

UTAH STATE BOARD OF EDUCATION
SPECIAL EDUCATION SERVICES
DUE PROCESS HEARING

In the matter of:

**[REDACTED], et al, on behalf of
[REDACTED],**

Petitioners,

vs.

WASATCH SCHOOL DISTRICT,

Respondent.

DECISION AND ORDER

Case # DP-2122-09

Hearing Officer:

Frank Snowden

DECISION ORDER

William Pohl, Esq., appeared on behalf of Petitioners **[REDACTED]** a student, by and through **[REDACTED]**, ("Petitioners"). Joan Andrews, Esq., appeared on behalf of Respondent Wasatch School District ("Respondent"). This matter was assigned to the undersigned Due Process Hearing Officer, Frank Snowden ("Hearing Officer").

Procedural History

The student, **[REDACTED]**, (the "Student") is **[REDACTED]** year old female with multiple diagnoses, including, but not limited to, **[REDACTED]** and others. Petitioners submitted a written Request for Due Process Hearing to the Utah State Board of Education ("USBE") dated April 15, 2022, which was received and entered of record on April 15, 2022. Petitioners allege violations of the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 et seq. ("IDEA"), denial of FAPE during the 20-21 and 21-22 school years. The Respondent filed its answer on June 9, 2022, which was considered timely based upon stipulation of the parties. The parties held a Resolution meeting on May 2, 2022, without resolution. The parties engaged in what was reported to be good faith mediation without resolution. Undersigned convened numerous Pre-Hearing Conferences

via teleconference, the parties requested extensions of decision deadlines which, were granted, and by agreement, trial was subsequently set to begin on August 24, 2022, and to last for 2-3 days based on the number of witnesses each party expected to call.

Extensions of the due process hearing timeline have been granted at the request of one or both of the parties pursuant to 34 CFR §§ 300.510(c) and 300.515(c), and USBE SER IV.R.2.

Jurisdiction: Subject Matter

Jurisdiction properly lies over the parties and over the subject-matter of this cause pursuant to 34 CFR § 300.507(a). Therefore, all claims presented by Petitioners under the IDEA are hearable and are reserved for decision by the Hearing Officer.

On the contrary, claims under the Americans with Disabilities Act, for disability discrimination *et al*, brought by the Petitioners in their original complaint, are outside the scope of the hearing officer in this matter, and were thus not heard and or DENIED.

The Hearing

On August 24, 2022 and each consecutive day thereafter through August 25, 2022, an impartial due process hearing was conducted at the offices of the Wasatch School District Offices, Heber City, Utah, in this matter. The hearing was held in accordance with the procedural requirements of the IDEA and its implementing regulations found at 34 CFR §§ 300.507-515, and the Utah State Board of Education Special Education Rules IV.I-P, (October, 2016). Petitioners and Respondents stipulated to the admission of some but not all exhibits previously exchanged and submitted. The Petitioners' witnesses included [REDACTED], the mother of the student, [REDACTED], father of the student, [REDACTED], Dr. [REDACTED]*, pediatrician for the student, Dr. [REDACTED]*, chiropractor for the student and [REDACTED], principal of the virtual school of the student. The Respondent's witnesses included [REDACTED], Wasatch Schools special education director, [REDACTED], (see above), and [REDACTED], former special education director for Wasatch. Petitioners submitted 21 Exhibits that were admitted into evidence. Respondent submitted 20 exhibits admitted into evidence. The hearing transcript is in two volumes totaling 374 pages.

**Please note that while undersigned appreciates and respects the time and the willingness to testify of these two medical professionals, their testimony was not given great weight as to the student's medical challenges as that appeared be not in controversy. Thus, their testimony is not summarized herein.*

Burden of Proof

Petitioners, as the party challenging the Respondent's provision of a Free Appropriate Public Education, has the burden of proof, by a preponderance of the evidence, for all issues raised in this matter. *Schaffer v. Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005). The Tenth Circuit Court of Appeals has held 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.*, [540 F.3d 1143](#), 1148 (10th Cir. 2008). The Hearing Officer is satisfied that the burden of proof question was made clear to counsel for the parties and the parties.

Issues

The following issues were presented to the Hearing Officer for decision:

I. Procedural Issue:

(a). Whether this hearing officer should hear and rule upon claims for disability discrimination.

II. Substantive Issue for Hearing:

(a) Whether the Respondent failed to provide the Student with a Free Appropriate Public Education (FAPE) during the time the student attended the School by:

(1) providing a course of study, a model, that was found, after the fact, to be non-compliant with state regulatory requirements, specifically that no certified teacher was assigned to the student to monitor and supervise her course of study.

