

**UTAH STATE OFFICE OF EDUCATION**

**BEFORE THE DUE PROCESS HEARING OFFICER**

**M. S.**, a student, by and through her parent,  
J. S.,

Petitioners,

vs.

**UTAH SCHOOLS FOR THE DEAF AND BLIND,**  
School District,

Respondent.

**DUE PROCESS HEARING DECISION AND  
ORDER**

(Hearing Officer Wallace J. Calder)

**APPEARANCES**

Ronald J. Gardner and Chantel L. Alberhasky, appeared on behalf of Petitioners M. S. and J. S. (“Petitioners”). Kristina L. Kindl and Kevin V. Olsen, Utah Attorney General’s Office, appeared on behalf of Respondent Utah Schools for the Deaf and the Blind (“Respondent”). This matter was assigned to the undersigned Due Process Hearing Officer, Wallace J. Calder (“Hearing Officer”). Ronald J. Gardner filed a motion with supporting documentation for pro hac vice admission of Chantel L. Alberhasky, who is admitted to practice in the state of Missouri, to appear as counsel in this matter. Without objection, the Hearing Officer granted Mr. Gardner’s motion on January 25, 2013, and ordered that Ms. Alberasky be admitted pro hac vice.

**PROCEDURAL HISTORY**

The student, M. S. (the “Student”) is a fifteen year old girl who is blind, hearing impaired, and has been diagnosed with autism and a cognitive impairment. On January 7, 2013,

Petitioners submitted a written Request for Due Process Hearing to the Utah State Office of Education (“USOE”). Petitioners alleged violations of the Individuals With Disabilities Education Act, 20 U.S.C.A. §1400 et seq. (“IDEA”), and of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A., Section 794 (“§ 504”). Pursuant to a stipulation of the parties, an amended complaint and hearing request was filed by Petitioners on February 8, 2013, and that amended complaint serves as the basis for these proceedings.

Respondent’s amended response to Petitioners’ Amended Complaint requested, among other things, that the Hearing Officer dismiss Petitioners’ § 504 claims. The Hearing Officer initially took Respondent’s motion to dismiss under advisement.

A resolution meeting was held by the parties on March 1, 2013, but no settlement was reached. Following the end of the Resolution Period, a telephonic pre-hearing conference was held on March 12, 2013. During the pre-hearing conference, and at all times during this proceeding, the parties were zealously and ably represented by their counsel of record. The Petitioners’ Amended Complaint and the Respondent’s objections were discussed and reviewed, and the Hearing Officer discussed at length with counsel the issues for the hearing. The Petitioners identified and submitted five procedural issues and seven substantive issues for hearing. A hearing date and location was agreed upon by the parties. The 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 and the Hearing Officer granted the parties leave to file briefs until April 27, 2012.

In its response to Petitioner's complaint, Respondent moved to dismiss Petitioner's § 504 claims from this due process hearing arguing that such claims are outside of the Hearing Officer's jurisdiction set forth in Rule I.B of the Special Education Rules. Petitioner did not provide any legal authorities to the Hearing Officer in opposition to Respondent's motion to dismiss. The § 504 regulations give states the discretion to establish administrative procedures and rules for the conduct of § 504 hearings. 34 CFR § 104.36. After reviewing the parties written and oral arguments and relevant legal authorities, the Hearing Officer concluded that Petitioners' complaint was brought under the authority and pursuant to the procedural safeguards afforded by the IDEA and the relevant implementing regulations. In Utah there is a separate process for addressing § 504 claims. In the Pre-Hearing Conference Order the Hearing Officer ruled that he has no authority or jurisdiction to hear the claims brought under § 504, and they were therefore dismissed.

On April 9, 10, 11, 12 and 15, 2013, an impartial due process hearing was conducted at the Utah State Office of Education in Salt Lake City, 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 16 witnesses and submitted 144 exhibits with over 800 pages. Respondent called 13 witnesses and submitted 232 exhibits of over 1361 pages. The hearing transcript is five volumes totaling 1534 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 they would have the burden of proof and the duty to present their evidence first at the hearing.

## ISSUES

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

(1) Procedural Issues for Hearing:

- (a) Did USDB pre-determine extended school year ("ESY") services for the student for 2011 and 2012 and, if so, did such procedural violations of the IDEA deny the student a free appropriate public education ("FAPE")?
- (b) Was the student's parent denied meaningful participation during the IEP team meetings held in September of 2011 and in October and December of 2012, and, if so, did such procedural violations of the IDEA deny the student FAPE?
- (c) Did USDB revise the student's 2010-2011 IEP on March 21, 2011, to add service minutes for the student, outside of an IEP team meeting and, if so, did such procedural violation of the IDEA deny the student FAPE?

- (d) Did USDB discontinue using the FM system as an accommodation for the student during the 2011-2012 school year, without the approval of the IEP team and without prior written notice to the parent and, if so, did such procedural violation of the IDEA deny the student FAPE?
- (e) Did USDB fail to provide prior written notice to the student's parent regarding changes made to the student's 2011-2012 IEP and, if so, did such procedural violation of the IDEA deny the student FAPE?

(2) Substantive Issues for Hearing:

- (a) Is USDB obligated to reimburse Petitioner for travel related expenses incurred in connection with the student's independent educational evaluation (IEE) conducted by the Perkins School For The Blind ("Perkins") in Massachusetts in March, 2012?
- (b) Were the student's IEPs for the 2010-2011 and 2011-2012 school years appropriate?
- (c) Did USDB fail to properly implement the student's IEP's for the two year period immediately preceding the filing of Petitioners' complaint, thus failing to provide any educational benefit to the student?
- (d) Has USDB failed to properly identify the student as "deaf/blind" in the student's IEP and to provide appropriate dual sensory services to the student.
- (e) Is USDB's proposed change of placement for the student back to the Provo School District an appropriate placement in the least restrictive environment?
- (f) Did USDB fail to propose an IEP for the 2012-2013 school year reasonably calculated to enable the student to receive educational benefit, including: (i) a failure to include accurate Present Levels of Performance (PLOP) and/or Present Levels of Academic

Achievement and Functional Performance (PLAAFP); (ii) a failure to include appropriate goals and objectives; (iii) a failure to include appropriate services, supports, accommodations, aids and modifications, including dual sensory services; and (iv) a failure to follow the recommendations from the Perkins IEE.

(g) If USDB's proposed placement in the Provo School District is not determined to be an appropriate placement in the least restrictive environment, is a residential placement at Perkins an appropriate placement in the least restrictive environment?

### **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' counsel, the Hearing Officer's Findings of Fact are as follows:

1. The Student is a 15 year-old girl who has attended USDB as part of its residential program since September 2004. (P-34). USDB's residential program is a place for the children to live so they can access their education during the day. (Tr. Vol. I, p. 204, In. 16-21).
2. The Student was born prematurely on February 13, 1998, as one of a set of identical triplets. The Student is legally blind. In 2002, she was diagnosed with autism by Dr. Julien T. Smith at Utah's Primary Children's Hospital. (Exhibit R55). The Student has a bilateral, mild to Moderate, low frequency hearing loss which slopes to within normal limits at 2000 and 4000 Hz. (Exhibit R32). The Student also has an intellectual disability, and low adaptive behavior. Based on psychological reports, the Student's cognitive level is less than three years of age. (Exhibits R56, R57, and R59) (Testimony of Rachelle

Hester, Tr. Vol. III, p. 287, ln. 6-25, p. 88, ln. 1-11; p. 305, ln. 3-12). (P-20).

3. The Student receives special education services at USDB under the classification of Multiple Disabilities. (P-124; R31). The Student is currently in a classroom with five students, one teacher, who specializes in teaching sensory impaired children, and two aides. (Tr. Vol. V, p. 58, ln. 21-25; 59, ln. 1-3).
4. In 2007, USDB performed several psychological tests to determine the Student's level of functioning including the Vineland Adaptive Behavior Scales, and the Autism Diagnostic Observation Schedule- Module 1 ("ADOS"). (Exhibits 49, 50, 51). The results of these psychological tests and observations supported the previous diagnosis of autism by Dr. Smith and indicated the Student was functioning at a low adaptive level.
5. Basic functional life skills goals have been identified by USDB as appropriate for the Student's educational program. (Testimony of Rachelle Hester, Tr. Vol. III, p. 287, ln. 6-25, p. 288, ln. 1-11, p. 305, ln. 3-12).
6. The Student has complicated health, cognitive and educational issues. (Tr. Vol. IV, p. 62, ln. 10-12; 158, ln. 17-19; V 58, ln. 6-8). The Student's dual sensory loss impacts her ability to communicate. (P-80; P-136). Children with autism have difficulty making sense of what people say. (Tr. Vol. II, p. 195, ln. 10-17). The Student needs one-on-one instruction to learn and makes more progress with one-on-one instruction. (Tr. Vol. I, p. 236, ln. 2-8; IV 63, ln. 7-9). The Student does not learn incidentally. (Tr. Vol. V, p. 58, ln. 3-4). The Student needs a high rate of repetition to learn. (Tr. Vol. I, p. 351, ln. 23-25). The Student needs consistency to learn. (Tr. Vol. I, p. 352, ln. 1-3). The Student needs intensive services to learn. (Tr. Vol. IV, p. 158, ln. 23-25). The Student needs direct and

meaningful communication with her peers and teachers. (Tr. Vol. IV, p. 159, ln. 5-8; 63, ln. 11-13; 311, ln. 24-25; 312, ln. 1-2; Tr. Vol. V, p. 60, ln. 12-15; 76, ln. 3-7).

7. On February 19, 2010, USDB Superintendent Steve Noyce sent a letter to Petitioner, as well as other parents of students in USDB's residential program, informing her of USDB's intent to modify its residential program due to budget cuts. (P-15). Mr. Noyce informed Petitioner of the need to hold an IEP meeting to review the Student's placement, since the changes to the residential program were to occur before the end of the school year. (P-15).
8. On February 22, 2010, USDB's Program Director of Region I, Educational Services, Carolyn Lasater, sent a letter to Petitioner, as well as other parents of students in USDB's residential program, informing her the residential program would be closing no later than Friday, March 12, 2010 and that the Student's personal items must be packed and ready to be sent home at the time of the IEP meeting to change the Student's placement, but no later than March 12, 2010. (P-16).
9. USDB's stated intention to restructure its residential program caused a strain in the relationship between USDB and Petitioner. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 97, ln. 3-12).
10. Petitioner contacted the Utah Parents of Blind Children ("UPBC") asking for assistance regarding USDB's decision to restructure its residential program. (Tr. Vol. III 186, ln. 4-23). Dr. Denise Colton was a volunteer advocate with UPBC. (Tr. Vol. III 186, ln. 9-10). Dr. Colton contacted the Special Education Coordinator/State and Federal Compliance Officer of USOE, regarding USDB's decision to restructure its residential program. (P-18;

Tr. Vol. III 186, ln. 2-25, 187, ln. 1-4).

11. After Ms. Lasater's letter was sent, the USDB Superintendent specifically rescinded that letter, and reaffirmed that USDB's residential program was not closing, and was still available for any student who required a residential placement in order to access their education. (Testimony of Steve Noyce, Tr. Vol. IV, p. 275, ln. 4-14; p. 314, ln. 18-25; p. 315, ln. 1-7; Testimony of Carolyn Lasater, Tr. Vol. V, p. 95, ln. 19-25; p. 96, ln. 1-25; p. 97, ln. 1-2). USDB's residential program is still operational, and continues to accept new students who require a residential placement. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 96-97).
12. USDB contacted Petitioner to hold an IEP meeting for the Student to review her goals and services. (Testimony of Steve Noyce, Tr. Vol. IV, p. 300, ln. 14-16). Petitioner requested USDB to conduct re-evaluations of the Student before having any discussion regarding the Student's change of placement. (Tr. Vol. III, p. 187, ln. 20-25; 186, ln. 1-4).
13. From May 14 through May 21, 2010, in response to Petitioner's request, USDB performed a number of evaluations on the Student including: an Occupational Therapy Evaluation, a Vocational/Transitional Evaluation, an Orientation and Mobility Evaluation, an Audiological Evaluation, a Psychoeducational Evaluation, a Speech and Language Report, and a Growing Up Assessment. (Exhibits R48, R52, R54, R56, R161, R163, and R164), (P9-24, 26-30).
14. In May 2010, USDB audiologist, Rob Shaw, attempted to conduct an audiological evaluation on the Student, but the Student would not tolerate anything in or near her ears, so it could not be completed. (P-19). Mr. Shaw reported that, "[a]ny further

audiological information will require more objective means of evaluation, of which a sedated ABR would be the most effective choice.” (P-19). An ABR, (Auditory Brainstem Response) is a hearing test conducted on newborns or patients who are not able to verbally respond. (Tr. Vol. I, p. 170, ln 24-25; Tr. Vol. I, p. 171, ln 1-5).

