NDE within 24 hours of the Incident. Ex. J-17 & J-19; Tr. at 48 & 258-259.
12. WCSD removed Teacher Aide from Elementary School the day of the Incident, as Parent acknowledges. Tr. 394-395.
13. While the criminal and administrative investigations of the aide's conduct were ongoing, Parent made the decision that Parent would not allow Student to return to school until the school could confirm that Teacher Aide would no longer work at the school. "[Teacher Aide] is **not** to be around or have any direct or indirect contact with any of my children. I will not compromise on this." (Emphasis in original), J-33 at p. J282.
14. At the insistence of Parent, School police referred the matter to the District Attorney's Office. The DA declined to criminally prosecute the aide. Tr.141-142 & 396.
15. Various personnel at WCSD made a uniform, ongoing, concerted effort to secure Student's immediate return to school. For example, Principal, Long Term Substitute, and Director of SPED, all corresponded and communicated with Parent to this end, through various means, including class dojo, email and Prior Written Notices. J-33, J35 and J20.
16. WCSD exhibited flexibility and sensitivity. For example, the Director of SPED described to the Parent a plan to gradually transition Student back into the classroom, which would allow for the Parent to participate in the classroom and the Student to have access to his specially designed instruction. Ex. J-20. Principal reiterated this

proposal and offered to create a reintegration/safety plan and assign two trusted and trained adults to ease Student through transitions, but the Parent still declined to do a slow reintroduction, citing safety concerns, despite the fact that Parent acknowledged on November 28, 2022, that the Teacher Aide was not present at the school. Ex. J-20; J-33 at p. J279-93.

17. The school also offered on numerous occasions to reconvene Student's IEP Team to address Parent concerns and get Student back into school. Id; J-35 (class dojo communications with teacher).
18. Again, accommodating the Parent, on January 9, 2023, the District prepared a prior written notice (PWN) and proposed to conduct the FBA requested by Parent, utilizing a BCBA and not school staff, under circumstances where WCSD would not typically use a BCBA for such a task. WCSD again proposed to reconvene the IEP Team after the FBA had been completed to consider the analysis and discuss Parent's concerns. J-20.
19. After the criminal investigation, the District was able to conduct its administrative investigation and on January 10, 2023, Principal finally was able to inform the Parents that the Teacher Aide would not be returning to Elementary School. Ex. J-33 at p. J284; Tr. 56-57. However, since Teacher Aide is also a parent of a student at Elementary School, the aide as a parent had the right to attend events with Teacher Aide's child and the school could not guarantee that Teacher Aide would never be seen on campus by Parent's family. Tr.at 57.
20. On January 11, 2023, the District prepared a PWN and proposed to conduct Student's 3-year reevaluation, which was due on February 21, 2023. Ex. J-21.

21. On January 25, 2023, the Parents and school staff met to create a Reintegration/safety plan in to address Parent concerns regarding Student's safety at school. Ex. J-23.
22. In late January 2023 Student returned to Elementary School.
23. BCBA completed the FBA on April 14, 2023, after 15 hours of observation of Student in the school setting, between February and April, 2023. J30 at p. J259.
24. BCBA also developed a Behavior Intervention Plan ("BIP") for Student. J30.
25. During 2022-2023 school year, Student was chronically absent by federal standards and had 25 unexcused absences. Including excused absences, Student missed a total of 37 full school days and Student missed at least some instruction 68 out of 180 school days. Ex. J-34; Tr. at 145-146.
26. The Associate Chief testified convincingly that, "if you're not in school, then it's hard to make progress on IEP goals and objectives, it's hard to -- school is where we're able to establish a student's routine and procedures and get them making progress. That's where they build most of their peer relations, that's where we're able to provide the support, provide related services. All of those things happen in a school building and when students are absent, it definitely impact[s] their ability to have access to the curriculum and make progress . . . So any student with autism, it's so important to be able to establish routines and make sure that students are familiar with what their days are going to be like and how to anticipate what's going to happen next. For example, when routines are messed up, that kind of can lead to behaviors or lead to concerns in not making progress." Tr.147.
27. Parents unjustifiably refused to return Student to school when WCSD (a) made special education services and accommodations available to Student and Parents, (b)

proactively attempted to secure the Parents' consent to convene the IEP Team and (c) took extraordinary measures to coordinate and collaborate with the family to ensure they would meet the family's safety and other concerns.