Findings of Fact

After considering all the evidence in the form of oral testimony and admitted exhibits, as well as the oral and written arguments of the parties' and counsel, the Hearing Officer's Findings of Fact are as follows:

The student, [REDACTED], is [REDACTED] year-old girl, and at the times in question in this matter the Student lived with the Petitioners in [REDACTED], Utah. Petitioners are the student's parents. She has multiple specific medical infirmities and consequently physical limitations, along with multiple learning disabilities. At the time of the hearing, had been enrolled in the Wasatch School District for two years. The student was considered to be medically complex, presenting a multitude of both physical limitations and learning limitations.

The student came to Wasatch from Provo school district and has been in a home school or virtual learning environment even before the advent of Covid-19. Her mother has been providing the majority of the instruction and her mother testified that the student has fared well in this learning environment. The mother further testified that this was her preferred method of delivery of education and that the mother was a credentialed classroom instructor in California. By all accounts, the student has made adequate progress and enjoyed the flexibility offered through the Harmony/Portfolio program and the mother was satisfied with the current situation- this was given some import based upon the mother's expertise in the educational arena. As the facts unfolded, it was clear that the Wasatch School District "inherited" the virtual program known herein as Harmony/Portfolio, and its "hundreds" of students, from Provo Schools at the end of the 2020-2021 school year. [REDACTED] was one of those students. Harmony is a third party contractor that operates in school districts with which it has a partnership and only when it has such partnership. It is especially noted that, despite efforts of the parties, no witness appeared on behalf of Harmony to defend or explain its role in the student's education or lack thereof. The families enrolled in the program do not typically incur expenses for the program and are in fact given an annual budget to purchase virtual educational materials in collaboration with the educational consultants provided by Harmony and the school district which disburses funds. This seemed to be good fit and exceptional situation for the student, the parents and the school district until it was learned by the school district that the current method of delivery of instruction did not comply with Utah State Education requirements. The fact that there was no credentialed instructor providing delivery of core curriculum was a de facto violation. The school district was candid on

its admission of this fact. This case boils down to a question of the provision of FAPE in a program or method of educational instruction that seemed satisfactory to both the parents and the student, wherein the student was allegedly making adequate progress, but was not compliant with state regulatory rules and thus failed to qualify for continued distribution of state and federal education funds. The school district took appropriate and timely remedial action and held a series of meetings to explain and effectuate the proposed changes in the students programming in a effort come into compliance with the aforesaid regulatory violations. However, the parents did not agree to the proposed changes, basically because the mother had been providing the majority of instruction for the most, if not the entirety, of the students educational life and feared the sudden change would be both detrimental to the student emotionally and take away the flexibility the student needed to succeed. With this disagreement, the parties attempted, to no avail to work out a plan of action. The parties found themselves at impasse and thus this dispute arose.

Evidence offered in the form of testimony follows:

[REDACTED], the student's mother, testified in pertinent part as follows:

Throughout **[REDACTED]** schooling since kindergarten I have primarily provided her instruction through a homeschool type setup sponsored by a school district. Prior to moving [to **[REDACTED]**, Utah in **[REDACTED]** County] **[REDACTED]** was in an independent study home school program through a public school district. I found Harmony ran a very similar type of model. First year in Harmony they were with the Provo School District. It took a month or two, but Provo got her services up and running. We did the Portfolio version of the program (WLA/Harmon/Portfolio). We homeschool check in with the teachers and the specialists, and she got her IEP services in school year 2019-2020. **[REDACTED]** was involved with Harmony through Provo School District. For 2020-2021 (third grade) school year Harmony switched to Wasatch School District. It took a couple of months, but eventually head of Sped and the principal got **[REDACTED]** services running and did compensatory services for months missed while not fulfilling her IEP. Harmony is a learning facilitator that has a sponsoring school district in order to run the program. Parents do not pay out of pocket, funding comes from the state. We choose curriculum, but it has to be approved by Harmony, Wasatch. They help us purchase the appropriate curriculum. I never see the money but we are allowed approximately an \$1800 budget. We submit learning logs in each subject. **[REDACTED]** did great, especially in reading because she's dyslexic. I am her educational coach. I find programs or I find the right tutor. Somethings are administered via a tutor. I help her with the other programs that she does not get

tutoring services for. I submit work samples through Harmony's program on the computer, and they are reviewed by a credentialed teacher. When the teacher of record is going through her samples, she will sometimes send me messages, just double checking that some of the accommodations were part of her IEP; or if she recommended that we do something in particular, we get some feedback as well.

