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DUE PROCESS PROCEEDINGS

(STUDENT) by and through her parents
(PARENT)
Petitioners,

vs.

CANYONS SCHOOL DISTRICT
Respondent.

DECISION AND ORDER
Richard H. Schwermer, Hearing Officer

Procedural Background

Student is a seven year old girl with an autism spectrum disorder, among other diagnoses. Petitioners filed a request for a Due Process Hearing dated April 20, 2012 on April 23, 2012, on behalf of their daughter (student). They alleged violations of the Individuals with Disabilities Act (20 U.S.C. §1400 et. seq.) and of §504 of the Rehabilitation Act of 1973. In response to Respondent's objections to the sufficiency of the complaint, an amended request was filed on May 11, 2012, and that complaint serves as the basis for these proceedings.

The amended due process request alleges eight areas of violation of IDEA with 48 specific claims, and two areas of §504 violations with 17 claims. Relative to the IDEA claims, Petitioners assert that Respondent failed to provide an appropriate placement or sufficient assessments and direct and related services to the student, therefore failing to provide an appropriate education, and that Respondent violated numerous procedural safeguards, which in combination denied the student a free and appropriate public education (FAPE). The remedies

sought include compensatory education, reimbursement for "educationally necessary services" provided by parents, and reimbursement for expenses incurred in procuring independent assessments and evaluations for student. The time period at issue is from April 2010 to the date of the complaint, April 2012.

Under the §504 claims, Petitioners claim that Respondent discriminated against student by failing to conduct assessments and otherwise determine her §504 eligibility, violating procedural safeguards, and otherwise refusing to accommodate her disabilities.

Proceedings

A pre-hearing conference was held on May 2, 2012. Both parties were represented by counsel then and at all times during these proceedings. In order that there would be sufficient time for the parties to attempt mediation, and based on the explicit and affirmative waiver by both parties of the requirement that proceedings be completed within 45 days, as permitted by 34 CFR §300.515(c), the hearing in this matter was scheduled for June 11, 12, 13 and 14. A time-line for exchange of witness lists and exhibits was also adopted without objection. Despite a motion by Petitioner to continue the date of the hearing,[1] the hearing went forward on the scheduled dates. Petitioners called 12 witnesses, including Petitioner, and introduced dozens of exhibits. Respondents called nine witnesses and also introduced dozens of exhibits. The matter received a full and complete hearing.[2]

Issues

As noted above, Petitioners raise dozens of specific IDEA claims and issues, but for ease of analysis they can be grouped into seven areas.

[1] On May 24, 2012 Petitioner filed a Motion to Extend Time for Due Process Hearing. The motion was denied.

[2] The verbatim transcript of the hearing totaled 1,347 pages.

1. Classroom support. Petitioners claim that the support of an aide was required in order for student to benefit from her educational opportunities. This area also includes claims about insufficient supervision and support related to transportation.
2. Occupational Therapy. Petitioners claim that occupational therapy (OT) goals and services were insufficient. Petitioners also complain that appropriate and needed assistive technologies were denied.
3. Physical Therapy. Petitioners claim that physical therapy (PT) goals and services were insufficient.
4. Behavioral Interventions. Petitioners allege that insufficient behavioral supports were in place to allow student to benefit from her education. Petitioners also claim that Respondent refused to conduct a functional behavior assessment, as required.
5. Speech and Language. Petitioners claim that insufficient speech and language services and assessments were provided, leading to regression in student's communication skills.
6. Placement and Extended School Year (ESY). Petitioners assert that appropriate placements were not offered by Respondent, and that adequate ESY services were not offered.
7. Procedural violations. Petitioners allege dozens of procedural errors and violations, including refusing to hold IEP meetings, refusing to conduct appropriate assessments, failing to implement the terms of IEPs, drafting legally insufficient IEPs, and failing to include all appropriate evaluations and input in formulating IEPs.

Burden of Proof

With respect to each of these allegations, Petitioners bear the burden of proof. The U.S. Supreme Court held that "[t]he burden of proof in an administrative hearing challenging an IEP

is properly placed upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 536 (2005). In matters brought under IDEA the Tenth Circuit Court of Appeals held also found that "the burden of proof in such a challenge rests with the party claiming a deficiency in the school district's efforts." *Thompson R2-J School Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008).

Standard

In *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892 (1984), the U.S. Supreme Court specifically recognized that Congress did not intend that "the requirement of an 'appropriate education' was to be limitless." It further found in the cornerstone case *Board of Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley* that Congress did not intend to "impose upon the States a burden of unspecified proportions and weight." 458 U.S. 176, 190, n. 11 (1982). Instead, the Supreme Court explained that the intent of the IDEA "was more to open the doors of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Id. at 192. The Court noted that access was the underlying intent of IDEA, stating "in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." Id. at 192. Accordingly, the focus of IDEA has been to provide access to public education by requiring schools to design and implement a program that provides an opportunity for a student to receive some educational benefit. Id. A school district provides a free, appropriate public education (FAPE) by providing a child the "basic floor of opportunity," or an educational benefit that might be found to be "more than de minimus." Id. at 200. The educational program to be provided under the IDEA "need not be the best possible one, nor one that will maximize the child's educational

potential; rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction." Id. 188-89. The Tenth Circuit Court of Appeals has also adopted the "some benefit" standard, specifically holding, "[W]e apply the "some benefit" standard the Supreme Court adopted in Rowley." *Systema v. Academy School Dist. No. 20*, 583 F.3d 1306, 1313 (10th Cir. 2008).

To apply this standard to a specific issue, two questions can be asked. First, was the relevant part of the educational plan reasonably calculated to provide some benefit? Since the embodiment of that plan is the IEP, the question is about the adequacy of the IEP. The Tenth Circuit Court of Appeals has held, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. . . . Neither the statute or reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *O'Toole v. Olathe District Schools Unified School Dist. No. 233*, 144 F.3d 692, 701-02 (10th Cir. 1998).

