

Judson W. Tolman

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Hearing Officer

BEFORE THE IDAHO STATE DEPARTMENT OF EDUCATION
(ADMINISTRATIVE HEARING)

██████ and ██████ as legal guardians and parents)	Case No. H-21-03-02a
of ██████ a minor,)	
)	
Petitioners,)	
)	MEMORANDUM DECISION
vs.)	
)	
WEST ADA SCHOOL DISTRICT No. 2,)	
)	
Respondent.)	
_____)	

INTRODUCTION

██████ and ██████(collectively “Petitioner”), parents of ██████ (“Student”), submitted a Due Process Complaint (“Complaint”) to the Idaho State Department of Education on March 2, 2021. Petitioner’s Complaint alleges that West Ada School District (“Respondent” or “WASD”) failed to provide Student with educational benefits afforded to students with disabilities under the Individuals with Disabilities Education Act (“IDEA”). Respondent submitted an Answer to the Complaint on March 11, 2021, denying Petitioner’s claims.

A due process hearing was held on May 26 -27, 2021, on Petitioner’s claims. Witnesses testifying at the hearing included:

- ██████ Petitioner;
- ██████ special education supervisor;

- [REDACTED] speech language pathologist;
- [REDACTED] board certified behavior analyst;
- [REDACTED] special education teacher;
- [REDACTED] paraprofessional;
- [REDACTED], general education teacher; and
- [REDACTED] resource room teacher.

Both Petitioner and Respondent presented documents at the due process hearing that were admitted into evidence. The following exhibits were admitted into evidence:

Petitioner’s Exhibits: 1, 2, 3, 4, 9, 11, 12, 13, 14, 15, 16, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 36, 39, 51, 55, 56, 59, and 62A;

Respondent’s Exhibits: 203, 232, 233, 234, 235, and 243.

ISSUES

On April 1, 2021, the Parties entered into a Mediation Agreement wherein Petitioner declares the following:

“I, [REDACTED], agree to withdraw the following allegations or claims pending in case #H-21-03-02a against the West Ada School District #2. I request the dismissal of the following with prejudice:

1. ESY eligibility
2. Amount of instruction time for math, reading, and written language in the Resource Room.

“I do not agree to withdraw the following allegations in the case and wish for these to be resolved through the State Department of Education’s complaint/hearing process.

1. The need for a certified ABA therapist/specialist/behaviorist.
2. The need for individual in addition to small group speech and language services.”

Mediation Agreement, p.5.

Accordingly, Petitioner withdrew, with prejudice, Petitioner's claims relating to ESY and the amount of instruction time for math, reading, and written language; Petitioner's unresolved claims addressed herein are:

1. Was Student denied FAPE by WASD failing to provide behavioral services through an ABA therapist/specialist/behaviorist; and
2. Was Student denied FAPE by WASD failing to provide individual speech-language services.

RELIEF SOUGHT BY PETITIONER

The relief sought by Petitioner for the remaining claims, as stated in the Complaint, is as follows:

“An . . . ABA therapist to be assigned to [Student] for 1950 minutes per week”

“[Student] should also receive individualized speech instruction.”

Complaint, p.2.

BURDEN OF PROOF

“The burden of proof in an administration hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). Commenting on *Schaffer*, the Ninth Circuit stated: “[T]he ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims, . . . [a]bsent some reason to believe that Congress intended otherwise, . . . we will conclude that the burden of persuasion lies

where it usually falls, upon the party seeking relief.” *Van Duyn v. Baker School Dist.* 5J, 502 F.3d 811, 820 (9th Cir. 2007).

Applying *Schaffer*, and the Ninth Circuit opinion in *Van Duyn*, Petitioner bears the burden of proof on both issues for determination in this matter because Petitioner is the party challenging the IEP and the only party seeking relief. Petitioner bears the burden of proof on all issues necessary to prove Petitioner’s claims including the Petitioner’s assertion that the services provided by Respondent are not comparable services. As noted below, Respondent implemented an IEP for the provision of FAPE to Student. Petitioner seeks relief from said IEP and therefore bears the burden of showing that the IEP, and the services provided thereunder, do not satisfy the requirements of the IDEA.