This year [REDACTED] is technically a [REDACTED] grader. Every year we have to re-register for Harmony and with their school district. [REDACTED] has several educational diagnoses and medical diagnoses, so we have to be very flexible in her schooling. She has [REDACTED]. She used to have a hole in her right eardrum causing hearing problems, but Friday she had surgery. Extra hormones are making her more hypermobile. She'll wake up in the morning and she's dislocated an ankle or a knee or a wrist, and so we have to wait for that to go back into place. So that can affect her handwriting, and I have to scribe for her. [REDACTED] can cause brain fog. So the cognition stuff, we have to do a lot of review in order to make sure she's got it. A form was filled out and handed to [REDACTED] and placed in IEP and then all assessments were emailed to Wasatch. After [REDACTED] did an evaluation they diagnosed her with apraxia of speech. She's received speech since about 18 months old.

Dr. [REDACTED], pediatrician at [REDACTED] sees [REDACTED] every three months. He gets all the information from all the different specialists and checks in with us on how things are going. [REDACTED] was recently diagnosed with [REDACTED].

In 2021, I participated in an IEP for [REDACTED]. She was getting up close to her triannual date, so I was concerned that none of the assessments had been started. It's my understanding that the Wasatch Special Education Department reached out to our home district in [REDACTED] County and worked out with them a plan for them, [REDACTED], to do all of her triannual IEP testing. I do not believe they did a hearing evaluation, nor any vision assessments. I told the district she has hearing problems and brought it up specifically when they sent me the prior written notice about the change of placement. No other IEP offer has been given since this time.

As per IEP, it says "General education class with special education and related services, accepted." And it says "Reason for accepting." "Parent provides majority of instruction through enrollment in WLA," which stands for Wasatch Learning Academy. In that meeting of her triannual evaluation (May 2021 IEP) we discussed she would continue in the WLA/Harmony program for the 2021-2022 school year. Her placement did not change. In the fall we did the Portfolio program

through Harmony in a virtual setting and I would administer and coach most of those programs. But, there is a teacher with Harmony that I can always reach out to. On Tuesdays from 10am-2:30pm she would go up to [REDACTED] for the in-person on-campus day. Then she was getting all of the minutes prescribed in the IEP services, mainly OT, speech and physical therapy in person except for writing, which was provided online through a facilitator. Within a week or two of school starting, they were discontinued (on or about December 2021).

I was contacted via e-mail by [REDACTED] from Wasatch School District to have an IEP meeting for [REDACTED]. The IEP meeting was attended by [REDACTED], special education teacher; [REDACTED], regular education teacher; [REDACTED], LEA representative and Principal; [REDACTED]; [REDACTED], Special Education person; [REDACTED], Harmony liaison/mentor, and myself virtually. They explained I had two options either switch [REDACTED] to their online program, the Wasatch Connect, or they would pull her IEP. They said they were no longer going to administer IEP services unless we switched to the Wasatch Connect program. They were stipulating that [REDACTED] was not receiving FAPE. I disagreed with that statement, and I asked them to point me to the specific law or person where I could get clarification. Never got a clear answer. I could not find a law that stipulated her current placement was not an offer of FAPE. They kept saying I was refusing. I did not agree that they were saying her current IEP is not an offer of FAPE. They said, this is Not an IEP meeting, we are purely telling you to do this or rescind her IEP. I told them I would not sign to either. Meeting ended with a promise to send me more information. They sent me the official prior written notice which stated: "The reason we are proposing to take action. The U.S. Department of Education's Office of Special Education Programs updated information on November 16, 2015." They did not provide that information in the meeting. It was in this document, but it still did not list out exactly which law they were speaking to. I asked for another meeting.

I received another Prior Written Notice dated December 3rd, 2021 proposing to initiate a change in identification, evaluation, educational placement, or provision of free appropriate public education to my child. So they talk about my procedural safeguards. No explanation or document was given to me regarding change in how Harmony was being viewed by the State Department of Education and/or the state attorney. They just referred to it. I was never given a contact or law. Even if verified I would still not agree that [REDACTED] educational model with Harmony and the services through special education through Wasatch, are not FAPE.

No other offer for placement was made other than the Wasatch Connect program which I do not believe would have been adequate for [REDACTED]. None of these accommodations list

the specific research-based programs that we use due to her dyslexia, dyscalculia, and dysgraphia. None of these programs were offered through Wasatch Connect and I never received an IEP offer that included Wasatch Connect. I was never given a document that I could enroll **[REDACTED]** in Wasatch Connect nor any document to withdraw **[REDACTED]** from special education services. I never provided them with any written desire to remove **[REDACTED]** from special education. I would have considered other programs had I been given the opportunity to discuss them.

Going forward I would like for the district to continue to implement that May 7th, 2021 IEP under the same program that **[REDACTED]** was receiving prior to December of 2021, but I stipulate that now that the IEP is so old and the services were held for so long, we would need to revisit her goals. Unfortunately, since then she's gained a couple diagnoses, and if we were looking to put her brick and mortar every day of the week, she would need additional assessments to figure out how that would be physically possible for her. We realized after this IEP, so in May of that year she did math testing which I ordered through an educational service, and they assessed her language arts, her math, her science, and then came out with scores. But the entire test was on a computer online, and she really struggled with being able to read things off the screen and look at the screen for as many hours as were required for the testing. It would be similar in time to state testing. By that time of the year I already knew what she needed for the following year, and I just made sure I didn't have her on a computer with a tutor or any sort of online class for longer than a half hour, hour at the most.

