

BEFORE THE HEARING OFFICER FOR THE  
IDAHO STATE DEPARTMENT OF EDUCATION  
(IDEA Due Process Hearing)

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| CASSIA SCHOOL DISTRICT NO. 151,           | ) | Case No. H-15-10-07 |
|   | ) |                     |
| Petitioner/ Counter-Respondent,           | ) |                     |
|   | ) |                     |
| vs.                                       | ) |                     |
|   | ) | MEMORANDUM DECISION |
| ██████████ as legal guardians and parents | ) | AND ORDER           |
| of ██████ a minor,                        | ) |                     |
|   | ) |                     |
| Respondent/ Counter-Petitioner.           | ) |                     |
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**INTRODUCTION**

A DUE PROCESS HEARING REQUEST (“Hearing Request”) under the Individuals with Disabilities Education Improvement Act (“IDEA”) was filed by the Petitioner/Counter-Respondent (“Petitioner”) on October 7, 2015. The Hearing Request asserts that for the 2015-2016 school year Petitioner established an Individualized Education Program (“IEP”) for ██████ following and complying with the appropriate procedural requirements of the IDEA.

Respondent/Counter-Petitioner (“Respondent”) filed, on October 15, 2015, a RESPONSE TO DISTRICT’S DUE PROCESS HEARING REQUEST AND COUNTER REQUEST FOR DUE PROCESS HEARING (“Counter Request”) asserting that ██████ was denied a Free

Appropriate Public Education (“FAPE”) in the 2014-2015 and 2015-2016 school years due to Petitioner’s failure to include provisions in the IEPs providing for appropriate related services, extended school year services and due to the Petitioner’s conduct in shortening [REDACTED]’s school day.

A pre-hearing conference call was held in this matter on November 9, 2015, at that time the parties were instructed to file written arguments on the issue of which party bears the burden of proof and a timeline for filing pre-hearing motions was established. Each party filed a memorandum on the burden of proof issue and Petitioner also filed a MOTION TO DISMISS.

On January 5, 2016, in the ORDER ON PETITIONER’S MOTION TO DISMISS AND THE BURDEN OF PROOF the claims for which each party would bear the burden of proof at the due process hearing were set forth and one claim of Respondent’s Counter Request was dismissed.

A due process hearing was held in [REDACTED] Idaho, on January 13, 14 and 15, 2016.

Witnesses testifying at the hearing included:

1. [REDACTED] Cassia County School District, Director of Student Services;
2. [REDACTED] Physical Therapist, Intermountain Health Care;
3. [REDACTED] Speech Language Pathologist, Cassia County School District;
4. [REDACTED] Special Education Teacher, Cassia County School District;
5. [REDACTED] Occupational Therapist, Intermountain Health Care;
6. [REDACTED] Human Resources Clerk, Cassia County School District;
7. [REDACTED] Principal-White Pine Intermediate School, Cassia County School District;
8. [REDACTED] Para-Professional, Cassia County School District;

9. [REDACTED] Physical Therapist, Primary Therapy Source;
10. [REDACTED] Retired – Director of Special Services, Cassia County School District;
11. [REDACTED] Occupational Therapist, Primary Therapy Source;
12. [REDACTED] Parent; and
13. [REDACTED] Parent.

Admitted into evidence at the due process hearing were Petitioner's Exhibits 1, 2, 3, 4, 9, 10, 12 through 47, and 49 through 51. Also admitted into evidence at the due process hearing were Respondents' Exhibits 113 through 117, 119 through 121, 124, and 127 through 129.

At the conclusion of the due process hearing, attorneys for the parties were given the opportunity to present oral closing arguments or submit written closing arguments. Written closing arguments were submitted by both parties on February 5, 2016.

