UTAH STATE OFFICE OF EDUCATION

BEFORE THE DUE PROCESS HEARING OFFICER

N.A., a student, by and through her parent, E.M.A., Petitioner, vs. **PROVO CITY SCHOOL DISTRICT**, Respondent.	**DECISION AND ORDER** (Hearing Officer: Wallace J. Calder

APPEARANCES

E.M.A. appeared pro se on behalf of Petitioners N.A. and E.M.A. ("Petitioners"). Mark F. Robinson, Robinson, Seiler & Anderson, LC appeared on behalf of Respondent Provo City School District ("Respondent"). This matter was assigned to the undersigned Due Process Hearing Officer, Wallace J. Calder ("Hearing Officer").

PROCEDURAL HISTORY

The student, N.A. (the "Student") is an 11 year old girl who has been diagnosed with dyslexia under the category of specific learning disability. Petitioners submitted a written Request for Due Process Hearing to the Utah State Office of Education ("USOE") dated October 21, 2014, which was received and entered of record on October 22, 2014. Petitioners alleged violations of the Individuals With Disabilities Education Act, 20 U.S.C.A. §1400 et seq. ("IDEA"). Respondent's Response to the Request of E.M.A. For a Due Process Hearing, filed on October

30, 2014, denied Petitioners' allegations generally, and specifically alleged that Petitioner E.M.A. lacked legal authority to revoke consent for special education services for the Student. Two resolution meetings were held by the parties on November 3 and November 7, 2014, but no resolution of any of Petitioners' issues occurred.

On November 5, 2014, Respondent timely filed an Objection to the Sufficiency of the Complaint. Respondent alleged that the Hearing Officer lacked jurisdiction to hear Petitioners' complaint regarding Respondent's denial of Petitioners' request to remove the Student from special education services. Respondent argued that a state divorce court order required the consent of both of the Student's parents to withdraw the Student from special education services and, therefore, the denial of E.M.A.'s unilateral request was not a violation of the IDEA. On November 7, 2014 the hearing officer entered his Order Regarding Respondent's Objection to Sufficiency of Complaint denying Respondent's request to dismiss Petitioners' Complaint. The Hearing Officer ruled that on its face, Petitioners' Complaint contains all of the requirements of 34 CFR §300.508(b) and, therefore, must be deemed sufficient. 34 CFR §300.508(d).

Following the end of the Resolution Period, a telephonic pre-hearing conference was held on November 20, 2014. The Hearing Officer informed Petitioner E.M.A. of her right to be represented by counsel, but E.M.A. informed the Hearing Officer that she intended to represent herself and the Student during this proceeding. During the pre-hearing conference, and at all times during this proceeding, the Respondent was represented by its counsel of record. The Petitioners' Complaint and the Respondent's objections were discussed and reviewed, and the Hearing Officer discussed at length with counsel the issues for the hearing. Petitioners

identified and submitted four issues for hearing. A hearing date and location was agreed upon by the parties. Petitioners requested that the hearing be closed and that witnesses be excluded from the hearing room. A date for the exchange of witness lists and exhibits was set. Various other procedural matters were discussed and explained at length by the Hearing Officer including the burden of proof, order of presentation of evidence, opening and closing statements, post hearing briefs and the parties allowed to be present at the hearing. Neither party has objected to the exchange of witness and exhibits lists. At the pre-hearing conference the parties requested leave to submit post-hearing briefs. The Hearing Officer granted the parties leave to file briefs until January 7, 2015. The Hearing Officer further ordered that the Student shall remain in the educational placement the Student was in prior to the filing of the request for due process. 34 CFR § 300.518.

During the pre-hearing conference the Respondent moved the Hearing Officer to extend the 45 day deadline, and Petitioners concurred with Respondent's request. The Hearing Officer granted a 10 day extension until January 15, 2015. The Hearing Officer ordered that the parties would have until November 26, 2014, to file any additional motions, and the nonmoving party would have five days thereafter to file a responsive memorandum.

Subsequent to the filing of the Hearing Officer's Pre-Hearing Conference Order, an Objection to Respondent's Witness Lists and Production of Documents was filed with the Hearing Officer. Pursuant to a request and stipulation from both parties, the Hearing Officer entered a Minute Entry which extended the date to exchange witness lists and documents until December 8, 2014, and extended the date to file pre–hearing briefs until December 10, 2014.

In a conference call with the Hearing Officer on December 8, 2014, the parties jointly

requested that the Hearing Officer grant them leave to file a joint stipulation of facts and supporting affidavits and legal memoranda in support of a motion for summary disposition. The issues on which summary disposition was requested were (1) whether the Respondent violated the procedural rights afforded to Petitioner under the IDEA by refusing to comply with Respondents' written revocation of consent for special education services for the Student; and (2) whether Petitioner has the legal right to remove the Student from special education and whether Petitioner is an IDEA parent. The Hearing Officer granted the parties leave to file the motion, a joint stipulation of facts and supporting affidavits to the Hearing Officer no later than December 11, 2014. On December 11, 2014, the parties submitted their Stipulation of Facts. Respondent submitted a Motion For Summary Disposition and Supporting Memorandum and the Affidavit of D.A., the father of the Student. Petitioners filed a memorandum in opposition to Respondent's motion for summary disposition.