FINDINGS OF FACT

- 1) Student is ■ years old and is presently attending ■ Elementary School (“■ Elementary”) in the West Ada School District. TR 15:10-21.
- 2) Student has been diagnosed with autism and an unspecified communication disorder. Complaint, p. 2; TR 15:22-25.
- 3) Prior to the 2020-2021 school year, Student lived in California and attended the ■ and ■ grade at ■ Elementary School in the Newhall School District. TR 16:1-6; Ex 1.
- 4) While attending ■ Elementary, Student received an IEP with a “Start Date of May 16, 2019 and an “End Date” of May 15, 2020 (“2019 IEP”). Ex 1., p.26.
- 5) The 2019 IEP included goals and observations in areas of reading, written language, mathematics, speech, motor skills and behavior. Ex 1.
- 6) Services provided under the 2019 IEP included in pertinent part:

- a) Behavior Intervention Services
Provider: Nonpublic agency (NPA) under contract with SELPA or district
Duration: 1950 min. served weekly
 - b) Language and speech
Provider: Nonpublic agency (NPA) under contract with SELPA or district
Duration: 60 min. served weekly
Ex. 1, p.26.
- 7) While at [REDACTED] Elementary, Behavior Intervention Services were provided to Student by an ABA therapist. TR 21:19-22:2.
- 8) On August 20, 2020, [REDACTED] Elementary granted Student an IEP (“August IEP”). The August IEP did not include goals and objectives; however, it did set forth services to be provided to Student. Services provided under the August IEP included, in pertinent part:
- a) Behavior Intervention Services
Provider: Nonpublic agency (NPA) under contract with SELPA or district
Duration: 1950 min. served weekly
 - b) Language and Speech
Provider: Nonpublic agency (NPA) under contract with SELPA or district
Duration: 60 min. served weekly
TR 145:24-146:7; 256:20-25; 109:10-13; 220:24-221:11. Ex 9.
- 9) The August IEP has a “Start Date” of August 20, 2020, and an “End Date” of October 13, 2020. Ex 9.
- 10) The Newhall School District did not do any formal assessments to determine or write the August IEP. TR 112: 16-20, Ex 114.
- 11) Neither the 2019 IEP nor the August IEP describes or prescribes any methodologies to be used for the provision of Behavior Intervention Services or Language and Speech services. Ex 1, 9; TR 108:5-8.
- 12) Neither the 2019 IEP nor the August IEP specifies who should provide, or any qualifications needed in order to provide, Behavior Intervention Services or Speech and Language services. Ex 1, 9; TR 108:5-8.

- 13) At the time Student transferred to WASD, Student's triennial assessments as required by the IDEA were due, but were not completed by the prior school district due to the COVID-19 Pandemic. TR 71:19-72:9; 105:14-107:3; 202:15-203:9); Ex 9.
- 14) Student's most recent evaluation for an IEP was August 23, 2017. Ex 1, p.1.
- 15) On September 18, 2020, Student moved from California to Idaho. TR 14:23-25.
- 16) On September 23, 2020, Student registered to attend [REDACTED] Elementary. TR 99:22-24, 101:6-8. Ex 203.
- 17) A Transition Meeting was held on September 28, 2020, for the purpose of discussing Student's special education needs. TR 141:3-143:11.
- 18) Student started attending school at [REDACTED] Elementary on or about October 2, 2020. TR 143:15-17.
- 19) After Student started attending [REDACTED] Elementary, WASD provided Student with a paraprofessional to provide behavior and academic support in the general education classroom, at lunch, during recess and at the beginning and end of each school day. TR 143:15-17; 162:3-12; 290:2-20; 316:9; 321:4; 322:3; 324:8; Ex 15.
- 20) WASD provided speech services for Student starting on October 6, 2020. TR 220:6-23; Ex 56.
- 21) On October 13, 2020, an IEP Team Meeting was held for the purpose of creating an IEP for Student ("Interim IEP"). TR 147:18-148:9; Ex 14.
- 22) During the meeting on October 13, 2020, the IEP Team indicated that the August IEP did not have goals or objectives and was insufficient. WASD did not to accept the August IEP. TR 109:10-13; 171:3-20; 296:5-24; Ex 9.

