

IN THE ADMINISTRATIVE LAW COURT OF THE
UTAH DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SERVICES DIVISION
DUE PROCESS HEARING

In the Matter of:¹

[REDACTED]

Petitioner,

v.

LOGAN CITY SCHOOL DISTRICT,
Respondent.

)
)
)
)
)
)
)

DP Case No. 1819-08

Kia Scott
Impartial Hearing Officer (IHO)

FINAL DETERMINATION AND ORDER

JURISDICTION

The undersigned has jurisdiction over this matter pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S. C. §1400 et seq. and the UTAH STATE BD. OF EDUC., SPECIAL EDUC. RULES IV.M.(2)-(3)(a)-(e), (2016).

PROCEDURAL BACKGROUND

The Petitioner is the parent (“Parent”) of [REDACTED] (“Student”) previously enrolled student at Logan High School in Logan City School District (“LCSD”) (“District”). On February 19, 2019 the Parent filed a due process complaint (“Complaint”) against the District.² The dispute arose over multiple issues, including but not limited to procedural safeguard concerns, reevaluation, and appropriate assistive technology (“AT”) devices.³

¹ See IHO-1 for personally, identifiable information for both Parties.

² IHO-10.

³ *Id.*; See also IHO-16.

The Parent was represented by the Honorable Mark Adamson. The District was represented by the Honorable Paul D. Van Komen and the Honorable Elliot B. Scruggs, attorneys for BURBIDGE & WHITE. On February 22, 2019, the Utah State Board of Education (“USBE”) appointed the undersigned as the Independent Hearing Officer (“IHO”) in this cause.⁴ On February 25, 2019, the District filed the Respondent’s Motion to Dismiss Claims Other than Claims Based on IDEA and to Dismiss Claims Barred by the Two-Year Statute of Limitations and Response to Request for Due Process Hearing and Due Process Complaint.⁵ On February 27, the undersigned issues a Pre-Hearing Letter to the Parties.⁶

The Parties participated in the first telephonic conference call February 28, 2019. During the call, Parties identified prehearing matters, discussed the status of a resolution session, established dates for the due process hearing, and confirmed other required deadlines. Parties agreed that the resolution session should be completed by March 21, 2019 and that a final decision in the matter was due by May 5, 2019. The Initial Scheduling Order was issued March 1, 2019.⁷

On March 5, 2019, the Parent filed a Response to the Respondent’s Motion to Dismiss Claims Other than Claims Based on IDEA and to Dismiss Claims Barred by the Two-Year Statute of Limitations and Response to Request for Due Process Hearing and Due Process Complaint.⁸ Then, on March 11, 2019, the District filed a Reply to the Parent’s Response. Later, on March 12, 2019, the Parent filed a Motion to Strike the Respondent’s Reply.⁹

⁴ IHO-2.

⁵ IHO-11.

⁶ IHO-3.

⁷ IHO-4.

⁸ IHO-12.

⁹ IHO-13.

The second telephonic conference call occurred on March 13, 2019 for the Parties to present oral arguments on the District's Motion to Dismiss Claims Other than Claims Based on IDEA and to Dismiss Claims Barred by the Two-Year Statute of Limitations and all responsive motions; confirm dates and times to convene the due process hearing; and discuss the length of the hearing and potential number of witnesses. The Second Order Re: Pre-Hearing Motions was issued March 20, 2019, in which Parties were Ordered to provide the IHO supplemental briefs concerning the Dismissal of Claims Barred by the Two-Year Statute of Limitations.¹⁰ Subsequently, Parties filed the following:

- (1) Respondent's Supplement to Motion to Dismiss Claims Barred by the Two-Year Statute of Limitations and Clarification of March 20, 2019 Order, filed March 23, 2019;¹¹
- (2) Petitioner's Supplemental, Brief Motion to Reconsider or in the Alternative Bifurcate the Issue of the Statute of Limitations for a Separate Hearing, filed March 23, 2019;¹² and
- (3) a Joint Stipulated Extension for Due Process Hearing and Final Decision, filed on April 3, 2019.¹³

The third telephonic conference call occurred on March 26, 2019 to discuss the IHO's final ruling on the matter of any applicable two-year statutes, revisit dates and possible locations for the hearing.¹⁴ During the call, Parties jointly extended the hearing deadline, agreeing to a final hearing May 20-23, 2019. On April 15, 2019, the Petitioner filed a Clarification of Issues.¹⁵

¹⁰ IHO-9; IHO-5; IHO 20-21.

¹¹ IHO-15.

¹² *Id.*

¹³ IHO-17.

¹⁴ *Id.*

¹⁵ IHO-16.