The Hearing Officer treated the motion for summary disposition as a motion for partial summary judgment pursuant to U.C.A. § 63G-4-102(4)(b) and Utah Rule of Civil Procedure 56(c). The Hearing Officer found that there was no disagreement as to the facts related to the issues set forth in the motion for summary disposition and therefore considered them in light of the applicable law. The parties stipulated to the fact that E.M.A. and the Student's father D.A. were awarded joint legal and physical custody of the Student with E.M.A. being the primary custodial parent. The parties further stipulated to the fact that E.M.A. and D.A. are subject to two orders of the Fourth Judicial District Court of Utah County, State of Utah ("the" State Court"), dated November 27, 2013 and March 26, 2014 (the "State Court Orders"), which deal with special education services for the Student. The parties further stipulated to the facts that

the Petitioner E.M.A. submitted a written revocation of consent for special education services to Respondent and that D.A. did not revoke his consent for, and continues to consent to, the provision of special education services to the Student. The Hearing Officer found that the State Court Orders limit the rights of the Petitioner E.M.A. and D.A. with respect to their ability to unilaterally object to the provision of special education services to the Student. The State Court Orders provide that the consent of only one parent is necessary for the school to develop and implement an IEP for the Student, and if the other parent objects he/she may file an objection with the State Court.

In its motion and memorandum, Respondent argued that the IDEA does not override the State Court's allocation of authority between divorced parents in a family court proceeding. Respondent further argued that as to the issue of the right to unilaterally revoke consent for special education services, the Petitioner E.M.A. should not be treated as a "parent" under the IDEA because E.M.A. does not have legal authority to unilaterally revoke consent. 34 CFR §300.30(b)(1). Petitioner E.M.A. argued that as the biological parent of the Student she is a "parent" under the IDEA (34 CFR §300.30(a)) and that the federal statute and regulations supersede the State Court Orders regarding her right to unilaterally revoke consent for special education services for the Student.

On December 12, 2014, the Hearing Officer entered his Decision and Order Regarding Respondent's Motion For Partial Summary Disposition. The Hearing Officer found that the State Court Orders did limit the educational rights of the Petitioner E.M.A.. Specifically, the Hearing Officer found that the State Court Orders clearly state that once the Student was placed on an IEP, E.M.A. did not have the unilateral right to exit the student from special education services.

The Hearing Officer was persuaded by the reasoning of the Second Circuit Court of Appeals in the case of *Taylor v. Vt. Dep't. Of Educ.*, 313 F.3d 768(2d. Cir. 2002), 38 IDELR 32. In *Taylor*, the biological mother argued that she was entitled to exercise parental rights under the IDEA and that state law could not abrogate those federal rights. The Second Circuit left intact a state's authority to determine who may make educational decisions on behalf of the child. The court "declined the plaintiff's invitation to federalize the law of domestic relations and [held] that the IDEA and FERPA leave intact a state's authority to determine who may make educational decisions on behalf of the child, so long as a state does so in a manner consistent with the federal statutes." *Taylor*, at 38. The Hearing Officer held that the State Court's limitation of E.M.A.'s educational rights with respect to unilateral revocation of consent for special education services was consistent with the IDEA. The Hearing Officer concluded, as a matter of law, that Petitioner E.M.A. does not have the legal right, and is not an IDEA "parent" solely with respect to the right, to unilaterally remove or exit the student from special education services without the consent of the Student's father, D.A.. Therefore, the Hearing Officer ordered that Petitioners' request for relief under the First Issue set forth in paragraph 4(a) of the Pre–Hearing Conference Order is denied and said issue is dismissed from the Petitioners' due process complaint and would not be addressed at the hearing.

On December 15 and 16, 2014, an impartial due process hearing was conducted at the offices of the Respondent, Provo City School District ("the District") in Provo, Utah, in this matter. The hearing was held in accordance with the procedural requirements of the IDEA and its implementing regulations found at 34 CFR §§300.507-515, and the Utah State Board of Education Special Education Rules IV.I-P, August, 2007). Petitioners called seven witnesses,

including Petitioner E.M.A., and submitted 45 exhibits with over 200 pages. Respondent called no witnesses and submitted 186 exhibits of over 1400 pages. The hearing transcript is two volumes totaling 643 pages.

BURDEN OF PROOF

Petitioners, as the party challenging the Respondent's determination or implementation of special education and related services, has the burden of proof by a preponderance of the evidence for all issues raised in this matter. *Schaffer v. Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005). The Tenth Circuit Court of Appeals has held that "the burden of proof in such a challenge rests with the party claiming a deficiency in the school district's efforts." *Thompson R2-J School Dist. v. Luke.,* 540 F.3d 1143, 1148 (10th Cir. 2008). The Hearing Officer informed Petitioners at the pre-hearing conference that Petitioners would have the burden of proof and the duty to present evidence first at the hearing.

ISSUES

The following issues were presented to the Hearing Officer at the hearing for decision:

(1) Procedural Issues for Hearing:

   (a) Whether the Petitioner E.M.A. was denied her right as a parent to participate in the eligibility determination of the Student?

   (b) Whether the Respondent predetermined the eligibility of the Student for special education services by withholding or failing to provide relevant testing materials, failing to consider Petitioners' recommendations, or stating the student needed special education services prior to the eligibility determination meeting?

(2) Substantive Issue for Hearing:

(a) Whether the school district's eligibility determination team incorrectly determined that the Student was in need of special education services in order to make progress in the general education curriculum?

