BEFORE THE IDAHO STATE DEPARTMENT OF EDUCATION
(Administrative Hearing)

IN THE MATTER OF THE DUE PROCESS HEARING	)	SDE CASE H-16-09-14a
	)	MEMORANDUM DECISION
by and through his parents, ,	)	
Petitioners,	)	
v.	)	
Boise City School District #1,	)	
Respondent.	)	

Introduction

On September 14, 2016 's parents filed a due process hearing request seeking a placement of their son in a program and at a school other than those determined appropriate by the student's IEP (Individualized Education Program) team.[1] After an unsuccessful attempt at resolution, Respondent answered the request for hearing on October 19th generally denying that the parents' proposed placement was appropriate.

An attorney who initially represented the parents subsequently withdrew at the parents' request. At a hearing on November 16th 's father appeared *pro se*. Both parties submitted written closing arguments on December 12th.

[1] The request for a due process hearing stated : " The single issue in this case is whether will attend Hillside Junior High in the new school year, or whether he will attend Fairmont Junior High, as the parents desire". Based on this statement and the evidence produced at the hearing, there was minimal challenge to the IEP itself.

[redacted] is a twelve-year-old boy eligible for special education based partly on a diagnosis of autism spectrum disorder. Since at least 3rd grade in 2013, [redacted] attended Valley View Elementary with a placement in it's Structured Learning Classroom (SLC) pursuant to IEP's developed during each school year until he was ready for seventh grade – the District's start of junior high- in the 2016-17 school year.

He is non-verbal, cannot speak any words but communicates using about 5-10 signs. (TR. p.39) The SLC special Ed teacher at Valley View testified that [redacted] uses at least 22 signs and or gestures. (TR. p.210) If he wants something, a cookie for example, he may point to it or move someone's hand towards it. Id. He is learning to use an iPad with a program containing symbols and icons that he can point to for communication, and currently understands about 10 icons. (TR. p.41)

He is healthy, strong, and in physical appearance much like his peers but needs constant supervision because he has no sense of danger. (TR. p. 42-43) He can ride a school bus to and from school and has done that without any behavioral incidents for several years. (TR. p.60) If he has to use a toilet when in school or out in the community he uses a sign to indicate that need. (TR. p.73)

For four or so years - outside the school environment- [redacted] has been provided habilitative therapy ("HI") two times per week, each session lasting three hours or so. (See: EX. 3) The focus of [redacted]'s therapy this past summer was communication, completing simple tasks such as hand washing, and responding with appropriate social responses to other peers in the group. (See: EX. 3) The therapy includes a brief session at home, then an hour or more trip to a park or coffee shop with the small group to interact with the public and others in a community setting. [redacted] appears to have made progress learning such skills in the past six months with no signs of skill regression typical after an absence from HI therapy during a family summer 2016 vacation. (See: EX. 3)

[redacted]'s father testified about a recent physical and mental growth spurt [redacted] has gone through during the summer of 2016 while in HI therapy. (TR. pp.16-17) Exposed to the somewhat older students in the HI group this past summer, [redacted] was able to do things he had not done before, i.e. take a football and pass it on, and interacted better socially with

the group. These recent positive changes in [redacted] have persuaded [redacted]'s father that he is ready for a more challenging school environment than the SLC program offers.

In addition to HI therapy sessions, [redacted] has for several years been receiving various out –of- school services his parents have arranged. These services have typically occurred on Mondays and Wednesdays and have included occupational therapy between 9:00 a.m. and 10:00a.m., speech therapy between 10:30 a.m. and 11:00 a.m., then the habiitative intervention scheduled for 11:30 a.m. to 2:20 p.m. (TR. pp.62-65) Each week day at home between 3:30 p.m. and 6:30 p.m. [redacted] also has another therapy called personal care services focused on personal care skills (TR. pp. 64-65) While [redacted] has not been in school since the end of the Summer 2016 extended school year program (approximately August 2016) [redacted]'s parents intend to continue these private services when and if [redacted] returns to school. (TR. p. 215)

More than nine years ago [redacted]'s father left a career in order to focus on his son's needs, coordinate his various therapies, and has been providing full time supervision since. (TR p. 48)

<u>Structured Learning Center – Extended Resource Room</u>

[redacted]'s special Ed teacher during 6th grade at Valley View described the layout of the SLC rooms, a typical day for [redacted], and other relevant observations of [redacted]'s present level of function.