The second question is, was there progress? While an IEP's sufficiency is fairly determined at the time of its development, with many of the issues in this hearing it is possible to look back at the results of the education plan, at the success of the IEP. If it is later able to be shown that a student received "some benefit" by demonstrating actual progress, the inquiry as to the sufficiency of the IEP at the time of development is essentially moot.

Classroom Support

Petitioners claim that from the 4/21/10 IEP forward, a classroom aide[3] was necessary for student to receive an appropriate education, and that unilateral changes to the nature of the aide support were unwarranted and inappropriate.

The 4/21/10 IEP (P 2) was not specific with respect to the frequency or nature of aide support for student during her kindergarten year, but there was in fact an aide who provided substantial support for student. The regular education kindergarten teacher succinctly described her role as follows (Transcript, 350:15-24):

Q. Okay. Was—can you tell us about the aid, what she did?

A. She was there to assist as needed with (student).

Q. Was she there daily with you?

A. She was.

Q. During the entire class periods?

A. Yes.

Q. For the entire school year?

A. Yes.

The same teacher went on to describe the role of the aide in monitoring student for seizures (363:15-25), and how the need for the aide faded (365:19-21). The 12/1/10 IEP (P 38) then memorialized the aide's role by adding a provision for "Adult support as needed or as directed by classroom teacher, for prompting and data collection, with fading as appropriate."

[3] Classroom aides are variously referred to in these proceedings and in the transcript as para-educators, paras, and "aids."

The first question then is whether these two kindergarten IEPs were appropriate, relative to classroom support. A theme repeated several times is apparent - while the words on the page of the IEP are either inadequate or barely adequate, the implementation of the services and the resulting progress demonstrated by student lead the Hearing Officer to conclude that the educational program was appropriate.

The 4/21/10 IEP has no description of supplementary services, in the way of an aide, and on its face does not reflect the services that were provided. But the discussion at the IEP meeting itself was a model of collaborative decision making. The transcript of the meeting (P 33) shows an IEP meeting where everyone participates, everyone contributes, and parental input is valued. An extensive review of present levels of functioning started the meeting, followed by a discussion of goals, objectives, and how they could be made as measurable as possible. Related services were dictated by assessment and need, and placement, taking into account the least restrictive environment, was last. The team was flexible and creative in response to parents' input. Yet while there was vague reference to "supports," there was no specific discussion or inclusion in the IEP of an aide as a supportive service.

Nonetheless, student started out the year with essentially a full-time aide. The December IEP then added a reference to adult support, and while frequency was not specifically listed for the aide, the special education teacher testified that the amount of support was specified as 100 minutes per day, based on attributing the functional classroom skills to the aide, minus the teacher's 20 minute role in that goal. (382:17-384:18)

Most importantly, student progressed. The general education teacher found that she "did exceptionally well and progressed amazingly." (348:3) The special education teacher also found that when her abilities were reviewed for the December IEP, "(student) actually completed and

exceeded the goals in many areas that were represented there, and it was time to look at it and set goals that were appropriate for her higher level of function than what was represented in the earlier IEP." Significantly, progress was documented relative to her functional classroom skills, which is what the aide primarily worked with student on. Specific behavioral progress is also discussed in the Behavioral Interventions section, infra. Therefore, as to the kindergarten IEPs and the issue of adult supports in kindergarten, student progressed, and the IEPs were substantively sufficient.

Petitioners next dispute the adult support appropriateness of the first grade IEPs, beginning with the 5/25/11 IEP, (P 39) in which parents wanted a provision for a full-time aide for the upcoming first grade placement, and the school district disagreed. The IEP provided that "adult support will be in place full time during the first two weeks of school - from drop off to pick up, including lunch and recesses. August 22 through September 2, 2011." This provision was intended as a transition and evaluation measure for the new school setting. Petitioners were concerned about a new transportation arrangement, and they had concerns about safety in and around the parking lot. Parents complain that no data was collected during the "evaluation," and they disagree with the lack of definition of aide services after the two week transition.

While the April 2010 IEP was a model of cooperative decision making, the May 2011 meeting was not. (P 87) The written document did not reflect a consensus among all team members, including parents. It reflected the last "offer" made by those team members left at the end of the marathon meeting. Parents were understandably frustrated by the lack of specificity about adult support past the two week transition period, and the IEP team's inability to specify, in the IEP, the district's plan for addressing parking lot safety.

But again, the actual services provided were appropriate, despite the IEP. The day after the May 25th IEP team meeting, the kindergarten team began working on parking lot safety issues with student. (403:20-404:23) The first grade team then followed up, and, despite no specific description of aide services past the first two weeks, an aide continued working with student. And again, to the extent the aide support was focused on behavioral goals and functioning, student progressed throughout first grade, as discussed in the Behavioral Interventions section, infra. Based on that progress, and the services provided, as opposed to those described in the May 2011 IEP, the Hearing Officer finds that the educational program offered to student, as it relates to Petitioners' complaints about adult support, was legally sufficient.

The next IEP was developed over the course of two meetings, on October 13th and November 17, 2011. The transcripts of the meetings (CSD 77 and 79) show that while there was significant discussion about the current role of aides, and about the expected role of aides during the time frame addressed by the IEP, the district refused to identify or quantify that service in the document.

Petitioners also dispute the way in which aides were proposed (verbally) to be used. Parents wanted a full-time aide available for student. The district disagreed, and emphasized that the aides should be used only when necessary, and that reducing the use of aides for prompting appropriate behaviors should be the goal. At the time of the development of the IEP the team had access to the independent report and recommendations of Jeff Skibitsky, a behavior specialist retained by the parents to evaluate student's behaviors. He observed student in the classroom, and then testified, "[T]he recommendation I had was to reduce the one-to-one support in the classroom. . . . I thought that the use of a direct aide, because of the behaviors being motivated and being controlled a lot by attention-seeking behaviors, was counter-

indicated for any sort of programmatic concerns for her. So having direct support I didn't see as being beneficial to her." (578:3-13.) Later he concluded that "If she has one person working directly for her, you're going to see an increase in behavior, not a decrease in behavior typically." (617:24¬25, 618:1.) Mr. Skibitsky's November 9, 2011 report and comments were discussed by the IEP team in the November 17, 2011 IEP Meeting.