Since we signed this IEP, she's also been diagnosed with **[REDACTED]**. Unfortunately, those allergic reactions can be triggered by any number of things -- someone's perfume, a smell of cleaning solution, in addition to all the normal environmental triggers that you would think allergies would be associated with. Also with small intestinal bacterial overgrowth, SIBO. It greatly slows her motility, so sometimes she needs to go to the restroom, and she's literally in the bathroom on the toilet for two to three hours at a time. She's had issues with all stopping so suddenly in the middle of a school year. She has questioned us a lot on if she did something wrong, why are they taking my services away, I still need help.

Last week, some of the SPED teachers from Wasatch did reach out about restarting her services. So she started meeting with the writing teacher again last week, based on the last IEP we have. She still has issues with speech, but she had not had speech time since it was stopped. She started up again this past week and had one session. They did continue the counseling past December, but it was no longer mandated minutes, so the counselor didn't have to reschedule

with us if she was out for a training session, or if something happened on her end, like you would normally have in an IEP, that person would be expected to reschedule minutes with you, that expectation was gone.

None of [REDACTED] personal needs were considered in the decision to switch her program. They were saying there is a compliance issue and switching [REDACTED] program is how it could be fixed. Her educational needs and her physical and psychological needs overlap a lot. I was concerned about all of it.

WITNESS: [REDACTED], petitioner, and father of [REDACTED], testified in pertinent part as follows:

A brain scan for [REDACTED] showed part of her gray matter didn't fully migrate to where it normally is in an adult. It's a developmental thing, with no remedy, where her brain didn't develop quite the way that is typical. And doctors didn't know what it could possibly affect or how it could possibly affect her.

WITNESS: [REDACTED], School Principal for Wasatch Learning Academy, the director of a K-8 school, testified in pertinent part, as follows:

Participated in IEPs for [REDACTED] beginning of fall 2021. Recall sending all requested attachments to [REDACTED] and finds [REDACTED] was prepared for the meeting topic on October 22, 2021. The topic was to discuss requirements from the state regarding portions of FAPE, and requirements put upon the school to make some curriculum program changes for all students with IEPs. Prior written notice (reviewed/pre-approved by the state) was sent to [REDACTED] before and after the meeting. The notice did not include any official forms from the Utah State Board that specified curriculum program changes for IEP students because there was no physical copy stating this. Majority of the directive was given either over Zoom or in phone conversations, and I think we have in evidence several attempts from me to try to ascertain it in writing. They did, however, share ways that parents could file complaints regarding the situation or reach out to them directly, and I made sure we included that in each meeting notice. The proposed change was a change to the general education curriculum program not the IEP. I felt from her parents that it would be a significant change and they expressed that a combination of the student's ability would need to be considered for any changed placement. I don't believe anything would have stopped. What would have been added is specialized instruction within the general core curriculum. That's what was deemed missing. The IEP did not dictate a curriculum program. We were not able to provide FAPE as required by the state and tried to continue to work

things out, and we did not schedule another IEP meeting, but we did review parental safeguards, including parent's rights to call a meeting at any time.

I was required to work within parameters outlined by the state. I was meeting my job duties required of me and trying to do that by absolutely looking at each child's accommodations to make sure that we could do that appropriately. The state had deemed that Connect did not meet their standard and definition of the portion of FAPE specific to general education, and that we would no longer be able to access federal monies and provide services for students with IEPs if we were not holding ourselves accountable to the specialized instruction within the general education core.

[REDACTED] are attorneys with whom USBE consults; they are not the state's USBE attorneys. There were multiple calls and zoom meetings seeking clarification. **[REDACTED]** stated USBE is not the decision maker for the IEP teams, meaning the IEP team has to make the decisions within the parameters laid out by state and within federal IDEA law, and these parameters were set forth by **[REDACTED]** which they would not give to me in writing. This new parameter affected many students. Email conversation with them stated that a discussion was had regarding the standard of FAPE was not met with "parent-as-teacher" and that curriculum would need to be delivered by a school employee. **[REDACTED]** response was simply to refer to a licensing requirement and an ed code. What was previously discussed was not confirmed in writing.