The SLC classroom is in a "portable", and consists of two adjacent rooms- one for academic work, the other called a "sensory "room. (TR. p.213) The latter has a swing, a disk the students can spin on, a rocker, small stackable wooden building blocks etc. The sensory room is designed to give students a readily available space to calm down when in need of a sensory break. (TR. p 216) [redacted] would sometimes go to the sensory room 5-6 times a day, each time for 10-15 minutes (TR. p. 216-7) Some of these visits were after completing a lesson successfully – making assemblies with the wooden blocks in the sensory room was a "preferred" activity for [redacted]. (TR. p.230)

The Valley View SLC staff consisted of the special end teacher and four paraprofessionals and had eight students. (TR. p.211-12) One of the staff would meet students at the school bus in the morning, escort them to the SLC area, and begin the day

in the sensory room for a short time. Afterwards the students would eat breakfast as a group then split into two groups, some working on fine motor skills, some doing academics. (TR. p. 214-5) Students would then rotate from one group to the other. Sometimes during the fine motor skill training [redacted] would get frustrated and signal that by moaning or rocking. Occasionally the moaning would get louder or [redacted] would make loud noises although usually he would cover his ears with his hands. (TR. p. 215) [redacted] was not generally disruptive of other students.(TR. p. 224) He has never been aggressive. He is a very compliant student who "wants to do what he's asked" according to the special Ed teacher. (TR. p. 228)

At lunchtime the SLC students would go to the cafeteria where general education students ate, but the SLC students were at their own table with a SLC staff member. (TR. p.218.) After lunch there was a recess period with the general education students, outside in good weather, where there was a walking track, slide etc. that [redacted] enjoyed. Two days a week SLC students participated in a PE class, as a class on their own without general Ed students. Afterwards students would return to the SLC rooms to do group academic or individual work and wrap up the day practicing jobs such as cleaning their tables or recycling. (TR. p. 133)

[redacted] also would go into the general education area of the school, accompanied by an SLC staff person, to learn such things as where the office, the nurse's station, or bathrooms were located. Learning to generalize information like where a bathroom might be located in an unfamiliar environment is one or [redacted] 's IEP goals. [redacted] 's reaction to these explorations varied: sometimes he would last five minutes, sometimes ten minutes before he wanted to go back to the SCL classroom. (TR. p. 222-3) When he wanted to return to the SLC classroom he would turn in that direction without a signal.

One of the District's speech pathologists who has worked with [redacted] for about five years and who is familiar with his IEP testified that his goals are pre-academic and cognitive rather than

> "Goals for reading, math, and written language. His reading goal is to identify his name in print, and he has not yet met that goal. So that level of goal indicates a much greater academic need for instruction as opposed to an

> extended resource room where students are reading. The same with his adaptive and self-help goals. He does still have goals such as, you know, wiping his face and blowing his nose. He has goals to be able to complete certain chores, to follow two-step, non-routine directions, meaning if you tell him, "pick that up and throw it in the garbage" he might be able to do it because it's a routine." But if you ask him, take your book and go put it on the table" and it's not part of his normal routine, he is not yet able to do that- or was not as of of his May (2016)progress report". (TR. p. 243-4)

That testimony is consistent with evidence in an October 2016 report from a private occupational therapist that has worked with [redacted] for over a year. (See Petitioner's EX. 4)