### **ISSUES PRESENTED**

The only claims that may be raised in a due process hearing are those claims set forth in the Due Process Hearing Request. See County of San Diego v. California Special Education Hearing Office, 93 F.3d 1458, 1464-65 (9th Cir. 1996)(finding that the hearings officer properly limited the hearing to issues presented in the petitioner's complaint only). In the present case, the issues to be determined are limited to only those issues raised in the Hearing Request and Counter Request. The Hearing Request raises one issue as whether FAPE is provided by the IEP for the 2015-2016 school year. The Counter Request sets forth five issues identified in the Counter Request as in numbered paragraphs B.1.a, B.1.b, B.1.c, B.2 and B.3. The issues are

further limited by the withdrawal of claims by Respondent. In Respondent's CLOSING BRIEF, the Respondent states the following:

After review of the evidence submitted at the hearing and the documentation on file, along with discussions with the district, [REDACTED] [Respondent] withdraw [sic] his issues enumerated as B(1), issues (a) and (b). . . . Further, [REDACTED] withdraws issue number two (2) with regard to frequency and duration of related services as credible evidence on that issue was presented during the course of the hearing." Petitioner's CLOSING BRIEF, p. 9.

The remaining issues raised in the Hearing Request and Counter Request are as follows:

1. Does the IEP for the 2015-2016 school year provide FAPE to [REDACTED]? (Hearing Request)
2. Was [REDACTED] denied FAPE due to Petitioner's failure to provide ESY services for the 2014-2015 school year? (Counter Request, B.1.c)
3. Was [REDACTED] denied FAPE due to Petitioner's failure to provide ESY services for the 2015-2016 school year? (Counter Request, B.1.c)
4. Was [REDACTED] denied FAPE due to the shortened school day during the 2014-2015 and 2015-2016 school years? (Counter Request, B.3)

### **BURDEN OF PROOF**

In an order by this hearing officer dated January 5, 2016, it was ordered that each party shall bear the burden of persuasion as to their respective claims for relief. See Schaffer ex re. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005)(holding that "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."). Accordingly, in relation to the enumerated issues above, at the due process hearing Petitioner had the burden of proof as to issue one; Respondent had the burden of proof as to issues two through four.

## FACTUAL FINDINGS

1. [REDACTED] was born on [REDACTED] and approximately two months later was diagnosed with failure to thrive. Thereafter, it became apparent that [REDACTED] was delayed developmentally. Eventually, [REDACTED] was diagnosed with a severe form of autism and epilepsy. HT 443-448, 476.
2. In August 2013, [REDACTED] moved into the [REDACTED] School District where he received special education services under an IEP. HT 454-455.
3. [REDACTED] received ESY services from the [REDACTED] School District during the summer of 2014. HT 450-451, 456.
4. [REDACTED] moved to [REDACTED] in the Cassia County School District at the beginning of the 2014-2015 school year and attended [REDACTED] Elementary School. HT 457-457.
5. On September 19, 2014, a meeting was held for development of an IEP ("2014 IEP"). Exh. 4.
6. The 2014 IEP provided for [REDACTED] to receive, among other services, gross motor services.
7. On December 9, 2014, Respondent filed a due process hearing request which was resolved through a MEMORANDUM OPINION AND ORDER dated April 8, 2015.
8. A facilitated IEP meeting was held on May 21, 2015, for the purpose of deciding whether or not [REDACTED] qualified for ESY services. Each of the IEP Team Members in attendance at the May IEP meeting, other than the parents, concluded that [REDACTED] did not qualify for ESY services. HT 33:1-34:13.