Use of aides was clearly anticipated as a means of implementing the agreed upon goals, but the IEP makes no mention of them.[4] The legal dichotomy is that while the IEP did not list aides, the team discussed and planned on their use, and the educational program put in place included the service. Further, as before, the result of the implementation of the educational plan was successful - student progressed. Accordingly, the Hearing Officer cannot find that as a matter of law FAPE was denied by failing to include a description of the role aides would play as part of the educational plan.

Occupational Therapy Petitioners claim that occupational therapy (OT) goals and services were insufficient. Petitioners also complain that appropriate and needed assistive technologies were denied. The kindergarten IEP had a specific OT goal, and three measurable objectives. (P 2) There does not appear to be a concern with the development or adequacy of the 2010 IEP relative to OT. Petitioners did raise concerns about a lack of progress during kindergarten, however. The occupational therapist who worked with student that year testified about her services to student:

A. I worked with Student when she was in the—in kindergarten.

[4] Whether through a misunderstanding or by district or other directive, the team insisted that they could not reference the use of adult supports. Clearly this conclusion is not correct - the then-existing IEP even referred to the use of aides. And the description of resources to be used in service delivery is not a "methodology" as suggested by some team members.

Q. And worked with her how often?

A. Weekly.

Q. Do you recall how long your sessions were?

A. Well, at the beginning of the school year, they were 30-minute sessions. And then we had the IEP in December, and I changed them to 40-minute sessions, so we increased—I increased my time in December.

Q. And why did you increase?

A. On the IEP, we had a team discussion, and there was parent input, and the team decided to increase our time so that we could spend—so I could spend part of my time individually with her and part of my time in the classroom. So we increased it, so it was like 20 minutes individually and 20 minutes in the classroom. (431:14-432-5)

Her response, and that of the IEP team, is exactly how a team should respond to a student who is making less than hoped for progress on a goal. Her IEP progress report in November of her kindergarten year showed 36% overall progress toward the goal, (P 45) which, while represents some progress, the team found to be insufficient. So they increased the level of services[5]. Four months later, student was measured at 43% progress toward the goal, (P 46), and three months after that she was at 65%. (P 47). While not optimal or maximal progress, the Hearing Officer finds that the student made progress toward her OT goals, and that the "some benefit" standard was met for her kindergarten year.

[5] Parents asked for additional OT services outside of school time, which the district denied.

In first grade, the occupational therapist was _____ and she continued to work on the same OT goals and objectives. In response to a question about whether a sample of student's handwriting was representative, she stated:

A. It depends on the time of the year it was taken.

Q. At the end of the year?

A. It was better, she made progress. (465:3-6).

The November 2011 IEP implemented new OT goals, agreed to by parents, and the March 2012 Progress Report shows overall progress toward an 85% standard at 71%, with no single measure below 70%. (CSD 10C). Ms. Fitzmayer also testified with regard to student's progress at the end of first grade that "She's a great student. She's making progress. She's doing well. She's in first grade. She's doing the first grade curriculum." (471:16:19.) Responding specifically to the questioning, "So by the end of the year, you had seen a lot of that progress?" Ms. ____ testified, "Yes, by the end of this year, yes, a lot of progress, a lot of – a lot of that small movement, yes." (482:2-6.) Ms. ____ also expressly refuted petitioners' claim that student had regressed in her handwriting. Ms. ____ explained the distinction between the April 2010 reporting "(student) is able to copy" and the March 2012 reporting that "(student) will be able to write" indicating that "these two things are measuring two different abilities." (491:22.) She testified "[W]hen we write our goals in the district, we specifically write 'will copy' versus 'will write,' because there is a distinction when we write our goals, there's two different things, because there is copying, which is for younger kids, and then there's writing for first graders, because they know their alphabet, so they will write it from memory." (491:14-20.)

Student was also given a standardized assessment, the Test of Handwriting Skills-Revised. The report of the findings states "[s]he achieved a score of 109, that's a standard score, and an

overall percentile rank of 74th percentile. In looking at subtests, she scored at or above the 50th percentile in three of four areas. The only area she scored below the 50th percentile was in writing speed." (CSD 2:25)

Petitioners claim that the district inappropriately failed to make available an assistive device known as an Alphasmart[6]. A referral was made to the Utah Augmented Alternative Assistive Communication Technology Team (UAAACT), a resource available for assistive technology assessments. Their process included an assessment of student's handwriting and communication skills, and recommendations related to the appropriateness of assistive technologies. Their report, dated February of 2012, found that student would benefit from continued OT services, focusing on essentially the same goals as were being addressed, and they found that progress was being made with her handwriting. The team did not recommend using a portable keyboard "at this time" based on her academic success and fine motor skills progress. (CSD 25) As Grace Storm, a special education teacher who was on the UAAACT team testified, the recommendation was that student shouldn't yet be provided this technology, based on her individual abilities.

Q. And did you decide that because Student is not in the third grade that she should not be having using the AlphaSmart?

A. No, that wasn't the basis of our decision. We looked—when we look at providing an AlphaSmart, we look at—I mean, it does play as a factor because students that are younger than third grade—and there's not a set grade level. But typically younger students, we're trying to develop those writing skills. And if they're making accurate—or

[6] Alphasmart is an adaptive keyboard.

adequate progress on their writing skills, then we try to develop those first before we impede on their growth and give them something that maybe they don't even need. (44:12-24)

Student's first grade occupational therapist, Ella _____, M.A. and IEP team member also testified that with regard to Alphasmart, "It's not a good idea for first graders. Why not? Because she's too young and she still needs to write, and I think she can write." (468:7-11.)