The fourth and fifth telephonic conference call occurred on April 5, 2019 and April 26, 2019, respectively. During the fourth telephonic conference call, the Parties confirmed final dates for the hearing, discussed additional location options for the hearing, discussed the Parent's objection to the undersigned's Orders dated March 20, 2019 and April 7, 2019, and discussed the Petitioner's burden to clarify issues to be heard in this matter. During the fifth telephonic conference call, the Parties discussed progress of evidence disclosures, witness lists, the order of the hearing, burdens of proof, student presence during the hearing, and all issues concerning telephonic testimony. The Fourth ORDER RE: Fourth and Fifth Pre-Hearing Conference Call Summary & Order was issued April 26, 2019.¹⁶

The hearing took place May 20-23, 2019, at Logan District Court, 135 N 100 W, Logan UT, from 8am – 5pm each day. The Parties provided the IHO with potential witness lists and exhibit lists prior to the hearing.¹⁷ The District provided exhibit books to the IHO on May 20, 2019. The Parent freely admitted the District's exhibits and various independent exhibits. On days one and two of the hearing the Parent called a total of eight (8) witnesses,¹⁸ and on days three and four of the hearing, the District provided a total of six (6) witnesses.¹⁹ The Petitioner called no expert witnesses.²⁰

The Parent admitted the following exhibits into the record: District's Exhibit 1 ("D-1"), D-2, D-6, D-7, D-4, D-13, Petitioner's Exhibit 1 ("P-1"), D-36, P-2, D-27

The District admitted the following exhibits into the record: D-29, D-18, D-5, D-26, D-10, D-31, D-32, D-37, D-33, D-44, D-25, P-49, P-50, P-51, P-54, P-55, P-56, P-58, D-12A, D-12B, D-16, D-14, D-15, D-17, D-34.

The IHO exhibits are IHO 1-21.²¹

¹⁶ IHO-6.

¹⁷ IHO-18-19; See also IHO-7.

¹⁸ IHO-18 (Petitioner did not call all potential witnesses and called no expert witnesses).

¹⁹ IHO-19 (District did not call all potential witnesses).

²⁰ On day two of the due process hearing, Petitioner's counsel informed the Court that the Petitioner was condensing its witness list. Specifically, the Court would hear from [REDACTED] (licensed psychologist and board-certified behavior analyst) and [REDACTED] (speech language pathologist), as non-experts and the Petitioner would not call any experts. (Day 2 at 155:18-25, 156:1-25, 157:1-4).

²¹ See Appendix.

During the hearing, the District motioned the Court to further extend the IDEA timeline because of additional time needed for the court reporter to provide transcripts to the Parties. The Parties agreed to provide post-hearing briefs to the Court on/before midnight MT, June 10, 2019; and that a final decision would be rendered on/before midnight MT June 17, 2019.²² The undersigned memorialized the agreement in a written Order on May 23, 2019.²³

The undersigned and all Parties received full copies of transcripts and the Parties produced post-hearing briefs.²⁴ In rendering this decision, the IHO considered all documents admitted into evidence, the testimony of the witnesses, the parties' opening and closing arguments, post hearing briefs, and the IHO's independent research. This decision was issued on/before midnight, MT, June 17, 2019, as agreed to by the parties and required by Utah law.²⁵

ISSUES AND REQUESTED REMEDIES

ISSUE A

The issues to be determined are as follows:²⁶

- A. Whether Student services offered by the District were reasonably calculated to enable the Student to make appropriate progress in light of [REDACTED] circumstances, which allegedly resulted in the denial of a free and appropriate public education (FAPE)?

Petitioner clarified the basis of this claim/evidence to support Issue A as follows:²⁷

²² IHO-8.

²³ *Id.*

²⁴ IHO-20-21.

²⁵ IHO-8. See also STATE BD. OF EDUC., SPECIAL EDUC. RULES IV.O – IV.R.(2)(e), (2016).

²⁶ IHO-16.

²⁷ *Id.* (provided herein verbatim as listed in Petitioner's pleading). During the hearing, there was no evidence

- a. *On February 19, 2019 LCSD was offering [Student] generic special education services under an IEP without conducting any evaluations that could inform the IEP team of the unique nature of the challenges [Student] faced due to [REDACTED] disability, and despite knowing this LCSD did not seek to amend the IEP or provide adequate evaluations;*
- b. *On February 19, 2019 LCSD was offering [Student] services under an IEP that lacked appropriate present levels of academic performance that accurately reflected [REDACTED] then current abilities, strengths and weaknesses as required by the IDEA, and despite knowing this LCSD did not seek to amend the IEP;*
- c. *On February 19, 2019 LCSD was offering [Student] services under an IEP without developing appropriately ambitious and measurable goals in light [Student]'s circumstances, and despite knowing this LCSD did not seek to amend the IEP;*
- d. *On February 19, 2019 LCSD was offering [Student] services under an IEP that did not contain adequate present levels of academic achievement and functional performance based on age-appropriate transition assessments as required by the Utah State Board of Education Rule VII.B.5 and despite knowing this LCSD did not seek to amend the IEP;*

admitted to substantiate sub-issues b-f, h-j, m, and s. For the purposes of this opinion and to reduce redundancy, sub-issues l is combined with sub-issue g, and sub-issues n & o are combined with b & g; sub-issues p & r are a general statements of fact/supposition and any admissible evidence supporting such suppositions was considered as supporting evidence concerning any applicable sub-issue(s).

