UTAH STATE BOARDOF EDUCATION
SPECIAL EDUCATION SERVICES
DUE PROCESS HEARING

IN THE MATTER OF	*	**DECISION AND ORDER**
	*	
[redacted] and [redacted], on behalf of [redacted]	*	
Petitioners,	*	**CASE No. DP-2021-15**
v.	*	
SALT LAKE CITY SCHOOL DISTRICT	*	
Respondents.	*	**Hearing Officer Frank Snowden**

DECISION AND ORDER

Michelle Marquis, Esq., Laura Henrie, Esq., Katie Cox, Esq. and Maya Anderson, Esq., with the DISABILITY LAW CENTER, appeared on behalf of Petitioners [redacted], a student, by and through [redacted] and [redacted], the parents ("Petitioners"). Kristina Kindl, Esq., appeared on behalf of Respondent SALT LAKE CITY SCHOOL DISTRICT ("Respondent"). This matter was assigned to the undersigned Due Process Hearing Officer, Frank Snowden ("Hearing Officer").

Procedural history

The student, [redacted] (the "Student") is [redacted] year old girl who has been diagnosed with [redacted], and was identified in the Student's IEP under the disability classification of Other Health Impairment (OHI). Petitioners submitted a written Request for Due Process Hearing to the Utah State Board of Education ("USBE") dated March 4, 2021, which was received and entered of record on March 4, 2021. Petitioners allege violations of the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 et seq. ("IDEA"), violations on behalf of and regarding other “similarly situated students” and violations of The Americans with Disabilities Act.

Respondent filed its first responsive pleading in the form of Motion Challenging the Sufficiency of the Petitioners' Complaint and Motion to Dismiss or Exclude Certain Claims of the same on March 13, 2021. On March 18, 2021, Petitioner responded to such Motion Challenging the Sufficiency of the Petitioners' Complaint and Motion to Dismiss or Exclude Certain Claims. On March 23, 2021, an Order was issued denying the "Challenge to Sufficiency" but granting the Motion to "Dismiss or Exclude" the claims under "ADA" and "on behalf of similarly situated students" and granting the Respondent an additional 10 days to file its answer. On March 31, 2021, the Respondent filed its answer which denied Petitioners' allegations that it failed to provide the student with a Free and Appropriate Public Education, failed to makes the students placement decisions based on her individual needs, failed to consider the full range of supplementary aids and services in determining her placement, failed to give meaningful consideration to the full continuum of alternative placement options and failed to consider the harmful effects on the student of being removed from and denying her access to the regular classroom environment.

On April 8, 2021, the parties represented to the undersigned that each had previously, and mutually, agreed to waive resolution.

On April 19, 2021, the Hearing Officer convened a pre-hearing telephonic conference call with the Petitioners and Respondent and their respective attorneys. The parties confirmed their agreement to waive the resolution period and upon joint motion, to waive the 45-day deadline for hearing this matter. The parties further confirmed they did not wish to pursue voluntary mediation. After discussion on the record, the limited scope of the matters to be considered was determined, IDEA matters only, it was determined that the hearing was to be held in-person,

subject to existing Covid-19 protocols, set to begin on September 13, 2021, and was anticipated to last 5 days. An order commemorating such agreement, and addressing discovery issues, was subsequently issued on May 4, 2021

Extensions of the due process hearing timeline have been granted at the request of one or both of the parties pursuant to 34 CFR §§ 300.510(c) and 300.515(c), and USBE SER IV.R.2.

Jurisdiction: Subject Matter

The Respondent argues that the Hearing Officer does not have jurisdiction to hear claims alleged by Petitioners in their Complaint brought under a "other similarly situated students" claim or the Americans with Disabilities Act. Once a subject-matter jurisdiction challenge is made, the responding party has the burden to establish jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). In this action, the burden rests, therefore, with the Petitioners. Petitioners have failed to establish such jurisdiction. **Therefore, all non-IDEA claims and requests for relief are dismissed for lack of subject matter jurisdiction. Specifically, the claims of the Petitioners under the Americans with Disabilities Act and the claims made on behalf of other similarly situated students are DISMISSED.** Unless otherwise found, jurisdiction properly lies over the parties and over the subject-matter pursuant to 34 CFR § 300.507(a). Therefore, all claims presented by Petitioners under the IDEA are hearable and are reserved for decision by the Hearing Officer.