FINDINGS OF FACT

After considering all the evidence in the form of testimony and exhibits, as well as the oral and written arguments of the parties' and counsel, the Hearing Officer's Findings of Fact are as follows:

1. Student is an 11-year-old girl and is a sixth grade student at Rock Canyon Elementary School ("Rock Canyon" or "the School") operated by Respondent. (Petitioners' Complaint; Exhibit R4a2, Tab 71).

2. Petitioner, E.M.A., is Student's mother, and D.A. is Student's father. (Stipulation of Facts, ¶ 1).

3. Student's parents are the parties to a divorce proceeding in the State Court, Case No. [*********]. A Decree of Divorce was entered by the State Court in 2010. (Stipulation of Facts, ¶ 2).

4. In 2011, when Student was in the third grade, Student was initially referred by her teacher for a special education evaluation. Student's parents consented to an evaluation, and the determination by the eligibility determination team was that Student was not eligible at that time. The parents later informed the School that in the spring of 2012 Student had received a medical evaluation and showed symptoms of Attention Deficit Disorder (ADD) and was prescribed some medication. (Exhibit R4a3, Tab 90; Testimony of Dean Nielsen, Tr. Vol. I, pp. 271-274.)

5. In October of 2012, D.A. signed a Consent for Evaluation for Student to be evaluated. E.M.A. initially refused to sign a consent for evaluation and she informed the School that the parents wanted Student to be tested for dyslexia by their medical professional. (Exhibit R4a1, Tab 4).

6. In December, 2012, and January, 2013, the parents had Student tested by Nanci Ross at the Dyslexia Center of Utah, and it was determined by Ms. Ross that Student has moderate dyslexia and mild dysgraphia. The parents informed the School of the results of that evaluation. Petitioner and the School agree that Student has moderate dyslexia and mild dysgraphia. (Exhibit R4b2, Tab 14; Testimony of Dean Nielsen, Tr. Vol. I, p. 222.)

7. Petitioner and Respondent agree that Student has dyslexia and is a student with a specific learning disability. (Testimony of Morgan Anderson, Tr. Vol. I, pp. 16, 63).

8 . In February, 2013, an eligibility determination meeting was held with both parents present. During the meeting, the members of the team from the School indicated to the parents that they believed Student was a student with a disability. However, at that time both of Student's parents did not agree with finding Student eligible. It was determined by the team that Student was not eligible for special education services at that time. (Testimony of Shauna Raby, Tr. Vol. I, p. 168; Exhibit P45; Testimony of Dean Nielsen, Tr. Vol. I, p. 290.)

9 . In September, 2013, the team members from the School, the parents and the State Court appointed guardian ad litem met to finalize a §504 plan for Student and to discuss an IEP. At that meeting Student's father referred Student for an evaluation and signed a

permission to test. E.M.A. did not sign a consent to have Student tested. The following day E.M.A. stated to the School that as the primary custodial parent for Student she had the final say in regards to educational decisions and that D.A.' consent was not sufficient to give the school permission to evaluate Student as to whether she was eligible for special education services. (Exhibit R4a2, Tab 70; Exhibit R4b1, Tab 15.)

10. On November 27, 2013, the court appointed guardian ad litem obtained a review hearing before the State Court at which the guardian ad litem and Student's parents were present. One issue discussed at this hearing was an evaluation of Student for special education services. The State Court's order from this hearing is discussed below. (Exhibit R Email Corr., Tab 101.)

11. Student's parents are subject to two orders from the State Court which deal, in part, with the provision of special education services to Student. These two orders are the following:

(a) An Amended Order (from a hearing dated November 27, 2013), which provides, in relevant part, as follows:

> Rock Canyon Elementary School shall be permitted to conduct any needed special education testing for the minor child, [Student]. If requested by the school, the parties shall participate in a meeting to discuss a possible Individualized Education Plan.

(b) An Order (from an evidentiary hearing dated March 26, 2014), which provides, in relevant part, as follows:

> 4. Education: If requested by the school, both parties shall

> participate in a meeting to discuss the possibility of placing the minor child N.A. [Student] on an Individualized Education Plan ("IEP"). Respondent [the Petitioner] shall be permitted to present the school with any special education tutoring certification she may have. Respondent shall be permitted to be used as a resource to help with an IEP if the school feels that is appropriate. If the school recommends that Respondent tutor the child during Petitioner's [D.A.] parent time that shall be allowed. **If the school recommends that N.A. [Student] be placed on an IEP and at least one parent agrees with the school about the terms of the plan, the child shall be placed on the IEP. If the other parent objects, he or she may file an objection with the Court. However, the school does not need further approval from the Court, and it should begin implementing the IEP.**
>
> (Emphasis added.) (Stipulation of Facts, ¶ 3; Exhibits R4b2, Tabs 16 and 101.)

12. Following entry of the Amended Order from the State Court, identified above, both parents consented in writing to the evaluation of Student for special education services. (Stipulation of Facts, ¶ 5.)

13. The School's referral form for evaluation for special education services for Student was created on March 19, 2014, at Petitioner's request. The referral form was signed by the principal at Rock Canyon. (Exhibit R4a2, Tab 71.)