28. While the service log only indicated Student received a total of 20 minutes of consultation in OT during the Period, Long Term Substitute convincingly testified concerning the frequency, scope and purpose of the consultations she had with the occupational therapist during the Period to support Student's OT goal. J14 at p. J143; Tr. at 111-113. Based on this testimony, the SRO finds that WCSD materially implemented the IEP concerning the related service of OT consultation during the Period.
29. Student never received all of Student's allotted 180 minutes per month in direct Speech/Language services required under the IEP. Ex. D-2; Tr. at 155-162.
30. Student's speech/language goals indicated that that the Student never met the objective consistently as required by the goal throughout the school year. Ex D-2. However, on Student's June 14, 2023 Progress Report, it indicates that Student met Student's speech/language goal, even though this is inconsistent with the SmartLogbook data. Ex. D-2, J-32.
31. Associate Director testified that barring two absences by Student in September 2022, Student would have received 170 of the 180 minutes per month called for in the IEP. Tr. 155-156.
32. In October 2022, allowing for a break the first week, Student received 110 minutes. Tr. at 156.
33. In November 2022, the 28th was a holiday and Student was absent on November 4, 17

and 18. Tr. at 158.

34. In December 2022 and January 2023, Student did not receive any services because Student was not in school. Tr. 158.
35. In February 2022, Student received 90 minutes of speech therapy.
36. In March 2022, based on the logs, Student got 30 minutes of services. Tr. 160.
37. In April 2022, Student got 145 minutes of services. Tr. 160.
38. In May 2022, Student got 140 minutes of services. Tr. 161.
39. Sometimes, Student did not receive speech services because the provider was absent and based on the logs, the provider did not make up the absences. Tr. 162.
40. Regarding the related service of Speech/Language, Student was denied a FAPE because WCSD materially failed to implement the IEP (the “Failure”).
41. WCSD is incorrect in stating that the Parents only alleged that the District withheld a copy of the video surveillance. The Due Process Complaint states in pertinent part:

WCSD failed to produce a complete copy of Student’s educational records, including but not limited to, the video of the incident that occurred on November 22, 2022.
Ex. J-28, p. J16.
42. The Parents were not aware of the existence of the progress monitoring records that had been withheld by the District until Principal’s testimony stating that the records existed. Tr.at 80–82. Moreover, the Parents moved for a brief recess so School District could try and locate the subject raw data. Principal testified that that the raw data did exist, constituted an educational record and should have been provided to Parents. Tr. at 88-89.
43. The IHO is the trier of fact in due process hearings and the IHO was well within his

authority to draw a negative inference based on the District's failure to produce the raw data that was used in preparation of the Student's Progress Reports. IHO Decision at 20.

44. The IHO made no express credibility findings.

ANALYSIS & CONCLUSIONS OF LAW:

NRS § 388.467 provides that whenever a due process hearing is held pursuant to the IDEA, and a school district is a party, the school district has the burden of proof and the burden of production. Respondent met its burden with regard to Hearing Issue 1 but has failed fully to meet its burden with regard to Hearing Issue 2.

As defined under the IDEA, "a FAPE comprises 'special education and related services' both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 158 (2017) (quoting 20 USCA § 1401).

The law does not require that a school district perfectly adhere to an IEP; minor implementation failures will not be deemed a denial of FAPE. *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 820-22 (9th Cir. 2007). However, a school district's "material failure to implement an IEP violates the IDEA." *Id.* "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." *Id.* Moreover, a "child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." *Id.*

The negative inference (§ 43 above) was not the only evidence that the IHO relied upon to draw the conclusion that the Student did not make meaningful progress towards his goals. The IHO also relied on the speech and language reports in Ex. D-2 and Ex. J-32 that were

inconsistent with the June 14, 2023 Progress Report in which the District claimed Student had met Student's speech and language goal. IHO Decision at 19– 20. In addition, the IHO relied upon prior progress reports that indicated that Student was not meeting Student's goals prior to the June 14, 2023 Progress Reports. IHO Decision at 20. Accordingly, the IHO had substantive evidence to reach his determination that the Student did not make meaningful progress and was denied a FAPE. Parents have consistently asserted that these records were important because they reinforced Parents' position that the restraint was but was a symptom of the fact that Elementary School was failing to comply with the IEP.