The Hearing

On September 13 and each consecutive day thereafter through September 16, 2021, an impartial due process hearing was conducted at the offices of the Salt Lake City School District Offices, 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, (October, 2016). Petitioners and Respondents stipulated to the admission of all exhibits previously exchanged and submitted, and that several witnesses would be jointly-called witnesses for the sake of time. The witnesses included the mother of the student, [redacted], [redacted] Special Ed Director for the District, [redacted], special ed teacher for the district and specifically this student, [redacted], classroom teacher, [redacted], special education consultant, [redacted], special education coordinator, [redacted], special education consultant, [redacted], Petitoners' expert, CEO of Maryland Coalition for Inclusive Education, [redacted], special education teacher for the district, [redacted], principal of [redacted] School, [redacted], school psychologist for the district, [redacted], speech language pathologist, and [redacted], occupational therapist. Petitioner submitted 46 exhibits consisting of 2247 pages, plus audio recordings of meetings, Respondent submitted 66 exhibits containing 697 pages. The hearing transcript is in four volumes totaling 887 pages.

Burden of proof

Petitioners, as the party challenging the Respondent's provision of FAPE, 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 confirmed with counsel for Petitioners at the pre-hearing conference that Petitioners would have the burden of proof and the duty to present evidence first at the hearing.

Issues

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

I. Issues for Hearing:

Procedural Issue-

1. v. Whether the relocation of [redacted]'s classroom from [redacted] to [redacted] constituted a change of placement for which prior written notice was not provided by the district.

In determining whether a "change in educational placement" has occurred, the public agency responsible for educating the child must determine whether the proposed change would substantially or materially alter the child's educational program. In making such a determination, the effect of the change in location on the following factors must be examined: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements. If this inquiry leads to the conclusion that a substantial or material change in the child's educational program has occurred, the public agency must provide prior written notice that meets the content requirements of 34 CFR § 300.505, as required by 34 CFR § 300.504(a).

Based on the evidence and testimony submitted during trial, I find that the move from [redacted] to [redacted] school did not constitute a change in placement. It appears from the evidence that the move was a change in location only and that all of previously provided supplementary aids and services provided by her IEP and her previous IEP followed her to her new location. Further even if it were considered a change of placement and that a violation had occurred,

An allegation of a denial of FAPE to a disabled student can be based on either substantive grounds or procedural violations of the IDEA. 20 USC § 1415(f)(3)(E). *Hendrick Hudson Central School Dist v. Rowley*, 458 US 176; 102 S Ct 3034; 73 L Ed 2d 690 (1982); *Sytsema v. Academy School District No*. 20, 538 F.3d 1306(10th Cir. 2008), 50 IDELR 213. "The IDEA also sought to maximize parental involvement in educational decisions affecting their disabled child by granting parents a number of procedural rights. For example, parents are entitled to: (1) examine all records relating to their child, 20 U.S.C. § 1415(b)(1); (2) participate in the IEP preparation process, *id.*; (3) obtain an independent evaluation of their child, *id.* (4) receive notice before an amendment to an IEP is either proposed or refused, § 1415(b)(3); (5) take membership in any group that makes decisions about the educational placement of their child, § 1414(f); and (6) receive formal notice of their rights under the IDEA, § 1415(d)(1)." *Ellenberg ex rel. S.E. v. New Mexico Military Institute*, 478 F.3d 1262 (10 th 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).

I do not find the evidence supports these contentions.

