

Judson W. Tolman

[REDACTED]
[REDACTED]
[REDACTED]

Hearing Officer

BEFORE THE STATE IDAHO DEPARTMENT OF EDUCATION
(ADMINISTRATIVE HEARING)

)	
[REDACTED] as legal guardian and)	SDE No. H-22-05-27a
parent of [REDACTED] a minor,)	
)	
Petitioner,)	
)	
vs.)	MEMORANDUM DECISION
)	
BLACKFOOT SCHOOL DISTRICT,)	
District No. 55,)	
)	
Respondent.)	
)	

PROCEDURAL HISTORY

The Due Process Hearing Request (“Complaint”) in this matter was submitted by Petitioner to the State Department of Education (“SDE”) on May 27, 2022, with [REDACTED] appearing as legal counsel for Petitioner. Respondent (also referred to herein as “School District”), through its attorney Ann S. Magnelli, submitted an Answer To Due Process Complaint on June 6, 2022. The parties stipulated that in lieu of the resolution period under the Individuals with Disabilities in Education Act (“IDEA”) the parties would participate in and attempt to settle this matter through mediation with the initial mediation session was scheduled for July 13, 2023. The parties also requested that the period for conducting the due process hearing be extended to accommodate the

parties' [REDACTED] efforts. In response to the parties' request the deadline for completing the due process hearing was extended to October 3, 2022.

Following a status conference call with attorneys for the parties and the hearing officer on August 23, 2022, an order was entered granting Petitioner leave to amend the complaint. Petitioner's First Amended Due Process Hearing Complaint ("Amended Complaint") was submitted on August 31, 2022. Respondent submitted an objection to the amended complaint asserting that said amended complaint did not comport with the Order Granting Leave To Amend. During a status conference was held on September 8, 2022, Respondent's objection to the Amended Complaint was denied and, pursuant to a verbal request to extend the due process hearing period, the due process hearing deadline was extended to October 31, 2022.

On October 4, 2022, [REDACTED] withdrew as legal counsel for Petitioner and Petitioner requested another extension of time in order to procure legal representation. Pursuant to Petitioner's request the due process hearing deadline was extended to November 30, 2022. Attorneys [REDACTED] and [REDACTED] each filed a Notice of Appearance for representation of Petitioner in this matter on November 21, 2022. During a conference call on that same date with attorneys for the parties a further extension was requested and granted. Following the conference call the Third Order Extending Time and Scheduling Order was issued extending the due process hearing deadline until March 1, 2023, with hearing dates scheduled for February 1 – 3, 2023.

Prior to the hearing, on January 17, 2023, both [REDACTED] and [REDACTED] withdrew as legal counsel for Petitioner. A conference call with Hearing Officer, Petitioner and the attorney for Respondent took place on January 20, 2023, at which time Petitioner indicated that Petitioner would proceed pro se.

A due process hearing was held beginning on February 1st and concluded the following day, February 2, 2023. At the hearing the following witnesses provided testimony:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED] Petitioner
- [REDACTED]
- [REDACTED]
- [REDACTED]

The parties stipulated to the admission into evidence of all Petitioner’s Exhibits, identified as Exhibits 101 through 111, and all of Respondent’s Exhibits, identified as Exhibits 201 through 232.

Written closing arguments were submitted by both parties on February 16, 2023.

ISSUES

Petitioner asserts the following claims in the Amended Complaint:

1. Student was denied a Free Appropriate Public Education (“FAPE) due to the School District’s failure to properly evaluate Student to identify [REDACTED] resulting from Student’s disability.

2. Student was denied FAPE due to the School District's failure to include appropriate measurable, annual goals and short-term objectives or benchmarks in Student's Individualized Education Plan ("IEP").
3. The School District denied Student FAPE by failing to provide [REDACTED].
4. The School District denied Student FAPE by failing to provide Written Notice to Student prior to implementing Student's IEP.
5. By providing [REDACTED] the School District denied Student FAPE.
6. The School District has denied Student FAPE by [REDACTED] for Student [REDACTED].
7. Student was denied FAPE by the School District's failure to provide [REDACTED].
8. The School District denied Student FAPE by failing to provide Student with the [REDACTED] services required by Student's IEP.
9. Student has been denied FAPE by the School District [REDACTED] [REDACTED] from Student's IEP and not providing Student with [REDACTED].

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 the issues for determination in this matter.