15. A May 2010 IEP meeting was held to discuss the results of USDB’s recent evaluations, including Mr. Shaw’s audiological evaluation. (Tr. Vol. III, p. 188, ln. 8-13). The May 27, 2010, IEP document was not signed by the parties at this meeting.
16. Prior to 2010, Petitioner had never requested an interpreter at IEP meetings. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 97, ln. 3-12; p. 108, ln. 20-25; p. 109, ln. 1-18; Testimony of Susan Westergard, Tr. Vol. V, p. 12, ln. 19-25; p. 13, ln. 1-5; Testimony of Rod Price, Tr. Vol. V, p. 80, ln. 20-25; p. 81, ln. 1-14; p. 83, ln. 10-25; p. 84, ln. 1-3). Beginning in 2010, Petitioner requested USDB to provide an interpreter for Petitioner at IEP meetings. USDB arranged through Utah State Purchasing for Petitioner to have an interpreter at every IEP meeting. Petitioner was dissatisfied with each interpreter. In an attempt to hire an interpreter that was not approved by the State, USDB applied to State Purchasing for an exemption from the state’s procurement laws, but that request was denied. (Ex. R13, Testimony of Steve Noyce, Tr. Vol. IV, p. 275, ln. 24- 25; pp. 276-277, p. 278, ln. 1-4). USDB arranged for the Petitioner to interview interpreters from all three state-approved vendors. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 108, ln. 20-25; p. 109, ln. 1-7; Testimony of Susan Westergard, Tr. Vol. V, p. 19, ln. 13-25; p. 20, ln. 1-3, 6-25; p. 21; p. 22, ln. 1-19; Testimony of Rod Price, Tr. Vol. V, pp. 80-81).
17. In August of 2010, an IEP meeting was held in Provo, Utah. (P-90). At that meeting,

Petitioner indicated she was dissatisfied with USDB's evaluations, and requested an Independent Educational Evaluation ("IEE") for the Student by experts in the areas of Autism and blindness (Exhibit P-38, page 140). Petitioner also requested a sedated Auditory Brainstem Response ("ABR") be performed on the Student to determine any possible hearing impairment. USDB agreed to both requests. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 99, ln. 11-25). Petitioner further requested that the IEP team not change the Student's current placement until an IEE was completed. (P-38, pg. 140). USDB agreed not to change the Student's placement until an IEE was completed. (Tr. Vol. I. p. 63, ln. 19-24).

18. In drafting the Student's 2010-2011 IEP, the IEP team, including Petitioner, discussed the Student's strengths, the Petitioner's concerns, the results of the most recent evaluations, and the academic, developmental and functional needs of the Student. (Exhibits P-33, P-34, and Testimony of Carolyn Lasater, Tr. Vol. V, p. 110, ln. 19-25; p. 111, ln. 1-18; Testimony of Kim Hadley, Tr. Vol. III, p. 57-58).
19. The 2010-2011 IEP indicates that the team also considered: (1) whether Braille was appropriate for the Student; (2) the communication needs of the Student; (3) whether the Student needs assistive technology devices and services; and (4) the Student's behavior (Exhibit R26, pages 148, 151-153).
20. The 2010-2011 IEP team included in the IEP: (1) a statement of the Student's present levels of academic achievement and functional performance ("PLAAFP"); (2) a statement of annual goals, including functional goals; (3) a description of short-term objectives and benchmarks for the Student; (4) a description of how the Student's progress would be

measured, and when reports would be sent to the Petitioner; (5) a statement of the special education and related services and supplementary aids and services to be provided to the Student, or on behalf of the Student, without any service times noted; (6) a statement of the program modification or supports for school personnel that would be provided; (7) a statement of any appropriate individualized accommodations for the Student; and (8) a projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and Modifications. (Exhibit P-34).

21. The Student's 2010-2011 IEP goals were individualized to provide the Student with an educational benefit. (Testimony of Kim Hadley, Tr. Vol. III, p. 58, ln. 6-20).
22. USDB staff signed the 2010-2011 IEP at the August 17, 2010, IEP team meeting. Petitioner refused to sign the IEP. (Exhibit R26, p. 149).
23. This IEP was implemented by the classroom teacher, and all related service providers. (Testimony of Marie Hollinger, Tr. Vol. I, p. 250; p. 264, ln. 1-7; p. 304, ln. 20-25; p. 305, ln. 1-7; Testimony of Kim Hadley, Tr. Vol. I, p. 388, Tr. Vol. III, p. 58).
24. The Student made progress toward her goals under this IEP. (Ex. P-57, 75, 82 and 84; Testimony of Marie Hollinger, Tr. Vol. I, p. 306, ln. 7-25; Testimony of Kim Hadley, Tr. Vol. I, p. 388, Tr. Vol. III, p. 58).
25. The Student's classroom teacher and related service providers utilized dual sensory approaches in implementing this IEP, including verbal prompts, object calendars, tactile/gesture cues, signing, and a voice output device. (Testimony of Marie Hollinger, Tr. Vol. I, p. 330, ln. 13-5; p. 331, ln. 1-2, 9-25; p. 332, ln. 1-9; p. 334, ln. 18-25; p. 335;

Testimony of Kim Hadley, Tr. Vol. I, p. 380, p. 388, Tr. Vol. III, p. 58; Testimony of Gloria Hearn, Tr. Vol. V, p. 61). Utilizing all these methods and strategies is a total communication approach in educating the Student. (Testimony of Lorri Finch, Tr. Vol. IV, p. 115, ln. 13-22).

26. In February 2011, the USOE performed an On-Site File Review in which they directed Gloria Hearn to make corrections to the 2010-2011 IEP document, including adding service times in the related services section that corresponded to the times the Petitioner had approved on the prior year's IEP. (Testimony of Carolyn Lasater, Tr. Vol. I, p. 93, ln. 14-25; p. 94, ln. 1-9; p. 95, ln. 11-25; p. 96, ln. 1-8). The service minutes reflected the services times that the Student was receiving. A copy of the 2010-2011 IEP with the hand-written service minutes was sent to Petitioner in March 2011.
27. The number of service minutes provided to the Student were individualized to meet her needs. (Testimony of Lorri Finch, Tr. Vol. IV, p. 130, ln. 10-24; p. 131, ln. 1-13).
28. The Student's sedated ABR was conducted on September 3, 2010 at Primary Children's Hospital by audiologist, Nancy Hohler. (P-140). The ABR testing revealed the Student has a mild to moderate hearing loss. (P-140). Nancy Hohler verbally advised Petitioner of the the Student's hearing impairment at the conclusion of the ABR testing, who "demonstrated understanding by asking appropriate questions and summarizing results." (Exhibit R32, p. 253). (P-140). Upon returning the Student to USDB, Petitioner advised the Student's classroom teacher, Kim Hadley, of the Student's hearing impairment. (Tr. Vol. III, p. 88, ln. 23-25; 89, ln. 1-5).
29. On February 8, 2011, USDB's counsel sent Petitioner's counsel a list of qualified

evaluators to perform an IEE on the Student. (Exhibit R90). This list included options for the Student to be evaluated within Utah. (Exhibit 90, Testimony of Carolyn Lasater, Tr. Vol. V, p. 102, ln. 12-25; p. 103, ln. 1-5). The letter also advised that the maximum allowable for the IEE was \$2000. (P- 41). Two of the evaluators on the list, Carol Evan and Teresa Pawletko, were utilized as witnesses for Petitioners at the Hearing.

30. Petitioner chose not to use any of the evaluators proposed by USDB, and instead chose to use the Perkins School for the Blind in Boston, Massachusetts for the IEE. After reviewing the qualifications of the evaluators at Perkins, USDB agreed that they were qualified and met USDB's requirements for IEE evaluators. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 104, ln. 7-18).

31. USDB paid for the full cost of the IEE and for the cost of an interpreter, but refused to pay for Petitioner's travel costs. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 104, ln. 17-24).

32. In March 2011, USDB received the results of the sedated ABR from Primary Children's Medical Center. These results indicated the Student has a "mild to moderate, low frequency hearing loss [500 to 1000 Hz] sloping to within normal limits at 2000 and 4000 Hz bilaterally." (Exhibit R32; P-140). On March 23, 2011, Petitioner's counsel provided USDB with a HIPPA release signed by the Parent, and on March 24, 2011, USDB provided a copy of ABR test results to Petitioner's counsel. (P-46, P-49).

33. Nancy Hohler, the audiologist at Primary Children's Hospital who conducted the Student's ABR, recommended that Petitioner [c]onsult with audiologists at USDB for any consideration of amplification though the Student's tactile defensive could prohibit

this.” (P-40).

34. After reviewing the ABR, USDB audiologist, Janeal Erikson, informed Ms. Lasater in an email that without amplification the Student *may* have difficulty accessing, some vowel information, voicing cues, important constant-vowel and vowel-consonant transition formation at certain frequencies. (P-48, pg. 165). She also testified that a noisy environment would impact a person with a mild to moderate hearing loss. (P-48; Tr. Vol. I, p.158, ln. 8-17).
35. After USDB’s audiologist Rob Shaw reviewed the ABR results, he recommended placing an FM system in the Student’s classroom although he was not certain that given her one-on-one instruction it would benefit her. (Exhibit R125). Rob Shaw stated in emails that he did not believe the Student would tolerate a hearing aid and suggested an FM system instead. (Ex. P-41). Mr. Shaw testified at the hearing that he also didn’t recommend hearing aids for the Student because he didn’t think hearing aids would benefit her. (Testimony of Rob Shaw, Tr. Vol. I, p. 121, ln. 21-24). Rob Shaw testified that he did not believe amplification was necessary for the Student, but if amplification was going to be provided he believed the FM system was the better option. (Testimony of Rob Shaw, Tr. Vol. I, p. 123, ln 14-19).
36. An Amendment to IEP was signed on May 19, 2011, for an FM system to be used “in the classroom to assist the Student in compensating on her hearing loss.” (Exhibit R27). Rob Shaw installed the FM system in the Student’s classroom by May 23, 2011, and trained the Student’s teacher on its use. (Exhibit R217). The FM system was used in the Student’s classroom the last three days of school for the 2010-2011 school year. (P-58).

The FM system was not used during the 2011-2012 school year. (Tr. Vol. I, p. 235, ln 6-8). The classroom teacher, Ms. Hollinger, testified that because the Student is blind she felt it was more important for the Student to learn to localize sounds and the FM system doesn't allow for that. (Tr. Vol. I, p. 235, ln. 8-14). Prior to the 2012-2013 IEP, USDB observed and took data for one day, December 14, 2012, on the FM system to see if it was helping the Student. (P-117). USDB concluded that the FM system was not benefitting the Student and did not propose it as an accommodation in the Student's December, 2012, IEP. (P-124). The FM system remains operational in the Student's classroom. (Testimony of Marie Hollinger, Tr. Vol. I, p. 234, ln. 24-25; p. 235; p. 236, ln. 1-8; p. 324, ln. 2- 15; Testimony of Gloria Hearn, Tr. Vol. V, p. 35, ln. 24-45; p. 36, ln. 1-22).

37. Petitioner's expert reports indicate that an FM system may benefit the Student not that it was essential in order for the Student to access her educational environment. (Exhibits R53, pp. 441-442, and P-137, p. 774).
38. On April 6, 2011, a USDB multi-disciplinary team met and determined the Student was not eligible for Extended School Year services for the summer of 2011. (P-53; Testimony of Carolyn Lasater, Tr. Vol. I, p. 81, ln. 15-25; p. 82, ln. 1-25; p. 83, ln. 1-13). The multi-disciplinary team reviewed three objectives from the Student's May 2010 IEP and looked at recoupment and regression data taken over breaks to determine the Student was not eligible. (P-53; Tr. Vol. I, p. 86, ln. 8-18). Over a month later, on May 13, 2011, USDB sent Petitioner a letter informing her USDB determined the Student was not eligible for ESY and if she disagreed with the decision, Petitioner could ask for an IEP

meeting. (P-52). Petitioner did not respond to the letter. Ms. Lasater testified that USDB violated the IDEA when it determined ESY services outside an IEP meeting. (Tr. Vol. I, p. 84, ln. 3-5).