IDEA limits related services to those developmental, corrective, and other supportive services that are required to assist a child with a disability to benefit from special education. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (emphasis added.) Not only is an Alphasmart not required to assist student, the testimony of those professionals most familiar with her and her educational environment is that at this point in time assistive technology would be detrimental to her fine motor development. The decision was a reasoned one, based on the collective experience of the team trained to evaluate exactly these scenarios. This was not a blanket or inappropriate denial of access to a resource.

Overall, the Hearing Officer finds that Petitioners have demonstrated no legal deficiency in Respondent's development or delivery of OT services, and the recommendation not to provide a specific assistive device was not inappropriate.

Physical Therapy

Petitioners claim that physical therapy (PT) assessment, goals and services were insufficient. A private PT evaluation dated 12/8/11 (P 145) is the first evidence of a PT need, but that evaluation doesn't suggest any nexus between the general gross motor deficiencies identified and educational need or impact. Nonetheless, Canyons School District Physical Therapist Susan D. Mikell, D.P.T. did a screening two months later, on February 16, 2012, in which she observed

student. In her report, Dr. Mikell noted, "(Student) is able to move about her school environment independently and keeps pace with her peers. Team members have not identified any concern regarding (student's) ability to access her education as related to her gross motor function. At this time, (student) does not require physical therapy as a related service."" (CSD 2:26). Similarly, the videos of student, including her social participation on the playground, suggest that she does not require physical therapy as a related service. Petitioners provided no credible expert testimony to the contrary.

To the extent petitioners claim student has been denied FAPE based on her gross motor skills needs, Petitioners have not provided evidence to meet their burden. They have provided no evidence to support a claim that physical therapy is required to assist student to benefit from special education. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (emphasis added.) The Written Prior Notice dated April 28, 2010, explains why a gross motor goal was not included on the IEP, including "(Student's) gross motor skills do not impede her ability to benefit from special education or access general education, including kindergarten core." (CSD 2:30.) The Hearing officer finds that Petitioners have failed to meet their burden to show any impact of student's gross motor deficiencies on her ability to benefit from her educational opportunities, and therefore there is no denial of FAPE.

Behavioral Interventions

Petitioners allege that insufficient behavioral supports were in place to allow student to benefit from her education. Petitioners also claim that Respondent refused to conduct a functional behavior assessment, as required.

Behavior needs have been identified in each of the IEPs developed for student, but the nature of the goals has varied. In the 4/21/10 IEP before kindergarten, her behavior needs were

addressed via goals that related to her independently following the daily routine, initiating cooperative play, and following classroom directions. (P 2) There were objective measures of progress identified, and data collection was provided for.

In the December 2011 IEP the Early Learning goal focused on following directions, and recognized her potential oppositional and disruptive behaviors, and a language goal was added that focused on replacing her inappropriate "talk outs"with appropriate communication strategies. (P 38) Relative to behavioral concerns, the May 2011 IEP was essentially the same. (P 39)

One recurring theme throughout the testimony and evidence produced at the hearing was that student's behaviors seemed more moderate at school than those reported at home. School psychologist _____ observed student on May 25, 2010. With regard to that observation, Ms. _____ testified, "That particular observation was done with two weeks left in the school year. When I went in to observe her, I didn't—I didn't notice anything that seemed out of the ordinary to me. I didn't notice any troubling behavior that lasted, in terms of duration or frequency. There weren't chronic or severe behaviors that would have warranted further action. Based on the behavior that I saw, I felt like it was appropriate. And I indicated that an observation should be done in the fall to follow up with her behaviors in the next setting. . . . I felt like all the behavior that (student) exhibited during that observation was totally age appropriate." (1093:8-22-24.)

_____, the kindergarten special education teacher testified that behaviors reported by the parents were not evident at school: "The data also showed that we were not seeing her tantruming at school, although we had reports from the family that tantruming was happening at home, but in our classroom we had not seen that. We left the tantruming behavior there

because it would be the most severe representation of behavior, if we were to see it, but once again, we were not seeing severe behavior with (student)" (389-8-15.)

Petitioners have repeatedly asked for development a formal behavior plan. Respondents have refused, arguing that a functional behavior assessment and behavioral intervention plan were not appropriate. _____ testified that even with the presence of some behavior issues a formal behavior plan isn't necessary. (1092:14-18) She further explained that "A behavior intervention plan is something that is implemented when a student has demonstrated that they need behavioral interventions that go above and beyond what is typically conducted in their classroom setting." (1100:6-10).

Dr. _____, school psychologist, also testified that student did not need a behavior intervention plan and that her behavior was being appropriately addressed. He explained, "(Student) really had quite mild oppositional behaviors. We were dealing with pretty mild behaviors. And usually we do behavior intervention plans for children who have severe behavior problems, behavior problems that are occurring frequently, behavior problems that are occurring over a long period of time. We just didn't feel the need for a behavioral intervention plan – behavior intervention plan for (student), although we were addressing the behaviors that we were interested in seeing her become more adaptive at performing." (1159:11-25.)

Dr. Jenson, who was one of the authors of and holds the copyright to Utah's Least Restrictive Behavioral Interventional guidelines (219:9-25) observed student and testified that there was no objective basis to require a functional behavior assessment or behavior intervention plan for student: "it generally is necessitated by a very severe behavior issue. All right. Self-injury behavior is an example. Severe aggression would be another example. I—if

someone wanted me to do a functional behavior assessment on student, I would ask for what behavior. I could not see one, I think that would warrant a full scale functional behavior assessment." (226:1-12.)