Services within IEP are defined by the team. We were asked to attend to the portion of FAPE related to the program. We were repeatedly stated that we were denying FAPE by not attending to special education services and specialized instruction within the general education study. The email states special education services which would mean to include Tier 1 and Tier 2 including **[REDACTED]**. **[REDACTED]** was receiving special education services at the time remotely through an online school via individuals under the direction of the district. Conversation with the state was that we were ignoring the Tier 1 general education core. That was our responsibility, and that was a denial of FAPE. It was not at this point a denial of services or implementation of the IEP; it was the specialized instruction within the general core. The USBE never put in writing that they were referring to Tier 1, but in their special education regulations they do. **[REDACTED]** would often refer me to those. I never spoke to the state directly about **[REDACTED]**, I was in continuous conference with them about implementation of their mandate. **[REDACTED]** was receiving all the services afforded her in her IEP, the general education portion of the IEP. I am not aware of her IEP stating her curriculum program. That's not typical.

We have a partnership with Harmony Education which is one of many curriculum vendors that we have contracts with. I believe the contract may state they will provide credentialed teachers, but I am not privy to the contract. All students who enroll with Wasatch Learning Academy also enroll with Harmony Education. That gives them access to their curriculum program. I never met with Harmony to see if they could provide a teacher for [REDACTED] because it's the schools primary responsibility to provide instruction, and we have certified teachers. I started my role in the 2021-2022 school year. Harmony was not a member of the meeting. Mother did express concern over the change in curriculum program/delivery method of the instruction. In this case instruction by a certified teacher in a classroom of peers. This was requiring us to provide something that was not currently being provided. We were trying to provide an appropriate standard FAPE, which meant giving her access to all the things that were required in the general education appropriate program. Which was Tier 1 instruction. The Connect Program which is taught by our classroom teachers, our special educators, was what the state at that point had identified as our only acceptable standard of FAPE. I have no written communication stating this. During a different investigation the state learned we were in violation of FAPE as to students with IEPs and I came to an understanding of this being part of their concern. I realized we needed to create a document that would appropriately outline and define our obligations to students with IEPs.

[REDACTED] shared she would not choose Connect nor will she revoke [REDACTED]'s IEP. I explained to [REDACTED] what was being asked of us by the state. We told them the state's only acceptable program for FAPE was Connect and I provided them with a description of it. She invoked the stay put. [REDACTED] communicated [REDACTED] was receiving tutoring in an Orton-Gillingham program and that she didn't want to lose that best practice. The team agreed. Our special education teachers are trained in Wilson, the program. But mom rejected our offer because they wanted to keep their tutor in their program, which is the Portfolio program by parent-led-instruction. Through Connect the classroom teacher and the special educator would provide the instruction. "What is at conflict here is the [REDACTED] desire for autonomy for education. The question is that they belong to a public entity, a public education, and they have access to public funds. And that's what the state continually impressed upon me and I tried to communicate to the [REDACTED], that we, the public school, are accountable to the state for the use of those funds, including federal funds for implementation of IEP, and they were calling into question our denial of FAPE for students who we are not providing specialized instruction within the general ed setting." My conclusion is that parent-led-instruction does not meet the state standard. The result would be that they would not be able to access federal funding under IDEA for the school to provide services because we were in denial of FAPE. As [REDACTED] stated in a conversation

it would be considered fraud. It was very clear to me that our accreditation as a school, that our standing with the USBE as a district was very much in question if we didn't clean up what they deemed a denial of FAPE through general education. I offered the family a different program delivery, a different mode of instruction via Connect, or revocation of IEP, or RWA.

At the time we did not discuss Flex Direct with the parents because it did not look like the current description. It was with due diligence to change Flex Direct so that it could be an additional offering of FAPE utilizing asynchronous instruction. Which are recorded instructions by a certified teacher, modeling the same parameters of our connect live program by making that recorded. These lessons can be watched and completed at their own pace. The current document was authored in June 2022.

WITNESS: [REDACTED], Special Education Director for Wasatch County School District, testified in pertinent part, as follows:

On June 1st I assumed the role of Sped Director, and I have been employed by WCSD for 21 years. As soon as my role began it was made clear to me, having been working closely with [REDACTED] (UPIPS-Utah Program Improvement Plan Coordinator for all things compliant) that we were going to have difficulty with the way instruction was being delivered in the Portfolio program. We knew there was a problem with not having a Utah licensed teacher delivering the instruction, specialized instruction that students with disabilities needed to access grade level curriculum. On the day [REDACTED] and her UPIPS team discovered a student from WLA was taking Portfolio she “very specifically and very emphatically had a discussion with me that said, we must move these students and they must be moved now. They must be moved from this type of educational delivery.”; which [REDACTED] was a part of. And all their core must be under the instruction of a Utah licensed teacher. [REDACTED] was not receiving instruction from a Utah licensed educator under the direction and supervision of WLA, or our LEA.