14. Respondent convened a Special Education Evaluation Team meeting on May 29, 2014 (the "EDT Meeting"). Petitioner E.M.A., and D.A., attended the EDT Meeting. The parents were present at all of the meetings involving Student and were never excluded from participation in the special education process. (Petitioner's Exhibit 26; Testimony of Morgan Anderson, Tr. Vol. I, p. 63; Testimony of Shauna Raby, Tr. Vol. I, p. 79; Testimony of Dean Nielsen, Tr. Vol. I, p. 290.).)

15. At the EDT Meeting, the EDT team reviewed and discussed, among other things, standardized and individual testing results, Student's educational history, classroom evaluations, teacher observations, the report of Petitioners' independent dyslexia expert Nanci Ross, and input from the parents. Notes from the EDT Meeting were transcribed and entered into the record. (Testimony of Shauna Raby, Tr. Vol. I, pp. 94-96, 110, 111, 133, 168, 188; Exhibit P45; Testimony of Dean Nielsen, Tr. Vol. I, pp. 218, 290; Exhibit R4a2, Tab 2.)

16. During the EDT Meeting, eight different assessments which were completed using a variety of assessment tools and methods, were reviewed by the team. Teacher input and the report and recommendations of Nanci Ross regarding Student's disability and the need for an IEP were also discussed and considered. Parental input regarding Student and her needs was received and considered. (Testimony of Morgan Anderson, Tr. Vol. I, pp. 62-63; Testimony of Shauna Raby, Tr. Vol. I, pp. 62-63, 74-75, 132-133; Testimony of Sarah Combs, Tr. Vol. I, p. 463, 483, 489-490.)

17. On page 32 of her report, Nanci Ross stated that "it will take 24 to 36 months of intensive tutoring in and Orton-Gillingham based program to bring her [Student's]

reading, writing and spelling skills up to grade level." (Exhibit R4a2, Tab 28.)

18. During the hearing, Shauna Raby testified that the school was "not just looking at one timed evaluation, we're looking at lots of different assessments." (Testimony of Shauna Raby, Tr. Vol. I, p. 179.) Ms. Raby further testified that standardized tests are just one piece of information the EDT team looked at along with all other things that were brought in, such as the Treasures testing. (Testimony of Shauna Raby, Tr. Vol. I, p. 180.)

19. Ms. Raby, who has 34 years of special education experience, testified that in her opinion Student was properly identified and properly evaluated to determine her eligibility for special education services and, as an expert in special education, her opinion is that Student needs specialized instruction to benefit from her education. (Testimony of Shauna Raby, Tr. Vol. I, pp. 185-187.)

20. Student's fifth grade classroom teacher, Christina Cooper, testified at the hearing about the results of various tests and assessments that she had administered to Student, and her classroom observations, which were discussed in the EDT Meeting. The latest tests and assessments included: (1) SRA, a standardized reading assessment for accuracy fluency comprehension and vocabulary, which showed a 2.6 grade equivalency in accuracy comprehension and vocabulary; (2) language arts standardized interim which tested fluency writing and comprehension, which was at the basic level of 3; (3) a math standardized interim, which was at the below basic level of 2; (4) STAR, a standardized reading assessment, which showed an independent reading level of 2.6; and (5) Treasures Packet and a fluency page, together with comprehension and comprehending text that looked at four areas in Student's reading. (Testimony of Christina Cooper, Tr.

Vol. II, pp. 359-363, Exhibit P25.)

21. Ms. Cooper testified that during the third term of fifth grade Student had problems with turning in class work and homework for language arts. (Testimony of Christina Cooper, Tr. Vol. II, p. 390.)

22. Ms. Cooper also testified that Student was making progress and working hard but she was not performing at grade level. (Testimony of Christina Cooper, Tr. Vol. II, pp. 392-3, 405.)

23. Ms. Cooper testified that Student needed special education and that she definitely supports Student having an IEP. (Testimony of Christina Cooper, Tr. Vol. II, p. 393-394.)

24. On May 27 and 28, 2014, and at the IEP team meeting on May 29, 2014, Petitioner did request to have copies of all of Student's current and previous school related tests that were used for Student's eligibility determination. Petitioner made a second request in October, 2014. Petitioner was not provided with copies of the tests. Ms. Cooper testified that she had shredded the tests in preparation for her new class of students. Ms. Cooper testified that it was a district policy to shred the tests and she did shred the tests every year. (Exhibit P4 ; Testimony of Christina Cooper, Tr. Vol. II, pp. 395-396.)

25. Student's sixth grade classroom teacher, Christy Yardley, testified at the hearing that during the beginning of the 2014-2015 school year, she noticed that Student was struggling or not performing to the same level as the other students. Ms. Yardley testified that at the September, 2014, IEP team meeting she stated that she thought Student needed special education. Ms. Yardley further testified that in her opinion she believes it is in Student's best interest to have a special education program. (Testimony

of Christy Yardley, Tr. Vol. II, pp. 412, 448.)

26. Sarah Combs, a special education teacher for 21 years, is a special education teacher and coordinator at the School and is the most veteran teacher there. Student is one of her students and is on her caseload. (Testimony of Sarah Combs, Tr. Vol. II, pp. 451-452, 589.)

27. Ms. Combs testified that she was present at the EDT Meeting on May 29, 2014. Ms. Combs reported the results of her observation of Student during literacy in her fifth grade classroom and concluded that it was very difficult for Student to access the general education curriculum. Ms. Combs observation report was used as one piece of many pieces of information in the EDT Meeting. (Testimony of Sarah Combs, Tr. Vol. II, pp. 453, 454, 459.)