- e. *On February 19, 2019 LCSD was offering [Student] services under an IEP that did not contain realistic and reasonable measurable postsecondary goals based upon annual age-appropriate transition assessments related to training or education, employment, and, where appropriate, independent living skills as required by the Utah State Board of Education Rule VII.B.5 and despite knowing this LCSD did not seek to amend the IEP;*
- f. *On February 19, 2019 LCSD was offering [Student] services under an IEP that did not contain transition services, including multi-year courses of study, that would reasonably enable [Student] to reach the post-secondary goals identified on the IEP; as required by the Utah State Board of Education Rule VII.B.5 and despite knowing this LCSD did not seek to amend the IEP;*
- g. *On February 19, 2019 LCSD was offering [Student] services under an IEP that did not contain appropriate assistive technology supports and or services despite the fact that LCSD was in possession of a detailed and highly detailed outside evaluation that identified the need and ability for [Student] to use a speech generating device to enable [REDACTED] to receive appropriate education services as required by the Utah State Board of Education Rule III.I.4 and despite knowing this LCSD did not seek to amend the IEP;*

- h. On February 19, 2019 LCSD was offering [Student] services under an IEP that did not provide for the use of positive behavior interventions and supports, and other strategies, to address the fact that [Student]’s maladaptive behaviors were impeding [REDACTED] learning as required by the Utah State Board of Education Rule III.I.5 and despite knowing this LCSD did not seek to amend the IEP;*
- i. On February 19, 2019 LCSD was offering [Student] services under an IEP that did not contain appropriate specialized instruction to enable [REDACTED] to make appropriately ambitious progress in light of [REDACTED] circumstances as required by the IDEA, and despite knowing this LCSD did not seek to amend the IEP*
- j. On February 19, 2019 LCSD was offering [Student] services under an IEP that was not reasonably calculated to provide supports and services that would allow [REDACTED] to be educated in the least restrictive environment amongst [REDACTED] non-disabled peers, and despite knowing this LCSD did not seek to amend the IEP;*
- k. LCSD did not adequately evaluate [Student] to understand the unique nature of [REDACTED] disability after [REDACTED] mother requested such evaluations to be completed at an IEP meeting held February 12, 2018. The evaluations that were completed included a Psycho Educational Evaluation, and speech language pathology evaluation. Both of these evaluations were conducted under improper test taking conditions when [Student] was unusually lethargic due to recently being under general*

anesthesia, the data taken resulted in scores that were inaccurate and unable to provide the IEP team with an appropriate understanding of the unique nature of [Student]'s disability.

l. On November 16, 2017 after making years of repeated failed request for LCSD to provide appropriate specialized education services [Student]'s Mother requested a facilitated IEP meeting to be held. At the meeting she made the team aware of the fact that [Student]'s behaviors at school were becoming more aggressive while [redacted] behaviors at home were improving, she requested that the team use an iPad with [Student] for communication, that [redacted] was being too isolated from [redacted] nondisabled peers, and that there was a need for a trained paraprofessional who could stay with [redacted] at all times throughout the day. Despite [Student]'s mother bringing these concerns to the IEP team LCSD did not amend [Student]'s IEP to ensure it was reasonably calculated to address [redacted] unique needs;

m. On February 12, 2018 at an IEP meeting [Student]'s mother and an attorney who attended on her behalf made the team aware of the fact that [Student]'s IEP was not based upon appropriate evaluations, did not contain appropriate present levels of academic achievement that accurately described [Student]'s then present abilities, strengths and weaknesses, did not contain appropriately ambitious measurable goals that were calculated to allow [redacted] to make appropriate educational progress in light of [redacted] circumstances, did not contain appropriate descriptions of individualized special education

instruction for [Student] to be properly educated, did not contain appropriate assistive technology services, did not contain appropriate behavior services, did not contain appropriate transition goals and services, and failed to provide appropriate services to allow [Student] to be educated in the least restrictive environment. Despite being made aware of these facts LCSD did not amend [Student]’s IEP to ensure it was reasonably calculated to ambitiously allow [Student] to make progress in light of [REDACTED] unique circumstances, as required by the IDEA;

n. On April 11, 2018 at an IEP meeting [Student]’s mother and an attorney who attended on her behalf made the team aware of the fact that [Student]’s IEP was not based upon appropriate evaluations, did not contain appropriate present levels of academic achievement that accurately described [Student]’s then present abilities, strengths and weaknesses, did not contain appropriately ambitious measurable goals that were calculated to allow [REDACTED] to make appropriate educational progress in light of [REDACTED] circumstances, did not contain appropriate descriptions of individualized special education instruction for [Student] to be properly educated, did not contain appropriate assistive technology services, did not contain appropriate behavior services, did not contain appropriate transition goals and services, and failed to provide appropriate services to allow [Student] to be educated in the least restrictive environment. Despite being made aware of these facts LCSD did not amend [Student]’s IEP to ensure it was reasonably calculated to ambitiously allow [Student] to make progress in light of [REDACTED] unique circumstances, as required by the IDEA.

o. On October 30, 2018 at an IEP meeting [Student]’s mother and an attorney who attended on her behalf made the team aware of the fact that [Student]’s IEP was not based upon appropriate evaluations, did not contain appropriate present levels of academic achievement that accurately described [Student]’s then present abilities, strengths and weaknesses, did not contain appropriately ambitious measurable goals that were calculated to allow [redacted] to make appropriate educational progress in light of [redacted] circumstances, did not contain appropriate descriptions of individualized special education instruction for [Student] to be properly educated, did not contain appropriate assistive technology services, did not contain appropriate behavior services, did not contain appropriate transition goals and services, and failed to provide appropriate services to allow [Student] to be educated in the least restrictive environment. Despite being made aware of these facts LCSD did not amend [Student]’s IEP to ensure it was reasonably calculated to ambitiously allow [Student] to make progress in light of [redacted] unique circumstances, as required by the IDEA;