9. Petitioner provided notice of the meeting to [REDACTED]'s parents who attended and participated in the May 2015 IEP meeting. Exh. 9. [REDACTED]'s parents believed that [REDACTED] qualified for ESY and expressed this opinion at the May 2015 IEP meeting. HT 33:1-34:13; Exh. 10.
10. The parents of [REDACTED] were provided written reports on the services provided to [REDACTED] during the 2014-2015 school year. These written reports included quarterly progress reports, Exh. 121, HT 494:3-494:9; 503:24-504:8; monthly service provider reports, Exh. 212, HT 504:6-25; and daily updates from the Special Education Teacher, HT 505:1-8.
11. At the May IEP meeting no consensus was reached on whether or not [REDACTED] qualified for ESY services and therefore the decision was made by the Director of Student Services, [REDACTED] who determined that [REDACTED] did not qualify for ESY services. HT 33:1-34:14
12. An IEP meeting was held on September 17, 2015. Exh. 24. Notice of this IEP meeting was given to Respondent on September 14, 2015. Exh. 18.
13. At the annual IEP meeting held on September 17, 2016, a draft IEP was reviewed. Exh. 19. Following the meeting a Final IEP was completed on October 5, 2016. Exh. 23.
14. The Final IEP, in addition to providing procedural information, has six goal areas which are: Behavior; Daily Living Skills; Developmental Skills; Gross Motor; Speech Language Therapy; and Occupational Therapy. Ex. 23.
15. Respondent, through legal counsel, objected to portions of the 2015-2016 IEP. Exh. 25, 26, 27, 29.
16. During the 2014-2015 school year and the first part of the 2015-2016 school year, up to October 6, 2015, [REDACTED] was being put on the bus to go home in the afternoon 15 to 20

minutes earlier than other students. HT 52:25-53:12. The total amount of school time [REDACTED] missed because of this busing schedule was 51.25 hours. Exh. 47.

## ANALYSIS

### I. The IEP established for the 2015-2016 school year provides FAPE to [REDACTED]

The U.S. Supreme Court has held that "a court's inquiry in suits brought under [the IDEA] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnote omitted);

#### A. The Petitioner satisfied the procedural requirements of the IDEA in establishing the IEP for the 2015-2016 school year.

Compliance with the IDEA procedures is "essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parental participation are particularly important." Amanda J v. Clark County School Dist., 267 F.3d 877, 891 (9<sup>th</sup> Cir. 2001). "When the elaborate and highly specific procedural safeguards embodied in [the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid." Rowley, 458 U.S. at 205, 102 S.Ct. 3034. This said, "not every procedural violation, however, is sufficient to support a finding that the child in question was denied a FAPE. Technical deviations, for example, will not render an IEP invalid. On the other hand, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits, clearly result in the denial of a FAPE." Amanda J., 267 F.3d at 892.

The procedural requirements of the IDEA for establishing an IEP emphasize affording the parents the opportunity to participate in the IEP creation process. The school district must take steps to ensure that one or both of the parents are present at IEP team meeting or are afforded the opportunity to participate. These steps include: notifying parents of the purpose, time and place of the meeting; scheduling the meeting at a mutually agreeable time and place; notifying the parents of who will be in attendance. See 34 C.F.R. 300.322.

At the due process hearing in this matter, credible evidence was presented to show that Petitioner met these requirements in relation to the IEP meeting held September 17, 2015. Notice to the parents, substantially complying with 34 C.F.R. 300.322, was provided on September 14, 2015. Exh. 18. The parents and their legal counsel attended the IEP meeting and participated in the discussion for establishing the IEP for the 2015-2016 school year. Exh. 24. The parents were provided a copy of the IEP following the September 17, 2016, IEP meeting.

Whereas the parents received appropriate notice of the IEP meeting, attended the meeting, participated in the meeting discussion and received a copy of the IEP following the meeting, Petitioner satisfied the IDEA requirements in establishing the 2015-2016 IEP.

**B. The IEP for the 2015-2016 school year is reasonably calculated to enable [REDACTED] to receive educational benefits.**

The standard for measuring educational benefit under the IDEA is not merely whether the placement is reasonably calculated to provide the student with educational benefits, but rather whether the student makes progress toward the goals set forth in his IEP. It must include educational instruction specifically designed to meet the unique needs of the student supported by such services as necessary to permit the child to benefit from the instruction. See County of San Diego v. California Special Education Hearing Officer, 24 IDELR 756, (9<sup>th</sup> Cir. 1996).