Substantive Issues-

(2) Whether the Respondent failed to provide the Student with a Free Appropriate Public Education (FAPE) and violated the students and parent’s procedural and substantive rights during the time the Student attended the School by:

(a) Failing to provide [redacted] with an appropriate public education in the least restrictive environment, as mandated by the IDEA, denying her the opportunity to receive her education in the regular classroom environment to the maximum extent appropriate and by segregating her unnecessarily for her non-disabled peers and the community;

(b) Failing to make [redacted]'s placement decision based on her individual needs as determined by her Individualized Education Plan, and instead basing the decision on the availability of group programs and other impermissible factors such as administrative convenience and severity of disability, resulting in her being educated in an overly restrictive placement by:

i. Failing to give consideration to the full range of supplementary aids services could be provided to her in the regular education environment before removing her to a self-contained classroom and again before moving her to one of the district's designated hub schools for students with disabilities;

ii. Failing to meaningfully consider the full continuum of placement options available for [redacted] in order to allow her to attend the school she would have attended were she not disabled, including the school closest to her home based on the district's perceived severity of her disability;

iii. Removing [redacted] from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

iv. Failing to give consideration to the potential harmful effect on [redacted] of being removed from and denied access to the regular classroom environment.

Findings of fact

After considering all the evidence in the form of oral testimony and admitted exhibits, as well as the allegations and references to statutes and case law in oral and written arguments of the parties' and counsel, the Hearing Officer's Findings of Fact regarding the issues presented are as follows:

Findings: The petitioners have failed to present the requisite preponderance of evidence to support their claims. The evidence tends to support the district's position that [redacted] was, and is, offered a free and appropriate public education and has, in fact, thrived and made progress, despite her disability. The evidence further supports the district's claim that the student has made sufficient progress during her time with the school district, that the student has been considered, and, in fact, offered more inclusion along the continuum of placement options, moving from a self-contained classroom to her present collaborative classroom alongside her non-disabled peers.

Specifically, the petitioners' claim of a violation by the district of IDEA's Least Restrictive Environment requirements, denying her the opportunity to receive her education in the regular classroom environment to the maximum extent appropriate and by segregating her unnecessarily for her non-disabled peers, it is my finding, based on the following, that the district did not fail to provide the student with a free appropriate public education in violation of IDEA:

"In implementing IDEA's LRE provisions, the regular classroom in the school the student would attend if not disabled is the first placement option considered for each disabled student before a more restrictive placement is considered. If the IEP of a student with a disability can be implemented **satisfactorily** with the provision of supplementary aids and services in the regular classroom in the school the student would attend if not disabled, that placement is the LRE

placement for that student. However, if the student's IEP cannot be implemented **satisfactorily** in that environment, even with the provision of supplementary aids and services, the regular classroom in the school the student would attend if not disabled is not the LRE placement for that student." [Emphasis added] OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES Letter to Chief State School Officers November 23, 1994

When mainstreaming requirement of the Individuals with Disabilities Education Act (IDEA) is specifically at issue, burden of proving compliance with IDEA is on the school regardless of which party brought the claim under IDEA before the district court; court is to give due weight to the administrative proceedings, by not imposing its own notions of educational policy on the states, but is not required to give deference to party who happen to prevail in those proceedings. Individuals with Disabilities Education Act, §§ 601(c), 615(e), 622(5)(B), as amended, 20 U.S.C.A. §§ 1400(c), 1415(e), 1422(5)(B).

The least restrictive environment (LRE) provision of Part B of the Individuals with Disabilities Education Act (Part B) means that, to the maximum extent appropriate, disabled students must be educated in regular classes with their nondisabled peers, provided that their individualized education programs (IEPs), can be implemented satisfactorily in that environment with the provision of supplementary aids and services. See 20 U.S.C. § 1412(5)(B); see also 34 CFR § 300.550(b). However, OSEP does not interpret Part B's LRE provision to require that a disabled student be placed in the regular classroom and fail before a more restrictive placement is considered.

In determining whether disabled child can be educated satisfactorily in regular classroom with supplementary aids and services, court should consider: steps school has taken to try to include

the child in regular classroom; comparison between educational benefits child will receive in regular classroom, with supplementary aids and services, and benefits child will receive in segregated special education classroom; and possible negative effect child's inclusion may have on education of other children in the regular classroom. Individuals with Disabilities Education Act, § 612(5)(B), as amended, 20 U.S.C.A. § 1412(5)(B).