p. In August 2018 after [Student] was given access to an appropriate speech generating device that met the description described in [redacted] prior outside evaluation for a speech generating device that was in LCSD’s possession since 2012 and in a follow up outside evaluation by the same assessor in June of 2018. As soon as [Student] was given access to the device [redacted] began to use it independently as a functional means of communication. [redacted] was able to do so with minimal instruction and has since this time experienced extraordinary educational progress. All of this progress has been completed by outside service providers and was

made possible by offering the appropriate assistive technology device and appropriate services;

q. Since November 2018 to the present [Student] has been receiving in home ABA services that have allowed [REDACTED] to experience rapid and extraordinary educational progress in functional skills, increased compliance with instruction, decreases in maladaptive behaviors, for the first time being able to independently use the toilet, and in communication. These same services had been requested and denied by LCSD since February 12, 2018. This progress demonstrates that [Student] has the ability to experience substantial educational growth when given the proper behavior services;

r. The fact that [Student] has been able to make appropriate progress once given access to proper assistive technology and services as well as proper behavior supports demonstrate that LCSD's services offered to [Student] between February 19, 2017 to the present were not appropriate;

s. Despite the fact that [Student] has been able to make progress in the areas of communication and behavior the current lack of understanding of [Student]'s cognitive abilities prevent the development of a proper IEP that is reasonably calculated to be appropriately ambitious in light of [REDACTED] circumstances.

Following the hearing and considering evidence admitted, the IHO condensed applicable issues as follows:²⁸

²⁸ *Id.*

(1) Whether on/after April 11, 2017, LCSD offered [Student] generic special education services under an IEP without conducting any evaluations, completed inadequate evaluations, or completed evaluations under improper test taking conditions which resulted in a denial of FAPE? (“Claim I”).

(2) Whether on/after April 11, 2017, LCSD offered [Student] services under an IEP that did not contain appropriate assistive technology supports and or services, which resulted in a denial of FAPE? (“Claim II”).

ISSUE B

B. Whether the District violated the Parent’s procedural safeguards between November 16, 2017 to the present, which allegedly resulted in the denial of a free and appropriate public education (FAPE) to the Student during such time?

Petitioner clarified the basis of this claim/evidence to support Issue B as follows:²⁹

a. Between November 16, 2017 to the present LCSD staff have acted in an overtly hostile manner towards [Student]’s mother which has resulted in her being alienated from the ability to engage meaningfully in the

²⁹ IHO-16 (provided herein verbatim as listed in Petitioner’s pleading). Sub-issues b-d are general statements of fact/supposition and any admissible evidence supporting such suppositions was considered as supporting evidence concerning applicable claims.

development of her [REDACTED] IEP, [including (1) refusing to allow Student's mother to participate in IEP development; holding IEP meetings in an inhospitable environment, including disallowing breaks at the April 11, 2018, IEP meeting; and (3) contacting a potential expert witnesses in an attempt to prevent [REDACTED] from offering damaging testimony].

b. These above stated actions prevented [Student]'s IEP team from collaborating with [Student]'s mother and impeded the meaningful consideration of her input.

c. Once [Student]'s mother secured the appropriate private services for [REDACTED] son that she was advocating for the IEP team to consider [Student] has experienced unprecedented and rapid educational progress once [REDACTED] had access to appropriate services in [REDACTED] private services.

d. Had the LCSD team allowed for [Student] to have meaningful participation in developing [Student]'s IEP and overseeing its implementation by actually considering and discussing her input [REDACTED] would not have been denied a FAPE.

Following the hearing and considering evidence admitted, the IHO condensed applicable issues as follows:³⁰

³⁰ *Id.*

(3) Whether the District violated the Parent’s procedural safeguards on/after November 16, 2017 to the present, including (1) refusing to allow Student’s mother to participate in IEP development; (2) holding IEP meetings in an inhospitable environment, (i.e. disallowing breaks at the April 11, 2018, IEP meeting); and (3) contacting a potential expert witness in an attempt to prevent [REDACTED] from offering damaging testimony which resulted in the denial of FAPE? (“Claim III”).

The Parent’s requested remedies are as follows:

1. Find that between February 19, 2017 to the present the District failed to provide a FAPE to the Student as required by the IDEA.
2. Find that between November 16, 2017 to the present the District violated the Parent’s procedural safeguards under IDEA, resulting in a denial of FAPE.
3. Order the District to provide compensatory education for failure to provide FAPE.
4. Order the District to provide the Student with a private educational placement, until the Student reaches the age of 22, at a private setting that can provide ABA supports and services, access to assistive technology and services, occupational therapy supports and services, physical therapy supports and services, speech and language supports and services, meaningful interaction with nondisabled peers, social skills supports and services, life skills supports and services, transition supports and services, and highly trained staff that can meet [Student]'s unique needs.
5. Order the District to contract with independent professionals, including a board-certified behavior analyst, occupational therapist, physical therapist, speech language pathologist, augmentative communication specialist, and

a neuropsychological educational psychologist with expertise in autism and cerebral palsy.³¹

6. Order LCSD to [provide] one on one paraprofessional to assist the Student during school services and extracurricular activities until Student reaches the age of 22.
7. Order LCSD to update Student's IEP to provide a qualified individual who will work with Student on a weekly basis to learn how to use an assistive technology device as [REDACTED] primary means of communication.
8. Order LCSD to provide money for the STUDENT in a special needs trust to receive compensatory services for any services that cannot be complete before the date [REDACTED] turns 22.
9. Find that Petitioner is the prevailing party entitled to reasonable attorney fees; and
10. Order such other and further relief as the Hearing Officer may deem just and proper.