<u>The Hillside Structured Learning Center and Extended Resource Room</u>

Some aspects of the SLC at Valley View, which [redacted] previously attended, have been described above. The SLC at Hillside Junior High –the placement recommended by the IEP team- is similar physically with two classrooms, including a sensory room, separated by a bathroom and kitchen. There are currently seven students, a special Ed teacher, and three-and one-half paraprofessionals. (TR 238) There are group and individualized instruction sessions each day, depending on student needs. The kitchen provides "life skills training" and the bathroom is there because many SLC students are still working on appropriate hygiene skills. (TR. p. 238) The SLC is a program and facility are specially designed for students with autism. (TR. p. 118)

The Extended Resource Room (ERR) at Hillside has one classroom, but no sensory room, kitchen, or bathroom. (TR. p. 239) There are currently fourteen students with one teacher, and four paraprofessionals.[2] Current ERR students are able to independently access the restrooms in the main school building by walking there. ERR students typically have more interaction with general Ed students and can participate in various classes with that population, i.e. home economics type classes. ERR students have cognitive deficits that make them more immature in their social interactions. (TR. p. 240)

The special education supervisor testified that:

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[2] The ERR program at Fairmont – the parents' preferred placement- currently has 12 students, 1 teacher and 3 paraprofessionals. Typically there are no restrooms adjoining an ERR classroom. (TR.p. 119)

> "The district's ERR program is structured, as well, but there's absolutely more flexibility with students. There's a variety of disabilities where they're at a more moderate level, gaining independence that way…..The students are working on their core academic work in extended resource and through groups. Those students are verbal, so they're working through expressing themselves through that group, learning their academic skills". (TR. p.119.[3])

One of the reasons [redacted]'s parents have advocated for a placement at Fairmont is that it is much closer to their home than is Hillside; Fairmont is about 1 to 1.5 miles distant, Hillside about 5 miles. (TR. p. 52) They have concerns about the possibility of having to pick [redacted] up from school for a health emergency and, with city traffic, the extra distance is problematic. [redacted]'s mother, for instance, would have to leave work and drive about an hour and a half in such a case if [redacted]'s father was not available. (TR. p.19) However, [redacted]'s father acknowledged that such a situation arises infrequently, maybe two or three times a year. (TR. p.49) and that [redacted] is generally very healthy.

Another reason the parents favor Fairmont over Hillside is the extra time [redacted] will have to ride the bus to school. [redacted]'s father testified about having timed the route to Hillside in his personal car and having spent 37 minutes on a light traffic day to reach the school following a direct route. (TR. p.30) At another point in his testimony he said a different trip between Hillside and home took 27 minutes. (TR. p.52.) The route between [redacted]'s home and his former elementary school (roughly the same distance as to Fairmont) takes about 10 minutes by car. (TR. p.52) He also testified that during the last school year while attending the elementary school a mile from home it sometimes took forty-five minutes to an hour to get home on the bus. (TR. p.21) He concluded that the extra distance would add an hour or hour and a half or more to [redacted]'s round trip bus ride each day. *Id*. Unusually longer bus travel times returning home tired [redacted], and made him less receptive to the after school therapy sessions. (TR. p.60)

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[3] Notes from an August, 2016 transition meeting contain this comment from the Fairmont Principal "core classes are in ERR and then students attend general education classes as well". EX H, p.141.

The district's supervisor of transportation testified that ☐'s morning bus trip to Valley View took about 8 minutes, starting at 8:22 a.m. and the route home lasted about 45 minutes dropping ☐ off at home shortly after 4:00 p.m. (See TR. starting at p.157 and revised EX J) She also testified that the currently scheduled pick-up time for ☐ at home for the ride to Hillside would be 6:56 a.m. and would take 30 minutes. The return trip to home after school at Hillside would start at 2:25 p.m. and take 20 minutes. (See revised EX. K) These bus schedules are subject to change and revision depending on a variety of factors including changes in the student mix using bus transportation, reports from bus drivers, GIS data generated by the busses themselves etc. There was no testimony from the witness concerning the current bus schedule between ☐'s home to and from Fairmont.