At the annual IEP meeting held on September 17, 2016, a draft IEP was reviewed. Exh. 19. Following the meeting a Final IEP was completed on October 5, 2016. Exh. 23. The Final IEP, in addition to providing procedural information, has six goal areas which are: Behavior; Daily Living Skills; Developmental Skills; Gross Motor; Speech Language Therapy; and Occupational Therapy. Each goal area includes standards, measurable goals, objectives, projected achievement dates, and evaluation procedures. The goals in each area are reasonably calculated to provide [REDACTED] an educational benefit. Each goal area also includes a section entitled "Present level of Care" identifying the status of [REDACTED] and how the goals are designed meet the unique needs of [REDACTED]

Respondent's witness [REDACTED], Physical Therapist, testified that all four of the goals in the Gross Motor area are appropriate for [REDACTED] and that a trained paraprofessional could assist [REDACTED] with each of these goals. HT 350:17-357:3. Respondent's witness [REDACTED] Occupational Therapist, testified that both of the goals in the Occupational Therapy area are appropriate for [REDACTED]

[REDACTED] Occupational Therapist, sees [REDACTED] two times a week for 15 to 20 minutes at each visit. HT 266:16-19. [REDACTED] testified that [REDACTED] is making good progress working on pre-writing skills like drawing lines and half circles, bead and string activities, working with his hands and improving his ability to pay attention. HT 265:2-16. [REDACTED] has been seeing [REDACTED] for four months and is seeing some improvements. HT 273:15-17.

[REDACTED] Physical Therapist, worked with [REDACTED] during the 2014-2015 school year at [REDACTED] Elementary School and is working with [REDACTED] this year at [REDACTED] Elementary School. [REDACTED] testified that [REDACTED] has improved in his general strength and in squatting and then come up to standing position. HT 165:8-20. In [REDACTED]'s note on

12/8/15 she states that [REDACTED] “. . . is making progress toward goals except playground slide. He is doing well ascending and descending stair steps without railing . . . making vertical and horizontal strokes with marker . . . puzzle, shapes, jumping on mini-trampoline, sitting upright on therapy ball.” Exh. 31A.

[REDACTED] paraprofessional, works with [REDACTED] two times per week. HT 302:10-303:3. [REDACTED]’s notes indicate that [REDACTED] has been progressing in ascending and descending stairs, drawing horizontal and vertical lines, climbing steps, and doing puzzles. Exh. 31.

Respondent’s asserts that the IEP for the 2015-2016 school year does not provide FAPE because it fails to provide physical therapy as a related service. RESPONDENT’S CLOSING BRIEF, p. 4. The aspect of physical therapy which Respondent asserts is necessary but missing from the IEP is the detail of how the physical therapist will supervise the services being provided by the paraprofessional. “[REDACTED]’s parents simply want to ensure that the services being provided to [REDACTED] whether they be physical therapy or gross motor, are properly supervised and monitored. The details of supervision should be included as a part of the IEP. Without that language in the IEP, the IEP fails to provide [REDACTED] FAPE.” Ibid. There is however no requirement in the IDEA, regulations, Idaho Special Education Manual, IDAPA, or Idaho statutes that the supervisory functions of the physical therapist be included in an IEP. There is undisputed testimony to show, however, that the physical therapist is directly involved in determining the goals and services for [REDACTED] and that the physical therapist is supervising the paraprofessional who is providing services to [REDACTED] HT 133:5-134:18; 136:15-138:15;140:2-143:10; 146:2-153:17;304:9-305:13;313:17-315:12.

