

Judson W. Tolman

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Hearing Officer

BEFORE THE OFFICER FOR THE
IDAHO DEPARTMENT OF EDUCATION

██████████ as legal guardian and parent of ██████████ a)	
minor,)	Case No. H-19-04-01A
)	
Petitioner,)	
)	
vs.)	MEMORANDUM DECISION
)	
KUNA SCHOOL DISTRICT No. 3,)	
)	
Respondent,)	
)	
vs.)	
)	
██████████ as legal guardian and parent of ██████████ a)	
minor,)	
)	
Intervenor-Respondent.)	
)	

INTRODUCTION

This case arises from a dispute between the Student’s ██████████ (“Petitioner”) and the Kuna School District (“School District”) concerning the Student’s 2018-2019 Individualized Educational Program (“IEP”). Petitioner, in a Due Process Hearing Request under the Individuals with Disabilities Education Improvement Act (“IDEA”) received by the State Department of Education on April 1, 2019, asserts that the Student has been denied a Free and

Appropriate Public Education (“FAPE”) under the IDEA because the IEP does not adequately address the Student’s disabling conditions and the IEP does not provide sufficient personal care services meeting the Student’s needs. The School District submitted an Answer To The Complaint denying Petitioner’s claims and asserting that the IEP adequately addresses the Student’s needs and the Student has not been denied FAPE. Also, in response to Petitioner’s claims, the Student’s [REDACTED] (“Intervenor”) submitted a motion to intervene in opposition to Petitioner’s claims which motion was granted.

A two-day due process hearing was held on June 3-4, 2019. The parties stipulated to the admission into evidence of Petitioner’s Exhibits 1 through 57, Respondent’s Exhibits 101 through 144, and Intervenor’s Exhibit’s 201 through 208. Transcript (“Tr.”) 17.

Witnesses who testified at the hearing include:

- Petitioner;
- Intervenor;
- Ludee Vermaas, Special Education Director, Kuna School District;
- Kelly Schamber, Building Administrator, Kuna [REDACTED]
- [REDACTED]
- [REDACTED], Kuna [REDACTED];
- Alicia Jordan, Nurse, Kuna School District;
- [REDACTED] Special Education Teacher, [REDACTED], Kuna [REDACTED]
- [REDACTED] Kuna [REDACTED]
- [REDACTED] Special Education Teacher, Kuna [REDACTED]
- [REDACTED], Special Education Teacher, [REDACTED], Kuna [REDACTED]; and
- [REDACTED], [REDACTED], Kuna [REDACTED].

Although all exhibits and testimony were considered, those exhibits and the witness testimony referenced in the findings and conclusions below were considered relevant, credible and given appropriate weight in rendering this Memorandum Decision.

ISSUES

In Petitioner's Due Process Hearing Request ("DPHR"), Petitioner asserts that under the Student's current IEP the "Problems in General" are:

- The school/district has failed to adequately address all disabling conditions, of which there are many.
- The school/district has failed to provide appropriate supports to level the playing field so that [the Student] can pursue FAPE as any other student. [The Student] has been refused a [REDACTED] despite the fact that [Student] cannot access [Student's] supplies or classroom materials.
- Class assignments, supplies, and personal items are routinely lost / misplaced / ruined because there is not one person responsible for assisting [the Student].
- In fact, the school/district has failed to make classrooms and common areas accessible for [the Student] to have access to the teacher and instruction and common areas.
- The school/district has failed to protect [the Student's] right to privacy, insisting [the Student] must use peers for support for his disabilities and allow them access to [Student's] backpack and supplies.
- The school/district has failed to minimize time lost in gen ed classrooms due to personal care supports, i.e., there is an accessible bathroom on both floors of the building and despite the fact that the majority of [the Student's] classes are on the second floor, [the Student] is required to travel to the first floor for [REDACTED] needs. [The Student] is told that there is not "adequate staff" to me [the Student's] needs at the upstairs bathroom ([the Student] requires a [REDACTED]).
- The staff refuse to use a written log book, and the school/district has instructed me to not communicate via email with the person who manages [the Student's] personal care staff. Instead, I am to email the VP in charge of SPED. This has created a clog in communication and messages that need to be passed on are delayed.

See DPHR, p. 3.

To resolve Petitioner's assertions, Petitioner seeks the following relief:

1. "Meet needs of the student by providing a [REDACTED] of student's disabilities. This will scaffold goal towards independence, minimize time outside of academic environment for [REDACTED], reinstate [the Student's] right to privacy, and provide adequate supports for physical disabilities.
2. "Amend the IEP to adequately reflect [the Student's] disabilities and needs. Revise goals.
3. "Reimbursement for personal items damaged under the current plan implementation protocol.
4. "Fix the physical environment of [REDACTED] to be truly accessible.
5. "Remove communication restrictions."
See DPHR, p. 2.