28. Ms. Combs testified that the report and recommendation of Nanci Ross were considered by the team at the EDT Meeting. Ms. Combs further testified that all of the EDT team members, including the parents, brought input and data, including the assessments identified in Petitioners' Exhibit 25, to the EDT Meeting, and all of that was considered in the eligibility determination. Ms. Combs testified that the data and input presented by the team found Student eligible for special education services. (Testimony of Sarah Combs, Tr. Vol. II, p. 463, 474, 489-490, 589.)

29. Ms. Combs testified that Student is unable to access the core curriculum for the fourth, fifth and now sixth grades and has plateaued in the beginning of 2014 with a grade equivalence in the second to third grade range. Ms. Combs further testified that Student is not keeping pace with her peers and that her need for specialized instruction is

increasing (Testimony of Sarah Combs, Tr. Vol. II, pp. 513, 517, 518.)

30. Ms. Combs testified that Student is not capable of performing up to grade level in the mainstream classroom without the benefit of specialized instruction. (Testimony of Sarah Combs, Tr. Vol. II, pp. 596-597.)

31. During the hearing, Ms. Combs testified that if a parent disagreed with the School regarding a determination of eligibility for special education services, the parent ultimately would have the right to refuse services for the student. (Testimony of Sarah Combs, Tr. Vol. II, pp. 461-462.)

32. During the EDT Meeting held on May 29, 2014, a Team Evaluation Summary Report and Written Prior Notice of Eligibility Determination for N.A. (the "EDT Report") was produced and signed by each team member except Petitioner E.M.A.. The EDT Report states that the team found Student eligible for special education services. (Exhibit P26; Exhibit R4a2, Tab 14.)

33. On May 30, 2014, the IEP team comprised of both parents, Student's guardian ad litem Daniel Gubler, Ms. Cooper, Ms. Combs, and Ms. Raby, met and developed an IEP for Student, which was signed by all team members including Petitioner E.M.A.. (Exhibit P24.)

34. During the summer 2014, Student received special education services coordinated by Haley Glick. (Exhibits P25, P6-P7.)

35. On September 4, 2014, E.M.A. indicated to the School that Student's IEP was only supposed to last for the summer (2014) and, if not, the IEP needed to be adjusted or amended. The following day, September 5, 2014, E.M.A. notified the school that she

wanted to revoke her previous consent regarding continued IEP services. (Exhibit R Email Corr., Tabs 8, 9.)

36. In a letter dated September 11, 2014, Petitioner E.M.A. notified the School in writing that she was revoking consent for special education services for Student. (Exhibit R Email Corr., Tab 38.)

37. On September 16, 2014, Respondent provided to petitioners a Prior Written Notice ("PWN") regarding E.M.A.'s revocation of consent for special education services. In the PWN respondent informed E.M.A. that it would continue to implement Student's May 30, 2014, IEP due to the State Court orders and D.A. continued consent for special education services. (Exhibit R Email Corr., Tab 39.)

38. On September 30, 2014, the IEP team met to review and revise Student's IEP. A revised IEP for Student was not agreed to or signed by the parties at the September 30, 2014 IEP team meeting, but was continued. The IEP team did not meet again or execute a revised IEP for Student prior to the filing of Petitioners' due process complaint on October 21, 2014. (Testimony of Sarah Combs, Tr. Vol. II, pp. 595-596; Exhibit P37.)

39. Mr. Nielsen and Ms. Combs testified that the team listen to many hours of E.M.A.'s concerns during team meetings and outside communications and indicated that E.M.A. was the most verbose team member in the meetings. They further testified that the team carefully considered E.M.A.'s input as a team member. (Testimony of Dean Nielsen, Tr. Vol. I, pp. 290-291; Testimony of Sarah Combs, Tr. Vol. II, pp. 589; Exhibit R4a4, Tab 13.)

40. Mr. Nielsen, Ms. Yardley and Ms. Combs all testified at the hearing that the eligibility

determination for Student was a team-based decision and that the School team members did not predetermine that Student was eligible for special education services. (Testimony of Dean Nielsen, Tr. Vol. I, p. 253; Testimony of Christy Yardley Tr. Vol. II, p. 448; Testimony of Sarah Combs, Tr. Vol. II, pp. 588-589.

41. On November 25, 2014, the hearing officer entered his Pre–Hearing Conference Order in this matter. Paragraph 16 of said order provides as follows:

> Stay Put Rule. It is hereby ordered that the student, who is the subject of this due process hearing, shall remain in the educational setting she was in prior to the filing of the request for due process.

(Hearing Officer Exhibits, Ex. 026.)

42. At the hearing, Ms. Combs testified that Student's special education services had been terminated on September 30, 2014, because Respondent believed that Student's IEP had expired as of that date. Ms. Combs testified that because of the due process hearing, she believed the stay put placement for Student is an expired IEP, which means that no services could be provided to Student until the hearing is wrapped up, at which point Student's new IEP could be immediately implemented. (Testimony of Sarah Combs, Tr. Vol. II, pp. 595, 597.)

DISCUSSION

I. GENERAL LEGAL STANDARDS

Students with disabilities who are protected by the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique

needs and prepare them for further education, employment, and independent living. 20 USC §1400(d); 34 CFR §300.1(a). The IDEA further provides that a party may present a complaint and request for due process hearing with respect to any matter relating to the identification, evaluation, educational placement, or provision of a FAPE to a disabled student. 20 USC §1415(b)(6).