Dr. Jenson also spoke to the data collection regarding behaviors, which was a task frequently assigned to the classroom aide. "I looked at her compliance data in her file. And the criticism of the other expert witness was that there was not an objective definition.

It is an objective definition in my view. It's from the Least Restrictive Behavioral Intervention guidelines for the state which Canyons follows. And compliance is defined as precision requests, which is complying with an adult request within three to five seconds." (218:7-15.) He further explained with regard to her compliance, "And her compliance rates—actually compliance is normative."(218:16-25).

One of Petitioners' experts, Dr. Davidson, was critical of the behavior interventions that were occurring, but to the extent Petitioners rely on Dr. Davidson, it is important to note that Dr. Davidson testified under the erroneous assumption that data had not been collected, let alone reviewed, assessed and discussed by the IEP team. For example, Dr. Davidson stated, "I would propose we start collecting data." (676:3-4.) The hearing officer finds his testimony and his opinions unpersuasive.

The opinions of the educators, and the data collected, show real progress on behavioral goals. Ms. _____ testified that she saw progress in kindergarten, and that student had benefitted from her IEP, including "progress in terms of initiating play with other peers and sustaining that play." (1094:22-23, 1095:2-4.)

Michele Rahn, an autism and behavior specialist testified that the data showed behavioral progress in first grade as well. In response to a question about whether she had seen behavioral

progress she replied “Absolutely. If you look at the graphs, the colored graphs or these graphs, you will definitely see progress in all of the areas in which you’re requesting information.” (1224:16-19) Ms. Rahn also referred to a Review of Data for IEP document (CSD 10G) that summarized the behavior data gathered during student’s first three months of first grade. Real progress is evident. For example, independent response to teacher requests went from 73% to 83% the second week, to 90%, to 86%, then 93%, 92%, 95%, etc.

Here it is appropriate to look at another indicator of whether student’s behaviors interfered with her educational opportunities - her academic progress. Respondent school district uses an academic benchmarking tool called AIMSweb. The tool measures skills in several academic areas and then maps progress, quarter to quarter, against the range of scores by same-grade same-school peers. The test results compare student from the fall of kindergarten, quarterly, through the fall or, in some cases winter, of first grade. In letter naming fluency, letter sound fluency, phoneme segmentation fluency, reading, oral counting, number identification, quantity discrimination, missing number, and math computation measures, student shows consistent, significant progress. (CSD 27) All trend lines in these areas go up. In many areas she is above the average range, and this is in comparison to all students in the school - not those in special education. In only one area, nonsense word fluency, she goes backwards, in kindergarten. But then in first grade, in that same area, she goes up again, and scores well above the school average.

Inappropriate behaviors are relevant for IDEA purposes if they interfere with the student’s ability to benefit from their educational program, or if they prevent others from doing so. Clearly this student is making progress on her behaviors, and she is benefitting from her educational program.

Speech and Language

Petitioners claim that insufficient speech and language services and assessments were provided, leading to regression in student's communication skills.

The 4/21/10 IEP prepared for the kindergarten year recounts that "[f]rom recent standardized testing, (student's) total language score is falling in the low average range when compared to students of the same chronological age." (P 2) Classroom observation, however, suggested delays in pragmatic judgment and occasional problems in following directions. Therefore, the IEP team agreed on a goal related to independent verbalization of comments or information without prompts, and they agreed on a direction following goal.

As that year progressed, the goals were changed. The December kindergarten IEP added a pragmatics goal and two objectives that were also related to her behaviors, the direction following goal was modified to expect more complex steps to be followed, a verbal/task goal was added, and the speech therapy time was increased. (P 38). _____, the speech language pathologist who saw student testified that after that IEP her time with student went up to 50 minutes each week, which was more than the amount specified in the IEP. (1112:16-1114:1) She summed up by stating that "she's making really good progress. I'm very proud of her." (1114:5-6)

The May 2011 IEP developed for first grade carried over the December speech goals verbatim. Then in the fall first grade IEP, concerns were raised about progress. Just prior to the October 13, 2011 IEP team meeting, the District was provided with additional standardized testing which had been done by Dr. Goldstein, student's private neuropsychologist, and by Allison Tanner, student's private speech and language pathologist. (CSD 2:21). Dr. Goldstein's office reported the results of sixteen assessment procedures, none of which indicated any

regression. (CSD 2:20.) Allison Tanner reported the results of two assessments, the Goldman Fristoe Test of Articulation-2 (GFTA-2) and the Comprehensive Assessment of Spoken Language (CASL). The scoring results of the October 2011 CASL were lower than the results of her October 2010 CASL. She went from a composite score of 87 to a 78, and her percentile went from the 19th percentile to the 7th. (P 13, P 135)

Concerning the CASL scores, the IEP team considered the significance of the scores and proceeded to reasonably calculate a plan for Student to benefit, as the hearing transcript provides: "That was presented at the IEP meeting. We went over that testing that was done by Allison Tanner at Primary Children's. She had given her the CASL, and that was presented at our IEP meeting." "And that was—that was incorporated into the plan as it was amended and enacted in November of 2011. . . . And I was working on social language. Those were the goals that she had on her IEP, so I was addressing the deficit." (1120:5-14.) The SLP was indeed working on those goals, and in the 10/13/11 Progress Report (CSD 10C), the team reported that there was significant progress on each of the speech goals. "Talk-outs have decreased from an average of 26 per week. . . to an average of 13 per week." "(Student) can follow 2 step directions containing 2 basic concept words with 80% accuracy." The objective was 50%. "(Student) can describe the steps of a 4-7 sequence task using pictures with 90% accuracy." The target had been 80%. The report detailed nothing but progress toward the IEP goal. Yet the standardized test suggested regression in some areas, so the IEP was amended to address the new information.(CSD 6) The goals already met were eliminated, and a single goal focused on social language skills was implemented, and the amount of specified SLP service was increased.