- 23) During the meeting on October 13, 2020, the parties discussed various goals for Student's IEP, including potential goals for Communications, Math, Fine/Gross Motor Skills, Reading and Social Emotional Behavior. Ex 14, p. 1-2.
- 24) The information used to establish the goals for the Interim IEP included information obtained from Student's previous school, information provided by Petitioner and informal assessments collected by Student's various teachers. TR 164:18-167:4; 201:8-202:14.
- 25) During the meeting on October 13, 2020, there was discussion about whether a paraprofessional in lieu of an Applied Behavior Analysis ("ABA") Therapist to provide behavioral support for Student was appropriate. WASD proposed gathering additional behavioral assessments to help WASD with goals, objectives and services. TR 52:22-53:22; 179:17-180:2; Ex 14, p 2.
- 26) Following the IEP team meeting on October 13, 2020, WASD provided Student special education services consistent with the Interim IEP. TR 324:20-325:17; 357:4-361:13; 217:9-218:19; 255:1-10; Ex 15, 403.
- 27) The Interim IEP included goals and objectives in areas of communications, mathematics, reading, written language and social/emotional/behavioral needs. Ex 15.
- 28) The services provided to Student under the Interim IEP include, in pertinent part:
 - a) Behavioral Skill Instruction
Staff Responsible: Special Education Teacher
Amount: 1950 minutes weekly
 - b) Language Therapy individual/group
Staff Responsible: Speech Language Pathologist
Amount: 45 minutes weekly
Ex. 15.
- 29) On October 28, 2020, the Parties participated in a Facilitated Meeting where WASD indicated that additional behavioral assessments were needed. TR 180:17-182:5.

- 30) On October 30, 2020, WASD sent a Written Notice to Petitioner notifying Petitioner that the Interim IEP drafted at the October 13, 2020, meeting would continue to be implemented. Ex 15, 19.
- 31) On November 11, 2020, a second Facilitated Meeting was held at which time Petitioner agreed to allow academic testing and communication testing, but would not agree to a Functional Behavior Assessment (“FBA”) or other behavioral assessments because Petitioner felt WASD was biased. TR 84:1-17; Ex 25.
- 32) After the meeting on November 11, 2020, a Consent for Assessment was sent to Petitioner. Although the Petitioner signed the document on November 28, 2020, Petitioner specifically excluded the FBA and added a note denying consent for any behavioral assessment. TR 90:6-21; Ex 26.
- 33) To date, Petitioner has not authorized WASD to conduct an FBA or a behavior assessment. TR 114:7-16; 129:1-15; 210:25-211:12; Ex 27. Petitioner won’t allow WASD to conduct a behavior assessment because Petitioner “did not trust the School District that they would be unbiased.” TR 125:4-25.
- 34) While attending ██████ Elementary Student has been accompanied by a paraprofessional for most, if not all, of ██████ school day, with the exception of times when ██████ is involved in individual or group sessions. TR 290:5-20. WASD’s paraprofessional support includes the time that Student spends in the general classroom, during lunch and recess. TR 316:9-327:19; 357:4-361:19; 339:11-343:21.
- 35) Student has not exhibited significant maladaptive behaviors while attending ██████ Elementary. TR 120:23-121:7; 362:19-22; 342:21-24; 349:11-350:5.
- 36) Student received speech-language therapy from ██████ Speech Language Pathologist, individually and in a small group. TR 217:24-224:25.

- 37) Group speech-language therapy sessions included Student and one peer. Group sessions included working on Student's goals to improve Student's communication with peers. TR 224:10-25.
- 38) While attending ██████ Elementary, Student has made progress in Student's speech-language abilities. 225:11-226:20; Ex 233.