39. On May 25, 2011, and September 7, 2011, Susan Patton, Deafblind Specialist at USDB, conducted a Functional Hearing Observation on the Student, to determine the impact of the Student's mild-moderate hearing loss on her ability to access her education. (Ex. R37, pages 263-265, and R38, page 275). Ms. Patten's report indicated: "the Student responds to a variety of auditory information, in various environments, during various activities. Her responses did not appear to be dependent upon the pitch, intensity, distance or the direction of the sounds." the Student's related service providers, residential staff and classroom staff were all consulted and provided input on their observations of the Student's use of her hearing. (Testimony of Susan Patton, Tr. Vol. IV, p. 68, ln. 21-15, p. 69, ln. 1-10). Ms. Patton's report also indicates the Student's responses are sometimes inconsistent and she appears motivated by favorite things such as food and swinging. (Ex. R38, page 275).
40. On September 7th and 8th, Leslie Buchanan, USDB's Deafblind Director, in consultation with other USDB staff, performed a Callier-Azusa assessment on the Student in order to determine whether she meets the criteria for being deafblind. (Exhibit 38, pages 271-273). Ms. Buchanan determined that the Student's hearing allows her to access her educational environment. Based on this assessment and Utah State Board of Education Special Education Rules defining deafblindness, Ms. Buchanan concluded that the Student did not fit within the definition of deafblind. (Testimony of Leslie Buchanan, Tr.

Vol. III, p. 365, ln. 7-25; p. 366; p. 367, ln. 1- 17).

41. The testimony from USDB staff was that the Student's hearing is one of her strengths and her hearing abilities should not be discounted. (Testimony of Marie Hollinger, Tr. Vol. I, p. 323, ln. 19-22; Testimony of Rachelle Hester, Tr. Vol. III, p. 296, ln. 22-25; p. 297, ln. 1; Testimony of Leslie Buchanan, Tr. Vol. III, p. 350, ln. 12-20; p. 351, ln. 6- 25; p. 352, ln. 1-2; p. 367, ln. 3-12).
42. On September 7, 2011, Petitioner sent USDB a list of Parent Concerns for the Student's 2011-2012 IEP. At that point an IEP meeting was scheduled for the following week. (Exhibit R114).
43. On September 13, 2011, an IEP meeting was held. The Petitioner attended this meeting with her two parent advocates, Denise Colton and Marla Palmar, and an interpreter. (Exhibit R30). The Petitioner's concerns were discussed and revisions were made to the draft IEP in accordance with those concerns. (Testimony of Marie Hollinger, Tr. Vol. I, p. 253, ln. 10-15; p. 318, ln. 19-25; p. 319, ln. 1-5).
44. At the September 13, 2011 IEP meeting Dr. Nancy Hohler informed the IEP team she was not able to give an opinion as to how the Student's hearing impairment impacts her ability to communicate due to the Student's blindness and other disabilities. (P-71). Ms. Hohler testified at the hearing she was not able to give an opinion as to how the Student's hearing impairment impacts the Student. (Tr. Vol. I, p. 111, ln. 16-19).
45. In drafting the Student's 2011-2012 IEP, the IEP team, including the parent, discussed the Student's strengths, the Petitioner's concerns, the results of the most recent evaluations, and the academic, developmental and functional needs of the Student.

(Testimony of Marie Hollinger, Tr. Vol. I, p. 253, In. 10-15; p. 273, In. 18-23; p. 318, In. 19-25; p. 319, In. 1-5; Testimony of Rachelle Hester, Tr. Vol. III, p. 304, In. 2-15).

46. The 2011-2012 IEP also indicates that the team considered: (1) whether Braille was appropriate for the Student; (2) the communication needs of the Student; (3) whether the Student needs assistive technology devices and services; and (4) the Student's behavior (Exhibits R29, p. 171, and R30).
47. The 2011-2012 draft IEP document included: (1) a six page detailed statement of the Student's PLAAFP; (2) a statement of annual goals, including functional goals; (3) a description of short-term objectives and benchmarks for the Student; (4) a description of how progress would be measured, and when reports would be sent to the Petitioner; (5) a statement of the special education and related services and supplementary aids and services to be provided to the Student, or on behalf of the Student; (6) a statement of the program modification or supports for school personnel that would be provided; (7) a statement of any appropriate individualized accommodations for the Student; and (8) a projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications. (Ex. R29, R231).
48. The 2011-2012 IEP was not signed at the September 13, 2011, IEP team meeting because it was still under construction. (Ex. R29).
49. On September 21, 2011, the Student's classroom teacher, Marie Hollinger, sent home the IEP document which included comments to further address Petitioner's concerns. (Ex. R231; Testimony of Marie Hollinger, Tr. Vol. I, p. 319, p. 320, In. 1-11; p. 315, In. 2-

- 20).
50. The 2011-2012 IEP contained three similar annual goals from the prior IEP out of nine total annual goals. While some annual goals were similar, the underlying short-term objectives and benchmarks were modified. (Testimony of Marie Hollinger, Tr. Vol. I, p. 310; p. 311, ln. 1-15, 24-25; pp. 312-314; p.317, ln.4-21; Testimony of Lorri Finch, Tr. Vol. IV, p. 102, ln. 21-23).
  51. The Student's classroom teacher implemented both the 2010-2011 and 2011-2012 IEPs during the 2011-2012 school year. (Ex. P-105, P-121, P-120, P-130; Testimony of Marie Hollinger, Tr. Vol. I, p. 374, ln. 12-14).
  52. The 2011-2012 IEP was implemented by the Student's related service providers. (Testimony of Marie Hollinger, Tr. Vol. I, p. 374, ln. 12-14).
  53. The Student's classroom teacher, Marie Hollinger, and the related service providers utilized dual sensory approaches in implementing this IEP that took into account the Student's mild to moderate hearing loss, including TEACCH curriculum, STARR curriculum, verbal cues, object calendar systems, tactile/gesture cues, signing, and a voice output device. (Testimony of Marie Hollinger, Tr. Vol. I, p. 252, ln. 2-23; p. 330, ln. 15-25; p. 331, ln. 1-4; Testimony of Leslie Buchanan, Tr. Vol. III, p. 373, ln. 5-18; p. 374, ln. 18-25; p. 375, ln. 1-17; Testimony of Lorri Finch, Tr. Vol. IV, p. 118, ln. 8-16).
  54. The Student's classroom teachers testified that the Student has not shown significant aptitude for tactile signing, and prefers the voice-output device with which she has had success in communicating her wants and needs. (Testimony of Marie Hollinger, Tr. Vol. I, p. 331, ln. 13-25; p. 332, ln. 1-9; Testimony of Lorri Finch, Tr. Vol. IV, p. 115, ln. 13-25; p.

- 116, ln. 1-23, Tr. Vol. IV, p. 116, ln. 1-23).
55. Trena Rouche is the associate superintendent for the deaf program and the director over residential services at USDB. (Tr. Vol. V, p. 64, ln. 7-9). Ms. Rouche testified that the residential staff has been implementing signs with the Student for the past seven years and the Student doesn't maintain signs and she is inconsistent. (Tr. Vol. V, p. 65, ln. 9-15).
  56. During the 2011-2012 school year the FM system in the Student's classroom was operational and available for the classroom teacher to use. (Testimony of Marie Hollinger). Ms. Hollinger testified that she exercised her professional judgment and did not personally use the FM system because the Student needs to learn to localize sound, and the Student's instruction was typically one-on-one, or in small group settings, and the Student responds to verbal instructions, and the prior data showing that the FM system did not benefit the Student. (Testimony of Marie Hollinger, Tr. Vol. I, p. 234, ln. 24-25; p. 235; p. 236, ln. 1-8; p. 323, ln. 2-22; p. 324, ln. 2-15).
  57. The number of service minutes provided to the Student were individualized. (Testimony of Marie Hollinger, Tr. Vol. I, p. 237, ln. 19-25; p. 238; p. 239, ln. 1-5; p. 306, ln. 7-25; Testimony of Lorri Finch, Tr. Vol. IV, p. 99, ln. 2-25; p. 100, ln. 1-15).
  58. The Therapist Contact Lists indicate that the Student received related services from August 2011 through May 2012. (Exhibits R75-R77).
  59. USDB's quarterly Progress Monitoring Reports indicate the Student progressed on her IEP goals throughout the 2011-2012 school year. (Exhibit R39).
  60. There was testimony that the Student made progress with her orientation and mobility

skills (Testimony of Jinsong Huang, Tr. Vol. IV, pp. 242-243), with her self-help skills including, toileting, cooking, and eating (Testimony of Marie Hollinger, Tr. Vol. I., pp. 272-73; Testimony of Jenn Mitchell, Tr. Vol. IV, p. 214, ln. 18-25, p. 215, p. 216, ln. 1-9), and with her expressive communication as shown by her expanded vocabulary in using her voice output device (Testimony of Lorri Finch, Tr. Vol. IV, p. 116, ln. 13-14).

61. USDB did not hear back from Petitioner on the 2011-2012 IEP, which had been sent to her on September 21, 2011, until February 27, 2012. (Testimony of Marie Hollinger, Tr. Vol. I, p. 319, ln. 6-25; p. 320, ln. 1-11).
62. USDB tried to schedule an IEP meeting with Petitioner but she did not want to hold one until the IEE had been completed, and the parties had an opportunity to review the IEE reports.
63. Denise Colton testified that after the ABR results revealed that the Student has a hearing impairment, and after consulting with other professionals in the field, she contacted Perkins School for the Blind to conduct a the Student's IEE. (Tr. Vol. III, p. 194, ln. 1-21).
64. The IEE, which was originally scheduled for November, 2011, was rescheduled by Perkins for March 13 and 14, 2012.
65. Petitioner testified she borrowed money from the National Federation of the Blind ("NFB") to pay for her travel expenses to Massachusetts and for lodging. (Tr. Vol. III, p. 218, ln. 16-21). USDB refused to reimburse Petitioner for the travel expenses she incurred for traveling to Massachusetts for the IEE. (Tr. Vol. I, p. 75, ln. 1-7).
66. On March 13 and 14, 2012, Perkins School for the Blind conducted its IEE of the Student.

(Ex R-53, P-80).

67. On April 12, 2012, a USDB multi-disciplinary team met and determined the Student was not eligible for Extended School Year services for the Summer of 2012. (P-53; Testimony of Carolyn Lasater, Tr. Vol. I, p. 81, ln. 15-25; p. 82, ln. 1-25; p. 83, ln. 1-13). The multi-disciplinary team reviewed three objectives from the Student's September 2011 IEP and looked at recoupment and regression data taken over breaks to determine the Student was not eligible. (Ex. R2, page 11). On April 16, 2012, USDB sent Petitioner a letter informing her USDB determined the Student was not eligible for ESY and if she disagreed with the decision, Petitioner could ask for an IEP meeting. (Exhibit R2, Testimony of Marie Hollinger, Tr. Vol. I, p. 339, ln. 12-25; pp. 340-341; p. 342, ln. 1-18; Testimony of Rod Price, Tr. Vol. V, p. 90, ln. 7-14). Petitioner did not respond to the letter.
68. On or about May 11, 2012, the Perkins School for the Blind provided its IEE report to USDB. (Exhibit R53).
69. USDB found that many aspects of the Perkins' evaluation was appropriate. (Tr. Vol. I, p. 77, ln. 11-13). Perkins' psychologist Pamela Ryan found that "overall estimates of [the Student's] cognitive function remain limited as well." (P-80, p. 406).
70. During the hearing, Perkins' staff testified that the strategies and teaching methods USDB was utilizing were appropriate for the Student. (Testimony of Briana Stewart, Tr. Vol. II, p. 156; Testimony of Mary Poblete, Tr. Vol. III, pp. 49-51).
71. Perkins did not perform any functional hearing observations on the Student. (Exhibit R53).