BURDEN OF PROOF

Under the Individuals with Disabilities in Education Act (IDEA), the burden of proof in an administrative hearing challenging an Individualized Education Program (IEP) is properly placed upon the party seeking relief, whether that is the disabled child or the school district. Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.³² Here, the Parent bears the burden of proof

³¹ See IHO Exhibit-16 (Petitioner requested that the requested professionals participate as members of Student's IEP team in all IEP meetings until Student reaches the age of 22; Identify which evaluations need to be conducted in order to understand the unique nature of the Student's disabilities and strategies [REDACTED] may needs to benefit from an education; Conduct evaluations and present the findings to the IEP team; Participate in drafting an appropriate IEP; Offer ongoing services and consultation to the individuals who provide services described in the IEP; and Participate in assessing how to best incorporate compensatory services into the Student's education so as to not interfere with those services that are provided in the IEP).

³² Schaffer ex rel. Shaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005).

and must prove her case by the preponderance of evidence.³³

FINDINGS OF FACT

After considering evidence, testimony, and arguments of the Parties, the IHO's Findings of Fact are as follows:

A. Student's Background & Current Placement

1. The Student is currently a [REDACTED] who is a former student at Logan High School, a school in Logan City School District, previously qualifying for an IEP under the category of autism.³⁴ During the 2017-2018 school year, the Student's eligibility changed to the category of multiple of disabilities, including cerebral palsy, vision and hearing, seizure disorder, hearing disorders, among other medical ailments.³⁵ Student's severity as it pertains to autism is in the top 5%,³⁶ and Student's IQ is 40.³⁷

³³ *Id.*

³⁴ Testimony of LCSD Special Education Director & LEA, [REDACTED] (Day 1). See also testimony of the Petitioner-Mother, [REDACTED].

³⁵ See D-6.

³⁶ Testimony of [REDACTED].

³⁷ Testimony of [REDACTED].

2. The Student was [REDACTED] and at the age of eight months, began receiving private therapy services after diagnosis of epilepsy, sepsis, and cerebral palsy.³⁸ [REDACTED] later began experiencing seizures and began seeing neurologists, gastrologists, ophthalmologists, and other medical professionals.³⁹ Student [REDACTED] in 2010, at age ten (10) and was enrolled in [REDACTED] zoned Utah school district as a fifth grader.⁴⁰ Months thereafter, [REDACTED] transferred to LCSD.⁴¹

3. Following the Parent’s request, Student was fully evaluated in 2018.⁴² Prior to the 2018 evaluations, the Student had not been evaluated since 2010, at the time of [REDACTED] enrollment.⁴³ From 2010-2018, the IEP Team agreed to waive evaluations.⁴⁴

4. During the 2018-2019 school year, Student attended school irregularly.⁴⁵ The Parent disenrolled Student on/around January 10, 2019,⁴⁶ after the Student began receiving services from an outside provider, Utah Behavior Services (UBS), in the Student’s home.⁴⁷ Prior to disenrollment, LCSD requested information concerning the services that the Student was receiving from UBS—the Mother declined to provide such data.⁴⁸

³⁸ Testimony of [REDACTED]

³⁹ Testimony of [REDACTED]

⁴⁰ Testimony of [REDACTED]

⁴¹ Testimony of [REDACTED]

⁴² Testimony of [REDACTED] (Day 1).

⁴³ Testimony of [REDACTED] (Day 3). See also testimony of [REDACTED]

⁴⁴ Testimony of [REDACTED].

⁴⁵ Testimony of [REDACTED]

⁴⁶ Testimony of [REDACTED] (Day 3).

⁴⁷ Testimony of [REDACTED] (Day 1 at). See also D-37.

⁴⁸ Testimony of [REDACTED] (Day 1 at); Testimony of [REDACTED] See also D-7.

B. 2018 Evaluations Sample

1. [REDACTED] completed the psychological evaluations, including a non-verbal intelligence test, achievement test subtests, and school observations for the student in 2018.⁴⁹ Scores show Student is profoundly limited and may be limited in [REDACTED] ability to live independently and work in the future.⁵⁰
2. [REDACTED] Speech Language Pathologist, conducted three evaluations in March of 2018, including the PPVT-4™, EVT-2, and Functional Communication Checklist. On PPVT-4, Student scored in the .1 percentile, equivalent to that of a 2-year old.⁵¹
3. [REDACTED] speech and language pathologist, medically evaluated Student on/around August 2018 for the purposes of determining an appropriate communication device.⁵² Following Fields' recommendation, Student began using the DynaVox at home as a preferred communication device.⁵³

C. 2017-2018 IEP Meetings & Notable Events

1. Since November 2017, Parties have participated in the following IEP Meetings:
 - a. November 16, 2017, Parties participated in a facilitated IEP Meeting.⁵⁴
 - b. October 30, 2018, Parties participated in an IEP Meeting.⁵⁵

⁴⁹ Testimony of Travis Loosli.

⁵⁰ Testimony of Travis Loosli.

⁵¹ Testimony of [REDACTED] See also P-7, at p. 145.

⁵² Testimony of [REDACTED] ([REDACTED] explained that the purpose of [REDACTED] evaluation was strictly medical, to assist determination as to whether Medicaid would fund the use of a communication devices. [REDACTED] further averred that [REDACTED] evaluation was not educational; hence, [REDACTED] had had no discussion with professionals who had worked with Student, did no classroom observation, reviewed no school records etc.).