We wanted to continue to give [REDACTED] special education services. “Looking at the SPED IDEA and Utah SPED law under the guidance of [REDACTED] and the state, it became very clear that special education, even the definition itself is specialized instruction and related services. And the reason related services exist are to make sure that students with disabilities can access grade level instruction.” As we were looking for a way to deliver instruction to [REDACTED] we were given more direct information that said, “special education services exist for general education to make sure that these students have the instruction they need in grade

level Utah core content so that they can have the same outcomes as other students.” According to the data I have, “yes” [REDACTED] was making adequate progress based on the previous program, and the reason that we had to consider changing it was “because of compliance”. In trying to come up with options that might meet the directives of the state, it came to my attention that the timeline that WLA thought that we would meet, was as IEPs came due the changes then could be made. But, [REDACTED] was clear we didn't have that time.

To comply with Utah's mandate we'd have to replace [REDACTED] mother with a licensed credentialed teacher that would be working with her special education teacher to make sure there was grade level content but that it was accessible to [REDACTED] via the Wasatch Connect program. We were still trying to find a way to meet the needs of the kids, and trying to figure out what to do with the kids whose parents did not want to join the Connect program. At that time we were told “you have to get them to revoke services. They could stay in Portfolio, but they cannot have special education services.” If the parent voluntarily revoked their child's IEP services, “We would meet with them. We would tell them at that time, we can still give you a 504 accommodation and we can still work with you. You can be on Portfolio. We just will not be able to provide any special education services, meaning no IEP, meaning no related services like speech, OT, PT.” It would have taken away related services even though they had a 504 in order to comply with the state mandate. This is because there are “federal and state funds above and beyond a regular WPU that can be accessed or the LEA can use for special education students. All compliance must be met or funding can be pulled for those services.”

I participated in the October 22, 2021 meeting, where [REDACTED] testing was not discussed, but her particular needs were. Her mother expressed concern about how long [REDACTED] could sit at a computer. “At this time we had spoken specifically that we felt that Connect would be able to implement all parts of the IEP as set forth, and that we would continue to work with [REDACTED] and be successful.” “The purpose of this meeting was to give some information to mom and to try to let her synthesize and think about this...we very clearly...told her that we...can make this work and that we could meet...again to try to get very specific on what we needed to do.” “...we would follow her IEP as set forth” under the Wasatch Connect program, but with a certified teacher giving direct instruction. This would be an amendment to the IEP, but we did not present them with this notation on a new document to sign.

For the November 19, 2021 meeting, mom was familiar with [REDACTED] core curriculum, but “we were not delivering instruction, nor were we familiar with it,...we were not privy to that

curriculum". So we wanted them to give us a chance and "come to Connect so that we can meet her needs" The parents asked for information about Wasatch Connect Program and [REDACTED] and [REDACTED] explained the program to them briefly. At the beginning of the year ('21) I communicated with parents regarding compensatory services, which were provided. To my recollection [REDACTED] was not offered a packet program to accomplish her core education. This would be something that the team would talk about, but did not.

Witness: [REDACTED], Former SPED Director at Wasatch, testified in pertinent part as follows:

He coordinates the Family Education Center and is a school psychologist.

He was the Director of SPED in Wasatch Co. for 8 years

They collaborated with the [REDACTED] School District for the evaluation of the student. The Wasatch Learning Academy contracted with Harmony to provide online services. This was started in August 2020. Harmony connects to a school district to enroll students to meet the standard of having a teacher record. All of the funding flowed through the Wasatch County School District.

[REDACTED] had concerns about how SPED and Harmony were modifying the curriculum, the source of the curriculum, and SPED regulations/law. He began to realize that the online services did not meet the time and content standards for curriculum in the state of Utah.

[REDACTED] did not see how the parent-led instruction program could meet the standard and quality of time and content of instruction. There was no relationship set up with the parents. [REDACTED] was concerned that they didn't have any hands on the quality of instruction, the modifications, and reporting to the state and federal government on the student's progress. This is necessary to maintain funding.

[REDACTED] met with [REDACTED] and their team at Harmony to discuss training them on SPED ASAP in late October. [REDACTED] was concerned that the parent communication was poor and putting him in a negative position with the parents. They didn't understand why they were receiving instruction information from [REDACTED].

Harmony finally sent information explaining [REDACTED] relationship in November 2020. His caseload went from 700 to 900 in a day. In a letter dated November 2020, Harmony was well aware that there had to be a credentialed teacher delivering services to the student.

They began writing the IEP in the late fall of 2020. The **[REDACTED]** were very supportive of our efforts and very communicative about the needs of their student.

Harmony starts with their program August 2020, **[REDACTED]** becomes aware of the noncompliance issues with Harmony in October-November and yet in May 2021, still allowing an IEP that is not in compliance with State and Federal law.

[REDACTED] received parent led instruction the entire 2021 school year. During their IEP meetings, **[REDACTED]** recognized that **[REDACTED]** could benefit from counseling. In May 2021, **[REDACTED]** contract switched over to a new role and he had zero interactions with the IEP.