72. Perkins' and USDB's audiologists agree that the Student's hearing is adequate for her communication needs. (Exhibit R53, p. 441, Testimony of Rob Shaw, Tr. Vol. I, p. 144, ln. 15-25, p. 145, ln. 9-14). The Perkins audiologists also stated that "the Student may benefit from using an FM system," either a desktop or a personal system "with ear buds or headphones if she could tolerate these devices." (Ex. R53). The Perkins audiologists' recommendations did not include hearing aides. (Ex. R53).
73. In December of 2012, two of the Student's classroom teachers utilized the FM system in the Student's classroom and took data on its negligible impact on the Student. (Testimony of Gloria Hearn, Tr. Vol. V, p. 36, ln. 1-22).
74. After several attempts by USDB, an IEP meeting was scheduled for October 29, 2012. (Testimony of Susan Westergard, Tr. Vol. V, p. 16, ln. 1-10).
75. On October 29, 2012, an IEP meeting was held, with USDB staff and Petitioner in attendance as well as her parent advocate, and an interpreter for Petitioner. This IEP meeting lasted approximately nine (9) hours. At the IEP meeting, the IEE was discussed in detail by the parties, and a discussion was held on whether the Student should be classified as deafblind. (Testimony of Rachelle Hester, Tr. Vol. III, p. 296, ln. 15-21).
76. At the IEP USDB expressed to Petitioner and her representatives what it agreed with, and disagreed with, in the Perkins IEE report. (Testimony of Denise Colton). USDB disagreed with many of the Perkins' IEE recommendations. USDB staff testified that they had a more accurate assessment of the Student's abilities and needs after knowing the Student for nearly 8 years. (Testimony of Rachelle Hester, Tr. Vol. III, p. 298, ln. 11-19; Testimony of Marie Hollinger, Tr. Vol. I, p. 327, ln. 8-25; p. 328). For example, USDB has

attempted for years to teach the Student simple signs, such as “more” and “eat.” And while the Student can, occasionally, repeat those signs after they are modeled for her, the Student does not generalize that knowledge or transfer it to a later date or time. (Testimony of Marie Hollinger, Tr. Vol. I, p. 331, In. 9-12; Testimony of Lorri Finch, Tr. Vol. IV, p. 106, In. 2-25; p. 107, In. 1-11). That knowledge and experience with the Student contrasted with Perkins’ Speech and Language Fellow, who indicated she had taught the Student the sign for “more” after only twenty minutes with her. (Exhibit 53, age 418). USDB was also concerned with Perkins’ disregard for the Student’s autism diagnosis (Testimony of Rachelle Hester, Tr. Vol. III, p. 292, In. 1-8; p. 293, In. 13-25; p. 294, In. 1-18; p. 295, l. 6), and Perkins’ failure to appreciate that her hearing is one of the Student’s strengths. (Testimony of Marie Hollinger, Tr. Vol. I, p. 323, In. 2-25; Testimony of Rachelle Hester, Tr. Vol. III, p. 296, In. 15-25; LB).

77. Several of the tests that Perkins performed on the Student were admitted as outdated and not reliable, such as the Perkins-Binet Test of Intelligence and the Blind Learning Aptitude Test. (Exhibit R53, Testimony of Rachelle Hester, Tr. Vol. III, p. 291; p. 389, In. 10- 25; p. 390; p. 339, In. 9-25; p. 340, In. 1-5). (Testimony of Pamela Ryan.)
78. USDB did not agree to incorporate Perkins’ simultaneous signing approach as an essential strategy for the Student and informed Petitioner USDB would utilize its total communication approach. (Testimony of Rachelle Hester, Tr. Vol. III, p. 296, In. 15-21; p. 319, In. 517; p. 297, In. 6-25; Testimony of Marie Hollinger, Tr. Vol. I, p. 332, In. 12-18; p. 343, In. 9-25; p. 344, In. 1-20). At the October, 2012, IEP team meeting Petitioner presented no evidence that simultaneous signing was the only approach that would

afford the Student a FAPE.

79. At the October, 2012, IEP team meeting the details of the 2012-2013 IEP were not discussed. Toward the end of the meeting the parent advocate, Denise Colton, orally presented a list of Petitioner's fifty-three (53) demands/requests for USDB to consider. (Exhibit R134, Testimony of Carolyn Lasater, Tr. Vol. V, p. 108, ln. 6-19; Testimony of Rod Price, Tr. Vol. V, p. 81, ln. 15-25; p. 83, ln. 5-25; p. 84, ln. 1-6; Testimony of Denise Colton).
80. USDB deciphered the IEP meeting tapes in order to recreate the Petitioner's list because Denise Colton refused to provide USDB a written copy of that list. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 132, ln. 11-25; p. 133, ln. 1-14; Testimony of Denise Colton). USDB held a staffing meeting and considered all of Petitioner's requests prior to holding another IEP meeting. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 117, ln. 18-25; p. 118, ln. 1-4).
81. An IEP meeting was scheduled for December 17, 2012. (Testimony of Susan Westergard, Tr. Vol. V, p. 17, ln. 3-13; p. 19, l. 1-12).
82. On December 17, 2012, another IEP meeting was held with a facilitator in attendance. (Testimony of Carolyn Lasater, Tr. Vol. V, pp. 116-117). Petitioner, her three advocates, and an interpreter were present at this IEP team meeting. (Exhibit R29, page 192). Petitioner and her advocates indicated to USDB they were only there to listen, made few comments, and left before the IEP was finalized. (Testimony of Carolyn Lasater, Tr. Vol. V, p. 117, ln. 7-12). USDB indicated that they would need reconvene in order to finalize the IEP because the services, accommodations, extended school year services,

and placement sections needed to be completed.

83. On January 8, 2013, Petitioner delivered a Request for a Due Process Hearing to USDB.
84. An IEP meeting was scheduled for February 4, 2013. (Testimony of Susan Westergard, Tr. Vol. V, pp. 16-17).
85. On February 4, 2013, an IEP meeting was held with Petitioner, Petitioner's parent advocate, and Petitioner's legal counsel in attendance. The IEP was finalized, and included a change in the Student's placement to Provo School District ("PSD").  
Petitioner refused to sign the 2012-2013 IEP. (Exhibit R31, page 202).
86. In drafting the Student's 2012-2013 IEP, the IEP team, including the parent, discussed the Student's strengths, the Petitioner's concerns, the Perkin's IEE reports, and the academic, developmental and functional needs of the Student. (Testimony of Marie Hollinger, L/9/2013, p. 333, ln. 17-25; pp. 334-339; p. 373, ln. 14-20).
87. In drafting the 2012-2013 IEP, USDB included recommendations from the Perkins IEE, some of which USDB was already implementing. (Testimony from Carolyn Lasater, Tr. Vol. V, p. 110, ln. 19-25; p. 111, ln. 1-18).
88. The 2012-2013 IEP document also indicated the team discussed: (1) whether Braille was appropriate for the Student; (2) the communication needs of the Student; (3) whether the Student needs assistive technology devices and services; and (4) the Student's behavior (Exhibits R31, pp. 200-201).
89. Rachelle Hester, USDB's school psychologist, created a draft behavior intervention plan ("BIP") based on Petitioner's concerns about the Student's behavior, and this draft was circulated at the meeting for the IEP team to review. (Exhibit RI79, Testimony of

Rachelle Hester, Tr. Vol. III. P. 299, ln. 8-25; pp. 300-302; p. 303, ln. 1-11; p. 335, ln. 12-25; p. 36, ln. 1-23). USDB staff indicated that a BIP was not appropriate for the Student given the infrequency and duration of the Student's negative behaviors, and because the Student was easily redirected toward a more acceptable behavior. The BIP was not included in the 2012-2013 IEP (Testimony of Marie Hollinger, Tr. Vol. I, p. 324, ln. 16-25; p. 325; p. 326, ln. 1-20; Testimony of Gloria Hearn, Tr. Vol. V, p. 49, ln. 20-25; p. 50, ln. 1-20).

90. The 2012-2013 IEP document includes: (1) a statement of the Student's PLAAFP; (2) a statement of annual goals, including functional goals; (3) a description of short-term objectives and benchmarks for the Student; (4) a description of how progress will be measured, and when reports would be sent to the Petitioner; (5) a statement of the special education and related services and supplementary aids and services to be provided to the Student, or on behalf of the Student; (6) a statement of the program modification or supports for school personnel that will be provided; (7) a statement of any appropriate individualized accommodations for the Student; and (8) a projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications. (Exhibit R31)
91. The Student's hearing impairment was described in the PLAAFP. The 2012-2013 IEP included services by a deafblind specialist. (Exhibits R31, pages 200, 209, 211, 213, 215, 217, 219, 221, 223). the Student has a new science goal which necessitates direct physical therapy ("PT") services to increase her walking speed, and improve her balance. (Exhibit R31, pages 235-36, Testimony of Denise Winters). The Student has new signing

short-term objectives, two O & M goals, a new prevocational goal area, a new daily living skills-leisure goal area, and a toileting area/goal added to her IEP. (Exhibit R31).

92. This IEP is being implemented by the Student's classroom teacher, and all related service providers. the Student's classroom teacher utilizes dual sensory approaches in implementing this IEP, including object calendars, tactile/gesture cues, signing, and a voice output device. (Testimony of Rachelle Hester, Tr. Vol. III, p. 297, ln. 9-22; Testimony of Leslie Buchanan, Tr. Vol. III, p. 373, ln. 5-15).
93. The number of service minutes designated in this IEP have been significantly increased from the 2011-2012 IEP. (Ex. R29, R31).
94. Several of Petitioner's witnesses did state that the Student could receive appropriate services in a local school district classroom. (Testimony of Martha Majors, Tr. Vol. II, p. 35, ln. 3-14).
95. There was testimony from both parties' witnesses that as the Student approaches sixteen, the age of transition, being close to her home community and family would be beneficial to her. (Exhibit R53, pp. 409-410; Testimony of Carolyn Lasater, Tr. Vol. V, p. 127). Placement at PSD would provide the Student with the ability to be educated with her non-disabled peers in the community where her mother and siblings live. USDB staff testified that PSD currently educates deafblind children within its special education classrooms at their local schools. (Testimony of Steve Noyce, Tr. Vol. V, p. 319, ln. 16-25; p. 320, ln. 1-5; Testimony of Carolyn Lasater, Tr. Vol. V, p. 127, ln. 16-24; Testimony of Rachelle Hester, Tr. Vol. III, p. 298, ln. 5-10; Testimony of Leslie Buchanan, Tr. Vol. III, pp. 376-378; p. 379, ln. 1-13).

96. Provo School District did not have any of its staff testify at the hearing.
97. Ms. Lasater testified that Dawn Casey, from Provo School district, expressed concerns at the February 2013 IEP meeting regarding the drop of support for the Student in that the Student would be going from USDB's classroom of five students with one teacher and two aides to a classroom of approximately 12 students and one teacher. (Tr. Vol. V 133, In. 22-25; 134, In. 1-3). Dr. Evans reported that the classroom at Provo was inappropriate for the Student because the classroom "is very crowded with adults and students, none of whom have communication systems that are compatible with the Student's unique needs." (P-135, pg. 765). Petitioner viewed the placement at Provo and testified one classroom had 18 students and the other had 12 students. (Tr. Vol. III 227, In. 6-19). Petitioner testified she found the placement inappropriate for the Student because the classroom had 12 students, the teacher in the classroom wasn't using sign language or symbols to communicate with the students. (Testimony of the Parent, Tr. Vol. III 227, In. 19-23).
98. USDB stated that a contributing factor in the Student's inability to communicate is her cognitive deficits and Autism. (P-125. Pg. 603-604). USDB bases its contention that the Student has autism on Dr. Smith's 2002 diagnosis and USDB 2007 testing by Rachelle Hester and Tamra (Brown) Gear, both certified school psychologists at USDB. (P-4).
99. Dr. Terese Pawletko is a licensed psychologist and certified school psychologist. (Tr. Vol. II 165, In. 18-21; P-144). Dr. Pawletko was listed as a qualified evaluator in USDB's counsel's February 2011 letter to Petitioner. (P-41, pg. 151). Dr. Pawletko, in collaboration with Dr. Carol Evans, reviewed the autism-related psychological reports

- and the Student's educational records and did observations for several hours. (Tr. Vol. II, p. 169, ln. 17-25; Tr. Vol. II, p. 170, ln. 1-2; P-135; Tr. Vol. II 170, ln. 3-4; P-135). Dr. Evans was also listed as a qualified evaluator regarding the Student's IEE. (P-41, pg. 152).
100. Dr. Pawletko testified at the hearing that it is a real challenge to screen a blind/visually impaired child for autism because there are no measures normed on children with vision impairment "even for cognitive assessments." (Tr. Vol. II 172, ln. 2-9). Dr. Pawletko evaluated the 2002 evaluation by Dr. Smith at Children's Primary Hospital and USDB's 2007 evaluation that includes the Autism Diagnostic Observation Schedules ("ADOS"). (Tr. Vol. II 174, ln. 15-22). Dr. Pawletko criticized Dr. Smith and USDB's evaluations. (Tr. Vol. II 175, ln. 4-18; P-135).
101. Dr. Pawletko testified that the type of programming used for children with a visual impairment and autism is the same kind of programming used for children who are deafblind. (Tr. Vol. II 194, ln. 1-24; P-80). Dr. Pawletko testified that children with autism "can't necessarily make sense out what people say to them" and said it is "like the equivalent of a Charlie Brown teacher talking head: 'Wah, wah, wah.'" (Tr. Vol. II 195, ln. 10-17). Dr. Pawletko reviewed the Perkins evaluations and agrees with the Perkins evaluators that the Student "needs a comprehensive, intense communication program in order to make sense of the visual and auditory world" and she recommended placement at Perkins. (Tr. Vol. II 196, ln. 16-25; 197, ln. 1-2).
102. Linda Alsop is the director of the deafblind programs at Utah State University and trains intervenors for children who are deafblind.. (Tr. Vol. II 240, ln. 6-7, 17-20; P-145). Ms. Alsop does consult work for children who are deafblind and works with State deafblind

projects (Tr. Vol. II 241, ln. 1-8; P-145), and works with U.S. Office of Special Education. (Tr. Vol. II 241, ln. 10-13; P-145). Ms. Alsop has a bachelor's degree in special education and a master's degree in deaf education. (Tr. Vol. II 242, ln. 23-25; 243, ln. 2-5; P-145) and has presented throughout the country on brain development, language development as it relates to the brain, and how sensory loss affects brain development. (Tr. Vol. II 243, ln. 15-25; 244, ln. 1-15; P-145).