A letter from ☐'s pediatrician recommended a school closer to his home as long at it provided certain therapies at a time when he was most receptive. (See EX 2) The therapies referred to are those the parents have arranged for Mondays and Wednesdays starting in the morning – days ☐ is not expected to be in school.

A letter from ☐'s Pediatric Nurse Practitioner similarly refer to those therapies ☐ obtains outside the school environment (See EX 1) The letter also expresses concerns about ☐ being placed in a more restrictive educational setting when ☐ could benefit from small group and social opportunities. Finally the letter encourages consideration of a placement with reasonable transit times to and from school. *Id.*

A speech pathologist with considerable experience in the Kuna district as a special Ed teacher and has provided privately arranged speech therapy to ☐ since July 2016 testified concerning her professional experience and her personal experience with the special education of two sons, both of whom were autistic, the younger of whom was non-verbal. She believed that the less restrictive environment approach worked well for that son who is now fully verbal, bright, and doing well. (TR. 98-9) She summed up the gist of her approach this way:

> "But the idea that he's exposed to differing abilities, perhaps higher abilities, but differing, because his strengths and needs and weaknesses, to be exposed to those different types of disabilities and not only grouped with children with

Autism, makes sense to me in terms of helping him grow and expand". (TR. p. 102)

In part of her testimony she said:

> "And so the question of whether it (the LRE placement) should be an extended resource room or SLC program, I think either one is viable for this young man, in my professional opinion. But I think that the respect for the family and their intense devotion and knowledge of their son needs to be really taken into account". (TR.p.101)

When questioned about her experience in the Kuna ERR program and whether a similar one would be suitable for [redacted] she responded:

> "Well, now a small district, like Kuna, doesn't have the advantage of an SLC program. It only has an ERR program" (TR p.102)

[redacted]'s IEPs and Progress Reports

A series of [redacted]'s IEPs, Progress Reports, and related documents going back to 2013 were introduced into evidence.[4] Overall they are consistent with the testimony of witnesses describing [redacted]'s present level of performance and special needs to succeed in school.

EX. F represents [redacted]'s latest IEP dated January 4, 2016 and contains sections documenting [redacted]'s present level of performance in areas such as his behavior, pre-academic and cognitive function, adaptive, self help, life skills, and communication. In each of those areas corresponding standards, goals, and objectives are set forth following criteria and methods contained in the Idaho Special Education Manual (2015). The IEP was the product of a consensus of the IEP team, including [redacted]'s parents, and continued [redacted] in Valley View's SLC program. It was not until later discussions concerning [redacted]'s placement in junior high that [redacted]'s parents began serious questioning of an SLC placement in junior high.

EX. P is [redacted]'s latest progress report from May 2016 documenting his achievement related to the goals and objectives contained in his latest IEP. It is also consistent with

[4] See EX.s D through H, and M through P.

witness testimony that the SLC placement he has been in is providing educational opportunities to him and that he is making good progress in that placement.

Applicable Law

The Individuals With Disabilities Education Improvement Act of 2004 (IDEA 2004) 20 USCS Sec. 1400 et seq. requires that school districts, like Respondent, provide a free appropriate public education (FAPE) in the least restrictive environment to students with various covered disabilities, like the one student has. Federal regulations contained in 34 CFR 300 et seq. have been promulgated to implement key provisions of the IDEA 2004.

In this case the Petitioners had the burden of persuasion since they initiated the request for a due process hearing. Weast v. Schaffer, 126 S. Ct. 528, 44 IDELR 150 (United States Supreme Court (2005)).