He felt that the MAY 2021 IEP was a natural progression. He liked the collaboration with the parents based assessment of the student along with the school team.

EXHIBITS 6-9 are all within Petitioners' Exhibit 14. They are admitted for the record.

Exhibit 2-14 are the same as the Petitioners' Exhibit 14.

[REDACTED] declares the May 2021 IEP was going to direct services. The special consideration on 5—page 2 of tab 5 says:

They selected the environment for the education setting—public separate school, not home school instruction. The parent provides the majority of instruction through the enrollment of Wasatch Learning Academy. THEY DID NOT WRITE OFF THAT THE PARENTS WERE GOING TO DO ALL OF THE INSTRUCTION ON THIS IEP.

There was another change to the IEP Fall of 2021. **[REDACTED]** was very pleased with the follow up in the Fall. He maintained this was good practice.

[REDACTED] was not involved in any further IEP meetings after May 2021.

Pohl's Cross Examination:

Harmony was to make the arrangements for a teacher of record for **[REDACTED]**. That teacher would be responsible for providing at least some instruction in the portfolio program.

[REDACTED] did not consult with Provo before becoming involved with Harmony. He repeated efforts to contact the Provo School district once Harmony was established in Wasatch County School District.

[REDACTED] wanted to make it clear on the IEP to whomever was going to be inheriting this document, that this IEP is a result of enrollment in Wasatch County School District and the Wasatch Learning Academy is the entity that will make these IEP decisions moving forward. The student would be enrolled in our online school.

After much discussion with PROVO, **[REDACTED]** believed that Provo mismanaged a large number of the IEP files and folders through their relationship with Harmony. The Provo school district was unhappy with Harmony's services. They were not able to meet the IEPs and that Wasatch inherited the problems.

One of **[REDACTED]** first correspondences with the **[REDACTED]** was that their IEP timeline had lapsed and the files received from PROVO were in poor shape.

[REDACTED], the student's mother, **[REDACTED]** on recall Testimony, testified in pertinent part as follows:

[REDACTED] gained her knowledge from **[REDACTED]** before the October 22nd meeting.

Her meeting knowledge included the desire to discuss FAPE and discussion regarding IEPs and 504s.

The meeting notes are combined with the October 22 meeting and the November 19th meeting. None of the people listed in the meetings had physically met **[REDACTED]**.

[REDACTED] and **[REDACTED]** had met/worked with **[REDACTED]**.

[REDACTED] discussed an email from **[REDACTED]** that gave a resource for families who are providing student instruction and in need of intervention services but wanting to maintain parent-led education.

The Orton-Gillingham method is considered the best practice to teaching dyslexic students.

[REDACTED] is familiar with the major subsets within this practice. Barton Reading and Spelling is the curriculum she used because it was recommended by their educational facilitator who is a credentialed California teacher and is certified in reading instruction.

[REDACTED] has been doing that program for 4-5 years and currently in that program.

Discussion

General Legal Standards

Students with disabilities who are protected by the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC § 1400(d); 34 CFR § 300.1(a). The IDEA further provides that a party may present a complaint and request for due process hearing with respect to any matter relating to the identification, evaluation, educational placement, or provision of a FAPE to a disabled student. 20 USC § 1415(b)(6).

The IDEA and its implementing regulations provide that in order to qualify as a "student with a disability" under the IDEA, a student must (1) meet the definition of one or more of the categories of disabilities which include: . . . a specific learning disability . . . , and (2) need special education and related services as a result of the student's disability. CFR § 300.8 (a)(1). A student is in need of special education and related services when the student requires those services in order to receive an educational benefit from the student's educational program. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7TH Cir. 2010); *Sebastian M. V. King Phillip Reg'l Sch. Dist.*, [59 IDELR 61](#) (1st Cir. 2012).

Petitioners' Procedural Issues

An allegation of a denial of FAPE to a disabled student can be based on either substantive grounds or procedural violations of the IDEA. 20 USC § 1415(f)(3)(E). *Hendrick Hudson Central School Dist v. Rowley*, 458 US 176; 102 S Ct 3034; 73 L Ed 2d 690 (1982); *Sytsema v. Academy School District No. 20*, [538 F.3d 1306](#) (10th Cir. 2008), 50 IDELR 213. "The IDEA also sought to maximize parental involvement in educational decisions affecting their disabled child by granting parents a number of procedural rights. For example, parents are entitled to: (1) examine all records relating to their child, 20 U.S.C. § 1415(b)(1); (2) participate in the IEP preparation process, *id.*; (3) obtain an independent evaluation of their child, *id.* (4) receive notice before an amendment to an IEP is either proposed or refused, § 1415(b)(3); (5) take membership in any group that makes decisions about the educational placement of their child, § 1414(f); and (6) receive formal notice of their rights under the IDEA, § 1415(d)(1)." *Ellenberg ex rel. S.E. v. New Mexico Military Institute*, [478 F.3d 1262](#) (10th Cir. 2007). The IDEA's "procedural guarantees are not mere procedural hoops through which Congress wanted state and local educational agencies to jump. Rather, the formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decision making." *Daniel R.R. v. State Bd. Of Edc.*, [874 F.2d 1036](#), 1041 (5th Cir. 1989) (internal quotation marks omitted).