103. Ms. Alsop reviewed the Student's educational records and observed the Student at USDB. (Tr. Vol. II 245, ln. 23-24; P-136). In the Student's classroom, Ms. Alsop did not find adaptations made in the classroom for the Student to access auditory and visual information. (Tr. Vol. II 249, ln. 11-21). Ms. Alsop found the Student to have the characteristics of a child who is deafblind, in that the Student needed to touch things and the Student shows a lack of ability to access information auditorily with being inconsistent in responding to things verbally. (Tr. Vol. II 250, ln. 24-25; 251, ln. 1-6; P-136). It is Ms. Alsop's opinion the Student is deafblind and it impacts her ability to communicate. (P-136).
104. Ms. Alsop testified that during her observation of the Student she never saw a calendar system, voice output choice board or other techno cues being used with the Student. (Tr. Vol. III 112, ln. 21-25; 113, ln 1-2). Ms. Alsop further testified that before she came to the conclusion that Perkins School for the Blind is the appropriate placement for the Student, she "gave it some thought and checked into some other options first." (Tr. Vol. III 129, ln. 9-10). Ms. Alsop further testified she is recommending the Student's placement be Perkins School for the Blind in part because "she needs to have access to

direction instruction...in her mode of communication. That's tactile direction instruction. I don't see that being in place here." (Tr. Vol. III 140, In. 14-25; 141, In. 1-9; P-136).

105. Cheralyn Creer has a bachelor's degree in special education with an endorsement teaching mild moderate disabilities and severe profound disabilities. (Tr. Vol. III 146, In. 17-25; P-143). Ms. Creer currently is the coordinator of a program for blind youth that focuses on transition age and services. (Tr. Vol. III 144, In. 10-13; P-143). Ms. Creer was previously employed at the Utah State Office of Education where she served as a liaison for school districts, educators, administrators across the state providing assistance in IEP writing and how to implement special education regulations. (Tr. Vol. III 145, 13-25; P-143). Ms. Creer also worked as a special educator in functional skills classroom for kids with severe disabilities including autism. (Tr. Vol. III 146, In. 8-16; P-143).
106. Ms. Creer reviewed the Student's educational records, the May 2010 IEP, September 2011 IEP, December 2012 IEP and observed the Student at USDB, and observed and spent time with the Student at a seminar for parents of blind children where Ms. Creer attended to the Student in childcare. (Tr. Vol. III 148, 3-7, 16-25; P-134). Ms. Creer testified that the Student pinched people, leaving Ms. Creer bruised. (Tr. Vol. III 150, In. 12-23). The Student had 11 incidents of self-injuries behaviors at USDB from November 29th to December 11th 2012. (Tr. Vol. III 325, In. 13-16). The residential staff at USDB have complained about the Student's behaviors. (Tr. Vol. III 341, In. 16-18).
107. USDB has not performed a functional behavior analysis ("FUBA") on the Student. (Tr. Vol. III, p. 325, In. 17-22; 328, In. 6-12; Tr. Vol. IV, p. 150, In. 13-15; 151, In. 7-9). Ms. Creer testified a behavior intervention plan ("BIP") is written from the information of

the FUBA and becomes part of the student's IEP "for all members of the team to be aware of and to know what the expectations are and how to respond." (Tr. Vol. III 152, In. 8-11, 23-25; 1-10). Ms. Creer testified that the May 2010, September 2011 IEP, and the December 2012 IEP do not contain behavior strategies to deal with the Student's behaviors. (Tr. Vol. III 154, In. 2-14; P-134). Ms. Creer testified a FUBA needs to be conducted so a behavior plan can be written for the Student. (Tr. Vol. III 154, In. 24-25; 155, In. 1-5). Ms. Creer observed the Student engage in "stimming" or self-stimulating behaviors including a rowing action, wrapping her arm around her face, wiggling her head. (Tr. Vol. III 150, In. 23-25; 151, In. 1-8; P-134). Ms. Creer testified that while observing the Student at USDB she never saw a consequence for the behaviors in that there was "no real correction or intervention to respond to those behaviors." (Tr. Vol. III, p. 155, In. 6-20).

108. Ms. Creer found the placement at USDB to be "highly restrictive environment as the Student's communication is limited to six words...and inappropriate behavior to express" herself. (Tr. Vol. III 162, In. 7-25; 163, In. 1). Ms. Creer testified that she did not observe total communication being used with the Student at USDB. (Tr. Vol. III 163, In. 11-14). Ms. Creer testified that she agrees with Perkins' recommendation that the Student needs to be in a total communication environment wherein all the staff that come in contact with her can communicate with her in her mode of communication and that all of her peers be able to communicate with her in her mode of communication. (Tr. Vol. III 163, In. 25; 164, In. 1-7). Ms. Creer testified that it is her opinion the Student can not get that in Utah. (Tr. Vol. III 165, In. 8-10). 47

109. Rachelle Hester testified that Ms. Pawletko failed to recognize the entire scope of evaluations and tests that Primary Children's Hospital had performed in diagnosing the Student with Autism. Ms. Pawletko also disregarded the expertise of USDB staff. Ms. Pawletko did not point out the cautionary language USDB had placed in the ADOS report, and she failed to understand the correct scoring criteria for this assessment. (Testimony of Rachelle Hester, Tr. Vol. III, pp. 227-229; p. 237, ln. 11-16; pp. 274-275)
- Dr. Pawletko also admitted that her recommendation for Perkins was inappropriate because she had not actually seen the Student but had merely reviewed reports. (Testimony of Terese Pawletko, Tr. Vol. II, p. 217, ln. 6-12; p. 221; p. 222, ln. 9-17).
110. Leslie Buchanan testified that Petitioner's expert Linda Alsop's recommendation to place the Student at Perkins was not accurate as to: (1) the Student's classroom setting, i.e., USDB's use of a object/tactile symbols, calendar systems, etc.; (2) the Student's positive behaviors, i.e. her calm demeanor during the fire-drill, her ease with transitions, etc; (3) the Student's independence, i.e., Ms. Alsop's use of a sighted guide technique to take the Student to lunch as opposed to allowing her to independently use her cane; (4) the Student's autism; (5) the Student's hearing abilities; (6) the Student's ability to communicate through various means. Ms. Alsop's spent just over two hours with the Student. USDB has over eight years of experience and knowledge with regard to the Student. (Testimony of Leslie Buchanan, Tr. Vol. IV, p. 23, ln. 7-25; p. 24; p. 25, ln. 1-9, 15-25; pp. 26-50).
111. Cheralyn Creer testified that she was formerly on USDB's Advisory Council and upon learning her position on USDB's advisory council was not being renewed she

immediately relinquished her position on the council. Ms. Creer also testified that given her own vision impairments, she could not discern everything that was taking place in the Student's classroom. Ms. Hearn testified that Ms. Creer's visit to the Student's classroom lasted only 15-20 minutes. Ms. Creer's longest interaction with the Student was outside of USDB in an unfamiliar social settings. (Testimony of Cheralyn Creer, Tr. Vol. III, p. 148, ln. 13-25; p. 149, ln. 1-8; p. 160, ln. 13-24; 181, ln. 5-20; Testimony of Susan Westergard, Tr. Vol. IV, pp. 293-295; Testimony of Gloria Hearn, Tr. Vol. V, pp. 53-56).

## **DISCUSSION**

### **I. GENERAL LEGAL STANDARDS REGARDING THE PROVISION OF FAPE**

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 United States Supreme Court has held that a school must provide a student with a FAPE, which is an "education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction." *Board of Educ. Of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 188-189, 102

S.Ct. 3034, 73 L.Ed.2d 690 (1982). In *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1148 (10th Cir. 2008), the Tenth Circuit, in quoting *Rowley*, explained the FAPE standard as follows:

“Congress did not impose upon the States any greater substantive educational standard than would be necessary to make ... access meaningful .... [T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Rowley*, 458 U.S. at 192. So, for example, the Court found no support in the text or history of the Act for the proposition that Congress sought to guarantee educational services sufficient to “maximize each child’s potential.” *Id.* at 198. Instead, we are told, Congress sought only to require a ‘basic floor of opportunity,’” *Id.* at 200, aimed at providing individualized services sufficient to provide every eligible child with “some educational benefit,” *id.* (emphasis added). We are also reminded that the “primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.” *Id.* at 207. From this direction, we have concluded that the educational benefit mandated by IDEA must merely be “more than de minimis.” *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996). Finally, because the question before us is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, our precedent instructs that “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student .... Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in

evaluating the appropriateness of a child's placement." *O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701-02 (10th Cir. 1998).

The Tenth Circuit Court of Appeals has specifically adopted the "some benefit" standard, holding "[w]e apply the 'some benefit' standard the Supreme Court adopted in *Rowley*." *Systema V. Academy School Dist. No. 20*, 583 F.3d 1306, 1313 (10th Cir. 2008). See also *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125 (10th Cir. 2008); *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1148-9 (10th Cir. 2008).

## 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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).

**A. ESY Services For 2011 and 2012.**

Petitioners’ first procedural issue is whether USDB pre-determined ESY services for the Student for 2011 and 2012 and, if so, whether such procedural violations denied the student a FAPE. USDB used a “multi-disciplinary” team to determine whether the Student was eligible for ESY services for 2011 and 2012. USDB notified Petitioner of the decision that the Student was

not eligible for ESY services in 2011 and in 2012. USDB advised Petitioner if she disagreed with the decision she could ask for an IEP meeting.

Such a process is not provided for in the IDEA. Eligibility for ESY services must be determined by the IEP team which includes the parent. *See* 20 U.S.C. 1412(a)(1). Carolyn Lasater admitted in her testimony at the hearing that USDB violated the IDEA when it determined ESY services in 2011 and 2012 outside an IEP meeting without parent participation. Therefore, USDB's determination that the Student was not eligible for ESY services for 2011 and 2012 outside of an IEP team meeting significantly impeded Petitioner's opportunity to participate in the decision making process regarding the provision of a FAPE for the Student and effectively denied the Student a FAPE.

**B. Petitioner's Participation in IEP Meetings.**

Petitioner's second procedural issue is whether Petitioner was denied meaningful participation during the IEP team meetings held in September of 2011 and in October and December of 2012, and, if so, whether such procedural violations 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 Petitioner attended the IEP team meetings in September, 2011 and in October and December, 2012 (and in February, 2013). There were no IEP meetings held without the Petitioner, her parent advocate(s), and an interpreter present. The evidence shows that USDB

consistently tried to schedule IEP meetings at a time convenient not only for the Petitioner, but also for her parent advocates. It is also evident that Petitioner participated, or was afforded an opportunity to participate in all IEP team meetings. The IEP meetings were long (one over 9 hours) during which the Petitioner and parent advocate's concerns were expressed and discussed. There was testimony that in September of 2011, USDB responded to parent's initial concerns regarding the 2011-2012 IEP, discussed them in the IEP meeting, and the classroom teacher provided further suggested revisions on the IEP to the Petitioner for her consideration.