CONCLUSIONS OF LAW

The purpose of the IDEA is, among other things, to provide all children with disabilities a Free Appropriate Public Education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further employment and independent living; to ensure that the rights of children with disabilities and parents of such children are protected; and to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities. 20 U.S.C. § 1400(d)(1)(A)-(C).

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), the U.S. Supreme Court established what constitutes FAPE holding that that "basic floor of opportunity" provided by the IDEA consisted of access to specialized instruction and related services which are individually designed to provide an educational benefit to the disabled child. In its ruling, the Supreme Court declined to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* Nonetheless, the Supreme Court held that a State satisfies the FAPE requirement by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that

instruction” and that a plan is reasonably calculated when it enables a child to achieve passing grades and advance to the next grade level.

The *Rowley* standard was modified in *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017), where the Supreme Court stated, in relevant part, that to meet its substantive obligation under the IDEA a school must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” The IDEA states that instruction needs to be offered in a manner that is specifically designed to meet a child’s needs through an individualized program. It needs to take into consideration the child’s present levels of achievement and potential for growth. The “adequacy of an IEP turns on the unique circumstances of the child for whom it was created.” *Id.*

Applying *Endrew F* to the present case, the claims raised by Petitioner challenge whether the IEP offered by WASD is specifically designed to meet Student’s individual needs in light of Student’s autism and communication disorder because: 1) the behavioral interventions in Student’s IEP are implemented by WASD through paraprofessionals rather than ABA therapists; and 2) the speech-language therapy sessions are not individual, one-on-one, sessions.

I. WASD provision of Behavior Services using paraprofessionals does not deny FAPE.

The IDEA section applicable to Petitioner’s behavior services claim states:

“In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.”

20 U.S.C. § 1414(d)(2)(C)(i)(II).

Student meets the initial qualifications to apply the statute:

- Student is a child with a disability,
- Student transferred schools within the 2020-2021 school year enrolling in a new school, [REDACTED] Elementary, and
- Student had an IEP that was in effect in another State.

Since Student meets these initial qualifications, then:

- 1) The local educational agency, WASD, shall provide Student with FAPE, including services comparable to those described in the previously held IEP, and
- 2) WASD must provide FAPE with comparable services until WASD conducts an evaluation and develops a new IEP.

In this case, WASD provided Student with FAPE by providing Student with the same behavioral services as “described in the previously held IEP.” Consistent interpretation of the statute requires that the “previously held IEP” is the same the “IEP that was in is the effect in another State.” The August IEP was in effect when Student moved to Idaho and enrolled in WASD. The behavior services described in the August IEP are under the services titled as “Behavioral Intervention Services”. The August IEP does not include goals, observations or methodologies for the Behavior Intervention Services. The only description of these services in the August IEP are the general statements as to duration and frequency. Ex 9; see also Finding of Fact No. 4 above. Although named differently (i.e., Behavioral Intervention Services versus Behavioral Skill Instruction), the services relating to behavior provided by WASD in the Interim IEP are the same as those described in the August IEP. The Interim IEP includes additional

descriptions, goals and objectives that are not included in the August IEP, but both IEPs provide 1950 minutes per week of behavioral services.

Petitioner does not argue, and no evidence was presented at the hearing to show, that the provision of 1950 minutes per week of behavior services is a denial of FAPE. Accordingly, WASD complied with the above-quoted statute and provided FAPE to Student by giving Student 1950 minutes per week of behavior services – the exact behavioral services described in the August 2020.

Petitioner claims that WASD denied Student FAPE by providing the behavior services using paraprofessionals instead of ABA therapists. Petitioner does not argue against the behavior services, as described in both the August and Interim IEPs. Rather, Petitioner’s claim objects to the method in which such behavioral services are implemented. Ninth Circuit precedent makes clear that methodology decisions are left to the school districts, therefore, WASD’s decision to use paraprofessionals, instead of ABA therapists, is within WASD’s discretion to determine the methodology for providing behavioral services to Student. See *Lapine School District v. DW*, 28 IDELR 734 (9th Cir. 1998); *C.P. vs. Prescott Unified School District*, 631 F.3d 1117, 1122 (9th Cir. 2011).