States retain some authority under IDEA 2004 and 34CFR 300 et seq. to manage the delivery of FAPE to covered student populations. Pursuant to that authority, Idaho has adopted rules and policies governing a whole range of topics related to the delivery of FAPE including the development of IEPs, the conduct of due process hearings, the provision of "related services", as well as rules related to the qualifications of personnel working within school districts with special ed students. See The Idaho Special Education Manual (the "Manual", Ch. 5, Sec. 2, 2015 Ed.) Hearing procedures in this case were governed by the Idaho Rules of Administrative Procedure of the Attorney General (See IDAPA 04.11.01), IDEA requirements, and the Manual. In case of any conflicts between Idaho rules and the IDEA, or rules contained in 34 CFR 300 et seq., the latter supersede and govern.

There was scant helpful case law addressing the central issue in this case - whether or not the District's proposed placement[5] of [redacted] in the Hillside Junior High (SLC) meets the "least restrictive environment" mandate of the IDEA, but the Manual provides a starting point.

Chapter 6 of the Manual provides that:

[5] "Placement" is not the same as "location". "Placement" refers to the range of services and programs a student with an IEP requires, whereas "location" refers to which particular "bricks and mortar" school or classroom a district might have where those placement services are provided. See 71 FR 46588, Aug. 14, 2006.

> "Placement decisions for a student with a disability are made following the determination of the individual needs, goals, and required services"

It then goes on to say:

> "LRE (least restrictive environment) decisions are made individually for each student. The IEP tem shall consider the following when determining the LRE in which the IEP can be implemented:
>
> 1. IEP Goals and Services: The student's goals and services are developed prior the determination of the services and settings. The services and settings needed by each student with a disability must be based on the student's unique needs that result from his or her disability, not on the student's category of disability.
> 2. Age appropriate Peers: Students with disabilities shall be educated with age appropriate peers to the maximum extent appropriate. A student with a disability is not removed from age-appropriate environments solely because of needed accommodations and/or adaptations in the general education curriculum.
> 3. School of Attendance: A student with a disability shall be educated in the school as close as possible to the student's home and unless the IEP requires some other arrangement, the student is educated in the school he or she would attend if not disabled.
> 4. Harmful Effects: Consideration shall be given to any potential effect on the student or on the quality of services the student needs."

It is clear from the above that placement decisions <u>follow</u> a determination of the goals and services in an IEP.

Chapter 5, Sec.2 of the Manual contains rules for the development of an IEP. Core components of IEPs are a statement of baseline data used for goal development and goals that are:

> " measureable statement(s), developed from the baseline data, describing what a student is reasonably expected to accomplish within the time period covered by the IEP, generally one year".

> "Goals shall include the behavior, the performance criteria, and the evaluation procedure."

Overall, developing an IEP and evaluating a student's progress following and IEP is very heavily focused on measureable data. A district speech pathologist that testified at the hearing put it this way:

> " …in schools we have a professional responsibility to make our decisions based on the data, and the law is very clear about that. We don't just try things. You know, we don't just throw kids into situations and see how they're going to do." (TR. p. 246-7)

Findings of Fact, Conclusions of Law

Based on a careful review of the hearing record, the documentary evidence in the record, the parties' closing arguments and applicable law this hearing officer concludes the parents did not show by a preponderance of evidence that the team's placement decision of [redacted] in the Hillside SLC was contrary to applicable law. Based on [redacted]'s IEP, including his identified individual needs, goals, and services, the Hillside SLC placement is the least restrictive placement for [redacted] at the current time that is reasonably calculated to provide him with a free, appropriate, public education and that there is insufficient evidence to support a finding that the alternative placement in the Fairmont ERR meets the LRE requirements.

It would likely be impossible to find advocates for a child more dedicated to his well-being or knowledgeable about his condition than [redacted]'s parents. Their desire to see that the school environment provides more challenges for their son is completely understandable especially when they have observed positive changes in their son that the father described as a recent "growth spurt". A finding contrary to their wishes might be described as a "non-preferred activity"- to use a phrase many hearing witnesses described, but findings and conclusions of law are dictated by the evidence and law.