In October of 2012, USDB discussed at length with Petitioner the Perkins IEE and Petitioner's advocate identified Petitioner's 53 requests during a nearly ten hour IEP meeting. Leslie Buchanan also engaged Petitioner in a discussion regarding the deafblind classification at that same meeting. At the December, 2012, IEP team meeting a facilitator attended to facilitate parent participation and the IEP was discussed. Moreover, at all of the IEPs in question, Petitioner was accompanied by very capable parent advocate(s) who participated on behalf of Petitioner. Petitioner has failed to prove by a preponderance of the evidence that Petitioner was denied meaningful participation in the Student's IEP team meetings. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**C. Revision of 2010-2011 IEP to Add Service Minutes Outside of an IEP Team Meeting.**

The third procedural issue is whether USDB revised the 2010-2011 IEP on March 21, 2011, to add service minutes for the student, outside of an IEP team meeting and, if so, whether such procedural violation of the IDEA denied the student FAPE. The evidence clearly shows that in response to a USOE on-site audit, Gloria Hearn hand wrote service minutes on the 2010-2011 IEP, outside of an IEP meeting, and provided Petitioner with a copy of that revision. The issue

now becomes whether doing so denied the Student a FAPE.

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.* In *O'Toole v. Olathe Dist. Sch. Unif: Sch. Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998), the court found no denial of FAPE when an IEP merely stated that related services would be provided "as appropriate." In reaching that conclusion, the court held that "it is important to distinguish between the statement of related services in the IEP and the provision of the related services." *Id.*

In this case, there was no evidence that the Student was not provided the related services on her IEP. The testimony and other evidence at the hearing shows that Ms. Hern wrote in service minutes that reflected times the Petitioner had previously agreed to, and reflected services times the Student was already receiving. The effect of the revisions was to make the Student's IEP fully compliant with the technical requirements of IDEA. Moreover, there was no evidence presented that the Petitioner objected after the IEP document was sent to her. There was also no evidence presented that adding the service minutes to the IEP caused substantive harm to the Student, deprived the Student of an IEP, or resulted in the loss of an educational opportunity.

Petitioner has proven that the 2010-2011 IEP was changed outside of an IEP meeting, but has failed to prove by a preponderance of the evidence that the addition of related service minutes to the Student's 2010-2011 IEP denied the Student a FAPE. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**D. The FM System.**

The fourth procedural issue is whether USDB discontinued using the FM system as an accommodation for the student during the 2011-2012 school year, without the approval of the IEP team and without prior written notice to the parent and, if so, whether such procedural violation of the IDEA denied the student FAPE. Following the Student's ABR in September, 2010, Nancy Hohler, the audiologist at Primary Children's Hospital who conducted the Student's ABR, recommended that Petitioner [c]onsult with audiologists at USDB for any consideration of amplification though the Student's tactile defensive could prohibit this." After reviewing the ABR, USDB audiologist, Janeal Erikson, stated in an email that without amplification the Student *may* have difficulty accessing some vowel information, voicing cues, important constant-vowel and vowel-consonant transition formation at certain frequencies.

USDB's audiologist Rob Shaw recommended placing an FM system in the Student's classroom although he was not certain that given her one-on-one instruction it would benefit her. Rob Shaw testified that he did not believe amplification was necessary for the Student, but if amplification was going to be provided he believed the FM system was the better option.

An Amendment to IEP was signed on May 19, 2011, for an FM system to be used "in the classroom to assist the Student in compensating on her hearing loss." Rob Shaw installed the FM system and trained the Student's teacher on its use. The FM system was used in the Student's classroom the last three days of school for the 2010-2011 school year and was not used during the 2011-2012 school year.

Petitioner alleges that USDB discontinued using the FM system as an accommodation for the student during the 2011-2012 school year. The evidence shows that the FM system was

installed in the classroom and was, and still is, operational. Data was taken by the prior teacher demonstrating the negligible impact of the FM system for the Student. Prior to the 2012-2013 IEP, USDB observed and took data for one day, December 14, 2012, on the FM system to see if it was helping the Student. USDB concluded that the FM system was not benefitting the Student and did not propose it as an accommodation in the Student's December, 2012, IEP.

The testimony indicated that during the 2011-2012 school year the Student's instruction was one-on-one or in small group settings. The Student's teachers testified that in neither case does the Student require amplification to access her education. The evidence supports the position that given the Student's blindness, and her hearing abilities, she needs to learn to localize sounds. The FM system, which broadcasts sound in the classroom from speakers, does not allow the Student to localize where the sound is actually coming from. Accordingly, while the FM system was present and operational in the classroom, the Student's teacher exercised her professional judgment in determining when to utilize that system.

Petitioner argues that USDB discontinued using the FM system during the 2011-2012 school year without the approval of the IEP team and without prior written notice to the Petitioner. The Amendment to the IEP states that there will be [a]n FM system in the classroom to assist the Student in compensating on her hearing loss." Since the IEP does not require the full-time use of the FM system, and the testimony is that the FM system is still in the classroom and has been used subsequently for the Student, it is unclear what prior written notice should have been sent or what approval was required from the IEP team. Moreover, Petitioner failed to tie the Student's classroom teacher's decision to not personally use the FM system to a denial of a FAPE. The weight of the evidence presented by Petitioner does not support a procedural

violation or a denial of FAPE. Petitioner's own expert reports indicate that an FM system may benefit the Student not that it was essential in order for the Student to access her educational environment.

Therefore, Petitioner has failed to prove by a preponderance of the evidence a procedural violation and a denial of FAPE regarding the use of the FM system. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**E. Failure to Provide Prior Written Notice Regarding Changes to the 2011-2012 IEP.**

Petitioner's final procedural issue is whether USDB failed to provide prior written notice to Petitioner regarding changes made to the 2011-2012 IEP and, if so, whether such procedural violation of the IDEA denied the student a FAPE. The Hearing Officer did not find any references in the record to changes made to the 2011-2012 IEP or a failure to provide prior written notice of such changes. Petitioner has failed to prove by a preponderance of the evidence that there were changes made to the 2011-2012 IEP, and that prior written notice was not provided of such changes, and a denial of FAPE. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**III. PETITIONERS' SUBSTANTIVE ISSUES**

For substantive violations, the IDEA and case law indicate that we must ask whether the student's IEPs were "reasonably calculated to enable her to receive educational benefits," *Rowley*, 458 U.S. at 207. "Central to IDEA is the requirement that local school districts develop, implement, and annually revise an individualized education program ("IEP") calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d)." *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1144 (10th Cir. 2008). The "IEP is a written statement that sets

forth the child's present performance level, goals and objectives, specific services that will enable the child to meet those goals, and evaluation criteria and procedures to determine whether the child has met the goals." *Ass'n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1043 (10th Cir. 1993)

In developing the IEP 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)), and the use of positive behavior interventions and supports and other strategies to address a child's behavior which impedes his learning or that of others. 20 USC §1414(d)(3)(B)(i). 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).

The courts have clearly indicated that IEPs are not evaluated retrospectively. "We do not judge an [IEP] in hindsight; rather, we look to the [IEP's] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [Student] with a meaningful benefit ... ." *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010).

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) ("The CFR does not mandate that the DOE send every student to every specialist possible in order to rule out every

potential diagnosis that could theoretically affect students especially if there are no indications students are suffering from a disorder.”).

**A. Payment of Travel Related Expenses Regarding the Perkins IEE.**

Petitioners’ first substantive issue is whether USDB is obligated to reimburse Petitioner for travel related expenses incurred in connection with the student’s independent educational evaluation (IEE) conducted by the Perkins School For The Blind (“Perkins”) in Massachusetts in March, 2012.

The parent of a child with a disability has a right to an IEE at public expense if the parent disagrees with the district’s evaluation of a child. 34 C.F.R §300.502(a)(1). The school district has the right to set agency criteria governing the location of an IEE, and the qualification of evaluators. See 34 C.F.R §300.502(e). Nowhere in the statutory scheme does it require a public agency to reimburse the cost of unnecessary travel expenses, especially when the necessary services were available within the community. See 34 C.F.R §300.502.

In this matter, USDB provided Petitioner with a list of qualified evaluators in the requested evaluation areas of autism and blindness that she could choose to perform an IEE. An IEE was available to Petitioner within Utah either at no cost or at a minimal cost. Petitioner did not argue that the evaluators on USDB were not qualified to perform an IEE on the Student. In fact, Petitioner utilized evaluators on USDB’s list to provide expert reports for the due process hearing, namely Carol Evans and Terese Pawletko. USDB initially placed a cap of \$2,000 to pay for the IEE.

Petitioner chose to have the Student evaluated at Perkins School for the Blind in Boston, Massachusetts. Petitioner’s parent advocate, Denise Colton, testified that she was the one who

chose Perkins to conduct the IEE for the Student. The cost of that evaluation was approximately \$2,250, which USDB paid for in full. USDB also paid over \$800 for an interpreter to assist the Petitioner during the course of the evaluation.

USDB staff testified at the hearing that all of the evaluators USDB recommended could have conducted an appropriate IEE within the state of Utah, without Petitioner incurring any travel costs. Petitioner has failed to prove by a preponderance of the evidence that an IEE at Perkins was a necessary service that could not be found within the state of Utah. Petitioner's travel costs were unnecessary. Petitioner is not entitled to reimbursement of her travel costs for the IEE. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**B. Appropriateness of the 2010-2011 and 2011-2012 IEPs.**

The second substantive issue is whether the IEPs for the 2010-2011 and 2011-2012 school years were appropriate. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b)(2006).) An IEP must include a statement of measureable annual goals including academic and functional goals designed to meet the child's needs that result from the child's disability. The goals must enable the child to be involved in and make progress in the general academic educational curriculum and meet each of the child's other educational needs that result from the child's disability (34 C.F.R. § 300.320(a)(2)(ii) (2006).)

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 school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*See, N.R. v. San Ramon Valley Unified Sch. Dist.*, (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580*, (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.*, (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia*, (D.D.C. 2002) 238 F. Supp.2d 127, 139 [The IDEA does not provide for an "education ... designed according to the parent's desires," *citing Rowley*, *supra*, 458 U.S. at 207].)

An IEP meets the *Rowley* standard and is substantively adequate if the plan is likely to produce progress, not regression, and is likely to produce more than trivial advancement such that the door of public education is opened for the disabled child. (*D.F. v. Ramapo Central School Dist.*, 430 F.3d 595, 598 (2nd Cir. 2005).) The IEP must be reasonably calculated to enable the child to receive educational benefit in light of the child’s intellectual potential. (*R.E. v. New York City Dept. of Educ.*, 785 F.Supp.2d 28, 42 (S.D.N.Y. 2011).) The focus must be on the placement of the school district, not the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) (*Gregory K.*.) An educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley, supra*, 458 U.S. at 197, fn. 21.) Instead, “(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals in that program.” (*Thompson R2-J School v. Luke P.*, 540 F.3d 1143, 1155 (10th Cir. 2008).)

As stated above, the Supreme Court recognized that the “benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with non-handicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills.” *Rowley*, 458 U.S. at 202. Given the wide spectrum of possible disabilities, the IEP is the basic mechanism through which FAPE is achieved. *O’Toole ex rel. O’Toole v. Olathe Dist. Sch. Unified Sch. Dist. No.*

233, 144 F.3d 692, 698 (10th Cir. 1998). An IEP is not required to be based on, or contain, baseline data. *Lathrop R-II Sch. Dist. v. Gray ex rel. D.G.*, 611 F.3d 419, 424 (8th Cir. 2010). IDEA does not prescribe any specific format or length, which is largely left to the IEP team's discretion. *O'Toole*, 144 F.3d at 702.

A present level of academic achievement and functional performance ("PLAAFP") needs to accurately describe the child's disability, the effect of the disability on academic performance, and avoid simple labels. *Id.* If parents and teachers are fully aware of a child's strengths and needs, and discuss those strengths and needs in detail in forming the IEP, then the IEP is procedurally sound, even if the statements conveying the PLAAFP could be more detailed. *Id.* at 702. The courts have also indicated, "there is no legal authority requiring a particular level of specificity in the statement of annual goals." *Id.* at 706.

#### **1. The 2010-2011 IEP.**

The 2010-2011 IEP contained a three-page single spaced PLAAFP for the Student which covered the following topics: vision, general information, hearing, communication/speech and language, behavioral, self-help, fine motor, gross motor, orientation and mobility, academic/functional performance, math, reading, science, and language arts. In each of these areas, USDB detailed the Student's strengths, her needs, and how her disability impacts her academic/functional performance. The PLAAFP references the assessments performed on the Student in further describing the Student's disabilities and unique needs. The IEP document and witness testimony at the hearing make it clear that the Student's teachers and Petitioner were fully aware of the Student's strengths and needs when this IEP was developed.

In creating goals for the Student, USDB considered the Student's classroom teacher's input,

Petitioner's input, the input of related service providers, assessments and data. The IEP goals were individualized for the Student. This IEP includes eight goals, with short-term objectives and benchmarks, in the areas of communication/speech and language, self help/occupational therapy, orientation and mobility, science, language arts, math, reading, and indicated how the Student's progress toward each goal would be measured. The IEP identified how Petitioner would be informed of the Student's progress. The short-term objectives were measurable, intermediate steps toward the goals stated.