During the Resolution Period, the parties reached a partial resolution as to item 1 and resolved items 3, 4 and 5 of the relief requested by Petitioner. As stated by Petitioner:

"We reached a partial agreement on item 1, [REDACTED] for [student]. The district offered additional supports in the morning before school which I accepted. We then continued a discussion of additional classroom supports and ended the conversation having NOT reached an agreement. So that item was partially, but certainly not fully resolved.

We did not reach any agreement on item 2, amending the IEP to accurately reflect [Student's] disabilities and needs.

We did reach agreement on item 3.

We did reach agreement on item 4.

We did reach agreement on item 5."

See Petitioner's Response to Respondent's Motion to Dismiss, (email 5/6/19); see also, ORDER ON RESPONDENT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, p. 4-5.

Following the parties' resolution as stated by Petitioner above, the remaining issues addressed at due process hearing and in this Memorandum Decision are items 1 and 2 above, specifically:

1. Has the Student been denied FAPE due to the School District's failure to provide appropriate [REDACTED] support; and
2. Has the Student been denied FAPE due to the School District's failure to amend the IEP to adequately reflect the Student's disabilities and needs.

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 whereas Petitioner is challenging the IEP and the only party seeking relief.

FINDINGS OF FACT

1. Student is [REDACTED] years old and has completed the [REDACTED] grade at Kuna [REDACTED]. Exh. 132.

2. Student receives special education support under the eligibility category of [REDACTED]
[REDACTED] Student has been receiving special education support since January [REDACTED]
Ibid.
3. Student is diagnosed with [REDACTED] which [REDACTED]
[REDACTED] The Student uses an [REDACTED] exclusively at school and needs
assistance with tasks that require the [REDACTED]
[REDACTED]
[REDACTED] Ibid.
4. Student has some use of his [REDACTED], limited control of the [REDACTED]
[REDACTED] Ibid.
5. Student wears [REDACTED]. Ibid.
6. An IEP team meeting was held on November 1, 2018, and was attended by Petitioner and
Intervenor, among others. Student's current IEP began November 2, 2018. Ibid.
7. Student's IEP provides, in relation to Personal Care Services, that:

"Personal Care Services in the school setting and/or school activity are provided by
teacher and/or para under the supervision of the RN.
[Student] qualifies for 1500 minutes per week of Personal Care Services (PCS) as
determined per the PCS Allocation Tool.
Personal Care Services at school include assisting with g [REDACTED]
[REDACTED]
Orientation and Mobility goals will be provided by a paraprofessional during transition or
other times that require him to leave the room (cafeteria, to bathroom, nurses office,
activities, assemblies, etc) under the supervision of [the] case manager.
Personal/Social goals will be provided by a paraprofessional or staff who attend lunch,
bathroom break and club activities with [Student].
Access to adult support during transition by special education para or teacher is provided
to set him up at the beginning and end of each class to assure access to materials as
needed."
Exh. 132,p.KSD000208

8. Daily PCS provided to the Student at school includes:

10. At the IEP meeting on 11/1/18, Petitioner requested [REDACTED] full-time support which was considered by the IEP team. The IEP team decided a [REDACTED] [REDACTED] was not necessary. Exh. 132, p. 15.
11. The School District has implemented a [REDACTED] process so that if Student needs to leave the class at a time when the [REDACTED] is not in the class the Student can [REDACTED]. The Student can then leave the classroom or the teacher will assist Student or obtain assistance for Student. Tr. 347, 351, 365.
12. Student spends an average of 87.5% of Student's school time in the general education environment. Exh. 132, p. 12.
13. Student attends a Study Skills class with a special education teacher. During this class the special education teacher spends individual time with the Student to review grades and assignments, organize his backpack and address any questions or concerns of the Student relating to his classes. Tr. 285-86.
14. At the beginning of the 2018-2019 school year, Student's teachers were provided information specifically about Student's disabilities and needs. This information also indicated what assistance the teachers were expected to provide Student while in the classroom. Tr. 194-6, 282-3; Exh. 28.
15. During [REDACTED] school Student achieved [REDACTED] and [REDACTED] grades with one [REDACTED] grade. Tr. 510
16. During Student's [REDACTED] grade year at [REDACTED] Student achieved all [REDACTED] grades. Tr. 450-51; Exh. 140.
17. During Student's [REDACTED] grade year at [REDACTED] Student achieved [REDACTED] grades and two [REDACTED] grades. Exh. 140.