Dr. Galloway is still of the professional expert opinion that student did not regress. "In your review of the information, of the data, of discussions with people, your observations, in your

professional opinion, has there been regression, that term has come up, 'regression,' with (student)?" Dr. Galloway testified, "Not that I have seen." (1174:9-13.)

But there are two separate issues here. The first is the appropriateness of the then current speech goals in the IEP. There is no showing that the goals from the May IEP were inappropriate, or that they were not reasonably calculated to confer educational benefit. And, there was progress made on those goals - every one of them - as shown in the October Progress Report. (CSD 10C).

The separate issue is, did student regress in some language areas, and if so, was the district response sufficient? Clearly a decrease in both total score and percentile on exactly the same standardized test suggests a problem, but the district responded. In the November 21, 2011 Written Prior Notice the district accepted Petitioners' request to increase speech and language time: "Accepted: Based on current data and information collected, including information from Allison Tanner, the need for increased speech and language services time was included in the IEP. The maximum of 50 minutes weekly of speech and language services is sufficient to address the social language concerns." (November 21, 2011 Written Prior Notice, CSD 2:32.)

The IEP team responded, changed the goal, and increased services. If student continues to decrease her performance on the same or similar standardized test, that would be an indication that the response was insufficient, but the evidence does not support a conclusion now that the response was insufficient - that it was not reasonably calculated to confer educational benefit.

Even if we were to find that student regressed in this one area, that does not end the inquiry. Improvement in every academic and non-academic area is not required to show an educational benefit. In *Corpus Christi Independent Sch. Dist, v. C.C.*, 59 IDELR 42, 112 LRP 30156 (S.D. Tex. June 7, 2012), the U.S. District Court, Southern District of Texas, noted that the

student made academic and social progress during the school year. The court held FAPE had been provided, holding: "CCISD was not required to provide the best possible education available, and B.C. did not need to improve in every academic and non-academic area to have obtained an educational benefit." *Houston Ind. Sch. Dist. v. Bobby R*., 200 F.3d at 350; Cypress-Fairbanks, 118 F.3d at 247. "Thus, the Court's inquiry is not whether there was more that could have been done, but simply whether CCISD provided a meaningful educational benefit to the student." *Houston Ind. Sch. Dist. v. V.P*., 582 F.3d at590. Id. (emphasis added).

Placement and Extended School Year (ESY)

Petitioners assert that appropriate placements were not offered by Respondent, and that adequate ESY services were not provided. These issues were raised at the hearing - no specific mention of them is contained in the due process request. Nonetheless, Respondent's position that full-day kindergarten and ESY were offered and refused by parents is well taken.

Regarding full-day kindergarten, the district offered that option, and substantial discussion about the advantages and disadvantages ensued at the April 2010 IEP meeting, but Petitioners elected not to enroll student in the full-day program. Instead, Petitioners elected to place her in the half-day diagnostic kindergarten at Bell View Elementary. It was a reasoned and reasonable decision, and the district cannot now be faulted for allowing Petitioners the choice. Nor can they be faulted for not offering even more choices. The Written Prior Notice dated September 3, 2010, set forth the District's proposal for "Full day kindergarten at Midvale Elementary" and documented that the "Parent refused based on demographics of elementary school." (CSD 2:31 at p. 1) Even so, full-day kindergarten was not objectively necessary for student. At the time, given the evaluations in the Spring of 2010, the discussions of the IEP team and the meeting of District representatives with Dr. Goldstein prior to the beginning of kindergarten, student's

placement in the diagnostic kindergarten at Bell View Elementary was reasonably calculated to confer educational benefit, and Petitioners were the ones who elected this placement option.

To the extent petitioners claim the full-day was necessary, but that the full-day option offered was inappropriate, they would bear the burden of showing that. However, Dr. Goldstein's statements in his August 27, 2010 meeting with District representatives Stacey Graziano, Dr. Kathryn McCarrie, Terri Mitchell and Dr. Lane Valum establish that kindergarten even at the Title I school would be appropriate. Dr. Goldstein expressed that he did not have the same concern with the student population at the Title I which the Petitioners expressed based on student population at the Title I school, stating, "I don't have an opinion about that because that would seem to suggest that we would be stigmatizing that some of these children are different than other children simply because they come from a lower socioeconomic strata." (CSD 2:16 at p. 11.) He continued, "I think it is very fair to say though, even within the Title I full day kindergarten programs we have a range of children at different developmental levels." (CSD 2:16 at p. 12.)

When told that the Title I school was the only full-day kindergarten program, Dr. Goldstein stated, "If you are telling me this is the only option we have for that with special ed. support services I don't have any reason to say no, because I don't see how it is different from just taking a developmental kindergarten and making it a full day." (CSD 2:16 at p. 18.) Dr. Goldstein supported the Tile I full day kindergarten option and noted that the Title I school would actually be advantageous because there kids would get extra help and support, stating, "I suggest you present that to her (Petitioner) and tell her that I am in support of that. Which as you explain it I hope she understands it as opposed to thinking that I have sold out. I think this child would benefit from services full day if she can handle the fatigue but not duplicate service and that

she ought to be served in a setting that is best suited to her. The advantage of that full day kindergarten is those kids need help and support but are not necessarily more severely impaired or delayed or they would be someplace else." (CSD 2:16 at p. 19.)

With regard to extended school year services, the Petitioners also declined most of those services before kindergarten, and all offered services before first grade. The school district found her eligible, and offered services[7]. Terri Mitchell, M.A. testified, that before student began kindergarten, "We felt that it would be important for her to be in a setting in which she could participate in ESY with students without disabilities. So we provided—or we offered two different—two different settings, actually combined, we offered both of them." (1239:15-21.) However, "(Petitioner chose not to" enroll (student) in ESY with the District indicating that she would instead do a community program. (1240:6). Later that summer, Ms. Mitchell testified, "about a month later I received an email, asking for us to reconsider, that the community programs weren't working." (1240:10-13.) In response, the District said she "could attend both Jordan Valley and Sandy Elementary, based on the sessions that were left. And she opted to only choose Jordan Valley School." (1240:17-20.) As a result, "(student) attended ESY at Jordan Valley maybe five or six times." (1243:23-24.)