Petitioner argues that the goals in the 2010-2011 IEP were not appropriate because they are skill based rather than conceptual in nature. The Student is in a functional skills program at USDB. Petitioner is arguing more the appropriateness of USDB's methodology rather than whether the goals and objectives in the 2010-2011 IEP were appropriate for the Student. From the detail of the PLAAFP, and the individualized nature of the goals and objectives, it appears that the Petitioner and USDB were fully aware of the Student's strengths and needs, and discussed those strengths and needs in forming the IEP. Petitioner has failed to prove by a preponderance of the evidence that the IEP for the 2010-2011 school year was inappropriate.

## **2. The 2011-2012 IEP.**

On September 7, 2011, Petitioner sent USDB a list of Parent Concerns for the Student's 2011-2012 IEP. On September 13, 2011, an IEP meeting was held. The Petitioner attended this meeting with her two parent advocates, Denise Colton and Marla Palmar, and an interpreter. The meeting notes indicate that Petitioner's concerns were discussed, and revisions were thereafter made to the draft IEP in accordance with those concerns.

The 2011-2012 IEP contained a six-page detailed PLAAFP for the Student. (Exhibit 231). This

PLAAFP covered the following topics: current status, evaluations, ABR, Deafblind evaluations, Callier-Azusa scale, vision, general education (pschoeducational), communication/speech and language, behavioral, self-help, fine motor, gross motor, orientation and mobility, academic/functional performance, math, reading, science, and language arts. In each of these areas, USDB described the Student's strengths, her needs, and how her disability impacts her academic/functional performance. The PLAAFP specifically references: (1) the ABR results and the Student's mild to moderate hearing loss; (2) the Deafblind evaluations including the Functional Hearing Observation, and the Callier-Azusa Scale; (3) Functional Vision Assessments; and (4) a Learning Media Assessments. There was no evidence presented by Petitioner that the PLAAFP was inaccurate. The IEP team discussed the Student's strengths, the Petitioner's concerns, the results of the most recent evaluations, and the academic, developmental and functional needs of the Student. The 2011-2012 IEP also indicates that the team considered: (1) whether Braille was appropriate for the Student; (2) the communication needs of the Student; (3) whether the Student needs assistive technology devices and services; and (4) the Student's behavior.

The 2011-2012 IEP was not signed at the September 13, 2011, IEP team meeting because it was still under construction. On September 21, 2011, the Student's classroom teacher, Marie Hollinger, sent home the IEP document which included comments to further address Petitioner's concerns.

The 2011-2012 IEP contained three similar annual goals from the prior IEP out of nine total annual goals. While some annual goals were similar, the underlying short-term objectives and benchmarks were modified. The testimony from USDB staff was that given the Student's

multiple disabilities and cognitive deficits, slow progress is to be expected. Therefore, several similar goals, with different short-term objectives, were individualized for the Student on this IEP. This does not indicate a failure to individualize the IEP. The testimony demonstrated that USDB developed IEP goals that were appropriate and individualized for the Student, and were reasonably calculated to provide her with an educational benefit. The team also discussed the Student's behavior and USDB staff indicated that they did not believe her behaviors were adversely impacting herself or others.

Petitioner argues that the goals in the 2010-2011 IEP were not appropriate because they are skill based rather than conceptual in nature. As noted, the Student is in a functional skills program at USDB. Petitioner is arguing more the appropriateness of USDB's methodology rather than whether the goals and objectives in the 2010-2011 IEP were appropriate for the Student. From the detail of the PLAAFP, and the individualized nature of the goals and objectives, it is clear that the Petitioner and USDB were fully aware of the Student's strengths and needs, and discussed those strengths and needs in forming the IEP.

Petitioner has failed to prove by a preponderance of the evidence that the IEP for the 2010-2011 school year was inappropriate. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**C. Implementation of 2010-2011 and 2011-2012 IEPs.**

The third substantive issue is whether USDB failed to properly implement the IEP's for the two year period immediately preceding the filing of Petitioners' complaint, thus failing to provide any educational benefit to the student. Although school districts should strive to follow IEP's as closely as possible, the IDEA does not require perfect adherence to a child's IEP. Minor

discrepancies between the services provided and the services called for by the IDEA do not give rise to an IDEA violation. *Van Dun ex. rel. Van Dun v. Baker Sch. Dist. 5J*, 502 F. 3d 811, 821 (9th Cir. 2007). A child has received an educational benefit under IDEA if the evidence clearly shows that the child made progress on the educational goals that were individually formulated through the IEP process. *Thompson*, 540 F.3d at 1145.

Petitioner argues that the IEP was not properly implemented during the 2010-2011 school year. However, Petitioner's own witness, Kim Hadley, the Student's classroom teacher for the 2010-2011 school year, testified that she had used multiples strategies that were appropriate for multi-disabled and autistic children like the Student. Ms. Hadley testified that she utilized a total communication approach to educating the Student which included, tactile signing, Braille instruction, Braille labeling, object cues, verbal cues, physical prompts, and object calendars. Ms. Hadley testified that during the 2010-2011 school year she appropriately implemented the IEP, and the Student made progress on her IEP goals.

Petitioner also argues that the Student's 2011-2012 IEP was not properly implemented during the 2011-2012 school year. Petitioner argues that the Student made only trivial progress on her goals, that USDB failed to conduct a FUBA and write a BIP for the Student, that sign language is not included in her IEPs, inconsistency with using object symbols with the Student and that the Student did not receive all of her speech and language service minutes.

USDB presented testimony from the Student's classroom teachers and related service providers that the Student made progress on her IPE goals during 2011-2012. The quarterly progress reports and data collected further support that the Student was making progress on her IEP goals. USDB argues that when analyzing the Student's progress, one needs to take into

account the Student's cognitive impairments. USDB and the Perkins evaluators agree that the Student's cognitive impairments cause the Student's progress to be slow and achieved through significant repetition. There was testimony regarding her progress in the area of orientation and mobility, with her self-help skills including, toileting, cooking, and eating. the Student's expressive communication has also improved as shown by her expanded vocabulary in using her voice output device.

With respect to the Student's behavior, the PLAAFP and IEP indicate that behavior issues of pinching and biting were discussed by the team. The PLAAFP indicates that behavior was also a topic for the upcoming IEE. The Testimony from the Student's teachers and USDB staff was that the behaviors were a form of communication. The evidence showed that there was no educational need for conducting a FUBA and then developing and implementing a specific BIP for the Student during the 2010-2011 school year or for the 2011-2012 school year. School staff did not see significant behaviors that interfered with the Student's ability to learn or that of others. For the most part the Student was compliant, easily redirected, and not considered to be a behavior problem.

In terms of special education law, a "related service" is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006).) An educational agency, in formulating a special education program for a disabled pupil, is not required to furnish every special service necessary to maximize the child's potential. (*Rowley, supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. *Park v. Anaheim Union High School*, 464 F.3d 1025, 1033 (9th Cir.

2006). Although school districts should strive to follow IEP's as closely as possible, the IDEA does not require perfect adherence to a child's IEP. Minor discrepancies between the services provided and the services called for by the IDEA do not give rise to an IDEA violation. *Van Dun ex. rel. Van Dun v. Baker Sch. Dist.* 5J, 502 F. 3d 811, 821 (9th Cir. 2007). Although the testimony is not clear whether the Student received all of her speech and language related service minutes, it does not appear from the record that there was evidence that the Student was denied an educational opportunity thereby.

Petitioner's arguments regarding sign language and object symbols again go more to the appropriateness of USDB's methodology rather than whether the Student made progress on her 2011-2012 IEP goals. Petitioner cannot require USDB to employ the methodology she believes should be used with the Student. The issue is whether USDB's teaching methodologies provide some educational benefit to the Student. The weight of the evidence shows that because the Student actually progressed on her educational goals she has been provided some educational benefit and has received FAPE. Petitioner has failed to prove that the Student's IEPs were not reasonably calculated to enable the Student to receive some educational benefit or that she did not in fact receive some educational benefit.

Petitioner has failed to prove by a preponderance of the evidence that the IEPs for the 2010-2011 and 2011-2012 school years were not properly implemented. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**D. Deaf/blind Classification and Provision of Dual Sensory Services.**

Petitioner's fourth substantive issue is whether USDB failed to properly identify the Student as "deaf/blind" in the Student's IEP and to provide appropriate dual sensory services to her. The

Student currently receives special education services under the classification of multiple disabilities. In September of 2010, a sedated ABR was performed on the Student to assess her hearing. USDB received the results in March of 2011, which showed a mild to moderate hearing loss in the lower frequencies. "Deafblindness means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for students with deafness or students with blindness." Utah Sp. Ed. R. II.J.2.a. To determine whether the Student fit within Utah's definition of deafblindness, Ms. Buchanan specifically followed, Utah Sp. Ed. Rule II.J.2.b.4, which outlines the combination of impairments that must exist in order for a child to be classified deafblind. There is no dispute as to the Student's vision loss. For a child to be deafblind, the child's hearing impairment must adversely affect his or her ability to access auditory information and the development of language and communication for educational performance. Utah Sp. Ed. Rule II.J.2.b.4.

Prior to the 2011-2012 IEP team meeting, USDB's Deafblind Director, Leslie Buchanan, and Lead Specialist, Susan Patten, performed a deafblind observation, and a Functional Hearing Observation on the Student in order to determine how her mild to moderate hearing loss impacts her ability to access her education. In conducting these observations, the Student's related service providers, residential staff and classroom staff were all consulted and provided input on their observations of the Student's use of her hearing. USDB determined that the Student's hearing allows her to access her educational environments. The observations indicated that the Student "responds to a variety of auditory information, in various environments, and during various activities. Her responses did not appear to be dependent

upon the pitch, intensity, distance or the direction of the sounds.” At the hearing the USDB staff and service providers testified that the Student’s hearing is one of her strengths. USDB’s audiologists agree that the Student’s hearing is sufficient for the development of language and communication, and USDB’s observations of the Student indicate that she utilizes her hearing to access her educational environment. Ms. Buchanan determined that the Student was not deafblind.

The PLAAFP must include information as to “[h]ow the child’s disability affects the child’s involvement and progress...” 34 C.F.R. § 300.320(a)(1)(i). The category of disability under which a student is found to qualify for special education services does not determine those services. However, how a student’s disability is described in the PLAAFP and how it impacts the student’s education, influences the goals and the services the student receives. USDB included in the 2011-2012 IEP, specifically the PLAAFP portion, the results of the ABR that indicated the Student’s mild to moderate hearing loss and the results of the deafblind observation and functional hearing test. The 2011-2012 IEP reflects the IEP team’s decision to use the Student’s hearing as a key component of her education program.

USDB testified that it has consistently utilized dual sensory strategies in educating the Student in recognition of her hearing impairment. Also, because of her mild to moderate hearing impairment, USDB’s recognized that a deafblind specialist might be able to offer strategies that would be beneficial to the Student. The services of a deafblind specialist were added to her 2012-2013 IEP. The recent IEP also contains dual sensory strategies and a total communication approach for educating the Student.

Petitioner alleges that the Student should be classified as deafblind, based on the IEE

recommendations and the recommendations of its other experts. However, it should be noted that Perkins did not perform any functional hearing observations on the Student. Also, the Perkins' audiologists also agree that the Student's hearing is sufficient for the development of language and communication. Petitioner's experts criticize the findings of USDB's deafblind specialists even though their own observations were very short and limited in scope. Also, Petitioner has not provided any evidence as to how merely changing the Student's classification from "multiple disabilities" to "deafblind" would impact the Student's IEP, or the services she is receiving.

The courts have been very clear that the focus is "more about whether the child is receiving an appropriate education than whether the experts have applied the right label to the child's condition." *Heather S. v. Wisconsin*, 125 F.3d 1045, 105' (7th Cir. 1997). "IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [a child's] multiple disabilities." *Id.* While it may be argued that the Student could technically qualify under the Utah definition of deafblind, focusing on a "label" is clearly less important than focusing on appropriate individualized services for the Student. The appropriate inquiry is whether the Student was receiving an appropriate education. The testimony at the hearing from witnesses on both sides clearly indicated that a particular label assigned to a child does not drive services, goals, or placement decisions. Rather it is the the Student's needs that drive those decisions.