As Parents assert in their response brief, “[t]he raw data was the core evidence available of what [WCSD] was doing and not doing with regard to the requirements of the IEP.” Parents' Appellate Brief at 13. The progress reports were merely conclusory and ultimately conflicted with the monitoring data, as the IHO noted.

Not only did the absence of these documents show that the District did not perform within the monitoring provisions of the IEP, the data that was provided unquestionably showed that the District was not in compliance with the IEP.

When asked by the investigating officer concerning the Incident if Teacher Aide “had an understanding or knowledge that [Student] had any special conditions or special needs”, Teacher Aide stated, amongst other things, that “she wasn't sure”. P2 at p. P34. Teacher Aide continued, “[Teacher Aide] made reference to [Student's] IEP but indicated she wasn't entirely sure what it was. “*Id.*

34 CFR § 300.323(d) provides:

Each public agency must ensure that— (1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and (2) Each teacher and provider described in paragraph (d)(1) of this section is informed of— (i) His or her specific responsibilities related to implementing the child's IEP; and (ii) The specific accommodations, modifications, and

supports that must be provided for the child in accordance with the IEP.

Obviously, WCSD did not comply with its obligations under 34 CFR § 300.323(d) concerning the Teacher Aide. The evidence shows that Teacher Aide was totally unaware of Teacher Aide's specific responsibilities related to implementing the student's IEP and was ill equipped to ensure that specially designed instruction, specific accommodations and supports were provided to the Student substantially in accordance with the IEP.

SUMMARY JUDGMENT

The IHO correctly dismissed WCSD's motion for summary judgment after determining that the parties never reached a clear and enforceable resolution: "The only admitted fact was that the November 22, 2022, restraint on Student did occur and that it was not permissible. All other facts regarding whether or not Student was provided a FAPE, whether Student suffered any damages, and what if any relief was Petitioner entitled to **remained in dispute.**" (Emphasis in original). IHO Decision at 5.

CROSS-EXAMINATION

While WCSD correctly reminds the SRO of the importance of cross-examination, of observing Student within the school environment, etc., as Parents stress in their response brief the formal rules of evidence do not apply in administrative hearings and nothing precluded the IHO from admitting into the record and considering the reports of Psychologist and Neurologist, particularly where WCSD did not object and had already admitted a portion of one of the documents into the record.

REMEDY

Parents' request for relief has 2 prongs, direct compensatory education for Student and

individualized training for the administrators, teachers and support staff at Elementary School; both are appropriate forms of relief.

Compensatory education services are intended to make up for the District's failure to provide a FAPE and to put the Student in the position he would have occupied had the District complied with its IDEA obligations.

Congress expressed a state's eligibility for federal IDEA funds in terms of whether a FAPE is "available" to all children with disabilities. 20 U.S.C. § 412(a)(1)(A)&(B). Thus, since the stated purpose of the regulations is to ensure that children with disabilities have FAPE "available to them" (34 C.F.R. § 300.1(a)), if a school district has made FAPE available, then neither the fact that a family does not access it nor the reason that they elected not to access it is evidence of a school district's noncompliance with the IDEA.

Compliance with the IDEA turns on the appropriateness of what was offered, not on whether a school district overcomes the misgivings of parents who are deciding whether to have their child attend the public-school program that is offered based on their own belief that their child is not safe at school. Congress did not express the duty in terms of whether each child actually attends public school and receives the public education that a school district makes available.

Accordingly, **the availability of a FAPE** is key under the IDEA, but if the family fails to allow the school district to provide the available educational opportunities because the parent refused to send the student to school, the school is not responsible for the provision of the services. See, e.g., *Pedraza v. Alameda Unified Sch. Dist.*, 117 LRP 3792, 676 F.App'x 704 (9th Cir. 01/26/17, unpublished) (The three-judge panel echoed the District Court's holding in *Pedraza v. Alameda Unified Sch. Dist.*, No. 05-04977 CW, 2011 WL 4507111, at *11 (N.D. Cal. Sept. 29, 2011) that a school district is not liable for failing to provide services to a student when

that failure is caused by the parents' own lack of cooperation).

Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to "grant such relief as the court determines appropriate," 20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(0)(3), when a child with a disability has previously been denied FAPE. *See Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 105 S. Ct. 1996 (1985); *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005); *Letter to Kohn*, 17 IDELR 522 (OSEP 1991); *See also Letter to Riffel*, 34 IDELR 292 (OSERS 2000).

Compensatory education effectuates a child's ability to receive FAPE by providing the FAPE by which the child was originally entitled to receive. *Letter to Kohn*, 17 IDELR 522 (OSEP 1991). "Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services ... to be provided prospectively to compensate for a past deficient program.' *Reid*, 401 F.3d 516 (D.C. Cir. 2005) *citing G. ex rd. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir. 2003).

An award of compensatory education "must be reasonably calculated to provide the educational benefits that likely would have accrued." *Reid*, 401 F.3d at 524. "This standard 'carries a qualitative rather than quantitative focus,' and must be applied with '[f]lexibility rather than rigidity.'" *Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland*, 555 F. Supp. 2d 130 (D.D.C. 2008) (*quoting Reid*, 401 F.3d at 524).

In crafting the remedy, the undersigned SRO is charged with the responsibility of engaging in "a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student's unique needs." *Mary McLeod*, 555 F. Supp. 2d 130 (*citing Reid*, 401 F.3d at 524). For some students, the compensatory education services can be short, and others may require extended programs. *Id.*

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Reid rejects a "cookie-cutter approach," i.e., an hour of compensatory instruction for each hour that FAPE was denied. *Reid* 401 F.3d at 523. However, while there is no obligation, and it might not be appropriate, to craft an hour for hour remedy, an "award constructed with the aid of a formula is not per se invalid." *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 532 F. Supp. 2d 121, 124 (D.D.C. 2008). Again, the inquiry is whether the "formula-based award ... represents an individually-tailored approach to meet the student's unique needs, as opposed to a backwards-looking calculation of educational units denied to a student." *Id.*

I further find that the Parent bears some responsibility in the Student going without appropriate services for the absences of the Student.

Concerning the award of speech therapy, even allowing for the absences, WCSD did not provide just over 5 hours of speech/language therapy and the SRO awards 6 hours of direct speech/language therapy compensatory services to be completed by WCSD in the 2023-2024 school year.

However, when seeking an equitable remedy, the Parent's own conduct should also be

considered when deciding whether the award is justified. *See e.g., Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 105 S. Ct. 1996 (1985). "[C]ompensatory education is not a contractual remedy, but an equitable remedy." *Reid*, 401 F.3d 516, *citing Parents of Student W. v. Puyallup Sch. Dist.*, No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994). "'[T]he essence of equity jurisdiction' is to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Reid*, 401 F.3d 516, *citing Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

ORDER:

IT IS HEREBY ORDERED:

-That Student is entitled to the compensatory education services of a total of 6 hours of direct speech and language therapy to be completed by WCSD in the 2023-2024 school year.

-Respondent shall provide Petitioner with a School District funded Psychoeducational Evaluation ("IEE") to include an academic assessment. Student's IEP team shall be convened within 30 school days after receiving the IEE to consider it. Student's Parents shall cooperate and provide Respondent with the necessary consents for evaluations.

-A total of **60 hours** of academic tutoring at a qualified provider of Petitioner's choosing to be administered over all of Student's subjects as needed, which need shall be determined jointly by Respondent and the qualified educational service provider (currently Learning Center). Petitioner shall sign a release permitting Respondent to communicate with the education services provider and obtain any and all of Student's progress data. This tutoring is to be paid for by Respondent, together with travel reimbursement for Student's transportation to and from

tutoring. This tutoring shall be completed within 1 year of the date of this Order.

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

NOTICE OF APPEAL RIGHTS:

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

ENTER: 11/3/2023

John Robinson

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by e-mail)