Based upon the testimony and exhibits cited above, the procedural requirements have been met by Respondent and the IEP is reasonably calculated to enable the child to receive educational benefits, thus, the IEP provides FAPE to [REDACTED]

**II. [REDACTED] was not denied FAPE by Petitioner's decision that [REDACTED] did not qualify for ESY services for the 2014-2015 school year.**

“Extended School Year (“ESY”) services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537-38 (4<sup>th</sup> Cir. 2002). For determining if such gains would be significantly jeopardized the State of Idaho has adopted provisions in the Idaho Special Education Manual identifying three areas to be analyzed:

“The ESY Services shall be considered in light of the totality of the circumstances, including the following:

- 1) Emerging Skill: Few, if any, gains are made during the regular school year. A skill is in the process of emerging, and the IEP team believes that with ESY services the student would make reasonable gains; or
- 2) Regression-Recoupment: The student would regress to such an extent and the amount of time required to relearn a skill or behavior becomes so significant that the student would be unable to benefit from his or her special education; or
- 3) Self-Sufficiency: An interruption in services would threaten the acquisition of critical life skills that aid in the student's ability to function as independently as possible, thereby continuing the student's reliance on caretakers, including institutionalized care. Critical life skills relate to those skills that lead to independent functioning. Development of these skills can lead to reduced dependency on future caretakers and enhance the student's integration with individuals without disabilities. Skills may include such things as toileting, feeding, mobility, communication, dressing, self-help, and social/emotional functioning.”

(Idaho Special Education Manual, Chapter 5, F(4)(b), pg. 93).

Respondent has the burden of proof to show by a preponderance of the evidence that [REDACTED] qualifies for ESY services and FAPE was denied because Respondent did not provide ESY services.

**A. Respondent's decision to not provide ESY services for the 2014-2015 school year is based upon sufficient data and written documents.**

The Special Education Manual also identifies information or data that the District may consider in making decisions concerning ESY, to wit:

“Decisions concerning ESY services shall be based on collected data and written documents. Types of data and information may include, but are not limited to, the following:

- 1) Criterion-referenced test data: Consider daily/weekly probes or pre-test/post-test data.
- 2) Norm-referenced test data: Consider pre-test/post-test data.
- 3) Anecdotal records: Consider information collected throughout the school year.
- 4) Physical mental, or emotional health factors: Consider the educational, medical, and psychological records of the student as well as the prognosis or judgements of educators, medical personnel, parents, and others that work with the student. Consider degenerative types of difficulties that may become intensified during breaks in education programming.
- 5) History: Consider evidence of past regression of past ESY services. The IEP team should not automatically assume that a student who has received ESY services in the past will be eligible for ESY services in the future, but it is a factor to consider.
- 6) Data on observed performance: Consider data maintained on the student concerning performance observed in the classroom, during the community-based activities, and as part of IEP progress monitoring.
- 7) Teacher interviews and recommendations: Consider progress reports by teachers, therapists, and others who have direct contact with the student before and after breaks in educational programming.
- 8) Parent/Adult student input: Consider parent observations of the student as well as parent/adult student requests for ESY services.

(Idaho Special Education Manual, Chapter 5, F(4)(c), pg. 94).

On May 21, 2015, an IEP meeting was held for the purpose of determining if [REDACTED] qualified for ESY services during the 2015 summer school break. Exh. 9, 10. At the meeting each school representative at the meeting and the parents had the opportunity to express whether they were in favor or opposed to providing ESY services for [REDACTED]. The parents expressed their opinion that [REDACTED] qualified for and that Petitioner should provide ESY services during the 2015 summer school break. Exh. 10. Each of the school representatives expressed an opinion that [REDACTED] did not qualify for ESY services. HT 33:22-34:6. As there was no consensus reached at the IEP meeting, the Director of Student Services, [REDACTED], made the determination that [REDACTED] did not qualify for ESY services. HT 34:7-14. In the Counter-Request, Respondent claims that "The District has failed to adequately address [REDACTED]'s need for ESY services." Exh. 2. Respondent then seeks ". . . compensatory education for ESY services which were not provided following the 2014-2015 school year." Ibid., pg. 4.