First, to focus on the applicable law, there's no doubt that a placement decision must be based on credible and oftentimes multi-sourced data in order to meet the standards of the IDEA, its regulations, and the Manual. (See discussion concerning the Manual

above). While it is undisputed that [redacted] has recently experienced a "growth spurt", the district is bound by law to make placement decisions based on measurable data, not anecdotal evidence. Without that data to validate a decision to place [redacted] in an ERR room is unwarranted, at the very least. [redacted] has not attended school since the beginning of the 2016-7 school year so there has been no opportunity to collect the data and observations necessary before a placement like an ERR.

Second, focusing on just one aspect [redacted]'s current educational placement needs, there is no reason to doubt that he still needs a resource like the "sensory room" only available in the SLC. There is no evidence in the record that that resource is no longer a necessary support that allows him to achieve goals set out in his IEP.

Evidence concerning the potentially lengthy bus travel to Hillside to and from RM's home was somewhat conflicting but tended to show that the total round-trip bus travel time would be only very slightly longer than what he managed without problems in previous years at Valley View. The current bus schedule to and from Hillside, as described by the district's transportation director, shows [redacted] being returned home over an hour earlier in the afternoon compared to the drop-off time on the return from Valley View.[6] That scheduled drop-off should not materially interfere with [redacted]'s after school therapy sessions.

The fact that Hillside is farther from [redacted]'s home than Fairmont will most likely make it more difficult for either of the parents to pick [redacted] up at school, for a health emergency for example.[7] But weighing all the evidence related to the need to continue with an SLC program against the potential for harm caused by possible extra travel time for the parents to Hillside versus Fairmont, the benefits of the SLC placement outweigh any potential harm.[8]

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[6] As mentioned previously there is no evidence in the record concerning the current bus schedule to and from Fairmont. Fairmont is about as close to [redacted]'s home as Valley View was so it might be inferred that bus travel time round trip to Fairmont would be approximately the same as it was to Valley View.

[7] The record shows that such situations rarely occur and that RM is generally very healthy.

[8] See the Manual Ch.6,Sec. 1.B.3-4.

Although it may go beyond the confines of a decision like this, testimony of one of the District's speech- language pathologists with long experience with [redacted] suggested an approach to [redacted]'s placement that might satisfy [redacted]'s parents desire to challenge him more by giving [redacted] some access to an ERR room at Hillside, as well as give the District an opportunity to develop necessary data to update [redacted]'s IEP when appropriate. When asked by the District's counsel if [redacted] going to be stuck in an SLC program forever she responded:

> "No. In fact we discussed this (with the parents) at our August meeting. One of the great advantages we have in this district is that we have several buildings that have an SLC and an ERR, and it just happens that Hillside is one of those. We specifically talked at that meeting that there are periods during the day where all 14 students are in the ERR classroom. And we don't feel like that would be the best time to have [redacted] visit the ERR to assess his ability to participate. But we do have periods, like we have a reading class that I believe only has, maybe, six students in it. And so that's something that we offered to the family, that, obviously, if he were attending school, we would collect data on all of his goals, and we could also transition to the ERR room for certain periods of the day and take data in that setting, as well. The IEP is a living document that can be changed as many times as we want to change it". (TR. p. 245)

IT IS SO ORDERED this____ day of December, 2016.

_____

Richard A. Carlson
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned Hearing Officer certifies that on the ___ day of _____, 2016 he served a true and correct copy of the foregoing on the persons named below at the addresses below by depositing the same into the U.S. mail, postage pre-paid:

[redacted]

Chris Hansen
Attorney at Law
P.O. Box 7426
Boise, ID 83707-7426

_____
Richard A. Carlson

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. Sec 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. Sec. 1415 (1)(2)). 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 that State law.** (See 34 CFR 516 (b). **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 a hearing officer's decision".