Mainstreaming requirement of the Individuals with Disabilities Education Act (IDEA) prohibits school from placing child with disabilities outside regular classroom if educating child in regular classroom, with supplementary aids and support services, can be achieved satisfactorily and, if placement outside regular classroom is necessary for child to receive educational benefit, school may still be violating IDEA if it has not made sufficient efforts to include child in school programs with nondisabled children whenever possible. Individuals with Disabilities Education Act, §§ 601–685, 612(5) (B), as amended, 20 U.S.C.A. §§ 1400–1485, 1412(5)(B).

Regulations promulgated under IDEA providing that "[t]he educational placement of each child with disability [shall be] as close as possible to child's home" and that state agencies must ensure that "[u]nless the IEP of a child with a disability requires some other arrangement, child is educated in the school that he or she would attend if nondisabled" do not create presumption that least restrictive environment for child's education is neighborhood school; regulations merely provide that disabled child should be educated in school he or she would attend if not disabled , unless child's IEP requires placement elsewhere; in such cases, geographical proximity to home is relevant and child should be placed as close to home as possible. Individuals with Disabilities Education Act, §§ 601–686, 612(5) (B), as amended, 20 U.S.C.A. §§ 1400–1485, 1412(5)(B); 34 C.F.R. § 300.552(a)(3), (c).

School district is not obligated under IDEA to fully explore supplementary aids and services before removing child from neighborhood school; it is only obligated to undertake such explorations before removing child from regular classroom with nondisabled children. Individuals with Disabilities Education Act, § 612(5)(B), as amended, 20 U.S.C.A. § 1412(5) (B)

Under the Individuals with Disabilities Education Act (IDEA), there is presumption in favor of placing child, if possible, in neighborhood school and, if that is not feasible, as close to home as possible. Individuals with Disabilities Education Act, §§ 601–685, as amended, 20 U.S.C.A. §§ 1400–1485.

Findings- There is little evidence to support the claim that [redacted]'s IEP can be implemented **satisfactorily** at [redacted], her neighborhood school and thus, I **do not** find that the student has been **wrongfully** denied the opportunity to receive her education in the regular classroom environment to the maximum extent appropriate, and/or by segregating her unnecessarily from her non-disabled peers. On the contrary, the school district provided substantial evidence that it is has given "thoughtful consideration" to [redacted]'s placement decisions, has developed and implemented an IEP tailored to her individual needs and has determined that the IEP cannot be implemented satisfactorily in [redacted], her neighborhood school.

Based on the evidence submitted during the hearing, it was abundantly clear that the student is very social and has needs for social interaction with her school peers and community. The mother testified that she desired for the student to be educated in her neighborhood school, in a regular education classroom, with appropriate supports in place so that the student could walk to and from school with her sibling and enjoy the socialization that comes with attending a "neighborhood" school. While it is agreed that socialization is an important aspect, I do not find

from the evidence that the student's interest is served by forcing the district to implement her IEP at the neighborhood school. On the contrary, the testimony of her special education teacher, Ms. [redacted], who testified that she had been providing special education services to the student for the last two years, revealed that the student would not receive educational benefit from such a placement. [redacted], along with [redacted], SPED director, and [redacted], classroom regular education teacher, all testified that because of [redacted]'s individual needs, that the collaborative classroom in which she was and is enrolled, is the most suitable option for her. [redacted] testified that such supplementary aids and services, as are part of [redacted]'s IEP, are not available at her neighborhood school.

(2) Failing to make [redacted]'s placement decision based on her individual needs as determined by her Individualized Education Plan, and instead basing the decision on the availability of group programs and other impermissible factors such as administrative convenience and severity of disability, resulting in her being educated in an overly restrictive placement by:

i. Failing to give consideration to the full range of supplementary aids services could be provided to her in the regular education environment before removing her to a self-contained classroom and again before moving her to one of the district's designated hub schools for students with disabilities;

Based on the testimony of the district witnesses, who were and are members of [redacted]'s IEP team, I do not find that the district failed to "give consideration to the full range of supplementary aids and services that could be provided to her in the regular education environment before removing her to a self-contained classroom and again before moving her to one of the district's designated hub schools for students with disabilities." It appears from the evidence that ample consideration

was given based upon the data gathered on [redacted] and her individualized needs before the recommendations and terms of her IEP were drafted and finalized.