The IDEA and its implementing regulations provide that in order to qualify as a "student with a disability" under the IDEA, a student must (1) meet the definition of one or more of the categories of disabilities which include: . . . a specific learning disability . . ., and (2) need special education and related services as a result of the student's disability. CFR §300.8 (a)(1). A student is in need of special education and related services when the student requires those services in order to receive an educational benefit from the student's educational program. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7TH Cir. 2010); *Sebastian M. V. King Phillip Reg'l Sch. Dist.*, 59 IDELR 61 (1st Cir. 2012).

II. PETITIONERS' PROCEDURAL ISSUES

An allegation of a denial of FAPE to a disabled student can be based on either substantive grounds or procedural violations of the IDEA. 20 USC §1415(f)(3)(E). *Hendrick Hudson Central School Dist v. Rowley*, 458 US 176; 102 S Ct 3034; 73 L Ed 2d 690 (1982); *Sytsema v. Academy School District No. 20*, 538 F.3d 1306 (10th Cir. 2008), 50 IDELR 213. "The IDEA also sought to maximize parental involvement in educational decisions affecting their disabled child by granting parents a number of procedural rights. For example, parents are entitled to: (1) examine all records relating to their child, 20 U.S.C. §1415(b)(1); (2) participate in the IEP preparation process, *id.;* (3) obtain an independent evaluation of their child, *id.* (4) receive

notice before an amendment to an IEP is either proposed or refused, §1415(b)(3); (5) take membership in any group that makes decisions about the educational placement of their child, §1414(f); and (6) receive formal notice of their rights under the IDEA, §1415(d)(1)." *Ellenberg ex rel. S.E. v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007). The IDEA's "procedural guarantees are not mere procedural hoops through which Congress wanted state and local educational agencies to jump. Rather, the formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decision making." *Daniel R.R. v. State Bd. Of Edc.,* 874 F.2d 1036, 1041 (5th Cir. 1989) (internal quotation marks omitted).

However, proving a procedural violation is only a first step to obtaining relief. In *Sytsema*, the court held that an "IEP's failure to clear all of the Act's procedural hurdles does not necessarily entitle a student to relief for past failures by the school district." *Sytsema*, 50 IDELR at 216; *quoting Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.,* 520 F.3d 1116, 1125-26 & n.4 (10th Cir. 2008) ("[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE."); *quoting Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1,* 89 F.3d 720, 726 (10th Cir. 1996) (holding that a procedural failure did not entitle a student to relief because that deficiency did not result in the denial of a FAPE).

Congress provided in the 2004 amendments to the IDEA that to find a denial of FAPE based on a procedural violation, the Hearing Officer must find that the procedural violation: (1) impeded the student's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or (3) caused a deprivation of educational benefits. 20 USC §1415(f)(3)(E)(ii); 34 CFR

§300.513(a)(2); UCA §53A-15-301(IV)(O)(2).

The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and information they provide regarding their child. (64 Fed. Reg. 12473 (Mar. 12, 1999).) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. *(Amanda J., supra,* 267 F.3d at 891.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. *(Fuhrmann v. East Hanover Board of Education,* 993 F. 2d 1031,1036 (3rd Cir. 1993).) Stated another way, a parent has meaningfully participated in the development of an IEP when he/she is informed of his/her child's problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. *(N.L. v. Knox County Schools,* 315 F.3d 688, 693 (6th Cir. 2003); *Fuhrmann, supra,* 993 F.2d at 1036.)

A. Petitioner's Participation in the Eligibility Determination of the Student.

Petitioner's first procedural issue is whether Petitioner was denied her right as a parent to participate in the eligibility determination of the Student and, if so, whether such procedural violation denied the student a FAPE.

The IDEA affords parents of a child with a disability an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child. 34 C.F.R. § 300.501(b); Utah Sp. Ed. R. IV.B.1. School districts must "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or

are afforded the opportunity to participate." 34 C.F.R. § 300.322(a); Utah Sp. Ed. R. III.G.1. The IDEA provides that the parents' participation in the special education process must be meaningful. *Deal v. Hamilton County Board of Education*, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004).

In this matter, the record clearly shows that Respondent provided Petitioner E.M.A. with a meaningful opportunity to participate in the eligibility determination process. Respondent provided to E.M.A. written notices of all of the team meetings. E.M.A. attended all of the eligibility determination meetings, including the May 29, 2014, EDT Meeting. Respondent's staff testified that E.M.A. participated at all of the meetings and was the most vocal person at the EDT Meeting and provided input and information that she wanted the team to consider, including her observations of Student and the report by Nanci Ross, Petitioners' dyslexia evaluator. Petitioner also voiced her objections at the meetings.

The March 26, 2014, State Court Order provides that the Petitioner may be used as tutor for the Student if the School believes it is appropriate. The Petitioner argues that because the School did not feel that it was appropriate to use her as a service provider on Student's IEP that she was denied meaningful participation. However, whether the School choose to use Petitioner as a service provider had nothing to do with the eligibility determination for Student or E.M.A. participation in the eligibility determination process, but is only an issue with the development and implementation of Student's IEP. The School's refusal to use E.M.A. as a service provider did not deny her meaningful participation in the eligibility determination of the Student.