⁵³ Testimony of [REDACTED]

⁵⁴ Testimony of [REDACTED] (Day 3).

⁵⁵ Testimony of [REDACTED] (Day 3). See also D-44.

- c. February 12, 2018, Parties participated in a facilitated IEP Meeting.⁵⁶ IEP included a transition plan and Mother’s counsel was present.⁵⁷ Mother did not sign consent for evaluations.⁵⁸
- d. April 11, 2018, Parties participated in a 4.5 hour, facilitated IEP meeting, with Mother’s counsel present.⁵⁹ Mother-Petitioner asked for breaks and was denied.⁶⁰

D. Assistive Technology (AT)

- 1. Student’s previous AT devices include an iPad with DynaVox / Proloquo applications.⁶¹ Throughout the Student’s enrollment at LCDS, the assistive technology team explored many AT methods, including GoTalk 9+ (GT 9+), PECS, sign, BIGmack, and teacher-created pictures.⁶²
- 2. LCSD provided Mother with an iPad for home use.⁶³ The Mother asked for decrease use of the iPad, suggesting he was spending too much time on the device and not getting enough one-on-one instruction.⁶⁴ Shortly thereafter, the Mother gave the school-provided iPad back to the school.⁶⁵
- 3. On/around January 2018, student began using a Parent-provided DynaVox.⁶⁶

⁵⁶ Testimony of [REDACTED] (Day 3).

⁵⁷ Testimony of [REDACTED] (Day 3). See also D-1, D-33.

⁵⁸ Testimony of [REDACTED] (Day 3). See also D-1, D-33.

⁵⁹ Testimony of [REDACTED] (Day 3). See also D-34.

⁶⁰ Testimony of [REDACTED]

⁶¹ Testimony of [REDACTED]

⁶² Testimony of [REDACTED]. See also D-26.

⁶³ Testimony of [REDACTED]

⁶⁴ Testimony of [REDACTED]

⁶⁵ Testimony of [REDACTED]

⁶⁶ Testimony of [REDACTED]

E. [REDACTED] Potential Expert for the Petitioner

1. [REDACTED] is a licensed psychologist and a board-certified behavior analyst (BCBA). [REDACTED] has never met or worked with Student or [REDACTED] and has no working relationship with LCSD.⁶⁷
2. On October 17, 2018, [REDACTED] received a voicemail from [REDACTED] LCSD LEA. [REDACTED] returned the call and was told that Mark Adamson, counsel for the Mother, was representing that LCSD did not know how to service individuals with disabilities and that [REDACTED] was being named as an expert witness in an upcoming hearing.⁶⁸
3. [REDACTED] had not agreed to testify as an expert witness and had no knowledge of the case.⁶⁹

CONCLUSIONS OF LAW AND DISCUSSION OF THE ISSUES

A school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.⁷⁰ Accordingly, the focus of IDEA has been to provide “a ‘free appropriate public education’ consist[ing] of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.”⁷¹ The proper consideration to determining whether an IEP is “reasonably calculated to confer some educational benefit,” is an IEP team’s prospective assessment of information.⁷²

⁶⁷ Testimony of [REDACTED]

⁶⁸ Testimony of [REDACTED]

⁶⁹ Testimony of [REDACTED] See also P-2.

⁷⁰ Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

⁷¹ In Board of Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley, 102 S. Ct. 3042 n. 11 (1982).

⁷² See K.E. ex rel. K.E. v. Independent School Dist. No. 15, 647 F.3d 795, 808 (8th Cir. 2011) (citing Roland M. v. Concord Sch. Comm., 910 F.2d 983,992 (1st Cir.1990), cert. denied, 111 S. Ct. 1122 (1991))

A. Claim I: Whether on/after April 11, 2017, LCSD offered Student generic special education services under an IEP without conducting any evaluations, completed inadequate evaluations, or completed evaluations under improper test taking conditions which resulted in a denial of FAPE?

Under federal regulations, “a public agency must ensure that a reevaluation of each child with a disability is conducted . . . (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.”⁷³ Further, reevaluations must occur at least once every 3 years, *unless* the parent and the public agency agree that a reevaluation is unnecessary.⁷⁴

In the present matter, Petitioner offered no evidence to show that Student’s most recent reevaluations were inadequate. Conversely, various educational professionals, including LCSD Special Education Director, psychologist and educational specialist, speech-language pathologist, transition specialist and special education instructors with direct knowledge of Student, testified that Student had been provided FAPE and that all IEPs on/after November 2017 were reasonably calculated to enable Student to make progress appropriate in light of [REDACTED] circumstances.

Likewise, independent expert witnesses, including [REDACTED], Ph.D., BCBA-D, LBA reviewed the prior IEPs, student data, and student evaluations and evaluated testimony during the hearing, testified that Student has been provided FAPE. More specifically, various educational professionals testified that the IEP Team had collectively agreed to waive reevaluations until the Parent requested evaluations in 2018. Petitioner offered no testimony/expert testimony to refute these claims.

⁷³ 34 C.F.R. § 300.303; See also STATE BD. OF EDUC., SPECIAL EDUC. RULES II.G.(2), (2016).

⁷⁴ 34 C.F.R. § 300.303.