Relative to the kindergarten placement and to ESY services, Respondent offered appropriate options, Petitioners chose the placements and services they thought best, and ultimately, student progressed, so no violation of FAPE can be found.

Procedural Violations

[7] Petitioners also misapprehend the purpose of ESY. Petitioner testified about the fact that with ESY she was "looking more at a window of opportunity, not necessarily regression." (499:13-14) The standards that the team considers for ESY are "regression-recoupment" and "critical point of skill acquisition." There is nothing in IDEA or USOE rules that supports that ESY is intended for students to learn new skills.

Alleged violations of procedural rights require a different analysis than the analysis applied to concerns about substantive elements of the educational program. The first question in this regard is whether a violation of required procedures occurred, but even if such a violation is found, the second question is whether the violation results in a denial of FAPE. The Tenth Circuit Court of Appeals found that "[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE." *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs*. 520 F.3d 1116, 1126 & n. 4 (10th Cir. 2008). See also *Urban ex. rel Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996) (holding that a procedural failure did not entitle a student to relief because that deficiency did not result in the denial of a FAPE); *Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997) (holding procedural violations must interfere with the provision of FAPE to support a finding that an agency failed to provide FAPE).

Similarly, the Tenth Circuit has held, "[C]ompensatory education is not an appropriate remedy for a procedural violation of the IDEA." *Erickson v. Albuquerque Pub. Schs.*, 199 F.3d 1116, 1122-23 (10th Cir.1999). For example, Petitioners complaint refers to "Failure to include parents in IEP meeting 5/25/11 regarding student's transition to new school." But Petitioners' Exhibit 87 is a 117 page transcript of the 5/25/11 IEP meeting in which Petitioner participates extensively.[8] The same level of participation, if not more, is found for every IEP meeting. With respect to this claim, there is no showing of a violation.

Petitioner perhaps is complaining more about whether their participation is truly meaningful, as Petitioners also complain about "predetermination of services to extent (sic)

[8] Note that parents didn't sign this or any subsequent IEP attendance/acknowledgment sheet, though at least one parent attended every IEP meeting.

exclude parental participation in IEP meeting." (Due Process Hearing Request p.6) As to this claim, there are hints in the IEP meeting transcripts that there are certain things the team cannot put in writing.[9] But there are only hints and inferences, and Petitioners have not met their burden of proof in this regard. And even if predetermination was found to have occurred, the second prong of the procedural violation inquiry would not be met, because the services actually were provided, so there is no denial of FAPE.

Petitioners have claimed dozens of procedural violations, and this opinion does not address them all individually. Some, like the claimed denial of parental participation are simply baseless, and others are too vague to address, and to the extent a ruling is required on each of them, except as provided below, the Hearing Officer has considered each of them, and finds them to be unsubstantiated. The ones that have some merit and therefore require analysis follow.

Parents contend that the IEPs failed to "provide frequency, location and duration" of certain services. As discussed in the Classroom Support section above, there certainly was at least one occasion when the frequency and duration of paraeducator support was not listed at all ¬in the 4/21/10 IEP.[10] While that is likely a procedural violation, the fact that an unspecified service, and one that parents wanted, was added despite not being specified in the IEP is not a violation that constitutes a denial of FAPE. Therefore it is not actionable.

Item 12 on page 5 of the due process request complains about "conducting assessments without parental consent in fall of 2011 regarding student's behaviors and occupational

[9] See e.g. the discussion, infra, about the inclusion of aides in certain IEPs. They were not written in the IEPs but were in fact provided. There is a similar discussion in the 11/17/11 IEP transcript (there are no page numbers) about a refusal to list the aide, but assurance that they will be there.

[10] Similarly, the 12/1/10 IEP mentions adult support, with no description of frequency, and the pattern of not specifying the availability and role of aides continued in each of the subsequent IEPs.

therapy." Petitioners never pointed to a particular unapproved assessment that actually required prior parental consent. 34 CFR 300.300(d) provides:

(1) Parental consent is not required before—

(i) Reviewing existing data as part of an evaluation or a reevaluation; or

(ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

Student was already receiving services in these areas, so reviews of data being collected is not a violation, and no actual assessment that would be in violation of the regulation has been identified.

Item 17 refers to the "failure to include those with knowledge about student to attend IEP meetings." Presumably this refers to aides who provided direct services to student. (P 207) Parents wanted the aides present, and Respondent would not allow their attendance at any IEP, as far as can be determined. The applicable regulation, 34 CFR 300.321 states:

(a) General. The public agency must ensure that the IEP Team for each child with a disability includes— . . .

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. . . .

(c) Determination of knowledge and special expertise. The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section must be made by the party (parents or public agency) who invited the individual to be a member of the IEP Team.

Here, parents requested the presence of classroom aides, and the district failed to make them available.[11] The question is, must the district ensure the attendance of one of their employees if parents determine and designate them as "having special expertise regarding the child?" A 2011 OSEP letter provides guidance:

> While 34 C.F.R. § 300.321(a)(6) permits a parent to designate a public agency employee who possesses the requisite knowledge or special expertise regarding their child as a member of their child's IEP Team, the Part B regulations do not address the public agency's responsibility to make an employee of the agency available for IEP Team meetings when the public agency itself does not designate the individual as a required participant on the IEP Team. That determination may be addressed by State and/or local policy (See, the Analysis of Comments and Changes accompanying publication of the August 14, 2006 final Part B regulations (Analysis), 71 Fed. Reg. 46675 (Aug 14, 2006), ("[w]hether other teachers or service providers who are not the public agency's required participants at the IEP Team meeting can attend an IEP Team meeting is best addressed by State and local officials.") In addition, the Department has also stated that a parent does not have a legal right to require a public agency employee not invited by the public agency to attend his or her child's IEP Team meeting, even though the individual is considered a member of the child's IEP Team. (See, Analysis, 71 Fed. Reg. 46674 (Aug. 14, 2006)). Letter to Rangel-Diaz 58 IDELR 78 (2011).