18. One of Student's [REDACTED] grades during the [REDACTED] grade was in [REDACTED]. The [REDACTED] [REDACTED] teacher discussed the assignment Student could redo in order to raise his grade to an [REDACTED]. Student choose to redo part of the assignment but not all of it. "[The Student] didn't want to. [Student] didn't like the way it looked. . . [Student] knew what [Student] was doing. [Student] had the skills. It was just some [REDACTED] elements and the part where [Student] chose, because [Student] wanted to do something different." Tr. 271-276.
19. Having a full-time [REDACTED] [REDACTED] in the [REDACTED] classroom with Student would not have helped Student obtain an [REDACTED] grade. Ibid.
20. The role of an [REDACTED] does not include assisting Student with academic assignments, advocating for Student concerning classwork or teacher instructions, or assisting Student with class assignments. Tr. 270-75; 345-46.
21. On 2/26/2019, Student's IEP was amended to help support Student's [REDACTED] [REDACTED] Exh. 121, p.4. The amendment identified Student needs of "specially designed instruction due to [REDACTED] [REDACTED] [REDACTED]." Exh. 121, p.2. To address Student's [REDACTED] needs Student was placed in the Study Skills class. Ibid.
22. The amendment to the IEP adding and related to [REDACTED] function was made at the request of and based upon information provided by Petitioner. Tr. 110-113.
23. In the fall of 2018, the [REDACTED] [REDACTED], [REDACTED] conducted tests and reviewed test results relating to the Student's deficits and abilities. These tests were identified as BASC-2, BASC-3, SIB R and ABAT. Tr. 196-220. The test results are included in the Student's Eligibility Report dated 10/11/18. Exh. 128.

24. From these tests, the [REDACTED] found no “evidence or indicia supporting the existence of an [REDACTED]” or of an “[REDACTED].”

Tr. 221.

25. The current IEP does not include [REDACTED] or [REDACTED] [REDACTED] Exh. 132.

26. By the end of the 3rd quarter of the current IEP year, Student’s Progress Report showed that Student made progress on all IEP goals. Specifically, Student made the following progress:

Goal: Orientation and Mobility

“. . . [Student] is becoming increasingly aware of his surroundings and the people [Student] interacts with. During quarter three, [Student] independently navigated the school successfully 62% of the time on 4 out of 5 trials.”

Goal: Personal/Social

“[Student] is comfortable with [Student’s] peers during lunch. [Student] initiates social contact comfortably. [Student] consistently initiates conversation on average 3/5 opportunities. Several observations have noted 4/5 or 5/5. [Student continues to make progress.”

Goal: Personal/Social

“[Student] has improved [Student’s] ability to problem solve. [Student] is becoming comfortable approaching administration or teachers to help [Student] work out an issue. [Student] is doing this 1/5 times.”

Goal: Academic Support

“[Student] has emailed 2 teachers to discuss academics and [Student] did not wait 48 hours for a response. ([Student did not start to CC staff on emails until 1/15/2019).”

Goal: Academic Support

“[Student] is making progress with organizing [Student’s] prepared materials. When prompted, [Student] goes through his binder. Staff is still giving [Student] ideas on where to put certain items, but [Student] is making progress on where to put his items.”

Exh. 138, p.KSD000237-239.

LEGAL CONCLUSIONS

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). To this end, schools are charged with the responsibility of identifying and assessing all children who are suspected of having disabilities and are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111.

The purpose of the IDEA is, among other things, to provide all 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).

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.*

The IDEA defines “related services” as:

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. 20 U.S.C. §1401(26).

In regard to the statutory definition of “related services” under the IDEA, the Supreme Court stated that related services are those services “. . . that enable a disabled child to remain in school during the day to provide the student with the meaningful access to education that Congress envisioned.” *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 73, 119 S.Ct. 992, 143 L.Ed.2d 154 (1999).

I. Petitioner failed to show that the current IEP is not reasonably calculated to allow Student to progress or that a full-time [REDACTED] [REDACTED] is necessary for Student to benefit from special education.