The Petitioner offered testimony that Student had surgery before [REDACTED] psychological evaluation(s) were conducted. She further testified that the doctor told her that it might take up to three days for the Student to function well in school. Petitioner also testified that the doctor cleared the Student to go back to school after a few days. Petitioner also testified that the doctor gave her a note, but she did not provide the note to teachers. The note was also not produced for the hearing.

Because the “parent and the public agency agreed that a reevaluation was unnecessary,” until her initial request in 2018, the District’s failure to reevaluate did not result in a denial of FAPE.⁷⁵ Further, because there was no evidence admitted to show that evaluations provided in 2018 were inadequate, nothing on the record reveals remaining issues concerning reevaluations resulted in a denial of FAPE.

B. Claim II: Whether on/after April 11, 2017, LCSD offered Student services under an IEP that did not contain appropriate assistive technology supports and or services, which resulted in a denial of FAPE?

Assistive technology service means any service that directly assists a student with a disability in the selection, acquisition, or use of an assistive technology device.⁷⁶ Such devices include “any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or

⁷⁵ See *Id.*

⁷⁶ 34 C.F.R. § 300.6; See also STATE BD. OF EDUC., SPECIAL EDUC. RULES I.E.(5), (2016) (explaining the term AT services includes, “a. Evaluating the needs of a student with a disability, including a functional evaluation of the student in the student’s customary environment. b. Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities. c. Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices. d. Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs. e. Training or technical assistance for a student with a disability or, if appropriate, that student’s family. f. Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of students with disabilities.”).

customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability.”⁷⁷

An IEP must include, among other components, a statement of the special education and related services and supplementary aids and services, including assistive technology.⁷⁸ If required by the IEP, an LEA must ensure that assistive technology devices/assistive technology services are made available to a student.⁷⁹

Here, Petitioner presented evidence that the DynaVox was the best AT device to increase, maintain, or improve the functional capabilities and communication of the Student. Testimony was offered that Student’s 2016- 2017, 2017-2018 and 2018-2019 IEPs included the use of AT services/AT device(s), including the use of an iPad with DynaVox applications. The Parent offered additional testimony that the Student thrived with the use of the DynaVox which the Student began using in [REDACTED] home in 2018. [REDACTED] speech and language pathologist, medically evaluated Student on/around August 2018 for the purposes of determining an appropriate communication device. Following [REDACTED] recommendation, Student began using the DynaVox at home as a preferred communication device. [REDACTED] testified that the only difference between the DynaVox and an iPad with DynaVox applications is durability (specifically that the DynaVox is water resistant and more durable).

⁷⁷ 34 C.F.R. § 300.5.

⁷⁸ STATE BD. OF EDUC., SPECIAL EDUC. RULES I.J.(2)(e), (2016) (clarifying, a statement concerning AT services should include a statement of the program modifications or supports for school personnel that will be provided to enable the student: “(1) To advance appropriately toward attaining the annual goals; (2) To be involved in and make progress in the grade-level general education curriculum, and to participate in extracurricular and other nonacademic activities; and (3) To be educated and participate with other similar-aged students with disabilities and non-disabled students . . .”).

⁷⁹ 34 C.F.R. § 300.105; See also STATE BD. OF EDUC., SPECIAL EDUC. RULES III.M.(1), (2016).

Overall, the District and the Parent implemented the used the DynaVox / an iPad with DynaVox applications. Because each applicable IEP included a statement of the special education and related services and supplementary aids and services, including assistive technology, including some DynaVox function, Petitioner failed to establish that such use as it pertains to the IEP was not reasonably calculated to enable a Student to make progress appropriate in light of [REDACTED] circumstances

C. Claim IV: Whether the District violated the Parent’s procedural safeguards on/after November 16, 2017 to the present, including (1) refusing to allow Student’s mother to participate in IEP development/predetermination; (2) holding IEP meetings in an inhospitable environment, (i.e. disallowing breaks at the April 11, 2018, IEP meeting); and (3) contacting a potential expert witnesses in an attempt to prevent [REDACTED] from offering damaging testimony which resulted in the denial of FAPE?

“Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.”⁸⁰ In matters alleging a procedural violation, a hearing officer may find that a student did not receive FAPE only if the procedural inadequacies impeded the student's right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit.⁸¹ A procedural error results in the denial of an educational opportunity where, absent the error, there is a “strong likelihood” that alternative educational possibilities for the student “would have been better considered.”⁸²

⁸⁰ Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 205–06, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690 (1982).

⁸¹ 34 C.F.R. § 300.513.

⁸² M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 657 (9th Cir. 2003) (Gould, J. concurring in part and concurring in the judgment.).

Petitioner raises three procedural arguments: (1) District refused to allow Student's mother to participate in IEP development and ultimately predetermined the IEP prior to IEP Meetings; (2) District held IEP meetings in an inhospitable environment, disallowing breaks at the April 11, 2018, IEP meeting; and (3) District contacted a potential expert witnesses in an attempt to prevent [REDACTED] from offering damaging testimony, all of which resulted in the denial of FAPE.

(1) District refused to allow Student's mother to participate in IEP development and ultimately predetermined the IEP prior to IEP Meetings.

Mother offered testimony that during at least one IEP Meeting in 2017, although she was not asked to provide her input, she was very vocal about Student's needs.

(2) District held IEP meetings in an inhospitable environment, disallowing breaks at the April 11, 2018, IEP meeting.