ii. Failing to meaningfully consider the full continuum of placement options available for [redacted] in order to allow her to attend the school she would have attended were she not disabled, including the school closest to her home based on the district's perceived severity of her disability;

Again, based on the evidence adduced, the exhibits and testimony of the various witnesses, I find neither that the district failed to "meaningfully consider the full continuum of placement options available for [redacted] in order to allow her to attend the school she would have attended were she not disabled, including the school closest to her home", nor that the district mischaracterized "the severity of her disability." The record is replete with evidence supporting the severity of the student's disability, and the testimony of her education personnel supports the contention that [redacted] has need for "scaffolding" and interventions to access the Tier 1 Instruction she ought to be receiving, based on her abilities and the complexity of the materials being taught to her age-appropriate non-disabled peers.

iii. Removing [redacted] from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

I find this contention to lack merit, in that the evidence submitted, is that [redacted] is and age-appropriate "collaborative" classroom receiving general education instruction properly modified to meet her individual needs.

iv. Failing to give consideration to the potential harmful effect on [redacted] of being removed from and denied access to the regular classroom environment.

Based on the evidence submitted during trial, I find that the district did in fact give consideration to the potential harmful effect of removing the student from a regular education classroom environment from the testimony of her IEP team members. I further find that those considerations gave way to the overriding considerations of [redacted]'s need for academic support.

General legal standards

Students with disabilities who are protected by the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC § 1400(d); 34 CFR § 300.1(a). The IDEA further provides that a party may present a complaint and request for due process hearing with respect to any matter relating to the identification, evaluation, educational placement, or provision of a FAPE to a disabled student. 20 USC § 1415(b)(6).

The IDEA and its implementing regulations provide that in order to qualify as a "student with a disability" under the IDEA, a student must (1) meet the definition of one or more of the categories of disabilities which include: . . . an other health impairment . . . , and (2) need special education and related services as a result of the student's disability. CFR § 300.8 (a)(1). A student is in need of special education and related services when the student requires those services in order to receive an educational benefit from the student's educational

program. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7TH Cir. 2010); *Sebastian M. V. King Phillip Reg'l Sch. Dist.*, 59 IDELR 61 (1st Cir. 2012).

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 enters the following Conclusions of Law:

1. Petitioners did not meet their burden of proof that Respondent failed to provide the Student with a FAPE or committed a procedural violation by failing to provide prior written notice of the change in location from [redacted] to [redacted]

2. Petitioners did not meet their burden of proof that Respondent failed to provide the student with an appropriate public education in the least restrictive environment, as mandated by the IDEA, denying her the opportunity to receive her education in the regular classroom environment to the maximum extent appropriate and by segregating her unnecessarily for her non-disabled peers and the community.

3. Petitioners did not meet their burden of proof that Respondent failed to provide the student with a placement decision based on her individual needs as determined by her Individualized Education Plan, and instead basing the decision on the availability of group programs and other impermissible factors such as administrative convenience and severity of disability, resulting in her being educated in an overly restrictive placement.

4. Petitioners did not meet their burden of proof that Respondent failed to provide the student with placement decisions in consideration of the full range of supplementary aids services could be provided to her in the regular education environment before removing her to a self-contained

classroom and again before moving her to one of the district's designated hub schools for students with disabilities.

5. Petitioners did not meet their burden of proof that Respondent failed to provide the student with meaningful consideration of the full continuum of placement options available for [redacted] in order to allow her to attend the school she would have attended were she not disabled, including the school closest to her home based on the district's perceived severity of her disability.

6. Petitioners did not meet their burden of proof that Respondent failed to provide the student with FAPE by removing [redacted] from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

7. Petitioners did not meet their burden of proof that Respondent failed to give consideration to the potential harmful effect on [redacted] of being removed from and denied access to the regular classroom environment.

Order

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

1. It is ORDERED that Petitioners' requests for relief under Procedural Issue No.1 is hereby DENIED.

2. It is ORDERED that Petitioners' request for relief under Substantive Issues Nos. 2, 3, 4, 5, 6 and 7 are hereby DENIED.

All other relief not specifically ordered herein is DENIED.

Dated this 10th day of November, 2021.

/s Frank Snowden
Due Process Hearing Officer