Petitioner has failed to prove by a preponderance of the evidence that: (1) the Student's classification should be changed to deafblind; and (2) USDB did not provide the Student with appropriate services based on her unique combination of disabilities. Therefore, Petitioners

have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**E. USDB's Proposed Change of Placement to Provo School District.**

The fifth substantive issue is whether USDB's proposed change of placement for the student back to the Provo School District is an appropriate placement in the least restrictive environment.

The IDEA provides that "to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separates schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of the severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved successfully. 20 U.S.C. § 1412(a)(5).

The Tenth Circuit has adopted the two part *Daniel R.R.* test to determine whether the LRE requirement has been met which requires a (1) determination as to whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determine if the school district has mainstreamed the child to the maximum extent appropriate. *L.B. v. Nebo Sch. Dist.*, 379 F.3d 996, 976 (10th Cir. 2004).

Several of Petitioner's witnesses, including Martha Majors, testified that the Student could receive appropriate services in a local school district classroom. There was testimony from both parties' witnesses that as the Student approaches sixteen, the age of transition, being close to her home community and family would be beneficial to her. Placement at PSD would provide the Student with the ability to be educated with her non-disabled peers in the community where her mother and siblings live. USDB staff testified that PSD currently educates deafblind

children within its special education classrooms at their local schools.

However, Ms. Lasater testified that Dawn Casey, from Provo School district, expressed concerns at the February 2013 IEP meeting regarding the drop of support for the Student in that the Student would be going from USDB's classroom of five students with one teacher and two aides to a classroom of approximately 12 students and one teacher. Dr. Evans reported that the classroom at Provo was inappropriate for the Student because the classroom "is very crowded with adults and students, none of whom have communication systems that are compatible with the Student's unique needs." Petitioner viewed the placement at Provo and testified one classroom had 18 students and the other had 12 students. Petitioner testified she found the placement inappropriate for the Student because the classroom had 12 students, the teacher in the classroom wasn't using sign language or symbols to communicate with the students. What is also troubling is that Provo School District did not have any of its staff testify at the hearing regarding its ability to implement the Student's IEP.

The Student's progress is slow because of her cognitive functioning and her complicated needs and issues which require her to receive intensive, one-on-one instruction to learn. Changing the Student's placement from her current residential setting in a classroom with five students with two aides and one teacher, who specializes in teaching children with sensory impairments, to a setting in a classroom in Provo with 12 students and one teacher is premature at best. And without more expressive language skills it is hard to see how the Student will be able to interact with and be educated with her non-disabled peers. It may be that in the future the Student's communication abilities and other skills and her transition needs will be such that the IEP team should re-visit this issue, but for now PSD is not found to

be an appropriate placement in the least restrictive environment. The Student will remain in her current placement at USDB

Petitioner has proven by a preponderance of the evidence that Provo School District's classroom is not the appropriate placement for the Student in the least restrictive environment at this time. Therefore, Petitioners have met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**F. The 2012-2013 IEP.**

The seventh substantive issue is whether USDB failed to propose an IEP for the 2012-2013 school year reasonably calculated to enable the student to receive educational benefit, including: (i) a failure to include an accurate (PLAAPF); (ii) a failure to include appropriate goals and objectives; (iii) a failure to include appropriate services, supports, accommodations, aids and modifications, including dual sensory services; and (iv) a failure to follow the recommendations from the Perkins IEE.

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child. (*Ibid.*). A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.*, (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580*, (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch.*

*Dist.*, (E.D. Mo. 2007) 47 IDELR 216.). Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. *Shaw v. Dist. of Colombia*, (D.D.C. 2002) 238 F. Supp.2d 127, 139 (The IDEA does not provide for an "education ... designed according to the parent's desires," citing *Rowley, supra*, 458 U.S. at 207).

The 2012-2013 IEP, currently being implemented, contains an appropriate PLAAFP for the Student which details the Student's disabilities including her autism, intellectual disability, multiple disabilities, low adaptive behaviors, blindness, hearing loss, and her functional hearing. The PLAAFP also describes the Student's strengths, her needs, and how her disability impacts her academic/functional performance. The PLAAFP also references the assessments performed on the Student as well as the IEE from Perkins. In this IEP, each goal area provides a further in-depth PLAAFP describing the Student's strengths, needs, and how her disability impacts her performance in that specific goal. IDEA requires no more.

The testimony at the hearing clearly showed that in creating appropriate goals for the Student, USDB considered the IEE recommendations, as well as the Student's classroom teacher's input, Petitioner's input, the input of related service providers, recent assessments and data. The testimony showed that the IEP teams spent hours crafting goals for the Student. The IEP goals were individualized to provide the Student with an educational benefit. The Student's 2012-2013 IEP includes new goal areas such as a pre-vocational goal area, a toileting goal area, and a daily living skills-leisure goal area. This IEP also incorporates two O & M goals, and a science goal that necessitates the direct services of a physical therapist. Many of these new goals and benchmarks were based on the IEE's recommendations and Petitioner's input. Moreover, each of the eight goal areas of the IEP contain measurable annual goals, short-term

objectives and benchmarks, and indicate how the Student's progress toward each goal will be measured and how Petitioner will be informed of the Student's progress. Each short-term objective is a measurable, intermediate step toward the goal stated.

The 2012-2013 IEP includes several teaching techniques, including tactile signing, voice output devices, object cues, verbal cues, physical prompts, hand-over hand instruction, hand-under-hand instruction, and an object calendar system. This total communication approach includes dual sensory strategies to take into account the Student's mild to moderate hearing loss. This IEP also includes new services for the Student. This IEP provides for a deafblind specialist to provide consultation services in order to assist USDB staff in developing strategies appropriate for the Student based on her complex multiple disabilities.

In this due process hearing many of Petitioner's arguments have been centered on the methodology of providing the communication and other services the Student needs. Petitioner is seeking to have the Student educated in the total communication approach as defined and used by Perkins, which includes simultaneous tactile signing and spoken language for all communication. However, as previously noted Petitioner does not have a right under IDEA to compel USDB to employ a specific methodology in providing for the Student's education. *Lachman*, 852 F.2d at 297 (citing *Rowley*, 458 U.S. at 208). At the hearing Petitioner did not prove that simultaneous signing was an essential component of, or the only means of providing, the Student's education program. The Student's teachers and USDB's staff testified that tactile signing is not the mode of communication the Student prefers or has been successful at. USDB utilizes a total communication approach which includes using multiple expressive communication options with the Student, including the voice-output device which the Student

gravitates toward and has success with.

In criticizing the 2012-2013 IEP, Petitioner alleges that the IEP is deficient because USDB failed to follow the recommendations from the Perkins' IEE. IDEA requires that if a parent obtains an IEE, the results of the IEE "must be considered by the public agency . . . in any decisions made with respect to the provision of FAPE to the child." 34 C.F.R. § 300.502. The testimony of USDB staff and Petitioner and her advocate, Denise Colton, makes clear that at the October 29, 2012, IEP meeting, the parties had a lengthy and detailed discussion of the IEE. USDB did include some of the Perkins' IEE's recommendations into the 2012-2013 IEP. However, as IDEA's implementing regulations make clear, USDB is not obligated to adopt every recommendation of an IEE. The courts clearly grant deference to the educators and school staff who typically have more extensive knowledge of the student, so long as consideration is given to the IEE recommendations. It cannot be said that after USDB reviewed the IEE and spent over eight hours in one meeting discussing it with Petitioner that USDB failed to consider the IEE. Moreover, USDB staff testified that they considered the 53 parent requests that Petitioner's advocate verbally presented to the IEP team at the October 29, 2012, IEP team meeting.

It appears from the record that USDB has proposed an IEP for 2012-2013 that complies with IDEA's requirements for IEPs, including considering the Perkins IEE and the concerns of Petitioner. Again, the issue is not whether USDB has proposed the best IEP that could be provided, but whether the IEP it did propose is reasonably calculated to provide the Student with some educational benefit.

Petitioner has not proved by a preponderance of the evidence that the Student's 2012-2013 IEP is not reasonably calculated to enable the Student to receive an educational benefit.

Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

**G. Residential Placement at Perkins.**

Petitioner's eighth substantive issue is whether a residential placement at Perkins is an appropriate placement in the least restrictive environment.

The U.S. Supreme Court has stated that placement in a private school can be appropriate relief under the IDEA. "The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense where this is not possible. See § 1412(5); 34 CFR § 300.132, 300.227, 300.307(b), 300.347." *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). "[A] disabled student is not required to demonstrate that he cannot be educated in a public setting. Under [the Act], the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether he will receive such an education." *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 248-49 (3d Cir. 1999).

It has not been disputed by USDB's witnesses that Perkins School for the Blind is a very fine school for blind and deafblind students with very experienced and very capable staff. Nor is it disputed that Perkins could provide an appropriate educational program for the Student. However, in this hearing it has been determined that the Student's IEPs for 2010-2011 and 2011-2012 were appropriate and provided the Student with FAPE. It has also been determined that the Student's 2012-2013 IEP is appropriate and reasonably calculated to provide the

Student with FAPE. Therefore, the question of whether Perkins is an appropriate placement in the least restrictive environment, or whether USDB is required to place the Student at Perkins or pay for her placement at Perkins is a moot issue. As a result, it is not necessary to get to the issue of whether placement at Perkins would be the least restrictive environment for the Student.

Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

### **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 meet their burden of proof that USDB pre-determined ESY services for the student for 2011 and 2012 and such procedural violation of the IDEA denied the student a FAPE. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
2. Petitioners did not meet their burden of proof that Petitioner was denied meaningful participation during the IEP team meetings held in September of 2011 and in October and December of 2012. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
3. Petitioners did meet their burden of proof that USDB revised the student's 2010-2011 IEP on March 21, 2011, to add service minutes for the student, outside of an IEP team meeting, however, Petitioners did not meet their burden of proof that such procedural violation of the IDEA denied the student FAPE. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
4. Petitioners did not meet their burden of proof that USDB discontinued using the FM system as an accommodation for the student during the 2011-2012 school year, without

the approval of the IEP team and without prior written notice to the parent. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).

5. Petitioners did not meet their burden of proof that USDB failed to provide prior written notice to the student's parent regarding changes made to the student's 2011-2012 IEP. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
6. Petitioners did not meet their burden of proof that USDB is obligated to reimburse Petitioner for travel related expenses incurred in connection with the student's independent educational evaluation (IEE) conducted by Perkins in Massachusetts in March, 2012. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
7. Petitioners did not meet their burden of proof that the student's IEPs for the 2010-2011 and 2011-2012 school years were not appropriate. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
8. Petitioners did not meet their burden of proof that USDB failed to properly implement the student's IEP's for the two year period immediately preceding the filing of Petitioners' complaint, thus failing to provide any educational benefit to the student. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
9. Petitioners did not meet their burden of proof that USDB failed to properly identify the student as "deaf/blind" in the student's IEP and to provide appropriate dual sensory services to the student. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
10. Petitioners did meet their burden of proof that USDB's proposed change of placement for the student back to the Provo School District is not an appropriate placement in the least restrictive environment. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).

11. Petitioners did not meet their burden of proof that USDB failed to propose an IEP for the 2012-2013 school year reasonably calculated to enable the student to receive educational benefit, including: (i) a failure to include an accurate PLAAFP; (ii) a failure to include appropriate goals and objectives; (iii) a failure to include appropriate services, supports, accommodations, aids and modifications, including dual sensory services; and (iv) a failure to follow the recommendations from the Perkins IEE. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
12. Petitioners did not meet their burden of proof that USDB's proposed residential placement at Perkins is an appropriate placement in the least restrictive environment. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).

#### **ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED that Petitioners' requests for relief under Procedural Issues Nos. 1(b), (c), (d) and (e) are DENIED. In regard to Procedural Issue No. 1(a), it is ORDERED that USDB immediately begin to provide compensatory educational services of a speech language pathologist, who is proficient in tactile sign language, to provide direct services to the Student for two 30 minute a week sessions for 20 weeks at USDB expense.

It is further hereby ORDERED that Petitioners' requests for relief under Substantive Issues Nos. 2(a), (b), (c), (d), (f) and (g) are DENIED. In regard to Procedural Issue No. 2(e), it is ORDERED that the Student not be placed at the Provo School District placement set forth in the Student's 2012-2013 IEP, but that said IEP be amended to indicate that the Student's current placement is USDB.

All other relief not specifically ordered herein is DENIED.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2013

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Wallace J. Calder  
Hearing Officer

**CERTIFICATE OF SERVICE**

On the \_\_\_\_ day of \_\_\_\_\_, 2013, a copy of the foregoing **DUE PROCESS HEARING DECISION AND ORDER** was sent by electronic transmission to the following:

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Hearing Officer