Under that analysis, the district is not required to compel the attendance of the aides, even if parents designate them under § 300.321(a)(6). Therefore it isn't a procedural violation.

[11] 11Whether they were excluded or simply not invited is not clear from the record.

The final procedural violation allegation that merits analysis is the claim that the district inappropriately refused to hold IEP meetings when requested by Petitioners.[12]12 IEP team meetings were held on April 21, 2010; December 1, 2010; May 25, 2011, October 13, 2011; and November 17, 2011. (CSD 1:1, 1:3, 1:4, 1:6. 1:7, 4:76, 4:77. 4:79.) In holding these meetings, the District met more often than the annual meeting required under the regulations, which provide that the District must ensure that the IEP team "Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and Revises the IEP, as appropriate." (34 CFR § 300.324(b), Utah State Rule III.I.4.) While these provisions provide the maximum duration of an IEP, the issue here is the district's responsibility when a parent requests a team meeting more frequently.

34 CFR 300.324(b) also provides that an LEA must assure that the team:

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under § 300.303 ;

(C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2) ;

(D) The child's anticipated needs; or

(E) Other matters.

IDEA does not require that a district convene an IEP meeting every time a parent requests a meeting. Some states impose such a requirement, but Utah does not. However, the above

[12] Written Prior Notices were provided explaining the reasoning behind not convening additional IEP meetings. Principal Denise Orme testified that written prior notices were provided in response to requests from the parents, including those specifically dated 1/13/12, 3/8/12 and 3/20/12. (CSD 2:4.)

provision does give guidance as to when a meeting would be appropriate. The question would how quickly after new "information about the child" is provided there needs to be a meeting, or how long there is a perceived "lack of expected progress" that would require reconsideration of the IEP. Here, there were five IEP team meetings in 13 school months. While that may or may not be reasonable frequency given the evolving nature of student's educational program, and the district is encouraged to be mindful of the reasons for revision listed in the regulation above, there is no explicit requirement for meetings at the unilateral request of parents, so there is no procedural violation.

§504 Claims

Petitioners' ninth and tenth claims, captioned as Issues 7 and 8 in the amended complaint, relate to §504 of the Rehabilitation Act of 1973. Prior to the hearing, Respondent timely raised an objection to consideration of Petitioners' §504 claims.[13]13 The Hearing officer finds that procedurally, this complaint and the subsequent proceeding was brought under the authority and procedural safeguard structure provided by IDEA. The jurisdiction, authority, timelines, disclosures, and other procedures are governed by 20 U.S.C. §1400 et. seq. and the relevant regulations. There is a separate process, with separate procedures and standards for §504 claims. Some states conflate those processes, but Utah is not one of those states. Since Utah provides a separate remedy and a separate process for addressing §504 claims, and since Canyons School District has adopted such a process, which petitioners have previously accessed, this Hearing Officer has no authority or jurisdiction to hear those claims, and they are therefore dismissed.

[13] Respondent first raised the issue at the pre-hearing conference, then again objected during the hearing, and followed up with a brief submitted on the final day of the hearing.

Conclusion

All claims proffered by Petitioner have been considered,[14] and to the extent they have not been specifically addressed herein, the remainder of Petitioner's claims the Hearing Officer finds to be without merit. Having not met their burden of proof regarding substantive or procedural violations of IDEA, we need not reach the question of damages or reimbursements. While Petitioners clearly provided and paid for significant private services, many of the claimed services were medical or clinical in nature, rather than educational, and the educational services provided by parents, including the unilateral private placement, were undertaken independently. The independent assessments were also certainly helpful to the IEP team, when provided, but they were not required based on a failure of the district or a deficiency of its evaluations, and therefore the district is not required to reimburse you for their costs. Unless the district fails to offer an appropriate educational program, it has no obligation to pay for those assessments and services, and the Hearing Officer has found, in each substantive area considered, that student was provided an appropriate education.

As found earlier, progress was made in the areas of core academics, OT, PT, behaviors, and even speech and language. While Petitioners disagree with the "some benefit" standard, it is the standard in the Tenth Circuit, including Utah,[15] and applying that requirement to the facts

[14] This includes Petitioners' supplemental post hearing filings. Procedurally, the post hearing proceedings have been somewhat unusual. The parties stipulated to a continuance of the date for submitting post hearing briefs, first at the request of Respondent's counsel, then at the request of Petitioners' counsel. Respondent's brief was submitted on August 2, and Petitioners', without agreement, on August 11 with supplemental filings on August 13. Respondent objected to consideration of the August 13 materials based on the fact that they were not contemporaneous with Respondent's, but based on the representation that Petitioner had not yet been provided a copy (by their counsel) of Respondent's brief, it was considered.

[15] Even the Deal v. Hamilton Board of Education case cited by Petitioners acknowledges that a student passing successfully from grade to grade in a regular education setting is presumed to be benefitting. Student's first grade report card, introduced at the end of the hearing, shows her passing quite successfully to second grade.

found in this proceeding, the Hearing Officer finds that the education plan offered and provided by Respondent comports with the requirements of IDEA.

Petitioners seek, completely understandably, to maximize their daughter's education. But that is not what IDEA requires.

Petitioners' claims are hereby dismissed.

So ORDERED this 14th day of August, 2012.

Richard Schwermer

Richard Schwermer
Due Process Hearing Officer

MAILING CERTIFICATE

This is to certify that a true and correct copy of the foregoing Pre-Hearing Order was sent by email as follows on this 14th day of August, 2012.

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