The minutes from the meeting on May 21, 2016, identify information that was discussed during the meeting including information from the Special Education teacher, physical therapist, speech therapist, SLP rating scale and daily data for behavior. Exh. 10. In her testimony [REDACTED] identified data and written documents provided to Respondent prior to or discussed at the IEP meeting: quarterly progress reports, Exh. 121, HT 494:3-494:9; 503:24-504:8; monthly service provider reports, Exh. 212, HT 504:6-25; daily updates from the Special Education Teacher, HT 505:1-8. The data and written documents referred to in this paragraph are the type of data and documents specified by the Idaho Special Education Manual that may be used in making decisions concerning ESY services.

Respondent contends that “only one (1) educator provided any data regarding regression/recoupment. None of the District’s witnesses at the due process hearing challenged the assertion by [REDACTED] and the [parents] regarding the lack of data. No credible data was supplied during the course of the hearing.” RESPONDENT’S CLOSING BRIEF, p. 13-14. Implicit in Respondent’s contention is that the data and written documents must be provided during the IEP meeting. However, there is no requirement that all data and written documents considered in making a decision concerning ESY need be provided at the IEP meeting. In this case much of the information was provided to the parents and IEP members prior to the IEP meeting in the form of daily, quarterly and monthly reports. Similarly the types of data and written documents specified in the Idaho Special Education Manual includes data and written documents gathered daily, weekly, and throughout the school year. There is no limitation that an ESY determination be made based only data and written documents provided at the IEP meeting or that the data and written documents could not be provided to the parents and IEP team members on a more frequent basis. As noted above, [REDACTED] testified that she had received the daily, weekly and quarterly reports prior to the IEP meeting. Testimony and exhibits from the due process hearing show that adequate data and written documents were provided to the parents and considered by the IEP team members to make a decision concerning ESY services.

**B. Respondent failed to meet the burden of proof to show that [REDACTED] qualified for ESY services.**

A preponderance of the evidence presented at the hearing in this matter supports Petitioner’s decision to not provide ESY services for the 2014-2015 school year.

1. Regression and Recoupment. Respondent, [REDACTED], testified in regard to data and information from two sources on the issue of regression and recoupment during the 2014-2015 school year. First, [REDACTED] testified that the only data she saw at the May

2015 meeting on regression and/recoupment was [REDACTED]'s data. HT 461:21-462:13. [REDACTED] testified that she saw this data at the meeting and that this was the only data in her possession at the time of the May 2015 meeting showing regression during the 2014-2015 school year. There was no further interpretation or explanation in regard to such data by [REDACTED]. [REDACTED] did not identify such data as an exhibit in this matter.

[REDACTED] testified in this matter that her data available at the May 2015 meeting did not show regression. HT 228:15-230:9; Exhibit 34.

Second, [REDACTED] testified that during the 2014-2015 school year she received [REDACTED]'s notes. HT 462:16-20. [REDACTED] identified [REDACTED]'s notes to which she was referring as Exhibit 128. HT 465:22-466:6. In September 2015, using these notes [REDACTED] created graphs which are Exhibits 113 and 114. HT 462:18-465:19. The graphs misconstrue the data from [REDACTED] by including scores of zero for days when [REDACTED] did not work with [REDACTED]; therefore, Exhibits 113 and 114 are given little weight by this hearing officer.

[REDACTED] testified that during the Summer of 2015 she did not notice regression with [REDACTED]. HT 306:2-6. [REDACTED]'s notes do not reflect regression such that the amount of time required to relearn a skill would be so significant that [REDACTED] would be unable to benefit from special education.