Mother testified that during the April 2018 IEP meeting, she asked for multiple breaks but was denied. The LEA testified that she suggested that the IEP Team keep working through issues as the meeting exceeded four (4) hours and she hoped to resolve all issues. The Mother offered testimony that she felt compelled to stay in the meeting despite her feminine needs, and she had a menstrual accident as a result.

(3) District contacted a potential expert witnesses in an attempt to prevent [REDACTED] from offering damaging testimony, all of which resulted in the denial of FAPE.

The Petitioner called [REDACTED] a licensed psychologist and a board-certified behavior analyst (BCBA), who had never met or worked with Student or [REDACTED] and has no working relationship with LCSD. Petitioner confirmed that the District LEA contacted [REDACTED] to inform [REDACTED] that “[REDACTED] was concerned about information that [REDACTED] had heard that . . . [REDACTED] was saying that certain schools couldn't handle students with disabilities or didn't have the capacity to handle students with disabilities.” The Witness also clarified, that [REDACTED] is happy to confidentially advise on cases, but requires a fee-for-service model to act as an expert witness and that [REDACTED] had not contracted to provide such testimony in the present matter.

The IHO rejects the argument that the alleged procedural deficiencies in this case impacted the Parent’s full and effective participation in the IEP process; hence, there has been no violation in this case which warrants relief. During the meeting in which she was not specifically asked for input; she provided the information without prompting. During the April 2018 IEP Meeting, although encouraged not to leave the meeting, multiple parties agreed that the IEP Team spent over four (4) hours discussing the Student and sharing ideas. Hence, not taking one bathroom break did not impede upon the Parent’s opportunity to participate, nor would have taking the break resulted in some possibility of an alternative educational option. Last, [REDACTED] testified that he had never agreed to be an expert witness in this matter, hence any phone call from the LEA would not have impeded Student's right to FAPE or significantly impeded the Parent’s opportunity to participate in the decision-making process regarding the provision of FAPE because the call did not change the BCBA’s course of action concerning witness testimony. None of the alleged procedural violations significantly impeded the Parent’s opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of some educational benefit.

ORDER

Based upon the above Findings of Fact and Conclusion of Law, it is hereby ordered:

1. Parent has failed to satisfy Petitioner's burden as the moving party to establish her claim of a denial of FAPE.
2. That on/after November 16, 2017 to the present, **District** provided an IEP reasonably calculated to enable Student to make progress appropriate in light of [REDACTED] circumstances; hence there was no violation of IDEA.
3. Parent's Petition and requested relief is hereby **DENIED**.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Pursuant to UTAH STATE BD. OF EDUC., SPECIAL EDUC. RULES IV.P, (2016), this decision may be appealed. If appealed, the appeal must be filed within thirty (30) days of the date of the due process hearing decision. *Id.* at IV.S.(2).⁸³

Ordered on this 17th Day of June, 2019.

/s/Kia Scott

IDEA Hearings Officer
6772 Taylor Circle
Montgomery, AL. 36117
Kia.Scott@KScottLaw.org
(334) 676-4113 Fax

cc: Naté Dearden, Esq.: nate.dearden@schools.utah.gov
Mark Adamson, Esq.: markadamson@utahiepadvocates.org
Paul D. Van Komen pvankomen@burbidgewhite.com
Elliot B. Scruggs escruggs@burbidgewhite.com

⁸³ See also 34 C.F.R. § 300.514 ("A decision made in a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and § 300.516.").

APPENDIX A

█ v. Logan City School District

DP Case No. 1819-08

USBE Documents / Data

IHO-1	Request for Due Process Hearing
IHO-2	USBE Notice of Due Process Hearing Request

IHO Orders

IHO-3	IHO Initial Correspondence
IHO-4	Initial Scheduling Order
IHO-5	Third Order Re: Amended Order
IHO-6	Fourth & Fifth Telephonic Conference Call Summary & Order
IHO-7	Order on Discovery
IHO-8	Fifth Order Re: First Post-Hearing Order
IHO-9	Second Order Re: Prehearing Motions

Pleadings / Motions

IHO-10	Petitioner's Complaint
IHO-11	District's NOA, Motion to Dismiss, & Response to DPH
IHO-12	Petitioner's Response to District's Motion to Dismiss & Response to DPH
IHO-13	Respondent's Reply to Petitioner's Response to District's Motion to Dismiss & Response to DPH
IHO-14	Motion to Strike Respondent's Reply
IHO-15	Petitioner & Respondent Supplemental Briefs
IHO-16	Petitioner's Clarification of Issues for Hearing
IHO-17	Joint Stipulated Motion to Extend
IHO-18	Petitioner's Witness and Exhibit Lists
IHO-19	District's Witness and Exhibit Lists
IHO-20	Petitioner's Post Hearing Briefs
IHO-21	Respondent's Post Hearing Brief

Trial Exhibits

P-1	Cache County School District Psycho-Education Team Report
P-2	█ Emails
D-1	Student's 2017-2018 IEP
D-2	Student's IEP Prior to 2017
D-7	Evaluation Reports 2018
D-12A	Goals Progress Data 2018-2019
D-12B	Goals Progress Data 2018-2019
D-13	Goals Progress Data 2017-2018
D-14	Goals Progress Data 2016-2017
D-32	Facilitated Meeting November 2017

D-33	Documents Regarding Feb 2018 IEP Meeting
D-34	Documents Regarding April 2018 IEP Meeting
D-44	IEP October 30, 2018