Even if the provision of behavior services by an ABA therapist is considered to be included in the description of behavior services in the August IEP, the evidence presented at the hearing did not show that the services provided to Student by paraprofessionals are not comparable to services an ABA therapist would provide to Student.¹ Petitioner presented testimony asserting that an ABA

¹ In arguing that WASD should have provided the same behavioral services that Student received in California, Petitioner asserts that the goals and objectives in the 2019 IEP should be considered with, and used as part of, the August 2020 IEP. Petitioner’s Closing Arguments, p. 6. However, the 2019 IEP does not apply to this case. The 2019 IEP ended May 15, 2020, and was not “an IEP that was in effect in another State” as required by 20 U.S.C. § 1414(d)(2)(C)(i)(II). The IDEA does not require that Respondent

therapist may have education or training that a paraprofessional may not have, but, Petitioner did not show that the behavior services Student received from paraprofessionals would be any different than the services that Student would receive from an ABA therapist.

On the other hand, evidence presented at the hearing shows that the services provided to Student by paraprofessionals are comparable to services an ABA therapist would provide to Student. “Comparable” under the IDEA does not mean that the services need to be the same or identical, rather, comparable means “similar” or “equivalent.” See OSEP Comment, 71 Fed. Reg. 46540, 46681 (August 14, 2006)(stating “the Department interprets ‘comparable’ to have the plain meaning of the word, which is ‘similar’ or ‘equivalent.’”). It is undisputed that under the Interim IEP WASD provided Student with paraprofessional assistance in the general education class, and while ■ eats lunch, at recess, to and from classes, when ■ arrives and when ■ leaves the school. Student receives paraprofessional assistance most, if not all of the day. Ex 15. The Interim IEP provides “similar” (i.e., comparable) services to the services that an ABA therapist would provide Student. TR 171:3-15; 164:18-165:25; 308:20-309:22; 369:22-372:6.

Even Petitioner’s expert witness, ■ testified that, although she preferred using ABA therapists, the services provided by an ABA therapist and a paraprofessional are comparable.

“Q. In your opinion, is providing ABA services to a student say, who has autism, is that comparable to providing that same student with just a paraprofessional with oversight by a special education teacher?”

THE WITNESS: Yes. With ABA we are trained in – ABA can be used for multiple different diagnosis. But it is kind of like the gold standard for clients with autism. Myself, I have a large background in development disorders, especially autism. So yes, I think that I would rather – RBTs are just going to have more of the specialized experience and education with working with kids with autism, ADHD, a bunch of other developmental disorders.

provide the same or comparable services to an expired IEP which was not in effect when Student transferred to WASD.

Q. So it would be comparable but the distinction being that an ABA therapist would be more specific to the child.

A. Yes, because that's what we – that's the foundation of applied behavioral analysis is understanding the individualized client and creating goals especially for them. The biggest thing in ABA is it's individualized to the client.”²

TR 253:7-254:5.

Petitioner failed to meet its burden to show that behavioral services provided to Student by a paraprofessional are not comparable to behavioral services from an ABA therapist, the evidence shows just the opposite.

The final part of the above-referenced statute (i.e., WASD must provide FAPE with comparable services until WASD conducts an evaluation and develops a new IEP) cannot be used to hold Petitioner in violation of providing Student FAPE. In *V.M. v. North Colonie School Dist.*, 954 F.Supp. 2nd, 102 (N.D. New York 2013), the court held that a Plaintiff's failure to provide consent for Defendant to perform evaluations precluded Plaintiff from asserting that Plaintiff denied FAPE for not providing services related to the evaluations for which consent was requested. Although not controlling precedent, the court's reasoning is persuasive. The Petitioner in this case has refused to give consent to FBA and other behavioral assessments and therefore is precluded from claiming WASD has not provided the services related to the evaluations for which consent has been requested. As early as the October 13, 2020, IEP meeting, Respondent began requesting consent from Petitioner for FBA and other behavioral assessments; however, Petitioner has not given consent for any behavioral assessments. Petitioner's expert witness, ██████████ testified that: an FBA or other behavior assessment is necessary in order to determine what ABA services