Petitioner's first claim in this matter concerns the provision of a related service, namely, providing Student with a [REDACTED] [REDACTED]. Petitioner's testimony clarifies that Petitioner's claim is for a full-time [REDACTED] [REDACTED] who can assist Student, not only at the times Student is currently receiving [REDACTED] services but also during the entire class time in Student's general education classes. Tr. 457-60, 464-65. The parties acknowledge that under the IEP Student receives 1500 minutes of Personal Care Services per week which includes [REDACTED] [REDACTED] services before and after school, between classes, at the beginning and end of each class, during lunch time, during the Study Skills class, and at other times when there is a specific need or a request by the Student. The [REDACTED] services provided under the IEP allow Student to progress in his classes by first, getting Student to each of his classes with any books, supplies or equipment set out for him. Next, the [REDACTED] services assist Student with the activities of daily living (i.e., [REDACTED]) so that he can remain at school and attend classes. Last, the [REDACTED] services are available to Student at any time through the [REDACTED] program set up by [REDACTED] to meet any unique and emergent needs of the Student.

Student attends all general education classes except for a Study Skills class which is a class for special education and 504 plan students. Student received all [REDACTED]'s during his [REDACTED] grade year (2017-2018). Under the current IEP for 2018-2019, Student received two [REDACTED]'s and the rest [REDACTED]'s. Academically, Student is in the top [REDACTED] of his class. Exh. 140. Student's high grades and standing in his class are an indication that Student is progressing and benefitting under his IEP.

Educational benefit in a particular program is measured by the degree to which a student is making progress on the goals set forth in the IEP. *County of San Diego v. California Special*

Education Hearing Office, et al. 93 F.3d 1458, 1467 (9th Cir. 1996). The Progress Report (Exh. 138) shows that in the last reported quarter for the 2018-2019 IEP the Student made progress on every goal of the IEP. Student's progress on every IEP goal is another indication that Student is receiving educational benefit under the IEP.

Student's [REDACTED] teacher was Student's only general education teacher to testify at the due process hearing. This teacher's testimony about her first-hand experience with the Student in the general education classroom was credible and warrants considerable weight. She explained that Student did his own academic work and that it would not be the role of an [REDACTED] to assist Student with assignments. She gave examples as to how Student has been assisted and Student's needs met when the [REDACTED] has not been present. When Student's [REDACTED] is not present, Student's needs are met by the teacher or when necessary the teacher can call for an [REDACTED] to come and assist Student. Tr. 270-75; Exh. 28. From the [REDACTED] teacher's experience with the Student, there were no needs of the Student during the class time that were not being met.

On the other hand, Petitioner did not meet her burden of proof by showing that Student has needs during the class time that are not being met. Petitioner did not show that [REDACTED] services under the current IEP were not reasonably calculated to enable Student to progress, that Student has needs that are not being met under the IEP, nor that a full-time [REDACTED] [REDACTED] was necessary for Student to benefit from special education. Rather, the evidence presented at the hearing did establish that Student's IEP enables him to make progress on all IEP goals and that the [REDACTED] services provided under the IEP enable the Student to stay at school and in class where Student receives meaningful access to both general education and special education at [REDACTED]

II. Student was not denied FAPE due to a failure to amend the IEP.

Petitioner asserts that Student's IEP needs to be amended to properly account for Student's disabilities and needs. Specifically, Petitioner asserts that the IEP should account for an [REDACTED] function disorder or disability. The 2017-2018 IEP was amended to include [REDACTED] function at the request of, and based upon information from, Petitioner. Prior to the 2018-2019 IEP team meeting on November 1, 2018, the [REDACTED] psychologist concluded that Student does not have [REDACTED] or [REDACTED]. The [REDACTED] psychologist's conclusion was based upon tests completed by the [REDACTED] and testing results obtained by another [REDACTED]t. At the due process hearing, Petitioner put forth Exhibit 07 as a neuropsychological assessment conducted by "Dr. Woody". Other than his last name no other information was provided about Dr. Woody (i.e., full name, experience, qualifications). Even if deemed credible, the neuropsychological assessment does not conclude that the Student has an [REDACTED]; to the contrary, under a heading of [REDACTED]", the assessment states:

"[Student's] performance with the WCST [Wisconsin Card Sorting Test] suggested Superior ability to use alternate problem-solving strategies in a nonverbal problem-solving task. [Student's] approach to the task was consistent with flexibility and the effective use of alternate strategies across conditions. Within the measure, [Student] demonstrated no frustration with his ability to resist a rigid response pattern, while maintaining conceptual flexibility in [Student's] approach to this task. Individuals with similar scores typically experience little difficulty in their capacity to initially identify an appropriate strategy and then alter it in response to changing conditions. Within the WCST [Student] demonstrated no difficulty with impulse control and careful consideration of his answers." Exh. 7, p.5.

This assessment relied upon by Petitioner lacks credibility and does not reach the conclusion that Student has [REDACTED] function problems.

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.”