However, proving a procedural violation is only a first step to obtaining relief. In *Sytsema*, the court held that an "IEP's failure to clear all of the Act's procedural hurdles does not necessarily entitle a student to relief for past failures by the school district." *Sytsema*, 50 IDELR at 216; *quoting Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, [520 F.3d 1116](#), 1125-26 & n.4 (10th Cir. 2008) ("[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."); *quoting 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).

Congress provided in the 2004 amendments to the IDEA that to find a denial of FAPE based on a procedural violation, the Hearing Officer must find that the procedural violation: (1) impeded the student's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or (3) caused a deprivation of educational benefits. 20 USC § 1415(f)(3)(E)(ii); 34 CFR § 300.513(a)(2); UCA § 53A-15-301(IV)(O)(2).

The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and information they provide regarding their child. (64 Fed. Reg. 12473 (Mar. 12, 1999).) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J.*, *supra*, 267 F.3d at 891.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031,1036 (3rd Cir. 1993).) Stated another way, a parent has meaningfully participated in the development of an IEP when he/she is informed of his/her child's problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*, 315 F.3d 688, 693 (6th Cir. 2003); *Fuhrmann*, *supra*, 993 F.2d at 1036.).

Substantive Issues

Petitioner's substantive issue is: (a) Whether the Respondent failed to provide the Student with a Free Appropriate Public Education (FAPE) during the time the student attended the School by:

Failing to place the student in and provide an educational course of study that complied with existing state and federal law.

Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR § 300.1(a); USBE SER II.A.

The Hearing Officer finds that the School District failed to provide the student with a Free Appropriate Public Education (FAPE) in that the "Harmony Portfolio" program under which the student was enrolled did not require, nor did the district provide a certified or licensed instructor to deliver core curriculum instruction, but only had a parent led instruction model. It was clearly established that this violated state and federal law and thus failed to provide FAPE. While it was evident that the school district made good faith efforts to come into compliance with requirements or regulations, it was also evident that the school district did not know, nor did they make themselves aware, which should be part of their job when contracting with a program like Harmony, of the violative nature of the Harmony Portfolio program. Undersigned finds this to be inexcusable neglect. It is the responsibility of the school district to ensure its offerings are fully compliant with all state and federal regulations. If not, the students and parents of its school district find themselves in the perilous situation of educating both themselves and the student.

Therefore, Petitioner has proven by a preponderance of the evidence that Respondent violated the provisions of the IDEA within the statutory jurisdiction period of Petitioners' due process Complaint, which was filed on April 15, 2022. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and analysis of issues and the Hearing Officer's own legal research, the Hearing Officer now enter the following Conclusions of Law:

1. Petitioners met their burden of proof that Respondent failed to provide the Student with a FAPE by such removal from his IEP. *Shaffer v. Weast*, [546 U.S. 49](#), 61 (2005).

ORDER

Based upon the foregoing findings of facts, evidence in the form of testimony and exhibits, procedural and substantive issues and conclusions of law, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. It is ORDERED that Petitioners are the prevailing party in this matter.
2. It is ORDERED that Petitioners' request for relief in the form of the student being "enrolled in the Harmony Portfolio Program with a credentialed teacher of record monitoring the program" is GRANTED and further that the district is ORDERED to ensure that in doing so, that ALL state and federal regulations regarding such program be followed, including specifically that a credentialed instructor is assigned to the student for delivery of instruction and progress monitoring.
3. It is ORDERED that the Respondent shall, as soon as is practicable, conduct evaluation(s) of the student to determine where she currently stands in her educational progress, and if such evaluations find that the student is lacking or deficient, that the Respondents shall take all necessary actions to close the deficiency gap as soon as is possible, given the student's unique circumstances.
4. It is ORDERED that Petitioners' request for relief in the form of "continued attendance at Options Day program" is GRANTED. The student shall be provided services at whatever location is geographically preferred.
5. The Petitioner's request for attorneys fees is beyond the scope of authority of this hearing officer, thus such request is neither granted nor denied.

Any and all other requested relief, not specifically GRANTED and ordered herein, is DENIED.

Dated this 6th day of October, 2022.

//s// Frank Snowden
USBE Hearing Officer