2. Emerging Skill. At the hearing in this matter there was no evidence identifying an emerging skill as such is defined by the Idaho Special Education Manual. [REDACTED] indicated that [REDACTED]'s ability to draw a vertical line was an "emerging skill." HT 215:25-216:16. [REDACTED] testified that when a student starts working on a new goal late in the school year it would not be an emerging skill because "there isn't

enough time to build a foundation that would be lost.” HT 418:5-14. It was [REDACTED] testimony that a new goal started even two months prior to the end of school could be an emerging skill depending on the circumstances. HT 418:15-23. [REDACTED] started working with [REDACTED] on a new goal of drawing vertical lines in late April 2015. [REDACTED]’s notes from April 22, 2015 to May 27, 2015, reflect [REDACTED]’ ability with this skill was up and down. He did well at times and needed more assistance at other times. Exh. 128. There was no testimony or evidence that ESY would benefit [REDACTED] in making reasonable gains with this skill. In the terms of [REDACTED], [REDACTED] did not “build a foundation that would be lost.”

3. Self-Sufficiency. No evidence was presented on this issue nor did Respondent assert arguments on this issue.

Accordingly, Respondent failed to show by a preponderance of evidence that for the 2014-2015 school year [REDACTED] qualified for ESY.

**C. The “Stay Put” provision of the IDEA did not require Petitioner provide ESY services for the 2014-1015 school year.**

“During the pendency of any proceeding, unless the State and local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement of the child . . .” 34 CFR 300.518. “[REDACTED] contends he was eligible for ESY for the 2014-2015 school year . . . because [REDACTED] objected to the district’s determination which effectively required the district to impose stay put. Thus, under the provisions of stay put, the district was required to implement ESY as set forth in the prior IEP at the [REDACTED] School District.” RESPONDENT’S CLOSING BRIEF, p. 13. Despite this contention in RESPONDENT’S CLOSING BRIEF, Respondent has not met its burden of proof on this issue in two regards: 1) there was no evidence presented in this matter as to whether or not at the time of the May 2015 meeting there

was a “pendency of any proceeding” which would invoke the stay put requirement; and 2) there was no evidence presented to establish the “then educational placement of the child.”

█ testified that the █ School District determined that █ qualified for ESY services for the 2013-2014 school year. HT 456:13-457:3. At the May 2015 IEP meeting, Respondent reviewed ESY provided the previous year in █ “It shows [█ was eligible for ESY as an amendment dated 4/1/2014. Was done for two weeks during the summer 4 x weekly for 4/hours a day.” Exh. 10, p.2. The █ IEP is not part of the record in this matter. Although this testimony and Exhibit 10 identify that ESY was provided by the █ School District, the evidence presented at the hearing is insufficient to identify the █ IEP as the “then current educational placement” of █. The last agreed upon IEP is generally considered to be the “current educational placement.” See John M. by Christine M & Michael M v. Bd of Educ of the Evanston Township HS Dist No. 202, 502 F.3d 708 (7<sup>th</sup> Cir. 2007). It is unclear from the record what the last agreed upon IEP was at the time of May 2015 IEP meeting. █ testimony identifies the █ IEP implemented for the 2013-2014 school year. There was also an IEP established in September 2014 for the 2014-2015 school year. Although Respondent objected to the September 2014 IEP and filed a request for a due process hearing, said due process hearing was resolved by the Memorandum Opinion And Order on April 8, 2015. Exh. 4. For purposes of stay put, a hearing officer decision is treated as an agreement between the parties. See JH by Hesse v. Los Angeles Unified Sch Dist, 54 IDELR 195 (CD Calif 2010). The April 8, 2015, Memorandum Opinion and Order resolved Respondent’s objection to the September 2014 IEP and therefore the opinion could be treated as an agreement between the parties as to the September 2014 IEP.