FINDINGS OF FACT

1. Student has [REDACTED]. TR 133:10-11.
2. Student [REDACTED] [REDACTED]. TR 133:23-25.
3. Student began attending school in the Blackfoot School District in [REDACTED]. TR 133:3-4.
4. In [REDACTED], Student transferred to [REDACTED] where Student attended [REDACTED] grade. TR 133:4-6.
5. In [REDACTED], Student transferred to [REDACTED] in the Blackfoot School District. TR 133:7-11.
6. Student requires assistance with [REDACTED] [REDACTED]. TR 134:1-6.
7. Student does [REDACTED]. At Petitioner’s request, Student [REDACTED] although Student does not [REDACTED]. TR 16:16-20; 22:8-16; 52:25-53:3; 70:15-71:3; 72:8-20; 77:6-12; 176:8-10.

8. Student's eligibility category for special education is [REDACTED]. Exh. 104:LOI000055.
9. [REDACTED] was added as a related service to Student's IEP in November 2021. TR 19:21 – 20:2.
10. During the 2021-2022 school year, Student [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. TR 20:13-22:3; 31:17-25; 35:2-19; 36:15-23; 38:3-16; 45:5-19; 50:24-51:5.
11. In order to [REDACTED], Student would [REDACTED]
[REDACTED] TR 16:11-17:7; 22:11-25.
12. [REDACTED] is the only day that Student would [REDACTED]
[REDACTED]. TR 173:17-24; 174:8 – 13; Exh. 205:0126.
13. On [REDACTED] Student missed a half an hour of [REDACTED]
[REDACTED]. Student received additional [REDACTED]
[REDACTED] making up for the time missed on [REDACTED] TR 111:8 – 112:7; 116:8 23; 121:16-122:7.
14. At the November 15, 2021, IEP meeting the School District offered to [REDACTED]
[REDACTED] related to Petitioner [REDACTED]
[REDACTED]. TR 70:4-14;

- 174:14-16. Petitioner declined the School District's offer [REDACTED]
[REDACTED] TR 71:9-13; Exh. 205:0127.
15. Student lives [REDACTED] boundaries. If Student attended [REDACTED] then Student would not [REDACTED] [REDACTED]. TR 70:15-71:10; 176:3-7.
16. Student has advanced from grade to grade in the general education setting with the assistance provided through Student's IEP. TR 77:20-23.
17. During the 2021-2022 school year, the School District provided [REDACTED] services for the Student. Student's [REDACTED] services included [REDACTED] [REDACTED]. Exh. 228.
At the November 2021, IEP meeting Student's IEP was modified to include [REDACTED] [REDACTED]. Exh. 104; 205:0127. The School District [REDACTED] [REDACTED] as required by the IEP except when Student [REDACTED] [REDACTED]. TR 96:4-99:9; 102:5-25; 118:17-120:9; 123:20-124:2.
18. The School District conducted Student's tri-annual evaluation prior to the November 2021 IEP meeting and Student's evaluation results were reviewed at the IEP meeting. TR 105:12-17. Student's evaluation results include [REDACTED]. A score of 85 or lower is an indication that special education services are needed. TR 105:24-108:25.
19. Student's evaluations was done using the Woodcock Johnson Test of Achievement. Scores from this test between 85 and 115 are considered average for general education. Student's overall [REDACTED] is in the average scoring range and

- such score indicates that an IEP goal in [REDACTED] is not needed. TR 143:19-148:20; Exh. 104:0119-0120.
20. At the November 2021 IEP meeting, the IEP team determined that Student did not need special education for [REDACTED] and removed services for [REDACTED] from Student's IEP. In making this determination the IEP team reviewed Student's [REDACTED] samples, information from Student's general education teacher along with Student's evaluation results. TR 105:6-110:19.
 21. Petitioner attended and participated at both the November, 15, 2021, IEP meeting and the January 19, 2022, IEP meeting. TR 137:10 – 138:11; Exh. 104; Exh. 208.
 22. Since Kindergarten, Student has progressed to the next grade each year. TR 138:24-139:8.
 23. Student attends school in the general education setting at least [REDACTED]. TR 139:2-5.
 24. During the 2021-2022 school year, twelve [REDACTED] visits required by Student's IEP were missed. These visits were missed for one of three reasons: 1) Student was absent from school; 2) Student declined or refused the [REDACTED]; or 3) the [REDACTED] was unavailable and missed the visit. TR 166:8-168:22.
 25. The School District's [REDACTED] tracked the time that [REDACTED] was delivered to Student and the time that was owed due to missed visits. TR 168:23-169:8; Exh. 224. Twelve make up visits have been scheduled to provide Student [REDACTED] for the time owed due to the missed visits. Nine of the twelve make up visits have been completed. Three make up visits were missed due to the student being absent from school. TR 169:9-16.