At the EDT Meeting, the team discussed Student's strengths, the Petitioner's concerns, the

results of the most recent evaluations, and the academic, developmental and functional needs of Student. The testimony of the School staff also indicates that the team considered the recommendations of Petitioner and the dyslexia expert Nanci Ross.

Petitioner has failed to prove by a preponderance of the evidence that Petitioner was denied meaningful participation in the Student's eligibility determination. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast,* 546 U.S. at 49, 62 (2005).

B. Predetermination of Eligibility.

Petitioner's second procedural issue is whether the Respondent predetermined the eligibility of the Student for special education services by withholding or failing to provide relevant testing materials, failing to consider Petitioners' recommendations, or stating the student needed special education services prior to the eligibility determination meeting. Petitioner is arguing, in effect, that Respondent denied her meaningful participation in the eligibility process by predetermining the result prior to the EDT Meeting.

Petitioner contends that Respondent predetermined eligibility for the Student (and thus denied her meaningful participation) by failing to provide to Petitioner copies of the tests used to determine Student's eligibility prior to the EDT Meeting. Petitioner made a request to the School for the documents two days prior to the EDT Meeting. It is undisputed that the actual test documents were not provided to Petitioner prior to the EDT Meeting. The School staff testified at the hearing that the results of the tests that were completed prior to the EDT Meeting were provided to Petitioner prior to or at the EDT Meeting, but petitioner was not provided with the actual test documents. In fact, the classroom teacher testified that she

shredded the prior year's documents in order to provide room for her new students for the 2014/2015 school year.

However, even if the actual test documents were not provided to Petitioner, Petitioner failed to cite any legal authority for the proposition that Respondent must provide the actual test documents to Petitioner in advance of an eligibility determination meeting (and the Hearing Officer's own legal research revealed no such authority). Petitioner has admitted that she was aware of the test results and that they were discussed at the EDT Meeting. Therefore, Respondent's failure to provide the actual tests to Petitioner prior to the EDT Meeting does not rise to the level of a denial of FAPE, which would be a substantive violation of the IDEA, and which could then invalidate the eligibility determination decision of the EDT team. As stated previously, technical deviations from IDEA's requirements do not render an IEP entirely invalid. *Systema*, 538 F.3d at 1313. Petitioner must prove that the alleged procedural error caused substantive harm to the child or parent, deprived the child of an IEP, or resulted in the loss of an educational opportunity. *Id*. Petitioner has proven that Respondent failed to provide her with the test documents prior to the EDT Meeting, but has failed to prove by a preponderance of the evidence that Respondent's failure to provide the documents invalidated the EDT team's determination of eligibility and thus denied Student a FAPE. Petitioner further contends that Respondent failed to consider her recommendations regarding eligibility and that this is evidence that Respondent predetermined the eligibility determination of the Student. However, as noted above, the witnesses from the School testified at the hearing that E.M.A. participated at all of the meetings, was the most vocal person at the EDT Meeting and provided input and information that she wanted the team to consider, including her observations of

Student and the report by Nanci Ross. The School witnesses all testified that the EDT team did in fact consider Petitioner's input and recommendations. Under the IDEA, school personnel are required to consider the concerns of the parents for enhancing the education of their child (20 USC §1414(d)(3)(A)(ii)). It should be noted that the term "consider" does not mean "acquiesce." The IDEA does not require districts "simply to accede to parents' demands without considering any suitable alternatives." *Blackmon v. Springfield R-XII Sch. Dist.,* 31 IDELR 132 (8th Cir. 1999), *rehearing denied*, 110 LRP 65933, No. 99-1163 (8th Cir. 01/25/00). Therefore, the fact that the EDT team did not agree with or adopt Petitioner's position that Student was not eligible for special education services is not evidence of predetermination.

Petitioner indicated her concern at the hearing that pre-meeting discussions by school staff with the classroom teacher unduly influenced the classroom teacher and caused her to adopt the position of other staff members prior to the EDT meeting. The classroom teacher testified that she did not come to the meeting with a predetermined opinion. Petitioner also points to the testimony by the School principal that the School staff talk every day and discuss data about students and could be influenced by each other outside of a meeting. However, Petitioner failed to provide any evidence that any staff member of the School who participated in the EDT Meeting came to the meeting with a predetermined result in mind. Pre-meeting discussions among the school staff are not unlawful under IDEA, so long as the participants at the eligibility meeting have an open mind when discussing eligibility. *J.D. v. Kanawha County Board of Education*, 48 IDELR 159 (S.D. WV 2007).

From the record it clearly appears that it was the credible and persuasive testimony of the Respondent's staff who participated in the EDT Meeting that they came to the meeting with an

open mind. The testimony of Respondent's staff who testified at the due process hearing is more credible and persuasive than Petitioner's argument that the lengthy and persistent efforts of the School to have Student evaluated evidenced a predetermination on the part of the School to find the Student eligible.

It is concluded that Respondent did not predetermine the result of the eligibility determination meeting and did not deny Petitioner meaningful participation in the eligibility meeting process by failing to provide the test documents prior to the EDT meeting, by not adopting Petitioner's belief that Student does not need special education services, or by the school staff discussing their concerns about Student outside of the EDT meeting. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast,* 546 U.S. at 49, 62 (2005).