Based upon the record in this matter, Respondent did not show by a preponderance of evidence that in May 2015 there was a pending proceeding so as to invoke stay put nor did the Respondent submit evidence to identify the “then current educational program” of [REDACTED]

**III. [REDACTED] has not been denied FAPE for the 2015-2016 school year due to postponement of the determination on ESY services until the Spring of 2016.**

The IEP for the 2015-2016 school year provides that a decision as to whether or not [REDACTED] qualifies for ESY services will be made by February 15, 2016.<sup>1</sup> Respondent asserts that “failure to substantively discuss and plan for ESY services was a procedural violation of IDEA . . .” RESPONDENT’S CLOSING BRIEF, p.13. Respondent supports it’s assertion by citing to the testimony of Respondent’s witness [REDACTED] however, [REDACTED]’s testimony is clear that a decision concerning ESY services would be best made shortly after spring break in March and based upon information from the current school year. HT 409:17-411:17; 419:13-20. Whereas a decision as to ESY for the 2015-2016 school year has not been made and the time for making a decision concerning ESY services has been extended until a time consistent with the testimony of [REDACTED] this issue is not ripe for determination. Accordingly, Respondent’s contention, that [REDACTED] has been denied FAPE for the 2015-2016 school year because of the district’s failure to provide [REDACTED] ESY services, is denied.

**IV. [REDACTED] was denied FAPE when Petitioner shortened [REDACTED] school day and [REDACTED] is entitled to an award of compensatory education.**

It is uncontested in this matter that during the entire 2014-2015 school year and the first part of the 2015-2016 school year, up to October 6, 2015, [REDACTED] was being put on the bus to go

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<sup>1</sup> The parties agreed to change this date to March 1, 2016. HT 567:13-24.

home in the afternoon 15 to 20 minutes earlier than other students. HT 52:25-53:12. The total amount of school time [REDACTED] missed because of this busing schedule was 51.25 hours. Exh. 47.

“In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies –

- “(i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
- (iii) Caused a deprivation of educational benefit.” 34 CFR §300.513(a)(2).

By picking [REDACTED] up early for the bus ride home, [REDACTED] was deprived of 15-20 minutes a day of instructional time in the classroom. Instructional time in the classroom is an educational benefit. This deprivation of this educational benefit to [REDACTED] is a violation of the IDEA and a denial of FAPE.

An hour-for-hour award of 51.25 hours of compensatory education is appropriate on this issue. These hours of compensatory education shall be provided over a two week period during the month of June 2015. The compensatory education will be based on [REDACTED]’s then current IEP goals.

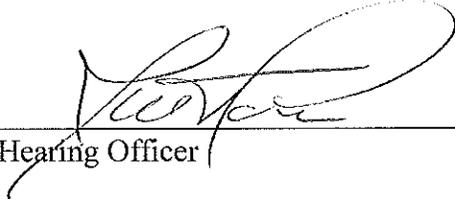
### CONCLUSION

For the reasons stated above it is hereby ADJUDGED and ORDERED that:

1. The IEP for the 2015-2016 school year provides FAPE to [REDACTED];
2. [REDACTED] was not denied FAPE by Petitioner’s determination that [REDACTED] did not qualify for ESY services for the 2014-2015 school year;

3. [REDACTED] was not denied FAPE by postponement of the decision to determine whether or not [REDACTED] qualifies for ESY services for the 2015-2016 school year;
4. [REDACTED] was denied FAPE due to being picked up early from school during the 2014-2015 and 2015-2016 school years. Accordingly, it is hereby ORDERED that 51.25 hours of compensatory education be provided to [REDACTED] by Petitioner during a consecutive two week period in the month of June 2015. Such hours of compensatory education shall be based upon [REDACTED]'s then current IEP goals.

So ADJUDGED and ORDERED this 22<sup>nd</sup> day of February, 2016.

  
\_\_\_\_\_  
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 22<sup>th</sup> day of February, 2016, I caused to be served on the following a true and correct copy of the foregoing document by the method indicated below:

Kelly Kumm  
1305 East Center Street  
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- U.S. Mail, postage prepaid
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- Overnight Mail
- Facsimile
- Email

By:   
Hearing Officer