CONCLUSIONS OF LAW

I. Petitioner failed meet the burden of proof on Issues that were raised in the Complaint but were not argued or addressed through the presentation of evidence at the due process hearing.

As set forth above, Petitioner, as the party seeking relief, bears the burden of proof on each claim raised in the Amended Complaint. The claims raised by Petitioner in the Amended Complaint are listed under the ISSUES heading, *supra*. At the due process hearing Petitioner did not assert, or present evidence relating to, the claims set forth in ISSUES numbered 1, 2, 3 and 4. Therefore, Petitioner failed to meet the burden of proof on the claims set forth in ISSUES numbered 1, 2, 3 and 4 and such claims are denied.

II. Under the IDEA, the School District is required to provide related services for the Student and Student's IEP includes related services enabling the Student to benefit from special education.

Under the IDEA state and local agencies provide special education to children with disabilities. 20 U.S.C. § 1412(a); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). The purpose of the IDEA is, among other things, to provide children with disabilities a 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).

“School districts may deny a child a free appropriate public education by violating either the substantive or procedural requirements of the IDEA. *M.M. v. Lafayette Sch. Dist.*, 767 F3d 842, 852 (9th Cir. 2014). “To meet the substantive obligation under the IDEA, a school must offer an

IEP reasonably calculated to enable the child to make progress in light of the child’s circumstances.” *Andrew F. v. Douglas Co. Sch. Dist.*, 19 IDELR 174, 137 S.Ct. 988 (2017).

FAPE includes both special education and related services. 34 C.F.R. §300.17. “Related Services means transportation and such developmental, corrective, and other supportive services as required to assist the child with a disability to benefit from special education. . .” 34 C.F.R. §300.34. Examples of related services include: transportation, speech-language pathology, interpreting services, physical and occupational therapy, counseling services, school health services and social work services. See *Id.*

Petitioner’s claims in this matter relate to Student’s IEP dated November 15, 2021, and the amendment to the IEP dated January 19, 2022. (collectively, “Student’s IEP”) Related services included in Student’s IEP are:

- [REDACTED] [REDACTED]
[REDACTED] [REDACTED] Exh. 104:LOI000061.
- [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]” Exh. 104:LOI000061.
- [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]

[REDACTED].” Exh. 104:LOI000063.

At the November 15, 2021, IEP meeting the IEP team discussed and considered the related services in Student’s IEP [REDACTED]. Exh. 205. The IEP team considered requests from Petitioner for changes to Student’s [REDACTED]. Petitioner requested extra [REDACTED]. In response to Petitioner’s request for extra [REDACTED], an additional [REDACTED] was added to [REDACTED] in the IEP. TR 23:19-24:15.

The IEP team also considered Petitioner’s request that Student’s [REDACTED] be changed to [REDACTED]. The IEP team did not grant Petitioner’s request as there was [REDACTED] for Student to [REDACTED]. Exh. 205.

At the November 15, 2021, IEP meeting Petitioner also requested that Student’s [REDACTED] services be amended to include [REDACTED]. The IEP team agreed to Petitioner’s request and the [REDACTED] were added to the IEP. TR 96:20-98:20.

At the due process hearing in this matter, Petitioner did not argue or assert, nor was evidence presented to show, that the related services included in Student’s IEP are inappropriate in order for Student to benefit from special education. Rather, Petitioner argues that the School District failed to provide the related services specified in Student’s IEP.

- a. **The School District has provided [REDACTED] services required by Student’s IEP.**

It is uncontested that during the 2021-2022 school year the School District provided [REDACTED] for Student, [REDACTED]. Petitioner contends that: i) the School District's [REDACTED] required Student to [REDACTED] and therefore denied Student FAPE; and ii) the School District's [REDACTED] did not allow Student [REDACTED] and therefore denied Student FAPE.

i. Student was not denied FAPE because [REDACTED] missed on [REDACTED] was covered by additional [REDACTED] provided every morning Monday through Friday.

Student [REDACTED] only on [REDACTED] afternoons. Petitioner chose to [REDACTED] Student on other days of the week so that Student could stay until the end of the school day. On [REDACTED] Student missed approximately [REDACTED]. To make up for the [REDACTED] missed on [REDACTED], Student was provided a half an hour of additional [REDACTED] each morning Monday through Friday. In other words, Student received [REDACTED] of additional [REDACTED] [REDACTED] weekly to make up for the [REDACTED] of [REDACTED] missed on [REDACTED]. Based on these facts, Student was not denied FAPE because the School District's [REDACTED] required Student to [REDACTED].

It is also noteworthy that Petitioner voluntarily chose to have Student [REDACTED] even though Student [REDACTED]. Student lives within the [REDACTED]. Had Student [REDACTED].