III. SUBSTANTIVE ISSUES

The IDEA provides that a child must be assessed in all areas of suspected disability. 20 USC § 1414(b)(3)(B). However, school personnel are not charged with knowledge of disabilities that they have not been made aware of or that there are no indications of at the time the IEP is developed. *Tracy N. v. Dep't of Educ, Hawaii,* 715 F. Supp. 2d 1093, 1112-13 (D. Haw. 2010)

A. Failure to Properly Evaluate.

Petitioners' substantive issue is whether the School's eligibility determination team incorrectly determined that the Student was in need of special education services in order to make progress in the general education curriculum.

Petitioner argues that the testing used in Respondent's evaluation regarding the Student's eligibility was unreliable or not valid and, therefore, the eligibility determination was flawed.

Petitioner argues that Respondent's failure to provide all of Student's §504 accommodations during the eligibility testing caused the EDT Team to incorrectly determined that Student was in need of special education services. Petitioner's argument appears to be that the lack of testing accommodations caused Student to incorrectly appear to be more disabled and need of special education services. It is difficult to understand the logic in this argument. It is undisputed by the parties that the Student has dyslexia, which is a disability listed under the qualifying category of specific learning disability. Petitioners cite no legal authority, and the Hearing Officer can find no legal authority, that a school district is required to provide testing accommodations on standardized tests to students during an eligibility evaluation process. Moreover, the School staff testified at the hearing that the standardized tests used in the evaluation of the Student would not accurately show what they were designed to show if testing accommodations were given. School staff also testified that Student was given her §504 accommodations on some of the non-standardized tests and that the information obtained from the standardized and non-standardized tests were all useful in the eligibility determination process. Given that Petitioner failed to prove that Respondent was required to provide the §504 accommodations on the standardized tests, Respondent's failure to provide them certainly does not invalidate the testing. Even if Respondent was legally required to provide the accommodations, it is difficult to understand how the lack of accommodations invalidated the eligibility process. The witnesses all testified that there were many data points looked at in addition to the standardized tests. Petitioners' argument in this regard is rejected. Petitioner has not established that Respondent incorrectly conducted the testing upon which the eligibility determination was based. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast,* 546

U.S. at 49, 62 (2005).

B. Mootness.

Petitioners' issues with respect to the eligibility determination of the Student present to the Hearing Officer the opposite of what is usually an eligibility determination claim. Typically, a parent would be objecting to the refusal of an eligibility determination team to find the student eligible for special education services. In the instant case, the Petitioner has filed a due process complaint objecting to the finding of eligibility by the EDT and requesting that the Student be exited from special education. Usually, if the parents object to a finding of eligibility, a due process complaint is not filed because either parent could simply refuse to consent to allow services to be provided to the student.

In this matter, the parents of the Student are divorced and do not agree with one another regarding the need for special education services for the Student. The Student's father wants the student to receive special education services and Petitioner E.M.A. does not. However, the parents are subject to two orders of the State Court regarding the education of the Student, as noted above. The first order permitted the School to conduct any needed special education testing for Student and, if requested by the School, the parents were required to participate in a meeting to discuss a possible IEP. The second order provides that if the School recommended that the Student was eligible for special education and at least one parent agreed with the school about the terms of the plan, the [Student] shall be placed on the IEP. The order further provides that if the other parent objects, he or she may file an objection with the State Court, but the School did not need further approval from the State Court to begin implementing the IEP. These orders of the State Court limited the educational rights of both parents to (1)

unilaterally refuse to allow the Student to be evaluated for special education services and (2) to unilaterally revoke consent for the continued provision of special education services to the Student. Therefore, the Hearing Officer has ruled in this matter that the Petitioner E.M.A. is not an IDEA "parent" solely with respect to the issue of unilateral revocation of consent for special education services.

In view of the State Court's orders limiting the educational rights of the Petitioner E.M.A. to unilaterally refuse consent for evaluation, and the fact that the Student's father D.A. agreed with the eligibility determination of the Student by the School, and also agrees with the Student's IEP, Petitioner's argument that the eligibility determination was not properly conducted is moot. Even if Petitioner had, by a preponderance of the evidence, proved that the eligibility evaluation of the Student was not properly conducted by the School, the fact that Petitioner does not have the right to unilaterally revoke consent for the provision of services to the Student makes Petitioner's argument regarding the School's eligibility determination moot.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and analysis of issues and the Hearing Officer's own legal research, the Hearing Officer now enter the following Conclusions of Law:

1. Petitioners did not meet their burden of proof that Petitioner E.M.A. was denied her right as a parent to participate in the eligibility determination of the Student. *Shaffer v. Weast,* 546 U.S. 49, 61 (2005).
2. Petitioners did not meet their burden of proof that Respondent pre-determined the eligibility of the Student for special education services by withholding or failing to provide relevant testing materials, failing to consider Petitioners' recommendations, or

stating the student needed special education services prior to the eligibility determination meeting for the Student for special education services. *Shaffer v. Weast,* 546 U.S. 49, 61 (2005).

3. Petitioners did not meet their burden of proof that the school district's eligibility determination team incorrectly determined that the Student was in need of special education services in order to make progress in the general education curriculum.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED as follows:

1. Petitioners' requests for relief under Procedural Issues Nos. 1(a) and (b) are hereby DENIED.

2. It is further ORDERED that Petitioners' request for relief under Substantive Issue No. 2(a) is hereby DENIED.

All other relief not specifically ordered herein is DENIED.

Dated this 15th day of January, 2015.

_____

Wallace J. Calder

Hearing Officer