² ██████████ gave further support for the position that services provided by ABA therapists and paraprofessionals can be comparable when she testified that, although she preferred using an ABA therapist for clients with maladaptive behaviors, she assigns both ABA therapists and a paraprofessionals to students with maladaptive behaviors. TR 250:7-252:16; 263:19-23.

should be provided, TR 258:20-259:1; an ABA plan cannot be provided without an FBA or a behavior assessment, TR 260:3-11; and to start or remove an ABA-related service an FBA is needed. TR 265:16-21. Applying *V.M. v. North Colonie School Dist*, Petitioner cannot assert WASD failed to provide FAPE by not providing ABA related services because Petitioner has refused to provide consent for the evaluations needed to determine what, if any, ABA services are needed.

As set forth above, the evidence in this case establishes that the Interim IEP, and the use of paraprofessionals to provide behavior services, offers the same or comparable behavioral services as required by the IDEA and is not a denial of FAPE.

II. WASD Provides Student Comparable Speech Services.

Petitioner asserts in the Complaint:

“[Student] needs individual instruction in speech, and [Student] previously was receiving 60 minutes per week individually as well as group instruction. Now [Student] is not receiving any specific speech instruction, even though [Student] clearly has speech deficits.

[Student] should also receive individualized speech instruction.” Complaint, p.2.

It is undisputed that WASD has provided Student with individual speech-language therapy. Evidence presented at the hearing shows that WASD provides Student with “45 minutes of speech-language therapy twice a week.” TR 217:18-21. These speech-language services include both individual and group sessions. TR 217:24-218:1; Ex 56.

The IDEA requires that WASD provide Student with comparable speech services. As noted previously, comparable services in this case requires a comparison of the services provided by WASD with the services described in the August IEP. The August IEP describes 60 minutes of speech therapy each week; however, the August IEP does not include goals or objectives. The

Interim IEP provides 45 minutes of speech therapy each week and also includes goals and objectives. Student is making progress toward these goals and objectives. TR 226:17-227:15. It is difficult to compare the speech services under the two IEPs without knowing the speech goals and objectives of each IEP. The evidence presented at the hearing shows that Student is making progress and benefiting from 45 minutes of speech therapy with meaningful goals and objectives. When compared to 60 minutes of therapy without goals and objectives and without evidence of progress or benefit to the Student, the speech services under the Interim IEP are at least comparable to the speech services described in the August 2020 IEP.

CONCLUSION

The choice by WASD to use of paraprofessionals in providing behavior services is a choice within WASD's discretion and the choice to use paraprofessionals does not deny Student of FAPE. WASD has provided Student the same or comparable behavioral services as required by the IDEA. Also, the speech-language services provided by WASD are comparable to the speech-language services described in Student's IEP in effect when Student moved to Idaho and enrolled at ██████ Elementary. Accordingly, Petitioner has provided Student with FAPE and Petitioner's requests for relief are both denied.

So ORDERED this 6th day of July, 2021.

/s/ - Judson W. Tolman
Hearing Officer

NOTICE

Any party aggrieved by the findings and decision herein has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under 20 U.S.C. §1415(i)(1). The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. (See 20 U.S.C. §1415(1)(2)). 20 U.S.C. §1415(i)(2)(a) provides that: Time limitation: The party bringing the action shall have 90 days from the date of this decision to file a civil action, **or if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by State law. (Emphasis Added).** IDAPA 08.02.03.109.05(g) provides that “An appeal to civil court must be filed within forty-two (42) calendar days from the date of issuance of the hearing officer’s decision.”

CERTIFICATE OF SERVICE

I DO HEREBY certify that on the 6th day of July, 2021, I caused to be served on the following a true and correct copy of the foregoing document by the method indicated below:

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By: /s/ - Judson W. Tolman
Hearing Officer