██████████ then Student would not have needed to ██████████
██████████ In other words, the fact that Student must
██████████ is a direct result of Petitioner's choice of
██████████ ██████████
██████████

ii. The School District's ██████████ procedures did not deny Student FAPE.

No evidence was presented to show that Student ever missed the
██████████ because of the School District's busing procedures.
Multiple witnesses testified that if there was any indication, ██████████
██████████, that Student ██████████
██████████
██████████ the assistance of School District staff.

Petitioner did not meet the burden of proof to show that Student was
denied FAPE because of the School District's ██████████
██████████ To the contrary, the evidence shows that ██████████ the
School District provided ██████████ services necessary for Student to
benefit from special education.

**b. Petitioner failed to show that the School District failed to provide the
██████████ services included in Student's IEP.**

During the 2021-2022 school year ██████████ was Student's special
education and ██████████ also provided Student's ██████████ services for roughly ██████████
██████████. ██████████ gave credible testimony based on personal, day-to-

day experience with the Student. [REDACTED] testified that: i) the IEP was changed at the November 15, 2021, IEP meeting to include [REDACTED]; ii) following this change in the IEP Student [REDACTED] except when Student [REDACTED] or when Student [REDACTED]; and iii) prior to the November 15, 2021, IEP meeting Student was [REDACTED]. TR 96:4-99:9; 102:5-25; 118:17-120:9; 123:20-124:2. [REDACTED] testimony on this issue is uncontroverted and [REDACTED] was [REDACTED] to testify about [REDACTED] of Student. Accordingly, Petitioner failed to meet the burden of proof on this claim and the evidence relating to this claim affirms that Student received [REDACTED] services required by Student's IEP.

c. The School District has provided the [REDACTED] services included in Student's IEP.

Petitioner testified that she received the [REDACTED] service logs and discovered that Student was not receiving the [REDACTED] services required by Student's IEP. TR 11-21. [REDACTED], owner of the School District's contract therapy provider, also testified that during the 2021-2022 school year Student was not provided all of the [REDACTED] services required by Student's IEP. TR 167:6-23. [REDACTED] then testified that twelve [REDACTED] were scheduled with Student to make-up for the missed [REDACTED] and that nine [REDACTED] have been completed. Three of the scheduled [REDACTED] were not completed due to Student being absent from school. TR 169:5-16; Exh. 224.

Minor discrepancies between the services provided and the services called for in the IEP do not give rise to an IDEA violation. A material failure occurs when

the services provided fall significantly short of the services in the IEP. See *Van Duyn v. Baker School District*, 502 F.3d 811, 47 IDELR 182 (9th Cir. 2007). The three missed visits due to Student's absence from school are a minor discrepancy and therefore do not constitute a failure to provide FAPE.

III. Removal of [REDACTED] services from Student's IEP was not a denial of FAPE.

At the November 15, 2021 IEP meeting the IEP team reviewed the results from Student's tri-annual academic assessment. Student's overall score for [REDACTED]. Score's above 85 indicate that special education is not needed for this skill. TR 105:6-107:8. Along with the assessment score the IEP team considered Student's [REDACTED] samples compared to [REDACTED] general education peers. TR 109:17-110:23. Student's [REDACTED] skills place [REDACTED] in the middle of [REDACTED] general education class. Exh. 205:0127.

In determining eligibility for special education, after determining that the child has a qualifying disability the next step is determining whether the child requires special education and related services as a result of such disability. *Norton v. Orinda Union Sch. Dist.*, 29 IDELR 1068; *R.Z.C. v. North Shore School Dist.*, 73 IDELR 139 (9th Cir. 2018, unpublished). Applying these eligibility criteria to the current case, although the Student has a qualifying disability, the IEP team determined that Student does not need special education for [REDACTED] [REDACTED]. This determination is based upon Student's assessment score, writing samples and performance compared to Student's general education peers. The IEP team did not rely solely on the Student's assessment score but considered other applicable information. IEP team's determination that Student does not need special education for [REDACTED] and remove [REDACTED] from Student's IEP is not a denial of FAPE.

CONCLUSION

For the reasons set forth above, Petitioner failed to meet Petitioner's burden of proof on the claims asserted in the Complaint; The School District has provided [REDACTED] as required by the IDEA, and Student was not denied FAPE by the removal of [REDACTED] services from Student's IEP. Accordingly, Petitioner's claims asserted in the Complaint are DENIED.

So ORDERED this 28th day of February, 2023.

/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 28th day of February, 2023, I caused to be served on the following a true and correct copy of the foregoing document by the method indicated below:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile
- Email

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile
- Email

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